THE CRIMINALIZATION OF HOMELESSNESS
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READINGS, Part I

Part I

ROBINSON *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 554. Argued April 17, 1962.—Decided June 25, 1962.

A California statute makes it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics," and, in sustaining petitioner's conviction thereunder, the California courts construed the statute as making the "status" of narcotic addiction a criminal offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the State and has not been guilty of any antisocial behavior there. *Held:* As so construed and applied, the statute inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Pp. 660–668.

Reversed.

Samuel Carter McMorris argued the cause and filed briefs for appellant.

William E. Doran argued the cause for appellee. With him on the brief were *Roger Arnebergh* and *Philip E. Grey.*

MR. JUSTICE STEWART delivered the opinion of the Court.

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics." [1] This

[1] The statute is § 11721 of the California Health and Safety Code. It provides:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced

appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial.[2] The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Officer Lindquist testified that he had examined the appellant the following morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms,

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to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

[2] At the trial the appellant, claiming that he had been the victim of an unconstitutional search and seizure, unsuccessfully objected to the admission of Officer Brown's testimony. That claim is also pressed here, but since we do not reach it there is no need to detail the circumstances which led to Officer Brown's examination of the appellant's person. Suffice it to say, that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.

and he identified photographs which had been taken of the appellant's arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

The trial judge instructed the jury that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics . . . .[3] That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical. . . . To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is

[3] The judge did not instruct the jury as to the meaning of the term "under the influence of" narcotics, having previously ruled that there was no evidence of a violation of that provision of the statute. See note 1, *supra*.

chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed *either* that he was of the "status" *or* had committed the "act" denounced by the statute.[4] "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics . . . ." [5]

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged."

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[4] "Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict."

[5] The instructions continued "and it is then up to the defendant to prove that the use, or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter." No evidence, of course, had been offered in support of this affirmative defense, since the appellant had denied that he had used narcotics or been addicted to their use.

An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, "the highest court of a State in which a decision could be had" in this case. 28 U. S. C. § 1257. See *Smith* v. *California,* 361 U. S. 147, 149; *Edwards* v. *California,* 314 U. S. 160, 171. Although expressing some doubt as to the constitutionality of "the crime of being a narcotic addict," the reviewing court in an unreported opinion affirmed the judgment of conviction, citing two of its own previous unreported decisions which had upheld the constitutionality of the statute.[6] We noted probable jurisdiction of this appeal, 368 U. S. 918, because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago, in *Whipple* v. *Martinson,* 256 U. S. 41, this Court explicitly recognized the validity of that power: "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." 256 U. S., at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the viola-

[6] The appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court.

tion of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[7] Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

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[7] California appears to have established just such a program in §§ 5350–5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.

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The instructions of the trial court, implicitly approved on appeal, amounted to "a ruling on a question of state law that is as binding on us as though the precise words had been written" into the statute. *Terminiello* v. *Chicago,* 337 U. S. 1, 4. "We can only take the statute as the state courts read it." *Id.,* at 6. Indeed, in their brief in this Court counsel for the State have emphasized that it is "the proof of addiction by circumstantial evidence . . . by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section."

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See *Francis* v. *Resweber,* 329 U. S. 459.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that 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 in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on

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[8] In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment." *Linder* v. *United States*, 268 U. S. 5, 18.

[9] Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. See Schneck, Narcotic Withdrawal Symptoms in the Newborn Infant Resulting from Maternal Addiction, 52 Journal of Pediatrics 584 (1958); Roman and Middelkamp, Narcotic Addiction in a Newborn Infant, 53 Journal of Pediatrics 231 (1958); Kunstadter, Klein, Lundeen, Witz, and Morrison, Narcotic Withdrawal Symptoms in Newborn Infants, 168 Journal of the American Medical Association 1008 (1958); Slobody and Cobrinik, Neonatal Narcotic Addiction, 14 Quarterly Review of Pediatrics 169 (1959); Vincow and Hackel, Neonatal Narcotic Addiction, 22 General Practitioner 90 (1960); Dikshit, Narcotic Withdrawal Syndrome in Newborns, 28 Indian Journal of Pediatrics 11 (1961).

which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I wish to make more explicit the reasons why I think it is "cruel and unusual" punishment in the sense of the Eighth Amendment to treat as a criminal a person who is a drug addict.

In Sixteenth Century England one prescription for insanity was to beat the subject "until he had regained his reason." Deutsch, The Mentally Ill in America (1937), p. 13. In America "the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged"; and "the pauper insane often roamed the countryside as wild men and from time to time were pilloried, whipped, and jailed." Action for Mental Health (1961), p. 26.

As stated by Dr. Isaac Ray many years ago:

> "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." Treatise on the Medical Jurisprudence of Insanity (5th ed. 1871), p. 56.

Today we have our differences over the legal definition of insanity. But however insanity is defined, it is in end effect treated as a disease. While afflicted people

may be confined either for treatment or for the protection of society, they are not branded as criminals.

Yet terror and punishment linger on as means of dealing with some diseases. As recently stated:

> ". . . the idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement. This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the 'water cures' (dousing, ducking, and near-drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock. All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor." Action for Mental Health (1961), pp. 27–28.

That approach continues as respects drug addicts. Drug addiction is more prevalent in this country than in any other nation of the western world.[1] S. Rep. No. 1440, 84th Cong., 2d Sess., p. 2. It is sometimes referred to as "a contagious disease." *Id.*, at p. 3. But those living in a world of black and white put the addict in the cate-

[1] Drug Addiction: Crime or Disease? (1961), p. XIV. ". . . even if one accepts the lowest estimates of the number of addicts in this country there would still be more here than in all the countries of Europe combined. Chicago and New York City, with a combined population of about 11 million or one-fifth that of Britain, are ordinarily estimated to have about 30,000 addicts, which is from thirty to fifty times as many as there are said to be in Britain."

gory of those who could, if they would, forsake their evil ways.

The first step toward addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth. Earl Ubell recently wrote:

> "In Bellevue Hospital's nurseries, Dr. Saul Krugman, head of pediatrics, has been discovering babies minutes old who are heroin addicts.
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> "More than 100 such infants have turned up in the last two years, and they show all the signs of drug withdrawal: irritability, jitters, loss of appetite, vomiting, diarrhea, sometimes convulsions and death.
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> " 'Of course, they get the drug while in the womb from their mothers who are addicts,' Dr. Krugman said yesterday when the situation came to light. 'We control the symptoms with Thorazine, a tranquilizing drug.
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> " 'You should see some of these children. They have a high-pitched cry. They appear hungry but they won't eat when offered food. They move around so much in the crib that their noses and toes become red and excoriated.'
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> "Dr. Lewis Thomas, professor of medicine at New York University-Bellevue, brought up the problem of the babies Monday night at a symposium on narcotics addiction sponsored by the New York County Medical Society. He saw in the way the babies respond to treatment a clue to the low rate of cure of addiction.
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> " 'Unlike the adult addict who gets over his symptoms of withdrawal in a matter of days, in most cases,' Dr. Thomas explained later, 'the infant has to be treated for weeks and months. The baby continues to show physical signs of the action of the drugs.

> " 'Perhaps in adults the drugs continue to have physical effects for a much longer time after withdrawal than we have been accustomed to recognize. That would mean that these people have a physical need for the drug for a long period, and this may be the clue to recidivism much more than the social or psychological pressures we've been talking about.' " N. Y. Herald Tribune, Apr. 25, 1962, p. 25, cols. 3–4.

The addict is under compulsions not capable of management without outside help. As stated by the Council on Mental Health:

> "Physical dependence is defined as the development of an altered physiological state which is brought about by the repeated administration of the drug and which necessitates continued administration of the drug to prevent the appearance of the characteristic illness which is termed an abstinence syndrome. When an addict says that he has a habit, he means that he is physically dependent on a drug. When he says that one drug is habit-forming and another is not, he means that the first drug is one on which physical dependence can be developed and that the second is a drug on which physical dependence cannot be developed. Physical dependence is a real physiological disturbance. It is associated with the development of hyperexcitability in reflexes mediated through multineurone arcs. It can be induced in animals, it has been shown to occur in the paralyzed hind limbs of addicted chronic spinal dogs, and also has been produced in dogs whose cerebral cortex has been removed." Report on Narcotic Addiction, 165 A. M. A. J. 1707, 1713.

Some say the addict has a disease. See Hesse, Narcotics and Drug Addiction (1946), p. 40 *et seq.*

Others say addiction is not a disease but "a symptom of a mental or psychiatric disorder." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 8. And see Present Status of Narcotic Addiction, 138 A. M. A. J. 1019, 1026; Narcotic Addiction, Report to Attorney General Brown by Citizens Advisory Committee to the Attorney General on Crime Prevention (1954), p. 12; Finestone, Narcotics and Criminality, 22 Law & Contemp. Prob. 69, 83–85 (1957).

The extreme symptoms of addiction have been described as follows:

> "To be a confirmed drug addict is to be one of the walking dead . . . . The teeth have rotted out; the appetite is lost and the stomach and intestines don't function properly. The gall bladder becomes inflamed; eyes and skin turn a billious yellow. In some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. Sex organs become affected. Veins collapse and livid purplish scars remain. Boils and abscesses plague the skin; gnawing pain racks the body. Nerves snap; vicious twitching develops. Imaginary and fantastic fears blight the mind and sometimes complete insanity results. Often times, too, death comes—much too early in life . . . . Such is the torment of being a drug addict; such is the plague of being one of the walking dead." N. Y. L. J., June 8, 1960, p. 4, col. 2.

Some States punish addiction, though most do not. See S. Doc. No. 120, 84th Cong., 2d Sess., pp. 41, 42. Nor does the Uniform Narcotic Drug Act, first approved in 1932 and now in effect in most of the States. Great Britain, beginning in 1920 placed "addiction and the

treatment of addicts squarely and exclusively into the hands of the medical profession." Lindesmith, The British System of Narcotics Control, 22 Law & Contemp. Prob. 138 (1957). In England the doctor "has almost complete professional autonomy in reaching decisions about the treatment of addicts." Schur, British Narcotics Policies, 51 J. Crim. L. & Criminology 619, 621 (1961). Under British law "addicts are patients, not criminals." *Ibid.* Addicts have not disappeared in England but they have decreased in number (*id.*, at 622) and there is now little "addict-crime" there. *Id.*, at 623.

The fact that England treats the addict as a sick person, while a few of our States, including California, treat him as a criminal, does not, of course, establish the unconstitutionality of California's penal law. But we do know that there is "a hard core" of "chronic and incurable drug addicts who, in reality, have lost their power of self-control." S. Rep. No. 2033, 84th Cong., 2d Sess., p. 8. There has been a controversy over the type of treatment—whether enforced hospitalization or ambulatory care is better. H. R. Rep. No. 2388, 84th Cong., 2d Sess., pp. 66–68. But there is little disagreement with the statement of Charles Winick: "The hold of drugs on persons addicted to them is so great that it would be almost appropriate to reverse the old adage and say that opium derivatives represent the religion of the people who use them." Narcotics Addiction and its Treatment, 22 Law & Contemp. Prob. 9 (1957). The abstinence symptoms and their treatment are well known. *Id.*, at 10–11. Cure is difficult because of the complex of forces that make for addiction. *Id.*, at 18–23. "After the withdrawal period, vocational activities, recreation, and some kind of psychotherapy have a major role in the treatment program, which ideally lasts from four to six months." *Id.*, at 23–24. Dr. Marie Nyswander tells us that normally a drug addict

must be hospitalized in order to be cured. The Drug Addict as a Patient (1956), p. 138.

The impact that an addict has on a community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.[2] As Charles Winick has said:

> "There can be no single program for the elimination of an illness as complex as drug addiction, which

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[2] "The sick addict must be quarantined until cured, and then carefully watched until fully rehabilitated to a life of normalcy." Narcotics, N. Y. Leg. Doc. No. 27 (1952), p. 116. And see the report of Judge Morris Ploscowe printed as Appendix A, Drug Addiction: Crime or Disease? (1961), pp. 18, 19–20, 21.

"These predilections for stringent law enforcement and severer penalties as answers to the problems of drug addiction reflect the philosophy and the teachings of the Bureau of Narcotics. For years the Bureau has supported the doctrine that if penalties for narcotic drug violations were severe enough and if they could be enforced strictly enough, drug addiction and the drug traffic would largely disappear from the American scene. This approach to problems of narcotics has resulted in spectacular modifications of our narcotic drug laws on both the state and federal level. . . .

. . . . . .

"Stringent law enforcement has its place in any system of controlling narcotic drugs. However, it is by no means the complete answer to American problems of drug addiction. In the first place it is doubtful whether drug addicts can be deterred from using drugs by threats of jail or prison sentences. The belief that fear of punishment is a vital factor in deterring an addict from using drugs rests upon a superficial view of the drug addiction process and the nature of drug addiction. . . .

". . . The very severity of law enforcement tends to increase the price of drugs on the illicit market and the profits to be made therefrom. The lure of profits and the risks of the traffic simply challenge the

> carries so much emotional freight in the community. Cooperative interdisciplinary research and action, more local community participation, training the various healing professions in the techniques of dealing with addicts, regional treatment facilities, demonstration centers, and a thorough and vigorous post-treatment rehabilitation program would certainly appear to be among the minimum requirements for any attempt to come to terms with this problem. The addict should be viewed as a sick person, with a chronic disease which requires almost emergency action." 22 Law & Contemp. Prob. 9, 33 (1957).

The Council on Mental Health reports that criminal sentences for addicts interferes "with the possible treatment and rehabilitation of addicts and therefore should be abolished." 165 A. M. A. J. 1968, 1972.

The command of the Eighth Amendment, banning "cruel and unusual punishments," stems from the Bill of Rights of 1688. See *Francis* v. *Resweber,* 329 U. S. 459, 463. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Ibid.*

The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (*In re Kemmler,* 136 U. S. 436, 446), quartering, the rack and thumbscrew (see *Chambers* v. *Florida,* 309 U. S. 227, 237), and in some circumstances even solitary confinement (see *Medley,* 134 U. S. 160, 167–168).

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ingenuity of the underworld peddlers to find new channels of distribution and new customers, so that profits can be maintained despite the risks involved. So long as a non-addict peddler is willing to take the risk of serving as a wholesaler of drugs, he can always find addict pushers or peddlers to handle the retail aspects of the business in return for a supply of the drugs for themselves. Thus, it is the belief of the author of this report that no matter how severe law enforcement may be, the drug traffic cannot be eliminated under present prohibitory repressive statutes."

The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present.[3] A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." See *O'Neil* v. *Vermont,* 144 U. S. 323, 331. So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. See *Wilkerson* v. *Utah,* 99 U. S. 130, 135. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the "cry of horror" against man's inhumanity to his fellow man. See *O'Neil* v. *Vermont, supra,* at 340 (dissenting opinion); *Francis* v. *Resweber, supra,* at 473 (dissenting opinion).

By the time of Coke, enlightenment was coming as respects the insane. Coke said that the execution of a madman "should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." 6 Coke's Third Inst. (4th ed. 1797), p. 6. Blackstone endorsed this view of Coke. 4 Commentaries (Lewis ed. 1897), p. 25.

We should show the same discernment respecting drug addiction. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society.[4] Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of § 11721 is not to cure, but to penalize.

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[3] See 3 Catholic U. L. Rev. 117 (1953); 31 Marq. L. Rev. 108 (1947); 22 St. John's L. Rev. 270 (1948); 2 Stan. L. Rev. 174 (1949); 33 Va. L. Rev. 348 (1947); 21 Tul. L. Rev. 480 (1947); 1960 Wash. U. L. Q., p. 160.

[4] As to the insane, see *Lynch* v. *Overholser,* 369 U. S. 705; note, 1 L. R. A. (N. S.), p. 540 *et seq.*

Were the purpose to cure, there would be no need for a mandatory jail term of not less than 90 days. Contrary to my Brother CLARK, I think the means must stand constitutional scrutiny, as well as the end to be achieved. A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well. Indeed, in § 5350 of the Welfare and Institutions Code, California has expressly provided for civil proceedings for the commitment of habitual addicts. Section 11721 is, in reality, a direct attempt to punish those the State cannot commit civilly.[5] This prosecution has no relationship to the curing

[5] The difference between § 5350 and § 11721 is that the former aims at treatment of the addiction, whereas § 11721 does not. The latter cannot be construed to provide treatment, unless jail sentences, without more, are suddenly to become medicinal. A comparison of the lengths of confinement under the two sections is irrelevant, for it is the purpose of the confinement that must be measured against the constitutional prohibition of cruel and unusual punishments.

Health and Safety Code § 11391, to be sure, indicates that perhaps some form of treatment may be given an addict convicted under § 11721. Section 11391, so far as here relevant, provides:

"No person shall treat an addict for addiction except in one of the following:

"(a) An institution approved by the Board of Medical Examiners, and where the patient is at all times kept under restraint and control.

"(b) A *city or county jail.*

"(c) A state prison.

"(d) A state narcotic hospital.

"(e) A state hospital.

"(f) A county hospital.

"This section does not apply during emergency treatment or where the patient's addiction is complicated by the presence of incurable disease, serious accident, or injury, or the infirmities of old age." (Emphasis supplied.)

Section 11391 does not state that any treatment is required for either part or the whole of the mandatory 90-day prison term imposed by § 11721. Should the necessity for treatment end before the 90-day

of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.

MR. JUSTICE HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics.* Since addiction alone cannot

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term is concluded, or should no treatment be given, the addict clearly would be undergoing punishment for an illness. Therefore, reference to § 11391 will not solve or alleviate the problem of cruel and unusual punishment presented by this case.

*The jury was instructed that "it is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. All that the People must show is *either* that the defendant did use a narcotic in Los Angeles County, *or* that while in the City of Los Angeles he was addicted to the use of narcotics." (Emphasis added.) Although the jury was told that it should acquit if the appellant proved that his "being addicted to the use of narcotics was administered [*sic*] by or under the direction of a person licensed by the State of California to prescribe and administer narcotics," this part of the instruction did not cover other possible lawful uses which could have produced the appellant's addiction.

reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, and for present purposes we must accept the trial court's construction as binding, *Terminiello* v. *Chicago,* 337 U. S. 1, 4, it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law. Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

The Court finds § 11721 of California's Health and Safety Code, making it an offense to "be addicted to the use of narcotics," violative of due process as "a cruel and unusual punishment." I cannot agree.

The statute must first be placed in perspective. California has a comprehensive and enlightened program for the control of narcotism based on the overriding policy of prevention and cure. It is the product of an extensive investigation made in the mid-Fifties by a committee of distinguished scientists, doctors, law enforcement officers and laymen appointed by the then Attorney General, now Governor, of California. The committee filed a detailed study entitled "Report on Narcotic Addiction" which was given considerable attention. No recommendation was made therein for the repeal of § 11721, and the State Legislature in its discretion continued the policy of that section.

Apart from prohibiting specific acts such as the purchase, possession and sale of narcotics, California has taken certain legislative steps in regard to the status of being a narcotic addict—a condition commonly recognized as a threat to the State and to the individual. The

Code deals with this problem in realistic stages. At its incipiency narcotic addiction is handled under § 11721 of the Health and Safety Code which is at issue here. It provides that a person found to be addicted to the use of narcotics shall serve a term in the county jail of not less than 90 days nor more than one year, with the minimum 90-day confinement applying in all cases without exception. Provision is made for parole with periodic tests to detect readdiction.

The trial court defined "addicted to narcotics" as used in § 11721 in the following charge to the jury:

> "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

There was no suggestion that the term "narcotic addict" as here used included a person who acted without volition or who had lost the power of self-control. Although the section is penal in appearance—perhaps a carry-over from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control, and its present purpose is reflected in a statement which closely follows § 11721: "The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern." California Health and Safety Code § 11728.

Where narcotic addiction has progressed beyond the incipient, volitional stage, California provides for commitment of three months to two years in a state hospital.

California Welfare and Institutions Code § 5355. For the purposes of this provision, a narcotic addict is defined as

> "any person who habitually takes or otherwise uses *to the extent of having lost the power of self-control* any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code." California Welfare and Institutions Code § 5350. (Emphasis supplied.)

This proceeding is clearly civil in nature with a purpose of rehabilitation and cure. Significantly, if it is found that a person committed under § 5355 will not receive substantial benefit from further hospital treatment and is not dangerous to society, he may be discharged—but only after a minimum confinement of three months. § 5355.1.

Thus, the "criminal" provision applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use. On the other hand, the "civil" commitment provision deals with addicts who have lost the power of self-control, requiring hospitalization up to two years. Each deals with a different type of addict but with a common purpose. This is most apparent when the sections overlap: if after civil commitment of an addict it is found that hospital treatment will not be helpful, the addict is confined for a minimum period of three months in the same manner as is the volitional addict under the "criminal" provision.

In the instant case the proceedings against the petitioner were brought under the volitional-addict section. There was testimony that he had been using drugs only four months with three to four relatively mild doses a

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week. At arrest and trial he appeared normal. His testimony was clear and concise, being simply that he had never used drugs. The scabs and pocks on his arms and body were caused, he said, by "overseas shots" administered during army service preparatory to foreign assignment. He was very articulate in his testimony but the jury did not believe him, apparently because he had told the clinical expert while being examined after arrest that he had been using drugs, as I have stated above. The officer who arrested him also testified to like statements and to scabs—some 10 or 15 days old—showing narcotic injections. There was no evidence in the record of withdrawal symptoms. Obviously he could not have been committed under § 5355 as one who had completely "lost the power of self-control." The jury was instructed that narcotic "addiction" as used in § 11721 meant strongly disposed to a taste or practice or habit of its use, indicated by the use of narcotics often or daily. A general verdict was returned against petitioner, and he was ordered confined for 90 days to be followed by a two-year parole during which he was required to take periodic Nalline tests.

The majority strikes down the conviction primarily on the grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status. This viewpoint is premised upon the theme that § 11721 is a "criminal" provision authorizing a punishment, for the majority admits that "a State might establish a program of compulsory treatment for those addicted to narcotics" which "might require periods of involuntary confinement." I submit that California has done exactly that. The majority's error is in instructing the California Legislature that hospitalization is the *only treatment* for narcotics addiction—that anything less is a punishment denying due process. California has found otherwise after a study which I suggest was more extensive than that conducted by the Court.

Even in California's program for hospital commitment of nonvolitional narcotic addicts—which the majority approves—it is recognized that some addicts will not respond to or do not need hospital treatment. As to these persons its provisions are identical to those of § 11721—confinement for a period of not less than 90 days. Section 11721 provides this confinement as treatment for the volitional addicts to whom its provisions apply, in addition to parole with frequent tests to detect and prevent further use of drugs. The fact that § 11721 might be labeled "criminal" seems irrelevant,* not only to the majority's own "treatment" test but to the "concept of ordered liberty" to which the States must attain under the Fourteenth Amendment. The test is the overall purpose and effect of a State's act, and I submit that California's program relative to narcotic addicts—including both the "criminal" and "civil" provisions—is inherently one of treatment and lies well within the power of a State.

However, the case in support of the judgment below need not rest solely on this reading of California law. For even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to § 11721, that provision still does not violate the Fourteenth Amendment. The majority acknowledges, as it must, that a State can punish persons who purchase, possess or use narcotics. Although none of these acts are harmful to society *in themselves,* the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose. Narcotics addiction—including the incipient, volitional addiction to which this provision speaks—is no different. California courts have taken judicial notice that "the inordinate use of a narcotic drug tends

*Any reliance upon the "stigma" of a misdemeanor conviction in this context is misplaced, as it would hardly be different from the stigma of a civil commitment for narcotics addiction.

to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position." *People* v. *Jaurequi,* 142 Cal. App. 2d 555, 561, 298 P. 2d 896, 900 (1956). Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?

It is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair. The section at issue applies only to persons who use narcotics often or even daily but not to the point of losing self-control. When dealing with involuntary addicts California moves only through § 5355 of its Welfare Institutions Code which clearly is not penal. Even if it could be argued that § 11721 may not be limited to volitional addicts, the petitioner in the instant case undeniably retained the power of self-control and thus to him the statute would be constitutional. Moreover, "status" offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones ed. 1916), 170. A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs.

Nor is the conjecture relevant that petitioner may have acquired his habit under lawful circumstances. There was no suggestion by him to this effect at trial, and surely the State need not rebut all possible lawful sources of addiction as part of its prima facie case.

The argument that the statute constitutes a cruel and unusual punishment is governed by the discussion above.

Properly construed, the statute provides a treatment rather than a punishment. But even if interpreted as penal, the sanction of incarceration for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State. Under either theory, its provisions for 3 to 12 months' confinement can hardly be deemed unreasonable when compared to the provisions for 3 to 24 months' confinement under § 5355 which the majority approves.

I would affirm the judgment.

MR. JUSTICE WHITE, dissenting.

If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case. But this record presents neither situation. And I believe the Court has departed from its wise rule of not deciding constitutional questions except where necessary and from its equally sound practice of construing state statutes, where possible, in a manner saving their constitutionality.[1]

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[1] It has repeatedly been held in this Court that its practice will not be "to decide any constitutional question in advance of the necessity for its decision . . . or . . . except with reference to the particular facts to which it is to be applied," *Alabama State Federation* v. *McAdory*, 325 U. S. 450, 461, and that state statutes will always be construed, if possible, to save their constitutionality despite the plausibility of different but unconstitutional interpretation of the language. Thus, the Court recently reaffirmed the principle in *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 370: "When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome. '"Constitutional questions are not to be dealt with abstractly". . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so

I am not at all ready to place the use of narcotics beyond the reach of the States' criminal laws. I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. As defined by the trial court,[2] addiction *is* the regular use of narcotics and can be proved only by evidence of such use. To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past.[3] California is entitled to have its statute and the record so read, particularly where the State's only purpose in allowing prosecutions for addiction was to supersede its own venue requirements applicable to prosecutions for the use of narcotics and in effect to allow convictions for use

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construe its law as to bring it into conflict with the federal Constitution or an act of Congress.' *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, at 746."

[2] The court instructed the jury that, "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. . . . To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

[3] This is not a case where a defendant is convicted "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." The evidence was that appellant lived and worked in Los Angeles. He admitted before trial that he had used narcotics for three or four months, three or four times a week, usually at his place with his friends. He stated to the police that he had last used narcotics at 54th and Central in the City of Los Angeles on January 27, 8 days before his arrest. According to the State's expert, no needle mark or scab found on appellant's arms was newer than 3 days old and the most recent mark might have been as old as 10 days, which was consistent with appellant's own pretrial admissions. The State's evidence was that appellant had used narcotics at least 7 times in the 15 days immediately preceding his arrest.

where there is no precise evidence of the county where the use took place.[4]

Nor do I find any indications in this record that California would apply § 11721 to the case of the helpless addict. I agree with my Brother CLARK that there was no evidence at all that appellant had lost the power to control his acts. There was no evidence of any use within 3 days prior to appellant's arrest. The most recent marks might have been 3 days old or they might have been 10

[4] The typical case under the narcotics statute, as the State made clear in its brief and argument, is the one where the defendant makes no admissions, as he did in this case, and the only evidence of use or addiction is presented by an expert who, on the basis of needle marks and scabs or other physical evidence revealed by the body of the defendant, testifies that the defendant has regularly taken narcotics in the recent past. See, *e. g., People* v. *Williams,* 164 Cal. App. 2d 858, 331 P. 2d 251; *People* v. *Garcia,* 122 Cal. App. 2d 962, 266 P. 2d 233; *People* v. *Ackles,* 147 Cal. App. 2d 40, 304 P. 2d 1032. Under the local venue requirements, a conviction for simple use of narcotics may be had only in the county where the use took place, *People* v. *Garcia, supra,* and in the usual case evidence of the precise location of the use is lacking. Where the charge is addiction, venue under § 11721 of the Health and Safety Code may be laid in any county where the defendant is found. *People* v. *Ackles, supra,* 147 Cal. App. 2d, at 42–43, 304 P. 2d, at 1033, distinguishing *People* v. *Thompson,* 144 Cal. App. 2d 854, 301 P. 2d 313. Under California law a defendant has no constitutional right to be tried in any particular county, but under statutory law, with certain exceptions, "an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred." *People* v. *Megladdery,* 40 Cal. App. 2d 748, 762, 106 P. 2d 84, 92. A charge of narcotics addiction is one of the exceptions and there are others. See, *e. g.,* §§ 781, 784, 785, 786, 788, Cal. Penal Code. Venue is to be determined from the evidence and is for the jury, but it need not be proved beyond a reasonable doubt. *People* v. *Megladdery, supra,* 40 Cal. App. 2d, at 764, 106 P. 2d, at 93. See *People* v. *Bastio,* 55 Cal. App. 2d 615, 131 P. 2d 614; *People* v. *Garcia, supra.* In reviewing convictions in narcotics cases, appellate courts view the evidence of venue "in the light most favorable to the judgment." *People* v. *Garcia, supra.*

days old. The appellant admitted before trial that he had last used narcotics 8 days before his arrest. At the trial he denied having taken narcotics at all. The uncontroverted evidence was that appellant was not under the influence of narcotics at the time of his arrest nor did he have withdrawal symptoms. He was an incipient addict, a redeemable user, and the State chose to send him to jail for 90 days rather than to attempt to confine him by civil proceedings under another statute which requires a finding that the addict has lost the power of self-control. In my opinion, on this record, it was within the power of the State of California to confine him by criminal proceedings for the use of narcotics or for regular use amounting to habitual use.[5]

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.

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[5] Health and Safety Code § 11391 expressly permits and contemplates the medical treatment of narcotics addicts confined to jail.

The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics. At the very least, it has effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use. Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances. But the States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case.

Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

I respectfully dissent.

POWELL *v.* TEXAS.

APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS.

No. 405. Argued March 7, 1968.—Decided June 17, 1968.

Appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Art. 477 of the Texas Penal Code. He was tried in the Corporation Court of Austin, and found guilty. He appealed to the County Court of Travis County, and after a trial *de novo*, he was again found guilty. That court made the following "findings of fact": (1) chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive use of alcohol, (2) a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism, and (3) appellant is a chronic alcoholic who is afflicted by the disease of chronic alcoholism; but ruled as a matter of law that chronic alcoholism was not a defense to the charge. The principal testimony was that of a psychiatrist, who testified that appellant, a man with a long history of arrests for drunkenness, was a "chronic alcoholic" and was subject to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence." *Held:* The judgment is affirmed. Pp. 517–554.

MR. JUSTICE MARSHALL, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN, concluded that:

1. The lower court's "findings of fact" were not such in any recognizable, traditional sense, but were merely premises of a syllogism designed to bring this case within the scope of *Robinson* v. *California*, 370 U. S. 660 (1962). P. 521.

2. The record here is utterly inadequate to permit the informed adjudication needed to support an important and wide-ranging new constitutional principle. Pp. 521–522.

3. There is no agreement among medical experts as to what it means to say that "alcoholism" is a "disease," or upon the "manifestations of alcoholism," or on the nature of a "compulsion." Pp. 522–526.

4. Faced with the reality that there is no known generally effective method of treatment or adequate facilities or manpower

for a full-scale attack on the enormous problem of alcoholics, it cannot be asserted that the use of the criminal process to deal with the public aspects of problem drinking can never be defended as rational. Pp. 526–530.

5. Appellant's conviction on the record in this case does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Pp. 531–537.

(a) Appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion, and thus, as distinguished from *Robinson* v. *California, supra,* was not being punished for a mere status. P. 532.

(b) It cannot be concluded, on this record and the current state of medical knowledge, that appellant suffers from such an irresistible compulsion to drink and to get drunk in public that he cannot control his performance of these acts and thus cannot be deterred from public intoxication. In any event, this Court has never articulated a general constitutional doctrine of *mens rea,* as the development of the doctrine and its adjustment to changing conditions has been thought to be the province of the States. Pp. 535–536.

MR. JUSTICE BLACK, joined by MR. JUSTICE HARLAN, concluded:

1. Public drunkenness, which has been a crime throughout our history, is an offense in every State, and this Court certainly cannot strike down a State's criminal law because of the heavy burden of enforcing it. P. 538.

2. Criminal punishment provides some form of treatment, protects alcoholics from causing harm or being harmed by removing them from the streets, and serves some deterrent functions; and States should not be barred from using the criminal process in attempting to cope with the problem. Pp. 538–540.

3. Medical decisions based on clinical problems of diagnosis and treatment bear no necessary correspondence to the legal decision whether the overall objectives of criminal law can be furthered by imposing punishment; and States should not be constitutionally required to inquire as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was the result of a "compulsion." Pp. 540–541.

4. Crimes which require the State to prove that the defendant actually committed some proscribed act do not come within the scope of *Robinson* v. *California, supra,* which is properly limited to pure status crimes. Pp. 541–544.

5. Appellant's argument that it is cruel and unusual to punish a person who is not morally blameworthy goes beyond the Eighth Amendment's limits on the use of criminal sanctions and would create confusion and uncertainty in areas of criminal law where our understanding is not complete. Pp. 544–546.

6. Appellant's proposed constitutional rule is not only revolutionary but it departs from the premise that experience in making local laws by local people is the safest guide for our Nation to follow. Pp. 547–548.

MR. JUSTICE WHITE concluded:

While *Robinson* v. *California, supra,* would support the view that a chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or being drunk, appellant's conviction was for the different crime of being drunk in a public place; and though appellant showed that he was to some degree compelled to drink and that he was drunk at the time of his arrest, he made no showing that he was unable to stay off the streets at that time. Pp. 548–554.

Don L. Davis argued the cause for appellant, *pro hac vice.* With him on the briefs was *Tom H. Davis.*

David Robinson, Jr., argued the cause for appellee. With him on the briefs were *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.*

Peter Barton Hutt argued the cause for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. With him on the brief was *Richard A. Merrill.*

Briefs of *amici curiae,* urging reversal, were filed by *Paul O'Dwyer* for the National Council on Alcoholism, and by the Philadelphia Diagnostic and Relocation Services Corp.

MR. JUSTICE MARSHALL announced the judgment of the Court and delivered an opinion in which THE CHIEF

JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN join.

In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Texas Penal Code, Art. 477 (1952), which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas, found guilty, and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. His counsel urged that appellant was "afflicted with the disease of chronic alcoholism," that "his appearance in public [while drunk was] . . . not of his own volition," and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge in the county court, sitting without a jury, made certain findings of fact, *infra*, at 521, but ruled as a matter of law that chronic alcoholism was not a defense to the charge. He found appellant guilty, and fined him $50. There being no further right to appeal within the Texas judicial system,[1] appellant appealed to this Court; we noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The principal testimony was that of Dr. David Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. Five of those pages were taken up with a recitation of Dr. Wade's qualifica-

[1] Tex. Code Crim. Proc., Art. 4.03 (1966).

tions. In the next 12 pages Dr. Wade was examined by appellant's counsel, cross-examined by the State, and re-examined by the defense, and those 12 pages contain virtually all the material developed at trial which is relevant to the constitutional issue we face here. Dr. Wade sketched the outlines of the "disease" concept of alcoholism; noted that there is no generally accepted definition of "alcoholism"; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically "addicting" or merely psychologically "habituating"; and concluded that in either case a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking." He testified that he had examined appellant, and that appellant is a "chronic alcoholic," who "by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink." Dr. Wade also responded in the negative to the question whether appellant has "the willpower to resist the constant excessive consumption of alcohol." He added that in his opinion jailing appellant without medical attention would operate neither to rehabilitate him nor to lessen his desire for alcohol.

On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right and wrong, and he responded affirmatively to the question whether appellant's act of taking the first drink in any given instance when he was sober was a "voluntary exercise of his will." Qualifying his answer, Dr. Wade stated that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded."

Appellant testified concerning the history of his drinking problem. He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried. On cross-examination, appellant admitted that he had had one drink on the morning of the trial and had been able to discontinue drinking. In relevant part, the cross-examination went as follows:

"Q. You took that one at eight o'clock because you wanted to drink?

"A. Yes, sir.

"Q. And you knew that if you drank it, you could keep on drinking and get drunk?

"A. Well, I was supposed to be here on trial, and I didn't take but that one drink.

"Q. You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

"A. Yes, sir, that's right.

"Q. So you exercised your will power and kept from drinking anything today except that one drink?

"A. Yes, sir, that's right.

"Q. Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

"A. Yes, sir.

"Q. And you didn't want that to happen to you today?

"A. No, sir.

"Q. Not today?

"A. No, sir.

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"Q. So you only had one drink today?

"A. Yes, sir."

On redirect examination, appellant's lawyer elicited the following:

"Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

"A. Well, that was just give to me.

"Q. In other words, you didn't have any money with which you could buy any drinks yourself?

"A. No, sir, that was give to me.

"Q. And that's really what controlled the amount you drank this morning, isn't it?

"A. Yes, sir.

"Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?

"A. No, sir."

Evidence in the case then closed. The State made no effort to obtain expert psychiatric testimony of its own, or even to explore with appellant's witness the question of appellant's power to control the frequency, timing, and location of his drinking bouts, or the substantial disagreement within the medical profession concerning the nature of the disease, the efficacy of treatment and the prerequisites for effective treatment. It did nothing to examine or illuminate what Dr. Wade might have meant by his reference to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence," or to inquire into the question of the proper role of such a "compulsion" in constitutional adjudication. Instead, the State contented itself with a brief argument that appellant had no defense to the charge because he "is legally sane and knows the difference between right and wrong."

Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

> "'(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson* v. *California,* 370 U. S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." *Post,* at 569.

The difficulty with that position, as we shall show, is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which re-

sulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." [2] This same author concludes that *"a disease is what the medical profession recognizes as such."* [3] In other words, there is widespread agreement today that "alcoholism" is a "disease," for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.[4]

Nor is there any substantial consensus as to the "manifestations of alcoholism." E. M. Jellinek, one of the outstanding authorities on the subject, identifies five

[2] E. Jellinek, The Disease Concept of Alcoholism 11 (1960).

[3] *Id.*, at 12 (emphasis in original).

[4] See, *e. g.*, Joint Information Serv. of the Am. Psychiatric Assn. & the Nat. Assn. for Mental Health, The Treatment of Alcoholism—A Study of Programs and Problems 6–8 (1967) (hereafter cited as Treatment of Alcoholism).

different types of alcoholics which predominate in the United States, and these types display a broad range of different and occasionally inconsistent symptoms.[5] Moreover, wholly distinct types, relatively rare in this country, predominate in nations with different cultural attitudes regarding the consumption of alcohol.[6] Even if we limit our consideration to the range of alcoholic symptoms more typically found in this country, there is substantial disagreement as to the manifestations of the "disease" called "alcoholism." Jellinek, for example, considers that only two of his five alcoholic types can truly be said to be suffering from "alcoholism" as a "disease," because only these two types attain what he believes to be the requisite degree of physiological dependence on alcohol.[7] He applies the label "gamma alcoholism" to "that species of alcoholism in which (1) acquired increased tissue tolerance to alcohol, (2) adaptive cell metabolism . . . , (3) withdrawal symptoms and 'craving,' i. e., physical dependence, and (4) loss of control are involved." [8] A "delta" alcoholic, on the other hand, "shows the first three characteristics of gamma alcoholism as well as a less marked form of the fourth characteristic—that is, instead of loss of control

[5] Jellinek, *supra*, n. 2, at 35–41.

[6] For example, in nations where large quantities of wine are customarily consumed with meals, apparently there are many people who are completely unaware that they have a "drinking problem"—they rarely if ever show signs of intoxication, they display no marked symptoms of behavioral disorder, and are entirely capable of limiting their alcoholic intake to a reasonable amount—and yet who display severe withdrawal symptoms, sometimes including delirium tremens, when deprived of their daily portion of wine. M. Block, Alcoholism—Its Facets and Phases 27 (1965); Jellinek, *supra*, n. 2, at 17. See generally *id.*, at 13–32.

[7] Jellinek, *supra*, n. 2, at 40.

[8] Jellinek, *supra*, n. 2, at 37.

there is inability to abstain." [9] Other authorities approach the problems of classification in an entirely different manner and, taking account of the large role which psycho-social factors seem to play in "problem drinking," define the "disease" in terms of the earliest identifiable manifestations of any sort of abnormality in drinking patterns.[10]

Dr. Wade appears to have testified about appellant's "chronic alcoholism" in terms similar to Jellinek's "gamma" and "delta" types, for these types are largely defined, in their later stages, in terms of a strong compulsion to drink, physiological dependence and an inability to abstain from drinking. No attempt was made in the court below, of course, to determine whether Leroy Powell could in fact properly be diagnosed as a "gamma" or "delta" alcoholic in Jellinek's terms. The focus at the trial, and in the dissent here, has been exclusively upon the factors of loss of control and inability to abstain. Assuming that it makes sense to compartmentalize in this manner the diagnosis of such a formless "disease," tremendous gaps in our knowledge remain, which the record in this case does nothing to fill.

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins. Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain"

[9] *Id.*, at 38.

[10] See Block, *supra*, n. 6, at 19–49.

from drinking in the first place.[11] Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a "voluntary exercise of his will," but that this exercise of will was undertaken under the "exceedingly strong influence" of a "compulsion" which was "not completely overpowering." Such concepts, when juxtaposed in this fashion, have little meaning.

Moreover, Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of withdrawal.[12] There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time. In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is re-

[11] Jellinek, *supra*, n. 2, at 41–42.

[12] *Id.*, at 43.

duced to unintelligible distinctions between a "compulsion" (a "psychopathological phenomenon" which can apparently serve in some instances as the functional equivalent of a "craving" or symptom of withdrawal) and an "impulse" (something which differs from a loss of control, a craving or a compulsion, and to which Jellinek attributes the start of a new drinking bout for a "gamma" alcoholic).[13] Other scholars are equally unhelpful in articulating the nature of a "compulsion." [14]

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[15]

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our prin-

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[13] *Id.*, at 41–44.

Dr. Wade did not clarify matters when he testified at trial that a chronic alcoholic suffers from "the same type of compulsion" as a "compulsive eater."

[14] See, *e. g.*, Block, *supra*, n. 6, at 40, 55, 308; Treatment of Alcoholism 6–8; Note, Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 112–114 (1966).

[15] See *Washington* v. *United States*, —— U. S. App. D. C. ——, ——–——, 390 F. 2d 444, 446–456 (1967).

cipal social and public health problems.[16] The lowest current informed estimate places the number of "alcoholics" in America (definitional problems aside) at 4,000,000,[17] and most authorities are inclined to put the figure considerably higher.[18] The problem is compounded by the fact that a very large percentage of the alcoholics in this country are "invisible"—they possess the means to keep their drinking problems secret, and the traditionally uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source.[19] Nor can it be gainsaid that the legislative response to this enormous problem has in general been inadequate.

There is as yet no known generally effective method for treating the vast number of alcoholics in our society. Some individual alcoholics have responded to particular forms of therapy with remissions of their symptomatic dependence upon the drug. But just as there is no agreement among doctors and social workers with respect to the causes of alcoholism, there is no consensus as to why particular treatments have been effective in particular cases and there is no generally agreed-upon approach to the problem of treatment on a large scale.[20] Most psychiatrists are apparently of the opinion that alcoholism is far more difficult to treat than other forms of behavioral disorders, and some believe it is impossible

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[16] See generally Block, *supra*, n. 6, at 19–30, 43–49.

[17] See Treatment of Alcoholism 11.

[18] Block, *supra*, n. 6, at 43–44; Blum & Braunstein, Mind-altering Drugs and Dangerous Behavior: Alcohol, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 29, 30 (1967); Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[19] See Block, *supra*, n. 6, at 74–81; Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[20] See Treatment of Alcoholism 13–17.

to cure by means of psychotherapy; indeed, the medical profession as a whole, and psychiatrists in particular, have been severely criticised for the prevailing reluctance to undertake the treatment of drinking problems.[21] Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our "visible"—let alone our "invisible"—alcoholic population.

However, facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country.[22] It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate

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[21] *Id.*, at 18–26.

[22] Encouraging pilot projects do exist. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 50–64, 82–108 (1967). But the President's Commission concluded that the "strongest barrier" to the abandonment of the current use of the criminal process to deal with public intoxication "is that there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 235 (1967). Moreover, even if massive expenditures for physical plants were forthcoming, there is a woeful shortage of trained personnel to man them. One study has concluded that:

"[T]here is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States." Cooperative Commission on Study of Alcoholism, Alcohol Problems 120 (1967) (emphasis in original).

such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.[23]

One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom." [24]

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[23] For the inadequate response in the District of Columbia following *Easter* v. *District of Columbia,* 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966), which held on constitutional and statutory grounds that a chronic alcoholic could not be punished for public drunkenness, see President's Commission on Crime in the District of Columbia, Report 486–490 (1966).

[24] Counsel for *amici curiae* ACLU et al., who has been extremely active in the recent spate of litigation dealing with public intoxication statutes and the chronic inebriate, recently told an annual meeting of the National Council on Alcoholism:

"We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. . . . The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration. . . . I would caution those who might rush headlong to adopt civil commitment procedures and

Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revela-

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remind them that just as difficult legal problems exist there as with the ordinary jail sentence."

Quoted in Robitscher, Psychiatry and Changing Concepts of Criminal Responsibility, 31 Fed. Prob. 44, 49 (No. 3, Sept. 1967). Cf. Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967).

tion of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Obviously, chronic alcoholics have not been deterred from drinking to excess by the existence of criminal sanctions against public drunkenness. But all those who violate penal laws of any kind are by definition undeterred. The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. Certainly no effort was made at the trial of this case, beyond a monosyllabic answer to a perfunctory one-line question, to determine the effectiveness of penal sanctions in deterring Leroy Powell in particular or chronic alcoholics in general from drinking at all or from getting drunk in particular places or at particular times.

III.

Appellant claims that his conviction on the facts of this case would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment. The primary purpose of that 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; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. See, *e. g., Trop* v. *Dulles,* 356 U. S. 86 (1958); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *Weems* v. *United States,* 217 U. S. 349 (1910).[25]

Appellant, however, seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson* v. *California,* 370 U. S. 660 (1962), which involved a state statute making it a crime to "be addicted to the use of narcotics." This Court held there that "a state law which imprisons a person thus afflicted [with narcotic addiction] 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.

On 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 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. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper . . . ." *Id.,* at 666.

[25] See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any 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.

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Post*, at 567. In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. 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" or "occasioned by a compulsion."

Likewise, as the dissent acknowledges, there is a substantial definitional distinction between a "status," as in *Robinson*, and a "condition," which is said to be involved in this case. Whatever may be the merits of an attempt to distinguish between behavior and a condition, it is perfectly clear that the crucial element in this case, so far as the dissent is concerned, is whether or not appellant can legally be held responsible for his

appearance in public in a state of intoxication. The only relevance of *Robinson* to this issue is that because the Court interpreted the statute there involved as making a "status" criminal, it was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily. 370 U. S., at 667, n. 9. That this factor was not determinative in the case is shown by the fact that there was no indication of how Robinson himself had become an addict.

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. In dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts" the particular individual, and that "[i]t is not foreseeable" that it would be applied "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery." *Post*, at 559, n. 2. That is limitation by fiat. In the first place, nothing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." [26] Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.

It is not difficult to imagine a case involving psychiatric testimony to the effect that an individual suffers

[26] Cf. *Commonwealth* v. *Phelan*, 427 Pa. 265, 234 A. 2d 540 (1967), cert. denied, 391 U. S. 920 (1968).

from some aggressive neurosis which he is able to control when sober; that very little alcohol suffices to remove the inhibitions which normally contain these aggressions, with the result that the individual engages in assaultive behavior without becoming actually intoxicated; and that the individual suffers from a very strong desire to drink, which is an "exceedingly strong influence" but "not completely overpowering." Without being untrue to the rationale of this case, should the principles advanced in dissent be accepted here, the Court could not avoid holding such an individual constitutionally unaccountable for his assaultive behavior.

Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.[27]

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral

[27] The Court did hold in *Lambert* v. *California*, 355 U. S. 225 (1957), that a person could not be punished for a "crime" of omission, if that person did not know, and the State had taken no reasonable steps to inform him, of his duty to act and of the criminal penalty for failure to do so. It is not suggested either that *Lambert* established a constitutional doctrine of *mens rea*, see generally Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, or that appellant in this case was not fully aware of the prohibited nature of his conduct and of the consequences of taking his first drink.

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accountability of an individual for his antisocial deeds.[28] The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham* v. *United States,* 94 U. S. App. D. C. 228, 241, 214 F. 2d 862, 875 (1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e. g.,* the right-wrong test of *M'Naghten's Case.*[29] The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. See, *e. g., Carter* v. *United States,* 102 U. S. App. D. C. 227, 252 F. 2d 608 (1957); *Blocker* v. *United States,* 107 U. S. App. D. C. 63, 274 F. 2d 572 (1959); *Blocker* v. *United States,* 110 U. S. App. D. C. 41, 288 F. 2d 853 (1961) (*en banc*); *McDonald* v. *United States,* 114 U. S. App. D. C. 120, 312 F. 2d 847 (1962) (*en banc*); *Washington* v. *United States,* — U. S. App. D. C. —, 390 F. 2d 444 (1967). But formulating a constitutional rule would reduce, if not eliminate, that fruitful

[28] See generally Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

[29] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Affirmed.

MR. JUSTICE BLACK, whom MR. JUSTICE HARLAN joins, concurring.

While I agree that the grounds set forth in MR. JUSTICE MARSHALL'S opinion are sufficient to require affirmance of the judgment here, I wish to amplify my reasons for concurring.

Those who favor the change now urged upon us rely on their own notions of the wisdom of this Texas law to erect a constitutional barrier, the desirability of which is far from clear. To adopt this position would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.

I.

Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tremendous burden on the police. Then it is argued that

there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all, these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.

Of course, the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter. But since proponents of this grave constitutional change insist on offering their pronouncements on these questions of medical diagnosis and social policy, I am compelled to add that, should we follow their arguments, the Court would be venturing far beyond the realm of problems for which we are in a position to know what we are talking about.

Public drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 English statute, 4 Jac. 1, c. 5. It is today made an offense in every State in the Union. The number of police to be assigned to enforcing these laws and the amount of time they should spend in the effort would seem to me a question for each local community. Never, even by the wildest stretch of this Court's judicial review power, could it be thought that a State's criminal law could be struck down because the amount of time spent in enforcing it constituted, in some expert's opinion, a tremendous burden.

Jailing of chronic alcoholics is definitely defended as therapeutic, and the claims of therapeutic value are not insubstantial. As appellee notes, the alcoholics are removed from the streets, where in their intoxicated state they may be in physical danger, and are given food, clothing, and shelter until they "sober up" and thus at least regain their ability to keep from being run over by

automobiles in the street. Of course, this treatment may not be "therapeutic" in the sense of curing the underlying causes of their behavior, but it seems probable that the effect of jail on any criminal is seldom "therapeutic" in this sense, and in any case the medical authorities relied on so heavily by appellant themselves stress that no generally effective method of curing alcoholics has yet been discovered.

Apart from the value of jail as a form of treatment, jail serves other traditional functions of the criminal law. For one thing, it gets the alcoholics off the street, where they may cause harm in a number of ways to a number of people, and isolation of the dangerous has always been considered an important function of the criminal law. In addition, punishment of chronic alcoholics can serve several deterrent functions—it can give potential alcoholics an additional incentive to control their drinking, and it may, even in the case of the chronic alcoholic, strengthen his incentive to control the frequency and location of his drinking experiences.

These values served by criminal punishment assume even greater significance in light of the available alternatives for dealing with the problem of alcoholism. Civil commitment facilities may not be any better than the jails they would replace. In addition, compulsory commitment can hardly be considered a less severe penalty from the alcoholic's point of view. The commitment period will presumably be at least as long, and it might in fact be longer since commitment often lasts until the "sick" person is cured. And compulsory commitment would of course carry with it a social stigma little different in practice from that associated with drunkenness when it is labeled a "crime."

Even the medical authorities stress the need for continued experimentation with a variety of approaches. 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. From what I have been able to learn about the subject, it 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.

II.

I agree with MR. JUSTICE MARSHALL that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense.[1] The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified

[1] If an intoxicated person is actually carried into the street by someone else, "he" does not do the act at all, and of course he is entitled to acquittal. *E. g., Martin* v. *State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, see *Morissette* v. *United States*, 342 U. S. 246 (1952), I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion." [2]

III.

The rule of constitutional law urged by appellant is not required by *Robinson* v. *California*, 370 U. S. 660 (1962). In that case we held that a person could not be punished for the mere status of being a narcotics

[2] The need for a cautious and tentative approach has been thoroughly recognized by one of the most active workers for reform in this area, Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit. In a recent decision limiting the scope of psychiatric testimony in insanity defense cases, Judge Bazelon states:

"[I]t may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . . But at least we will be able to make that decision on the basis of an informed experience. For now the writer is content to join the court in this first step." *Washington* v. *United States* — U. S. App. D. C. —, —, n. 33, 390 F. 2d 444, 457, n. 33 (1967) (expressing the views of Chief Judge Bazelon).

addict. We explicitly limited our holding to the situation where no conduct of any kind is involved, stating:

> "We hold that 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 in violation of the Fourteenth Amendment." 370 U. S., at 667. (Emphasis added.)

The argument is made that appellant comes within the terms of our holding in *Robinson* because being drunk in public is a mere status or "condition." Despite this many-faceted use of the concept of "condition," this argument would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision.

A different question, I admit, is whether our attempt in *Robinson* to limit our holding to pure status crimes, involving no conduct whatever, was a sound one. I believe it was. Although some of our objections to the statute in *Robinson* are equally applicable to statutes that punish conduct "symptomatic" of a disease, any attempt to explain *Robinson* as based solely on the lack of voluntariness encounters a number of logical difficulties.[3] Other problems raised by status crimes are in no way involved when the State attempts to punish for conduct, and these other problems were, in my view, the controlling aspects of our decision.

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[3] Although we noted in *Robinson,* 370 U. S., at 667, that narcotics addiction apparently is an illness that can be contracted innocently or involuntarily, we barred punishment for addiction even when it could be proved that the defendant had voluntarily become addicted. And we compared addiction to the status of having a common cold, a condition that most people can either avoid or quickly cure when it is important enough for them to do so.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.[4] In fact, one eminent authority has found only one isolated instance, in all of Anglo-American jurisprudence, in which criminal responsibility was imposed in the absence of any act at all.[5]

The reasons for this refusal to permit conviction without proof of an act are difficult to spell out, but they are nonetheless perceived and universally expressed in our criminal law. Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges. See 4 Blackstone, Commentaries 21. Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhib-

[4] As Glanville Williams puts it, "[t]hat crime requires an act is *invariably* true if the proposition be read as meaning that a private thought is not sufficient to found responsibility." Williams, Criminal Law—the General Part 1 (1961). (Emphasis added.) For the requirement of some act as an element of conspiracy and attempt, see *id.*, at 631, 663, 668; R. Perkins, Criminal Law 482, 531–532 (1957).

[5] Williams, *supra*, n. 4, at 11.

ited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal." [6]

In contrast, crimes that require the State to prove that the defendant actually committed some proscribed act involve none of these special problems. In addition, the question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant. In light of all these considerations, our limitation of our *Robinson* holding to pure status crimes seems to me entirely proper.

IV.

The rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of "irresistible impulse" as a complete defense to any crime; this is probably contrary to present law in most American jurisdictions.[7]

The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. I state the proposition in this sympathetic way because I feel there is much to be said for avoiding the use of criminal sanctions in many

[6] *Id.*, at 2.

[7] Perkins, *supra*, n. 4, at 762.

such situations. See *Morissette* v. *United States, supra.* But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E. g., United States* v. *Dotterweich,* 320 U. S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them.

But even if we were to limit any holding in this field to "compulsions" that are "symptomatic" of a "disease," in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for "being" in possession of drugs or, for that matter, for "being" guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland* v. *Oregon,* 343 U. S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility. *Id.,* at 800–801; *id.,* at 803 (Frankfurter, J., dissenting).

The impact of the holding urged upon us would, of course, be greatest in those States which have until now

refused to accept any qualifications to the "right from wrong" test of insanity; apparently at least 30 States fall into this category.[8] But even in States which have recognized insanity defenses similar to the proposed new constitutional rule, or where comparable defenses could be presented in terms of the requirement of a guilty mind (*mens rea*), the proposed new constitutional rule would be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evidence relating to "disease" and "compulsion," and by every state attempt to explain these concepts in instructions to the jury. The test urged would make it necessary to determine, not only what constitutes a "disease," but also what is the "pattern" of the disease, what "conditions" are "part" of the pattern, what parts of this pattern result from a "compulsion," and finally which of these compulsions are "symptomatic" of the disease. The resulting confusion and uncertainty could easily surpass that experienced by the District of Columbia Circuit in attempting to give content to its similar, though somewhat less complicated, test of insanity.[9] The range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.

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[8] See Model Penal Code § 4.01, at 160 (Tent. Draft No. 4, 1955).

[9] *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954). Some of the enormous difficulties encountered by the District of Columbia Circuit in attempting to apply its *Durham* rule are related in H. R. Rep. No. 563, 87th Cong., 1st Sess. (1961). The difficulties and shortcomings of the *Durham* rule have been fully acknowledged by the District of Columbia Circuit itself, and in particular by the author of the *Durham* opinion. See *Washington* v. *United States*, *supra*.

V.

Perceptive students of history at an early date learned that one country controlling another could do a more successful job if it permitted the latter to keep in force the laws and rules of conduct which it had adopted for itself. When our Nation was created by the Constitution of 1789, many people feared that the 13 straggling, struggling States along the Atlantic composed too great an area ever to be controlled from one central point. As the years went on, however, the Nation crept cautiously westward until it reached the Pacific Ocean and finally the Nation planted its flag on the far-distant Islands of Hawaii and on the frozen peaks of Alaska. During all this period the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.

This Court is urged to forget that lesson today. We are asked to tell the most-distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil. This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation for the control of the unfortunate people who fall victim to drunkenness. It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—

it departs from the ancient faith based on 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. I suspect this is a most propitious time to remember the words of the late Judge Learned Hand, who so wisely said:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, The Bill of Rights 73 (1958).

I would confess the limits of my own ability to answer the age-old questions of the criminal law's ethical foundations and practical effectiveness. I would hold that *Robinson* v. *California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of *Robinson* into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict. I join in affirmance of this conviction.

MR. JUSTICE WHITE, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson* v. *California*, 370 U. S. 660, rehearing denied, 371 U. S. 905 (1962), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an

addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. The statute involved here, which aims at keeping drunks off the street for their own welfare and that of others, is not challenged on the ground that it interferes unconstitutionally with the right to frequent public places. No question is raised about applying this statute to the nonchronic drunk, who has no compulsion to drink, who need not drink to excess, and who could have arranged to do his drinking in private or, if he began drinking in public, could have removed himself at an appropriate point on the path toward complete inebriation.

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge.[1] The sober chronic alcoholic has no

[1] The trial court gave no reasons for its conclusion that Powell appeared in public due to "a compulsion symptomatic of the disease of chronic alcoholism." No facts in the record support that conclusion. The trial transcript strongly suggests that the trial judge merely adopted proposed findings put before him by Powell's counsel. The fact that those findings were of no legal relevance in the trial judge's view of the case is very significant for appraising the extent to which they represented a well-considered and well-supported judgment. For all these reasons I do not feel impelled to accept this finding, and certainly would not rest a constitutional adjudication upon it.

compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who could be punished for driving a car but not for his disease.[2]

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[2] Analysis of this difficult case is not advanced by preoccupation with the label "condition." In *Robinson* the Court dealt with "a statute which makes the 'status' of narcotic addiction a criminal offense . . . ." 370 U. S., at 666. By precluding criminal conviction for such a "status" the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. Although the same may be said for the "condition" of being a chronic alcoholic, it cannot be said for the mere transitory state of "being drunk in public." "Being" drunk in public is not far removed in time from the acts of "getting" drunk and "going" into public, and it is not necessarily a state of any great duration. And, an isolated instance of "being" drunk in public is of relatively slight importance in the life of an individual as compared with the condition of being a chronic alcoholic. If it were necessary to distinguish between "acts" and "conditions" for purposes of the Eighth Amendment, I would adhere to the concept of "condition" implicit

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*.[3] Although many chronics have homes, many others do not. 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. 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.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that

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in the opinion in *Robinson;* I would not trivialize that concept by drawing a nonexistent line between the man who appears in public drunk and that same man five minutes later who is then "being" drunk in public. The proper subject of inquiry is whether volitional acts brought about the "condition" and whether those acts are sufficiently proximate to the "condition" for it to be permissible to impose penal sanctions on the "condition."

[3] The opinion of MR. JUSTICE MARSHALL makes clear the limitations of our present knowledge of alcoholism and the disagreements among doctors in their description and analysis of the disease. It is also true that on the record before us there is some question whether Powell possessed that degree of compulsion which alone would satisfy one of the prerequisites I deem essential to assertion of an Eighth Amendment defense. It is nowhere disputed, however, that there are chronic alcoholics whose need to consume alcohol in large quantities is so persistent and so insistent that they are truly compelled to drink. I find it unnecessary to attempt on this record to determine whether or not Powell is such an alcoholic, for in my view his attempt to claim the Eighth Amendment fails for other reasons.

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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.

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.[4] Whether or not Powell established that he could

[4] A holding that a person establishing the requisite facts could not, because of the Eighth Amendment, be criminally punished for appearing in public while drunk would be a novel construction of that Amendment, but it would hardly have radical consequences. In the first place, when as here the crime charged was being drunk in a public place, only the compulsive chronic alcoholic would have a defense to both elements of the crime—for his drunkenness because his disease compelled him to drink and for being in a public place because the force of circumstances or excessive intoxication sufficiently deprived him of his mental and physical powers. The drinker who was not compelled to drink, on the other hand, although he might be as poorly circumstanced, equally intoxicated, and equally without his physical powers and cognitive faculties, could have avoided drinking in the first place, could have avoided drinking to excess, and need not have lost the power to manage his movements. Perhaps the heavily intoxicated, compulsive alcoholic who could not have arranged to avoid being in public places may not, consistent with the Eighth Amendment, be convicted for being drunk in a public place. However, it does not necessarily follow that it would be unconstitutional to convict him for committing crimes involving much greater risk to society.

Outside the area of alcoholism such a holding would not have a wide impact. Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties. This doctrine would not bar con-

not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record.

Also, the only evidence bearing on Powell's condition at the time of his arrest was the testimony of the arresting officer that appellant staggered, smelled of alcohol, and was "very drunk." Powell testified that he had no clear recollection of the situation at the time of his arrest. His testimony about his usual condition when drunk is no substitute for evidence about his condition at the time of his arrest. Neither in the medical testimony nor elsewhere is there any indication that Powell had reached such a state of intoxication that he had lost the ability to comprehend what he was doing or where he was. For all we know from this record, Powell at the time knew precisely where he was, retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere.

It is 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. For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled

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viction of a heroin addict for being under the influence of heroin in a public place (although other constitutional concepts might be relevant to such a conviction), or for committing other criminal acts.

to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.[5]

Because Powell did not show that his conviction offended the Constitution, I concur in the judgment affirming the Travis County court.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Appellant was charged with being found in a state of intoxication in a public place. This is a violation of Article 477 of the Texas Penal Code, which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas. He was found guilty and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. Appellant was defended by counsel who urged that appellant was "afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appear-

[5] I do not question the power of the State to remove a helplessly intoxicated person from a public street, although against his will, and to hold him until he has regained his powers. The person's own safety and the public interest require this much. A statute such as the one challenged in this case is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place. Whether such a person may be charged and convicted for violating the statute will depend upon whether he is entitled to the protection of the Eighth Amendment.

ance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism." Counsel contended that to penalize appellant for public intoxication would be to inflict upon him cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At the trial in the county court, the arresting officer testified that he had observed appellant in the 2000 block of Hamilton Street in Austin; that appellant staggered when he walked; that his speech was slurred; and that he smelled strongly of alcohol. He was not loud or boisterous; he did not resist arrest; he was cooperative with the officer.

The defense established that appellant had been convicted of public intoxication approximately 100 times since 1949, primarily in Travis County, Texas. The circumstances were always the same: the "subject smelled strongly of alcoholic beverages, staggered when walking, speech incoherent." At the end of the proceedings, he would be fined: "down in Bastrop County, it's $25.00 down there, and it's $20.00 up here [in Travis County]." Appellant was usually unable to pay the fines imposed for these offenses, and therefore usually has been obliged to work the fines off in jail. The statutory rate for working off such fines in Texas is one day in jail for each $5 of fine unpaid. Texas Code Crim. Proc., Art. 43.09.

Appellant took the stand. He testified that he works at a tavern shining shoes. He makes about $12 a week which he uses to buy wine. He has a family, but he does not contribute to its support. He drinks wine every day. He gets drunk about once a week. When he gets drunk, he usually goes to sleep, "mostly" in public places such as the sidewalk. He does not disturb the peace or interfere with others.

The defense called as a witness Dr. David Wade, a Fellow of the American Medical Association and a former President of the Texas Medical Association. Dr. Wade is a qualified doctor of medicine, duly certificated in psychiatry. He has been engaged in the practice of psychiatry for more than 20 years. During all of that time he has been especially interested in the problem of alcoholism. He has treated alcoholics; lectured and written on the subject; and has observed the work of various institutions in treating alcoholism. Dr. Wade testified that he had observed and interviewed the appellant. He said that appellant has a history of excessive drinking dating back to his early years; that appellant drinks only wine and beer; that "he rarely passes a week without going on an alcoholic binge"; that "his consumption of alcohol is limited only by his finances, and when he is broke, he makes an effort to secure alcohol by getting his friends to buy alcohol for him"; that he buys a "fifty cent bottle" of wine, always with the thought that this is all he will drink; but that he ends by drinking all he can buy until he "is . . . passed out in some joint or out on the sidewalk." According to Dr. Wade, appellant "has never engaged in any activity that is destructive to society or to anyone except himself." He has never received medical or psychiatric treatment for his drinking problem. He has never been referred to Alcoholics Anonymous, a voluntary association for helping alcoholics, nor has he ever been sent to the State Hospital.

Dr. Wade's conclusion was that "Leroy Powell is an alcoholic and that his alcoholism is in a chronic stage." Although the doctor responded affirmatively to a question as to whether the appellant's taking the first drink on any given occasion is "a voluntary exercise of will," his testimony was that "we must take into account" the fact that chronic alcoholics have a "compulsion" to drink which "while not completely overpowering, is a

very strong influence, an exceedingly strong influence," and that this compulsion is coupled with the "firm belief in their mind that they are going to be able to handle it from now on." It was also Dr. Wade's opinion that appellant "has an uncontrollable compulsion to drink" and that he "does not have the willpower [to resist the constant excessive consumption of alcohol or to avoid appearing in public when intoxicated] nor has he been given medical treatment to enable him to develop this willpower."

The trial judge in the county court, sitting without a jury, made the following findings of fact:

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." [1]

[1] I do not understand the relevance of our knowing "very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem." (Opinion of MARSHALL, J., *ante*, at 521–522). We do not "traditionally" sit as a trial court, much less as a finder of fact. I submit that we must accept the findings of the trial court as they were made and not as the members of this Court would have made them had they sat as triers of fact. I would add, lest I create a misunderstanding, that I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant's conviction would be constitutionally invalid. See *infra*, at 567–570.

I confess, too, that I do not understand the relevance of our knowing very little "about alcoholism itself," given what we do

The court then rejected appellant's constitutional defense, entering the following conclusion of law:

> "(1) The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court found appellant guilty as charged and increased his fine to $50. Appellant did not have the right to appeal further within the Texas judicial system. Tex. Code Crim. Proc., Art. 4.03. He filed a jurisdictional statement in this Court.

I.

The issue posed in this case is a narrow one. There is no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular. This case does not concern the infliction of punishment upon the "social" drinker—or upon anyone other than a "chronic alcoholic" who, as the trier of fact here found, cannot "resist the constant, excessive consumption of alcohol." Nor does it relate to any offense other than the crime of public intoxication.

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism." We must consider whether the Eighth Amendment, made applicable to the States through the

know—that findings such as those made in this case are, in the view of competent medical authorities, perfectly plausible. See *infra*, at 560–562.

Fourteenth Amendment, prohibits the imposition of this penalty in these rather special circumstances as "cruel and unusual punishment." This case does not raise any question as to the right of the police to stop and detain those who are intoxicated in public, whether as a result of the disease or otherwise; or as to the State's power to commit chronic alcoholics for treatment. Nor does it concern the responsibility of an alcoholic for criminal *acts*. We deal here with the mere *condition* of being intoxicated in public.[2]

II.

As I shall discuss, consideration of the Eighth Amendment issue in this case requires an understanding of "the disease of chronic alcoholism" with which, as the trial court found, appellant is afflicted, which has destroyed his "will power to resist the constant, excessive consumption of alcohol," and which leads him to "appear in public [not] by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." It is true, of course, that there is a great deal that remains to be discovered about chronic alcoholism. Although many aspects of the disease remain obscure, there are some hard facts—medical and, especially, legal facts—that are accessible to us and that provide a context in which the instant case may be analyzed. We are similarly woefully deficient in our medical, diagnostic, and therapeutic

[2] It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.

knowledge of mental disease and the problem of insanity; but few would urge that, because of this, we should totally reject the legal significance of what we do know about these phenomena.

Alcoholism [3] is a major problem in the United States.[4] In 1956 the American Medical Association for the first time designated alcoholism as a major medical problem and urged that alcoholics be admitted to general hospitals for care.[5] This significant development marked the acceptance among the medical profession of the "disease concept of alcoholism." [6] Although there is some prob-

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[3] The term has been variously defined. The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."

For other common definitions of alcoholism, see Keller, Alcoholism: Nature and Extent of the Problem, in Understanding Alcoholism, 315 Annals 1, 2 (1958); O. Diethelm, Etiology of Chronic Alcoholism 4 (1955); T. Plaut, Alcohol Problems—A Report to the Nation by the Cooperative Commission on the Study of Alcoholism 39 (1967) (hereafter cited as Plaut); Aspects of Alcoholism 9 (1963) (published by Roche Laboratories); The Treatment of Alcoholism—A Study of Programs and Problems 8 (1967) (published by the Joint Information Service of the American Psychiatric Association and the National Association for Mental Health) (hereafter cited as The Treatment of Alcoholism); 2 R. Cecil & R. Loeb, A Textbook of Medicine 1620, 1625 (1959).

[4] It ranks among the top four public health problems of the country. M. Block, Alcoholism—Its Facets and Phases (1962).

[5] American Medical Association: Report of Reference Committee on Medical Education and Hospitals, Proceedings of the House of Delegates, Seattle, Wash., Nov. 27–29, 1956, p. 33; 163 J. A. M. A. 52 (1957).

[6] See generally E. Jellinek, The Disease Concept of Alcoholism (1960).

lem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled by him. Today most alcohologists and qualified members of the medical profession recognize the validity of this concept. Recent years have seen an intensification of medical interest in the subject.[7] Medical groups have become active in educating the public, medical schools, and physicians in the etiology, diagnosis, and treatment of alcoholism.[8]

Authorities have recognized that a number of factors may contribute to alcoholism. Some studies have pointed to physiological influences, such as vitamin deficiency, hormone imbalance, abnormal metabolism, and hereditary proclivity. Other researchers have found more convincing a psychological approach, emphasizing early environment and underlying conflicts and tensions. Numerous studies have indicated the influence of socio-cultural factors. It has been shown, for example, that the incidence of alcoholism among certain ethnic groups is far higher than among others.[9]

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[7] See, *e. g.*, H. Haggard & E. Jellinek, Alcohol Explored (1942); O. Diethelm, Etiology of Chronic Alcoholism (1955); A. Ullman, To Know the Difference (1960); D. Pittman & C. Snyder, Society, Culture, and Drinking Patterns (1962).

[8] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 113 (1966).

[9] See Alcohol and Alcoholism 24–28 (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). "Although many interesting pieces of evidence have been assembled, it is not yet known why a small percentage of those who use alcohol develop a destructive affinity for it." The Treatment of Alcoholism 9.

The manifestations of alcoholism are reasonably well identified. The late E. M. Jellinek, an eminent alcohologist, has described five discrete types commonly found among American alcoholics.[10] It is well established that alcohol may be habituative and "can be physically addicting." [11] . It has been said that "the main point for the nonprofessional is that alcoholism is not within the control of the person involved. He is not willfully drinking." [12]

Although the treatment of alcoholics has been successful in many cases,[13] physicians have been unable to discover any single treatment method that will invariably produce satisfactory results. A recent study of available treatment facilities concludes as follows: [14]

> "Although numerous kinds of therapy and intervention appear to have been effective with various kinds of problem drinkers, the process of matching patient and treatment method is not yet highly developed. There is an urgent need for continued experimentation, for modifying and improving exist-

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[10] See E. Jellinek, The Disease Concept of Alcoholism 35–41 (1960).

[11] Alcoholism 3 (1963) (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). See also Bacon, Alcoholics Do Not Drink, in Understanding Alcoholism, 315 Annals 55–64 (1958).

[12] A. Ullman, To Know the Difference 22 (1960).

[13] In response to the question "can a chronic alcoholic be medically treated and returned to society as a useful citizen?" Dr. Wade testified as follows:

"We believe that it is possible to treat alcoholics, and we have large numbers of individuals who are now former alcoholics. They themselves would rather say that their condition has been arrested and that they remain alcoholics, that they are simply living a pattern of life, through the help of medicine or whatever source, that enables them to refrain from drinking and enables them to combat the compulsion to drink."

[14] The Treatment of Alcoholism 13.

> ing treatment methods, for developing new ones, and for careful and well-designed evaluative studies. Most of the facilities that provide services for alcoholics have made little, if any, attempt to determine the effectiveness of the total program or of its components."

Present services for alcoholics include state and general hospitals, separate state alcoholism programs, outpatient clinics, community health centers, general practitioners, and private psychiatric facilities.[15] Self-help organizations, such as Alcoholics Anonymous, also aid in treatment and rehabilitation.[16]

The consequences of treating alcoholics, under the public intoxication laws, as criminals can be identified with more specificity. Public drunkenness is punished as a crime, under a variety of laws and ordinances, in every State of the Union.[17] The Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice has reported that "[t]wo million arrests in 1965—one of every three arrests in America—were for the offense of public drunkenness." [18] Drunkenness offenders make up a large percentage of the population in short-term penal institutions.[19] Their arrest and processing place a tremendous burden upon the police, who are called upon to spend a large amount of time

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[15] *Id.*, at 13–26. See also Alcohol and Alcoholism 31–40; Plaut 53–85.

[16] See A. Ullman, To Know the Difference 173–191 (1960).

[17] For the most part these laws and ordinances, like Article 477 of the Texas Penal Code, cover the offense of being drunk in a public place. See Task Force Report: Drunkenness 1 (1967) (published by The President's Commission on Law Enforcement and Administration of Justice) (hereafter cited as Task Force Report).

[18] *Ibid.*

[19] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 110 (1966).

in arresting for public intoxication and in appearing at trials for public intoxication, and upon the entire criminal process.[20]

It is not known how many drunkenness offenders are chronic alcoholics, but "[t]here is strong evidence . . . that a large number of those who are arrested have a lengthy history of prior drunkenness arrests." [21] "There are instances of the same person being arrested as many as forty times in a single year on charges of drunkenness, and every large urban center can point to cases of individuals appearing before the courts on such charges 125, 150, or even 200 times in the course of a somewhat longer period." [22]

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest.[23] The jails, overcrowded and put to a use for which they are not suit-

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[20] See Task Force Report 3–4.

[21] *Id.*, at 1.

[22] F. Allen, The Borderland of Criminal Justice 8 (1964). It does not, of course, necessarily follow from the frequency of his arrests that a person is a chronic alcoholic.

[23] See D. Pittman & C. Gordon, Revolving Door: A Study of the Chronic Police Case Inebriate (1958). See also Pittman, Public Intoxication and the Alcoholic Offender in American Society, Appendix A to Task Force Report.

Dr. Wade answered each time in the negative when asked:

"Is a chronic alcoholic going to be rehabilitated by simply confining him in jail without medical attention?

"Would putting a chronic alcoholic in jail operate to lessen his desire for alcohol when he is released?

"Would imposing a monetary fine on a chronic alcoholic operate to lessen his desire for alcohol?"

able, have a destructive effect upon alcoholic inmates.[24]

Finally, most commentators, as well as experienced judges,[25] are in agreement that "there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness." [26]

> "If all of this effort, all of this investment of time and money, were producing constructive results, then we might find satisfaction in the situation despite its costs. But the fact is that this activity accomplishes little that is fundamental. No one can seriously suggest that the threat of fines and jail sentences actually deters habitual drunkenness or alcoholic addiction. . . . Nor, despite the heroic efforts being made in a few localities, is there much reason to suppose that any very effective measures of cure and therapy can or will be administered in the jails. But the weary process continues, to the detriment of the total performance of the law-enforcement function." [27]

III.

It bears emphasis that these data provide only a context for consideration of the instant case. They should not dictate our conclusion. The questions for this Court are not settled by reference to medicine or penology. Our task is to determine whether the principles embodied in the Constitution of the United States place any limitations upon the circumstances under which punishment

[24] See, *e. g.*, MacCormick, Correctional Views on Alcohol, Alcoholism, and Crime, 9 Crime & Delin. 15 (1963).

[25] See, *e. g.*, Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966).

[26] M. Guttmacher & H. Weihofen, Psychiatry and the Law 319 (1952).

[27] F. Allen, The Borderland of Criminal Justice 8–9 (1964).

may be inflicted, and, if so, whether, in the case now before us, those principles preclude the imposition of such punishment.

It is settled that the Federal Constitution places some substantive limitation upon the power of state legislatures to define crimes for which the imposition of punishment is ordered. In *Robinson* v. *California,* 370 U. S. 660 (1962), the Court considered a conviction under a California statute making it a criminal offense for a person to "be addicted to the use of narcotics." At Robinson's trial, it was developed that the defendant had been a user of narcotics. The trial court instructed the jury that "[t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." *Id.,* at 662–663.

This Court reversed Robinson's conviction on the ground that punishment under the law in question was cruel and unusual, in violation of the Eighth Amendment of the Constitution as applied to the States through the Fourteenth Amendment. The Court noted that narcotic addiction is considered to be an illness and that California had recognized it as such. It held that the State could not make it a crime for a person to be ill.[28] Although Robinson had been sentenced to only 90 days in prison for his offense, it was beyond the power of the State to prescribe such punishment. As MR. JUSTICE STEWART, speaking for the Court, said: "[e]ven one day

[28] "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U. S., at 678 (DOUGLAS, J., concurring).

in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U. S., at 667.

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct.[29] The statute imposed a penalty for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status.[30] But the essen-

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[29] The Court noted in *Robinson* that narcotic addiction "is apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In the case of alcoholism it is even more likely that the disease may be innocently contracted, since the drinking of alcoholic beverages is a common activity, generally accepted in our society, while the purchasing and taking of drugs are crimes. As in *Robinson*, the State has not argued here that Powell's conviction may be supported by his "voluntary" action in becoming afflicted.

[30] In *Robinson*, we distinguished between punishment for the "status" of addiction and punishment of an "act":

"This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status'

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tial 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.[31]

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of narcotic addition a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there." *Id.*, at 666.

[31] I also read these findings to mean that appellant's disease is such that he cannot be deterred by Article 477 of the Texas Penal Code from drinking to excess and from appearing in public while intoxicated. See n. 23, *supra*.

Finally, contrary to the views of MR. JUSTICE WHITE, *ante*, at 549–551, I believe these findings must fairly be read to encompass the facts that my Brother WHITE agrees would require reversal, that is, that for appellant Powell, "resisting drunkenness" and "avoiding public places when intoxicated" on the occasion in question were "impossible." Accordingly, in MR. JUSTICE WHITE's words, "[the] statute is in effect a law which bans a single act for which [he] may not be convicted under the Eighth Amendment—the act of getting drunk." In my judgment, the findings amply show that "it was not feasible for [Powell] to have made arrangements to prevent his being in public when drunk and that his extreme drunkennesss sufficiently deprived him of his faculties on the occasion in issue."

Article 477 of the Texas Penal Code is specifically directed to the accused's presence while in a state of intoxication, "in any public place, or at any private house except his own." This is the essence of the crime. Ordinarily when the State proves such presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed. But here the findings of the trial judge call into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson*. It is true that the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1689 were initially directed to the type and degree of punishment inflicted.[32] But in *Robinson* we recognized that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." 370 U. S., at 676 (MR. JUSTICE DOUGLAS, concurring).[33]

The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in

[32] See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Weems* v. *United States*, 217 U. S. 349 (1910). See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 636–645 (1966).

[33] Convictions of chronic alcoholics for violations of public intoxication statutes have been invalidated on Eighth Amendment grounds in two circuits. See *Easter* v. *District of Columbia*, 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966); *Driver* v. *Hinnant*, 356 F. 2d 761 (C. A. 4th Cir. 1966).

a public place would be "cruel and inhuman punishment" within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a "chronic alcoholic" who, according to the trier of fact, cannot resist the "constant excessive consumption of alcohol" and does not appear in public by his own volition but under a "compulsion" which is part of his condition.

I would reverse the judgment below.

BAXTER, Associate Justice.

I. BACKGROUND

In October 1992, Santa Ana added article VIII, section 10–400 et seq. (the ordinance) to its municipal code. The declared purpose of the ordinance was to maintain public streets and other public areas in the city in a clean and accessible condition. Camping and storage of personal property in those areas, the ordinance recited, interfered with the rights of others to use those areas for the purposes for which they were intended.

The ordinance provides:

"Sec. 10–402. Unlawful Camping.
"It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided:
"(a) any street;
"(b) any public parking lot or public area, improved or unimproved.

"Sec. 10–403. Storage of Personal Property in Public Places.
"It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council:
"(a) any park;
"(b) any street;
"(c) any public parking lot or public area, improved or unimproved."[1]

Plaintiffs in these consolidated actions are: (1) homeless persons and taxpayers who appealed from a superior court order which struck "to live temporarily in a camp facility or outdoors" from the ordinance, but otherwise denied their petition for writ of mandate by which they sought to bar enforcement of the ordinance (Tobe), and (2) persons who, having been charged with violating the ordinance, demurred unsuccessfully to the complaints and thereafter sought mandate to compel the respondent municipal court to sustain their demurrers (Zuckernick).

Plaintiffs offered evidence to demonstrate that the ordinance was the culmination of a four-year effort by Santa Ana to expel homeless persons. There was evidence that in 1988 a policy was developed to show "vagrants" that they were not welcome in the city. To force them out, they were to be continually moved from locations they frequented by a task force from the city's police and recreation and parks departments; early park closing times were to be posted and strictly enforced; sleeping bags and accessories were to be disposed of; and abandoned shopping carts were to be confiscated. Providers of free food were to be monitored; sprinklers in the Center Park were to be turned on often; and violations of the city code by businesses and social service agencies in that area were to be strictly enforced. This effort led to a lawsuit which the city settled in April 1990.

Santa Ana then launched an August 15, 1990, sweep of the civic center area arresting and holding violators for offenses which included blocking passageways, drinking in public, urinating in public, jaywalking, destroying vegetation, riding bicycles on the sidewalk, glue sniffing, removing trash from a bin, and violating the fire code. Some conduct involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking. The arrestees were handcuffed and taken to an athletic

[1] Section 10–401 of the ordinance defines the terms:
"(a) *Camp* means to pitch or occupy camp facilities; to use camp paraphernalia.
"(b) *Camp facilities* include, but are not limited to, tents, huts, or temporary shelters.
"(c) *Camp paraphernalia* includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.
"(d) *Park* means the same as defined in section 31–1 of this Code.
"(e) *Store* means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.
"(f) *Street* means the same as defined in section 1–2 of this Code."

field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location. Homeless persons among the arrestees claimed they were the victims of discriminatory enforcement. The municipal court found that they had been singled out for arrest for offenses that rarely, if ever, were the basis for even a citation.

In October 1990, Santa Ana settled a civil action for injunctive relief, agreeing to refrain from discriminating on the basis of homelessness, from taking action to drive the homeless out of the city, and from conducting future sweeps and mass arrests. That case, which was to be dismissed in 1995, was still pending when the camping ordinance was passed in 1992.

Evidence in the form of declarations regarding the number of homeless and facilities for them was also offered. In 1993 there were from 10,000 to 12,000 homeless persons in Orange County and 975 permanent beds available to them. When National Guard armories opened in cold weather, there were 125 additional beds in Santa Ana and another 125 in Fullerton. On any given night, however, the number of shelter beds available was more than 2,500 less than the need.

The Court of Appeal majority, relying in part on this evidence, concluded that the purpose of the ordinance—to displace the homeless—was apparent. On that basis, it held that the ordinance infringed on the right to travel, authorized cruel and unusual punishment by criminalizing status, and was vague and overbroad. The city contends that the ordinance is constitutional on its face. We agree. We also conclude that, if the Tobe petition sought to mount an as applied challenge to the ordinance, it failed to perfect that type of challenge.

II. PRELIMINARY CONSIDERATIONS

A. Facial or As Applied Challenge.

Plaintiffs argue that they have mounted an as applied challenge to the ordinance as well as a facial challenge. While they may have intended both, we conclude that no as applied challenge to the ordinance was perfected. The procedural posture of the Zuckernick action precludes an as applied challenge, which may not be made on demurrer to a complaint which does not describe the allegedly unlawful conduct or the circumstances in which it occurred. The Tobe plaintiffs did not clearly allege such a challenge or seek relief from specific allegedly impermissible applications of the ordinance. Moreover, assuming that an as applied attack on the ordinance was stated, the plaintiffs did not establish that the ordinance has been applied in a constitutionally impermissible manner either to themselves or to others in the past.

Because the Court of Appeal appears to have based its decision in part on reasoning that would be appropriate to a constitutional challenge based on a claim that, as applied to particular defendants, the Santa Ana ordinance was invalid, we must first consider the nature of the challenge made by these petitioners.

1. The Tobe petition.

[A]n as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional. All of the declarants who had been cited under the ordinance described conduct in which they had engaged and that conduct appears to have violated the ordinance. None describes an impermissible means of enforcement of the ordinance or enforcement in circumstances that violated the constitutional rights the petition claimed had been violated. None demonstrated that the circumstances in which he or she was cited affected the declarant's right to travel. None states facts to support a conclusion that any punishment, let alone cruel and unusual punishment proscribed by the Eighth Amendment, had been imposed. Since no constitutionally impermissible pattern, or even single instance, of constitutionally impermissible enforcement was shown, no injunction against such enforcement could be issued and none was sought by plaintiffs.

Because the Tobe plaintiffs sought only to enjoin *any* enforcement of the ordinance and did not demonstrate a pattern of unconstitutional enforcement, the petition must be considered as one which presented only a facial challenge to the ordinance.

2. The Zuckernick petition.

None of the complaints in the Zuckernick proceedings included any allegations identifying the defendant as an involuntarily homeless person whose violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable. Although the petition for writ of mandate included allegations regarding Santa Ana's past efforts to rid the city of its homeless population, those allegations, even if true, were irrelevant to the legal sufficiency of the complaints.

Therefore, while we are not insensitive to the importance of the larger issues petitioners and amici curiae seek to raise in these actions, or to the disturbing nature of the evidence which persuaded the Court of Appeal to base its decision on what it believed to be the impact of the ordinance on homeless persons, the only question properly before the municipal and superior courts and the Court of Appeal for decision was the facial validity of the ordinance.

This court's consideration will, therefore, be limited to the facial validity of the ordinance.

B. Motive of Legislators.

The Court of Appeal also considered the evidence of Santa Ana's past attempts to remove homeless persons from the city significant evidence of the purpose for which the ordinance was adopted. It then considered that purpose in assessing the validity of the ordinance. While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance, the motive of the legislative body is generally irrelevant to the validity of the statute or ordinance.

The Court of Appeal relied in part on *Pottinger v. City of Miami* (S.D.Fla.1992) 810 F.Supp. 1551, 1581, for its assumption that consideration of the motives of the Santa Ana City Council may be considered in assessing the validity of the ordinance. That is not the rule in this state, but even were it so, *Pottinger* was not a challenge to the facial validity of the Miami ordinance in question there. Moreover, the district court's conclusion that the ordinance was invalid as applied was not based on the motives of the legislators in enacting the ordinance. The court considered internal memoranda and evidence of arrest records as evidence of the purpose underlying *enforcement* of the ordinance against homeless persons.

Absent a basis for believing that the ordinance would not have been adopted if the public areas of Santa Ana had been appropriated for living accommodation by any group other than the homeless, or that it was the intent of that body that the ordinance be enforced only against homeless persons, the ordinance is not subject to attack on the basis that the city council may have hoped that its impact would be to discourage homeless persons from moving to Santa Ana.

We cannot assume … that the sole purpose of the Santa Ana ordinance was to force the homeless out of the city. The city had agreed to discontinue such attempts when it settled the prior litigation. The record confirms that the city faced a problem common to many urban areas, the occupation of public parks and other public facilities by homeless persons. Were we to adopt the approach suggested by the dissent, any facially valid ordinance enacted by a city that had once acted in a legally impermissible manner to achieve a permissible objective could be found invalid on the basis that its past conduct established that the ordinance was not enacted for a permissible purpose. Absent evidence other than the enactment of a facially valid ordinance, we cannot make that assumption here.

III. FACIAL VALIDITY OF THE SANTA ANA ORDINANCE

A. Right to Travel.

Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a

fundamental aspect of the federal union of states. "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." (*Passenger Cases* (1849) 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702 (dis. opn. of Taney, C.J.).)

In the *Passenger Cases, supra,* 48 U.S. (7 How.) 283 the court struck down taxes imposed by the States of New York and Massachusetts on aliens who entered the state from other states and countries by ship. The basis for the decision, as found in the opinions of the individual justices, was that the tax invaded the power of Congress over foreign and interstate commerce. The opinion of Chief Justice Taney, in which he disagreed with the majority on the commerce clause issue, also addressed the tax as applied to citizens of the United States arriving from other states. That tax he believed to be impermissible. Some later decisions of the court trace recognition of the constitutional right of unburdened interstate travel to that opinion. (See, e.g., *Shapiro v. Thompson* (1969) 394 U.S. 618, 630. And, relying on the dissenting opinion of the Chief Justice in the *Passenger Cases,* the court struck down a tax on egress from the State of Nevada in *Crandall v. Nevada* (1867) 73 U.S. (6 Wall.) 35, 18 L.Ed. 745, holding that the right of interstate travel was a right of national citizenship which was essential if a citizen were to be able to pass freely through another state to reach the national or a regional seat of the federal government.

Other cases find the source of the right in the privileges and immunities clause. In *Paul v. Virginia* (1868) 75 U.S. (8 Wall.) 168, 19 L.Ed. 357, the court rejected a challenge predicated on the privileges and immunities clause made by a corporation to a tax imposed by the State of Virginia on out-of-state insurance companies. In so doing, it recognized interstate travel as a right guaranteed to citizens. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; *it gives them the right of free ingress into other States, and egress from them;* it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." (*Id.,* at p. 180, italics added.)

In the *Slaughter–House Cases* (1872) 83 U.S. (16 Wall.) 36, the court equated the rights protected by the privileges and immunities clause to those in the corresponding provision of the Articles of Confederation which provided that the inhabitants of each state were to have " 'the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State....' "

The privileges and immunities clause was also the source of the right of interstate travel as an incident of national citizenship. The right to travel, or right of migration, now is seen as an aspect of personal liberty which, when united with the right to travel, requires "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

In a line of cases originating with *Shapiro v. Thompson,* the court has considered the right to travel in the context of equal protection challenges to state laws creating durational residency requirements as a condition to the exercise of a fundamental right or receipt of a state benefit. In those cases the court has held that a law which *directly* burdens the fundamental right of migration or interstate travel is constitutionally impermissible. Therefore a state may not create classifications which, by imposing burdens or restrictions on newer residents which do not apply to all residents, deter or penalize migration of persons who exercise their right to travel to the

state.

In *Shapiro,* where public assistance was denied residents who had lived in the state for less than one year, the court held that durational residence as a condition of receiving public assistance constituted invidious discrimination between residents, and that if a law had no other purpose than chilling the exercise of a constitutional right such as that of migration of needy persons into the state the law was impermissible. Further, "any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."

Next, durational residence requirements for voting were struck down by the court in *Dunn v. Blumstein* (1972) 405 U.S. 330.

The court's focus on whether the law directly burdened, by penalizing, interstate travel continued in *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, in which a durational residence requirement for indigent, nonemergency medical care at county expense was challenged. The court held that the restriction denied newcomers equal protection, impinged on the right to travel by denying basic necessities of life, and penalized interstate migration.

In each of these cases the court had before it a law which denied residents a fundamental constitutional right (voting) or a governmental benefit (public assistance, medical care) on the basis of the duration of their residence. The law created two classes of residents. In *Zobel v. Williams* (1982) 457 U.S. 55, where the right to share in oil revenues was based on the duration of residence in Alaska, the court noted that the right to travel analysis in those cases, which did not create an actual barrier to travel, was simply a type of equal protection analysis. "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents."

The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution.

Neither the United States Supreme Court nor this court has ever held, however, that the incidental impact on travel of a law having a purpose other than restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible.

By contrast, in a decision clearly relevant here, a zoning law which restricted occupancy to family units or nonfamily units of no more than two persons was upheld by the Supreme Court, notwithstanding any incidental impact on a person's preference to move to that area, because the law was not aimed at transients and involved no fundamental right. (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 7.

Courts of this state have taken a broader view of the right of intrastate travel, but have found violations only when a direct restriction of the right to travel occurred.

This court has also rejected an argument that any legislation that burdens the right to travel must be subjected to strict scrutiny and sustained only if a compelling need is demonstrated.

We do not question the conclusion of the Court of Appeal that a local ordinance which forbids sleeping on public streets or in public parks and other public places may have the effect of deterring travel by persons who are unable to afford or obtain other accommodations in the location to which they travel. Assuming that there may be some state actions short of imposing a direct barrier to migration or denying benefits to a newly arrived resident which violate the right to travel, the ordinance does not do so. It is a nondiscrimi-

natory ordinance which forbids use of the public streets, parks, and property by residents and nonresidents alike for purposes other than those for which the property was designed. It is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel.

As we have pointed out above, to succeed in a facial challenge to the validity of a statute or ordinance the plaintiff must establish that " 'the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions.' " All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so.

Since the Santa Ana ordinance does not on its face reflect a discriminatory purpose, and is one which the city has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights. The provisions of the Santa Ana ordinance do not inevitably conflict with the right to travel. The ordinance is capable of constitutional application. The ordinance prohibits "any person" from camping and/or storing personal possessions on public streets and other public property. It has no impact, incidental or otherwise, on the right to travel except insofar as a person, homeless or not, might be discouraged from traveling to Santa Ana because camping on public property is banned. An ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel. Even assuming that the ordinance may constitute an incidental impediment to some individuals' ability to travel to Santa Ana, since it is manifest that the ordinance is capable of applications which do not offend the Constitution in the manner suggested by petitioners and the Court of Appeal, the ordinance must be upheld.

Our conclusion that the Santa Ana ordinance does not impermissibly infringe on the right of the homeless, or others, to travel, finds support in the decision of the United States District Court in *Joyce v. City and County of San Francisco* (1994) 846 F.Supp. 843. The plaintiffs, on behalf of a class of homeless individuals, sought a preliminary injunction to prevent implementation of a program of enforcement (the Matrix Program) of state and municipal laws which were commonly violated by the homeless residents of the City. Among the laws to be enforced were those banning "camping" or "lodging" in public parks and obstructing sidewalks. It was claimed, inter alia, that the Matrix Program infringed on the right to travel. The court rejected that argument and refused to require the City to show a compelling state interest to justify any impact the program might have on the right of the class members to travel. It noted that the program was not facially discriminatory as it did not distinguish between persons who were residents of the City and those who were not. In so doing, the court suggested that the opinion of the Court of Appeal in this case was among those which constituted extensions of the right to travel that appeared to be "unwarranted under the governing Supreme Court precedent." We agree.

The right to travel does not, as the Court of Appeal reasoned in this case, endow citizens with a "right to live or stay where one will." While an individual may travel where he will and remain in a chosen location, that constitutional guaranty does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which he chooses to live or stay, be it public or privately owned property.

Moreover, lest we be understood to imply that an as applied challenge to the ordinance might succeed on the right to travel ground alone, we caution that, with few exceptions, the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right. Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel. and on the Mall in the nation's capital violated the First Amendment rights of the demonstrators. The

court held that it did not, as other areas were available for the purpose. *Clark* dealt with an affirmative right—that of free speech—which could be restricted in public fora only by reasonable, content-neutral time, place and manner restrictions. (*Id.* at p. 293, 104 S.Ct. at p. 3069). The court expressly recognized the authority of the National Park Service "to promulgate rules and regulations for the use of the

The Court of Appeal erred in holding that the Santa Ana ordinance impermissibly infringes on the right of the homeless to travel.

B. Punishment for Status.

The Court of Appeal invalidated the ordinance for the additional reason that it imposed punishment for the "involuntary status of being homeless." On that basis the court held the ordinance was invalid because such punishment violates the Eighth Amendment prohibition of cruel and unusual punishment, and the ban on cruel or unusual punishment of article I, section 17 of the California Constitution. We disagree with that construction of the ordinance and of the activity for which punishment is authorized. The ordinance permits punishment for proscribed conduct, not punishment for status.

The holding of the Court of Appeal is not limited to the face of the ordinance, and goes beyond even the evidence submitted by petitioners. Neither the language of the ordinance nor that evidence supports a conclusion that a person may be convicted and punished under the ordinance solely on the basis that he or she has no fixed place of abode. No authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or, as the Court of Appeal also concluded, is punishment for poverty. *Robinson v. California* (1962) 370 U.S. 660, on which the court relied, dealt with a statute which criminalized the status of being addicted to narcotics. The court made it clear, however, that punishing the conduct of using or possessing narcotics, even by an addict, is not impermissible punishment for status.

A plurality of the high court reaffirmed the *Robinson* holding in *Powell v. State of Texas* (1968) 392 U.S. 514, where it rejected a claim that punishment of an alcoholic for being drunk in public was constitutionally impermissible. "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' or 'occasioned by a compulsion.'"

[T]he Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status. Indeed, the district court questioned whether "homelessness" is a status at all within the meaning of the high court's decisions. "As an analytical matter, more fundamentally, homelessness is not readily classified as a 'status.' Rather, as expressed for the plurality in *Powell* by Justice Marshall, there is a 'substantial definitional distinction between a "status" ... and a "condition"....' While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), and the degree to which an individual has control over that characteristic."

The declarations submitted by petitioners in this action demonstrate the analytical difficulty to which the *Joyce* court referred. Assuming arguendo the accuracy of the declarants' descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.

The Court of Appeal erred, therefore, in concluding that the ordinance is invalid because it permits punishment for the status of being indi-

gent or homeless.

C. Vagueness and Overbreadth.

The Court of Appeal concluded that the Santa Ana ordinance was vague and overbroad. It based its vagueness conclusion on the nonexclusive list of examples of camping "paraphernalia" and "facilities" in the definitions of those terms. Those definitions were so unspecific, the court reasoned, that they invited arbitrary enforcement of the ordinance in the unfettered discretion of the police. The overbreadth conclusion was based on reasoning that the ordinance could be applied to constitutionally protected conduct. In that respect the court held that the verb "store" was overbroad as it could be applied to innocent conduct such as leaving beach towels unattended at public pools and wet umbrellas in library foyers.

1. Vagueness.

The Tobe respondents and the People, real party in interest in the Zuckernick matter, argue that the Court of Appeal failed to apply the tests enunciated by the United States Supreme Court and this court in applying the vagueness doctrine. It has isolated particular terms rather than considering them in context. We agree.

A penal statute must define the offense with sufficient precision that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." "The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7)."

To satisfy the constitutional command, a statute must meet two basic requirements: (1) the statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. Only a reasonable degree of certainty is required, however. The analysis begins with "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' "

The Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be. Contrary to the suggestion of the Court of Appeal, we see no possibility that any law enforcement agent would believe that a picnic in a public park constituted "camping" within the meaning of the ordinance or would believe that leaving a towel on a beach or an umbrella in a library constituted storage of property in violation of the ordinance.

The stated purpose of the ordinance is to make public streets and other areas readily accessible to the public and to prevent use of public property "for camping purposes or storage of personal property" which "interferes with the rights of others to use the areas for which they were intended." No reasonable person would believe that a picnic in an area designated for picnics would constitute camping in violation of the ordinance. The ordinance defines camping as occupation of camp facilities, living temporarily in a camp facility or outdoors, or using camp paraphernalia. The Court of Appeal's strained interpretation of "living," reasoning that we all use public facilities for "living" since all of our activities are part of living, ignores the context of the ordinance which prohibits living not in the sense of existing, but dwelling or residing on public property. Picnicking is not living on public property. It does not involve occupation of "tents, huts, or temporary shelters" "pitched" on public property or residing on public property.

Nor is the term "store" vague. Accumulating or putting aside items, placing them for safekeeping, or leaving them in public parks, on public streets, or in a public parking lot or other public area is prohibited by the ordinance. When read in light of the express purpose of the ordinance—to avoid interfering with use of those areas for the purposes for which they are intended—it is clear that leaving a towel on a beach, an umbrella in the public library, or a student backpack in a school, or using picnic supplies in a park in which picnics are permitted is not a violation of the ordinance.

The ordinance is not vague. It gives adequate notice of the conduct it prohibits. It does not invite arbitrary or capricious enforcement. The superior court properly rejected that basis of the Tobe plaintiffs' challenge to the ordinance. The Court of Appeal erred in reversing that judgment on that ground.

2. Overbreadth.

The Court of Appeal reasoned that the ordinance was broader than necessary since it banned camping on all public property. There is no such limitation on the exercise of the police power, however, unless an ordinance is vulnerable on equal protection grounds or directly impinges on a fundamental constitutional right.

If the overbreadth argument is a claim that the ordinance exceeds the police power of that city, it must also fail. There is no fundamental right to camp on public property; persons who do so are not a suspect classification; and neither of the petitions claims that the ordinance is invidiously discriminatory on its face. The Legislature has expressly recognized the power of a city "to regulate conduct upon a street, sidewalk, or other public place or on or in a place open to the public" and has specifically authorized local ordinances governing the use of municipal parks. Adoption of the ordinance was clearly within the police power of the city, which may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." As the more than 90 cities and the California State Association of Counties that have filed an amicus curiae brief in this court have observed, a city not only has the power to keep its streets and other public property open and available for the purpose to which they are dedicated, it has a duty to do so.

The Court of Appeal also failed to recognize that a facial challenge to a law on grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and cannot have *any* valid application, or a claim that the law sweeps in a substantial amount of constitutionally protected conduct. The concepts of vagueness and overbreadth are related, in the sense that if a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies.

Neither the Tobe plaintiffs nor the Zuckernick petitioners have identified a constitutionally protected right that is impermissibly restricted by application or threatened application of the ordinance. There is no impermissible restriction on the right to travel. There is no right to use of public property for living accommodations or for storage of personal possessions except insofar as the government permits such use by ordinance or regulation. Therefore, the ordinance is not overbroad, and is not facially invalid in that respect. It is capable of constitutional application.

Since the ordinance is not unconstitutionally overbroad, and the facial vagueness challenge must fail, the Court of Appeal erred in ordering dismissal of the complaints in the Zuckernick prosecution and enjoining enforcement of the ordinance.

IV. DISPOSITION

The judgment of the Court of Appeal is reversed.

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

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 13, 2017 Portland, Oregon

Filed April 1, 2019

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, Ben-

nett, 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.

1. Federal Courts ⚿3675

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.

2. Federal Civil Procedure ⚿103.2, 103.3

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.

3. Federal Civil Procedure ⚿103.2

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 ⚿699

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 ⚿699

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 ⚿2467

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.

7. Federal Civil Procedure ⚿2491.5

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.

8. Constitutional Law ⚿1374
Vagrancy ⚿6

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 ⚿1088(5)

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 ⚿1454
Declaratory Judgment ⚿84

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.

11. Civil Rights ⚿1088(5)

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 ⚿1088(5)

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.

13. Sentencing and Punishment ⚿1435, 1452, 1482

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.

14. Sentencing and Punishment ⚿1452

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.

15. Sentencing and Punishment ⚿1453
Vagrancy ⚿6

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.

16. Civil Rights ⚿1454

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.

17. Civil Rights ⚿1454

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

18. Civil Rights ⚿1454

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.

19. Sentencing and Punishment ⚿1435

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.

20. Sentencing and Punishment ⚿1452

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 ⚿1452

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.

22. Sentencing and Punishment ⚿1452

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 ⚿1452

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.

24. Sentencing and Punishment ⚿1453
Vagrancy ⚿6

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.

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

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.

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

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

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 ordi-

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.

nances 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.

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.

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

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).

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");

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

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.

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]

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.

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 cit-

ies 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] Ac-

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/

cordingly, 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."[16]

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'').

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 *Ed-*

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.

wards, 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. *John-*

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.

son, 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

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, 203 L.Ed.2d 11 (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." *Harmelin*, 501 U.S. at

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.").

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 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., dis-

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 *Rob-*

senting) (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.

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 perma-

inson 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).

nent 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.

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."

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

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.

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

"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 uncon-

stitutional . . . 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]

[2–6] "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

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.

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 at-

mosphere 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.

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, de-

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.

clared 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).

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.

[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), allud-

ing 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

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

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

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.

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 "con-

10. Costs shall be awarded to the plaintiffs.

viction 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 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.

Gloria JOHNSON; John Logan, individuals, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS, Defendant-Appellant.

Nos. 20-35752, 20-35881

United States Court of Appeals, Ninth Circuit.

Argued and Submitted December 6, 2021 San Francisco, California

Filed September 28, 2022

Background: Individuals experiencing homelessness brought putative class action against city, challenging constitutionality of city ordinances which precluded use of a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within city's limits and which provided for civil fines, exclusion orders, and criminal prosecution for trespass. After certifying class, 2019 WL 3717800, the United States District Court for the District of Oregon, Mark D. Clarke, United States Magistrate Judge, 2020 WL 4209227, granted partial summary judgment to individuals and issued permanent injunction prohibiting enforcement of some of the ordinances. City appealed.

Holdings: The Court of Appeals, Silver, District Judge, held that:

(1) city's alleged reduction in enforcement of ordinances did not render action moot;

(2) relief sought was within limits of Article III;

(3) district court acted within its discretion in finding that commonality requirement for class certification was met; and

(4) ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep.

Affirmed in part, vacated in part, and remanded.

Collins, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⚿3581(1), 3585(2)

Standing and mootness are questions of law that Court of Appeals reviews de novo.

2. Federal Civil Procedure ⚿103.2

Federal Courts ⚿2073

Federal courts must determine that they have jurisdiction before proceeding to merits, and plaintiffs must demonstrate

standing as necessary component of jurisdiction.

3. Federal Civil Procedure ⚿103.2, 103.3

To have Article III standing, plaintiff must show (1) concrete and particularized injury, (2) caused by challenged conduct, (3) that is likely redressable by favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

4. Injunction ⚿1505

For purposes of injunctive relief, abstract injury is not enough to support Article III standing; plaintiff must have sustained or be in immediate danger of sustaining some direct injury as result of challenged law. U.S. Const. art. 3, § 2, cl. 1.

5. Constitutional Law ⚿977

City's alleged reduction in enforcement of ordinances challenged as unconstitutional by individuals experiencing homelessness did not render individuals' challenge moot, in case involving ordinances which provided for civil fines, exclusion orders, and criminal prosecution for trespass, where, even if rate of enforcement of ordinances had decreased, it was undisputed that enforcement continued to some degree.

6. Federal Courts ⚿2109

A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court.

7. Federal Courts ⚿2114

Voluntary cessation of challenged practices rarely suffices to moot a case.

8. Federal Courts ⚿2114, 2202

To support an argument of mootness based on voluntary cessation of challenged practice, defendant bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

9. Constitutional Law ⚿2500, 2543

Municipal Corporations ⚿622

Relief sought by individuals experiencing homelessness, in their action challenging constitutionality of city ordinances which included trespass and anti-camping provisions, was within limits of Article III, despite city's argument that any possible relief would inappropriately intrude upon matters of policy best left to executive and legislative discretion; court could grant limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. U.S. Const. art. 3, § 2, cl. 1.

10. Constitutional Law ⚿977

Death of one class representative during pendency of city's appeal of district court's issuance of permanent injunctive relief in favor of individuals experiencing homelessness did not moot individuals' class claims as to constitutionality of city's park-exclusion, criminal trespass, and anti-camping ordinances, where surviving class representatives had standing in their own right.

11. Constitutional Law ⚿695, 705

Individual experiencing homelessness had standing for pre-enforcement challenge to constitutionality of city ordinances which provided that a person with multiple violations of anti-camping and anti-sleeping provisions could be excluded from city parks or charged with criminal trespass, even though individual lived in her car, where there was little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. U.S. Const. art. 3, § 2, cl. 1.

12. Constitutional Law ⚿695

Individual experiencing homelessness had standing for pre-enforcement chal-

lenge to constitutionality of city ordinances that included anti-camping and anti-sleeping provisions, even though individual stated he usually slept in his truck just outside of city limits, where individual had previously slept in city and been awoken by police officers and ordered to move, and individual stated that, but for the challenged ordinances, he would sleep in the city. U.S. Const. art. 3, § 2, cl. 1.

13. Federal Civil Procedure ⚿164.5

For a class representative to pursue the live claims of a properly certified class, without the need to remand for substitution of a new representative, even after his own claims become moot, class must be properly certified or representative must be appealing denial of class certification, and class representative must be a member of the class with standing to sue at the time certification is granted or denied, the unnamed class members must still have a live interest in the matter throughout the duration of the litigation, and the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired.

14. Federal Courts ⚿3785

Remand was required for determination of whether a substitute class representative was available as to challenge to constitutionality of city ordinance precluding sleeping in certain public places, after death of class representative in action against city by individuals experiencing homelessness, which challenged multiple ordinances, where deceased class representative was the only representative with standing in her own right to challenge that particular ordinance, parties had not moved to substitute a class representative, and Court of Appeals was unsure of its jurisdiction to consider challenge to the ordinance at issue.

15. Federal Courts ⚿3585(3)

Court of Appeals reviews district court's order granting class certification for abuse of discretion, but Court of Appeals gives district court noticeably more deference when reviewing grant of class certification than when reviewing denial. Fed. R. Civ. P. 23.

16. Federal Courts ⚿3585(3)

Factual findings underlying class certification are reviewed for clear error. Fed. R. Civ. P. 23.

17. Federal Civil Procedure ⚿171

Assessing the initial requirements for class certification involves rigorous analysis of the evidence. Fed. R. Civ. P. 23(a).

18. Federal Civil Procedure ⚿163

For purposes of numerosity requirement for class certification, impracticability of joinder of all members does not mean impossibility but only difficulty or inconvenience of joining all members of class. Fed. R. Civ. P. 23(a)(1).

19. Federal Civil Procedure ⚿163

There is no specific number of class members required to satisfy numerosity requirement for class certification; however, proposed classes of less than 15 are too small while classes of more than 60 are sufficiently large. Fed. R. Civ. P. 23(a)(1).

20. Federal Civil Procedure ⚿181

District court acted within its discretion in finding that numerosity requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, even though city police officer asserted in declaration that there were less than 50 individuals in city who did not have access to any shelter; point-in-time (PIT) counts conducted by non-profit organization indi-

cated there were at least 600 such individuals, and there was general understanding that PIT counts routinely undercounted. Fed. R. Civ. P. 23(a)(1).

21. Federal Civil Procedure ⇐165

Class satisfies commonality requirement for certification if there is at least one question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2).

22. Federal Civil Procedure ⇐165

To satisfy commonality requirement for class certification, class members' claims must depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. Fed. R. Civ. P. 23(a)(2).

23. Federal Civil Procedure ⇐181

District court acted within its discretion in finding that commonality requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, where individuals' claims presented at least one question and answer common to the class, which was whether city's custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws against involuntarily homeless individuals violated the Eighth Amendment. U.S. Const. Amend. 8; Fed. R. Civ. P. 23(a)(2).

24. Federal Civil Procedure ⇐176

A "fail safe class" is one that includes only those individuals who were injured by the allegedly unlawful conduct; such classes are prohibited because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment. Fed. R. Civ. P. 23.

See publication Words and Phrases for other judicial constructions and definitions.

25. Federal Civil Procedure ⇐181

Definition of class as "[a]ll involuntarily homeless individuals living in [city]" did not create an impermissible fail-safe class, in action against city by individuals experiencing homelessness, challenging constitutionality of multiple city ordinances precluding conduct including camping in public parks; class would consist of exactly the same population whether city won or lost on merits, and class population would not change if a court determined that one or more ordinances were unconstitutional but that other ordinances were not. Fed. R. Civ. P. 23.

26. Federal Civil Procedure ⇐164

The typicality requirement for class certification is a permissive standard. Fed. R. Civ. P. 23(a)(3).

27. Federal Civil Procedure ⇐164

Typicality requirement for class certification refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. Fed. R. Civ. P. 23(a)(3).

28. Federal Civil Procedure ⇐181

District court acted within its discretion in finding that typicality requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, even though some class representatives lived in vehicles while some class members lived on streets or in parks; class representatives asserted that city could not enforce the challenged ordinances against them when they had no shelter, the defenses

that applied to class representatives and class members were identical, and sleeping in vehicle rather than on ground would only result in violation of ordinances in different manner. Fed. R. Civ. P. 23(a)(3).

29. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453

City's "anti-camping" ordinance allowing citation of individuals for use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public could violate the Cruel and Unusual Punishments Clause even though citation at issue was a civil citation, where, under totality of city ordinances, if an individual violated the anti-camping ordinance twice, she could be issued a park-exclusion order, and if the individual was subsequently found in a park, she could be cited for criminal trespass. U.S. Const. Amend. 8.

30. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453

City's "anti-camping" ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep; ordinance prohibited individuals from engaging in activity they could not avoid, given lack of other shelter options and fact that, due to city being cold in winter, use of rudimentary protection from elements was a life-preserving imperative. U.S. Const. Amend. 8.

31. Courts ⚿90(2)

The narrowest position which gained the support of five justices is treated as the holding of the Supreme Court.

32. Sentencing and Punishment ⚿1453

Under the Cruel and Unusual Punishments Clause, it is unconstitutional to punish simply sleeping somewhere in public if one has nowhere else to do so; "sleeping" includes sleeping with rudimentary forms of protection from the elements. U.S. Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the District of Oregon, Mark D. Clarke, Magistrate Judge, Presiding, D.C. No. 1:18-cv-01823-CL

Aaron P. Hisel (argued), Law Offices of Montoya Hisel and Associates, Salem, Oregon; Gerald L. Warren, Law Office of Gerald L. Warren, Salem, Oregon, for Defendant-Appellant.

Edward Johnson (argued) and Walter Fonseca, Oregon Law Center, Portland, Oregon, for Plaintiffs-Appellees.

Eric S. Tars, National Homelessness Law Center, Washington, D.C.; Tamar Ezer, Acting Director; David Berris, Joe Candelaria, and Lily Fontenot, Legal Interns; David Stuzin, Student Fellow; University of Miami School of Law, Human Rights Clinic, Coral Gables, Florida; Leilani Farha, Former United Nations Special Rapporteur on the Right to Adequate Housing and Global Director, The Shift #Right2Housing, Ottawa, Ontario, Canada; for Amici Curiae University of Miami School of Law, Human Rights Clinic and National Homelessness Law Center.

Kelsi B. Corkran and Seth Wayne, Institute for Constitutional Advocacy & Protection, Washington, D.C., for Amicus Curiae Fines and Fees Justice Center.

John He, Leslie Bailey, and Brian Hardingham, Public Justice, Oakland, California; John Thomas H. Do, ACLU Foundation of Northern California, San Francisco, California; for Amici Curiae Public Justice,

ACLU of Northern California, ACLU of Southern California, ACLU of Oregon, Institute for Justice, National Center for Law and Economic Justice, and Rutherford Institute.

Nicolle Jacoby, Dechert LLP, New York, New York; Tristia M. Bauman, National Homelessness Law Center, Washington, D.C.; for Amici Curiae National Homelessness Law Center, Homeless Rights Advocacy Project at the Korematsu Center for Law and Equality at Seattle University School of Law, and National Coalition for the Homeless.

Before: RONALD M. GOULD and DANIEL P. COLLINS, Circuit Judges, and ROSLYN O. SILVER,* District Judge.

Opinion by Judge SILVER;

Dissent by Judge COLLINS

OPINION

SILVER, District Judge:

The City of Grants Pass in southern Oregon has a population of approximately 38,000. At least fifty, and perhaps as many as 600, homeless persons live in the City.[1] And the number of homeless persons outnumber the available shelter beds. In other words, homeless persons have nowhere to shelter and sleep in the City other than on the streets or in parks. Nonetheless, City ordinances preclude homeless persons from using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits. The ordinances result in civil fines up to several hundred dollars per violation and persons found to violate ordinances multiple times can be barred from all City property. And if a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for trespass.

In September 2018, a three-judge panel issued *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), holding "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." *Id.* at 1048. Approximately six weeks after the initial *Martin* panel opinion, three homeless individuals filed a putative class action complaint against the City arguing a number of City ordinances were unconstitutional. The district court certified a class of "involuntarily homeless" persons and later granted partial summary judgment in favor of the class.[2] After the plaintiffs vol-

* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

1. During this litigation the parties have used different phrases when referring to this population. For simplicity, we use ''homeless persons'' throughout this opinion.

2. Persons are involuntarily homeless if they do not ''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.'' *See Martin*, 920 F.3d at 617 n.8. However, someone who has the financial means to obtain shelter, or someone who is staying in an emergency shelter is not involuntarily homeless. *See id.* at 617 n.8. Contrary to the City's argument, this definition of involuntary homelessness is not the same as the definition of ''homeless'' found in regulations for the Department of Housing and Urban Development, 24 C.F.R. § 582.5, or the McKinney-Vento Act, 42 U.S.C. § 11434a(2), the federal law regarding the right of homeless children to a public education. For example, the McKinney-Vento Act includes as ''homeless children and youths'' persons who may not qualify as involuntarily homeless under *Martin*, such as children and youths ''living in emergency or transitional shelters.'' 42 U.S.C. § 11434a(2). Though the district court noted in part that Plaintiffs met the definition of homelessness set forth in 24 C.F.R. § 582.5, the district court also relied on the specific definition of unsheltered homeless persons set forth in the

untarily dismissed some claims not resolved at summary judgment, the district court issued a permanent injunction prohibiting enforcement against the class members of some City ordinances, at certain times, in certain places. The City now appeals, arguing this case is moot, the class should not have been certified, the claims fail on the merits, and Plaintiffs did not adequately plead one of their theories. On the material aspects of this case, the district court was right.[3]

I.

This case involves challenges to five provisions of the Grants Pass Municipal Code ("GPMC"). The provisions can be described as an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance. When the district court entered judgment, the various ordinances consisted of the following.

First, the anti-sleeping ordinance stated, in full

> *Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited*
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

GPMC 5.61.020. A violation of this ordinance resulted in a presumptive $75 fine. If unpaid, that fine escalated to $160. If a violator pled guilty, the fines could be reduced by a state circuit court judge to $35 for a first offense and $50 for a second offense. GPMC 1.36.010(K).

Next, the general anti-camping ordinance prohibited persons from occupying a "campsite" on all public property, such as parks, benches, or rights of way. GPMC 5.61.030. The term "campsite" was defined as

> 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.

GPMC 5.61.010. A second overlapping anti-camping ordinance prohibited camping in public parks, including "[o]vernight parking" of any vehicle. GPMC 6.46.090. A homeless individual would violate this parking prohibition if she parked or left "a vehicle parked for two consecutive hours [in a City park] . . . between the hours of midnight and 6:00 a.m." *Id.* Violations of either anti-camping ordinance resulted in a fine of $295. If unpaid, the fine escalated to

Department of Housing and Urban Development's regulations regarding point-in-time counts: "persons who are living in a place not designed or ordinarily used as a regular sleeping accommodation for humans must be counted as unsheltered homeless persons." 24 C.F.R. § 578.7(c)(2)(i).

3. Our dissenting colleague's strong disagreement with the majority largely arises from his disapproval of *Martin*. *See, e.g.,* Dissent 813–14 ("Even assuming *Martin* remains good law . . ."); Dissent 830 ("... and the gravity of *Martin*'s errors."); Dissent 831 (claiming, without evidence, that "it is hard to deny that *Martin* has 'generate[d] dire practical consequences' ") (modification in original and citation omitted). But *Martin* is controlling law in the Ninth Circuit, to which we are required to adhere.

$537.60. However, if a violator pled guilty, the fine could be reduced to $180 for a first offense and $225 for a second offense. GPMC 1.36.010(J).

Finally, the "park exclusion" ordinance allowed a police officer to bar an individual from all city parks for 30 days if, within one year, the individual was issued two or more citations for violating park regulations. GPMC 6.46.350(A). Pursuant to the "park exclusion appeals" ordinance, exclusion orders could be appealed to the City Council. GPMC 6.46.355. If an individual received a "park exclusion" order, but subsequently was found in a city park, that individual would be prosecuted for criminal trespass.

Since at least 2013, City leaders have viewed homeless persons as cause for substantial concern. That year the City Council convened a Community Roundtable ("Roundtable") "to identify solutions to current vagrancy problems." Participants discussed the possibility of "driving repeat offenders out of town and leaving them there." The City's Public Safety Director noted police officers had bought homeless persons bus tickets out of town, only to have the person returned to the City from the location where they were sent. A city councilor made clear the City's goal should be "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." The planned actions resulting from the Roundtable included increased enforcement of City ordinances, including the anti-camping ordinances.

The year following the Roundtable saw a significant increase in enforcement of the City's anti-sleeping and anti-camping ordinances. From 2013 through 2018, the City issued a steady stream of tickets under the ordinances.[4] On September 4, 2018, a three-judge panel issued its opinion in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).[5] That case served as the backdrop for this entire litigation.

In *Martin*, six homeless or recently homeless individuals sued the city of Boise, Idaho, seeking relief from criminal prosecution under two city ordinances related to public camping. *Martin*, 920 F.3d 584, 603–04 (9th Cir. 2019). As relevant here, *Martin* held the Cruel and Unusual Punishment Clause of 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." *Id.* at 616. *Martin* made clear, however, that a city is not required to "provide sufficient shelter

4. The City issued the following number of tickets under the anti-sleeping and anti-camping ordinances:

2013: 74 total tickets
2014: 228 total tickets
2015: 80 total tickets
2016: 47 total tickets
2017: 99 total tickets
2018: 46 total tickets

5. Following the opinion, the City of Boise petitioned for rehearing en banc. On April 1, 2019, an amended panel opinion was issued and the petition for rehearing was denied. Judge M. Smith, joined by five other judges, dissented from the denial of rehearing en banc. He argued the three-judge panel had, among other errors, misinterpreted the Supreme Court precedents regarding the criminalization of involuntary conduct. *Martin*, 920 F.3d at 591–92 (M. Smith, J., dissenting from denial of rehearing en banc). Judge Bennett, joined by four judges, also dissented from the denial of rehearing en banc. Judge Bennett argued the three-judge panel's opinion was inconsistent with the original public meaning of the Cruel and Unusual Punishment Clause. *Id.* at 599 (Bennett, J., dissenting from denial of rehearing en banc). The merits of those dissents do not alter the binding nature of the amended *Martin* panel opinion. Unless otherwise indicated, all citations to *Martin* throughout the remainder of this opinion are to the amended panel opinion.

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 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)) (omission in original).

The formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there "is a greater number of homeless individuals in [a jurisdiction] than the number of available" shelter spaces. *Id.* (alteration in original). When assessing the number of shelter spaces, *Martin* held shelters with a "mandatory religious focus" could not be counted as available due to potential violations of the First Amendment's Establishment Clause. *Id.* at 609–10 (citing *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007)).

In October 2018, approximately six weeks after the *Martin* opinion, Debra Blake filed her putative class action complaint against the City. The complaint alleged enforcement of the City's anti-sleeping and anti-camping ordinances violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. The complaint was amended to include additional named plaintiffs and to allege a claim that the fines imposed under the ordinances violated the Excessive Fines Clause of the Eighth Amendment. On January 2, 2019, a few months after the initial complaint was filed, and before Plaintiffs filed their class certification motion, the City amended its anti-camping ordinance in an attempt to come into compliance with *Martin*. Prior to this change, the anti-camping ordinance was worded such that " 'sleeping' in parks . . . automatically constitut[ed] 'camping.' " According to the City, "in direct response to *Martin v. Boise*, the City amended [the anti-camping ordinance] to make it clear that the act of 'sleeping' was to be distinguished from the prohibited conduct of 'camping.' " The City meant to "make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks." Shortly after the City removed "sleeping" from the "camping" definition, Plaintiffs moved to certify a class. Plaintiffs requested certification of a class 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 [the City] as addressed in this lawsuit.

Plaintiffs' class certification motion was accompanied by a declaration from the Chief Operating Officer and Director of Housing and Homeless Services for United Community Action Network ("UCAN"), a nonprofit organization that serves homeless people in Josephine County, the county where the City is located.[6] UCAN had recently conducted a "point-in-time count of homeless individuals in Josephine County."[7] Based on that count, the Chief Oper-

6. The Department of Housing and Urban Development regulations impose obligations on the "continuum of care," which is defined as "the group composed of representatives of relevant organizations . . . that are organized to plan for and provide, as necessary, a system of outreach, engagement, and assessment . . . to address the various needs of homeless persons and persons at risk of homelessness for a specific geographic area." 24 C.F.R. § 576.2.

7. As the "continuum of care" in the City, UCAN was required to conduct point-in-time counts ("PIT counts") of homeless persons within that geographic area. 24 C.F.R. § 578.7(c)(2). PIT counts measure the number of sheltered and unsheltered homeless individuals on a single night. 24 C.F.R.

ating Officer's declaration stated "[h]undreds of [homeless] people live in Grants Pass," and "almost all of the homeless people in Grants Pass are involuntarily homeless. There is simply no place in Grants Pass for them to find affordable housing or shelter. They are not choosing to live on the street or in the woods."

The City opposed class certification, arguing Plaintiffs had not provided sufficient evidence to meet any of the requirements for certifying a class. The district court disagreed and certified the class proposed by Plaintiffs. The parties proceeded with discovery and filed cross-motions for summary judgment.

At the time the parties filed their summary judgment motions, there were only four locations in the City that temporarily housed homeless persons, which proved inadequate. One location was run by the Gospel Rescue Mission, an explicitly religious organization devoted to helping the poor. The Gospel Rescue Mission operated a facility for single men without children, and another facility for women, including women with children. These two facilities required residents to work at the mission six hours a day, six days a week in exchange for a bunk for 30 days. Residents were required to attend an approved place of worship each Sunday and that place of worship had to espouse "traditional Christian teachings such as the Apostles Creed." Disabled persons with chronic medical or mental health issues that prevented them from complying with the Mission's rules were prohibited.[8]

In addition to the Gospel Rescue Mission, the City itself operated a "sobering center" where law enforcement could transport intoxicated or impaired persons. That facility consisted of twelve locked rooms with toilets where intoxicated individuals could sober up. The rooms did not have beds. The City also provided financial support to the Hearts with a Mission Youth Shelter, an 18-bed facility where unaccompanied minors aged 10 to 17 could stay for up to 72 hours, and could stay even longer if they had parental consent.

Finally, on nights when the temperature was below 30 degrees (or below 32 degrees with snow), UCAN operated a "warming center" capable of holding up to 40 individuals. That center did not provide beds. The center reached capacity on every night it operated except the first night it opened, February 3, 2020. Between February 3 and March 19, 2020, the warming center was open for 16 nights. The center did not open at all during the winter of 2020–2021.

Presented with evidence of the number of homeless persons and the shelter spaces available, the district court concluded "[t]he record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds." The court then held that, based on the unavailability of shelter beds, the City's enforcement of its anti-camping and anti-sleeping ordinances violated the Cruel and Unusual Punishment Clause. The fact that *Martin* involved criminal violations while the present case involved initial civil violations that matured into criminal violations made "no difference for Eight

§ 578.7(c)(2). The *Martin* court relied on PIT counts conducted by local non-profits to determine the number of homeless people in the jurisdiction. *See Martin,* 920 F.3d at 604. Courts and experts note that PIT counts routinely undercount homeless persons, but they appear to be the best available source of data on homelessness. *See, e.g., id.*

8. Multiple class members submitted uncontested declarations to the district court stating they did not stay at the Gospel Rescue Mission because they suffer from disqualifying disabilities and/or were unwilling to attend church.

Amendment purposes." Next, the court held the system of fines violated the Eighth Amendment's Excessive Fines Clause.[9] Finally, the court held the appeals process for park exclusions violated procedural due process under the Due Process Clause of the Fourteenth Amendment.

In reaching its decision the district court was careful to point out that, consistent with *Martin*, the scope of its decision was limited. The court's order made clear that the City was not required to provide shelter for homeless persons and the City could still limit camping or sleeping at certain times and in certain places. The district court also noted the City may still "ban the use of tents in public parks," "limi[t] the amount of bedding type materials allowed per individual," and pursue other options "to prevent the erection of encampments that cause public health and safety concerns."[10]

Approximately one month after the summary judgment order, the district court issued a judgment which included a permanent injunction that provided a complicated mix of relief. First, the district court declared the ordinance regarding the appeals of park exclusions failed to provide "adequate procedural due process," but that ordinance was not permanently enjoined. Instead, the district court enjoined only the enforcement of the underlying park exclusion ordinance. Next, the district court declared enforcement of the anti-sleeping and anti-camping ordinances against class members "violates the Eighth Amendment prohibition against cruel and unusual punishment" and "violates the Eighth Amendment prohibition against excessive fines." Without explanation, however, the district court did not enjoin those ordinances in their entirety. Rather, the district court entered no injunctive relief regarding the anti-sleeping ordinance. But the district court permanently enjoined enforcement of the anti-camping ordinances, as well as an ordinance regarding "criminal trespassing on city property related to parks," in all City parks at night except for one park where the parties agreed the injunction need not apply.[11] The district court also permanently enjoined enforcement of the anti-camping ordinances during daytime hours unless an initial warning was given "at least 24 hours before enforcement." Accordingly, under the permanent injunction, the anti-camping ordinances may be enforced under some circumstances during the day, but never at night.

The City appealed and sought initial en banc review to clarify the scope of *Martin*.

9. Part of the City's argument on this issue was that the fines are not mandatory because state court judges retain discretion not to impose fines. This is inconsistent with the text of the ordinances and not supported by the record. The provision of the municipal code defining penalties for ordinance violations clarifies that the fines are mandatory. It provides, the fines "*shall* be $295" and "*shall* be $75." GPMC 1.36.010(J)–(K) (emphasis added). Conversely, it is only discretionary to reduce fines because the relevant ordinance provides that, "[u]pon a plea of guilty . . . the penalty *may* be reduced" to the amount listed for a first or second offense. *Id.* (emphasis added). After a second citation, there is no authority within the municipal code that permits judges to reduce fines, and there is no evidence in the record demonstrating circuit court judges have reduced fines except pursuant to GPMC 1.36.010.

10. The district court denied summary judgment on other claims brought by Plaintiffs. Those claims were subsequently voluntarily dismissed.

11. The City ordinance regarding "criminal trespass" was never at issue in the litigation until the permanent injunction. Plaintiffs explain it was included in the injunction "[b]y agreement of the parties."

The petition for initial hearing en banc was denied.

II.

The core issue involving enforcement of the anti-camping ordinances is governed in large part by *Martin.* While there are some differences between *Martin* and the present case, the City has not identified a persuasive way to differentiate its anti-camping ordinances from the questioned ordinances in *Martin.* Therefore, the district court's ruling that the Cruel and Unusual Punishment Clause bars enforcement of the anti-camping ordinances will be mostly affirmed. We need not address the potential excessiveness of the fines issue or whether Plaintiffs adequately pled their due process challenge.

Our analysis proceeds in five parts. First, we reject the City's argument that the district court lacked jurisdiction.[12] Second, we find no abuse of discretion in the district court's certification of a class of involuntarily homeless persons. Third, we agree with the district court that at least portions of the anti-camping ordinance violate the Cruel and Unusual Punishment clause under *Martin.* Fourth, we conclude there is no need to resolve whether the fines violate the Excessive Fines clause. Fifth, we hold it is unnecessary to decide Plaintiffs' procedural due process claim.

A.

[1–4] Standing and mootness are questions of law that we review de novo. *Hartman v. Summers*, 120 F.3d 157, 159 (9th Cir. 1997); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). "Federal courts must determine that they have jurisdiction before proceeding to the merits," and plaintiffs must demonstrate standing as a necessary component of jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). To have Article III standing, a plaintiff must show (1) a concrete and particularized injury, (2) caused by the challenged conduct, (3) that is likely redressable by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). For purposes of injunctive relief, "[a]bstract injury is not enough"—the plaintiff must have sustained or be in immediate danger "of sustaining some direct injury as the result of the challenged" law. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (quotation marks and citation omitted).

[5] The City's appellate briefing makes two standing arguments. First, the City argues Plaintiffs' claims are now moot because Plaintiffs no longer face a risk of injury based on the City's changed behavior after *Martin.* Second, the City argues Plaintiffs have not identified any relief that is within a federal court's power to redress. Both arguments are without merit.

[6, 7] A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). There is abundant evidence in the record establishing homeless persons were injured by the City's enforcement actions in the past. The City argues, however, that it made changes after *Martin* such that there is no longer a threat of future injury. The problem for the City is that voluntary cessation of challenged practices rarely suffices to moot a

12. However, we vacate summary judgment and remand as to the anti-sleeping ordinance to afford the district court the opportunity to substitute a class representative in place of Debra Blake, who passed away while this matter was on appeal.

case and, in any event, there is evidence the challenged practices have continued after *Martin*.

[8] "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). This is so "because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Thus, the City "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693. Instead of the City making it "absolutely clear" it has stopped enforcement activities, the record shows ongoing enforcement.

The parties diverge substantially on how to characterize the degree of enforcement after *Martin* was issued in September 2018. The City argued in its briefing and at oral argument that it has largely complied with *Martin*, noting the 2019 amendment to an anti-camping ordinance, that citations were issued "sparingly" in 2019, and in particular it says it issued only two citations during the late evening and early morning since *Martin*. The City supports its petition with a declaration from a City police officer stating "[i]t is the regular practice of every officer I know of on this department to enforce these Ordinances sparingly and in recognition of the different circumstances we encounter." As for Plaintiffs, they offered evidence showing enforcement continued after *Martin* such that class members received citations and exclusion orders for camping or sleeping and were prosecuted for criminal trespass between the point the lawsuit was filed and the close of discovery.

Although the record does show the rate of enforcement of the various ordinances decreased since *Martin*, even accepting the City's position the evidence is undisputed that enforcement continued.[13] It is plainly inaccurate for the City to claim all enforcement ceased. The ongoing enforcement activities establish the City did not meet its "formidable burden" of showing the challenged activities will not recur. *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693. The City's mootness argument fails.[14]

13. The City also argues "there was no evidence that anyone was ever cited for the simple act of sleeping in a City park" after *Martin*. But the citation issued to Dolores Nevin in late December 2019 pursuant to the City's "criminal trespass" ordinance included a narrative explaining, "[d]uring an area check of Riverside Park, Dolores Nevin was found *sleeping* during closed hours. Nevin, who has been warned in the past, was issued a citation for Trespass on City Property." (emphasis added). And on September 11, 2019, Grants Pass Police Officer Jason McGinnis issued citations to Debra Blake and Carla Thomas for being in Riverside Park at approximately 7:30 a.m. with sleeping bags and belongings spread around themselves. Other individuals cited for camping in a city park in 2019 include class members: Gail Laine, William Stroh, Dawn Schmidt, Cristina Trejo, Kellie Parker, Colleen Bannon, Amanda Sirnio, and Michael and Louana Ellis.

14. Mootness was also considered during the *Martin* litigation. *See Bell v. City of Boise*, 709 F.3d 890, 898, 900–01 (9th Cir. 2013). The City of Boise argued that a combination of an amended definition of "camping" in the ordinance and a "Special Order," prohibiting police officers from enforcing the ordinances when a person is on public property and there is no available overnight shelter, mooted the case. *Id.* at 894–95. We rejected the argument that the change to the definition of "camping"

[9] The City's other jurisdictional argument is that Plaintiffs' claims are not redressable. According to the City, any possible relief intrudes inappropriately upon matters of policy best left to executive and legislative discretion. We disagree. Consistent with *Martin*, the district court granted limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. None of the cases cited by the City credibly support its argument that the district court injunction overstepped the judiciary's limited authority under the Constitution. Contrary to the City's position, enjoining enforcement of a few municipal ordinances aimed at involuntarily homeless persons cannot credibly be compared to an injunction seeking to require the federal government to "phase out fossil fuel emissions and draw down excess atmospheric CO2." *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020). The relief sought by Plaintiffs was redressable within the limits of Article III. *See Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (holding a plaintiff's burden to demonstrate redressability is "relatively modest") (citation omitted).

[10] Finally, we raise *sua sponte* the possibility that the death of class representative Debra Blake while this matter was on the appeal has jurisdictional significance. *Cf. Fort Bend Cty. v. Davis*, —— U.S. ——, 139 S.Ct. 1843, 1849, 204 L.Ed.2d 116 (2019) (holding courts must raise issues of subject matter jurisdiction *sua sponte*). We hold Blake's death does not moot the class's claims as to all challenged ordinances except possibly the anti-sleeping ordinance. As to that ordinance, we remand to allow the district court the opportunity to substitute a class representative in Blake's stead.

[11, 12] With respect to the park exclusion, criminal trespass, and anti-camping ordinances, the surviving class representatives, Gloria Johnson [15] and John Logan,[16]

rendered the case moot because "[m]ere clarification of the Camping Ordinance does not address the central concerns of the Plaintiffs' Eighth Amendment claims"—that the ordinance "effectively criminalized their status as homeless individuals." *Id.* at 898 n.12. And we held the adoption of a "Special Order" did not moot the case because the Special Order was not a legislative enactment, and as such it "could be easily abandoned or altered in the future." *Id.* at 901.

15. The dissent suggests Gloria Johnson does not have standing to challenge the park exclusion and criminal trespass ordinances. Dissent 821–22. The dissent concedes, however, Johnson has standing to challenge the anti-camping ordinances, GPMC 5.61.030, 6.46.090. But the dissent does not provide a meaningful explanation why it draws this distinction between the ordinances that work in concert. It is true Johnson has not received a park exclusion order and has not been charged with criminal trespass in the second degree. However, there is little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. Johnson is positioned to bring a pre-enforcement challenge against the park exclusion and criminal trespass ordinances, because they will be used against her given the undisputed fact that she remains involuntarily homeless in Grants Pass. She established a credible threat of future enforcement under the anti-camping ordinances which creates a credible threat of future enforcement under the park exclusion and criminal trespass ordinances.

16. The dissent claims John Logan has not established standing. Dissent 820–21. During the course of this case, Logan submitted two declarations. At the class certification stage, his declaration stated he "lived out of [his] truck on the streets in Grants Pass for about 4 years." During that time, he was "awakened by City of Grants Pass police officer and told that I cannot sleep in my truck anywhere in the city and ordered to move on." To avoid those encounters, Logan "usually sleep[s] in [his] truck just outside the Grants Pass city limits." However, Logan stated "[i]f there was some place in the city where [he] could legally

have standing in their own right. Although they live in their cars, they risk enforcement under all the same ordinances as Blake and the class (with the exception of the anti-sleeping ordinance, GPMC 5.61.020, which cannot be violated by sleeping in a car) and have standing in their own right as to all ordinances except GPMC 5.61.020.

[13] With respect to the anti-sleeping ordinance, the law is less clear. Debra Blake is the only class representative who had standing in her own right to challenge the anti-sleeping ordinance. Under cases such as *Sosna v. Iowa*, 419 U.S. 393, 401, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a class representative may pursue the live claims of a properly certified class—without the need to remand for substitution of a new representative [17]—even after his own claims become moot, provided that several requirements are met.[18] *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc). If Debra Blake's challenge

sleep in [his] truck, [he] would because it would save valuable gas money and avoid . . . having to constantly move.'' Logan also explained he has ''met dozens, if not hundreds, of homeless people in Grants Pass'' over the years who had been ticketed, fined, arrested, and criminally prosecuted ''for living outside.'' At summary judgment, Logan submitted a declaration stating he is ''currently involuntarily homeless in Grants Pass and sleeping in [his] truck at night at a rest stop North of Grants Pass.'' He stated he ''cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed and charged with Criminal Trespass.'' The dissent reads this evidence as indicating Logan failed to ''provide[ ] any facts to establish'' that he is likely to be issued a citation under the challenged ordinances. Dissent 820–21. We do not agree. The undisputed facts establish Logan is involuntarily homeless. When he slept in Grants Pass, he was awoken by police officers and ordered to move. His personal knowledge was that involuntarily homeless individuals in Grants Pass often are cited under the challenged ordinances and Grants Pass continues to enforce the challenged ordinances. And, but for the challenged ordinances, Logan would sleep in the city. Therefore, as the district court found, it is sufficiently likely Logan would be issued a citation that Logan's standing is established. That is especially true given the Supreme Court's instruction that a plaintiff need not wait for ''an actual arrest, prosecution, or other enforcement action'' before ''challenging [a] law.'' *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). Finally, even if Logan had not demonstrated standing, the dissent's analysis regarding Logan is irrelevant because this case could proceed solely based on the standing established by Gloria Johnson and the class. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d at 985 (9th Cir. 2007) (en banc).

17. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553 (''[W]e believe that the test of Rule 23(a) is met.''); *id.* at 416–17, 95 S.Ct. 553 (White, J., dissenting) (''It is claimed that the certified class supplies the necessary adverse parties for a continuing case or controversy . . . The Court cites no authority for this retrospective decision as to the adequacy of representation which seems to focus on the competence of counsel rather than a party plaintiff who is a representative member of the class. At the very least, the case should be remanded to the District Court.'').

18. The class must be properly certified, *see Franks*, 424 U.S. at 755– 56, 96 S.Ct. 1251, or the representative must be appealing denial of class certification. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). The class representative must be a member of the class with standing to sue at the time certification is granted or denied. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553. The unnamed class members must still have a live interest in the matter throughout the duration of the litigation. *See Franks*, 424 U.S. at 755, 96 S.Ct. 1251. And the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553.

to the anti-sleeping ordinance became moot before she passed away, she could have continued to pursue the challenge on behalf of the class under the doctrine of *Sosna*. But we have not found any case applying *Sosna* and *Franks* to a situation such as this, in which the death of a representative causes a class to be unrepresented as to part (but not all) of a claim. The parties did not brief this issue and no precedent indicates whether this raises a jurisdictional question, which would deprive us of authority to review the merits of the anti-sleeping ordinance challenge, or a matter of Federal Rule of Civil Procedure 23, which might not.

[14] Because Plaintiffs have not moved to substitute a class representative pursuant to Federal Rule of Appellate Procedure 43(a) or identified a representative who could be substituted, because no party has addressed this question in briefing, and because we are not certain of our jurisdiction to consider the challenge to the anti-sleeping ordinance, we think it appropriate to vacate summary judgment as to the anti-sleeping ordinance and remand to determine whether a substitute representative is available as to that challenge alone. *See Cobell v. Jewell*, 802 F.3d 12, 23–24 (D.C. Cir. 2015) (discussing substitution of a party during appeal). Substitution of a class representative may significantly aid in the resolution of the issues in this case. Remand will not cause significant delay because, as we explain below, remand is otherwise required so that the injunction can be modified. In the absence of briefing or precedent regarding this question, we do not decide whether this limitation is jurisdictional or whether it arises from operation of Rule 23.

We therefore hold the surviving class representatives at a minimum have standing to challenge every ordinance except the anti-sleeping ordinance. As to the anti-sleeping ordinance, we vacate summary judgment and remand for the district court to consider in the first instance whether an adequate class representative, such as class member Dolores Nevin, exists who may be substituted.

B.

[15, 16] The City's next argument is the district court erred in certifying the class. We "review a district court's order granting class certification for abuse of discretion, but give the district court 'noticeably more deference when reviewing a grant of class certification than when reviewing a denial.' " *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019) (internal citation omitted) (quoting *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017)). Factual findings underlying class certification are reviewed for clear error. *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014).

[17] A member of a class may sue as a representative party if the member satisfies Federal Rule of Civil Procedure 23(a)'s four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Assessing these requirements involves "rigorous analysis" of the evidence. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

If the initial requirements of Rule 23(a) are met, a putative class representative must also show the class falls into one of three categories under Rule 23(b). Plaintiffs brought this suit under Rule 23(b)(2), seeking injunctive or declaratory relief based on the City having "acted or refused to act on grounds that apply generally to

the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The district court found the Rule 23(a) requirements satisfied and certified a class under Rule 23(b)(2). The City's arguments against this class certification are obscure. It appears the City's argument is that class certification was an abuse of discretion because the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntarily homeless person's access to shelter.[19] The City appears to suggest the need for individualized inquiry defeats numerosity, commonality, and typicality. While we acknowledge the *Martin* litigation was not a class action, nothing in that decision precluded class actions.[20] And based on the record in this case, the district court did not err by finding Plaintiffs satisfied the requirements of Rule 23 such that a class could be certified.

[18–20] To satisfy the numerosity requirement a proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). For purposes of this requirement, " 'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (quotation omitted). There is no specific number of class members required. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). However, proposed classes of less than fifteen are too small while classes of more than sixty are sufficiently large. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051–52 (9th Cir. 2003).

When the district court certified the class on August 7, 2019, it found there were at least 600 homeless persons in the City based on the 2018 and 2019 PIT counts conducted by UCAN. The City does not identify how this finding was clearly erroneous. In fact, the City affirmatively indicated to Plaintiffs prior to the class certification order that the number of homeless persons residing in Grants Pass for the past 7 years was "unknown." Further, the only guidance offered by the City regarding a specific number of class members came long after the class was certified. A City police officer claimed in a declaration that he was "aware of less than fifty individuals total who do not have access to any shelter" in the City. The officer admitted, however, it "would be extremely difficult to accurately estimate the population of people who are homeless in Grants Pass regardless of the definition used."

The officer's guess of "less than fifty" homeless persons is inconsistent with the general understanding that PIT counts routinely undercount homeless persons. *See Martin*, 920 F.3d at 604 ("It is widely recognized that a one-night point in time count will undercount the homeless population.") (internal quotation marks omitted). But even accepting the officer's assessment that there were approximately fifty

19. There is no reason to believe the putative class members are voluntarily homeless. To the contrary, at least 13 class members submitted declarations to the district court indicating that they are involuntarily homeless.

20. Other courts have certified similar classes. *See e.g., Lehr v. City of Sacramento,* 259 F.R.D. 479 (E.D. Cal. 2009) (addressing numerosity, commonality, and typicality for homeless persons in Sacramento); *Joyce v. City & Cty. of S.F.,* 1994 WL 443464 (N.D. Cal. Aug. 4, 1994), *dismissed as moot,* 87 F.3d 1320 (9th Cir. 1996) (finding typicality despite some differences among homeless class members); *Pottinger v. City of Miami,* 720 F.Supp. 955, 960 (S.D. Fla. 1989) (certifying a class of homeless persons).

homeless persons in the City, the numerosity requirement is satisfied. Joining approximately fifty persons might be impracticable and especially so under the facts here because homeless persons obviously lack a fixed address and likely have no reliable means of communications.[21] At the very least, the district court did not abuse its discretion in concluding the numerosity requirement was met.

[21–23] A class satisfies Rule 23's commonality requirement if there is at least one question of fact or law common to the class. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). The Supreme Court has said the word "question" in Rule 23(a)(2) is a misnomer: "What matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis and omission in original). "[C]lass members' claims [must] 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.' " *Mazza*, 666 F.3d at 588 (quoting *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541).

As correctly identified by the district court, Plaintiffs' claims present at least one question and answer common to the class: "whether [the City's] custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws ... against involuntarily homeless individuals violates the Eighth Amendment of the Constitution." An answer on this question resolved a crucial aspect of the claims shared by all class members.

[24, 25] The City argues the commonality requirement was not met because some class members might have alternative options for housing, or might have the means to acquire their own shelter.[22] But

21. Moreover, there is a well-documented correlation between physical and mental illness and homelessness. *See, e.g.*, Sara K. Rankin, *Punishing Homelessness*, 22 N. Crim. L. Rev. 99, 105 (2019) (''Psychiatric disorders affect at least 30 to 40 percent of all people experiencing homelessness.''); Stefan Gutwinski et al., *The prevalence of mental disorders among homeless people in high-income countries: An updated systematic review and meta-regression analysis*, 18(8) PLoS Med. 1, 14 (Aug. 23, 2021), (''Our third main finding was high prevalence rates for treatable mental illnesses, with 1 in 8 homeless individuals having either major depression (12.6%) or schizophrenia spectrum disorders (12.4%). This represents a high rate of schizophrenia spectrum disorders among homeless people, and a very large excess compared to the 12-month prevalence in the general population, which for schizophrenia is estimated around 0.7% in high-income countries.''); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 Psychiatric Servs. 170, 170 (2008) (''Homeless individuals may also be more likely to have health conditions ... Severe mental illness is also more prevalent among homeless people than in the general population.''); Ctr. for Disease Control & Prevention, Homelessness as a Public Health Law Issue: Selected Resources (Mar. 2, 2017) (''Homelessness is closely connected to declines in physical and mental health; homeless persons experience high rates of health problems such as HIV infection, alcohol and drug abuse, mental illness, tuberculosis, and other conditions.'').

22. The dissent adapts the City's argument that enforcement of the anti-camping ordinances depends on individual circumstances and is therefore not capable of resolution on a common basis. Dissent 824–25. That misunderstands how the present class was structured. The dissent attempts to reframe the common question as a very general inquiry. It appears the dissent interprets the question whether an

this argument misunderstands the class definition. Pursuant to the class definition, the class includes only *involuntarily* homeless persons.[23] Individuals who have shelter or the means to acquire their own shelter simply are never class members.[24] Because we find there existed at least one question of law or fact common to the class, the district court did not abuse its discretion in concluding commonality was satisfied.

[26–28] Typicality asks whether "the claims or defenses of the representative parties are typical" of the class. Fed. R. Civ. P. 23(a)(3). Typicality is a "permissive standard[ ]." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citation omitted). It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (citation omitted).

The class representatives' claims and defenses are typical of the class in that they are homeless persons who claim that the City cannot enforce the challenged ordinances against them when they have no shelter. The defenses that apply to class representatives and class members are identical. The claims of class representa-

Eighth Amendment violation must be determined by an individualized inquiry as whether each individual is ''involuntarily homeless.'' To assess that, a court would have to conduct an individualized inquiry and determine if an individual was ''involuntarily homeless.'' But that is not the common question in this case. Rather, the question is whether the City's enforcement of the anti-camping ordinances against all involuntarily homeless individuals violates the Eighth Amendment. This question is capable of common resolution on a prospective class-wide basis, as the record establishes.

23. The dissent argues this created a prohibited ''fail safe'' class. That is erroneous. As noted in a recent en banc decision, ''a 'fail safe' class . . . is defined to include only those individuals who were injured by the allegedly unlawful conduct.'' *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc). Such classes are prohibited ''because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.'' *Id. See also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (noting a fail safe class ''is one that is defined so narrowly as to preclude[ ] membership unless the liability of the defendant is established''). No such class is present here. The class was defined, in relevant part, as ''[a]ll involuntarily homeless individuals living in Grants Pass.'' Membership in that class has no connection to the success of the underlying claims. Put differently, the class would have consisted of exactly the same population whether Grants Pass won or lost on the merits. The obvious illustration of this is the class population would not change if a court determined the anti-camping ordinance violated the Eighth Amendment while the anti-sleeping ordinance did not. In that situation, class members would not be ''defined out of the class.'' *Olean*, 31 F.4th at 669 n.14 (citation omitted). Rather, class members would be ''bound by the judgment'' regarding the anti-sleeping ordinance. *Id.* In any event, the dissent's concerns regarding individualized determinations are best made when the City attempts to enforce its ordinances. *Cf. McArdle v. City of Ocala*, 519 F.Supp.3d 1045, 1052 (M.D. Fla. 2021) (requiring that officers inquire into the availability of shelter space before an arrest could be made for violation of the City's ''open lodging'' ordinance). If it is determined at the enforcement stage that a homeless individual has access to shelter, then they do not benefit from the injunction and may be cited or prosecuted under the anti-camping ordinances. Moreover, as we noted above, several classes of homeless individuals have been certified in this past. *See supra* note 18.

24. We do not, as the dissent contends, ''suggest[ ] that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as 'involuntarily homeless.' '' Dissent 827. It is unclear where the dissent finds this in the opinion. To be clear: A person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter.

tives and class members are similar, except that some class representatives live in vehicles while other class members may live on streets or in parks, not vehicles. This does not defeat typicality. The class representatives with vehicles may violate the challenged ordinances in a different manner than some class members—*i.e.*, by sleeping in their vehicle, rather than on the ground. But they challenge the same ordinances under the same constitutional provisions as other class members. *Cf. Staton*, 327 F.3d at 957 ("[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.") (citation omitted). The district court did not abuse its discretion in finding the typicality requirement met.

The City does not present any other arguments regarding class certification, such as the propriety of certifying the class as an injunctive class under Rule 23(b)(2). We do not make arguments for parties and the arguments raised by the City regarding class certification fail.

C.

[29] Having rejected the City's jurisdictional arguments, as well as its arguments regarding class certification, the merits can be addressed. The City's merits arguments regarding the Cruel and Unusual Punishment Clause take two forms. First, the City argues its system of imposing civil fines cannot be challenged as violating the Cruel and Unusual Clause because that clause provides protection only in criminal proceedings, after an individual has been convicted. That is incorrect. Second, the City argues *Martin* does not protect homeless persons from being cited under the City's amended anti-camping ordinance which prohibits use of any bedding or similar protection from the elements. The City appears to have conceded it cannot cite homeless persons merely for sleeping in public but the City maintains it is entitled to cite individuals for the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag "for bedding purposes." *See* GPMC 5.61.010(B). Again, the City is incorrect. Here, we focus exclusively on the anti-camping ordinances.

According to the City, citing individuals under the anti-camping ordinances cannot violate the Cruel and Unusual Punishment Clause because citations under the ordinances are civil and civil citations are "categorically not 'punishment' under the Eight Amendment."[25] The City explains "the simple act of issuing a civil citation with a court date [has never] been found to be unconstitutional 'punishment' under the Eighth Amendment." While not entirely clear, the City appears to be arguing the Cruel and Unusual Punishment Clause provides no protection from citations categorized as "civil" by a governmental authority.[26]

25. This position is in significant tension with the City's actions taken immediately after *Martin* was issued. As noted earlier, the City amended its anti-camping ordinance "in direct response to *Martin v. Boise*" to allow for "the act of 'sleeping'" in City parks. If the City believed *Martin* has no impact on civil ordinances, it is unclear why the City believed a curative "response" to *Martin* was necessary.

26. The primary support for this contention is *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). In *Ingraham*, the Supreme Court addressed whether the Cruel and Unusual Punishment Clause was implicated by corporal punishment in public schools. The Court stated the Cruel and Unusual Punishment Clause limits "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

Plaintiffs' focus on civil citations does involve an extra step from the normal Cruel and Unusual Clause analysis and the analysis of *Martin*. Usually, claims under the Cruel and Unusual Clause involve straightforward criminal charges. For example, the situation in *Martin* involved homeless persons allegedly violating criminal ordinances and the opinion identified its analysis as focusing on the "criminal" nature of the charges over ten times. 920 F.3d at 617. Here, the City has adopted a slightly more circuitous approach than simply establishing violation of its ordinances as criminal offenses. Instead, the City issues civil citations under the ordinances. If an individual violates the ordinances twice, she can be issued a park exclusion order. And if the individual is found in a park after issuance of the park exclusion order, she is cited for criminal trespass. *See* O.R.S. 164.245 (criminal trespass in the second degree). Multiple City police officers explained in their depositions this sequence was the standard protocol. The holding in *Martin* cannot be so easily evaded.

Martin held the Cruel and Unusual Punishment clause "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d at 616. A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses. A recent decision by the en banc Fourth Circuit illustrates how the Cruel and Unusual Punishment Clause looks to the eventual criminal penalty, even if there are preliminary civil steps.

The disputes in *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc) arose from a Virginia law which allowed a state court to issue a civil order identifying an individual as a "habitual drunkard." *Id.* at 268. Once labeled a "habitual drunkard," the individual was "subject to incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public." *Id.* at 269. A group of homeless alcoholics filed suit claiming, among other theories, the "habitual drunkard" scheme violated the Cruel and Unusual Punishment Clause. In the plaintiffs' view, the scheme resulted in criminal prosecutions based on their "status," *i.e.* alcoholism. *See id.* at 281.

Using reasoning very similar to that in *Martin*, the Fourth Circuit found the statutory scheme unconstitutional because it provided punishment based on the plaintiffs' status. Of particular relevance here, the Fourth Circuit reasoned the fact that Virginia's "scheme operate[d] in two steps" did not change the analysis. *Id.* 283. Issuing a civil order first, followed by a criminal charge, was a "two-pronged statutory

severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.'' *Id.* at 667, 97 S.Ct. 1401. The Court interpreted the challenge to corporal punishment as, in effect, asserting arguments under only the first or second limitation. That is, the challenge was whether ''the paddling of schoolchildren'' was a permissible amount or type of punishment. *Id.* at 668, 97 S.Ct. 1401. The *Ingraham* decision involved no analysis or discussion of the third limitation, *i.e.* the ''substantive limits on what can be made criminal.'' *Id.* at 667, 97 S.Ct. 1401. Thus, it was in the context of evaluating the amount or type of punishment that *Ingraham* stated ''Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'' *Id.* at 671, 97 S.Ct. 1401 n.40. When, as here, plaintiffs are raising challenges to the ''substantive limits on what can be made criminal,'' *Ingraham* does not prohibit a challenge before a criminal conviction. *See Martin*, 920 F.3d at 614 (''*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.'').

scheme" potentially "less direct" than straightforwardly criminalizing the status of alcohol addiction. *Id.* But the scheme remained unconstitutional because it "effectively criminalize[d] an illness." *Id.* The fact that Virginia "civilly brands alcoholics as 'habitual drunkards' before prosecuting them for involuntary manifestations of their illness does nothing to cure the unconstitutionality of this statutory scheme." *Id.*

[30] The same reasoning applies here. The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity.

The City offers a second way to evade the holding in *Martin.* According to the City, it revised its anti-camping ordinances to allow homeless persons to sleep in City parks. However, the City's argument regarding the revised anti-camping ordinance is an illusion. The amended ordinance continues to prohibit homeless persons from using "bedding, sleeping bag, or other material used for bedding purposes," or using stoves, lighting fires, or erecting structures of any kind. GPMC 5.61.010. The City claims homeless persons are free to sleep in City parks, but only without items necessary to facilitate sleeping outdoors.[27]

The discrepancy between sleeping without bedding materials, which is permitted under the anti-camping ordinances, and sleeping with bedding, which is not, is intended to distinguish the anti-camping ordinances from *Martin* and the two Supreme Court precedents underlying *Martin, 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). Under those cases, a person may not be prosecuted for conduct that is involuntary or the product of a "status." *See Martin*, 920 F.3d at 617 (citation omitted). The City accordingly argues that sleeping is involuntary conduct for a homeless person, but that homeless persons can choose to sleep without bedding materials and therefore can be prosecuted for sleeping *with* bedding.

In its order granting summary judgment, the district court correctly concluded the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from "taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available." The only plausible reading of *Martin* is that it applies to the act of "sleeping" in public, including articles necessary to facilitate sleep. In fact, *Martin* expressed concern regarding a citation given to a woman who had been found sleeping on the ground, wrapped in blankets. 920 F.3d at 618. *Martin* noted that citation as an example of the anti-camping ordinance being "en-

27. The Grants Pass ordinance does not specifically define "bedding" but courts give the words of a statute or ordinance their "ordinary, contemporary, common meaning" absent an indication to the contrary from the legislature. *See Williams v. Taylor,* 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (citation omitted). The Oxford English Dictionary defines "bedding" as "[a] collective term for the articles which compose a bed." OXFORD ENGLISH DICTIONARY. And "bed" is defined as "a place for sleeping." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 108 (11th ed.). The City's effort to dissociate the use of bedding from the act of sleeping or protection from the elements is nonsensical.

forced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements." *Id.* *Martin* deemed such enforcement unconstitutional. *Id.* It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit "the most rudimentary precautions" a homeless person might take against the elements.[28] The City's position that it is entitled to enforce a complete prohibition on "bedding, sleeping bag, or other material used for bedding purposes" is incorrect.

The dissent claims we have misread *Martin* by "completely disregard[ing] the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required." Dissent 826. The dissent concedes that pursuant to *Martin*, the City cannot impose criminal penalties on involuntarily homeless individuals for sitting, sleeping, or lying outside on public property. Dissent 816–17. Thus, our purported "complete disregard[ ]" for *Martin* is not regarding the central holding that local governments may not criminalize involuntary conduct. Rather, the dissent believes, based on its interpretation of the Supreme Court opinions underlying *Martin*, that the Eighth Amendment provides only "a case-specific affirmative defense" that can never be litigated on a class basis. Dissent 824. To reach this counterintuitive conclusion, the dissent reads limitations into *Robinson*, *Powell*, and *Martin* that are nonexistent.

In *Robinson*, the Supreme Court struck down, under the Eighth Amendment, a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 666, 82 S.Ct. 1417. The law was unconstitutional, the Court explained, because it rendered the defendant "continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State." *Id.*

Six years later, in *Powell*, the Court divided 4-1-4 over whether Texas violated the Eighth Amendment under *Robinson* by prosecuting an alcoholic for public drunkenness. In a plurality opinion, Justice Marshall upheld the conviction of Leroy Powell on the ground that he was not punished on the basis of his status as an alcoholic, but rather for the *actus reus* of being drunk in public. *Powell*, 392 U.S. at 535, 88 S.Ct. 2145. Four justices dissented, in an opinion by Justice Fortas, on the ground that the findings made by the trial judge—that Powell was a chronic alcoholic who could not resist the impulse to drink—compelled the conclusion that Powell's prosecution violated the Eighth Amendment because Powell could not avoid breaking the law. *Id.* at 569–70, 88 S.Ct. 2145 (Fortas, J., dissenting). Justice White concurred in the judgment. He stressed, "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 549, 88 S.Ct. 2145 (White, J., concurring). However, the reason for Justice White's concurrence was that he felt *Powell* failed to prove his status as an alcoholic compelled him to violate the law by appearing in public. *Id.* at 553, 88 S.Ct. 2145 (White, J., concurring).

[31] Pursuant to *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51

28. Grants Pass is cold in the winter. The evidence in the record establishes that homeless persons in Grants Pass have struggled against frostbite. Faced with spending every minute of the day and night outdoors, the choice to use rudimentary protection of bedding to protect against snow, frost, or rain is not volitional; it is a life-preserving imperative.

L.Ed.2d 260 (1977), the narrowest position which gained the support of five justices is treated as the holding of the Court. In identifying that position, *Martin* held: "five Justices [in *Powell*] 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.' " *Martin*, 920 F.3d at 616 (quoting *Jones*, 444 F.3d at 1135). *Martin* did not—as the dissent alleges—hold that *Powell*'s "controlling opinion was Justice White's concurrence." Dissent 816. *See id.*, 920 F.3d at 616–17. It would have violated the rule of *Marks* to adopt portions of Justice White's concurrence that did not receive the support of five justices. The dissent claims Justice White's concurrence requires that the individual claiming a status must prove the status compels the individual to violate the law—here, that each homeless individual must prove their status as an involuntarily homeless person to avoid prosecution.[29] Dissent 815–17. The dissent claims this renders class action litigation inappropriate. But no opinion in either *Powell* or *Martin* discussed the propriety of litigating the constitutionality of such criminal statutes by way of a class action.[30]

The law that the dissent purports to unearth in Justice White's concurrence is not the "narrowest ground" which received the support of five justices. *No* opinion in *Powell* or *Martin* supports the dissent's assertion that *Powell* offers exclusively an "affirmative 'defense' " that cannot be liti-

29. The dissent's attempt to create a governing holding out of Justice White's concurrence is erroneous. By citing a word or two out of context in the *Powell* dissenting opinion (*e.g.*, "constitutional defense") our dissenting colleague argues both Justice White and the dissenting justices in *Powell* agreed any person subject to prosecution has, at most, "a case-specific affirmative 'defense.' " Dissent 815, 824. We disagree. Though status was litigated as a defense in the context of Leroy Powell's prosecution, no opinion in *Powell* held status may be raised only as a defense. The *Powell* plurality noted trial court evidence that Leroy Powell was an alcoholic, but that opinion contains no indication "status" may only be invoked as "a case-specific affirmative 'defense.' " As for Justice White, the opening paragraph of his concurrence indicates he was primarily concerned not with how a status must be invoked but with the fact that certain statuses should be beyond the reach of the criminal law:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell, 392 U.S. at 548–49, 88 S.Ct. 2145 (White, J., concurring) (internal citation omitted). Finally, neither the remainder of Justice White's concurrence nor the dissenting opinion explicitly indicates one's status may only be invoked as a defense. Rather, Justice White and the dissenters simply agreed that, if Powell's status made his public intoxication involuntary, he could not be prosecuted. There is no conceivable way to interpret *Martin* as adopting our dissenting colleague's position that one's status must be invoked as a defense. But even assuming the burden must be placed on the party wishing to invoke a status, the class representatives established there is no genuine dispute of material fact they have the relevant status of being involuntarily homeless.

30. Federal courts have certified classes of homeless plaintiffs in the past, *see supra* note 18, which counsels against the City's and the dissent's position that such classes are impermissible under Rule 23.

gated in a class action.[31] Dissent 815, 824. Although the dissent might prefer that these principles find support in the controlling law, they do not. We thus do not misread *Martin* by failing to apply the principles found solely in Justice White's concurrence. Rather, we adhere to the narrow holding of *Martin* adopting the narrowest ground shared by five justices in *Powell*: a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status.

In addition to erecting an absolute bar to class litigation of this sort, the dissent would also impose artificial limitations on claims brought pursuant to *Martin.* The dissent concedes Gloria Johnson has standing to bring individual challenges to most of the City's ordinances. But the dissent then speculates that Gloria Johnson may, in fact, not be involuntarily homeless in the City. The dissent would insist that Gloria Johnson, for example, leave the City to camp illegally on federal or state lands, provide the court an accounting of her finances and employment history, and indicate with specificity where she lived before she lost her job and her home. Dissent 827–29. There, of course, exists no law or rule requiring a homeless person to do any of these things. Gloria Johnson has adequately demonstrated that there is no available shelter in Grants Pass and that she is involuntarily homeless.

The undisputed evidence establishes Gloria Johnson is involuntarily homeless and there is undisputed evidence showing many other individuals in similar situations. It is undisputed that there are at least around 50 involuntarily homeless persons in Grants Pass, and PIT counts, which *Martin* relied on to establish the number of homeless persons in Boise, revealed more than 600. *See Martin*, 920 F.3d at 604. It is undisputed that there is no secular shelter space available to adults. Many class members, including the class representatives, have sworn they are homeless and the City has not contested those declarations. The dissent claims this showing is not enough, implying that Plaintiffs must meet an extremely high standard to show they are involuntarily homeless. Even viewed in the light most favorable to the City, there is no dispute of material fact that the City is home to many involuntarily homeless individuals, including the class representatives. In fact, neither the City nor the dissent has demonstrated there is even one *voluntarily* homeless individual living in the City.[32] In

31. As noted above, *Martin* did not hold homeless persons bear the burden of demonstrating they are involuntarily homeless. *See supra* note 29. Because the record plainly demonstrates Plaintiffs are involuntarily homeless, there similarly is no reason for us to determine what showing would be required. We note, however, that some district courts have addressed circumstances in which the question of burden was somewhat relevant. *See, e.g., McArdle,* 519 F.Supp.3d at 1052 (requiring, based in part on *Martin,* that officers inquire into the availability of shelter space before making an arrest for violation of the City's "open lodging" ordinance); *Butcher v. City of Marysville,* 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (holding plaintiffs failed to make the "threshold showing" of pleading that there was no shelter capacity and that they had no other housing at the time of enforcement).

32. The dissent claims we have "shifted the burden to the City to establish the voluntariness of the behavior targeted by the ordinances." Dissent 828–29 n.13 (emphasis omitted). To the contrary, as we have explained, we do not decide who would bear such a burden because undisputed evidence demonstrates Plaintiffs are involuntarily homeless. Rather, without deciding who would bear such a burden if involuntariness were subject to serious dispute, we note Plaintiffs have demonstrated involuntariness and there is no evidence in the record showing any class member has adequate alternative shelter.

light of the undisputed facts in the record underlying the district court's summary judgment ruling that show Plaintiffs are involuntarily homeless, and the complete absence of evidence that Plaintiffs are voluntarily homeless, we agree with the district court that Plaintiffs such as Gloria Johnson are not voluntarily homeless and that the anti-camping ordinances are unconstitutional as applied to them unless there is some place, such as shelter, they can lawfully sleep.[33]

Our holding that the City's interpretation of the anti-camping ordinances is counter to *Martin* is not to be interpreted to hold that the anti-camping ordinances were properly enjoined in their entirety. Beyond prohibiting bedding, the ordinances also prohibit the use of stoves or fires, as well as the erection of any structures. The record has not established the fire, stove, and structure prohibitions deprive homeless persons of sleep or "the most rudimentary precautions" against the elements.[34] Moreover, the record does not explain the City's interest in these prohibitions.[35] Consistent with *Martin*, these prohibitions may or may not be permissible. On remand, the district court will be required to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available.[36]

33. Following *Martin,* several district courts have held that the government may evict or punish sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep. *See, e.g., Shipp v. Schaaf,* 379 F.Supp.3d 1033, 1037 (N.D. Cal. 2019) (''However, even assuming (as Plaintiffs do) that [eviction from a homeless encampment by citation or arrest] might occur, remaining at a particular encampment on public property is not conduct protected by *Martin,* especially where the closure is temporary in nature.''); *Aitken v. City of Aberdeen,* 393 F.Supp.3d 1075, 1082 (W.D. Wash. 2019) (''*Martin* does not limit the City's ability to evict homeless individuals from particular public places.''); *Gomes v. Cty. of Kauai*, 481 F.Supp.3d 1104, 1109 (D. Haw. 2020) (holding the County of Kauai could prohibit sleeping in a public park because it had not prohibited sleeping on other public lands); *Miralle v. City of Oakland,* 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018) (holding the City could clear out a specific homeless encampment because ''*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option''); *Le Van Hung v. Schaaf,* 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019) (holding *Martin* does not ''create a right for homeless residents to occupy indefinitely any public space of their choosing''). Because the City has not established any realistically available place within the jurisdiction for involuntarily homeless individuals to sleep we need not decide whether alternate outdoor space would be sufficient under *Martin.* The district court may consider this issue on remand, if it is germane to do so.

34. The dissent claims we establish ''the right to use (at least) a tent.'' Dissent 830 n.15. This assertion is obviously false. The district court's holding that the City may still ''ban the use of tents in public parks'' remains undisturbed by our opinion.

35. The dissent asserts, ''it is hard to deny that *Martin* has 'generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.' '' Dissent 831 (quoting *Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc)) (modification in original). There are no facts in the record to establish that *Martin* has generated ''dire'' consequences for the City. Our review of this case is governed only by the evidence contained in the record.

36. The district court enjoined the park exclusion ordinance in its entirety. The parties do not address this in their appellate briefing but, on remand, the district court should consider narrowing this portion as well because the park exclusion ordinance presumably may be enforced against Plaintiffs who engage in prohibited activity unrelated to their status as homeless persons.

D.

The district court concluded the fines imposed under the anti-sleeping and anti-camping ordinances violated the Eighth Amendment's prohibition on excessive fines. A central portion of the district court's analysis regarding these fines was that they were based on conduct "beyond what the City may constitutionally punish." With this in mind, the district court noted "[a]ny fine [would be] excessive" for the conduct at issue.

The City presents no meaningful argument on appeal regarding the excessive fines issue. As for Plaintiffs, they argue the fines at issue were properly deemed excessive because they were imposed for "engaging in involuntary, unavoidable life sustaining acts." The permanent injunction will result in no class member being fined for engaging in such protected activity. Because no fines will be imposed for protected activity, there is no need for us to address whether hypothetical fines would be excessive.

E.

The final issue is whether Plaintiffs properly pled their challenge to the park exclusion appeals ordinance. GPMC 6.46.355. That ordinance provided a mechanism whereby an individual who received an exclusion order could appeal to the City Council. Subsequent to the district court's order, the City amended its park exclusion appeals ordinance. Therefore, the district court's determination the previous ordinance violated Plaintiffs' procedural due process rights has no prospective relevance. Because of this, we need not decide if Plaintiffs adequately pled their challenge to the previous ordinance.

III.

We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go. On remand, however, the district court must narrow its injunction to enjoin only those portions of the anti-camping ordinances that prohibit conduct protected by *Martin* and this opinion. In particular, the district court should narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless person for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available. Finally, the district court on remand should consider whether there is an adequate representative who may be substituted for Debra Blake.

[32] We are careful to note that, as in *Martin*, our decision is narrow. As in *Martin*, we hold simply that it is "unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so." *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc). Our decision reaches beyond *Martin* slightly. We hold, where *Martin* did not, that class certification is not categorically impermissible in cases such as this, that "sleeping" in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined. Our decision does not address a regime of purely civil infractions, nor does it prohibit the City from attempting other solutions to the homelessness issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COLLINS, Circuit Judge, dissenting:

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), we held that "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." *Id.* at 603. Even assuming that *Martin* remains good law, today's decision—which both misreads and greatly expands *Martin*'s holding—is egregiously wrong. To make things worse, the majority opinion then combines its gross misreading of *Martin* with a flagrant disregard of settled class-certification principles. The end result of this amalgamation of error is that the majority validates the core aspects of the district court's extraordinary injunction in this case, which effectively requires the City of Grants Pass to allow all but one of its public parks to be used as homeless encampments.[1] I respectfully dissent.

I

Because our opinion in *Martin* frames the issues here, I begin with a detailed overview of that decision before turning to the facts of the case before us.

A

In *Martin*, six individuals sued the City of Boise, Idaho, under 42 U.S.C. § 1983, alleging that the City had violated their Eighth Amendment rights in enforcing two ordinances that respectively barred, *inter alia*, (1) camping in public spaces and (2) sleeping in public places without permission. 920 F.3d at 603–04, 606. All six plaintiffs had been convicted of violating at least one of the ordinances, *id.* at 606, but we held that claims for retrospective relief based on those convictions were barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). *See Martin*, 920 F.3d at 611–12 (noting that, under *Heck*, a § 1983 action may not be maintained if success in the suit would necessarily show the invalidity of the plaintiff's criminal conviction, unless that conviction has already been set aside or invalidated). What remained, after application of the *Heck* bar, were the claims for retrospective relief asserted by two plaintiffs (Robert Martin and Pamela Hawkes) in connection with citations they had received that did *not* result in convictions, and the claims for prospective injunctive and declaratory relief asserted by Martin and one additional plaintiff (Robert Anderson). *Id.* at 604, 610, 613–15; *see also id.* at 618–20 (Owens, J., dissenting in part) (dissenting from the majority's holding that the prospective relief claims survived *Heck*). On the merits of those three plaintiffs' Eighth Amendment claims, the *Martin* panel held that the district court had erred in granting summary judgment for the City. *Id.* at 615–18.

Although the text of the Eighth Amendment's Cruel and Unusual Punishments Clause states only that "cruel and unusual *punishments*" shall not be "inflicted," U.S. CONST., amend. VIII (emphasis added), the *Martin* panel nonetheless held that the Clause "places substantive limits" on the government's ability to *criminalize* "sitting, sleeping, or lying outside on public property," 920 F.3d at 615–16. In reaching this conclusion, the *Martin* panel placed dispositive reliance on the Supreme Court's decisions in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), and *Powell v. Texas*, 392 U.S.

1. The majority's decision is all the more troubling because, in truth, the foundation on which it is built is deeply flawed: *Martin* seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it. *See infra* at 830–31. But I am bound by *Martin*, and—unlike the majority—I faithfully apply it here.

514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). I therefore briefly review those two decisions before returning to *Martin*.

Robinson held that a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics,' " 370 U.S. at 660, 82 S.Ct. 1417 (quoting CAL. HEALTH & SAFETY CODE § 11721 (1957 ed.)), and that did so "even though [the person] has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment," *id.* at 667, 82 S.Ct. 1417. The California statute, the Court emphasized, made the " '*status*' of narcotic addiction a criminal offense," regardless of whether the defendant had "ever *used or possessed* any narcotics within the State" or had "been guilty of any antisocial *behavior* there." *Id.* at 666, 82 S.Ct. 1417 (emphasis added).

In *Powell*, a fractured Supreme Court rejected Powell's challenge to his conviction, under a Texas statute, for being "found in a state of intoxication in any public place." 392 U.S. at 517, 88 S.Ct. 2145 (quoting TEX. PENAL CODE art. 477 (1952)). A four-Justice plurality distinguished *Robinson* on the ground that, because Powell "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion," Texas had "not sought to punish a mere status, as California did in *Robinson*." *Id.* at 532, 88 S.Ct. 2145 (plurality). The plurality held that *Robinson* did not address, much less establish, that "certain *conduct* cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 533, 88 S.Ct. 2145 (emphasis added).

Justice White concurred in the judgment on the narrower ground that Powell had failed to establish the "prerequisites to the possible invocation of the Eighth Amendment," which would have required him to "satisfactorily show[ ] 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 552, 88 S.Ct. 2145 (White, J., concurring). And because, in Justice White's view, the Eighth Amendment at most provided a case-specific affirmative "defense" to application of the statute, *id.* at 552, 88 S.Ct. 2145 n.4, he agreed that the Texas statute was "constitutional insofar as it authorizes a police officer to *arrest* any seriously intoxicated person when he is encountered in a public place," *id.* at 554, 88 S.Ct. 2145 n.5 (emphasis added). Emphasizing that Powell himself "did not show that *his* conviction offended the Constitution" and that Powell had "made no showing that *he* was unable to stay off the streets on the night in question," Justice White concurred in the majority's affirmance of Powell's conviction. *Id.* at 554, 88 S.Ct. 2145 (emphasis added).

The four dissenting Justices in *Powell* agreed that the Texas statute "differ[ed] from that in *Robinson*" inasmuch as it "covers more than a mere status." 392 U.S. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). There was, as the dissenters noted, "no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular." *Id.* at 558, 88 S.Ct. 2145. Indeed, the dissenters agreed that, in the ordinary case "when the State proves such [public] presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed." *Id.* at 569, 88 S.Ct. 2145. Instead, the dissenters concluded that the application of the statute to Powell was unconstitutional "*on the occasion in question*" in light of the Texas trial court's findings about Powell's inability to

control his condition. *Id.* at 568, 88 S.Ct. 2145 n.31 (emphasis added). Those findings concerning Powell's "constitutional defense," the dissenters concluded, established that Powell "was powerless to avoid drinking" and "that, once intoxicated, he could not prevent himself from appearing in public places." *Id.* at 558, 568, 88 S.Ct. 2145; *see also id.* at 525, 88 S.Ct. 2145 (plurality) (describing the elements of the "*constitutional defense*" that Powell sought to have the Court recognize).

While acknowledging that the plurality in *Powell* had "interpret[ed] *Robinson* as precluding only the criminalization of 'status,' not of 'involuntary' conduct," the *Martin* panel held that the controlling opinion was Justice White's concurrence. 920 F.3d at 616. As I have noted, Justice White concluded that the Texas statute against public drunkenness could constitutionally be applied, even to an alcoholic, if the defendant failed to "satisfactorily show[ ] 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." *Powell*, 392 U.S. at 552, 88 S.Ct. 2145 (White, J., concurring).[2] Under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), this narrower reasoning given by Justice White for joining the *Powell* majority's judgment *upholding* the conviction constitutes the Court's holding in that case. *See id.* at 193, 97 S.Ct. 990 ("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 judgments on the narrowest grounds.' " (citation omitted)); *see also United States v. Moore*, 486 F.2d 1139, 1151 (D.C. Cir. 1973) (en banc) (Wilkey, J., concurring) (concluding that the judgment in *Powell* rested on the overlap in the views of "four members of the Court" who held that Powell's acts of public drunkenness "were punishable without question" and the view of Justice White that Powell's acts "were punishable so long as the acts had not been proved to be the product of an established irresistible compulsion").

The *Martin* panel quoted dicta in Justice White's concurrence suggesting that, if the defendant could make the requisite "showing" that "resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible," then the Texas statute "[a]s applied" to such persons might violate "the Eighth Amendment." 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 551, 88 S.Ct. 2145 (White, J., concurring)). These dicta, *Martin* noted, overlapped with similar statements in the dissenting opinion in *Powell*, and from those two opinions, the *Martin* panel derived the proposition that "five Justices" had endorsed the view 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.* (citation omitted). Applying that principle, *Martin* 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." *Id.* Because "human beings are biologically compelled to rest, whether by sitting, lying, or sleeping," *Martin* held

2. Justice White, however, did not resolve the further question of whether, if such a showing *had* been made, the Eighth Amendment would have been violated. He stated that the Eighth Amendment "*might* bar conviction" in such circumstances, but he found it "unnecessary" to decide whether that "novel construction of that Amendment" was ultimately correct. 392 U.S. at 552–53 & n.4, 88 S.Ct. 2145 (emphasis added).

that prohibitions on such activities in public cannot be applied to those who simply have "no option of sleeping indoors." *Id.* at 617.

The *Martin* panel emphasized that its "holding is a narrow one." *Id. Martin* recognized that, if there are sufficient available shelter beds for all homeless persons within a jurisdiction, then of course there can be no Eighth Amendment impediment to enforcing laws against sleeping and camping in public, because those persons engaging in such activities cannot be said to have "no option of sleeping indoors." *Id.* But "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.* (simplified) (emphasis added). Consistent with Justice White's concurrence, the *Martin* panel emphasized that, in determining whether the defendant was being punished for conduct that was "involuntary and inseparable from status," *id.* (citation omitted), the specific individual circumstances of the defendant must be considered. Thus, *Martin* explained, the panel's "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." *Id.* at 617 n.8. But *Martin* held that, where it is shown that homeless persons "do not have a single place where they can lawfully be," an ordinance against sleeping or camping in public, "as applied to them, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id.* at 617 (simplified). Concluding that the remaining plaintiffs had "demonstrated a genuine issue of material fact" as to their lack of any access to indoor shelter, *Martin* reversed the district court's grant of summary judgment to the City. *Id.* at 617 n.9; *see also id.* at 617–18.

B

With that backdrop in place, I turn to the specific facts of this case.

In the operative Third Amended Complaint, named Plaintiffs Debra Blake, Gloria Johnson, and John Logan sought to represent a putative class of "all involuntarily homeless people living in Grants Pass, Oregon" in pursuing a variety of claims under 42 U.S.C. § 1983 against the City of Grants Pass. In particular, they asserted that the following three sections of the Grants Pass Municipal Code ("GPMC"), which generally prohibited sleeping and camping in public, violated the Eighth Amendment's Cruel and Unusual Punishments Clause and its Excessive Fines Clause:

> **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, [subject to specified exceptions].[3]

6.46.090 Camping in Parks

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

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

Plaintiffs' complaint also challenged the following "park exclusion" ordinance as a violation of their "Eighth and Fourteenth Amendment rights":

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.[4]

In an August 2019 order, the district court certified a class seeking declaratory and injunctive relief with respect to Plaintiffs' Eighth Amendment claims, pursuant to Federal Rule of Civil Procedure 23(b)(2).[5] As defined in the court's order, the class consists of "[a]ll involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant as addressed in this lawsuit."

After the parties filed cross-motions for summary judgment, the district court in July 2020 granted Plaintiffs' motion in relevant part and denied the City's motion. The district court held that, under *Martin*, the City's enforcement of the above-described ordinances violated the Cruel and Unusual Punishments Clause. The court further held that, for similar reasons, the ordinances imposed excessive fines in violation of the Eighth Amendment's Excessive Fines Clause.

After Plaintiffs voluntarily dismissed those claims as to which summary judg-

3. The definition of ''campsite'' for purposes of GPMC 5.61.030 includes using a ''vehicle'' as a temporary place to live. *See* GPMC 5.61.010(B).

4. This latter ordinance was amended in September 2020 to read as follows:

> An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from a City park for a period of 30 days, if within a one-year period the individual:
>
> A. Is issued two or more citations in the same City park 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.
>
> The foregoing exclusion order shall only apply to the particular City park in which the offending conduct under 6.46.350(A) or 6.46.350(B) occurred.

5. At the time that the district court certified the class, the operative complaint was the Second Amended Complaint. That complaint was materially comparable to the Third Amended Complaint, with the exception that it did not mention the park-exclusion ordinance or seek injunctive relief with respect to it.

ment had been denied to both sides, the district court entered final judgment declaring that the City's enforcement of the anti-camping and anti-sleeping ordinances (GPMC §§ 5.61.020, 5.61.030, 6.46.090) violates "the Eighth Amendment prohibition against cruel and unusual punishment" and its "prohibition against excessive fines." Nonetheless, the court's final injunctive relief did not prohibit all enforcement of these provisions. Enforcement of § 5.61.020 (the anti-sleeping ordinance) was not enjoined at all. The City was enjoined from enforcing the anti-camping ordinances (GPMC §§ 6.46.030 and 6.46.090) "without first giving a person a warning of at least 24 hours before enforcement." It was further enjoined from enforcing those ordinances, and a related ordinance against criminal trespass on city property, in all but one City park during specified evening and overnight hours, which varied depending upon the time of year. Finally, the City was enjoined from enforcing the park-exclusion ordinance.[6]

The City timely appealed from that judgment and from the district court's subsequent award of attorneys' fees.

II

Before turning to the merits, I first address the question of our jurisdiction under Article III of the Constitution. *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008) (holding that courts "bear an independent obligation to assure [them]selves that jurisdiction is proper before proceeding to the merits").

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). "The doctrine of standing is one of several doctrines that reflect this fundamental limitation," and in the context of a request for prospective injunctive or declaratory relief, that doctrine requires a plaintiff to "show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* at 493, 129 S.Ct. 1142. The requirement to show an actual threat of *imminent* injury-in-fact in order to obtain prospective relief is a demanding one: the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (simplified).

As "an indispensable part of the plaintiff's case," each of these elements of Article III standing "must be supported in the

6. The district court's summary judgment order and judgment also declared that a separate ordinance (GPMC § 6.46.355), which addressed the procedures for appealing park-exclusion orders under § 6.46.350, failed to provide sufficient procedural due process. The parties dispute whether this claim was adequately raised and reached below, but as the majority notes, this claim for purely prospective relief has been mooted by the City's subsequent amendment of § 6.46.355 in a way that removes the features that had led to its invalidation. *See* Opin. at 813. Accordingly, this aspect of the district court's judgment should be vacated and remanded with instructions to dismiss as moot Plaintiffs' challenge to § 6.46.355.

same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because, as in *Lujan*, this case arises from a grant of summary judgment, the question is whether, in seeking summary judgment, Plaintiffs " 'set forth' by affidavit or other evidence 'specific facts' " in support of each element of standing. *Id.* (citation omitted). Moreover, "standing is not dispensed in gross," and therefore "a plaintiff must demonstrate standing for *each* claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (emphasis added) (citation omitted).

Plaintiffs' operative complaint named three individual plaintiffs as class representatives (John Logan, Gloria Johnson, and Debra Blake), and we have jurisdiction to address the merits of a particular claim if any one of them sufficiently established Article III standing as to that claim. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."); *see also Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."). Accordingly, I address the showing made by each named Plaintiff in support of summary judgment.

In my view, Plaintiff John Logan failed to establish that he has standing to challenge any of the ordinances in question. In support of his motion for summary judgment, Logan submitted a half-page declaration stating, in conclusory fashion, that he is "involuntarily homeless in Grants Pass," but that he is "sleeping in [his] truck at night at a rest stop North of Grants Pass." He asserted that he "cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed[,] and charged with Criminal Trespass." Logan also previously submitted two declarations in support of his class certification motion. In them, Logan stated that he has been homeless in Grants Pass for nearly seven of the last 10 years; that there have been occasions in the past in which police in Grants Pass have awakened him in his car and instructed him to move on; and that he now generally sleeps in his truck outside of Grants Pass. Logan has made no showing that, over the seven years that he has been homeless, he has ever been issued a citation for violating the challenged ordinances, nor has he provided any facts to establish either that the threat of such a citation is "certainly impending" or that "there is a substantial risk" that he may be issued a citation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (citation and internal quotation marks omitted). At best, his declarations suggest that he would *prefer* to sleep in his truck within the City limits rather than outside them, and that he is subjectively deterred from doing so due to the City's ordinances. But such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Nor has Logan provided any facts that would show that he has any actual intention or plans to stay overnight in the City. *See Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) ("[W]e have concluded that pre-enforcement plaintiffs who failed to allege a concrete intent to

violate the challenged law could not establish a credible threat of enforcement."). Even if his declarations could be generously construed as asserting an intention to stay in the City at some future point, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130; *cf. Driehaus*, 573 U.S. at 161, 134 S.Ct. 2334 (permitting pre-enforcement challenge against ordinance regulating election-related speech where plaintiffs' allegations identified "specific statements they intend[ed] to make in future election cycles"). And, contrary to what the majority suggests, *see* Opin. at 800–01 n.16, Logan's vaguely described knowledge about what has happened to *other* people cannot establish his standing. Accordingly, Logan failed to carry his burden to establish standing for the prospective relief he seeks.

By contrast, Plaintiff Gloria Johnson made a sufficient showing that she has standing to challenge the general anti-camping ordinance, GPMC § 5.61.030, and the parks anti-camping ordinance, GPMC § 6.46.090. Although Johnson's earlier declaration in support of class certification stated that she "often" sleeps in her van outside the City limits, she also stated that she "*continue[s]* to live without shelter in Grants Pass" and that, consequently, "[a]t any time, I could be arrested, ticketed, fined, and prosecuted for sleeping outside in my van or for covering myself with a blanket to stay warm" (emphasis added). Her declaration also recounts "dozens of occasions" in which the anti-camping ordinances have been enforced against her, either by instructions to "move along" or, in one instance, by issuance of a citation for violating the parks anti-camping ordinance, GPMC § 6.46.090. Because Johnson presented facts showing that she continues to violate the anti-camping ordinances and that, in light of past enforcement, she faces a credible threat of future enforcement, she has standing to challenge those ordinances. *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130. Johnson, however, presented no facts that would establish standing to challenge either the anti-sleeping ordinance (which, unlike the anti-camping ordinances, does not apply to sleeping in a vehicle), the park-exclusion ordinance, or the criminal trespass ordinance.[7]

Debra Blake sufficiently established her standing, both in connection with the class

7. The majority concludes that Johnson's standing to challenge the anti-camping ordinances necessarily establishes her standing to challenge the park-exclusion and criminal-trespass ordinances. *See* Opin. at 800 n.15. But as the district court explained, the undisputed evidence concerning Grants Pass's enforcement policies established 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" (emphasis added). Although Johnson's continued intention to sleep in her vehicle in Grants Pass gives her standing to challenge the anti-camping ordinances, Johnson has wholly failed to plead any facts to show, *inter alia*, that she intends to engage in the *further* conduct that might expose her to a "credible threat" of prosecution under the park-exclusion or criminal trespass ordinances. *Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334 (citation omitted). Johnson's declaration states that she has been homeless in Grants Pass for three years, but it does not contend that she has ever been issued, or threatened with issuance of, a trespass order, a park-exclusion order, or a criminal trespass charge or that she has "an intention to engage in a course of conduct" that would lead to such an order or charge. *Id.* (citation omitted). Because "standing is not dispensed in gross," *see DaimlerChrysler*, 547 U.S. at 353, 126 S.Ct. 1854 (citation omitted), Johnson must separately establish her standing with respect to each ordinance, and she has failed to do so with respect to the park-exclusion and criminal-trespass ordinances.

certification motion and the summary judgment motion. Although she was actually living in temporary housing at the time she submitted her declarations in support of class certification in March and June 2019, she explained that that temporary housing would soon expire; that she would become homeless in Grants Pass again; and that she would therefore again be subject to being "arrested, ticketed and prosecuted for sleeping outside or for covering myself with a blanket to stay warm." And, as her declaration at summary judgment showed, that is exactly what happened: in September 2019, she was cited for sleeping in the park in violation of GPMC § 6.46.090, convicted, and fined. Her declarations also confirmed that Blake's persistence in sleeping and camping in a variety of places in Grants Pass had also resulted in a park-exclusion order (which she successfully appealed), and in citations for violation of the anti-sleeping ordinance, GPMC § 5.61.020 (for sleeping in an alley), and for criminal trespass on City property. Based on this showing, I conclude that Blake established standing to challenge each of the ordinances at issue in the district court's judgment.

However, Blake subsequently passed away during this litigation, as her counsel noted in a letter to this court submitted under Federal Rule of Appellate Procedure 43(a). Because the only relief she sought was prospective declaratory and injunctive relief, Blake's death moots her claims. *King v. County of Los Angeles*, 885 F.3d 548, 553, 559 (9th Cir. 2018). And because, as explained earlier, Blake was the only named Plaintiff who established standing with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances that are the subject of the district court's classwide judgment, her death raises the question whether we consequently lack jurisdiction over those additional claims. Under *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the answer to that question would appear to be no. Blake established her standing at the time that the class was certified and, as a result, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [Blake]." *Id.* at 399, 95 S.Ct. 553. "Although the controversy is no longer alive as to [Blake], it remains very much alive for the class of persons she [had] been certified to represent." *Id.* at 401, 95 S.Ct. 553; *see also Nielsen v. Preap*, —— U.S. ——, 139 S. Ct. 954, 963, 203 L.Ed.2d 333 (2019) (finding no mootness where "there was at least one named plaintiff with a live claim when the class was certified"); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc).

There is, however, presently no class representative who meets the requirements for representing the certified class with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances.[8] Although that would normally re-

8. Because—in contrast to the named representative in *Sosna,* who had Article III standing at the time of certification—Johnson and Logan *never* had standing to represent the class with respect to the anti-sleeping ordinance, they may not represent the class as to such claims. *See Sosna,* 419 U.S. at 403, 95 S.Ct. 553 (holding that a *previously proper* class representative whose claims had become moot on appeal could continue to represent the class for purposes of that appeal); *see also Bates,* 511 F.3d at 987 (emphasizing that the named plaintiff "had standing at the time of certification"); *B.K. ex rel. Tinsley v. Snyder,* 922 F.3d 957, 966 (9th Cir. 2019) (stating that "class representatives must have Article III standing"); *cf. NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. SW., Inc.,* 926 F.3d 528, 533 (9th Cir. 2019) (holding that, where the named plaintiffs never had stand-

quire a remand to permit the possible substitution of a new class member, *see Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1336–37 (9th Cir. 1977), I see no need to do so here, and that remains true even if one assumes that the failure to substitute a new class representative might otherwise present a potential jurisdictional defect. As noted earlier, we have jurisdiction to address all claims concerning the two anti-camping ordinances, as to which Johnson has sufficient standing to represent the certified class. And, as I shall explain, the class as to those claims should be decertified, and the reasons for that decertification rest on cross-cutting grounds that apply equally to all claims. As a result, I conclude that we have jurisdiction to order the complete decertification of the class as to all claims, without the need for a remand to substitute a new class representative as to the anti-sleeping, park-exclusion, and criminal trespass ordinances. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that, where "a merits issue [is] dispositively resolved in a companion case," that merits ruling could be applied to the other companion case without the need for a remand to resolve a potential jurisdictional issue).

III

I therefore turn to whether the district court properly certified the class under Rule 23 of the Federal Rules of Civil Procedure. In my view, the district court relied on erroneous legal premises in certifying the class, and it therefore abused its discretion in doing so. *B.K.*, 922 F.3d at 965.

A

"To obtain certification of a plaintiff class under Federal Rule of Civil Procedure 23, a plaintiff must satisfy both the four requirements of Rule 23(a)—'numerosity, commonality, typicality, and adequate representation'—and 'one of the three requirements listed in Rule 23(b).'" *A.B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828, 834 (9th Cir. 2022) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)). Commonality, which is contested here, requires a showing that the class members' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. In finding that commonality was satisfied with respect to the Eighth Amendment claims, the district court relied solely on the premise that whether the City's conduct "violates the Eighth Amendment" was a common question that could be resolved on a classwide basis. And in finding that Rule 23(b) was satisfied here, the district court relied solely on Rule 23(b)(2), which provides that a "class action may be maintained" if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). That requirement was satisfied, the district court concluded, because (for reasons similar to those that

ing, the class "must be decertified"). The majority correctly concedes this point. *See* Opin. at 801–02. Nonetheless, the majority wrongly allows Johnson and Logan to represent the class as to the park-exclusion and criminal-trespass ordinances, based on its erroneous conclusion that they established standing to challenge those ordinances. *See supra* at 820–22 & n.7.

underlay its commonality analysis) the City's challenged enforcement of the ordinances "applies equally to all class members." The district court's commonality and Rule 23(b)(2) analyses are both flawed because they are based on an incorrect understanding of our decision in *Martin.*

As the earlier discussion of *Martin* makes clear, the Eighth Amendment theory adopted in that case requires an individualized inquiry in order to assess whether any individuals to whom the challenged ordinances are being applied "*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." 920 F.3d at 617 n.8. *See supra* at 816–17. Only when persons "do not have a *single place* where they can lawfully be," can it be said that an ordinance against sleeping or camping in public, "*as applied to them*, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id.* at 617 (simplified) (emphasis added).

Of course, such an individualized inquiry is not required—and no Eighth Amendment violation occurs under *Martin*—when the defendant can show that there is adequate shelter space to house all homeless persons in the jurisdiction. *Id.* But the converse is not true—the mere fact that a city's shelters are full does *not* by itself establish, without more, that any particular person who is sleeping in public does "not have a single place where [he or she] can lawfully be." *Id.* The logic of *Martin*, and of the opinions in *Powell* on which it is based, requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person. Indeed, the opinions in *Powell* on which *Martin* relied—Justice White's concurring opinion and the opinion of the dissenting Justices—all agreed that, at most, the Eighth Amendment provided a case-specific affirmative defense that would require the defendant to provide a "satisfactor[y] showing that it was not feasible for him to have made arrangements" to avoid the conduct at issue. *Powell*, 392 U.S. at 552, 88 S.Ct. 2145 (White, J., concurring); *id.* at 568, 88 S.Ct. 2145 n.31 (Fortas, J., dissenting) (agreeing with Justice White that the issue is whether the defendant "on the occasion in question" had shown that avoiding the conduct was "impossible"); *see also supra* at 815.[9]

In light of this understanding of *Martin*, the district court clearly erred in finding that the requirement of commonality

9. The majority incorrectly contends that the dissenters in *Powell* did not endorse Justice White's conclusion that the *defendant* bears the burden to establish that his or her conduct was involuntary. *See* Opin. at 809–11. On the contrary, the *Powell* dissenters' entire argument rested on the affirmative "constitutional defense" presented at the trial in that case and on the findings made by the trial court in connection with that defense. *See* 392 U.S. at 558, 88 S.Ct. 2145 (Fortas, J., dissenting). The majority's suggestion that I have taken that explicit reference to Powell's defense "out of context," *see* Opin. at 810 n.29, is demonstrably wrong—the context of the case was precisely the extensive affirmative defense that Powell presented at trial, including the testimony of an expert. *See id.* at 517–26, 88 S.Ct. 2145 (plurality) (summarizing the testimony). And, of course, in *Martin,* the issue was raised in the context of a § 1983 action in which the plaintiffs challenging the laws bore the burden to prove the involuntariness of their relevant conduct. The majority points to nothing that would plausibly support the view that *Powell* and *Martin* might require the *government* to carry the burden to establish *voluntariness*. *See* Opin. at 811 n.31 (leaving this issue open). The majority claims that it can sidestep this issue here, but that is also wrong: the burden issue is critical both to the class-certification analysis and to the issue of summary judgment on the merits. *See infra* at 824–30.

was met here. "What matters to class certification is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (simplified). Under *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion. That question is simply not one that can be resolved, on a common basis, "in one stroke." *Id.* That requires decertification.

For similar reasons, the district court also erred in concluding that the requirements of Rule 23(b)(2) were met. By its terms, Rule 23(b)(2) is satisfied only if (1) the defendant has acted (or refused to act) on grounds that are generally applicable to the class as whole and (2) as a result, final classwide or injunctive relief is appropriate. As the Supreme Court has observed, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' " *Wal-Mart*, 564 U.S. at 360, 131 S.Ct. 2541. It follows that, when the *wrongfulness* of the challenged conduct with respect to any particular class member depends critically upon the individual circumstances of that class member, a class action under Rule 23(b)(2) is not appropriate. In such a case, in which (for example) the challenged enforcement of a particular law may be lawful as to some persons and not as to others, depending upon their individual circumstances, the all-or-nothing determination of wrongfulness that is the foundation of a (b)(2) class is absent: in such a case, it is simply not true that the defendant's "conduct is such that it can be enjoined or declared unlawful *only* as to *all* of the class members or as to *none* of them.' " *Id.* (emphasis added).

Because *Martin* requires an assessment of each person's individual circumstances in order to determine whether application of the challenged ordinances violates the Eighth Amendment, these standards for the application of Rule 23(b)(2) were plainly not met in this case. That is, because the applicable law governing Plaintiffs' claims would entail "a process through which highly individualized determinations of liability and remedy are made," certification of a class under Rule 23(b)(2) is improper. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012). Moreover, the mere fact that the district court's final judgment imposes sweeping across-the-board injunctive relief that disregards individual differences in determining the defendant's liability does *not* mean that Rule 23(b)(2) has been satisfied. The rule requires that any such classwide relief be rooted in a determination of *classwide liability*—the defendant must have acted, or be acting, unlawfully "on grounds that apply generally to the class, *so that* final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added). That requirement was not established here, and the class must be decertified.[10]

10. The majority wrongly concludes that the City has forfeited any argument concerning Rule 23(b)(2) because it did not specifically mention that subdivision of the rule in its opening brief. Opin. at 805–06. This "Simon Says" approach to reading briefs is wrong.

B

The majority provides two responses to this analysis, but both of them are wrong.

First, the majority contends that *Martin* established a bright-line rule that "the government cannot prosecute homeless people for sleeping in public"—or, presumably, for camping—"if there 'is a greater number of homeless individuals in [a jurisdiction] than the number of available' shelter spaces." *See* Opin. at 795 (quoting *Martin*, 920 F.3d at 617). Because, according to the majority, *Martin* establishes a simple "formula" for determining when all enforcement of anti-camping and anti-sleeping ordinances must cease, it presents a common question that may be resolved on a classwide basis. *See* Opin. at 795; *see also* Opin. at 802–03, 804. As the above analysis makes clear, the majority's premise is incorrect. *Martin* states that, if there are insufficient available beds at shelters, then a jurisdiction "cannot prosecute homeless individuals for '*involuntarily* sitting, lying, and sleeping in public.' " 920 F.3d at 617 (emphasis added). The lack of adequate shelter beds thus merely eliminates a *safe-harbor* that might otherwise have allowed a jurisdiction to prosecute violations of such ordinances *without* regard to individual circumstances, with the result that the jurisdiction's enforcement power will instead depend upon whether the conduct of the individual on a particular occasion was "involuntar[y]." *Id. Martin* confirms that the resulting inquiry turns on whether the persons in question "*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." *Id.* at 617 n.8; *see also id.* at 617 (stating that enforcement is barred only if the persons in question "do not have a single place where they can lawfully be" (citation omitted)). And the majority's misreading of *Martin* completely disregards the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required.

Second, the majority states that, to the extent that *Martin* requires such an individualized showing to establish an Eighth Amendment violation, any such individualized issue here has been eliminated by the fact that "[p]ursuant to the class definition, the class includes only *involuntarily* homeless persons." *See* Opin. at 805. As the majority acknowledges, "[p]ersons are involuntarily homeless" under *Martin* only "if they do not 'have access to adequate temporary shelter,' " such as, for example, when they lack " 'the means to pay for it' " and it is otherwise not " 'realistically available to them for free.' " Opin. at 792 n.2 (quoting *Martin*, 920 F.3d at 617 n.8). Because that individualized issue has been shifted into the class definition, the majority holds, the City's enforcement of the challenged ordinances against *that* class can in that sense be understood to present a "common question" that can be resolved in one stroke. According to the majority, because the class definition requires that, at the time the ordinances are applied against them, the class members must be "involuntarily homeless" in the sense that *Martin* requires, there is a common question as to whether "the City's enforcement of the anti-camping ordinances against all

The *substance* of the argument is contained in the opening brief, in which the City explicitly contended that *Martin* requires "a more individualized analysis" than the district court applied and that, as a result, "neither FED. R. CIV. P. 23 nor *Martin* provide plaintiffs the ability to establish the type of sweeping classwide claims advanced in this case." Indeed, Plaintiffs themselves responded to this argument, in their answering brief, by explaining why they believe that the requirements of Rule 23(b)(2) were met.

involuntarily homeless individuals violates the Eighth Amendment." *See* Opin. at 804 & n.22.

The majority cites no authority for this audacious bootstrap argument. If a person's individual circumstances are such that he or she has *no* "access to adequate temporary shelter"—which necessarily subsumes (among other things) the determination that there are no shelter beds available—then the *entire* (highly individualized) question of the City's liability to that person under *Martin*'s standards has been shifted into the class definition. That is wholly improper. *See Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc) ("A court may not ... create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct."); *see also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (stating that it would be improper to define a class in such a way "as to preclude membership unless the liability of the defendant is established" (simplified)).

The majority nonetheless insists that "[m]embership in the class" here "has no connection to the success of the underlying claims." *See* Opin. at 805 n.23. That is obviously false. As I have explained, *Martin*'s understanding of when a person "involuntarily" lacks "access to adequate temporary shelter" or to "a single place where [he or she] can lawfully be," *see* 920 F.3d at 617 & n.8 (citations omitted), requires an individualized inquiry into a given person's circumstances at a particular moment. By insisting that a common question exists here *because Martin*'s involuntariness standard has been folded into the class definition, the majority is unavoidably relying on a fail-safe class definition that improperly subsumes this crucial individualized merits issue into the class definition. The majority's artifice renders the limitations of Rule 23 largely illusory.[11]

To the extent that the majority instead suggests that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as "involuntarily homeless," its argument collapses for a different reason. Because *Martin*'s Eighth Amendment holding applies only to those who involuntarily lack "access to adequate temporary shelter" on a given occasion, *see* 920 F.3d at 617 n.8, such an understanding of the class definition would *not* be sufficient to eliminate the highly individualized inquiry into whether a particular person lacked such access at a given moment, and the class would then have to be decertified for the reasons I have discussed earlier. *See supra* at 823–26. Put simply, the majority cannot have it both ways: either the class definition is co-extensive with *Martin*'s involuntariness concept (in which case the class is

11. The majority contends that, despite the presence of a liability-determining individualized issue in the class definition, there is no fail-safe class here because one or more of the claims might still conceivably fail on the merits for *other* reasons. *See* Opin. at 805 n.23. But the majority does not identify any such other reasons and, of course, under the majority's view of the substantive law, there are none. But more importantly, the majority is simply wrong in positing that the *only* type of class that would qualify as an impermissible fail-safe class is one in which *every* conceivable merits issue in the litigation has been folded into the class definition. What matters is whether the class definition folds within it *any* bootstrapping merits issue (such as the "injur[y]" issue mentioned in *Olean*) as to which "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Olean*, 31 F.4th at 670 n.14. To the extent that the central individualized merits issue in this case has been folded into the class definition, that defect is present here.

an improper fail-safe class) or the class definition differs from the *Martin* standard (in which case *Martin*'s individualized inquiry requires decertification).

IV

Given these conclusions as to standing and class certification, all that remains are the individual claims of Johnson for prospective relief against enforcement of the two anti-camping ordinances. In my view, these claims fail as a matter of law.

Johnson's sole basis for challenging these ordinances is that they prohibit her from sleeping in her van within the City. In her declaration in support of class certification, however, Johnson specifically stated that she has "often" been able to sleep in her van by parking *outside* the City limits. In a supplemental declaration in support of summary judgment, she affirmed that these facts "remain true," but she added that there had also been occasions in which, outside the City limits, county officers had told her to "move on" when she "was parked on county roads" and that, when she parked "on BLM land"—*i.e.*, land managed by the federal Bureau of Land Management—she was told that she "could only stay on BLM for a few days."

As an initial matter, Johnson's declaration provides no non-conclusory basis for finding that she lacks *any* option other than sleeping in her van. Although her declaration notes that she worked as a nurse "for decades" and that she now collects social security benefits, the declaration simply states, without saying anything further about her present economic situation, that she "cannot afford housing." Her declaration also says nothing about where she lived before she began living "on the street" a few years ago, and it says nothing about whether she has any friends or family, in Grants Pass or elsewhere, who might be able to provide assistance.[12] And even assuming that this factual showing would be sufficient to permit a trier of fact to find that Johnson lacks any realistic option other than sleeping in her van, we cannot affirm the district court's summary judgment in Johnson's favor without holding that her showing was so overwhelming that she should prevail as a matter of law. Because a reasonable trier of fact could find, in light of these evidentiary gaps, that Johnson failed to carry her burden of proof on this preliminary point, summary judgment in her favor was improper.[13]

12. The majority dismisses these questions about the sufficiency of Johnson's evidentiary showing as "artificial limitations" on claims under *Martin*, *see* Opin. at 810–11, but the standard for establishing an Eighth Amendment violation under *Martin* and the *Powell* opinions on which it relies is a demanding and individualized one, and we are obligated to follow it. Indeed, in upholding Powell's conviction for public drunkenness, the controlling opinion of Justice White probed the details of the record as to whether, in light of the fact that Powell "had a home and wife," he could have "made plans while sober to prevent ending up in a public place," and whether, despite his chronic alcoholism, he "retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere." 392 U.S. at 553, 88 S.Ct. 2145.

13. The majority errs by instead counting all gaps in the evidentiary record against the City, faulting it for what the majority thinks the City has failed to "demonstrate[ ]," *See* Opin. at 811–12 & n.32. That is contrary to well-settled law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (holding that a movant's summary judgment motion should be granted "against a [nonmovant] who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The majority's analysis also belies its implausible claim that it has not shifted the burden to the City to establish the *volun-*

But even assuming that Johnson had established that she truly has no option other than sleeping in her van, her showing is still insufficient to establish an Eighth Amendment violation. As noted, Johnson's *sole* complaint in this case is that, by enforcing the anti-camping ordinances, the City will not let her sleep in her van. But the sparse facts she has presented fail to establish that she lacks any alternative place where she could park her van and sleep in it. On the contrary, her factual showing establishes that the BLM will let her do so on BLM land for a "few days" at a time and that she also has "often" been able to do so on county land. Given that Johnson has failed to present sufficient evidence to show that she lacks alternatives that would allow her to avoid violating the City's anti-camping ordinances, she has not established that the conduct for which the City would punish her is involuntary such that, under *Martin* and the *Powell* opinions on which *Martin* relies, it would violate the Eighth Amendment to enforce that prohibition against her.

In nonetheless finding that the anti-camping ordinances' prohibition on sleeping in vehicles violates the Eighth Amendment, the majority apparently relies on the premise that the question of whether an individual has options for avoiding violations of the challenged law must be limited to alternatives that are *within the City limits.* Under this view, if a large homeless shelter with 1,000 vacant beds were opened a block outside the City's limits, the City would *still* be required by the Eighth Amendment to allow hundreds of people to sleep in their vans in the City and, presumably, in the City's public parks as well. Nothing in law or logic supports such a conclusion. *Martin* says that anti-sleeping ordinances may be enforced, consistent with the Eighth Amendment, so long as there is a "*single place* where [the person] can lawfully be," 920 F.2d at 617 (emphasis added) (citation omitted), and Justice White's concurrence in *Powell* confirms that the Eighth Amendment does not bar enforcement of a law when the defendant has failed to show that avoiding the violative conduct is "*impossible*," 392 U.S. at 551, 88 S.Ct. 2145 (emphasis added).[14] Nothing in the rationale of this Eighth Amendment theory suggests that the inquiry into whether it is "impossible" for the defendant to avoid violating the law must be artificially constrained to only those particular options that suit the defendant's geographic or other preferences. To be sure, Johnson states that having to drive outside the City limits costs her money for gas, but that does not provide any basis for concluding that the option is infeasible or that she has thereby suffered "cruel and unusual punishment."

Finally, because the district court's reliance on the Excessive Fines Clause was predicated on the comparable view that the challenged ordinances punish "status and not conduct" in violation of *Robinson*, that ruling was flawed for the same reasons. And because Johnson provides no other basis for finding an Excessive Fines violation here, her claims under that clause also fail as a matter of law.

V

Accordingly, I would remand this case with instructions (1) to dismiss as moot the claims of Debra Blake as well as Plaintiffs' claims with respect to GPMC § 6.46.355;

tariness of the behavior targeted by the ordinances. *See supra* at 824 n.9.

14. The majority complains that this standard is too high, *see* Opin. at 811–12, but it is the standard applied in *Martin* and in the *Powell* opinions on which *Martin* relied.

(2) to dismiss the claims of John Logan for lack of Article III standing; (3) to dismiss the remaining claims of Gloria Johnson for lack of Article III standing, except to the extent that she challenges the two anti-camping ordinances (GPMC §§ 5.61.030, 6.46.090); (4) to decertify the class; and (5) to grant summary judgment to the City, and against Johnson, with respect to her challenges to the City's anti-camping ordinances under the Eighth Amendment's Cruel and Unusual Punishments Clause and Excessive Fines Clause. That disposes of all claims at issue, and I therefore need not reach any of the many additional issues discussed and decided by the majority's opinion or raised by the parties.[15]

VI

Up to this point, I have faithfully adhered to *Martin* and its understanding of *Powell*, as I am obligated to do. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). But given the importance of the issues at stake, and the gravity of *Martin*'s errors, I think it appropriate to conclude by noting my general agreement with many of the points made by my colleagues who dissented from our failure to rehear *Martin* en banc.

In particular, I agree that, by combining *dicta* in a concurring opinion with a *dissent*, the panel in *Martin* plainly misapplied *Marks*' rule 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.' " 430 U.S. at 193, 97 S.Ct. 990 (emphasis added) (citation omitted). Under a correct application of *Marks*, the holding of *Powell* is that there is no constitutional obstacle to punishing conduct that has *not* been shown to be involuntary, and the converse question of what rule applies when the conduct *has* been shown to be involuntary was left open. *See Martin*, 920 F.3d at 590–93 (M. Smith, J., dissenting from denial of rehearing en banc) (explaining that, under a proper application of *Marks*, " 'there is definitely no Supreme Court holding' pro-

15. Two of the majority's expansions of *Martin* nonetheless warrant special mention. First, the majority's decision goes well beyond *Martin* by holding that the Eighth Amendment precludes enforcement of anti-camping ordinances against those who involuntarily lack access to temporary shelter, if those ordinances deny such persons the use of whatever materials they need "to keep themselves warm and dry." *See* Opin. at 808. It seems unavoidable that this newly declared right to the necessary "materials to keep warm and dry" while sleeping in public parks must include the right to use (at least) a tent; it is hard to see how else one would keep "warm and dry" in a downpour. And the majority also raises, and leaves open, the possibility that the City's prohibition on the use of other "items necessary to facilitate sleeping outdoors"—such as "stoves," "fires," and makeshift "structures"—"may or may not be permissible." *See* Opin. at 807–08, 812. Second, the majority indirectly extends *Martin*'s holding from the strictly criminal context at issue in that case to civil citations and fines. *See* Opin. at 806–07. As the district court noted below, the parties vigorously debated the extent to which a "violation" qualifies as a crime under Oregon law. The majority, however, sidesteps that issue by instead treating it as irrelevant. The majority's theory is that, even assuming *arguendo* that violations of the anti-camping ordinances are only civil in nature, they are covered by *Martin* because such violations *later* could lead (after more conduct by the defendant) to criminal fines, *see* Opin. at 807–08. But the majority does not follow the logic of its own theory, because it has not limited its holding or remedy to the enforcement of the ultimate criminal provisions; on the contrary, the majority has enjoined *any* relevant enforcement of the underlying ordinances that contravenes the majority's understanding of *Martin*. *See* Opin. at 813.

hibiting the criminalization of involuntary conduct" (citation omitted)).

Moreover, the correct answer to the question left open in *Powell* was the one provided in Justice Marshall's plurality opinion in that case: there is no federal "constitutional doctrine of criminal responsibility." 392 U.S. at 534, 88 S.Ct. 2145. In light of the "centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds," including the "doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress," the "process of adjustment" of "the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man" is a matter that the Constitution leaves within "the province of the States" or of Congress. *Id.* at 535–36, 88 S.Ct. 2145. "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," and the later incorporation of that clause's protections vis-à-vis the States in the Fourteenth Amendment "worked no change in its meaning." *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc); *see also id.* at 599 (explaining that *Martin*'s novel holding was inconsistent with the "text, tradition, and original public meaning[ ] [of] the Cruel and Unusual Punishments Clause of the Eighth Amendment"). Consequently, so long as "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*," the Eighth Amendment principles applied in *Robinson* have been satisfied. *Powell*, 392 U.S. at 533, 88 S.Ct. 2145 (plurality). The Eighth Amendment does not preclude punishing such an act merely "because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.*; *see also Martin*, 920 F.3d at 592 n.3 (M. Smith, J., dissenting from denial of rehearing en banc) ("*Powell* does not prohibit the criminalization of involuntary conduct.").

Further, it is hard to deny that *Martin* has "generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein." *Id.* at 594 (M. Smith, J., dissenting from denial of rehearing en banc). Those harms, of course, will be greatly magnified by the egregiously flawed reconceptualization and extension of *Martin*'s holding in today's decision, and by the majority's equally troubling reworking of settled class-action principles. With no sense of irony, the majority declares that no such harms are demonstrated by the record in this case, even as the majority largely endorses an injunction effectively requiring Grants Pass to allow the use of its public parks as homeless encampments. Other cities in this circuit can be expected to suffer a similar fate.

In view of all of the foregoing, both *Martin* and today's decision should be overturned or overruled at the earliest opportunity, either by this court sitting en banc or by the U.S. Supreme Court.

* * *

I respectfully but emphatically dissent.

No.

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit held that the Cruel and Unusual Punishments Clause prevents cities from enforcing criminal restrictions on public camping unless the person has "access to adequate temporary shelter." *Id.* at 617 & n.8. In this case, the Ninth Circuit extended *Martin* to a classwide injunction prohibiting the City of Grants Pass from enforcing its public-camping ordinance even through civil citations. That decision cemented a conflict with the California Supreme Court and the Eleventh Circuit, which have upheld similar ordinances, and entrenched a broader split on the application of the Eighth Amendment to purportedly involuntary conduct. The Ninth Circuit nevertheless denied rehearing en banc by a 14-to-13 vote.

The question presented is:

Does the enforcement of generally applicable laws regulating camping on public property constitute "cruel and unusual punishment" prohibited by the Eighth Amendment?

RELATED PROCEEDINGS

United States District Court (D. Or.)

Blake v. *City of Grants Pass*
No. 18-cv-1823 (Aug. 26, 2020)
(judgment entered)

United States Court of Appeals (9th Cir.)

Johnson v. *City of Grants Pass*
Nos. 20-35752, 20-35881 (July 5, 2023)
(amended opinion upon denial of rehearing)

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PETITION FOR A WRIT OF CERTIORARI

The City of Grants Pass, Oregon, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's amended opinion, together with its order denying the City's petition for panel rehearing or rehearing en banc (App., *infra*, 1a-162a), is reported at 72 F.4th 868. The district court's order on the parties' cross-motions for summary judgment (App., *infra*, 163a-205a) is not reported but is available at 2020 WL 4209227. An earlier order of the district court on class certification (App., *infra*, 206a-

220a) is not reported but is available at 2019 WL 3717800.

JURISDICTION

The Ninth Circuit issued its original opinion on September 28, 2022, and issued an amended opinion and order denying rehearing on July 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Relevant ordinances are reproduced in the appendix to the petition. App., *infra*, 221a-224a.

INTRODUCTION

The Ninth Circuit has decided that enforcement of commonplace restrictions on public camping constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment. When the Ninth Circuit first announced this rule in *Martin* v. *City of Boise*, 902 F.3d 1031 (9th Cir. 2018), amended on denial of reh'g, 920 F.3d 584 (9th Cir. 2019), six judges criticized the decision as a constitutional aberration that deviated from this Court's decisions and split from the lower courts. They also predicted that *Martin* would paralyze cities across the West in addressing urgent safety and public-health risks created by an ever-growing sprawl of tents and makeshift structures. The panel in *Martin* responded that its ruling was "narrow" and would leave ample leeway to cities on the frontlines of the homelessness crisis. 920 F.3d

at 617. Five years under *Martin* has proved the dissenters right—and then some.

This case offered the Ninth Circuit an opportunity to correct course. Instead, it doubled down on *Martin*, extending that ruling to civil citations and affirming a classwide injunction against the City of Grants Pass's enforcement of its ordinance prohibiting camping on public property. The full Ninth Circuit then denied rehearing en banc by the slimmest of margins—14 to 13—over the objections of 17 active and senior judges, who explained that the Ninth Circuit should have reconsidered this ill-conceived judicial experiment.

The Ninth Circuit's decisions have no foundation in the Constitution's original meaning or our Nation's history and traditions. The Cruel and Unusual Punishments Clause (as its name suggests) prohibits "'*methods* of punishment'" that inflict unnecessary pain and have fallen out of use. *Martin*, 920 F.3d at 601 (Bennett, J., dissenting from denial of rehearing en banc). As Judge O'Scannlain explained, that provision does not have "anything to do with the jurisprudence" the Ninth Circuit has created for public-camping ordinances. App., *infra*, 122a (statement respecting denial of rehearing en banc). There is nothing cruel or unusual about a civil fine for violating commonplace restrictions on public camping.

Consistent with that original meaning, this Court has recognized that 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* v. *Wright*, 430 U.S. 651, 667 (1977). Only once has this Court held that the Eighth Amendment imposes a substantive

limit on *what* can be made a crime as opposed to *how* a crime could be punished. In *Robinson* v. *California*, 370 U.S. 660 (1962), this Court decided that the Eighth Amendment forbids punishing the *status* of being a drug addict, even if it permits prosecutions for the *act* of using drugs.

The Ninth Circuit concluded that the Cruel and Unusual Punishments Clause protects the conduct of camping on public property through a misreading of *Robinson* and the splintered decision in *Powell* v. *Texas*, 392 U.S. 514 (1968). In *Powell*, Justice Marshall, writing for a four-Justice plurality, rejected an Eighth Amendment defense because the defendant was punished for the act of being drunk in public, not the status of being an alcoholic. Justice Fortas's dissent (also for four Justices) advanced a diametrically opposed view: that *Robinson* prohibits punishing behavior that a defendant has no power to change. Concurring in the judgment, Justice White opined that the Eighth Amendment might prohibit enforcement of the challenged law if the defendant had no place else to go, but explained that it was unnecessary to decide that issue because the defendant had not proved he had no choice but to be drunk in public on the night in question.

In *Martin* and this case, the Ninth Circuit read the *Powell* dissent together with Justice White's dicta to create the rule that the Eighth Amendment prohibits punishment for conduct that purportedly flows from a status. That dissent-plus-concurrence-dicta approach is impossible to square with *Marks* v. *United States*, 430 U.S. 188 (1977), which directs lower courts interpreting fractured decisions to examine only the views of Justices *concurring* in the judgment. And regardless of which opinion is controlling on lower

courts under *Marks*, the Ninth Circuit's understanding of *Powell* is at odds with both the Eighth Amendment's focus on methods of punishment and this Court's consistent recognition that Justice Marshall's plurality opinion—not Justice White's concurrence or the dissent—embodies the true statement of constitutional principles.

In deciding that the enforcement of public-camping ordinances constitutes cruel and unusual punishment, the Ninth Circuit has parted ways with the California Supreme Court and the Eleventh Circuit, both of which have upheld virtually identical ordinances against similar challenges. The Ninth Circuit's holding that the Eighth Amendment protects conduct related to status also deepened a longstanding divide among the lower courts. On one side, seven circuits and 17 state courts of last resort have held that the government may punish *acts* (like drug use and sex with minors) even if they cannot punish mere *status* (like being a drug addict or pedophile). On the other side, the Ninth and Fourth Circuits, as well as two state courts, have extended the Eighth Amendment to conduct that purportedly follows from a status.

Time is of the essence for this exceptionally important question. The Ninth Circuit, though nearly evenly split, has made clear that it will not clean up its outlier decisions on its own. But these decisions have erected a judicial roadblock preventing a comprehensive response to the growth of public encampments in the West. The consequences of inaction are dire for those living both in and near encampments: crime, fires, the reemergence of medieval diseases, environmental harm, and record levels of drug overdoses and deaths on public streets. The decision below,

which reaffirms and extends *Martin*, will further hamstring cities at the worst possible time.

The Ninth Circuit's arrogation of quintessential policymaking authority over public health and safety has struck a blow not only to the principle of democratic governance, but also to the practical ability of cities to address the growth of public encampments. Only this Court can end this misguided project of federal courts dictating homelessness policy under the banner of the Eighth Amendment.

STATEMENT

A. The Ninth Circuit's creation of a right to public camping under the Cruel and Unusual Punishments Clause began two decades ago in Los Angeles. In *Jones* v. *City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), people living on Skid Row brought an Eighth Amendment claim against an ordinance that prohibited sitting, lying, or sleeping on streets, sidewalks, and other public ways. *Id.* at 1123-1125. The district court upheld the ordinance "because it penalizes conduct, not status." *Id.* at 1125. A divided panel of the Ninth Circuit reversed, holding that the Eighth Amendment protects "involuntary conduct" (such as sleeping on public property) that is "inseparable from [the] status" of homelessness. *Id.* at 1136. The majority arrived at this rule by combining two separate *Powell* opinions—Justice White's concurrence and Justice Fortas's dissent. *Id.* at 1134-1136. Dissenting, Judge Rymer objected that this "extension of the Eighth Amendment to conduct that is derivative of status takes the substantive limits on criminality further than *Robinson* or its progeny support." *Id.* at 1143. After Los Angeles sought rehearing en banc, the parties settled the case, and the Ninth Circuit

vacated its opinion. *Jones* v. *City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

The Ninth Circuit resurrected the *Jones* rationale soon enough. In *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), people living on the streets of Boise claimed that punishing public camping with fines or short jail stints violates the Eighth Amendment. *Id.* at 606. The Ninth Circuit held that any punishment for public camping, no matter how small, would be cruel and unusual if the plaintiffs had "no access to alternative shelter," repeating "essentially the same reasons articulated in the now-vacated *Jones* opinion." *Id.* at 615.

The Ninth Circuit again read Justice White's concurrence and Justice Fortas's dissent in *Powell* together to establish 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.'" 920 F.3d at 616. That rule meant that Boise could not enforce its public-camping ordinance "'so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.'" *Id.* at 617 (brackets omitted). The court also disregarded open beds in religiously affiliated shelters out of perceived Establishment Clause concerns. *Id.* at 609-610. The Ninth Circuit stated, however, that its decision left open the possibility of enforcement against "individuals who *do* have access to adequate temporary shelter" but "choose not to use it." *Id.* at 617 n.8.

The Ninth Circuit denied rehearing en banc over two separate dissents. Judge Milan Smith explained that *Martin* misapplied *Powell* and invalidated the ordinances of "countless, if not all, cities within" the Ninth Circuit. 920 F.3d at 590-594, 599. He also

predicted that the "overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night" would force cities to "abandon enforcement of a host of laws regulating public health and safety." *Id.* at 594. Judge Bennett separately canvassed the "text, tradition, and original public meaning" of the Cruel and Unusual Punishments Clause and found no authority for courts to impose "substantive limits on what conduct a state may criminalize." *Id.* at 599-602. In his view, *Martin* "stretche[d] the Eighth Amendment past its breaking point." *Id.* at 603.

Boise petitioned this Court for a writ of certiorari. No. 19-247. Expressing concern about the widespread impact of *Martin*, dozens of amici argued in favor of review, including seven States and 45 counties, cities, and local homeless service providers. After the plaintiffs claimed that *Martin* would "leave[] cities with a powerful toolbox to address encampments" and urged this Court "to await the contours of [*Martin*'s] rule to be elucidated in subsequent cases," Br. in Opp. 29-30, this Court denied the petition, *City of Boise* v. *Martin*, 140 S. Ct. 674 (2019).

B. The effects of *Martin* immediately reverberated throughout the Ninth Circuit, as the dissenting judges and amici had predicted. Three days after the Ninth Circuit's initial September 2018 ruling, a plaintiff filed a follow-on suit against Portland. Compl., *O'Callaghan* v. *City of Portland*, No. 3:18-cv-1641-YY (D. Or. Sept. 7, 2018). Over the ensuing months, more plaintiffs pursued *Martin* theories. *E.g.*, Compl., *Miralle* v. *City of Oakland*, No. 4:18-cv-6823 (N.D. Cal. Nov. 9, 2018).

1. This wave affected cities big and small. Just six weeks after the Ninth Circuit handed down

Martin, three people brought *Martin* claims against Grants Pass, a city of 38,000 in southern Oregon. App., *infra*, 13a.

Like many cities and towns across the country, Grants Pass protects public health and safety by regulating the public's ability to camp or sleep overnight in its outdoor spaces, including parks, trails, and sidewalks. App., *infra*, 221a-224a. Grants Pass has adopted three ordinances related to public sleeping and camping. The first prohibits sleeping "on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety." Grants Pass Municipal Code § 5.61.020(A). The second prohibits "[c]amping" on "any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct," with a "[c]ampsite" defined as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed." §§ 5.61.010(B), 5.61.030. And the third prohibits camping specifically in the City's parks. § 6.46.090.

Grants Pass enforces these ordinances through civil citations, not through criminal fines or jail terms. App., *infra*, 44a, 175a. If a person has twice been cited for violating park regulations, city officers also have authority to issue an exclusion order barring that person from a City park for 30 days. Grants Pass Municipal Code § 6.46.350.

As relevant here, the plaintiffs claimed that the City's public-sleeping, public-camping, and park-exclusion ordinances violate the Cruel and Unusual Punishments Clause. App., *infra*, 19a. They also promptly moved to certify a class of "[a]ll involuntarily homeless individuals living in Grants Pass." *Id.* at 20a.

2. The district court certified the proposed class. App., *infra*, 206a-220a. According to the court, the Eighth Amendment claim concerned "city-wide practice[s]" in enforcing the public-sleeping and public-camping ordinances. *Id.* at 214a-215a. The court also believed that all class members could prove that they were "involuntarily" homeless under *Martin* solely because "[t]here are more homeless individuals than shelter beds in the City of Grants Pass." *Id.* at 216a.

On cross-motions for summary judgment, the district court ruled for the plaintiffs on their claim that enforcement of the City's ordinances constitutes cruel and unusual punishment. App., *infra*, 163a-205a. The court understood *Martin* to establish a "mathematical ratio" that prevents the City from enforcing its ordinances unless a shelter bed within the City's borders is available for every homeless person. *Id.* at 179a. After finding that 602 class members qualified as homeless, the court concluded that *zero* shelter alternatives satisfied *Martin*, discounting 138 beds at Gospel Rescue Mission due to "substantial religious requirements," nearby campgrounds on federal land, a warming shelter, and a sobering center. *Id.* at 179a-183a.

The district court also extended *Martin* in two ways. First, the court held that *Martin* protects not only sleeping on public property, but also camping with "bedding." App., *infra*, 177a-179a. Second, the court (citing decisions applying the Excessive Fines Clause) concluded that the Cruel and Unusual Punishments Clause prohibits even *civil* enforcement of the City's ordinances. *Id.* at 183a-187a.

The district court subsequently entered a judgment enjoining Grants Pass from enforcing its public-camping ordinances during daytime hours without

first giving a 24-hour warning, and at nighttime hours entirely. App., *infra*, 24a-25a.

3. A divided panel of the Ninth Circuit affirmed the district court's rulings in large part and remanded for further proceedings. App., *infra*, 13a-58a (amended opinion issued upon denial of rehearing).

a. In an opinion authored by Judge Silver (D. Ariz.) and joined by Judge Gould, the majority affirmed the district court's determination that the Cruel and Unusual Punishments Clause invalidates Grants Pass's public-camping ordinances. App., *infra*, 42a-55a. The majority reasoned that "the number of homeless persons outnumber the available shelter beds" in "secular shelter space." *Id.* at 13a, 53a. The majority also held that this Eighth Amendment claim could be decided on a classwide basis even though Grants Pass had argued that the class lacked commonality "because some class members might have alternative options for housing, or might have the means to acquire their own shelter." *Id.* at 39a. According to the majority, the class definition eliminated such individualized issues because "the class includes only *involuntarily* homeless persons," meaning that people with access to alternative shelter "simply are never class members." *Id.* at 39a-41a. The majority also approved the district court's extension of *Martin* to civil citations and to camping with bedding. *Id.* at 44a-47a.

The majority remanded with instructions for the district court to consider whether to narrow the injunction to allow Grants Pass to enforce its public-camping ordinances against the use of stoves and fires. App., *infra*, 55a. The majority also vacated summary judgment as to only the public-sleeping ordinance and remanded for the district court to

consider whether to substitute a new class representative for a plaintiff who passed away while the case was on appeal—the only one of the three who had standing to challenge the public-sleeping regulation. *Id.* at 25a n.12, 30a-32a.

b. Dissenting, Judge Collins criticized *Martin* for "combining *dicta* in a concurring opinion with a *dissent*" to mint a new constitutional rule—that the Eighth Amendment forbids punishment for any act that "is, in some sense, involuntary or occasioned by a compulsion"—in conflict with this Court's precedents. App., *infra*, 93a-95a (quotation marks omitted). That decision has had "'dire practical consequences'" for hundreds of cities and millions of people over the past five years. *Id.* at 95a.

Judge Collins further explained that the majority had manipulated the class definition to reduce *Martin* "to a simplistic formula": "whether the number of homeless persons . . . exceeds the number of available shelter beds." App., *infra*, 84a-86a. The majority's "egregiously flawed reconceptualization and extension of *Martin*'s holding," he feared, would mean that other cities could come under classwide injunctions "effectively requiring" them to "allow the use of [their] public parks as homeless encampments." *Id.* at 95a. Judge Collins called for the Ninth Circuit or this Court to overrule *Martin* and the present decision "at the earliest opportunity." *Ibid.*

4. The Ninth Circuit denied Grants Pass's petition for rehearing en banc over the dissent of 13 active judges (one short of a majority). App., *infra*, 12a.

a. All 13 dissenting active judges and four senior judges joined five separate opinions calling for en banc review. App., *infra*, 117a-162a.

Judge O'Scannlain, joined by 14 judges, explained that the Ninth Circuit has departed from the Constitution's original meaning, this Court's precedents, and decisions of other appellate courts, none of which has been "bold enough to embrace an Eighth Amendment doctrine that effectively requires local communities to surrender their sidewalks and other public places to homeless encampments." App., *infra*, 122a-131a (O'Scannlain, J., respecting denial of rehearing en banc). He also blamed *Martin* for both "paralyzing local communities from addressing the pressing issue of homelessness, and seizing policymaking authority that our federal system of government leaves to the democratic process"—twin problems that "will be greatly worsened by the doctrinal innovations introduced" in this case. *Id.* at 117a, 131a-133a.

Judge Milan Smith, joined by eight judges, denounced the "status quo" under *Martin* that "fails both those in the homeless encampments and those near them," as crime, drug use, and disease proliferate. App., *infra*, 138a-139a (M. Smith, J., dissenting from denial of rehearing en banc). He pointed out that this decision "doubles down on *Martin*—crystallizing *Martin* into a crude population-level inquiry, greenlighting what should be (at most) an individualized inquiry for class-wide litigation, and leaving local governments without a clue of how to regulate homeless encampments without risking legal liability." *Id.* at 142a; see *id.* at 146a-151a. And after reviewing litigation against cities such as San Francisco and Phoenix, he observed that *Martin* has "require[d] unelected federal judges" to act "like homelessness policy czars" instead of "Article III judges applying a discernible rule of law." *Id.* at 151a-156a.

Judge Collins reiterated his critiques of *Martin* and stated that Judges O'Scannlain and Smith had "further cogently explain[ed] the multiple serious errors in the panel majority's opinion." App., *infra*, 157a.

Judge Bress, joined by 11 judges, wrote that the Constitution grants "local leaders—and the people who elect them—the latitude to address on the ground the distinctly local features of the present crisis of homelessness and lack of affordable housing," and that the Ninth Circuit's "expanding constitutional common law" of the Eighth Amendment "adds enormous and unjustified complication to an already extremely complicated set of circumstances." App., *infra*, 161a-162a (Bress, J., dissenting from denial of rehearing en banc).

Judge Graber criticized the panel for extending "*Martin* to *classwide* relief" and "enjoining *civil* statutes." App., *infra*, 135a (Graber, J., respecting denial of rehearing en banc). Although she largely agreed with *Martin*, she also said that, "given the widespread nature of the homelessness crisis in our jurisdiction," it was "crucial" for the Ninth Circuit to rehear this case to "get it right." *Id.* at 136a-137a.

b. The panel majority filed a joint statement responding to Judges O'Scannlain and Smith and defending their decision as "modest" and "exceptionally limited." App., *infra*, 96a-116a. In his dissent from denial of rehearing, Judge Collins disputed those characterizations and explained that "the panel majority's statement confirms and illustrates the layers of self-contradiction that underlie its opinion in this case." *Id.* at 158a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has now repeatedly held that enforcement of restrictions on public camping constitutes "cruel and unusual punishment" under the Eighth Amendment. By contrast, the California Supreme Court and the Eleventh Circuit have upheld public-camping ordinances against similar constitutional challenges. The Fifth Circuit, too, has rejected such a challenge on the ground that the Eighth Amendment does not apply at all to citations for public camping but only to punishment following a conviction.

This dispute over restrictions on public camping is part of a larger conflict over the Eighth Amendment's scope. A few courts, including the Ninth and Fourth Circuits, have interpreted this Court's decisions in *Robinson* and *Powell* as holding that the government cannot punish conduct that necessarily follows from a status. In contrast, seven federal courts of appeals and 17 state courts of last resort have rejected that approach, drawing a bright line between conduct (which can be punished) and status (which cannot).

The minority view has no foundation in the Eighth Amendment's text, history, and tradition. As this Court has long held, the Cruel and Unusual Punishments Clause prohibits certain *types* of punishments. With the lone exception of *Robinson*, the Court has never held that the Eighth Amendment sets substantive limits on what can be a crime in the first place. That one-off holding should be limited to punishment for mere status, not expanded to conduct that arguably follows from a status.

To extend *Robinson* to purportedly involuntary conduct related to a status, the Ninth Circuit relied on dicta in Justice White's *Powell* concurrence as a basis to adopt the rule advocated by Justice Fortas in dissent. But that approach takes the wrong path through *Powell* and so arrives at the wrong destination. In *Marks*, this Court held that lower courts should rely on the opinions of the Justices *concurring* in the judgment. And since *Powell*, this Court has repeatedly applied Justice Marshall's plurality opinion and never even hinted that the correct interpretation of the Eighth Amendment lay hidden in Justice White's dicta and Justice Fortas's dissent.

The question presented in this case is indisputably important. Across the West, cities face a growing humanitarian tragedy. Hundreds of thousands of people camp in public, their tents and belongings overtaking sidewalks, parks, and trails. Cities want to help those in encampments get the services they need while ensuring that our communities remain safe, but they find themselves hamstrung in responding to public encampments and the drug overdoses, murders, sexual assaults, diseases, and fires that inevitably accompany them. Even when coupled with offers of shelter and other services, efforts to enforce commonsense camping regulations have been met with injunctions. Restoring to local governments their rightful authority to address this pressing and complex crisis and get people the help they desperately need is a critical step to solving this crisis.

I. THE NINTH CIRCUIT'S DECISION ENTRENCHES A CONFLICT AMONG THE LOWER COURTS

A. The Ninth Circuit alone recognizes a "constitutional 'right' to encamp on public property." App., *infra*, 128a (opinion of O'Scannlain, J.). The

California Supreme Court, Eleventh Circuit, and Fifth Circuit have rejected similar challenges under the Eighth Amendment.

1. The federal and state courts in California—home to half of the Nation's unsheltered homeless population—are divided on the question presented. In *Tobe* v. *City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), plaintiffs challenged an ordinance prohibiting "'any person to camp, occupy camp facilities or use camp paraphernalia in . . . any street [or] any public parking lot or public area.'" *Id.* at 1150. The California Court of Appeal invalidated the ordinance under *Robinson* as "punishment for the 'involuntary status of being homeless.'" *Id.* at 1166. But the California Supreme Court reversed, explaining that "[t]he ordinance permits punishment for proscribed conduct, not punishment for status." *Ibid.* California courts have continued to uphold public-camping ordinances under the act/status distinction. *E.g.*, *Allen* v. *City of Sacramento*, 234 Cal. App. 4th 41, 59-60 (2015).

The Eleventh Circuit reached a similar result in *Joel* v. *City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). There, homeless plaintiffs challenged an ordinance prohibiting unauthorized camping "on all public property." *Id.* at 1356. The Eleventh Circuit upheld the ordinance because it "target[ed] conduct, and d[id] not provide criminal punishment based on a person's status." *Id.* at 1362. The Eleventh Circuit also suggested that "homelessness is not a 'status' within the meaning of the Eighth Amendment" in any event. *Ibid.*

The Fifth Circuit rejected another challenge at an earlier step of the analysis. In *Johnson* v. *City of Dallas*, 61 F.3d 442 (5th Cir. 1995), a district court enjoined the enforcement of a public-sleeping ordinance against homeless people who had been ticketed for

violations. *Id.* at 443. The Fifth Circuit reversed on the ground that the Eighth Amendment applies only to punishment following a conviction. *Id.* at 445. Although the Fifth Circuit labeled the defect as a lack of Article III standing, its analysis focused on the Eighth Amendment's scope. *Id.* at 444-445 (relying on *Ingraham* v. *Wright*, 430 U.S. 651 (1977)).

2. The Ninth Circuit's precedents conflict with these decisions. In contrast to the California Supreme Court's and Eleventh Circuit's adoption of the act/status distinction, the Ninth Circuit has now twice invalidated public-camping ordinances under "the principle 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.'" App., *infra*, 50a (quoting *Martin*, 920 F.3d at 616). The Ninth Circuit also held that such Eighth Amendment challenges may be raised *before* conviction, breaking with the Fifth Circuit's decision in *Johnson*. *Martin*, 920 F.3d at 613-614.

B. More broadly, the Ninth Circuit is "locked in a deep and varied intercircuit split over how to read the Eighth Amendment in light of *Robinson* and *Powell*." App., *infra*, 130a (opinion of O'Scannlain, J.). That split is even deeper when one considers state courts of last resort. In total, 24 courts have held the line at the act/status distinction, and only four subscribe to the view that the Eighth Amendment protects involuntary conduct linked to a supposed status.

1. In *Robinson*, this Court confronted an unusual California statute providing that "'[n]o person shall . . . be addicted to the use of narcotics.'" 370 U.S. at 660 n.1. This statute "ma[de] the 'status' of narcotic addiction a criminal offense" even absent "proof of the actual use of narcotics within the State's

jurisdiction." *Id.* at 665-666. Although this Court held that the defendant's 90-day sentence for addiction was cruel and unusual punishment, this Court explained that California *could* prohibit "manufacture, prescription, sale, purchase, or possession of narcotics within its borders"—even by drug addicts—so long as the law didn't penalize "the 'status' of narcotic addiction." *Id.* at 664-667.

This Court revisited the act/status distinction in *Powell*, where an alcoholic sought to extend *Robinson* to purportedly involuntary conduct: his public drunkenness. Justice Marshall, writing for a four-Justice plurality, explained that *Robinson* stands for the proposition that "criminal penalties may be inflicted only if the accused has committed some act" that "society has an interest in preventing"—or put in "historical common law terms, has committed some *actus reus*." 392 U.S. at 533. To forestall "this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility," the plurality rejected the defendant's proposed extension of *Robinson* from status to conduct that "is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Ibid.*

Justice Black concurred to underscore the "sound" distinction between "pure status crimes" and "crimes that require the State to prove that the defendant actually committed some proscribed act." *Powell,* 392 U.S. at 542-544.

Justice White, who concurred only in the result, ventured that the Eighth Amendment might protect public drunkenness when alcoholics "have no place else to go and no place else to be when they are drinking," but found this admittedly "novel construction" of the Amendment "unnecessary to pursue at this point"

because the defendant hadn't proved his alcoholism made him "unable to stay off the streets on the night in question." *Powell*, 392 U.S. at 551-554 & n.4.

Finally, Justice Fortas penned a four-Justice dissent advancing the theory that *Robinson* immunizes a person from punishment for "being in a condition he is powerless to change." *Powell*, 392 U.S. at 567.

2. Seven circuits have followed the *Powell* plurality in holding that *Robinson* applies only to status crimes and does not immunize conduct supposedly associated with a status:

- In this precise context of a public-camping ordinance, the Eleventh Circuit agreed with the *Powell* plurality that "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not." *Joel*, 232 F.3d at 1361-1362.
- In *United States* v. *Sirois*, 898 F.3d 134 (1st Cir. 2018), the First Circuit rejected a defendant's argument that a district court committed plain error under the Eighth Amendment when revoking supervised release for drug use that was "compelled by his addiction." *Id.* at 137-138.
- In *United States* v. *Black*, 116 F.3d 198 (7th Cir. 1997), the Seventh Circuit rejected an Eighth Amendment defense by a defendant with a compulsive desire to collect child pornography. *Id.* at 201. The court reasoned that "*Robinson* is simply inapposite on its face because the statutes involved here do not criminalize the statuses of pedophile or ephebophile," but rather the "conduct of

receiving, possessing and distributing child pornography," and that Justice White's concurrence "need not be discussed further" because "no other Justice joined in that opinion." *Id.* at 201 & n.2.

- In *Yanez* v. *Romero*, 619 F.2d 851 (10th Cir. 1980), the Tenth Circuit held that "[a] reading of the decision in *Robinson* and that in *Powell* makes clear" that States can prohibit drug possession even by addicts. *Id.* at 852.
- In *United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir. 1973) (en banc), a majority of a fractured D.C. Circuit endorsed the *Powell* plurality in rejecting an "Eighth Amendment defense for the addict-possessor" of drugs. *Id.* at 1153-1154 (plurality opinion); *id.* at 1197-1198 (Leventhal, J., concurring).
- In *Smith* v. *Follette*, 445 F.2d 955 (2d Cir. 1971), the Second Circuit agreed with the *Powell* plurality that *Robinson* "was in no way intended to stand for the proposition that those who affirmatively commit crimes because of their condition may not be punished"—there, for drug possession that "was the result in some degree of a socially developed compulsion." *Id.* at 961.
- In *United States ex rel. Mudry* v. *Rundle*, 429 F.2d 1316 (3d Cir. 1970) (per curiam), the Third Circuit held that *Robinson* and *Powell* allow States to forbid drug possession by addicts. *Id.* at 1316.

In addition to those seven circuits, 17 state courts of last resort have limited *Robinson* to status crimes. They, like the *Powell* plurality, have rejected claims

that the Eighth Amendment protects conduct associated with homelessness,[1] alcoholism,[2] drug addiction,[3] and sexual compulsions.[4]

3. The Ninth Circuit sees *Robinson* and *Powell* in a very different light. According to the Ninth Circuit, those decisions overrode the act/status distinction and compelled the conclusion that "a person may not be prosecuted for conduct that is involuntary or the product of a 'status.'" App., *infra*, 47a (citing *Martin*, 920 F.3d at 617); *id.* at 109a (statement of Gould and Silver, JJ.).

Among the federal courts of appeals, only the Fourth Circuit has joined the Ninth Circuit in extending *Robinson* to conduct that flows from a status. Its initial foray was *Driver* v. *Hinnant*, 356 F.2d 761 (4th Cir. 1966), where the Fourth Circuit reasoned that if *Robinson* forbids punishment for the status of being an alcoholic, then the Eighth Amendment should also forbid punishment for "an involuntary symptom of a

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[1] *Tobe*, 892 P.2d at 1166.

[2] *Rosser* v. *Housewright*, 664 P.2d 961, 962-963 (Nev. 1983) (per curiam); *Loveday* v. *State*, 247 N.W.2d 116, 121 (Wis. 1976); *Vick* v. *State*, 453 P.2d 342, 343-344 (Alaska 1969); *Shelburne* v. *State*, 446 P.2d 58, 59 (Okla. Crim. App. 1968); *People* v. *Hoy*, 158 N.W.2d 436, 445 (Mich. 1968); *City of Seattle* v. *Hill*, 435 P.2d 692, 698-699 (Wash. 1967).

[3] *State* v. *Robinson*, 254 P.3d 183, 191 & n.41 (Utah 2011); *State* v. *Smith*, 355 A.2d 257, 259-260 (Conn. 1974); *State* v. *Smith*, 219 N.W.2d 655, 657 (Iowa 1974); *Wheeler* v. *United States*, 276 A.2d 722, 726 (D.C. 1971); *Steeves* v. *State*, 178 N.W.2d 723, 726 (Minn. 1970); *Rangel* v. *State*, 444 S.W.2d 924, 925-926 (Tex. Crim. App. 1969); *State* v. *Mendoza*, 454 P.2d 140, 141 (Ariz. 1969); *State* v. *Margo*, 191 A.2d 43, 44 (N.J. 1963) (per curiam).

[4] *State* v. *Little*, 261 N.W.2d 847, 851-852 (Neb. 1978); *People* v. *Jones*, 251 N.E.2d 195, 198 (Ill. 1969).

status—public intoxication." *Id.* at 764-765. Justice Fortas cited *Driver* with approval in his dissent in *Powell*, 392 U.S. at 569 n.33, but the plurality rejected *Driver*'s holding, drawing a clear line between status and conduct, *id.* at 533-534. Nevertheless, the Fourth Circuit recently reaffirmed *Driver* on the theory that the controlling *Powell* opinion under *Marks* is Justice White's concurrence, including his dictum that the Eighth Amendment might protect truly involuntary conduct. *Manning* v. *Caldwell*, 930 F.3d 264, 280-283 & n.13 (4th Cir. 2019) (en banc); see *id.* at 282 n.17 (agreeing with *Martin*).

Like the Ninth and Fourth Circuits, the Pennsylvania Supreme Court has "combine[d]" Justice White's concurrence and Justice Fortas's dissent "to produce an amplification of *Robinson*"—namely, that the Eighth Amendment immunizes "anti-social *acts* flowing from an uncontrollable 'status.'" *In re Jones*, 246 A.2d 356, 362 (Pa. 1968).

A state intermediate appellate court has also expressly aligned itself with the Ninth Circuit's approach for conduct that follows from status. In *State* v. *Adams*, 91 So. 3d 724 (Ala. Crim. App. 2010), a sex offender argued that he could not be punished for failing to provide an address upon his release because he could not afford rent and had nowhere else to stay. *Id.* at 729-730. The Alabama Court of Criminal Appeals, in analyzing this claim, incorporated wholesale pages of *Jones*, the Ninth Circuit's vacated predecessor to *Martin*. *Id.* at 745-753 (quoting *Jones*, 444 F.3d at 1131-1138). *Robinson* and *Powell*, on this reading, "forbid[] punishing criminally not only a person's pure status, but also a person's involuntary conduct that is inseparable from that person's status." *Id.* at 753. And that understanding of the Eighth

Amendment invalidated the reporting requirement because the defendant's failure to provide an address was "involuntary conduct that was inseparable from his status of homelessness" given the lack of space in shelters that housed sex offenders. *Id.* at 754.

* * *

The Ninth Circuit alone has upheld Eighth Amendment challenges to generally applicable public-camping ordinances. Even though a chorus of judges across eight separate opinions in *Martin* and this case has criticized this interpretation from every possible angle, the Ninth Circuit has refused to change course and instead has further entrenched a long-recognized and "sharp split of opinion throughout the legal profession concerning the meaning of *Powell*" for the act/status distinction this Court adopted in *Robinson*. *Moore*, 486 F.2d at 1239 n.178 (Wright, J., dissenting). That split stands little chance of resolving itself after the Ninth Circuit denied rehearing en banc over 17 judges' objections and the en banc Fourth Circuit adhered to its outlier position in *Manning*. This Court should grant certiorari to restore uniformity to the interpretation of the Cruel and Unusual Punishments Clause.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS.

As Judges O'Scannlain, Smith, and Collins explained below, the Ninth Circuit has departed from this Court's precedents and the Eighth Amendment's original meaning.

A. *Martin* and the decision below find no support—and indeed never claim the pretense of support—in the "text, history, or tradition of the Eighth Amendment." App., *infra*, 119a (opinion of

O'Scannlain, J.). Under this Court's decisions, however, original meaning and history are critical to the Cruel and Unusual Punishments Clause. *E.g.*, *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123-1124 (2019); *Ingraham*, 430 U.S. at 664-666.

The Eighth Amendment provides that "cruel and unusual punishments" shall not be "inflicted." U.S. Const. amend. VIII. The Framers borrowed this language verbatim from the English Declaration of Rights of 1689. *Martin*, 920 F.3d at 599-600 (Bennett, J., dissenting from denial of rehearing en banc). And the text and its common-law backdrop show that the Cruel and Unusual Punishments Clause is "directed to *modes of punishment*." App., *infra*, 122a (opinion of O'Scannlain, J.). As this Court has explained, the "original and historical understanding" is that the Eighth Amendment outlaws only "methods" of punishment that unnecessarily "'superadd[]'" pain (cruel) and have "long fallen out of use" (unusual). *Bucklew*, 139 S. Ct. at 1122-1123; accord *Harmelin* v. *Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.). Such cruel and unusual punishments include, for example, "burning at the stake, crucifixion, [and] breaking on the wheel." *In re Kemmler*, 136 U.S. 436, 446 (1890).

Under *Bucklew*, there is nothing cruel or unusual about the modes of punishment in *Martin* (one-day jail sentences and criminal fines) and this case (civil citations). 920 F.3d at 606; App., *infra*, 44a. These low-level penalties are not "marked by savagery and barbarity" and have not fallen out of "common use." App., *infra*, 123a (opinion of O'Scannlain, J.). To the contrary, countless jurisdictions across the Nation have adopted such routine measures to protect public

health and safety. *Martin*, 920 F.3d at 599 (M. Smith, J., dissenting from denial of rehearing en banc).

Nor does text or history suggest that the Cruel and Unusual Punishments Clause "arrogate[s] the substantive authority of legislatures to prohibit 'acts' like those at issue here." App., *infra*, 122a (opinion of O'Scannlain, J.) (quoting *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc)). Even Justice White, whose dictum in *Powell* about involuntary conduct now governs jurisdictions throughout the Ninth and Fourth Circuits, stated that *Robinson* itself involved an "application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty." *Robinson*, 370 U.S. at 689 (dissenting opinion). Whatever the merits of *Robinson*, there is no basis to extend the Cruel and Unusual Punishments Clause yet further to prevent even issuing a citation for conduct that supposedly flows from a status. In fact, no court suggested that the Eighth Amendment or a state equivalent could invalidate public-camping restrictions until the early 1990s—two centuries after the Founding. *Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992).

Plaintiffs in the Ninth Circuit appear to have pursued their inventive theory under the Eighth Amendment because "a Fourteenth Amendment claim" would have "prove[d] unavailing." *Jones*, 444 F.3d at 1147 (Rymer, J., dissenting) (emphasis omitted). There is no serious argument that a right to camp on public property is "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720-721 (1997). But this Court's decisions

have consistently made clear that the original meaning of the Eighth Amendment matters, too. Under that approach, *Martin* and the decision below have no footing in the Cruel and Unusual Punishments Clause.

B. In keeping with text and history, this Court has long recognized that the Cruel and Unusual Punishments Clause is primarily "'directed at the *method or kind of punishment* imposed for the violation of criminal statutes'" and does not apply to "impositions outside the criminal process." *Ingraham*, 430 U.S. at 667-668 (emphasis added) (quoting *Powell*, 392 U.S. at 531-532 (plurality opinion)). This Court has also held that certain punishments can become cruel and unusual if they are excessively disproportionate to the crime committed. *Solem* v. *Helm*, 463 U.S. 277, 288-289 (1983). Even so, this Court's focus has always remained on the mode of punishment with the lone exception of *Robinson*, where this Court held that the Eighth Amendment prohibited States from criminalizing status irrespective of the method of criminal punishment. 370 U.S. at 667. This Court has cautioned this limitation is "to be applied sparingly" and has never again invalidated a crime on this basis. *Ingraham*, 430 U.S. at 667.

As Judge O'Scannlain explained, the Ninth Circuit misread *Robinson* and *Powell* in holding that the Eighth Amendment prohibits the enforcement of public-camping ordinances. App., *infra*, 126a-127a. *Robinson* distinguished between status and conduct for Eighth Amendment purposes. 370 U.S. at 664-665. The *Powell* plurality reaffirmed this act/status distinction in rejecting the extension of *Robinson* to conduct that "is, in some sense, 'involuntary.'" 392 U.S. at 533. And in the half century since *Powell*, this

Court has relied on only Justice Marshall's plurality opinion and Justice Black's concurrence, and has never endorsed the views expressed in Justice White's concurrence in the result, let alone Justice Fortas's dissent. *E.g.*, *Ingraham*, 430 U.S. at 659; see *Manning*, 930 F.3d at 289 (Wilkinson, J., dissenting) (collecting cases).

An illustrative example is *Kahler* v. *Kansas*, 140 S. Ct. 1021 (2020), which presented the question whether the Due Process Clause guaranteed a defendant's right to claim insanity based on his inability to tell right from wrong. In rejecting that contention, this Court understood Justice Marshall's analysis of the Eighth Amendment to set forth the proper framework for constitutional challenges to the "paramount role of the States in setting 'standards of criminal responsibility.'" *Id.* at 1028 (quoting *Powell*, 392 U.S. at 533). Respect for that role means that the people's representatives, rather than the courts, get to decide "when a person should be held criminally accountable for 'his antisocial deeds.'" *Ibid.* (quoting *Powell*, 392 U.S. at 535-536). Judges simply aren't equipped to dictate "rigid" constitutional rules in this context, *ibid.* (citing *Powell*, 392 U.S. at 536-537), or to "balanc[e] and rebalanc[e] over time complex and oft-competing ideas about 'social policy' and 'moral culpability,'" *ibid.* (quoting *Powell*, 392 U.S. at 538 (Black, J., concurring)). *Powell* thus stands for the principle that "'doctrine[s] of criminal responsibility' must remain 'the province of the States.'" *Ibid*. (quoting *Powell*, 392 U.S. at 534, 536 (plurality opinion)).

The Ninth Circuit has read *Powell* the polar opposite way from *Kahler*. Rather than follow the *Powell* plurality's properly cabined approach, the Ninth Circuit has developed its own constitutional doctrine of

criminal responsibility for involuntary conduct related to status—all "by stitching together *dicta* in a lone concurrence with a *dissent*." App., *infra*, 119a (opinion of O'Scannlain, J.). Judges Smith and Collins explained that this dissent-plus-concurrence-dicta approach conflicts with this Court's decision in *Marks*, which instructs courts to consider "[o]nly the views of the Justices *concurring* in the judgment." *Martin*, 920 F.3d at 592-593 (M. Smith, J., dissenting from denial of rehearing en banc) (emphasis added); accord App., *infra*, 93a-94a (Collins, J., dissenting). Typically, "'comments in a dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.'" *Georgia* v. *Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020) (brackets omitted) (quoting *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980)). But the Ninth Circuit's upside-down *Marks* analysis of *Powell* means that one Justice's dictum has transformed Justice Fortas's dissenting comments into the law of the land for the western United States.

In short, the Ninth Circuit's rule that the Eighth Amendment prohibits punishing "'a person for being in a condition he is powerless to change'" turns a constitutional provision that is ostensibly directed to the kinds of *criminal punishments* into a sweeping doctrine of *criminal responsibility*. *Martin*, 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 567 (Fortas, J., dissenting)). This interpretation, as Justice Marshall explained, discards "[t]raditional common-law concepts of personal accountability and essential considerations of federalism." *Powell*, 392 U.S. at 534-536. But in the absence of a majority decision settling the issue, parties have sought to extend the radical logic of the *Powell* dissent to all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that

could be characterized as involuntary or compulsive. *Supra*, at 20-22. This Court should reject the *Powell* dissent once and for all.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

When the Ninth Circuit declined to rehear *Martin* en banc, six judges warned of "dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people" living there. 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc). The past five years under *Martin* have been, if anything, more disastrous than even its fiercest critics predicted.

Martin has "paralyz[ed] local communities from addressing the pressing issue of homelessness." App., *infra*, 117a (opinion of O'Scannlain, J.). As a formal matter, cities purportedly retain the authority to enforce public-camping laws against people who "'have access to adequate temporary shelter'" or the "financial means to obtain shelter." *Id.* at 14a n.2 (majority opinion). But those standards are unworkable in practice. There is no reliable way for an officer in the field to determine whether a person is "involuntarily" homeless, let alone assess how many people need shelter in total and how much shelter is currently available at that exact moment. Nor has the Ninth Circuit offered any guideposts for what qualifies as "'*adequate* temporary shelter'" (other than that religiously affiliated shelters don't qualify). *Id.* at 19a (emphasis added). That ambiguity has empowered courts to ignore available shelter for a growing list of reasons—for example, because a shelter lacks beds (which sidewalks and parks also lack), *id.* at 22a, or is outdoors (like sidewalks and parks), *Warren* v. *City of Chico*, 2021 WL 2894648, at *3-4 (E.D. Cal. July 8, 2021).

Some district judges have observed that "the practical ramifications for the community are much more complex" than the Ninth Circuit's singular focus on "practically-available shelter." *Warren*, 2021 WL 2894648, at *4 & n.4. Still, given the difficulties of administering a shelter-based approach, district courts applying *Martin* have hamstrung cities in enforcing public-camping laws against *anyone* unless and until they have enough "secular shelter space" for *everyone*—a near-impossible task, especially because the number of homeless people surpasses the shelter available in every major western city and continues to climb. App., *infra*, 53a.

For example, San Francisco has attempted to clean up public encampments under threat of law enforcement only after offering "'appropriate shelter'" to the encampment's residents. *Coalition on Homelessness* v. *City & County of San Francisco*, 2022 WL 17905114, at *4-7 (N.D. Cal. Dec. 23, 2022). Given the high resistance to social services, "55% of homeless individuals rejected shelter when offered it."[5] Yet a district court still enjoined San Francisco from enforcing its public-camping ordinance "as long as there are more homeless individuals in San Francisco than there are shelter beds available." *Id.* at *28.

The story is much the same for Phoenix, which has instructed its police officers to "make individualized assessments before citing individuals" for sleeping on sidewalks and other public ways. *Fund for Empowerment* v. *City of Phoenix*, 2022 WL 18213522, at *2-3 (D. Ariz. Dec. 16, 2022). After one encampment in 2022 alone witnessed "1,097 calls for emergency

[5] Editorial Board, *Why San Francisco Is a Homeless Mecca*, Wall St. J. (Aug. 6, 2023), https://tinyurl.com/5cx5cr7v.

medical help, 573 fights or assaults, 236 incidents of trespassing, 185 fires, 140 thefts, 125 armed robberies, 13 sexual assaults and four homicides," as well as 16 other deaths "from overdoses, suicides, hypothermia or excessive heat," Phoenix tried to clean up the encampment.[6] Again, however, a district court enjoined Phoenix from enforcing its public-camping ordinance "as long as there are more unsheltered individuals in Phoenix than there are shelter beds available." *Id.* at *9.

The logic of *Martin*—that governments cannot regulate "'universal and unavoidable consequences of being human,'" 920 F.3d at 617—also hasn't stopped at public camping, but has "inevitably" extended to "public defecation and urination." *Id.* at 596 (M. Smith, J., dissenting from denial of rehearing en banc). A district court has held that the Eighth Amendment right under *Martin* "to be free from punishment for involuntary conduct" includes "eliminating" (a euphemism for defecating) "in public if there is no alternative to doing so." *Mahoney* v. *City of Sacramento*, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020); see App., *infra*, 155a (opinion of M. Smith, J.).

The status quo under *Martin* has harmed local governments, surrounding residents, and—most of all—the homeless themselves by contributing to the growth of encampments across the West. See App., *infra*, 139a (opinion of M. Smith, J.). These lawsuits, though brought "in the name of compassion and decriminalizing homelessness[,] had the effect of surrounding the homeless in criminality and predation, not to mention fires, filth, disease, and fentanyl and

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[6] Eli Saslow, *A Sandwich Shop, a Tent City and an American Crisis*, N.Y. Times (Mar. 31, 2023), https://tinyurl.com/yh42zzrh.

meth."[7] The results have been tragic, if predictable: skyrocketing rates of fatal drug overdoses;[8] "increasingly volatile behavior on the streets" for those who live near encampments;[9] a shocking rise in homicides and sexual assaults committed against the homeless;[10] a resurgence of "medieval" diseases (such as typhus and tuberculosis) in encampments;[11] a series of fires in major cities, some of which burned out of

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[7] Sam Quinones, *Skid Row Nation: How L.A.'s Homelessness Crisis Response Spread Across the Country*, L.A. Mag. 131 (Oct. 6, 2022).

[8] Thomas Fuller, *Death on the Streets*, N.Y. Times (Apr. 25, 2022), https://nyti.ms/3DpJsKs (deaths among the homeless are up 200% in Los Angeles County); Christal Hayes, *'The World Doesn't Care': Homeless Deaths Spiked During Pandemic, Not from COVID. From Drugs.*, USA Today (May 28, 2022), https://tinyurl.com/523wex3p (Seattle and Portland experienced a record number of deaths in 2021 among the homeless).

[9] Michael Corkery, *Fighting for Anthony: The Struggle to Save Portland, Oregon*, N.Y. Times (July 29, 2023), https://tinyurl.com/3zvxpss3.

[10] *Recent Killings in Los Angeles and New York Spark Anger, Raise Risk for Homeless People*, KTLA (Jan. 28, 2022), https://tinyurl.com/y97jbayw; Eric Leonard, *LAPD Concerned About Increase in Sexual Violence Against Women Experiencing Homelessness*, NBC4 (Feb. 27, 2020), https://tinyurl.com/4ccfrb6v.

[11] Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://tinyurl.com/53k3h44z.

control for days;[12] and massive amounts of debris, such as needles and excrement, polluting the environment.[13]

The Ninth Circuit's decision in this case exacerbates all of these problems. If "*Martin* handcuffed local jurisdictions as they tried to respond to the homelessness crisis," this decision "now places them in a straitjacket." App., *infra*, 143a (opinion of M. Smith, J.). Cities can't issue even *civil* citations for public camping if there are any potential downstream criminal consequences. *Id.* at 44a-46a (majority opinion). And having collapsed the individualized voluntariness inquiry under *Martin* from the merits into the class definition, the Ninth Circuit has charted a path for the routine issuance of classwide injunctions under which cities must assess on a case-by-case basis (facing the threat of contempt) whether public camping is sufficiently "involuntary" for Eighth Amendment protection. *Id.* at 39a-41a & n.23. As the Ninth Circuit's judge-made rules become more and more elaborate, and as the costs of both complying and litigating continue to rise, more cities will be forced "to surrender the use of many of their public spaces (including

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[12] Natalie O'Neill, *Blazes That Begin in Homeless Camps Now Account for Nearly Half the Fires in Portland*, Willamette Week (Nov. 2, 2022), https://tinyurl.com/ykw69dtf (Portland firefighters extinguish six fires a day that start in encampments); Jennifer Medina, *Los Angeles Fire Started in Homeless Encampment, Officials Say*, N.Y. Times (Dec. 12, 2017), https://nyti.ms/3sPyXLv.

[13] Quinones, *supra*, *Skid Row Nation* at 112 (noting that the cleanup of the Echo Park Lake encampment in Los Angeles generated "35 tons of debris, 723 pounds of biological waste, and 300 pounds of needles and other drug paraphernalia").

sidewalks) to homeless encampments." *Id.* at 133a (opinion of O'Scannlain, J.).

The homelessness crisis is an exceptionally difficult public-policy challenge. No one argues that *Martin* is "an on/off-switch entirely responsible for" this crisis, which stems from "a complex mix of economic, mental-health, and substance-abuse factors, and appears to resist any easy solution." App., *infra*, 140a-141a, 143a (opinion of M. Smith, J.). But if the past five years have proved nothing else, it is that courts not only lack the legal authority, but also the practical competence, to serve as "homelessness policy czars" superintending every major city in the Ninth Circuit on today's paramount policy issue. *Id.* at 157a.

Public-camping laws are a critical (and constitutional) backstop as cities attempt to stop the growth of encampments and start to make progress on the underlying causes of homelessness. Cities on the frontlines of this crisis should be allowed "to make tough policy choices unobstructed by court-created mandates that lack any sound basis in law" and have "add[ed] enormous and unjustified complication to an already extremely complicated set of circumstances." App., *infra*, 163a (opinion of Bress, J.). Only this Court's intervention can return this issue to the people's representatives—where it has belonged all along.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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August 22, 2023

No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

In an effort to push its homeless residents into neighboring jurisdictions, the City of Grants Pass, Oregon, began aggressively enforcing a set of ordinances that make it unlawful to sleep anywhere on public property with so much as a blanket to survive cold nights, even if shelter is unavailable.

The question presented is whether the ordinances transgress the Eighth Amendment's "substantive limits on what can be made criminal and punished as such," *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), by effectively punishing the City's involuntarily homeless residents for their existence within city limits.

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INTRODUCTION

In 2013, the City of Grants Pass, Oregon, decided that the solution to its "vagrancy problem" was to drive its homeless residents into neighboring jurisdictions by making it impossible for them to live in Grants Pass without facing civil and criminal penalties. City leaders adopted a plan to aggressively enforce a set of ordinances that make it illegal to sleep anywhere in public at any time with so much as a blanket to survive cold nights. "[T]he point," the city council president explained, was "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." ER 368.

Because there are no homeless shelters in Grants Pass and the two privately operated housing programs in town serve only a small fraction of the City's homeless population, most of the City's involuntarily homeless residents have nowhere to sleep but outside. Given the universal biological necessity of sleeping and of using a blanket to survive in cold weather, the City's enforcement of its ordinances meant that its homeless residents could not remain within city limits without facing punishment. The City had, in other words, "criminalized their existence in Grants Pass." Pet. App. 208a.

The Ninth Circuit correctly concluded that the City's efforts to punish involuntarily homeless persons for simply existing in Grants Pass transgress the Eighth Amendment's "substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). As *Robinson v. California*, 370 U.S. 660 (1962), explains, the Cruel and Unusual Punishments Clause prohibits punishing

people for having an involuntary status, and the logic of *Robinson* necessarily includes unavoidable biological reactions to such a status: If "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," *id.* at 667, the same must be true for symptoms like coughing or sneezing. Whatever disagreement the Justices had in *Powell v. Texas*, 392 U.S. 514 (1968), over that principle's application to harmful compulsive behavior arising from addiction, it certainly prohibits jurisdictions from punishing people for universal biological necessities like sleeping and using a blanket to survive cold temperatures when they have no choice but to be outside.

The City's purported circuit splits are based on false premises. The first is that the Ninth Circuit recognized "a constitutional right to encamp on public property." Pet. 16 (internal quotation marks omitted). To the contrary, the panel emphasized that the district court's injunction left the City free to "ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns." Pet. App. 23a–24a (internal quotation marks and alterations omitted). The panel held only that the Eighth Amendment prohibits the City from punishing homeless persons for engaging in the unavoidable biological function of sleeping with the minimal bedding necessary to survive cold nights when shelter is unavailable. *Id.* at 48a & n.28, 57a. None of the decisions cited in the petition disagree.

The second false premise is that the Ninth Circuit's holding forecloses the criminalization of "all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that could be characterized as involuntary or compulsive." Pet. 29–30. The City does not identify any decision relying on Ninth Circuit precedent for the proposition that the Eighth Amendment forecloses punishment for harmful compulsive behavior, and for good reason: Unlike the addiction-related conduct that divided the *Powell* Court, sleeping is not a harmful compulsion, but rather a universal and unavoidable consequence of being human.

The City's exceptional importance argument similarly turns on the false claim that the decision below deprives cities of the ability to dismantle homeless encampments. Again, the panel explicitly recognized the right of jurisdictions to clear encampments and to criminalize the use of tents on public property. Indeed, Grants Pass itself has continued to actively dismantle encampments throughout this litigation, as it is free to do under the district court's injunction and the decision below. The district court decisions cited by the City and its amici confirm the same.

In short, in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial mandate. The City and its amici's claims to the contrary are nothing more than an exercise in political expediency. For years, political leaders have chosen to tolerate encampments as an alternative to meaningfully addressing the western region's severe housing shortage. As the homelessness crisis has es-

calated, these amici have faced intense public backlash for their failed policies, and it is easier to blame the courts than to take responsibility for finding a solution.

Finally, the petition suffers from numerous vehicle problems. First, this Court's resolution of the question presented would have no bearing on the legal rights of the parties. The district court granted summary judgment to respondents not only under the Cruel and Unusual Punishments Clause, but also on the independent ground that the ordinances violate the Excessive Fines Clause by imposing monetary sanctions grossly disproportionate to the severity of the offense. The City has not and cannot seek this Court's review of the Excessive Fines Clause ruling because it forfeited that issue on appeal.

Second, before the City filed its petition for certiorari, a new Oregon statute went into effect that restrains municipalities from criminalizing homelessness by punishing people for involuntarily sleeping and staying warm outside. Although it would be premature to say that the statute moots this litigation, as no court has yet had an opportunity to decide how it would apply to the City's ordinances, it would be a waste of this Court's resources to further review a local enforcement scheme that the state legislature has rejected.

Third, the Ninth Circuit directed the district court to narrow its injunction on remand, making it unclear what injunction this Court would review if it granted certiorari now.

Finally, while this case was on appeal, the only named plaintiff with standing to challenge one of the ordinances passed away. The Ninth Circuit thus vacated the district court's grant of summary judgment as to that ordinance and remanded for the substitution of a new class representative. Accordingly, if the Court grants review now, it may not be able to resolve the question presented as to the entire constellation of relevant ordinances.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

Like many west coast cities, Grants Pass has experienced a population explosion in the past 20 years, growing from 23,000 residents in 2000 to 38,000 in 2020. Pet. App. 165a, 167a. The development of affordable housing in Grants Pass has not kept up with the population growth. *Id.* Grants Pass has a vacancy rate of one percent, and rental units that cost less than $1,000 a month "are virtually unheard of." *Id.* at 167a. As a result, hundreds of Grants Pass residents have become homeless. *See id.* at 167a–168a. A 2019 point-in-time count in Grants Pass counted 602 homeless people and another 1,045 individuals that were "precariously housed." *Id.*

In March 2013, the Grants Pass City Council held a public meeting to "identify solutions to current vagrancy problems." *Id.* at 168a. Participants focused on strategies for pushing homeless residents into neighboring jurisdictions and "leaving them there." *Id.* at 17a. The Public Safety Director noted that officers "had at times tried buying [homeless persons] a bus

ticket" out of town, but they later "returned to Grants Pass with a request from the other location to not send them there." ER 368. The council president proposed instead "mak[ing] it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." *Id.*

City leaders thus decided to aggressively enforce a set of ordinances that make it impossible for involuntarily homeless people to exist within city limits without facing civil and criminal penalties. Pet. App. 17a, 42a–55a. Two "anti-camping" ordinances prohibit "occupy[ing] a campsite" on "any … publicly-owned property" at any time, with "campsite" defined expansively 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." *Id.* at 221a–222a. The ordinances also prohibit sleeping in a car in a parking lot for two or more consecutive hours between midnight and 6:00 am. *Id.* at 223a. And an "anti-sleeping" ordinance prohibits sleeping "on public sidewalks, streets, or alleyways at any time" or "in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk." *Id.* at 221a–222a.

These ordinances collectively "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'"—language that extends far beyond "camping" to prohibit sleeping with so much as a blanket or "a bundled up item of clothing as a pillow." *Id.* at 177a–178a.

Grants Pass does not have any shelters where a homeless person can show up and stay for the night.

Id. at 169a–170a; SER 20–21, 46–49. The only transitional housing program in the City is run by a religious organization that has the capacity to serve a maximum of 138 people, who are required, among other things, to participate in chapel services twice a day. Pet. App. 21a, 169a, 179a–180a. There is one other 18-bed facility that serves only unaccompanied minors aged 10–17. *Id.* at 22a.[1] The lack of shelter space in Grants Pass combined with the City's enforcement of its anti-homeless ordinances meant that the City's involuntarily homeless residents could not survive within city limits without facing punishment when they succumbed to sleep using any sort of makeshift pillow or blanket to stay warm. *Id.* at 178a, 182a–183a. The City had, in other words, "criminalized their existence in Grants Pass." *Id.* at 208a.

II. District Court Proceedings

In October 2018, respondents filed this suit on behalf of themselves and all other involuntarily homeless persons in Grants Pass, seeking to enjoin the City from punishing them for the biological necessity of sleeping outside with as little as a blanket to survive the cold, when shelter is unavailable. *See* ER 412–14. As relevant here, respondents alleged that the City's imposition of civil and criminal penalties under these

[1] From February to March 2020, a non-profit organization briefly opened a "warming center" that held up to 40 individuals on nights when the temperature was either below 30 degrees or below 32 degrees with snow, which amounted to 16 days. *See* Pet. App. 22a. The center did not have beds, and it turned people away almost every night. *Id.*; ER 195–96. The center did not open at all during the winter of 2020-2021. Pet. App. 22a.

circumstances violates the Eighth Amendment's prohibitions on cruel and unusual punishment and excessive fines. *See* Pet. App. 19a.

Following class certification and extensive discovery, the parties filed cross-motions for summary judgment. The evidentiary record included an analysis of 615 citations and 541 incident reports issued pursuant to the challenged ordinances. *Id.* at 175a; SER 129–31. It also established that class members were, on a daily and nightly basis, awakened, threatened with punishment, moved along, cited, fined, and prosecuted for criminal trespass for simply lying down or sleeping outside in Grants Pass. SER 6–21; ER 198–204, 361–66, 380–411.

The district court granted summary judgment to respondents on their Eighth Amendment claims. Pet. App. 163a–164a. The court first held that the City's "policy and practice of punishing homelessness" violates the Cruel and Unusual Punishments Clause. *Id.* at 176a. The court relied on *Martin v. Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which held that the government cannot, consistent with the Eighth Amendment, punish involuntarily homeless persons for sleeping outside when it is physically impossible for them to avoid doing so. Pet. App. 176a.

The district court rejected the City's claim that the Cruel and Unusual Punishments Clause is inapplicable because the ordinances punish "violations" rather than crimes. *Id.* at 183a. Citing *Austin v. United States*, 509 U.S. 602 (1993), and *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the court observed that this Court has repeatedly rejected the notion that the

Eighth Amendment is limited to criminal punishments. Pet. App. 183a–185a. Rather, the Eighth Amendment "cuts across the division between the civil and the criminal law." *Id.* at 183a (quoting *Austin*, 509 U.S. at 610). Moreover, the court noted, the City's enforcement scheme does involve criminal punishment: Repeat violations result in arrest and prosecution for criminal trespass. *Id.* at 186a–187a.

The district court also held that the City's enforcement of the ordinances violates the Eighth Amendment's Excessive Fines Clause. *Id.* at 187a–191a. The court began by identifying the "two-step inquiry in analyzing an excessive fines claim: (1) is the fine punitive, and if so, (2) is it excessive?" *Id.* at 187a (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The evidentiary record established that the fines are punitive because they serve "no remedial purpose" and are "intended to deter homeless individuals from residing in Grants Pass." *Id.* at 189a. The ordinances also describe the fines as "punishment." *Id.* (citing GPMC 1.36.010(c)).

The record likewise established that the fines are excessive. The two camping ordinances carry a presumptive fine of $295, and the fine for illegal sleeping is $75. *Id.* at 188a. When unpaid, the fines increase to $537.60 and $160 respectively. *Id.* The court found these fines "grossly disproportionate to the gravity of the offense." *Id.* at 190a (internal quotation marks omitted). Moreover, given that class members "do not have enough money to obtain shelter," they "likely cannot pay these fines." *Id.* When the fines remain unpaid, class members face collection efforts and damaged credit, "mak[ing] it even more difficult for them to find housing." *Id.*

The district court further noted this Court's recognition in the cruel and unusual punishment context that "'even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.'" *Id.* (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)). In other words, the district court explained, "[a]ny fine is excessive if it is imposed on the basis of status and not conduct." *Id.* Here, the conduct for which the class members face punishment—"sleep[ing] outside beneath a blanket because they cannot find shelter"—is "inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish." *Id.*

The court concluded by emphasizing what it had *not* held: "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." *Id.* at 199a. To the contrary, "[t]he 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[s] packed up." *Id.* The City may also "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." *Id.* at 199a–200a. And the City may "limit[] the amount of bedding type materials allowed per individual in public places." *Id.* at 200a. Moreover, the court noted, its holding did not limit the City's "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." *Id.* In short, the City "retain[ed] a large

toolbox for regulating public space without violating the Eight[h] Amendment." *Id.*

The district court then issued a permanent injunction that, as relevant here, enjoined the City from enforcing the "anti-camping" ordinances against class members in city parks at night. The order permitted the City to enforce the ordinances during daytime hours so long as a warning is given twenty-four hours in advance. ER 4–6. Although the order declared the "anti-sleeping" ordinance unconstitutional under the Eighth Amendment, the injunction did not contain any language enjoining that ordinance. *Id.*

III. Court Of Appeals Proceedings

The Ninth Circuit affirmed in part and vacated in part. Pet. App. 13a–58a.

The court of appeals first rejected the City's challenge to the district court's class certification determination. *Id.* at 34a–42a. The panel noted, however, that one of the three class representatives, Debra Blake, had died while the appeal was pending, a development of "possib[le] … jurisdictional significance" because Blake was the only class representative with standing to challenge the anti-sleeping ordinance. *Id.* at 30a–32a. Although it is well established that a class representative may pursue the live claims of a properly certified class even if her own claims become moot, the panel could not find any cases applying that precedent in a situation where "the death of a representative causes a class to be unrepresented as to part (but not all) of a claim." *Id.* at 33a. The panel thus deemed it appropriate to vacate summary judgment

as to the anti-sleeping ordinance and remand "to determine whether a substitute representative is available as to that challenge alone." *Id.* at 34a.

The panel then addressed the City's merits arguments. Like the district court, the panel found *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), directly on point. *Martin*, it explained, relied on *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), for the proposition that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." Pet. App. 52a. Although the City argued that its ordinances are distinguishable because they permit involuntarily homeless persons to sleep outside if they do not use a blanket, the panel observed that in a city as cold as Grants Pass, the "rudimentary protection of bedding" to avoid freezing "is not volitional; it is a life-preserving imperative." *Id.* at 48a n.28.

The panel agreed with the City, however, that the ordinances are permissible to the extent that they prohibit conduct beyond having the minimal protections necessary to survive outside. *Id.* at 55a. The panel observed that the record did not establish that the ordinance's "fire, stove, and structure prohibitions" deprived respondents of their "limited right to protection against the elements." *Id.* And, it held, the ordinances should be enforceable "when a shelter bed is available." *Id.* The panel thus ordered the district court on remand to "craft a narrower injunction" recognizing these limitations on respondents' rights. *Id.*

The panel noted that although the district court had also concluded that the fines imposed under the

ordinances violate the Eighth Amendment's Excessive Fines Clause, the City "present[ed] no meaningful argument on appeal regarding the excessive fines issue." *Id.* at 56a. The panel also found it unnecessary to reach the issue, as it had already largely upheld the injunction as necessary under the Cruel and Unusual Punishments Clause. *Id.*

Judge Collins dissented from the panel decision, explaining that in his view *Martin* requires an individual inquiry into the involuntariness of each homeless person's lack of shelter, and that in any event, *Martin* was wrongly decided. *Id.* at 59a–95a.

The Ninth Circuit denied the City's petition for rehearing en banc by a 14-13 vote, with several judges authoring statements and dissents respecting the denial. *Id.* at 96a–162a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Aligns With This Court's Precedent.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. *Ingraham v. Wright*, 430 U.S. 651 (1977), explains that this prohibition "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." *Id.* at 667 (citations omitted).

The Ninth Circuit correctly held that the City's anti-homeless ordinances implicate the third category: By rendering it unlawful to sleep anywhere on public property with so much as a blanket to survive the cold, the ordinances effectively punish the City's involuntarily homeless residents for their existence in Grants Pass, transgressing the Cruel and Unusual Punishments Clause's substantive limits. In so holding, the Ninth Circuit relied on its earlier decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which in turn relied on *Robinson v. California*, 370 U.S. 660 (1962).

Robinson struck down a California statute that made it a crime to "be addicted to the use of narcotics," reasoning that it "would doubtless be universally thought to be an infliction of cruel and unusual punishment" if the government were "to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Id.* at 660, 666 (internal quotation marks omitted). "[N]arcotic addiction," the Court concluded, is "of the same category." *Id.* at 667. The Court acknowledged that the ninety-day sentence imposed by the California law was "not, in the abstract, a punishment which is either cruel or unusual." *Id.* But just as "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," so, too, did the Eighth Amendment prohibit punishing the defendant for having a narcotics addiction. *Id.*

As the Ninth Circuit recognized, *Robinson* stands most obviously for the proposition that the Eighth Amendment prohibits punishing people for having an involuntary status. Being involuntarily homeless is

such a status, and when shelter is unavailable, it is a status that means you have nowhere to exist but outside. "[S]leep[ing] outside beneath a blanket because they cannot find shelter" is thus "inseparable from [respondents'] status as homeless individuals," and "beyond what the City may constitutionally punish." Pet. App. 190a.

The City's primary response is that "original meaning and history" demonstrate that the Cruel and Unusual Punishments Clause circumscribes the criminal process in just one way: It "outlaws only methods of punishment that unnecessarily superadd pain (cruel) and have long fallen out of use (unusual)." Pet. 25 (internal quotation marks and alteration omitted). The City did not even mention this argument before the district court or Ninth Circuit panel, however, let alone present the historical evidence that would be necessary to adjudicate it. Pet. App. 105a (Silver & Gould, JJ., statement regarding denial of rehearing) (noting that the "historical inquiry," which "may require the parties retain experts," was never briefed).

The City, moreover, makes no attempt to reconcile its cramped view of the Eighth Amendment with this Court's statement of the law in *Ingraham*. And its only response to *Robinson* is to dismiss it as a "one-off holding" that should not be "expanded." Pet. 15, 27. But *Robinson*'s reasoning necessarily includes involuntary biological reactions to a status: If "having a common cold" is unpunishable, so too are symptoms like coughing or sneezing.

Five Justices endorsed this reading of *Robinson* in *Powell v. Texas*, 392 U.S. 514 (1968), a case addressing whether the Eighth Amendment prohibited the criminalization of public intoxication where the defendant was an alcoholic. Notably, contrary to the City's position here, every Justice in *Powell* embraced *Robinson*'s holding that the Eighth Amendment proscribes punishment for an involuntary status. Justice Marshall, in an opinion joined by three other Justices, expressed the view that the Eighth Amendment did not, however, prevent the State from punishing the defendant "for being in public while drunk on a particular occasion." *Id.* at 532 (plurality opinion). Justice Marshall reasoned that, unlike in *Robinson*, the State "ha[d] not sought to punish a mere status," and the State had not "attempted to regulate [the defendant's] behavior in the privacy of his own home." *Id.*

In an opinion also joined by three other Justices, Justice Fortas argued that "the essential constitutional defect" with the defendant's conviction was "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 567–68 (Fortas, J., dissenting). He interpreted the trial court's finding to mean that the defendant "was powerless to avoid drinking" and, after taking "his first drink, he had an uncontrollable compulsion to drink to the point of intoxication," at which point "he could not prevent himself from appearing in public places." *Id.* at 568 (internal quotation marks omitted).

Justice White cast the deciding vote. In a lone concurrence, he agreed with Justice Fortas that "the chronic alcoholic with an irresistible urge to consume

alcohol should not be punishable for drinking or for being drunk." *Id.* at 549 (White, J., concurring in the result). To adopt a contrary reading of *Robinson*, he explained, would be "like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." *Id.* at 548. On the facts of the case before the Court, however, Justice White thought that "nothing in the record indicate[d] that [the defendant] could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street." *Id.* at 553. Because the defendant "made no showing that he was unable to stay off the streets on the night in question," Justice White concluded that he "did not show that his conviction offended the Constitution." *Id.* at 554.

Like Justice White and the dissenting Justices in *Powell*, the Ninth Circuit "gleaned from *Robinson* the principle … 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." *Martin*, 920 F.3d at 616 (internal quotation marks omitted). And whatever disagreement the Justices had about the application of that principle to harmful compulsive behavior arising from addiction, the Ninth Circuit reasoned that it certainly prohibits jurisdictions from punishing involuntarily homeless persons for the universal biological necessity of sleeping outside when no shelter is available. *Id.* The decision below recognizes that holding's application to the City's infliction of punishment for using a blanket to

survive cold temperatures, also "a life-preserving imperative." Pet. App. 48a n.28.[2]

Indeed, as Judges Silver and Gould observed in their statement regarding the rehearing denial, a contrary view would empower jurisdictions to "avoid *Robinson* by tying 'statuses' to inescapable human activities." *Id.* at 108a–109a. Rather than criminalizing the condition of being addicted to narcotics, for example, California could have "ma[de] it a criminal offense for a person addicted to the use of narcotics to fall asleep." *Id.* at 109a (internal quotation marks omitted). "Reading *Robinson* as allowing such simple evasion is absurd." *Id.*

The City does not contest that its position permits this end run around *Robinson*. Instead, it argues that the Ninth Circuit's holding has its own absurd consequence of foreclosing the criminalization of "all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that could be characterized as involuntary or compulsive." Pet. 29–30.

[2] The City's argument regarding *Marks v. United States*, 430 U.S. 188 (1977), *see* Pet. 4–5, 28–29, is wrong for the reasons identified by the panel, *see* Pet. App. 49a–52a, and a sideshow in any event. As Judge Collins recognized, even if the City's application of *Marks* were correct, it would at most establish that *Powell* "left open" whether "conduct [that] *has* been shown to be involuntary" is punishable. Pet. App. at 93a–94a. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020), does not help the City, *see* Pet. 28, as it merely cites the *Powell* plurality for the uncontroversial proposition that States play a "paramount role … in setting standards of criminal responsibility," 140 S. Ct. at 1028 (internal quotation marks omitted).

The City does not identify any decision relying on *Martin* or the decision below for the proposition that the Eighth Amendment forecloses punishment for harmful compulsive behavior, and for good reason: Unlike the addiction-related conduct that divided the *Powell* Court, sleeping is not a harmful compulsion, but rather a "universal and unavoidable consequence[] of being human." *Martin*, 920 F.3d at 617 (internal quotation marks omitted). Using a blanket to survive a cold night is likewise a universal necessity for human survival when shelter is unavailable. *See* Pet. App. 47a–48a. City leaders acknowledged as much when they decided to enforce the challenged ordinances for the express purpose of forcing the City's involuntarily homeless residents to leave—i.e., to *stop existing* in Grants Pass. *See supra* pp. 5–6. The Eighth Amendment does not and need not equate laws prohibiting harmful compulsive conduct with the City's efforts to "criminalize[] [its homeless residents'] existence." Pet. App. 208a.

Although the City flags a footnote in *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc), citing *Martin* for the proposition that "the controlling *Powell* opinion … is Justice White's concurrence," Pet. 23, *Manning* does not otherwise cite *Martin* as supporting its holding that the Eighth Amendment limits the criminalization of alcohol consumption by "habitual drunkards."[3] Judge Wilkinson's dissent explicitly

[3] The panel majority correctly notes in its statement regarding the rehearing denial that Judge O'Scannlain's position, if adopted, would conflict with *Manning*, Pet. App. 113a: If the

recognizes the distinction: While the majority's decision to strike down the habitual drunkard law was, in Judge Wilkinson's view, "at odds" with *Robinson*, striking down a law that punishes homeless people for engaging in "essential bodily functions" such as "eat[ing] or sleep[ing]" is "simply a variation of *Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *Manning*, 930 F.3d at 289–90 (Wilkinson, J., dissenting) (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)).

The United States likewise recognized the difference between universal biological necessities and harmful compulsive behaviors in its Statement of Interest in *Martin*: "[T]he knotty concerns raised by the *Powell* plurality" regarding whether addiction-related conduct is truly involuntary are "not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely." Statement of Interest of the United States at 12–13, *Bell v. City of Boise*, No. 1:09-cv-00540-REB (D. Idaho Aug. 6, 2015), ECF No. 276.

Fourth Circuit is right that Virginia's habitual drunkard law transgressed the Eighth Amendment because it criminalized compulsive alcohol consumption, then it is necessarily true that the City's ordinances transgress the Eighth Amendment by criminalizing universal, biologically necessary functioning. But that does not mean that the latter conclusion necessitates the former.

Like a law criminalizing breathing outside by homeless persons, the City's ordinances punish respondents for simply existing within City limits. "It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment." *Id.* at 11 (internal quotation marks and alteration omitted).

II. Neither *Martin* Nor The Decision Below Implicate Any Division Of Authority.

The City does not identify any case in conflict with *Martin* or the decision below.

The City first argues that by recognizing "a constitutional right to encamp on public property," the Ninth Circuit has parted ways with the Eleventh Circuit, the Fifth Circuit, and the California Supreme Court, which "have rejected similar challenges under the Eighth Amendment." Pet. 16–17 (internal quotation marks omitted).

The City's argument fails at the outset because the Ninth Circuit unequivocally *rejected* a right to encamp on public property. *See* Pet. App. 23a–24a (noting with approval that, "consistent with *Martin*," the district court's injunction left the City free to "ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns" (internal quotation marks and alterations omitted)). The panel held only that the Eighth Amendment prohibits the City from punishing involuntarily homeless persons for engaging in the unavoidable biological function of sleeping with "rudimentary forms of pro-

tection" to survive cold nights when shelter is unavailable. *Id.* at 57a. None of the cases cited in the petition are to the contrary.

The City characterizes *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), as rejecting the homeless plaintiff's Eighth Amendment challenge to an anti-sleeping ordinance "because it 'targeted conduct'" rather than "'status.'" Pet. 17 (alteration omitted) (quoting *Joel*, 232 F.3d at 1362). The City omits that the Eleventh Circuit reached that conclusion based on "unrefuted evidence" that a local shelter "ha[d] never reached its maximum capacity," which "distinguish[ed]" the plaintiff's challenge from those where the lack of shelter beds meant that the anti-sleeping ordinance effectively "criminalize[d] involuntary behavior." *Joel*, 232 F.3d at 1362. This is precisely the same line drawn by the Ninth Circuit: Where sleeping outside is not a biological necessity because other options are available, an anti-sleeping ordinance targets only the conduct of choosing to sleep outside rather than in a shelter, and not the status of being involuntarily homeless. *See Martin*, 920 F.3d at 617 & n.8.

As the City acknowledges, *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995), does not address the question presented here—i.e., whether the Eighth Amendment constrains the ability of jurisdictions to punish involuntarily homeless persons for sleeping outside when shelter is unavailable. *See* Pet. 17 (describing *Johnson* as involving "an earlier step of the analysis"). The Fifth Circuit held only that the plaintiffs lacked standing to challenge Dallas's anti-sleeping ordinance because they had not been convicted of violating it. *Johnson*, 61 F.3d at 443–45. The City does not raise the issue of respondents' standing in its

petition, but rather asks this Court to decide only whether its ordinances violate the Eighth Amendment. *See* Pet. i. As such, *Johnson* is not a basis for the Court to grant the petition.

Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995), involved a facial challenge to an ordinance barring camping and storage on public property. Accordingly, the only question addressed by the California Supreme Court was whether "there were *no circumstances* in which the ordinance could be constitutionally applied." *Id.* at 1157 (emphasis added). The court expressly declined to reach whether the ordinance would survive an as-applied challenge by "an involuntarily homeless person who involuntarily camps on public property." *Id.* at 1166 n.19. As respondents challenge the City's ordinances only as applied to involuntarily homeless residents who have nowhere else to sleep, *Tobe* is inapposite.

The City's second purported split "'over how to read the Eighth Amendment,'" Pet. 18 (quoting Pet. App. 130a), is even more illusory. According to the City, "24 courts have held the line at the act/status distinction," purportedly in contrast to *Martin* and the decision below. *Id.* Aside from *Tobe* and *Joel* (distinguished above, *supra* pp. 22–23), all of the City's cases involve allegedly compulsive sexual behavior or addiction, with many holding that the conduct was not in fact involuntary.[4] None hold that a jurisdiction

[4] *See, e.g.*, *United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (possession of child pornography was not "involuntary or uncontrollable"); *United States v. Moore*, 486 F.2d 1139, 1151

can punish universal biologically necessary "acts" like sleeping or using a blanket to survive in the cold, and none express any disagreement with the Ninth Circuit's application of *Robinson* to strike down such laws.

III. The City's Exceptional Importance Argument Is Unrelated To The Ninth Circuit's Actual Holding.

A. The City's exceptional importance argument turns entirely on the false claim that the Ninth Circuit has deprived cities of the "practical ability" to address the "growth of public encampments," Pet. 6, and the "fires, filth, disease, and fentanyl and meth" that allegedly accompany them, *id.* at 32-33 (internal quotation marks omitted).

Again, *see supra* pp. 21–22, neither *Martin* nor the decision below prevents cities from clearing or otherwise regulating encampments. To the contrary, both decisions explicitly recognize the right of jurisdictions to criminalize the use of tents on public property. *See* Pet. App. 55a n.34 (describing it as "obviously false" that the panel decision limits the City's ability to "'ban the use of tents'"); *Martin*, 920 F.3d at 589 (Berzon, J., concurring in denial of rehearing en banc) ("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, and that the holding 'in no way dictates to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or

(D.C. Cir. 1973) (plurality opinion) (drug possession is a "freely willed" act even for people with drug addiction).

sleep on the streets at any time and at any place.'" (alterations and citations omitted)).

Jurisdictions, rather, "remain free to address the complex policy issues regarding homelessness in the way [they] deem fit," including by restricting sleeping to "certain times and in certain places," "ban[ning] the use of tents in public parks, limi[ting] the amount of bedding type materials allowed per individual, and pursu[ing] other options to prevent the erection of encampments that cause public health and safety concerns." Pet. App. 23a–24a, 98a (internal quotation marks omitted).

Indeed, numerous district courts have rejected Eighth Amendment challenges to encampment sweeps, *see id.* at 54a n.33 (collecting cases), and Grants Pass itself has continued to dismantle encampments throughout this litigation, as it is free to do under the district court's injunction and the decision below, *see, e.g.*, City Manager's Weekly Report 7 (Nov. 9, 2023), *available at* https://perma.cc/6JNE-UHQS (twenty-nine encampments cleared the previous week).

The district court decisions cited by the City likewise confirm that jurisdictions retain the power to clear encampments:

San Francisco. The City claims that a district court enjoined San Francisco from "clean[ing] up public encampments" even though it "offer[ed] appropriate shelter to the encampment residents." Pet. 31. This is false. As an initial matter, the record established that, in violation of its own policies, San Francisco was *not* offering shelter before imposing criminal penalties against homeless people for "sitting,

sleeping, or lying outside on public property" when they had no option of sleeping indoors. *See Coal. on Homelessness v. City & County of San Francisco*, 647 F. Supp. 3d 806, 833–37 (N.D. Cal. 2022). Because that practice of making it impossible for homeless persons to exist in San Francisco ran afoul of the Eighth Amendment, the district court entered a narrow preliminary injunction to that effect. *Id.* at 842.

The court explicitly recognized, however, San Francisco's authority to enforce its laws "directed at conduct *beyond* sitting, lying, or sleeping outside." *Id.* at 841 n.19 (emphasis added). The only constitutional constraint on encampment sweeps that the court identified is the Fourth Amendment's requirement that San Francisco comply with its own "bag and tag policy" of storing personal property it seizes during sweeps, *id.* at 837, 842—a modest obligation that the city had already imposed on itself and that in any event had nothing to do with *Martin* or this case. Indeed, San Francisco has conducted massive encampment clearances under the injunction.[5]

Phoenix. Involuntarily homeless residents of Phoenix challenged city ordinances that were "essentially identical to the ordinances at issue in *Martin*,"—i.e., they effectively criminalized sleeping anywhere on public property. *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1124 (D. Ariz. 2022). The district court thus enjoined Phoenix from

[5] *See* Alexander Hall, *Newsom Trashed for Admitting San Francisco Was Cleaned Up for China Summit*, Fox News (Nov. 13, 2023), https://www.foxnews.com/media/newsom-trashed-admitting-san-francisco-cleaned-up-china-summit-slap-face.

enforcing these anti-sleeping ordinances "against individuals who practically cannot obtain shelter." *Id.* at 1132.

The City's assertion that the district court also enjoined Phoenix from cleaning up a large encampment, Pet. 31–32, is false: Although the court held that the Fourth and Fourteenth Amendments require Phoenix to provide notice before seizing or destroying property (again for reasons unrelated to *Martin* or this case), 646 F. Supp. 3d at 1126, it expressly allowed the city to implement its plan to clean up the encampment (called "The Zone"), citing numerous other cases where courts had rejected Eighth Amendment challenges to encampment sweeps, *id.* at 1127–28. And when local businesses sued Phoenix for nonetheless failing to clean up The Zone, the state court likewise recognized that neither *Martin* nor this case prevented the city from doing so. *Brown v. City of Phoenix*, No. CV 2022-010439, slip op. at 19–20 (Maricopa Cnty. Super. Ct. Mar. 27, 2023), https://perma.cc/NFT2-4F9N. Consistent with these decisions, Phoenix has now eliminated The Zone altogether.[6]

The district court cases cited by amici are equally unhelpful to the City. In *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075 (W.D. Wash. 2019), the district court *rejected* the plaintiffs' challenge to an Aberdeen ordinance allowing encampment sweeps, explaining

[6] Jack Healy, *Phoenix Encampment Is Gone, but the City's Homeless Crisis Persists*, N.Y. Times (Nov. 4, 2023), https://www.nytimes.com/2023/11/04/us/phoenix-tent-camp-homelessness.html.

that "*Martin* does *not* limit the City's ability to evict homeless individuals from particular places." *Id.* at 1081–82 (emphasis added). The court noted several other district court decisions reaching the same conclusion. *Id.* Moreover, although the court temporarily restrained Aberdeen from enforcing another ordinance that made "camping" punishable on essentially all public property, it did so to give the parties an opportunity to develop an evidentiary record regarding "how the ordinances … actually apply to Plaintiffs." *Id.* at 1083. The court emphasized that *Martin* involved "total homelessness criminalization," and indicated that it would follow other courts in not "stretch[ing] the ruling beyond its context." *Id.* at 1081. The Court subsequently vacated the temporary injunction, *see* Minute Order, *Aitken v. City of Aberdeen*, No. 3:19-cv-05322 (Sept. 13, 2019), ECF No. 70, and the plaintiffs dropped their case, *see* ECF No. 72–73.

Many of amici's other examples similarly illustrate *Martin*'s narrow scope:

- In *Quintero v. City of Santa Cruz*, No. 5:19-cv-01898-EJD, 2019 WL 1924990, at *1 (N.D. Cal. Apr. 30, 2019), the district court *rejected* an Eighth Amendment challenge to encampment sweeps.
- In *Sacramento Homeless Union v. County of Sacramento*, 617 F. Supp. 3d 1179, 1199 (E.D. Cal. 2022), the district court found that *Martin* "ha[d] no bearing" on the plaintiffs' challenge to Sacramento's encampment sweeps.
- In *Boring v. Murillo*, No. LA CV 21-07305-DOC (KES), 2022 WL 14740244, at *6 (C.D. Cal.

Aug. 11, 2022), the district court simply declined to dismiss the complaint at the pleading stage so that the parties could develop the evidentiary record on whether a "geographic limitation" in Santa Barbara's anti-sleeping ordinance "mean[s] the ban does not violate the Eighth Amendment."

- In *Warren v. City of Chico*, No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648, at *3–4 (E.D. Cal. July 8, 2021), the district court enjoined Chico only from enforcing an ordinance imposing criminal penalties on homeless persons for resting anywhere on public property, after concluding that Chico's plan to force its homeless residents to move to an airport tarmac did not solve the Eighth Amendment problem.

Amici's other examples have nothing to do with the Eighth Amendment at all, let alone *Martin* or the decision below. *E.g.*, *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1118 (9th Cir. 2021) (seizure of plaintiff's property likely violated Fourth Amendment); *Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1140–41, 1146 (N.D. Cal. 2021) (enjoining encampment sweep on Fourteenth Amendment grounds during a COVID surge).[7]

In short, in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial mandate under *Martin* or this case. Why, then,

[7] The City's claim that *Martin* has "'inevitably' extended to 'public defecation and urination,'" Pet. 32, rests on one line of dictum in an unpublished district court decision rejecting the

have so many politicians and public officials filed amicus briefs misattributing the encampments in their cities to court decisions?

The answer is simple: Political deflection. For years, western cities forewent investments in shelter capacity, housing, mental-health services, and addiction treatment, in favor of "'tolerant containment'—basically [pushing] the unhoused to certain neighborhoods of squalor such as San Francisco's Tenderloin or Los Angeles' Skid Row, and then selectively prosecuting them for living on the streets."[8]

But as housing costs have skyrocketed across the western region in recent years, so, too, has its homeless population, to a point that is no longer containable or tolerable to voters. The encampments that many amici actively encouraged are now the focus of intense public backlash, and it is easier to blame the

plaintiffs' challenge to Sacramento's decision to remove a portable toilet from public property, *see Mahoney v. City of Sacramento*, No. 2:20-cv-00258, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020). The district court in this case affirmatively recognized the City's authority "to enforce laws that actually further public health and safety, such as laws restricting … public urination or defecation." Pet. App. 200a. The Ninth Circuit panel majority agreed. *Id.* at 101a–103a (Silver & Gould &, JJ., statement regarding rehearing denial).

[8] Greg Rosalsky, *How California Homelessness Became a Crisis*, NPR (June 8, 2021), https://www.npr.org/sections/money/2021/06/08/1003982733/squalor-behind-the-golden-gate-confronting-californias-homelessness-crisis.

courts than to take responsibility for finding a solution. The two encampment crises cited by the City prove the point:

California Governor Gavin Newsom and San Francisco Mayor London Breed publicly claimed for months that the injunction in *Coalition on Homelessness* prohibited San Francisco from clearing encampments,[9] and they each filed amicus briefs urging this Court to review the decision below on that ground. In mid-November, however, they abruptly switched course and ordered a massive encampment sweep ahead of a visit by President Biden and Chinese President Xi Jingpin. Although Breed claimed that "a recent clarification" from the Ninth Circuit allowed the city to resume its sweeps,[10] all the Ninth Circuit did was *decline* to modify the injunction because the parties *already agreed* in relevant part on its scope. *See* Order, No. 23-15087 (9th Cir. Sept. 5, 2023), Dkt. 88 (noting that "the parties agree[d]" on "the sole issue" raised by the city's motion to modify, namely, "the definition of 'involuntarily homeless'"). Newsom was more candid: "I know folks are saying, 'Oh they're just

[9] *See, e.g.*, Barnini Chakraborty, *Gavin Newsom Blames Progressive Advocates and Judges for California's Homelessness Crisis*, Wash. Exam'r (Aug. 30, 2023), https://www.washingtonexaminer.com/news/newsom-california-homelessness-democrats-blame-judges.

[10] London Breed, *Injunction Update: Our Path Forward*, Medium (Sept. 25, 2023), https://perma.cc/7Q4B-8RHE.

cleaning up this place because all those fancy leaders are coming to town.' That's true, because it's true."[11]

Meanwhile, in Phoenix, city leaders "transport[ed] homeless people from other locations in Phoenix *into* The Zone," and then refused to address the encampment's dangerous and inhumane conditions on the ground that "its hands are tied by the *Martin* ruling," essentially "exploit[ing] … the rulings in this case and in *Martin*, as excuses for inaction." Goldwater Institute Amicus Br. 11–12, 15. As noted above, Phoenix has now cleared The Zone after a state court rejected the city's claim that *Martin* and the decision below prohibited it from doing so. *Supra* p. 27.

Although the Goldwater Institute's amicus brief is wrong about much, it gets this right: The public handwringing by politicians over this case is largely opportunistic—"a device whereby city officials can excuse" their inaction and distract from their failed policies by claiming that the Ninth Circuit has constrained them far beyond what *Martin* and the decision below actually say. Goldwater Institute Amicus Br. 11. There is no reason for the Court to engage with this political theater.

B. *Martin* and the decision below hold only that jurisdictions cannot punish involuntarily homeless persons for *sleeping* on public property when shelter is unavailable and there is nowhere else to sleep, or for using "the rudimentary protection of bedding" to survive cold nights. Pet. App. 23a–24a, 47a–48a &

[11] Hall, *supra* note 5.

n.28; *Martin*, 920 F.3d at 604. For all the City's insistence on misdescribing its ordinances as "commonplace restrictions on public camping," Pet. 2, it does not dispute that the ordinances effectively make it biologically impossible for its involuntarily homeless residents to stay in Grants Pass without facing punishment.

As the Ninth Circuit recognized, there is nothing "commonplace" about punishing involuntarily homeless persons for existing. Nor can the City seriously claim that its efforts to do so are necessary "to make progress on the underlying causes of homelessness." *Id.* at 35. Empirical evidence confirms what logic dictates: "[C]riminalization does not reduce the number of people experiencing homelessness."[12] To the contrary, punishing people for involuntarily sleeping outside simply imposes "fines they cannot afford" and "jail time that puts jobs in jeopardy and sends people back out to the streets, where their new criminal records will only make it harder to find housing and jobs."[13]

The City may well want to punish its homeless residents for living in Grants Pass anyway, if only to "make it uncomfortable enough" to force them out of town and into neighboring jurisdictions. ER 368. But what happens when those jurisdictions push them back by imposing an even more "uncomfortable" set of

[12] Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. Interagency Council on Homelessness (Oct. 26, 2022), https://perma.cc/MMR2-SJNP.

[13] *Id.*

penalties, setting off an escalating banishment race among municipalities across the West Coast? Neither the City nor its amici say.

IV. The Petition Presents Numerous Vehicle Problems.

Finally, even if the Court were interested in reviewing the question presented, the petition suffers from several serious vehicle problems.

First, and most fatally, this Court's resolution of the question presented would have no bearing on the legal rights of the parties. The district court granted summary judgment to respondents on two independently sufficient grounds: (1) the ordinances violate the Cruel and Unusual Punishments Clause by imposing punishment for merely existing outside with nowhere else to go, and (2) the fines imposed under those ordinances violate the Excessive Fines Clause by imposing monetary sanctions grossly disproportionate to the severity of the offense. Pet. App. 176a–191a.

The petition asks this Court to review only the Cruel and Unusual Punishments Clause's application to the ordinances. Pet. i. This is not an oversight. The City cannot seek review of the Excessive Fines Clause ruling because it forfeited that issue on appeal. As the Ninth Circuit observed, "[t]he City present[ed] no meaningful argument on appeal regarding the excessive fines issue." Pet. App. 56a. Accordingly, even if this Court were to reject the Ninth Circuit's application of the Cruel and Unusual Punishments Clause, the injunction would remain intact on grounds the City has not adequately preserved.

Second, on July 1, 2023, before the City filed its petition for certiorari, a new Oregon statute went into effect that restrains municipalities from criminalizing homelessness by punishing people for involuntarily sleeping outside or using a blanket to survive. The statute provides that "[a]ny 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." Or. Rev. Stat. Ann. § 195.530(2). And it grants persons "experiencing homelessness" a cause of action to "bring suit for injunctive or declaratory relief to challenge the objective reasonableness" of a covered city or county ordinance. *Id.* § 195.530(4). Governor Tina Kotek, who as Speaker of the Oregon House of Representatives was the primary sponsor of the bill, testified, "[t]his bill is the product of a workgroup process to operationalize and affirm the principles" of *Martin* to "ensure that individuals experiencing homelessness are protected from fines or arrests for sleeping or camping on public property when there are no other options."[14]

Although it would be premature to say that the statute moots this litigation, as no court has yet had an opportunity to decide how it would apply to the City's ordinances, it appears likely that the statute

[14] *Hearing on H.B. 3115 Before the H. Comm. on the Judiciary*, 2021 Reg. Sess. at 4:29 (Or. 2021) (statement of Rep. Tina Kotek), https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021031014&startStreamAt=269#conten,mt (last visited Dec. 4, 2023).

constrains the City's enforcement of its ordinances as much as, if not more than, the injunction in this case.[15] It would be a waste of this Court's resources to review the constitutionality of local ordinances that the state legislature has already rejected.

Third, the Ninth Circuit determined that the district court's injunction was too broad, and thus remanded with instructions to "craft a narrower injunction" that reflects the "limited" nature of respondents' "right to protection against the elements, as well as limitations when a shelter bed is available." Pet. App. 55a. In the absence of a final determination from the lower courts on the scope of the injunction, the case is not ripe for this Court's consideration.

Fourth, Debra Blake, the only named plaintiff with standing to challenge the anti-sleeping ordinance, passed away while this case was on appeal. *Id.* at 30a–34a. The Ninth Circuit explained that her death raised a complicated question about its ability to review the district court's resolution of a claim that no living class representative had standing to pursue. *Id.* at 33a. Because it had no briefing on that issue, the Ninth Circuit vacated the district court's grant of summary judgment as to the anti-sleeping ordinance and remanded for the district court to determine

[15] In the first challenge brought under the new statute, the state court preliminarily enjoined Portland's anti-camping ordinance on exclusively state law grounds. *See* Order, *Duncan v. City of Portland*, No. 23CV39824 (Multnomah Cnty. Cir. Ct. Nov. 9, 2023); Complaint at 17–19, *id.* (Sept. 29, 2023) (stating only state-law claims).

whether a new class representative could be substituted. *Id.* at 34a. Accordingly, if the Court were to grant certiorari now, it may not be able to resolve the question presented as to the entire constellation of relevant ordinances.

CONCLUSION

The petition for a writ of certiorari should be denied.

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DECEMBER 6, 2023

No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Twenty-five briefs supporting certiorari filed by a diverse array of amici confirm what the 17 judges urging rehearing en banc below made clear: The Ninth Circuit's decision, which extends its Eighth Amendment ruling in *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), is unprincipled, unworkable, and irreconcilable with decisions of this Court, as well as other courts of appeals and state supreme courts. Respondents deny that the Ninth Circuit's decisions have worsened the homelessness crisis, but the experiences of amici—which include 20 States, California's governor, dozens of cities ranging from Phoenix and San Francisco to Seattle and Anchorage, and myriad

community and business groups—prove the real and tangible effects of *Martin*.

The Ninth Circuit squarely held below that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits cities from regulating purportedly "involuntary" public camping, even through civil citations. Respondents' attempts to minimize the scope and impact of that holding, which "inevitably" extends to "public defecation and urination," defy reality. *Martin*, 920 F.3d at 596 (M. Smith, J., dissenting from denial of rehearing en banc). In *Martin*, this Court heard similar assurances that the Ninth Circuit's ruling was narrow and would leave local governments with adequate tools to enforce basic health and safety laws. That was an empty promise, as the unprecedented coalition of amici reflects. The Court should grant review and reject the Ninth Circuit's untenable reading of the Eighth Amendment.

I. THE NINTH CIRCUIT'S DECISION ENTRENCHES A CONFLICT.

A. Respondents attempt to downplay the Ninth Circuit's recognition of a right to "encamp" on public property. Opp. 21. But their objection is semantic. As respondents' own reformulation shows, the decision below holds that "involuntarily homeless persons" have a right to live and sleep on public property with "'rudimentary forms of protection.'" Opp. 21-22. The Ninth Circuit reached that conclusion by embracing "the principle 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'" and then affirming a sweeping classwide injunction. Pet. App. 50a, 57a (quoting *Martin*, 920 F.3d at 616). That decision—however respondents

label it—creates a constitutional right to camp on public property.

Respondents' distortion of the decision below cannot mask the direct conflict with *Tobe* v. *City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), and *Joel* v. *City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), which rejected similar challenges to public-camping ordinances. Pet. 17. Respondents argue that those decisions are factually distinguishable because the Eleventh Circuit also mentioned available shelter beds and the California Supreme Court confronted a facial challenge. Opp. 22-23. But neither distinction diminishes the clash with those courts' legal conclusion that the Cruel and Unusual Punishments Clause forbids "punishment for status" simpliciter, *not* for the "proscribed conduct" of public camping. *Tobe*, 892 P.2d at 1166-1167; accord *Joel*, 232 F.3d at 1361-1362; but see Pet. App. 50a.

B. Respondents barely engage with the broader split on the Eighth Amendment's application to involuntary conduct. Seven federal courts of appeals and 17 state courts of last resort have properly interpreted *Robinson* v. *California*, 370 U.S. 660 (1962), to prohibit only pure status crimes; only the Ninth and Fourth Circuits and one state supreme court reject that consensus. Pet. 18-24. Respondents alone refuse to recognize that "sharp split" on the meaning of this Court's precedent, which judges on both sides have long acknowledged. *United States* v. *Moore*, 486 F.2d 1139, 1239 n.178 (D.C. Cir. 1973) (en banc) (Wright, J., dissenting); see Pet. App. 130a-131a (O'Scannlain, J., respecting denial of rehearing en banc).

Respondents' only rejoinder (Opp. 19, 23-24) is that the prohibited conduct in other cases (drug use, public intoxication, sexual assaults, etc.) is more

"harmful" than public camping. But the ultimate question here is *who decides*—the people's representatives or federal judges—whether conduct is sufficiently harmful to warrant prohibition. And even the Ninth Circuit did not embrace respondents' invented distinction. Instead, it relied on decisions involving drug addiction (*Robinson*) and public intoxication (*Powell* v. *Texas*, 392 U.S. 514 (1968)). Pet. App. 47a.

II. THE DECISION BELOW IS WRONG.

Respondents primarily argue (Opp. 13-21) that the Ninth Circuit's expansive interpretation of the Cruel and Unusual Punishments Clause is correct. The Court should consider that important question with the benefit of full merits briefing. In any event, respondents cannot square the decision below with the Constitution and controlling precedent.

A. Respondents never deny that *Martin* and the decision below lack any support in the "text, history, or tradition of the Eighth Amendment." Pet. App. 119a (opinion of O'Scannlain, J.). After all, no serious argument can be made applying these traditional tools of constitutional interpretation that the short jail sentences and fines in *Martin*—let alone the civil citations here—are cruel and unusual modes of punishment. Pet. 24-27.

Respondents try to sidestep first principles by contending that the Eighth Amendment's original meaning, history, and tradition are off-limits because the City did not canvass the "historical evidence" or "'retain experts'" below. Opp. 15 (citation omitted). That is not how preservation (or constitutional interpretation) works. This Court has repeatedly held that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that

claim" and is "not limited to the precise arguments [it] made below." *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) (citations omitted). Respondents' contrary view would undermine inquiry into "original meaning, as demonstrated by its historical derivation," which has long been a touchstone of this Court's decisions construing the Eighth Amendment and other constitutional provisions. *Ingraham* v. *Wright*, 430 U.S. 651, 670 n.39 (1977); see, *e.g.*, *Kennedy* v. *Bremerton School District*, 142 S. Ct. 2407, 2428 (2022).

B. Respondents' merits argument rests on their misreading of three decisions of this Court: *Robinson*, which they ask the Court to extend; the splintered opinions in *Powell*; and a sentence fragment from *Ingraham*. Opp. 14-18. None supports the Ninth Circuit's transformation of the Cruel and Unusual Punishments Clause into a font of judicial power to micromanage municipal housing and land-use policy.

Respondents begin with *Robinson*, which held that States cannot punish "the 'status' of narcotics addiction" but recognized that States may punish drug possession by addicts. 370 U.S. at 664-667. Respondents urge the Court to extend *Robinson*'s status-only holding to include "involuntary" conduct that stems from "a status." Opp. 15. That unwarranted expansion finds no support in the Eighth Amendment's text, history, or tradition. Pet. 25. At this stage, though, what matters is that seven circuits and 17 state supreme courts have refused to extend *Robinson* in this way. Pet. 20-22.

Respondents promptly retreat to *Powell*, claiming that Justice Fortas's dissent and Justice White's concurrence "endorsed" respondents' "reading of *Robinson*." Opp. 16. But the *Court* has only ever applied

Justice Marshall's plurality opinion and Justice Black's concurrence, both of which upheld the "paramount role of the States in setting 'standards of criminal responsibility.'" *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell*, 392 U.S. at 533 (plurality opinion)); see Pet. 27-28. Tellingly, respondents also retreat from the Ninth Circuit's rationale for bypassing the *Powell* plurality opinion: its view that *Marks* v. *United States*, 430 U.S. 188 (1977), requires fidelity to a dissent and dicta in a concurrence. Pet. App. 49a-50a; see, *e.g.*, Pet. 28-29; San Francisco Br. 13-19. Respondents now call the ground on which they prevailed below a "sideshow" because properly applying *Marks* would mean *Powell* "'left open'" the question presented here. Opp. 18 n.2. But without *Powell*, the foundation of respondents' merits argument crumbles.

Finally, respondents repeatedly try (Opp. i, 1, 13, 15) to transform a snippet from *Ingraham* into a broad Eighth Amendment rule, but that decision undermines their position. Respondents quote *Ingraham*'s observation that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." 430 U.S. at 667. But *Ingraham*'s only example was *Robinson*, whose prohibition on pure status crimes doesn't support respondents. *Ibid.* *Ingraham* further underscored that this "limitation," disconnected from the "'primary purpose of the Cruel and Unusual Punishments Clause,'" must "be applied sparingly." *Ibid.* The Ninth Circuit's extension of *Robinson* has been anything but sparing.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Despite more than two dozen amicus briefs, respondents attempt to downplay the stakes, insisting

that the "narrow scope" of the Ninth Circuit's decision will not interfere with cities' efforts to "clea[r] or otherwise regulat[e] encampments." Opp. 24, 28. That prediction should sound familiar: This Court heard the same assurances four years ago, when the *Martin* plaintiffs insisted that any "policy concerns are dramatically overstated" because the decision had "limited practical consequence." Opp. 25-28, No. 19-247. As dozens of amici in this case—including many government officials charged with complying with the Ninth Circuit's decisions—have explained, those assurances proved disastrously wrong.

A. Cities, counties, and States all agree that *Martin* has "wreaked practical havoc in courts and on the ground in municipalities across the Ninth Circuit." San Francisco Br. 6; see, *e.g.*, California Counties Br. 12-14; States Br. 5-11. That decision exacerbated the homelessness crisis, prevented comprehensive and swift responses to encampments, and undermined the "core mandate for every municipality" to "keep its public space safe and accessible to all its residents." Los Angeles Br. 19.

Contrary to respondents' assertion (Opp. 31-32), San Francisco's limited cleanup of encampments in advance of President Xi's visit illustrates the severe burdens the Ninth Circuit's decisions inflict. San Francisco began preparations months in advance merely to clear a part of the South of Market neighborhood.[1] That San Francisco's months-long partial cleanup of a neighborhood made national news is a

[1] David Sjostedt, *San Francisco 'Cleaned Up' Streets Ahead of APEC. But How and What, Exactly, Did It Do?*, S.F. Standard (Nov. 14, 2023), https://tinyurl.com/2ba9ucw4.

disheartening sign of the new normal under *Martin*.[2] And within weeks, the "homeless encampments have returned," as two-thirds of their inhabitants (162 of 244) rejected San Francisco's offers of shelter.[3]

The Ninth Circuit's open-ended standards also foist on local governments frequent actual and potential litigation over such issues as what constitutes adequate shelter, *e.g.*, Los Angeles Br. 14-15, and where and when cities may enforce restrictions, *e.g.*, Phoenix Br. 23. As Governor Newsom observes (Br. 12), the test's opacity puts public officials in a no-win situation where "[a]ny attempt to move unhoused persons out of encampments," or to regulate "the place or manner in which unhoused persons can sleep, will at best subject the community to litigation and at worst result in a broad injunction." Los Angeles likewise reports (Br. 21) that "the chaos of defending lawsuits from both sides over whether or how to enforce public space regulations creates paralysis and diverts limited public resources from the homeless population that needs it most." Absent this Court's intervention, the paralysis will only worsen now that the Ninth Circuit has blessed the routine certification of sweeping *Martin* classes. Pet. 34.

B. The Ninth Circuit's novel framework is also unworkable. For example, *Martin* and the decision below apply to the "involuntarily homeless." Opp. 33. That test inevitably invites confusion for law enforcement and other officials tasked with "determin[ing]

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[2] *E.g.*, Heather Knight, *Before World Leaders Arrive, San Francisco Races to Clean Up*, N.Y. Times (Nov. 10, 2023), https://tinyurl.com/bdfjcpjh.

[3] Sergio Quintana, *Here's What San Francisco's Streets Look Like 3 Weeks After APEC*, NBC Bay Area (Dec. 11, 2023), http://tinyurl.com/3tmt9bpj.

voluntariness on the ground and in the course of interactions with persons experiencing homelessness." San Francisco Br. 11.

Cities also must undertake the "monumentally difficult" task of counting "available shelter beds" and "homeless residents" on a *nightly* basis and making sure officers in the field know the latest count. Los Angeles Br. 13-14. Even then, cities have no good way "to determine whether someone has declined an offer of shelter, let alone document every interaction." San Francisco Br. 11. No wonder cities across the Ninth Circuit have been compelled to "abandon enforcement of a host of laws regulating public health and safety"—precisely as the *Martin* dissenters predicted. 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc).

C. The *Martin* plaintiffs insisted that the burdens and unworkability of the Ninth Circuit's approach that the petitioner there highlighted were "reason for this Court to wait" to grant review until those problems "actually materialize." Opp. 29-31, No. 19-247. Respondents here cannot reprise that response now that *Martin*'s harms have materialized. They instead seek to distract by invoking politics, accusing elected officials of "blam[ing] the courts" for problems they have failed to solve. Opp. 30-31.

Respondents' scapegoating theory is contradicted by the chorus of governmental amici who disagree on much but agree that this Court's intervention is necessary. Amici hale from every State in the Ninth Circuit (plus many others), state and local governments, and both major political parties. These amici hold different policy views on how to address the homelessness crisis—for example, by "lift[ing] impediments" to "creating shelter and housing," Los Angeles Br. 4;

"remov[ing] tents from the sidewalk" to allow for "enhanced cleanings" of encampment areas, Phoenix Br. 15-17; "devoting billions of dollars in funds and resources," San Francisco Br. 1; and setting aside areas of public spaces to be used as outdoor homeless shelters, Chico Br. 16. But they all agree that the Ninth Circuit's decisions stand in the way of solutions to this complex problem and harm the very people they were intended to help. Amici also have put their money where their mouths are. For example, California has "invested more than $15 billion toward homelessness issues." Newsom Br. 9; see also, *e.g.*, Arizona Legislature Br. 19. The crisis has worsened *despite* these efforts, not in the absence of them.

Respondents' narrative is also incoherent. If the crisis of encampments truly were a product of "political expediency" by officials who prefer to blame courts for policy problems, Opp. 3, then amici would have little reason to ask this Court to grant review and reverse the Ninth Circuit's decision, which would eliminate their supposed excuse. The reality is simpler: Public officials have come in droves to this Court not to take part in "[p]olitical theater," Opp. 32, but to seek the return of policy questions the Ninth Circuit wrongly answered under the Eighth Amendment to their rightful place with the people's representatives.

IV. THIS PETITION IS AN IDEAL VEHICLE.

Respondents' supposed vehicle problems (Opp. 34-37) are makeweights and pose no obstacle to review.

A. Respondents contend that the district court's grant of summary judgment under the Eighth Amendment's Excessive Fines Clause is an "independently sufficient groun[d]" for the injunction. Opp. 34. But

the excessive-fines claim was not even a ground for the decision below because the Ninth Circuit did not "resolve whether the fines violate the Excessive Fines clause" and affirmed the injunction solely under the Cruel and Unusual Punishments Clause. Pet. App. 25a-26a, 55a. The excessive-fines claim also was not independent, but instead an afterthought that rose or fell with the *Martin* claim. See *id.* at 56a. A vestigial issue that the Ninth Circuit did not reach is no impediment to reviewing its actual decision.

B. Respondents cite a newly enacted Oregon statute that requires public-camping regulations to "be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness." Opp. 35 (quoting Or. Rev. Stat. Ann. § 195.530(2)). But they do not contend that the new law poses any jurisdictional impediment, expressly declining to argue "that the statute moots this litigation." *Ibid.* Nor have respondents claimed that the Oregon statute justifies vacating the injunction they won below. And the statute's objective-reasonableness standard departs from *Martin*, which puts the City in an "objectively *un*reasonable constitutional straitjacket." Pet. App. 159a-160a (Collins, J., dissenting from denial of rehearing en banc). Because Ninth Circuit precedent sets a higher constitutional floor, Oregon's reasonableness standard is irrelevant.

Respondents also overlook the irony of asserting a vehicle problem when the Oregon statute was a response to *Martin*. Opp. 35. States should serve "as laboratories for devising solutions to difficult legal problems," but the Ninth Circuit has wrongly attempted to constitutionalize one particular policy. *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). *Martin*'s one-size-fits-all rule has hindered legislative efforts in

California, Arizona, Idaho, Montana, and Alaska. Newsom Br. 9-11; Arizona Legislature Br. 19; States Br. 12-16. Given the limits on legislative action imposed by *Martin*, the question presented remains exceptionally important in Oregon and across the Ninth Circuit.

C. Respondents argue (Opp. 36) that this Court should not review the decision below until the district court reconsiders whether to enjoin the City from prohibiting "the use of stoves or fires, as well as the erection of any structures." Pet. App. 55a. But the question presented will determine whether any injunction is warranted at all. And the injunction the Ninth Circuit affirmed—which prevents the City from regulating camping with bedding—cleanly presents the Eighth Amendment question. See *ibid.* Respondents do not dispute this Court's jurisdiction to review an operative injunction that currently restricts the City's ability to regulate camping on public property. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 308, 316-317 (1988) (reviewing permanent injunction that the Ninth Circuit affirmed with "slight modifications"). Nothing would be gained by waiting for the district court to fine-tune the injunction at the margins when a proper reading of the Cruel and Unusual Punishments Clause would preclude injunctive relief altogether.

D. Finally, respondents note (Opp. 36-37) that the Ninth Circuit affirmed the injunction only as to the public-camping ordinances because the named plaintiff with standing to challenge the separate public-sleeping ordinance had since passed away. Pet. App. 30a-34a. But respondents never challenge this Court's jurisdiction to review the constitutionality of the two ordinances that the Ninth Circuit invalidated. The absence of a respondent with standing to challenge

another ordinance is beside the point, particularly because the Ninth Circuit held that the Eighth Amendment applies to public camping and public sleeping in the same way. *Id.* at 46a-48a.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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December 20, 2023

WARDLAW, Circuit Judge:

I. FACTS AND PROCEDURAL BACKGROUND

The facts underlying this appeal are largely undisputed.[1] Appellees are homeless persons living on the streets of the Skid Row district of Los Angeles. Skid Row's inhabitants include the highest concentration of homeless persons in the City of Los Angeles; this concentration has only increased in recent years. Appellees occupy the sidewalks of Skid Row pursuant to a settlement agreement we approved in 2007. *See Jones v. City of Los Angeles,* 444 F.3d 1118 (9th Cir.2006), *vacated due to settlement,* 505 F.3d 1006 (9th Cir.2007). The settlement agreement limits the City's ability to arrest homeless persons for sleeping, sitting, or standing on public streets until the City constructs 1250 units of permanent supportive housing for the chronically homeless, at least 50 percent of which must be located within Skid Row or greater downtown Los Angeles. *See* Settlement Agreement, *Jones v. City of Los Angeles,* No. 03–CV–01142 (C.D.Cal. Sept. 15, 2008).

Like many of Skid Row's homeless residents, Appellees stored their personal possessions—including personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets—in mobile containers provided to homeless persons by social service organizations. Appellees Tony Lavan, Caterius Smith, Willie Vassie, Shamal Ballantine, and Reginald Wilson packed their possessions in EDAR mobile shelters. Appellees Ernest Seymore, Lamoen Hall, and Byron Reese kept their possessions in distinctive carts provided by the "Hippie Kitchen," a soup kitchen run by the Los Angeles Catholic Worker.

On separate occasions between February 6, 2011 and March 17, 2011, Appellees stepped away from their personal property, leaving it on the sidewalks, to perform necessary tasks such as showering, eating, using restrooms, or attending court. Appellees had not abandoned their property, but City employees nonetheless seized and summarily destroyed Appellees' EDARs and carts, thereby permanently depriving Appellees of possessions ranging from personal identification documents and family memorabilia to portable electronics, blankets, and shelters. *See Lavan,* 797 F.Supp.2d at 1013–14. The City did not have a good-faith belief that Appellees' possessions were abandoned when it destroyed them. Indeed, on a number of the occasions when the City seized Appellees' possessions, Appellees and other persons were present, explained to City employees that the property was not abandoned, and implored the City not to destroy it. *Id.* at 1013. Although "the City was in fact notified that the property belonged to Lamoen Hall and others, ... when attempts to retrieve the property were made, the City took it and destroyed it nevertheless." *Id.* at 1014.

The City does not deny that it has a policy and practice of seizing and destroying homeless persons' unabandoned possessions. Nor is the practice new: The City was previously enjoined

[1] Public critics of the district court's ruling have mischaracterized both the breadth of the district court's order and the substance of the City's appeal. *See, e.g.,* Carol Schatz, "Enabling homelessness on L.A.'s skid row," *L.A. Times,* April 9, 2012; Estela Lopez, "Skid row: Hoarding trash on sidewalks isn't a right," *L.A. Times,* Feb. 28, 2012, *available at* http://opinion.latimes.com/opinionla/2012/02/skid-row-trash-sidewalks-blowback.html. The injunction does not require the City to allow hazardous debris to remain on Skid Row, nor does the City quibble with the contours of the order. Rather, the City seeks a broad ruling that it may seize and immediately destroy any personal possessions, including medications, legal documents, family photographs, and bicycles, that are left momentarily unattended in violation of a municipal ordinance.

from engaging in the precise conduct at issue in this appeal.

The City maintains, however, that its seizure and disposal of items is authorized pursuant to its enforcement of Los Angeles Municipal Code ("LAMC") § 56.11, a local ordinance that provides that "[n]o person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk."

On April 5, 2011, Appellees sued the City under 42 U.S.C. § 1983, claiming that the City's practice of summarily confiscating and destroying the unabandoned possessions of homeless persons living on Skid Row violated the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. On April 18, 2011, Appellees filed an ex parte application for a temporary restraining order (the "TRO"), seeking an injunction preventing the City from seizing and destroying Appellees' possessions without notice.

On April 22, 2011, the district court granted Appellees' application for the TRO, concluding that "Plaintiffs have sufficiently established a likelihood of success on the merits for, at the least, their Fourth Amendment and Fourteenth Amendment claims against the City," that the City's conduct, unless enjoined, would irreparably injure Plaintiffs, and that the TRO served the public interest, as it allowed the City to "lawfully seize and detain property, as opposed to unlawfully seizing and immediately destroying property." The district court fashioned an order encompassing all unabandoned property on Skid Row, reasoning that "it would likely be impossible for the City to determine whose property is being confiscated—i.e. whether it is one of the named Plaintiffs or another homeless person." *Id.* at *4. The terms of the TRO bar the City from:

> 1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and
>
> 2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

The City is also "directed to leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner."

On June 23, 2011, the district court issued a preliminary injunction (the "Injunction") on the same terms as the TRO. After weighing the evidence before it, the district court found that the Appellees had "clearly shown that they will likely succeed in establishing that the City seized and destroyed property that it knew was not abandoned," and held that Appellees had shown a strong likelihood of success on the merits of their claims that the City violated their Fourth Amendment and Fourteenth Amendment rights. Explaining that Appellees "have a legitimate expectation of privacy in their property," the district court further held that "[t]he property of the homeless is entitled to Fourth Amendment protection." The district court also concluded that Appellees "personal possessions, perhaps representing everything they own, must be considered 'property' for purposes of [Fourteenth Amendment] due process analysis." *Id.* at 1016. Because Appellees had shown a strong likelihood of success on their claims that the seizure and destruction of their property was neither reasonable under the Fourth Amendment nor comported with procedural due process, the district court enjoined the City from continuing to engage in its practice of summarily destroying Appellees' unattended personal belongings.

The district court made clear that under the terms of the injunction, "[t]he City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash." *Id.* at 1019. It emphasized that "issuance of the injunction ... merely prevent[s the City] from unlawfully seizing and destroying personal prop-

erty that is not abandoned without providing any meaningful notice and opportunity to be heard." *Id.* This appeal followed.

III. DISCUSSION

The City's only argument on appeal is that its seizure and destruction of Appellees' unabandoned property implicates neither the Fourth nor the Fourteenth Amendment. Therefore, the City claims, the district court relied on erroneous legal premises in finding a likelihood of success on the merits. Because the unabandoned property of homeless persons is not beyond the reach of the protections enshrined in the Fourth and Fourteenth Amendments, we affirm the district court.

A. *The Fourth Amendment's Protection Against Unreasonable Seizures*

The City argues that the Fourth Amendment does not protect Appellees from the summary seizure and destruction of their unabandoned personal property. It bases its entire theory on its view that Appellees have no legitimate expectation of privacy in property left unattended on a public sidewalk in violation of LAMC § 56.11. Relying on Justice Harlan's concurrence in *Katz v. United States,* the City asserts that the Fourth Amendment protects only persons who have both a subjectively and an objectively reasonable expectation of privacy in their property. 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J. concurring). As the Supreme Court has recently made very clear in *United States v. Jones,* 565 U.S. ——, 132 S.Ct. 945, 950, 181 L.Ed.2d 911 (2012), however, the City's view entirely misapprehends the appropriate Fourth Amendment inquiry, as well as the fundamental nature of the interests it protects. The reasonableness of Appellees' expectation of privacy is irrelevant as to the question before us: whether the Fourth Amendment protects Appellees' unabandoned property from unreasonable seizures.

The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when the government intrudes upon an expectation of privacy that society is prepared to consider reasonable. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). Appellees need not show a reasonable expectation of privacy to enjoy the protection of the Fourth Amendment against *seizures* of their unabandoned property. Although the district court determined that Appellees had a reasonable expectation of privacy in their EDARs and carts, we need not decide that question because the constitutional standard is whether there was "some meaningful interference" with Plaintiffs' possessory interest in the property.[2]

To the extent that Justice Harlan's *Katz* concurrence generated the mistaken impression that the Fourth Amendment protects only privacy interests, the Supreme Court has clarified that the Fourth Amendment protects possessory and liberty interests even when privacy rights are not implicated. *Soldal v. Cook County,* 506 U.S. 56, 63–64 & n. 8. As the Court explained, while *Katz* and its progeny may have shifted the emphasis in Fourth Amendment law from property to privacy, "[t]here was no suggestion that this shift in emphasis had snuffed out the previously recognized protection for property under the

[2] Although the question is not before us, we note that Appellees' expectation of privacy in their unabandoned shelters and effects may well have been reasonable. When determining whether an expectation of privacy is reasonable, "we must keep in mind that the test of legitimacy is ... whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." As our sane, decent, civilized society has failed to afford more of an oasis, shelter, or castle for the homeless of Skid Row than their EDARs, it is in keeping with the Fourth Amendment's "very core" for the same society to recognize as reasonable homeless persons' expectation that their EDARs are not beyond the reach of the Fourth Amendment. *See generally State v. Mooney,* 218 Conn. 85, 588 A.2d 145, 161 (1991) .

Fourth Amendment." Indeed, even in the *search* context, where privacy is the principal protected interest, the Supreme Court has recently reiterated that a reasonable expectation of privacy is not required for Fourth Amendment protections to apply because "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones,* 565 U.S. at ——, 132 S.Ct. at 950.

Following *Soldal,* we recognized that a reasonable expectation of privacy is not required to trigger Fourth Amendment protection against seizures. We held that the seizure was subject to the Fourth Amendment's reasonableness standard because "[t]he Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy."

Thus the dissent's nearly exclusive focus on the *Katz* "reasonable expectation of privacy" standard is misguided. We need not make any conclusion as to expectations of privacy because that is not the standard applicable to a "seizure" analysis.

Even if we were to assume, as the City maintains, that Appellees violated LAMC § 56.11 by momentarily leaving their unabandoned property on Skid Row sidewalks, the seizure and destruction of Appellees' property remains subject to the Fourth Amendment's reasonableness requirement. Violation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.[3]

Here, by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement. Thus, the district court properly subjected the City's actions to the Fourth Amendment's reasonableness requirement, even if the City was acting to enforce the prohibitions in LAMC § 56.11.

The district court properly balanced the invasion of Appellees' possessory interests in their personal belongings against the City's reasons for taking the property to conclude that Appellees demonstrated a strong likelihood of success on the merits of their claim that by collecting and destroying Appellees' property on the spot, the City acted unreasonably in violation of the Fourth Amendment. The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable.

The City does not—and almost certainly could not—argue that its summary destruction of Appellees' family photographs, identification pa-

[3] The dissent's analogy between the factual scenario presented by this case and that of a government official's seizure of a traveler's unattended bag in an airport terminal or train station is inapt. The City has not challenged the district court's clearly correct conclusion that the City's immediate destruction of Plaintiffs' unabandoned property was unreasonable. Even if the City had raised this issue on appeal, however, the dissent's suggestion that the government has the same interest in destroying EDARs and homeless persons' family photographs and identification papers found on public sidewalks as it does in destroying suspicious unattended luggage discovered in transportation hubs fails to recognize the unique nature of the security risks that exist at airports and train stations. The Fourth Amendment remains applicable at such transportation hubs; the nature of the security risks there (and, similarly, at border crossings) gives the government broader leeway in the reasonableness standard. As far as we are aware, Skid Row has never been the target of a terrorist attack, and the City makes no argument that the property it destroyed was suspicious or threatening. And, in any event, the very injunction that the City is challenging in this appeal expressly allows the City to act *immediately* to remove and destroy threats to public health or safety.

pers, portable electronics, and other property was reasonable under the Fourth Amendment; it has instead staked this appeal on the argument that the Fourth Amendment simply does not apply to the challenged seizures. We reject the City's invitation to impose this unprecedented limit on the Fourth Amendment's guarantees.

B. *The Fourteenth Amendment's Due Process Requirement*

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "Any significant taking of property by the State is within the purview of the Due Process Clause."

Let us be clear about the property interest at stake in this appeal: The district court did not recognize, and we do not now address, the existence of a constitutionally-protected property right to leave possessions unattended on public sidewalks. Instead, the district court correctly recognized that this case concerns the most basic of property interests encompassed by the due process clause: Appellees' interest in the continued ownership of their personal possessions.

The City maintains that "no constitutionally protected property interest is implicated by the City's purported conduct" because "there is no law establishing an individual's constitutionally protected property interest in unattended personal property left illegally on the public sidewalk." Therefore, the City contends, no process is required before the City permanently deprives Appellees of their unattended possessions.

To determine whether Appellees have a protected property interest in the continued ownership of their unattended possessions, we look to "existing rules or understandings that stem from an independent source such as state law-rules or understandings." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972), While "[t]he Court has ... made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," this appeal concerns only the core property interest that derives from actual ownership of chattels. California law recognizes the right of ownership of personal property, a right that is held by "[a]ny person, whether citizen or alien." Cal. Civ.Code §§ 655, 663, 671. It is undisputed that Appellees owned their possessions and had not abandoned them; therefore,

As we have repeatedly made clear, "[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart. The City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a municipal ordinance. As the district court recognized, the logic of the City's suggestion would also allow it to seize and destroy cars parked in no-parking zones left momentarily unattended.

Even if Appellees had violated a city ordinance, their previously-recognized property interest is not thereby eliminated. Even if the City had seized Appellees' possessions in accordance with the Fourth Amendment, which it did not, due process requires law enforcement "to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return." And even if LAMC § 56.11 provided for forfeiture of property, which it does not, the City is required to provide procedural protections before permanently depriving Appellees of their possessions. *See Greene,* 648 F.3d at 1019 ("An agency ... violates the Due Process Clause of the Fourteenth Amendment when it prescribes and enforces forfeitures of property '[w]ithout underlying [statutory] authority and competent procedural protections.' ") (quoting *Vance v. Barrett,* 345 F.3d 1083, 1090 (9th Cir.2003)).

Because homeless persons' unabandoned possessions are "property" within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them. The City admits that it failed to provide any notice or opportunity to be heard for Tony Lavan and other Appellees before it seized and destroyed their property. The City's decision to forego any process before permanently depriving Appellees of protected property interests is especially troubling given the vulnerability of Skid Row's homeless residents: "For many of us, the loss of our personal effects may pose a minor inconvenience. However, ... the loss can be devastating for the homeless." *Pottinger v. City of Miami,* 810 F.Supp. 1551, 1559 (S.D.Fla.1992). The City does not argue, nor could it, that the district court erred in holding that the City's "practice of on-the-spot destruction of seized property.... presents an enormous risk of erroneous deprivation, which could likely be mitigated by certain safeguards such as adequate notice and a meaningful opportunity to be heard."

We reject the City's suggestion that we create an exception to the requirements of due process for the belongings of homeless persons. The district court did not abuse its discretion when it found a likelihood of success on Appellees' Fourteenth Amendment claims, as the City admits it failed utterly to provide any meaningful opportunity to be heard before or after it seized and destroyed property belonging to Skid Row's homeless population.

IV. CONCLUSION

This appeal does not concern the power of the federal courts to constrain municipal governments from addressing the deep and pressing problem of mass homelessness or to otherwise fulfill their obligations to maintain public health and safety. In fact, this court would urge Los Angeles to do more to resolve that problem and to fulfill that obligation. Nor does this appeal concern any purported right to use public sidewalks as personal storage facilities. The City has instead asked us to declare that the unattended property of homeless persons is uniquely beyond the reach of the Constitution, so that the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society. Because even the most basic reading of our Constitution prohibits such a result, the City's appeal is **DENIED.**

CALLAHAN, Circuit Judge, dissenting:

I respectfully dissent. I disagree that Plaintiffs are likely to succeed on the merits of their claims that the City of Los Angeles (the "City") violated their protected interests under the Fourth Amendment and under the due process clause of the Fourteenth Amendment. The pivotal question under both Amendments is not whether Plaintiffs had a property interest in the items seized—they may very well have had such an interest—but whether that interest is one that society would recognize as reasonably worthy of protection where the personal property is left unattended on public sidewalks. Because under the due process standard, society does not recognize a property interest in unattended personal property left on public sidewalks, the City's health and safety concerns allow it to seize and dispose of such property.

In this case, Plaintiffs left their personal property unattended on the sidewalks. They did so despite the numerous 10593 signs blanketing Skid Row that specifically warned that personal property found on the sidewalks in violation of the Los Angeles Municipal Code section 56.11 (the "Ordinance" or "LAMC § 56.11") would be seized and disposed of during scheduled clean-ups. The majority impermissibly stretches our Fourth Amendment jurisprudence to find that Plaintiffs had a protected interest in their unattended personal property. In addition, because Plaintiffs have not demonstrated a protected property interest, I would reverse the district court's ruling that Plaintiffs established a likelihood of success on the merits of their claim under the Fourteenth Amendment.

II. Analysis

B. Plaintiffs Lacked an Objectively Reasonable Expectation of Privacy in Their Unattended Personal Property under the Fourth Amendment.

Plaintiffs do have a right to use the public sidewalks, but this does not mean that they may leave personal property unattended on the sidewalk, particularly where the Ordinance prohibits it and multiple signs expressly warn the public that unattended personal property "is subject to disposal by the City of Los Angeles."[3] The issue is not whether Plaintiffs illegally occupied the sidewalks; they did not. However, Plaintiffs violated the law. They left their personal property unattended on the City's sidewalks, in clear violation of the City's Ordinance prohibiting that conduct. In other words, by leaving their property unattended in violation of the City's Ordinance and in the face of express notice that their property would be removed during the scheduled clean-ups, Plaintiffs forfeited any privacy interest that society recognizes as objectively reasonable.

The [most] apt comparison is leaving an unattended bag in the airport terminal or a train station, where travelers are warned that such unattended personal property may be immediately seized and destroyed.[6] In the hypothetical of an illegally parked vehicle, there is no warning that the vehicle, in addition to being ticketed and towed, will be destroyed. Here, just as in the airport hypothetical, the City has a legitimate interest in immediately destroying personal property left on the streets rather than storing it for health and safety reasons.[7] Unfortunately, in light of the incidents of domestic terrorism, the City must be concerned with potential dangers arising from a cart, box, bag, or other container left unattended in a public place as they could easily contain bombs, weapons, or bio-hazards.[4]

[4] The majority does not really argue that a City may not seize an illegally parked car or an unlawfully unattended dog. Thus, it would appear that the majority's real concern is not with the constitutionality of the City's seizure of the unattended personal property but with the disposal of the property. Indeed, the district court's injunction allows the City to continue to seize property where it has "an objectively reasonable belief that it is abandoned." But it is difficult for the City to determine whether personal items are unattended or abandoned. Furthermore, legitimate concerns for public safety and health require that the City search and remove unattended property on its public sidewalks. I would hold that the fact that a cart is apparently unattended on a public sidewalk where warning signs are prominently displayed allows the City to search and seize the property.

C. Plaintiffs Did Not Have a Property Interest in their Unattended Personal Property Under the Fourteenth Amendment.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

The Eleventh Circuit has held that there is no "constitutional right to store one's personal belongings on public lands" regardless of subjective expectations. *Church,* 30 F.3d at 1345. Similarly, in this case, there do not appear to be any "existing rules or understandings" that provide Plaintiffs with an objectively protected interest that allows them to leave their belongings unattended on public sidewalks, even if temporarily.

California Penal Code section 647c provides that cities have the power to "regulate conduct upon a street, sidewalk, or other place or in a place open to the public." Although this law is not definitive, it does suggest that California's "existing rules or understandings" weigh in favor of the City. The courts should be reluctant to find a protected property interest where, as here, the result has far-sweeping implications for cities across the country, including their basic responsibility for public health and safety.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DISPOSED OF

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO: 15-220 AC

LOWER COURT NO: M15013370

ANDREW TOOMBS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

Opinion filed: July 11, 2017.

An Appeal from the County Court for Miami-Dade County, Florida, Judge Robin Faber.

John Eddy Morrison, Assistant Public Defender, for Appellant.

K. Philip Harte, Assistant State Attorney, for Appellee.

Before, ELLEN SUE VENZER, MARISA TINKLER MENDEZ, MIGUEL M. DE LA O, JJ.

DE LA O, J.

Appellant, Andrew Toombs ("Toombs"), appeals his conviction for violating a City of Miami ("City")[1] ordinance, section 37-8 of the Miami Municipal Code Part II, which prohibits "soliciting, begging or panhandling" in the "Downtown Business District" ("Ordinance"). This appeal concerns only the constitutionality of the Ordinance.[2]

[1] After Toombs filed his notice of appeal, the City intervened in this appeal.

[2] The parties do not dispute the facts which resulted in Toombs' conviction. Toombs was approaching vehicles begging for money within the "Downtown Business District," but never obstructed traffic. Toombs pled no contest and preserved his constitutional challenge for appeal.

We review the constitutional challenge to the Ordinance *de novo*. *City of Fort Lauderdale* v. *Dhar*, 185 So. 3d 1232, 1234 (Fla. 2016). Because panhandling is speech protected by the First Amendment, *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980),[3] and because city streets and sidewalks are recognized as "quintessential public forum[s]," *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983), we first determine if the Ordinance is content-neutral, then apply the level of scrutiny commensurate with the answer.

With over 200 years of constitutional jurisprudence to guide us, we do not typically write on a clean slate when discussing the First Amendment. Here, the slate comes to us especially filled with the binding precedent of the United States Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). One court has described *Reed* as working a "sea change in First Amendment law." *Blitch v. City of Slidell*, 2017 WL 2840009, at *7 (E.D. La., June 22, 2017).

Although the ordinance in *Reed* addressed outdoor signs rather than panhandling, it clarified the analysis courts must apply in determining whether a statute violates the First Amendment.

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed, 135 S. Ct. at 2227 (citations omitted).

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[3] *See Gresham v. Peterson*, 225 F.3d 899, 904-05 (7th Cir. 2000) ("[w]hile some communities might wish for all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support."). *See also Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection.").

The analytical framework adopted in *Reed* has resulted in the invalidation of panhandling statutes similar to the one at issue here. In the immediate aftermath of *Reed,* the Seventh Circuit granted rehearing in *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and reversed its ruling upholding the constitutionality of Springfield's panhandling ordinance.[4]

> The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in *Reed* found that insufficient: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2228. It added: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230.
>
> . . . The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (citations omitted). Other courts have applied *Reed* to strike down panhandling ordinances nationwide, as the federal district court noted in *Thayer v. City of Worchester*, 144 F. Supp. 3d 218 (D. Mass. 2015):

> As to Ordinance 9-16 [the panhandling ordinance], a protracted discussion of this issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content based and therefore, subject to strict scrutiny. Simply put, *Reed* mandates a finding that Ordinance 9-16 is content based because it targets anyone seeking to engage in a specific type of speech, *i.e.*, solicitation of donations.

Id. at 233 & n.2. Neither the State nor the City could direct us to any decision post-*Reed* upholding a law criminalizing panhandling. Every single decision after *Reed* has struck down panhandling

[4] It is important to note that Springfield's Ordinance also prohibited panhandling in its Downtown Historic District, although the statute was more narrowly drawn than the City's.

laws similar to the City's Ordinance.[5] *See Blitch v. City of Slidell*, 2017 WL 2840009 (E.D. La., June 22, 2017); *Champion v. Commonwealth*, 2017 WL 636420 (Ky., Feb. 16, 2017); *City v. Willis*, 375 P.3d 1056 (Wash. 2016); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 (M.D. Fla., Aug. 5, 2016); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015); and *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015).

Perhaps the court in *Champion* explained best why the City's Ordinance is unconstitutional as a content-based speech restriction:

> On its face, Ordinance 14-5 singles out speech for criminal liability based solely on its particularized message. Only citizens seeking financial assistance on public streets and intersections face prosecution. For example, someone standing at a prominent Lexington intersection displaying a sign that reads "Jesus loves you," or one that says "Not my President" has no fear of criminal liability under the ordinance. But another person displaying a sign on public streets reading "Homeless please help" may be convicted of a misdemeanor. The only thing distinguishing these two people is the content of their messages. Thus, to enforce Ordinance 14-5, law enforcement would have to examine the content of the message conveyed to determine whether a violation has occurred. This then, in effect, prohibits public discussion in a traditional public forum of an entire topic. And as a result, this ordinance is unambiguously content-based and is presumptively unconstitutional.

Champion, 2017 WL 636420 at *4.

Having concluded that the Ordinance is content-based, it can be deemed constitutional only if it passes strict scrutiny analysis. However, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000) (citations omitted).

> When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded Congressional enactments is reversed. Content-based regulations are presumptively invalid and the Government bars the burden to rebut that presumption.

[5] *Cf. Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 860 (N.D. Tex. 2015) (ordinance which regulates all interactions between pedestrians and the occupants of vehicles stopped at traffic lights is content neutral).

Id. at 816.

The City claims the purpose of the Ordinance is to protect tourism, encourage expansion of the City's economic base, and protect the City's economy, as set forth in the preamble to the Ordinance. Although no evidence was introduced at trial to support these assertions, we would reject these claims as insufficient to survive strict scrutiny even if the City or the State had introduced evidence at trial to support them.

> . . . [T]he promotion of tourism and business has never been found to be compelling government interest for the purposes of the First Amendment. *See Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992) ("The City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests.").
>
> * * *
>
> The mechanism by which Lowell's ban on panhandling downtown would promote tourism flies in the face of the First Amendment. The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed. It is core First Amendment teaching that on streets and sidewalks a person might be "confronted with an uncomfortable message" that they cannot avoid; this "is a virtue, not a vice." Just as speech cannot be burdened "because it might offend a hostile mob," *Forsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 135 (1992), it cannot be burdened because it would discomfort comparatively more comfortable segments of society.
>
> For First Amendment purposes, economic revitalization might be important, but it does not allow the sensibilities of some to trump the speech rights of others.

McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 189-90 (D. Mass. 2015) (citations omitted).

Moreover, *Reed* makes clear that benign motives will not shield a facially content-based speech abridgement.

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral

> justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster, [Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105,] 117 [(1991)]. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 135 S. Ct. at 2228.

The City argues that it does not discriminate among viewpoints, that no one is allowed to solicit funds whether they are homeless or members of the girl scouts. This is an outdated view of First Amendment jurisprudence which was rendered obsolete by *Reed*. In *Reed*, the Circuit Court of Appeals had upheld the sign ordinance because it did "not mention any idea or viewpoint, let alone single one out for differential treatment." *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 977 (9th Cir. 2009). The Court firmly rejected this argument.

> This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints – or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker" – is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va., 515* U.S. 819, 829 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980).
>
> Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Id.*

Reed, 135 S. Ct. at 2229-30.

Consequently, we **REVERSE** the trial court's finding that the Ordinance is constitutional, and **REMAND** this matter to the trial court for proceedings consistent with this opinion.

ELLEN SUE VENZER and MARISA TINKLER MENDEZ, J.J., concur.

ELLEN SUE VENZER
Circuit Judge

MARISA TINKLER MENDEZ
Circuit Judge

MIGUEL M. DE LA O
Circuit Judge

Mark MESSINA, et al., Plaintiffs,

v.

CITY OF FORT LAUDERDALE, FLORIDA, a Florida municipal corporation, Defendant.

CASE NO. 21-cv-60168-ALTMAN/Hunt

United States District Court, S.D. Florida.

Signed 06/23/2021

Background: County residents brought § 1983 action against city, challenging city's panhandling regulations under First Amendment. Residents moved for preliminary injunction.

Holdings: The District Court, Roy K. Altman, J., held that:

(1) residents had Article III standing;

(2) panhandling ordinance was content-based restriction of speech, and thus subject to strict scrutiny under First Amendment;

(3) residents were likely to succeed on merits;

(4) residents established that they would suffer irreparable injury in absence of preliminary injunction; and

(5) balance of harms and public interest considerations weighed in favor of granting motion.

Motion granted.

1. Federal Civil Procedure ⚿103.2

When individual is subject to threatened enforcement of law, actual arrest, prosecution, or other enforcement action is not prerequisite for standing to challenge law. U.S. Const. art. 3, § 2, cl. 1.

2. Constitutional Law ⚿699

Person has standing to bring pre-enforcement suit when he has alleged intention to engage in course of conduct arguably affected with constitutional interest, but proscribed by statute, and there exists credible threat of prosecution. U.S. Const. art. 3, § 2, cl. 1.

3. Constitutional Law ⚿855

County residents sufficiently alleged injury necessary to establish Article III standing to bring facial challenge under First Amendment to city ordinance forbidding "aggressive panhandling," including requesting donation after person has given negative response to initial request, blocking individuals or groups from passage, touching another without permission, and intimidating conduct; although residents did not allege that they intended to intimidate pedestrians or to touch others without consent, they alleged that want to do certain things that "aggressive panhandling" provisions arguably forbade, and that their

speech was chilled because they feared prosecution under ordinance. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

4. Constitutional Law ⚿1163

First Amendment's "overbreadth doctrine" allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though as applied to him the statute would be constitutional. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⚿1521

Under First Amendment's "overbreadth doctrine," if plaintiff can show that challenged law punishes substantial amount of protected free speech, judged in relation to statute's plainly legitimate sweep, court may invalidate all enforcement of that law, until and unless limiting construction or partial invalidation so narrows it as to remove seeming threat or deterrence to constitutionally protected expression. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

6. Injunction ⚿1092

To prevail on motion for preliminary injunction, plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits, (2) they will suffer irreparable injury unless the injunction is granted, (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party, and (4) the injunction would not be adverse to the public interest.

7. Injunction ⚿1096

For purposes of motion for preliminary injunction, a substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain, success.

8. Injunction ⚿1096

Substantial likelihood of success on the merits is generally the most important factor in the preliminary injunction analysis.

9. Injunction ⚿1246

When the government is the opposing party to a motion for a preliminary injunction, the balance of harms and public interests factors merge.

10. Injunction ⚿1563

Plaintiffs bear the burden of proving their entitlement to a preliminary injunction.

11. Constitutional Law ⚿1880

Panhandling is protected speech under the First Amendment. U.S. Const. Amend. 1.

12. Constitutional Law ⚿1739

The government may regulate protected speech in traditional public fora, but the legality of any such regulation turns on its justification and the degree to which the regulation is tailored to that justification. U.S. Const. Amend. 1.

13. Constitutional Law ⚿1739

If a law regulating protected speech in traditional public fora limits speech based on its communicative content, i.e., a content-based restriction, then it is subject to strict scrutiny. U.S. Const. Amend. 1.

14. Constitutional Law ⚿1053

Laws subject to strict scrutiny are presumptively unconstitutional, and government must prove that they are narrowly tailored to serve compelling state interests. U.S. Const. Amend. 1.

15. Constitutional Law ⚿1739

A law regulating protected speech in traditional public fora which imposes reasonable and content-neutral restrictions, i.e., on the time, place, or manner of

speech, must withstand only intermediate scrutiny, which requires both that the regulation be narrowly tailored to serve a significant governmental interest and that it leave open ample alternative channels for communication of the information. U.S. Const. Amend. 1.

16. Constitutional Law ⚿1517

Regulation of speech is "content-based," and therefore subject to strict scrutiny, if it applies to particular speech because of topic discussed or idea or message expressed. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

17. Constitutional Law ⚿1518

If law regulating speech expressly draws distinctions based on communicative content, law will be subject to strict scrutiny regardless of government's benign motive, content-neutral justification, or lack of animus towards ideas contained in regulated speech. U.S. Const. Amend. 1.

18. Constitutional Law ⚿1517

Some facial distinctions are obvious, insofar as they define speech by particular subject matter, whereas others are more subtle, defining regulated speech by its function or purpose, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. U.S. Const. Amend. 1.

19. Constitutional Law ⚿1513, 1517

Laws may be facially neutral, but still content based and therefore subject to strict scrutiny, if they cannot be justified without reference to content of regulated speech or if they were adopted by government because of disagreement with message speech conveys. U.S. Const. Amend. 1.

20. Constitutional Law ⚿1880

City's panhandling ordinance was content-based restriction of speech, and thus subject to strict scrutiny on First Amendment challenge by county residents; ordinance regulated solicitations made in person requesting immediate donation of money or other thing of value, but did not cover other topics of discussion. U.S. Const. Amend. 1.

21. Civil Rights ⚿1457(7)

Under strict scrutiny analysis applicable to content-based restrictions of speech, county residents were likely to succeed on merits of their First Amendment challenge to city's panhandling ordinance, which prohibited solicitations made in person requesting immediate donations of money or other things of value in certain kinds of locations throughout city, as required for preliminary injunction blocking enforcement of ordinance; city's stated economic interest in limiting panhandling was not compelling, advancing comfort of residents was not compelling interest, and city failed to show that ordinance was designed to further its compelling interest in public safety, since ordinance was both over- and under-inclusive in that regard. U.S. Const. Amend. 1.

22. Constitutional Law ⚿1150

Allowing uncomfortable messages is a virtue, not a vice, of the First Amendment. U.S. Const. Amend. 1.

23. Constitutional Law ⚿1504

Public safety is a compelling governmental interest for purposes of regulating speech. U.S. Const. Amend. 1.

24. Statutes ⚿1161

When a statute includes a list of terms or phrases followed by a limiting clause, the limiting clause should ordinarily be read as modifying only the noun or phrase that it immediately follows.

25. Constitutional Law ⚿1880

City's panhandling ordinance prohibiting persons from standing on any portion

of designated rights-of-way and selling or advertising for sale service or item, or asking for donation, was content-based restriction of speech, and thus subject to strict scrutiny on First Amendment challenge by county residents, where ordinance did not prevent anyone from standing in same spot and communicating other messages. U.S. Const. Amend. 1.

26. Civil Rights ⇐1457(7)

Under strict scrutiny analysis applicable to content-based restrictions of speech, county residents were likely to succeed on merits of their First Amendment challenge to city's ordinance prohibiting persons from standing on any portion of designated rights-of-way and selling or advertising for sale service or item or asking for donation, as required for preliminary injunction blocking enforcement of ordinance; ordinance did not promote city's stated goal of promoting traffic safety by banning pedestrian-driver interactions, since ordinance did not preclude people from standing in same portions of rights-of-way and talking to pedestrians or drivers about any other topic. U.S. Const. Amend. 1.

27. Civil Rights ⇐1457(7)

Under intermediate scrutiny analysis applicable to content-neutral restrictions of speech, county residents were likely to succeed on merits of their First Amendment challenge to city's ordinance prohibiting persons from standing on any portion of designated rights-of-way and engaging in hand-to-hand transmissions with persons in motor vehicles, as required for preliminary injunction blocking enforcement of ordinance; city failed to provide evidence that ordinance was least intrusive means of advancing its stated interest in maintaining or improving traffic flow, or that city investigated issue, what evidence it collected, or extent to which it entertained other regulatory options. U.S. Const. Amend. 1.

28. Civil Rights ⇐1457(7)

County residents were likely to succeed on merits of their First Amendment challenge to city's ordinance prohibiting canvassers from holding signs which violated general city sign ordinance on any portion of designated public rights-of-way, where city offered no justification of ordinance, and to extent that city argued that law should only be enforced on private property, city's police were nevertheless enforcing it on public rights-of-way. U.S. Const. Amend. 1.

29. Civil Rights ⇐1457(1)

The loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury for purposes of preliminary injunction analysis. U.S. Const. Amend. 1.

30. Civil Rights ⇐1457(7)

County residents established that they would suffer irreparable injury in absence of preliminary injunction barring enforcement of city's panhandling regulations, in action challenging regulations under First Amendment; residents established likelihood of success on merits of claim that regulations abridged their free speech rights, and money damages would not compensate them for past deprivation of their constitutional rights, particularly in light of fact that residents relied on panhandling as only means of subsistence. U.S. Const. Amend. 1.

31. Civil Rights ⇐1457(7)

Balance of harms and public interest considerations weighed in favor of granting county residents' motion for preliminary injunction against enforcement of city's panhandling regulations; residents established likelihood of success on merits of claim that regulations abridged their free speech rights, and public had no interest in enforcing unconstitutional law. U.S. Const. Amend. 1.

32. Injunction ⚿1253

The public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law, for purposes of the preliminary injunction analysis; enforcing unconstitutional laws not only wastes valuable public resources, but also disserves the public interest.

Dante Pasquale Trevisani, Raymond J. Taseff, Florida Justice Institute, Miami, FL, F. Jahra McLawrence, The McLawrence Law Firm, Tamarac, FL, Mara Shlackman, Law Offices of Mara Shlackman, P.L., Fort Lauderdale, FL, for Plaintiffs.

Michael Thomas Burke, Hudson Carter Gill, Johnson Anselmo Murdoch Burke Piper & Hochman PA, Fort Lauderdale, FL, for Defendant.

ORDER

ROY K. ALTMAN, UNITED STATES DISTRICT JUDGE

Mark Messina and Bernard McDonald are men of limited means. To survive, they hold signs and panhandle in the City of Fort Lauderdale—sometimes on sidewalks, sometimes along public roads. The City enacted (and its police have been enforcing) two ordinances that chill these activities. The first ordinance bans solicitation in designated areas—at bus stops and garages, for instance, or near ATMs and sidewalk cafés—and it prohibits so-called "aggressive panhandling" anywhere within the City's limits. The second ordinance makes it illegal to solicit donations along certain arterial roads—including via hand-to-hand exchanges with motorists—and it forbids canvassers from standing on those roads and holding signs that violate the City's sign regulations. Both ordinances are punishable by fines and imprisonment.

Messrs. Messina and McDonald (our Plaintiffs) have sued the City under 42 U.S.C. § 1983 for past and ongoing injuries to their rights under the First Amendment to the U.S. Constitution. As redress, they've asked us to enjoin both ordinances. After a hearing and a careful review of the record, we conclude that the Plaintiffs are likely to succeed on the merits of their claims and that they've satisfied the other requirements for preliminary injunctive relief. We therefore **GRANT** their motion for a preliminary injunction.

Background

In May 2012, the Fort Lauderdale City Commission enacted Ordinance No. C-12-10, which it later codified as § 16-82 of the City Code (we'll refer to this Ordinance as "§ 16-82" or the "Panhandling Ordinance"). *See* Complaint [ECF No. 1] ¶ 1. About two-and-a-half years later, the Commission enacted Ordinance No. C-14-38, which it later codified as § 25-267 of the City Code (we'll refer to this Ordinance as "§ 25-267" or the "Right-of-Way Ordinance"). *Id.* ¶ 22. These are the two Ordinances the Plaintiffs challenge in this case, so we'll take a moment to describe each in detail.[1]

The Panhandling Ordinance bans two activities. *First*, it prohibits "panhandling" in certain *kinds* of locations throughout the City—at bus stops and transportation facilities; in parking lots and City parks; anywhere within 15 feet of sidewalk cafés, ATMs, or entrances to commercial or government buildings; and on private property. § 16-82(b). The Ordinance defines "panhandling" as any request for "an immediate donation of money or thing of value," or an exchange in which one person receives an item of "little or no mone-

1. For full-text versions, see Appendices A & B. Both Ordinances and the entire City Code are available at https://library.municode.com/fl/fort_lauderdale/codes/code_of_ordinances.

tary value in exchange for a donation," such that "a reasonable person would understand that the transaction is in substance a donation." § 16-82(a). Panhandling *doesn't* include "passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought, but without any vocal request other than a response to an inquiry by another person." *Id.*

Second, the Panhandling Ordinance forbids "aggressive panhandling" *anywhere* within City limits. § 16-82(c). "Aggressive panhandling" is a form of panhandling that includes the following: (1) approaching someone in a manner that would lead a "reasonable person to believe" that he is "being threatened with either imminent bodily injury or the commission of a criminal act upon the person"; (2) requesting a donation after a person has "given a negative response to the initial request"; (3) blocking individuals or groups from passage; (4) touching another without permission; or (5) "[e]ngaging in conduct that would reasonably be construed as intended to intimidate, compel or force a solicited person to accede to demands." § 16-82(a).

Section 25-267, the Right-of-Way Ordinance, identifies and regulates a distinct category of panhandler whom the provision refers to as the "right-of-way canvasser or solicitor." This person does any of the following three things on a "right-of-way"[2] : he (1) sells items or services of any kind, or advertises for sale anything or service of any kind; (2) seeks a "donation of any kind"; or (3) "personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind" to a motorist on any street or roadway, whether the motorist's vehicle is temporarily stopped or not. § 25-267(a). The Ordinance makes it illegal to act "as a right-of-way canvasser or solicitor"—that is, to engage in one of the three listed activities—on any portion of certain specified public rights-of-way. § 25-267(b). It's also illegal for a right-of-way canvasser "to hold, carry, possess or use any sign or other device of any kind, within any portion of the public right-of-way contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations." § 25-267(d).[3]

The penalties for violating the Panhandling Ordinance or the Right-of-Way Ordinance are set forth in § 1-6 of the City Code and include fines of up to $500, a term of imprisonment of up to 60 days, or both. § 16-82(d); § 25-267(f).

The Plaintiffs are residents of Broward County. *See* Complaint ¶¶ 7–8. They've either lived without permanent housing or struggled to pay for basic needs and expenses, and they rely on donations for their subsistence. *Id.* Mr. Messina solicits pedestrians for donations, typically on city sidewalks near commercial areas or outdoor cafés—though sometimes he stands on the medians or shoulders of roads to ask for donations from motorists who are temporarily stopped in traffic. *Id.* ¶ 36. He often holds a sign with a religious message and sometimes distributes pamphlets, hoping for donations in return. *Id.* ¶ 37. When Mr. Messina panhandles in the City, he is

2. The term "right-of-way" is borrowed from § 25-97 of the City Code, and it means "the surface and space above and below any real property in which the city has an interest in law or equity, whether held in fee, or other estate or interest, or as a trustee for the public, including, but not limited to any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, or bridge."

3. Section 47-22 is the City's sign regulation, which is generally applicable on private property. *See* § 47-22-1(c) ("This section regulates the time, place and manner in which a sign is erected, posted, or displayed on private property[.]").

"regularly harassed by [City] officers who will drive up to where he is standing and yell at him to leave the area immediately and warn him that if they see him again, they will arrest him." *Id.* ¶ 38. On several occasions, he's seen the police arrest *other* panhandlers. *Id.* ¶ 39. Mr. Messina panhandles a few times a week and would like to do so more often, but he doesn't because of his fear of arrest. *Id.* ¶ 39.

Mr. McDonald likewise panhandles at several locations in the City, standing on sidewalks adjacent to the street or on the medians or shoulders of City roads. *Id.* ¶ 43. He displays a sign that reads "Homeless, please help me if you can," *id.*, and—like Mr. Messina—he's been "repeatedly harassed" and threatened with arrest by the police, *id.* ¶ 44. Those experiences have deterred him from panhandling more frequently. *Id.* ¶ 45.[4]

In this lawsuit, the Plaintiffs assert two counts under the First Amendment—one for each Ordinance—and ask for the following relief: (1) declarations that §§ 16-82 and 25-267 violate the First Amendment, facially and as applied to the Plaintiffs; (2) a preliminary and permanent injunction prohibiting the City from enforcing §§ 16-82 and 25-267; (3) money damages; and (4) attorneys' fees and costs. *Id.* ¶¶ 47–63.

Procedural History

Soon after the Plaintiffs filed their Complaint, they moved for a preliminary injunction, arguing that they've been irreparably harmed by having their speech chilled and that preliminary relief is equitable insofar as the City has no valid interest in enforcing unconstitutional laws. *See generally* Motion for Preliminary Injunction ("Motion") [ECF No. 5]. The City subsequently moved to dismiss the Complaint for lack of subject matter jurisdiction, *see* Defendant City's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") [ECF No. 12], contending that the Plaintiffs lack Article III standing because (1) they haven't been arrested or cited for violating the Ordinances and (2) their general allegations of "harassment" don't suffice to state a concrete injury, *id.* ¶¶ 2–3. Nor, according to the City, can the Plaintiffs *really* allege that their speech has been "chilled" because (as they acknowledge) they continue to panhandle in the City. *Id.*[5]

After both motions were fully briefed,[6] the Court scheduled a preliminary injunction hearing and asked the parties whether they intended to call witnesses or present additional evidence. *See* Order [ECF No. 26]. The City submitted an excerpt of Mr. McDonald's deposition testimony from another case—which it used to challenge his Article III standing—and a copy of the sign ordinance, § 47-22. *See* Joint Notice [ECF No. 27]. In their Reply, the Plaintiffs sought to introduce an updated arrest

4. The Plaintiffs allege that, since 2018, more than 100 people have been arrested or cited with a notice to appear in court for violations of the two Ordinances, and they claim that "the predominant reason for [these] arrests or citations was solicitation of donations." *Id.* ¶ 33.

5. The City didn't challenge the Plaintiffs' standing to attack any of the Ordinances' *specific* provisions; it argued only that their speech hasn't been chilled *generally—i.e.,* that they haven't suffered any Article III injury. *See generally* Motion to Dismiss.

6. *See* Defendant City of Fort Lauderdale's Response to Plaintiff's Motion for Preliminary Injunction ("Response") [ECF No. 11]; Plaintiffs' Reply to Defendant City of Fort Lauderdale's Response to Plaintiffs' Motion for Preliminary Injunction ("Reply") [ECF No. 21]; *see also* Plaintiffs' Response and Memorandum of Law in Opposition to Defendant City's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Response to Motion to Dismiss") [ECF No. 20]; Defendant City's Reply in Support of Motion to Dismiss ("Reply to Motion to Dismiss") [ECF No. 22].

report. *See id.* At the Hearing, we sustained the City's objection to this report—which, after all, the Plaintiffs had only submitted in Reply. *See* Apr. 9, 2021 Hr'g. The Plaintiffs also introduced copies of the Ordinances, the arrest records, and a letter signed by various organizations asking the City Commission to repeal the Ordinances. *See* Motion, Exs. 1–6.

At the Hearing, we denied the City's Motion to Dismiss,[7] explaining that Article III standing is "loosened" for First Amendment challenges to laws that are broadly applicable to the public. *See Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001); *see also Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 762 n.5 (11th Cir. 1991) ("[T]he broader the first amendment right and . . . the more likely it is that a governmental act will impinge on the first amendment, the more likely it is that the courts will find a justiciable case when confronted with a challenge to the governmental act."). And we found that the Plaintiffs' specific claims of police harassment—coupled with their concrete allegations about personally seeing the police arrest *others* for panhandling—were more than sufficient to raise an inference that their speech had been chilled and that they'd suffered an injury in fact. *See generally* Apr. 9, 2021 Hr'g. Alleging standing at the pleading stage is, we noted, relatively easy. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (explaining that "general factual allegations of injury" suffice at the pleading stage and that plaintiffs must substantiate general claims with "specific facts" *only* at later stages of the case); *see also Bennett v. Spear*, 520 U.S. 154, 171, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (noting that the burden to *plead* standing is "relatively modest").

We noted, moreover, that the Plaintiffs didn't have to be arrested or prosecuted to raise a facial challenge to the Ordinances under the First Amendment; they only needed to do precisely as they did: allege that they (1) intended to engage in the banned activity and (2) faced a credible threat of prosecution. *See, e.g., Pittman*, 267 F.3d at 1283–84 (holding that, to establish standing, "the plaintiff must show that he or she had an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution" (cleaned up)). In other words, the Plaintiffs had only to demonstrate that their decision to refrain from protected speech was objectively reasonable—which is to say, that it wasn't an injury they'd manufactured. We also rejected the near-frivolous argument that the Plaintiffs' injury claims were belied by their decision to continue panhandling. *See* Apr. 9, 2019 Hr'g. The concept of "chilled speech," we explained, isn't an either-or proposition. *Id.* It doesn't require the Plaintiffs to cease their protected activities entirely—so long as they can show that they reduced *the frequency* of their speech *because of* a credible fear of arrest. *Id.* In that way, we held, the Plaintiffs suffered (and continue to suffer) an Article III injury.

At the argument on the Plaintiffs' request for a preliminary injunction, the City raised three new issues. *First*, it suggested that § 25-267(d) proscribes sign-holding only on *private* property, and not on public rights-of-way—though it eventually conceded that the provision was "poorly drafted" and, at best, ambiguous as to whether

7. We later issued a written order to that effect. *See* Order Denying Motion to Dismiss [ECF No. 31].

it applied on public or private land. Because City police officers were enforcing the provision on *public* sidewalks, though—and because the Plaintiffs often hold signs while panhandling on sidewalks—the City agreed to issue a memorandum directing its officers *not* to enforce that provision on *public* rights-of-way. *Second*, the City at least implied that the Plaintiffs lacked standing to challenge the aggressive panhandling provision in § 16-82 because they hadn't alleged that, as part of their panhandling activities, they routinely threaten, touch, or block pedestrians. *Third*, the City contended that the hand-to-hand clause in the Right-of-Way Ordinance was a distinct, content-neutral prohibition, which could be isolated from the other proscriptions and evaluated separately. Because the City hadn't advanced any of these arguments before, we invited supplemental briefing. Now that the parties have submitted those additional papers,[8] we address the Plaintiffs' Motion—and, for the following reasons, we **GRANT** it in full.

Standing

As we've explained, at the Hearing—and after we'd found that the Plaintiffs had sufficiently alleged an Article III injury—the City launched a renewed attack on the Plaintiffs' standing to advance a facial challenge against the Panhandling Ordinance's "aggressive panhandling" provisions. Specifically, the City claimed that the Plaintiffs lacked standing to pursue that aspect of their claims because they failed to allege that they engaged (or intended to engage) in conduct that falls within the ambit of those provisions—intimidating pedestrians, for example, or touching others without consent. *See* Apr. 9, 2021 Hr'g. The City didn't say much more on the subject; nor has it briefed the issue, either before or after the Hearing. *See generally* Motion to Dismiss; Supplemental Response. We address it anyway, though, because it's "the Court's responsibility to 'zealously insure that jurisdiction exists over a case.' " *Sully v. Scottsdale Ins. Co.*, 533 F.Supp.3d 1242, 1251 (S.D. Fla. 2021) (Altman, J.) (quoting *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001)).

[1, 2] "When an individual is subject to [the threatened enforcement of a law], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). So, a person may bring a pre-enforcement suit when he "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[.]" *Id.* (citation omitted); *see also ACLU v. The Florida Bar*, 999 F.2d 1486, 1494 & n.13 (11th Cir. 1993) (explaining that a plaintiff must have an objectively reasonable belief about the likelihood of disciplinary action).

[3–5] The Plaintiffs (it's true) haven't alleged that they intend to intimidate pedestrians or to touch others without consent. *See generally* Complaint. But it's still reasonable to infer—at least at this stage of the case—that (1) they want to do certain things the "aggressive panhandling" provisions arguably forbid, *and* that (2) their speech has been chilled because they

8. *See* Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Supplemental Brief") [ECF No. 32]; Defendant City's Supplemental Response to Plaintiff's Motion for Preliminary Injunction ("Supplemental Response") [ECF No. 40]; Plaintiffs' Reply to Defendant City of Fort Lauderdale's Response to Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Supplemental Reply") [ECF No. 47].

fear prosecution. So, for example, by standing on a narrow sidewalk and asking strangers for donations (even in areas not covered by § 16-82(b)), it's likely that the Plaintiffs will end up making a second request after a first refusal or that they'll accidentally "block" (or even touch) others on the sidewalk. And it's undisputed that the Plaintiffs *could* be subject to arrest in either of those scenarios. *See* § 16-82(a)(2), (3) (prohibiting second requests after initial refusal and penalizing panhandlers for "blocking" pedestrians). Unsurprisingly, then, the Plaintiffs allege that they (subjectively) fear arrest under both Ordinances. *See* Complaint ¶ 40. And, given the breadth of the "aggressive panhandling" provisions, their decision to chill their own speech seems reasonable in the circumstances. Indeed, the Plaintiffs allege that, while panhandling, police officers have harassed them and threatened them with arrest, *see id.* ¶¶ 38, 44, and that they've seen officers arrest *other* panhandlers, *see id.* ¶ 39—claims they've corroborated by appending to their Motion a stack of arrest and citation records, showing (they say) that the City's police officers continue to arrest panhandlers for violating the "aggressive panhandling" provisions. *See* Arrest Records [ECF No. 5-6] at 8, 14, 33 (citations for "aggressive panhandling").[9] The Plaintiffs, in short, have standing to advance their facial challenge to the "aggressive panhandling" provisions.

Preliminary Injunction

[6–10] To prevail here, the Plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would

9. This evidence of third-party arrests—together with the scope of the "aggressive panhandling" provisions—*may* bring this case within the ambit of the First Amendment's "overbreadth doctrine." That doctrine allows "a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though 'as applied' to him the statute would be constitutional." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). If a plaintiff can show that the challenged law punishes a "substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep," the court may "invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression[.]" *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (cleaned up). The Supreme Court has "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Id.* at 119, 123 S.Ct. 2191.

Because the Plaintiffs' activities are arguably proscribed by the "aggressive panhandling" provisions, and because—at this stage—the Plaintiffs have plausibly alleged a reasonable fear of prosecution, we don't need to dive into the murky waters of overbreadth standing. We note, though, that the "standing" concerns the City raised at the Hearing are perhaps better suited for a merits-based evaluation. *See Munson*, 467 U.S. at 958–59, 104 S.Ct. 2839 ("The Secretary's [standing] concern ... is one that is more properly reserved for the determination of Munson's First Amendment challenge on the merits. The requirement that a statute be 'substantially overbroad' before it will be struck down on its face is a 'standing' question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has no 'standing' to allege that, as applied to others, the statute might be unconstitutional."). We, of course, address that merits question below. For now, though, it suffices to say that the Plaintiffs have standing to proceed through this initial phase of the case.

not be adverse to the public interest. *See, e.g., Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270–71 (11th Cir. 2020). The first factor, "a substantial likelihood of success on the merits," requires a showing of "only *likely* or probable, rather than *certain*, success." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005). It's worth noting, too, that this first factor is "generally the most important" of the four. *Id.* One last thing on these factors: the third and fourth factors " 'merge' when, as here, the [g]overnment is the opposing party." *Gonzalez*, 978 F.3d at 1270–71 (quoting *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020)). And, of course, the Plaintiffs bear the burden of proving their entitlement to a preliminary injunction. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000).

I. Likelihood of Success on the Merits

A. The First Amendment

[11] The First Amendment, applicable to the States through the Fourteenth, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend I. The City concedes, as it must, that panhandling is protected speech under the First Amendment. *See generally* Response; *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (holding that a request for charity or gifts, whether "on the street or door to door," is protected First Amendment speech); *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) ("There is no question that panhandling and solicitation of charitable contributions are protected speech."); *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection."). The City also acknowledges—or at least it doesn't contest—that both Ordinances regulate activities in "traditional public fora" (*e.g.*, sidewalks and public parks). *See generally* Response; *see also Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) ("Traditional public fora are public areas such as streets and parks that, since 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983))).

[12–15] The government may, of course, regulate protected speech in traditional public fora. But the legality of any such regulation turns on its justification and the degree to which the regulation is tailored to that justification. The state's burden in this regard depends on the regulation's features. If the law limits speech based on its communicative content—sometimes referred to as a content-based restriction—then it is subject to strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). Laws subject to strict scrutiny are "presumptively unconstitutional," which means that the government must prove that they are "narrowly tailored to serve compelling state interests." *Id.* By contrast, a regulation imposing reasonable and content-*neutral* restrictions—on the time, place, or manner of speech—must withstand only intermediate scrutiny, which requires *both* that the regulation be narrowly tailored to serve a significant governmental interest *and* that it "leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014); *see also Bloedorn*, 631 F.3d at 1231 ("[A] time, place, and manner restriction can be placed on a traditional public forum only if it is content neutral, narrowly tailored to achieve a significant government interest, and leaves open ample alternative channels of communication." (cleaned up)).

[16–19] So, how do we know if a law is content based or content neutral? Fortunately, the Supreme Court recently answered this question in *Reed*. A regulation of speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. In so holding, *Reed* clarified that courts must take the "crucial first step" of determining "whether the law is content neutral *on its face*," which means evaluating whether the law "expressly draws distinctions based on . . . communicative content." *Id.* at 165, 135 S.Ct. 2218 (emphasis added). If it does, the law will be subject to strict scrutiny "*regardless* of the government's benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech." *Id.* (emphasis added & cleaned up). Some facial distinctions will be "obvious" insofar as they define speech "by particular subject matter," whereas others "are more subtle, defining regulated speech by its function or purpose." *Id.* at 163, 135 S.Ct. 2218. But "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* A separate category of laws may be facially neutral—but still content based—if they can't be "justified without reference to the content of the regulated speech" or if they were "adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Applying this paradigm in *Reed*, the Court found that a town's sign ordinance was content based *on its face* because it exempted from certain permitting requirements three categories of signs—ideological signs, political signs, and temporary-event signs—which were exempted based only on the contents of the messages they expressed. *Id.* at 164–65, 135 S.Ct. 2218.

We can see *Reed*'s impact in two opinions—one before *Reed*, the other after—the Seventh Circuit issued in a case called *Norton v. City of Springfield, Illinois*. In its initial decision—issued before *Reed*—the Seventh Circuit recognized that "[t]he [Supreme] Court [had] classified two kinds of regulations as content based. One [was] regulation that restricts speech because of the ideas it conveys. The other [was] regulation that restricts speech because the government disapproves of its message." *Norton v. City of Springfield, Ill.*, 768 F.3d 713, 717 (7th Cir. 2014), *on reh'g*, 806 F.3d 411 (7th Cir. 2015). Based on that typology, the Seventh Circuit found it "hard to see an anti-panhandling ordinance as entailing either kind of discrimination." *Id.*

But that all changed after *Reed*. As the Seventh Circuit explained in reversing itself on rehearing, *Reed* held that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015) (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218). In other words, the Seventh Circuit read *Reed* as holding that an ordinance is content based if it distinguishes between *topics* of speech—even if it's neutral with respect to ideas or viewpoints. *Id.* Under this new framework, the Seventh Circuit vacated its prior opinion and reversed and remanded the case for the district court to enjoin an ordinance that prohibited panhandling in a city's historic district. *Id.* In his concurrence, Judge Manion predicted that "[f]ew regulations will survive [*Reed*'s] rigorous standard." *Id.* at 413 (Manion, J., concurring); *cf. Reed*, 576 U.S. at 180, 135 S.Ct. 2218 (Kagan, J., concurring) ("Given the Court's analysis, many sign ordinances of that kind are now in jeopardy.").

Judge Manion was right. Since 2015, several courts have found that panhandling

ordinances like the City's—especially general bans on panhandling in large swaths of a city, such as commercial zones or historic districts, or near bus stops and sidewalk cafés—are content based and (thus) unconstitutional. *See Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019) (affirming a preliminary injunction barring enforcement of an anti-loitering law because the law was "a content-based restriction [insofar as] . . . it applie[d] only to those asking for charity or gifts, not those who are, for example, soliciting votes, seeking signatures for a petition, or selling something"—*i.e.*, "its application depend[ed] on the 'communicative content' of the speech"); *Ind. C.L. Union Found., Inc. v. Superintendent, Ind. State Police*, 470 F. Supp. 3d 888, 895, 908 (S.D. Ind. 2020) (preliminarily enjoining an ordinance that banned panhandling (1) at various locations—including bus stops, parking facilities, and within 50 feet of ATMs or entrances to certain buildings; (2) while touching another without consent; and (3) while blocking another's path); *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 673 (E.D. La. 2017) (permanently enjoining an ordinance that required panhandlers to register with the chief of police and to wear identification before asking for money); *Homeless Helping Homeless, Inc. v. City of Tampa, Fla.*, 2016 WL 4162882, at *6 (M.D. Fla. Aug. 5, 2016) (permanently enjoining a general ban on panhandling in front of sidewalk cafés, within 15 feet of ATMs, and in other designated areas); *Browne v. City of Grand Junction, Colo.*, 136 F. Supp. 3d 1276, 1288–94 (D. Colo. 2015) (permanently enjoining a panhandling ban to the extent it (1) limited the times during which a person could panhandle; (2) prevented solicitation after a first refusal; and (3) banned panhandling on public buses or in parking garages, parking lots, or similar facilities); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 182 (D. Mass. 2015) (declaring unconstitutional (1) a ban on panhandling in certain areas of the city and (2) a ban on "aggressive panhandling").

As students of constitutional law will recognize, the application of strict scrutiny *usually* sounds the death knell for a challenged ordinance, particularly in the arena of the First Amendment. There are, of course, notable exceptions. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (holding that a canon of judicial conduct was "narrowly tailored to serve a compelling government interest" and that "the First Amendment pose[d] no obstacle to its enforcement"). But, so far anyway, there don't appear to be exceptions in the panhandling context. Carefully applying strict scrutiny, the courts in the cases we've cited above all came out the same way, concluding that the ordinances failed (or would likely fail) strict scrutiny. And, for that reason, we won't review the strict-scrutiny analysis in each case, other than to make two general observations. The first is that, in some cases, a city may not even be able to articulate the "compelling" interests that animated its decision to enact a panhandling prohibition. *See, e.g., Homeless Helping Homeless*, 2016 WL 4162882, at *2 (government conceding that it lacked any compelling interest in passing the panhandling law). A city may try to justify its ordinance by invoking a general interest in making its residents and tourists *feel* more "comfortable." But the Supreme Court has explained that a state has no compelling interest in banning uncomfortable (or unpleasant) speech. Indeed, as the Court has pointed out, allowing "uncomfortable message[s]" is a "virtue, not a vice" of the First Amendment. *McCullen*, 573 U.S. at 476, 134 S.Ct. 2518; *see also McLaughlin*, 140 F. Supp. 3d at 189 (noting that "the promotion of tourism and business has never been found to be a compelling government interest for the

purposes of the First Amendment" and that the First Amendment "does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed"); *Ind. C.L. Union*, 470 F. Supp. 3d at 904 ("[S]imply stating that individuals may not want to be approached for a solicitation is not enough to show a compelling interest.").

Our second observation is that public safety, as a general matter, is a compelling government interest. But when a city attempts to justify a panhandling ordinance by reference to public safety, it still has a steep hill to climb—even where, as here, the ordinance targets so-called "aggressive panhandling," which (at the very least) sounds dangerous. That's because "aggressive panhandling" ordinances often sweep in much more speech than is necessary to promote public safety—including speech that is entirely innocuous—while omitting conduct that's genuinely threatening. Where that's true—*viz.*, that the law is both under- and over-inclusive—then it's not narrowly tailored to accomplish the state's compelling interests, however provocatively it's titled. *See, e.g., Blitch*, 260 F. Supp. 3d at 670 ("Panhandling may be annoying to the residents of Slidell, but that does not establish that all panhandling is a threat to public safety. And at best, the City's summary judgment evidence demonstrates that the City is presently having some difficulty identifying aggressive panhandlers and the ordinance would aid Slidell in enforcing its law. That is an insufficient showing to justify such a sweeping registration requirement on prospective panhandlers."); *Browne*, 136 F. Supp. 3d at 1293–94 ("[T]he problem in this case is that Grand Junction has taken a sledgehammer to a problem that can and should be solved with a scalpel. In attempting to combat what it sees as threatening behavior that endangers public safety, Grand Junction has passed an ordinance that sweeps into its purview non-threatening conduct that is constitutionally protected.").

With that legal framework in mind, we turn to the Plaintiffs' arguments.

B. The Panhandling Ordinance, § 16-82

i. *The Panhandling Ordinance is Content Based*

[20] As the above summation should make clear, the Plaintiffs have shown that the Panhandling Ordinance is content based.[10] Like the panhandling laws that, in the wake of *Reed*, have been enjoined by federal courts across the country, our Panhandling Ordinance identifies certain *topics* that a panhandler may not discuss when addressing another person in designated areas. "Panhandling," under the Ordinance, is "[a]ny solicitation made in person *requesting an immediate donation of money or other thing of value*." § 16-82(a) (emphasis added). In that way, the law limits in-person, vocal solicitations for money or things of value. But it *doesn't* touch other topics of discussion. So, for instance, people are free to solicit pedestrians—in person and vocally—for advice, for directions, for their prayers, for a signature on a petition, to read a treatise by John Locke, to join a political party, to visit a restaurant, to come to church, to put on Tefillin, to shake a Lulav, to kiss an Etrog, to join a softball team, etc. As long

10. The City essentially (and accidentally) conceded this point at the Hearing by acknowledging that the Panhandling Ordinance is somewhat "more" directed towards the content of speech than the Right-of-Way Ordinance is. *See* Apr. 9, 2021 Hr'g. After *Reed*, though, if an ordinance discriminates based on content *at all*, it's content based.

as the speaker doesn't say something to the effect of "I'm poor, please help" or "Do you have some spare change?" he may approach a stranger anywhere in the City and utter any *other* message. Because the Panhandling Ordinance prohibits one topic and allows all others, it is content based.

The City nonetheless argues that the law is content neutral because a person can still receive donations by "passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought, but without any vocal request other than a response to an inquiry by another person." Response at 7 (quoting § 16-82(a)). Here, the City simply misses the point. The First Amendment doesn't care that the City allows panhandlers to *receive money* by doing *something else*, such as sitting passively with a sign or singing. As *Reed* explained, the First Amendment prohibits government, in the realm of speech, from picking winners and losers—from discriminating against certain classes (or topics) of discussion. And that's precisely what the City has tried to do here.[11]

In this respect, we note that whether the Panhandling Ordinance "leave[s] open ample alternative channels for communication of the information," *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518, has to do with whether, in the world of intermediate scrutiny, an ordinance is narrowly tailored. But it doesn't answer the "crucial" threshold question we have here—which is whether the Ordinance, on its face, is content based. The sign ordinance in *Reed* was content based, after all, even though Pastor Reed *could have* used some alternative means to invite people to his church—say, by sending emails or by taking out an ad in the local paper. What mattered, the Supreme Court said, was that Pastor Reed wanted to put a up a sign but couldn't—not because of some general proscription on signs but because of a regulation that discriminated against *the specific topic* he intended his sign to convey. Our Plaintiffs face a similar quandary: They (and, presumably, other panhandlers) may not want to "sing" for money or sit passively and wait for donations; they'd prefer to communicate their message by *speaking* to pedestrians—which is something anyone else can do anywhere in the City, so long as they have a different kind of message to communicate.

The City's content-neutrality cases are wholly inapposite. The City relies, for ex-

11. We also reject the City's cursory, one-line suggestion that § 16-82 should be subjected to less rigorous scrutiny because it regulates only "commercial speech." Response at 7 n.1. The Supreme Court has said that charitable solicitation is not *purely* economic in nature, even though the speaker requests goods or currency. As the Court explained:

> [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.

Schaumburg, 444 U.S. at 632, 100 S.Ct. 826. Drawing from this passage, the lower courts have uniformly held that panhandling is *not* commercial speech. *See Henry v. City of Cincinnati, Ohio*, 2005 WL 1198814, at *6 (S.D. Ohio Apr. 28, 2005) (collecting cases and explaining that, "[a]fter *Schaumburg*, lower federal courts and state courts have equated panhandling to charitable solicitations, [ ] analyzed them under the same framework," and found that "panhandling, like charitable solicitation, is more than mere commercial speech").

ample, on *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164 (11th Cir. 2018), a post-*Reed* case, which involved an ordinance preventing adult businesses (*i.e.*, ones that "regularly feature[ ] sexual devices") from operating within a certain distance of residential districts, places of worship, parks, or public libraries. *Id.* at 1168. The Eleventh Circuit treated the regulations as content-neutral time, place, and manner restrictions and, accordingly, subjected them to intermediate scrutiny. *See id.* at 1173–74. Out of context, it's true, that holding might seem to support the City's position here. But courts have always handled adult-entertainment ordinances differently—both before and after *Reed*. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 703 F. App'x 929, 933 (11th Cir. 2017) ("On their face, the ordinances may appear to be content based because they target adult entertainment; *so if we were applying general principles of First Amendment law, the ordinances would be subjected to strict scrutiny*. Yet under equally well-established Supreme Court and Eleventh Circuit precedent, *adult-entertainment ordinances are not treated like other content based regulations*." (emphases added & internal citation omitted)). There's only one way to read this passage from *Flanigan's*: outside the special case of adult entertainment, we apply strict scrutiny to regulations that discriminate between *topics* of speech.

As for the City's other cases, they were *all* decided before 2015 and, thus, likely won't survive *Reed*. In *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir. 1999), for example, the court addressed a regulation that limited nonprofits from setting up portable tables on sidewalks, but which exempted full-service restaurants from the same restrictions. *Id.* at 1284–85. Although it recognized that setting up tables to distribute information was a form of protected speech, the Eleventh Circuit held that the regulation was nonetheless content neutral. *Id.* at 1286–87. When we dig deeper, though, we can see that the Eleventh Circuit deployed a rationale *Reed* later rejected. The court, for instance, noted that the plaintiffs didn't challenge "the city's stated intent" or show that the city meant to "control any particular message." *Id.* at 1287. Certainly, discriminatory *intent*—if established—would be *sufficient* to demonstrate that a law is content based. But, after *Reed*, it isn't *necessary*. As *Reed* made plain, a law may be content based even if, in enacting that law, the government wasn't motivated by some preference (nefarious or otherwise) for a particular message or viewpoint. If, *on the face of the regulation*, there's any differential treatment of communicative content, then the law is content based and subject to strict scrutiny. In *One World*, by contrast, the Eleventh Circuit concluded that, "[a]lthough there is differential treatment between restaurants on the one hand, and other commercial and nonprofit entities in terms of the placement of tables, such a distinction between nonprofit and commercial tables does not turn the ordinance into a content based one." *Id.* That conclusion, we think, no longer stands.

We needn't say more on whether the Ordinance is content based or content neutral, because the very heavy weight of authority supports the Plaintiffs. The ordinances at issue in the post-2015 panhandling cases we've cited bear striking similarities to the Panhandling Ordinance we have here, and our sister courts have unanimously enjoined those laws precisely because they were content based. So, as the Plaintiffs note, in *Homeless Helping Homeless*, 2016 WL 4162882, at *6, the court permanently enjoined a general ban on panhandling in designated areas, such as in front of sidewalk cafés and within 15 feet of ATMs. Our law's panhandling bans

are almost identical. *See* § 16-82(b)(3), (6) (banning panhandling within 15 feet of sidewalk cafés or ATMs). Similarly, in *McLaughlin*, 140 F. Supp. 3d at 182, the court declared unconstitutional a ban on panhandling in certain areas of the city and a general ban on aggressive panhandling. Again, our ban does the same thing. *See* § 16-82(a), (b) (banning panhandling in several types of locations throughout the City and "aggressive panhandling" altogether). And the court in *Browne*, 136 F. Supp. 3d at 1288–94, permanently enjoined an ordinance that (1) prevented solicitation after a first refusal and (2) banned panhandling on public buses or in parking garages, lots, or other parking facilities. Our regulation works a similar prohibition. *See* § 16-82(a), (b)(1), (b)(2), (b)(5) (banning panhandling in similar facilities and locations—and banning "aggressive panhandling" throughout the City). Finally, in *Indiana Civil Liberties Union*, 470 F. Supp. 3d at 895, the court preliminarily enjoined an ordinance that criminalized panhandling (1) at bus stops and parking facilities, (2) on the sidewalk dining area of a restaurant, (3) within 50 feet of entrances to certain commercial buildings or ATMs, and (4) while touching an individual without consent, while blocking the paths of solicited persons, or while behaving in a way that would cause a reasonable person to fear for his safety. If the *Indiana Civil Liberties Union* ordinance sounds familiar, that's because it's almost identical to the Ordinances we have here. *See* § 16-82(a)(3)–(5), (b)(1)–(4), (b)(6)–(7) (banning panhandling in similar facilities and locations and prohibiting all "aggressive panhandling"—defined, in relevant part, as panhandling coupled with unwanted touching, blocking, and behavior that "would reasonably be construed as intended to intimidate, compel or force a solicited person to accede to demands"). The City, by contrast, fails to point us to any post-*Reed* authority upholding similar panhandling bans as content neutral. *See generally* Response.

ii. The Panhandling Ordinance Will Likely Fail Strict Scrutiny

Under strict scrutiny, the Panhandling Ordinance is presumptively unconstitutional and survives only if the City can prove that its regulatory scheme "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. Based on the arguments and evidence presented thus far, the City will likely fail this exacting test.[12]

[21] We start our strict-scrutiny analysis by asking whether the City had a "compelling" justification for passing the Ordinance. At this first step, the City offers two such justifications—only one of which requires much attention here. *First*, it says that "[u]nlimited direct vocal panhandling" posed a "significant problem to the economic interest of the City." Response at 16. But that's not a sufficiently compelling reason to curtail protected speech. *See McLaughlin*, 140 F. Supp. 3d at 189 (explaining that "the promotion of tourism and business has never been found to be a compelling government interest for the purposes of the First Amendment"); *Ind. C.L. Union*, 470 F. Supp. 3d at 904 ("[S]imply stating that individuals may not want to be approached for a solicitation is not enough to show a compelling interest.").

[22] *Second*, the City claims that it enacted the Panhandling Ordinance to pro-

12. Relying on the faulty premise that § 16-82 is content neutral, the City spends most of its time working within the intermediate-scrutiny paradigm. *See* Response at 7–13. The City does (in fairness) argue, in the alternative, that the law can survive strict scrutiny. *See id.* at 15–16. But its contentions in this regard are perfunctory and unconvincing.

tect residents and tourists "from aggressive panhandling ... which results in unwanted touching, impeding, intimidation and fear of persons who are constantly confronted with vocal requests or demands for monetary donations." Response at 16. But, if the law's purpose is to make people more comfortable—*i.e.*, less "intimidated" or "fearful"—then it fails strict scrutiny because, while advancing the comfort of residents may be a *significant* interest, it isn't a *compelling* one. As we've explained, allowing "uncomfortable message[s]" is a "virtue, not a vice" of the First Amendment. *See McCullen*, 573 U.S. at 476, 134 S.Ct. 2518; *see also McLaughlin*, 140 F. Supp. 3d at 189 (explaining that the First Amendment "does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed").

[23] Public safety, on the other hand, *is* a compelling governmental interest. *See McLaughlin*, 140 F. Supp. 3d at 191 ("[T]he Aggressive Panhandling provisions were enacted in furtherance of a compelling state interest: public safety."); *Browne*, 136 F. Supp. 3d at 1292 ("The Court does not question that 'public safety' is a compelling governmental interest."). But it's not clear that the Panhandling Ordinance—which the City now says was designed to prevent "unwanted touching" and "impeding"—was *really* promulgated to promote the public's safety. The City argues that the "restricted areas [listed in the Panhandling Ordinance, § 16-82(b)] present circumstances where the alarm or immediate concern for the safety of individuals by unwanted touching, detaining, impeding or intimidation would be exacerbated (automatic teller machines, parks, sidewalk cafés, public transportation vehicles and parking pay stations) by vocal requests or demands for donations." Response at 9. But it offers no further explanation as to why safety concerns are "exacerbated" in those areas, and it certainly hasn't proffered any *evidence* in support of this public-safety rationale. It hasn't shown (or even suggested), for example, that there's been an uptick in attacks by panhandlers—much less that any such attacks occurred more frequently in the areas the Ordinance singles out for special treatment. Nor has it pointed to police reports or studies demonstrating that panhandlers tend to be more violent in front of sidewalk cafés than in other, uncovered parts of the City. *See Ind. C.L. Union*, 470 F. Supp. 3d at 904 (preliminarily enjoining a panhandling law because the state hadn't "presented any evidence demonstrating that panhandling threatens" public interests—for example, by "showing that panhandling typically escalates to criminal behavior").

Even if it had shown these things, though, the City's public-safety arguments would likely fail on the merits. And that's because, if public safety were *really* the goal, the Panhandling Ordinance would seem to be a very bad way of achieving it. As an example, the law prevents solicitation at bus stops (§ 16-82(b)), where constant crowds might be expected to deter dangerous conduct, but it says nothing about solicitation in back-alleys, where there are fewer people to prevent or deter violent attacks. *See McLaughlin*, 140 F. Supp. 3d at 195 (explaining that panhandling at bus stops, "where people are essentially captive audiences for panhandlers ... may be more bothersome, and even in some sense more coercive, for a person to be panhandled when they cannot, or find it difficult to leave," but it is "not demonstrably more dangerous"); *Browne*, 136 F. Supp. 3d at 1293 (finding that the city "has not shown—and the Court does not believe—that a solicitation for money or other thing of value is a threat to public safety simply because it takes place in a public parking garage, parking lot, or oth-

er parking facility"). The same is true of sidewalk cafés. In these areas, perhaps, panhandling is more *irritating*. But there's no reason to think it any more *dangerous*—and, again, the City shows us no evidence that it is. *See McLaughlin*, 140 F. Supp. 3d at 196 ("No theory or evidence has been offered as to how pedestrians walking near an outdoor café are unusually threatened by panhandlers."). Ultimately, then, the character of the areas the City chose to regulate strongly suggests that the City was motivated, not by any great desire to protect the public from dangerous crimes, but by an understandable (if insufficient) interest in preventing its residents' discomfort.

As for the "aggressive panhandling" aspect of § 16-82, some courts have recognized that comparable laws *can* serve compelling interests. *See id.* at 191 ("[T]he Aggressive Panhandling provisions were enacted in furtherance of a compelling state interest: public safety."). But the City has indisputably banned substantial amounts of protected (and harmless) activities in a way that doesn't seem likely to avert dangerous encounters. For example, § 16-82(a) prohibits a person from "[r]equesting money or something else of value after the person solicited has given a negative response to the initial request." Since the City has chosen not to defend that restriction specifically, *see generally* Response, it (again) hasn't presented any evidence that such second requests tend to lead to violence. In any case—warning: we're about to operate in an evidentiary vacuum—we see nothing inherently dangerous about a person asking a second question after an initial rejection. A once-rejected panhandler might want to "explain that the change is needed because she is unemployed" or to "state that she will use it to buy food." *McLaughlin*, 140 F. Supp. 3d at 193. Indeed, the panhandler's ability to communicate "the nature of poverty"—which she may decide to do only after a rejection—"sit[s] at the heart of what makes panhandling protected expressive conduct in the first place." *Id.*; *see also Browne*, 136 F. Supp. 3d at 1293 (finding the city's anecdotal evidence of second-request solicitations unpersuasive because "in neither instance [did] it appear that the safety of the person being solicited was threatened simply because the person doing the soliciting had made a second request after the initial request was refused," and noting that the court did "not believe ... that a repeated request for money or other thing of value necessarily threatens public safety").

The "aggressive panhandling" provision of the Panhandling Ordinance *does* prohibit other behavior that *could* lead to precarious encounters, such as intimidating or "[t]ouching a solicited person without explicit permission." § 16-82(a). But the State has already criminalized assault and battery, *see* FLA. STAT. §§ 784.011 *et seq.*, and the City doesn't explain why a batterer should receive *enhanced* penalties solely because, before the assault, he asked the victim for change. And, if the answer to that question isn't at first glance obvious, think for a moment about how underinclusive the provision is: Those enhancements, after all, would apply to the batterer who first asked for pennies but *not* to the activist who, before the assault, asked the victim to join the Communist Party or the Ku Klux Klan. In the end, "[t]he City may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds." *McLaughlin*, 140 F. Supp. 3d at 193.[13]

13. In *McLaughlin,* the court distilled ten different "aggressive panhandling" prohibitions into three categories—two of which are relevant here. The first category encompassed

Nor is the City likely to show that the law is narrowly tailored to serve a compelling state interest. As we've hinted, when it comes to promoting public safety—the only compelling interest the City has identified—the law is both over- *and* under-inclusive. We've already seen how under-inclusive it is—and it isn't hard to conjure a hundred other examples of its under-inclusivity. But, by sweeping in the speech activities of countless panhandlers who will never act violently towards another, the law is also woefully—and unconstitutionally—over-inclusive. *See, e.g., Browne*, 136 F. Supp. 3d at 1292–94 (striking down panhandling bans that were "over-inclusive" because "they prohibit[ed] protected speech that pose[d] no threat to public safety"). Here, again, the City hasn't told us what percentage of its targeted panhandlers is likely to turn violent—so we can safely assume that the percentage is unacceptably small. The City, in short, has failed to demonstrate that the law constitutes the least restrictive means of promoting public safety. It will, of course, have the chance to make its case later on. For now, though, we find that the Plaintiffs are likely to prevail in their First Amendment challenge to the Panhandling Ordinance.

provisions that duplicated existing sanctions but were "directed specifically at panhandling." 140 F. Supp. 3d at 182. One subsection, for instance, criminalized panhandling "intended or likely to cause a reasonable person to fear bodily harm to oneself"—which was really just an assault under Massachusetts law. *Id.* The second relevant category included those provisions that prohibited non-criminal, but "coercive," behavior. *Id.* at 183. "Coercive" behavior included, for example, continuing to solicit a person after that person has "given a negative response to such soliciting." *Id.*

The court concluded that neither of these two categories of prohibitions could survive strict scrutiny. Starting with the so-called "duplicate" provisions, the court found that "[t]he City ha[d] not demonstrated that public safety requires harsher punishments for panhandlers than others who commit assault or battery or other crimes." *Id.* at 193. Here, the court relied on the Supreme Court's decision in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), for the proposition that a state may not treat criminal activity more harshly simply because it's conducted in combination with protected speech. As for the second category, the court found that "bans on following a person and panhandling after a person has given a negative response are not the least restrictive means available." *McLaughlin*, 140 F. Supp. 3d at 194.

C. The Right-of-Way Ordinance, § 25-267

The Right-of-Way Ordinance presents more challenging questions, some of which were first raised at the Hearing. The Court therefore invited supplemental briefing on whether the "hand-to-hand exchange" prohibition in § 25-267(a) is content based and on the scope of § 25-267(d), which incorporates the City's general sign ordinance. We address these issues in turn.

i. *Selling and Advertising or Requesting Donations*

The Right-of-Way Ordinance prevents people, while standing on "any portion" of a designated arterial road, from (1) selling anything or offering a service of any kind, or advertising things or services of any kind; (2) seeking donations of any kind; or (3) engaging in any hand-to-hand exchange with a driver, even one who is temporarily stopped. § 25-267(a), (b). The first two prohibitions are clearly content based. The third we'll address in a separate section below.

The City takes a different approach than we do. Rather than address each of the three prohibitions in isolation, it treats the entire provision as one "all[-]encompassing" ban on "all manner of interactions

between pedestrian solicitors and the drivers and occupants of motor vehicles engaged in traffic." Supplemental Response at 5. According to the City, it is "[i]mplicit in § 25-267 . . . that the pedestrian solicitor is attempting to sell something to the occupant of a motor vehicle, obtain a donation from the occupant of a motor vehicle and/or exchange anything else (leaflet, advertising, etc.) by hand with the driver or occupant of a motor vehicle engaged in traffic." *Id.* The provision (the City would have us believe) is thus nothing more than a ban on walk-up interactions with drivers on designated roads—and, in that way, *doesn't* discriminate based on content. We disagree.

Let's "start with the text." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, —— U.S. ——, 139 S. Ct. 1652, 1661, 203 L.Ed.2d 876 (2019). The provision reads, in pertinent part, as follows:

> *Right-of-way canvasser or solicitor* shall mean any person who sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, or who seeks any donation of any kind, or who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind, whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road.

§ 25-267(a). Read plainly, the provision doesn't apply *only* to interactions with motorists, as the City suggests. Instead, it prohibits three different kinds of activities a panhandler might engage in while standing on any portion of a public right-of-way—*regardless* of whether one approaches a motorist. We know this because the prepositional phrase at the end of the provision—"to any person who operates or occupies a motor vehicle of any kind"—modifies *only* the third activity (hand-to-hand transmissions) but not the first two. A person thus unmistakably violates § 25-267(a)–(b) by standing in the crosswalk of an arterial road and asking a *pedestrian* for a donation. The Ordinance, in other words, can be broken out as follows *without* changing any of its meaning:

> *Right-of-way canvasser or solicitor* shall mean any person
>
> **[1]** who sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, *or*
>
> **[2]** who seeks any donation of any kind, *or*
>
> **[3]** who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind, whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road.

§ 25-267(a) (emphases and numbers added). Those three activities are then banned on "any portion of [certain] public right[s]-of-way." § 25-267(b).

[24] Our conclusion—that the prepositional phrase at the end of the third provision modifies only hand-to-hand exchanges with motorists—flows naturally from five mutually-reinforcing principles of textual interpretation. *First*, a "[a] timeworn textual canon" provides that, when a statute "include[s] a list of terms or phrases followed by a limiting clause," the limiting clause "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351, 136 S.Ct. 958,

194 L.Ed.2d 48 (2016) (cleaned up); *see also* BLACK'S LAW DICTIONARY 1532–33 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing."); A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) (noting that, under the "last antecedent" rule, limiting phrases should be read as modifying only the words and phrases that immediately precede them). *Second*, each of the three activities the Right-of-Way Ordinance proscribes is introduced with the relative pronoun "who" and is separated from the others by the disjunctive "or"—thereby cordoning off each clause and isolating the third activity with its *own* prepositional phrase. *Cf.* SCALIA & GARNER at 148 (explaining that the "typical way in which syntax would suggest no carryover modification is that a determiner (*a*, *the*, *some*, etc.) will be repeated before the second element"). *Third*, the prepositional phrase doesn't match up grammatically with the second activity—requesting donations. Recall the phrasing: "*Right-of-way canvasser or solicitor* shall mean any person ... who seeks any donation of any kind ... *to* any person who operates or occupies a motor vehicle of any kind." § 25-267(a) (emphasis added). A person seeks donations *from* others, not *to* them. The only natural explanation for this grammatical incongruity is that, contra the City's position, the prepositional phrase *isn't* meant to modify the second clause. *Fourth*, the label "right-of-way canvasser" suggests that the Commission intended to define this type of panhandler by reference to his *location* (*i.e.*, on the right-of-way), rather than by his *conduct* (*viz.*, whether he interacts with motorists). *Fifth*, if the City Commission had, in fact, intended to enact a universal ban on driver-motorist interactions, it could have done that—with far fewer (and simpler) words.

[25] When read properly, then, the statute clearly prohibits two speech activities—our first two "subsections" above—based on their communicative content. A person may not stand on any portion of one of the designated rights-of-way and (1) sell (or advertise for sale) a service or item, or (2) ask for a donation. Nothing on the face of the Right-of-Way Ordinance, though, prevents a person from standing in precisely the same spot and communicating *other* messages, such as "Vote for Jones," "Join the Nazis," or "Read John Locke." In that way, those first two clauses are content based and subject to strict scrutiny.

[26] And, for many of the same reasons we've already given, those clauses are unlikely to survive strict scrutiny. The clauses prohibit someone from standing on "any portion" of a designated right-of-way, such as a median or crosswalk, and "requesting a donation." But why would it be more dangerous to stand on that crosswalk and ask for a donation than, say, to stand in that same place and talk to pedestrians about politics, religion, books, ideas, sports, or *anything else*? Again, we needn't speculate on what the answer to this question might be because the City (notably) doesn't offer one—which is reason enough to find that the law isn't narrowly tailored to the City's goal of promoting traffic safety.

Even accepting the City's argument that it *meant* the two clauses to act *only* as a ban on pedestrian-driver interactions (on designated roads), *see* Supplemental Response at 6, the clauses would still be content based *on its face* as to the first two activities. That's because a person walking up to the car *cannot* sell or advertise goods or services and *cannot* request a donation, but he *can* walk up to a car for a chat about John Locke, Jack Nicklaus, or

Joe Biden. *Cf. Fernandez v. St. Louis Cnty., Mo.*, 461 F. Supp. 3d 894, 898 (E.D. Mo. 2020) (finding that a law banning people from "stand[ing] in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle" was content based). Why are the latter three topics of conversation *less* dangerous than the former? The City doesn't say. As a result, even if we bought the City's position about what it *intended* the two clauses to do—for which we haven't a shred of evidence—the clauses still wouldn't survive strict scrutiny.

ii. *Hand-to-Hand Transmission*

[27] On the Ordinance's third clause, the parties find some common ground: They agree that this hand-to-hand transmission clause (the one we've isolated as the third activity) is content neutral and subject to *intermediate* scrutiny. *See* Supplemental Brief at 1; Supplemental Response at 1. Although that agreement alleviates the City's burden *somewhat*, the City must still show *both* that the provision is "narrowly tailored to achieve a significant government interest" *and* that it "leaves open ample alternative channels of communication." *Bloedorn*, 631 F.3d at 1231 (cleaned up). In *McCullen v. Coakley*, the Supreme Court added that, to survive intermediate scrutiny, the government must demonstrate that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "considered different methods that other jurisdictions have found effective." 573 U.S. at 494, 134 S.Ct. 2518. The City fails to meet this less rigorous standard here.

Rather than describe protracted investigation, factfinding, and legislative debate, the City says simply that it "operat[ed] under the premise" that it could promote traffic safety by extending the Right-of-Way Ordinance to arterial roads, which are "heavily travelled and operating beyond their capacity." Supplemental Response at 2. Based on that premise, the City explains, it concluded that "prohibiting solicitors from interacting with motorists engaged in travel, either from a median, sidewalk or the roadway itself, furthers the City's interest in trying to maintain or improve traffic flow on these overcapacity and heavily travelled roadway segments." *Id.* at 3. Although these aren't entirely unreasonable assumptions, they're just that—*assumptions*. At trial, the City will bear the *evidentiary* burden of proving that the provision is narrowly tailored in a way that satisfies intermediate scrutiny; for now, though, it must show (at the very least) that it will be able to carry its burden down the road. *See Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) ("As the Government bears the burden of proof on the ultimate question of [a statute's] constitutionality, respondents must be deemed likely to prevail [on the merits] unless *the Government has shown* that respondents' proposed less restrictive alternatives are less effective than [the challenged statute]." (emphasis added)); *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (explaining that, when considering the likelihood-of-success element of a request for a preliminary injunction, "the district court should have inquired whether there is a sufficient likelihood the State will ultimately fail to prove its regulation constitutional," and having "little difficulty in concluding that appellants are likely to succeed on their claim *because the State has not shown* its ability to justify the statutes' constitutionality" (emphasis added)).[14] In

14. *See also S.O.C., Inc. v. Cnty. of Clark,* 152 F.3d 1136, 1147 (9th Cir. 1998) (remanding for entry of a preliminary injunction where "there is no evidence that an outright ban on commercial canvassing is necessary to meet the asserted interests of the County"); *Chase v. Town of Ocean City,* 825 F. Supp. 2d 599,

other words, the City must point to some evidence (e.g., traffic reports, baseline studies, citizen complaints, etc.) that its Ordinance was justified by some significant government interest.

That's important here for at least two reasons. *First*, the City's "premises" aren't unassailable, even if they aren't facially unreasonable. For example, it may be, as the Plaintiffs suggest, that "[a] person lawfully standing on the sidewalk who accepts a donation from a motorist who is stopped at a light in the lane next to the sidewalk poses no greater danger than a person standing on the sidewalk who is holding a sign." Supplemental Reply at 2. Or it may be that there's never been a single accident in the City involving (or caused by) a hand-to-hand exchange between a panhandler and a temporarily stopped motorist. Or it may be that accidents have happened only when the panhandler walks out into the middle of the street, whereas hand-to-hand exchanges from the *sidewalk* have proven to be relatively safe. In any of these three (quite reasonable) scenarios, the City would have had less intrusive ways of promoting traffic safety. And, as should be obvious, under any of these three hypotheticals, our law would be both over- and under-inclusive: over-inclusive because it penalizes panhandlers whose conduct is not dangerous; under-inclusive because it punishes only the panhandler and not the driver.

Second, and more problematic, is the lack of *any* evidence to justify the law. As we've suggested, that evidentiary lacuna seems to confirm the Plaintiffs' view that the City operated off of assumptions and didn't (as the Supreme Court requires) "seriously [endeavor] to address the problem with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494, 134 S.Ct. 2518. Again, the City has said nothing about whether it investigated the issue, what evidence it collected, or the extent to which it entertained other regulatory options. The City can't so completely curtail a citizen's First Amendment rights based only on what amounts to speculation.

For those two reasons, *Cosac Foundation v. City of Pembroke Pines*, 2013 WL 5345817 (S.D. Fla. Sept. 21, 2013), doesn't help the City here. There, Judge Rosenbaum—then on the district court—concluded that a similar ordinance survived intermediate scrutiny precisely because the city *had* submitted evidence of narrow tailoring. *See id.* at *18 (explaining that the city tailored its law based on "information from a variety of sources," including police reports "mapping traffic accidents at City intersections," Florida Department of Safety and Motor Vehicles data on "crashes involving pedestrians in the state," and news reports "on fatal and non-fatal accidents involving right-of-way canvassers nationwide, which revealed three such accidents that occurred in South Florida and involved roadway newspaper vendors"). As we've said, our City passed the Right-of-Way Ordinance without doing (or collecting) any of this.

In passing, it's true, Judge Rosenbaum added that, "even if the City had not introduced such detailed evidence into the record, 'common sense and logic' would still support the City's determination that canvassing and soliciting drivers on heavily trafficked streets presents substantial traffic flow and safety hazards both to pedes-

617 (D. Md. 2011) (concluding, at the preliminary injunction stage of a First Amendment case, that the city carried its burden of persuasion under intermediate scrutiny); *cf. Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011) (where a city had the trial burden to justify a firearm regulation, it didn't—at the preliminary injunction stage—''come close to satisfying this standard'' because ''the City presented no data or expert opinion to support'' the regulation and its public safety concerns were ''entirely speculative'').

trians and motorists." *Id.* We agree in principle that there's *some* logical fit between the banning of hand-to-hand transmissions on busy streets and traffic safety.[15] But that doesn't answer the questions presented here: whether solicitation by sidewalk panhandlers is comparatively safe or whether, as we've said, our regulation is under-inclusive insofar as it penalizes solicitors but not motorists. Those questions may not have been raised in *Cosac*. In any event, in the years since *Cosac*, the Supreme Court has held that a governmental entity bears the evidentiary burden of demonstrating that it "seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494, 134 S.Ct. 2518. That evidentiary requirement, it goes without saying, supersedes Judge Rosenbaum's *obiter dictum*, such as it is, that an ordinance can survive intermediate scrutiny on "common sense and logic" alone. And the City here has only common sense to go on. It explicitly admits, in fact, that it operated only under certain "premises" (read: assumptions); and it points to *no* evidence that it investigated, studied, or even solicited reports on the issue—any one of which might have shown that it seriously undertook to address the problem by less intrusive means.

The Plaintiffs, in short, are likely to succeed on the merits of this claim.

iii. *The Sign Ordinance, § 25-267(d)*

The City continues to maintain, as it did at the Hearing, that § 25-267(d) "deals almost exclusively with signage on private property that *can be viewed from* the public right of ways" and that it is "difficult to conjure a scenario in which the provision would have any application to the Plaintiffs or other pedestrian solicitors who may be carrying a sign to facilitate their activities." Supplemental Response at 6 (emphasis added). To the extent that City officers were, in practice, relying on this provision to arrest canvassers who were standing on *public* rights-of-way, the City represented that, in consultation with the Plaintiffs, it would draft a memorandum, telling its officers to desist from any such future arrests. *See* April 9, 2021 Hr'g. The City later promised to file a notice by April 30, 2021, indicating whether it had issued that enforcement moratorium. *See* Response at 6. As of this writing, however, the City has filed no such notice—and there's no indication in the record that it has ordered its officers to stop enforcing this provision on public rights-of-way. *See generally* Docket. We therefore address the provision and, as with the others, enjoin its enforcement.

We begin, as we must, with the text of § 25-267(d). Contra the City's arguments, that provision unambiguously applies to canvassers who hold signs on *public* rights-of-way. The provision reads as follows:

> It is a violation of this section for any *right-of-way* canvasser or solicitor to hold, carry, possess or use any sign or other device of any kind, *within any portion of the public right-of-way* contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations.

§ 25-267(d) (emphases added). As the text makes pellucid, the City Commission simply incorporated the "terms and provisions" of its general sign ordinance—things like dimensional requirements and display characteristics—into a *different* ordinance, which regulates solicitors and canvassers on *public* rights-of-way. And that make sense: Why reinvent the legislative wheel when you can simply borrow

15. Given the trajectory of Judge Rosenbaum's career since her decision in *Cosac,* we couldn't really say otherwise.

from another law? The City's reading, by contrast, makes no sense—as the City itself acknowledged at the Hearing, when it conceded that, given its construction, the subsection had no "viable application." Apr. 9, 2019 Hr'g. The truth is that the City doesn't need panhandling proscriptions to prevent panhandlers from entering private property for two obvious reasons: *one*, it already has trespassing laws that do that; and *two*, panhandlers don't generally canvas on private property because there are orders of magnitude more people to solicit—motorists and pedestrians—on *public* property.

To the extent the City's arguing that it needed to regulate *signage* on private property, we know that isn't true either, because the sign ordinance, by its terms, already regulates the size and structure of signs on private property. *See* § 47-22-1(c) ("This section regulates the time, place and manner in which a sign is erected, posted, *or displayed* on private property[.]" (emphasis added)). The City's reading would thus render § 25-267(d) entirely superfluous—a cardinal sin of statutory interpretation. *See Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (recognizing that "one of the most basic interpretive canons" is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"); SCALIA & GARNER at 174 ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). We note, too, that, if the City Commission didn't actually intend for this law to apply on public property, then the City's police officers—who are trained to carry out the City Commission's will—didn't get the memo. They, after all, have consistently used this provision to cite and arrest canvassers on *public* rights-of-way. *See, e.g.*, Arrest Report at 32 (police report stating that canvasser had been cited under Right-of-Way Ordinance because the officer saw him "hold, carry, possess and use a sign *within a portion of the public right of way*" (emphasis added)).

[28] It is, of course, possible that § 25-267(d) incorporates only content-neutral time, place, and manner sign restrictions, such that it *could* withstand intermediate scrutiny. Oddly, however, the City has chosen not to defend the Sign Ordinance on those grounds: it never argues that the Ordinance is content-neutral, offers no legitimate governmental interest, and adduces no evidence that the Ordinance is in any way tailored to that interest. *See generally* Response; Supplemental Response. It's thus waived any such arguments. *See In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived."). The City concedes—albeit for different reasons—that the Ordinance *shouldn't* be enforced on public rights-of-way. *See* Apr. 9, 2019 Hr'g. Nevertheless, as we've said, its police officers have been enforcing the law as if it did apply there. Because the City hasn't directed its officers to stop enforcing the law—and given that it hasn't justified the law on any other ground—the Plaintiffs are entitled to a preliminary injunction.[16]

16. Because the provision applies to panhandlers who hold signs on *public* property—and given that our Plaintiffs do precisely that, *see* Complaint ¶¶ 37, 43 (alleging that the Plaintiffs hold signs while panhandling on sidewalks)—the Plaintiffs have standing to challenge the provision facially.

II. The Remaining Elements

[29] The Plaintiffs easily satisfy the remaining elements of a preliminary injunction. *First*, it's well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271–72 (11th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). In *KH Outdoor*, the city cited a local sign ordinance in denying the plaintiff's application for outdoor advertisements and billboards. *See id.* at 1264. Although the district court didn't make any findings about irreparable injury, the Eleventh Circuit explained that the sign ordinance's direct penalization—rather than "incidental inhibition"—of protected speech, standing alone, established irreparable injury. *Id.* at 1272. It thus concluded that the district court "did not abuse its discretion on those grounds, because the injury (categorically barring speech by prohibiting noncommercial billboards) was of a nature that could not be cured by the award of monetary damages." *Id.*

[30] Our Plaintiffs' free-speech rights have been similarly abridged, and their claim to irreparable injury is no less straightforward. Money damages, after all, won't compensate them for the past deprivation of their constitutional rights. *See Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (noting that "chilled free speech . . . [cannot] be compensated for by monetary damages"). Indeed, our Plaintiffs may feel this "chilling" effect more acutely than most because they've staked their livelihoods to the outcome of this case. Our Plaintiffs, recall, don't panhandle for fun; they canvass the streets because it's their only means of subsistence. Were we to push off our injunction until the end of the case, therefore, we'd be preventing them (perhaps for six months or more) from collecting the donations they need to survive. That, we think, is precisely what the law means when it speaks of irreparable injury.

The City counters that "there is no assertion that the challenged regulations have even been applied to [the Plaintiffs], through an arrest or citation." Response at 13. But that's really just a rehash of its standing objection, which we've rejected already—and which, in any event, is foreclosed by the many decisions granting, in similar circumstances, pre-enforcement preliminary injunctions. *See, e.g., KH Outdoor*, 458 F.3d at 1271–72; *Ashcroft*, 542 U.S. at 663, 124 S.Ct. 2783; *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 870 (11th Cir. 2020).

We find even less persuasive the related argument that the Plaintiffs cannot establish irreparable injury because they continue to panhandle—despite the Ordinances. *See* Response at 13. As we've said, whether a plaintiff continues to engage in prohibited speech is immaterial where he has alleged—as the Plaintiffs have here, *see* Complaint ¶¶ 39, 45—that, were it not for the offending ordinance, he would have engaged in more of the conduct the ordinance proscribes. That reticence to exercise one's free-speech rights lies at the very heart of our irreparable-injury jurisprudence. *Cf. Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1295 (S.D. Fla. 2012) ("[T]he Court rejects the notion that Plaintiff is not entitled to an injunction either because her injury (a slight intrusion into her speech and associational rights) or its duration . . . are minimal.").

[31, 32] *Second*, the harm from the threatened injury outweighs any harm to the public interest. *See Gonzalez*, 978 F.3d at 1270–71. A temporary infringement of First Amendment rights "constitutes a serious and substantial injury," whereas

"the public, when the state is a party asserting harm, has *no interest* in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) (emphasis added). Enforcing unconstitutional laws not only wastes valuable public resources; it "disserves" the public interest. *Id.* at 1290, 1297; *see also Otto*, 981 F.3d at 870 ("The nonmovant is the government, so the third and fourth requirements—'damage to the opposing party' and 'public interest'—can be consolidated. It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance."); *KH Outdoor*, 458 F.3d at 1272–73 ("As for the third requirement for injunctive relief, the threatened injury to the plaintiff clearly outweighs whatever damage the injunction may cause the city ... [because] the city has no legitimate interest in enforcing an unconstitutional ordinance. For similar reasons, the injunction plainly is not adverse to the public interest. The public has no interest in enforcing an unconstitutional ordinance.").

The City correctly notes that the "less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." Response at 14 (quoting *Scott*, 612 F.3d at 1297). And, the City says, we shouldn't be "certain" here because the Plaintiffs haven't cited Eleventh Circuit or Supreme Court cases overturning similar panhandling ordinances under *Reed*. But *Reed*'s teachings are clear, and we have no trouble applying it to the facts of this case. The Plaintiffs, moreover, have cited several cases from *other* circuits—*q.v.*, Part I.A.—applying *Reed* and enjoining similar ordinances. The City, by contrast, has cited not a single post-*Reed* case (within or outside this Circuit) that directly supports its position. Instead, as we've seen, it continues to rely on *Stardust* and its progeny, which dealt with a distinct area of free-speech jurisprudence: the "secondary effects" of adult businesses. It relies on these cases despite the Eleventh Circuit's unambiguous, post-*Reed* admonition that "adult-entertainment ordinances are *not* treated like other content based regulations." *Flanigan's*, 703 F. App'x at 933 (emphasis added). The Plaintiffs, in short, plainly have the better side of this argument.

* * *

For all these reasons, the Plaintiffs' Motion [ECF No. 5] is **GRANTED**. The City is **PRELIMINARILY ENJOINED** from enforcing §§ 16-82 and 25-267 of the City Code.

DONE AND ORDERED in Fort Lauderdale, Florida, this 23rd day of June 2021.

Appendix A

Sec. 16-82. - Panhandling, begging or solicitation.

(a) Definitions. The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section.

Aggressive panhandling, begging or solicitation means:

(1) Approaching or speaking to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with either imminent bodily injury or the commission of a criminal act upon the person or another person, or upon property in the person's immediate possession;

(2) Requesting money or something else of value after the person solicited has given a negative response to the initial request;

(3) Blocking, either individually or as part of a group of persons, the passage of a solicited person;

(4) Touching a solicited person without explicit permission; or

Appendix A—Continued

(5) Engaging in conduct that would reasonably be construed as intended to intimidate, compel or force a solicited person to accede to demands.

Panhandling means:

(1) Any solicitation made in person requesting an immediate donation of money or other thing of value for oneself or another person or entity; and

(2) Seeking donations where the person solicited receives an item of little or no monetary value in exchange for a donation, under circumstances where a reasonable person would understand that the transaction is in substance a donation.

Panhandling does not mean the act of passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought, but without any vocal request other than a response to an inquiry by another person.

(b) Prohibited areas of panhandling, begging or solicitation. It shall be unlawful to engage in the act or acts of panhandling, begging or solicitation when either the solicitation or the person being solicited is located in, on, or at any of the following locations:

(1) Bus stop or any public transportation facility;

(2) Public transportation vehicle;

(3) Area within fifteen (15) feet, in any direction, of a sidewalk café[;]

(4) Parking lot, parking garage, or parking pay station owned or operated by the city;

(5) Park owned or operated by the city;

(6) Area within fifteen (15) feet, in any direction, of an automatic teller machine;

(7) Area within fifteen (15) feet, in any direction, of the entrance or exit of a commercial or governmental building; or

(8) Private property, unless the person panhandling has permission from the owner of such property.

(c) It shall be unlawful to engage in the act of aggressive panhandling in any location in the city.

(d) Penalty. Any person found guilty of violating this section shall, upon conviction, be penalized as provided in section 1-6 of this Code.

Appendix B

Sec. 25-267. - Right-of-way solicitors and canvassers.

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

Right-of-way canvasser or solicitor shall mean any person who sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, or who seeks any donation of any kind, or who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind,

Appendix B—Continued

whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road.

Right-of-way shall have the same definition as provided in section 25-97 of the Code of Ordinances.

(b) *Prohibition of right-of-way canvassers and solicitors*. It shall be unlawful for any person to act as a right-of-way canvasser or solicitor on any portion of a public right-of-way with a functional classification of arterial on the Broward County Highway Functional Classifications Map and a Broward County Metropolitan Planning Organization Roadway 2012 Peak Level of Service (LOS) designation of D, E or F. (See Exhibit "A" following § 25-267)

(c) *Prohibition of storage of goods, merchandise and other materials*. It shall be unlawful for any person to store or exhibit any goods, merchandise or other materials on any portion of the public street, including the median, or bicycle lane.

(d) It is a violation of this section for any right-of-way canvasser or solicitor to hold, carry, possess or use any sign or other device of any kind, within any portion of the public right-of-way contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations.

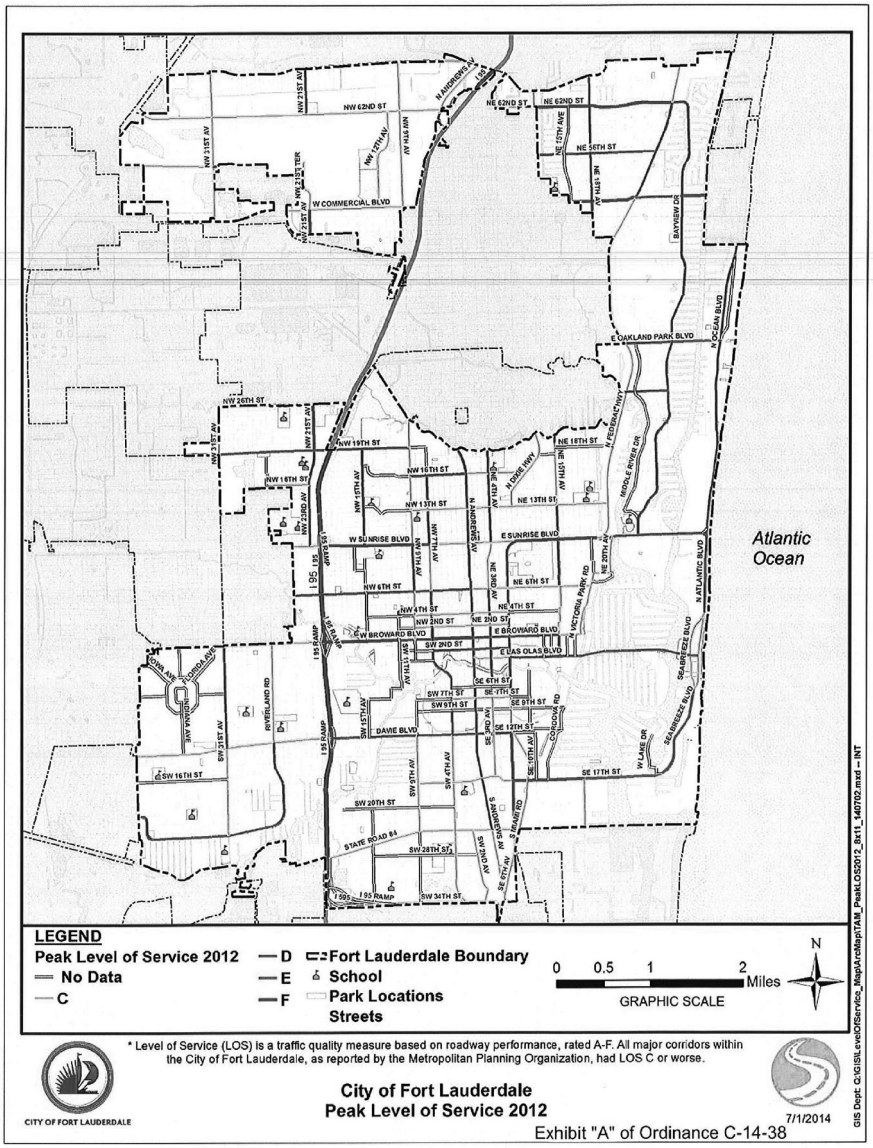
(e) Nothing in this section shall be construed to apply to:

(1) Licensees, lessees, franchisees, permittees, employees or contractors of the city, county or state authorized to engage in inspection, construction, repair or maintenance or in making traffic or engineering surveys.

(2) Any of the following persons while engaged in the performance of their respective occupations: firefighting and rescue personnel, law enforcement personnel, emergency medical services personnel, health care workers or providers, military personnel, civil preparedness personnel, emergency management personnel, solid waste or recycling personnel; public works personnel or public utilities personnel.

(3) Use of public streets, alleys, sidewalks or other portions of the public right-of-way in areas which have been closed to vehicular traffic for festivals or other events or activities permitted by the city.

(f) Violations of this section shall be punishable as provided in section 1-6 of this Code.



Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual Crimes*, 96 J. Crim. L. & Criminology 329 (2005)

TWO CONFLICTING READINGS OF ROBINSON AND POWELL

In spite of the Powell plurality's apparent neutralization of Robinson, the collective meaning of Robinson and Powell remains ambiguous, in large part because the concurring opinion of Justice White in Powell --the same Justice White who dissented in Robinson --seemed to disagree with the plurality on its limitation of the earlier case. White cast the fifth and deciding vote in Powell, but in his concurrence he emphasized that his vote was limited to the facts of the case:

> [T]he chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.
>
> Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. In other words, Powell's crime was not being drunk; rather it was leaving a private space where his drunkenness could not be subjected to criminal liability.

As White pointed out, if Powell stayed home, he would not have been criminally liable. Powell was not convicted of being an alcoholic, or even of being drunk: he was convicted of being drunk in public. Thus, the constitutionally punishable crime of public intoxication would seem to involve a spatial or contextual element that transforms innocent behavior into culpable conduct. If the state may punish conduct, but may not punish status, then this contextual element, which arose in Powell but not in Robinson, blurs the distinction between status and conduct. As an illustration, what if a state made it illegal to walk around outside while being addicted to drugs? Walking around outside is conduct, but being addicted to drugs is a status. A person would not be criminally liable for addiction to drugs until he stepped outside of his house. As a technical matter, that contextual law would pass the Robinson test for constitutionality. As noted below, however, Justice White's Powell concurrence raises, without explicitly articulating, the complicating factor of the contextual element.

As a doctrinal matter, it remains unclear whether White's vote should count towards the plurality's holding that the State may punish any conduct so long as it is not punishing mere status--or, alternatively, whether his vote should count towards the dissent's interpretation of Robinson, under which the State may punish only volitional conduct, that is, conduct which the defendant has the power to prevent.[1]

At the time Powell was decided, advocates for reforming the criminal justice system's treatment of addicts, including Powell's lawyers, developed the volitional reading, claiming to have lost "on the facts of [Powell's] case, but [to have] won on the law." They claimed that Powell and Robinson collectively stand for the principle that the

[1] For the purposes of this Comment, I will refer to the Powell plurality's interpretation of the Robinson doctrine as the "status/act reading" and the dissent's interpretation as the "volitional reading." However, this dichotomy between the status/act and volitional readings is not meant to foreclose additional readings of the doctrine, including the one endorsed by this Comment. See infra Part VI. Indeed, scholars have suggested alternative ways of understanding conflicting interpretations of the doctrine. For example, a contemporary analysis of Robinson argued that the status/act holding of the case could be read in one of three ways. The Cruel and Unusual Punishment Clause, supra note 3, at 646. First, one could argue that the holding proscribes only "pure status" crimes--i.e., laws that punish membership in a status that is not predicated on any conduct, as opposed to laws that punish statuses, membership in which requires certain conduct (for example, being a "common thief," while a status, is predicated on one's having committed theft). Id. at 646-47. Second, the holding may be read to proscribe only "involuntary" status crimes--i.e., laws that punish, for example, drug addicts who are "born to mothers who are addicts" or whose addiction "may result from medical prescription." Id. at 648-49. Finally, the holding may be read to proscribe punishment of "innocent" status crimes--i.e., laws that punish membership in a "status one cannot change." Id. at 648. Under this reading, the state would not be permitted to punish an addict--even one who has become addicted through conduct that is entirely voluntary--once he is addicted. Id. Building on these three readings of the "constitutional principles underlying the Robinson holding," a more recent commentator has added a fourth reading, which she labels the "'human dignity' rationale for Robinson." Smith, supra note 4, at 314. According to this reading, derived from Justice Brennan's concurrence in Furman v. Georgia, imprisoning addicts is tantamount to treating "members of the human race as nonhumans" and thus is cruel and unusual. Id. at 313-14 (quoting Furman v. Georgia, 408 U.S. 238, 272-73 (Brennan, J., concurring)). However, this commentator acknowledges that, "because the definition of 'inhuman' treatment depends on one's own moral conscience... this rationale does not offer much help toward developing a conceptual rubric with which to guide future applications of Robinson." Id. at 314.

state may not criminally sanction non-volitional conduct. History, however, has not entirely borne out the success of the volitional reading, as "the more common [judicial] interpretation has been to treat the plurality opinion as controlling and Robinson as limited to a proscription of status criminality." Nevertheless, some judges have read White's opinion in Powell as controlling and have applied it to factual situations involving punishment for non-volitional conduct, as opposed to mere status.

It is worth noting as well that the volitional reading has manifested itself outside of American courthouses. The Model Penal Code suggests a voluntary act requirement as an element of every offense: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." Several states have incorporated this voluntary act requirement into their criminal codes. Further, the highest court of Canada has judicially recognized the requirement, albeit through the due process provisions of its Charter of Rights and Freedoms.

White's concurrence in Powell is considered by many to be the closest the U.S. Supreme Court has come to consummating its "flirtation with the possibility of a constitutional criminal law doctrine" that would have mandated a voluntary act requirement. However, the status/act reading remains the dominant judicial interpretation of Robinson and Powell, and the seemingly bright line the status/act reading draws is frequently cited as a rationale for giving it preference over the volitional reading. . .

V. Policy Implications of Applying the Robinson Doctrine to Camping Ordinances

Whether courts apply a status/act or a volitional reading of Robinson and Powell, they ought to recognize the policies behind laws targeting innocent conduct. The two primary policy rationales for camping ordinances--which punish sleeping, eating and other victimless activities when performed in public--are fairly intuitive, although one is considered by many to be legitimate, while the other remains unspoken.

The first rationale includes camping ordinances in a crime-reduction scheme that has come to be known as "quality-of-life enforcement," and which is designed to create "increased police-citizen contact as a way to create and maintain order in our urban streets and to decrease serious crime." Proponents of this scheme--which is also known as the "order-maintenance approach" or the "Broken Windows" theory--"affirmatively promote youth curfews, anti-gang loitering ordinances, and order-maintenance crackdowns as milder alternatives to the theory of incapacitation and increased incarceration." The premise underlying these quality-of-life measures is that cracking down on minor offenses will create an appearance of order in public spaces, which will deter "serious criminal activity."

The second, more hidden, rationale for camping ordinances is that, by allowing the police to harass the homeless through "removal or targeted arrest campaigns" to the point where the homeless can no longer live in a given city, elected officials appear to be "doing something" about the homeless problem in their cities. In other words, camping ordinances, particularly when they become part of a police campaign, eliminate homeless people from the view of the populace by making it illegal for the homeless to live in the city. This rationale is cosmetic--unlike the quality-of-life rationale, it does not target the homeless by way of nominally deterring serious crimes. A policy of cosmetic removal leads to one of two outcomes. The first is a "domino effect": if the homeless cannot live in one city, they are simply forced to move to a more tolerant city. The second is a costly cycle of "arrest, prosecution, and court enforced-service planning."

The second outcome played out in the San Diego Police Department's treatment of Thomas Kellogg.[2] In addition to raising constitutional questions, Kellogg's case is indicative of why a pure status/act reading of Robinson and Powell, under which camping ordinances are upheld because they nominally punish conduct, lead to unfavorable outcomes from a public policy standpoint. Somewhat paradoxically, the policy implications of applying the status/act reading to homeless persons are most evident in Justice Haller's majority opinion when she is expressing her own sympathy for Kellogg, and describing the compassion of Kellogg's jailers and arresting officers.

[2] [Kellogg, a homeless alcoholic, had been arrested several times for public intoxication and sentenced to 180 days in jail.[90] He appealed his conviction, arguing that, because he was both homeless and an alcoholic, he had no choice but to appear drunk in public, and therefore punishing him was cruel and unusual. The California Appeals court rejected an Eighth Amendment challenge to his conviction, characterizing it as for conduct—creating a safety hazard by blocking a public way. People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004)]

Judging from the facts in the opinion, the police who arrested Kellogg, and his jailers, were apparently kind to him. Moreover, this kindness seems to be the result of official police procedures: the officer who arrested Kellogg for the first time, Heidi Hawley, is "a member of the [city's] Homeless Outreach Team," which "consists of police officers, social services technicians, and psychiatric technicians," which, on prior occasions had approached Kellogg to offer him assistance, and which once before had taken Kellogg to the hospital for medical care. In jail, Kellogg received a variety of medical attention, including assistance for alcohol withdrawal. At trial, a physician testifying for the prosecution testified that Kellogg's condition improved in jail.

While the compassionate police treatment of Kellogg is heartening, it suggests a gap between the state of the law of public intoxication as applied to homeless alcoholics and public policy considerations. In short, the law allows the homeless to be arrested, and then obliges the police to care for them. However, as Kellogg contended, because he was a "chronic" or "serial" alcoholic, he was apparently ineligible for "the option of civil detoxification." The facts of Kellogg's case are not only suggestive of the cruel reality that people like Thomas Kellogg are perpetually exposed to criminal liability; they also attest to the futility of applying camping ordinances compassionately.

Meanwhile, as one scholar has suggested, abandoning a regime of camping ordinances not only will oblige cities to "[d]eliver[] comprehensive services to homeless people," but will lead to "more effective and cheaper" means for cities to address the homeless problem. At any rate, courts should not remain complicit in legislative efforts to keep homeless people out of sight of the voting public. Simply put, courts should not hide behind slavish status/act readings of the Robinson doctrine to enable legislators to appease their constituents. Not only is such an application of the Robinson doctrine a distortion of the principle underlying Robinson v. California, it leads to cosmetic and ineffectual methods of dealing with a widespread and substantial social problem and allows cities to "pass the buck" to cities making good-faith efforts to solve the homeless problem.

VI. The Behavioral/Contextual Reading: A New, Fairer Principle for Applying the Robinson Doctrine

How, then, can courts strike down camping ordinances and other laws that for all practical purposes punish status, without neutering municipalities' police power? The answer may well lie in the Robinson doctrine.

Even many of those who reject a volitional reading of the Robinson doctrine still recognize intuitively that there is something wrong with branding someone a criminal for doing something that it is beyond their power to avoid doing. On the other hand, courts have found it difficult to assert a limiting principle that would prevent lawmakers from targeting innocent conduct like sleeping in public, while allowing them to punish truly culpable--or at least harmful--conduct, such as buying or using drugs.

To date, proponents of the volitional reading have adopted or attempted to formulate tests that rely on overly subjective or factually burdensome standards of analysis. One scholar, for instance, has suggested a test for applying the Robinson doctrine to "symptomatic acts":

> If the case involves symptomatic acts [derived from status], then a test should be applied based on the homelessness paradigm. The following would have to be established for the Robinson doctrine to apply to symptomatic acts: (a) the "act" would have to be involuntary, (b) the status would have to be one that "cannot be changed" through individual volition except with significant outside assistance and (c) the "act" would have to be inextricably related to the status such that, as with the homelessness case, criminalization of the act obviously criminalized the status.

Unfortunately, this test--while it will result in a finding that camping ordinances are unconstitutional--leaves open to manipulation the definition of such terms as "involuntary," "cannot be changed," "inextricably," and "obviously," and remains vulnerable to Justice Marshall's slippery slope argument in Powell.

The court in Pottinger devised a more objective test, but one that would require defendants employing Robinson defenses to obtain factual information that may be difficult to obtain, and at any rate may not convince an unsympathetic court that their conduct was unavoidable. The Pottinger test essentially requires a homeless litigant to prove that the number of homeless persons living in the city on the night when he or she was arrested exceeded the number of available shelter beds. That proof would be difficult for a homeless litigant to establish, not least because calculating homeless populations usually involves a degree of estimation that courts may simply reject on evidentiary grounds.

The tests described above are derived from volitional readings of the Robinson doctrine, and thus are likely to be rejected by any court attracted to the seemingly bright-line status/act reading. However, these strict status/act readings--which claim legitimacy based on the purportedly self-evident difference between a status and an act--are

equally susceptible to uncertainty. Furthermore, these readings strip the Robinson doctrine of its fundamental substance, that the criminal law should strive, to the extent possible, to punish only the culpable.

The Robinson and Powell Courts clearly did not contemplate the homeless epidemic that would arise in the 1980s, and that may be severely exacerbated by Hurricane Katrina. However, given the "evolving standards of decency" rationale of the Court's Eighth Amendment jurisprudence--and invoked by Justices Stewart and Douglas in Robinson --one can argue that the Robinson majority would not have tolerated a law making it a crime simply to be without a home. Similarly, it is likely that the Robinson Court would have frowned upon criminalization of the innocent acts of homeless persons. Thus, to reduce the Robinson doctrine to a strict status/act reading--in addition to creating a false and easily malleable dichotomy between status and act--is also a clear undermining of Robinson's holding, which, although difficult to articulate, remains good law.

Courts could solve the dilemma of how to articulate the Robinson doctrine-- while not edging down the slippery slope as Justice Marshall and others have feared--simply enough by distinguishing between innocent and culpable conduct. The test for determining whether conduct is innocent or culpable would be this: is the targeted conduct only unlawful in a particular context? If so, then the conduct is innocent, and if the defendant is unable either to escape the context, or avoid performing the conduct, it would violate the Eighth Amendment to hold him criminally liable.

To understand this contextual reading, one must draw a distinction between laws that criminalize specific conduct in all spacial and temporal contexts--such as theft, homicide, rape, assault, and buying or possessing drugs--and laws that criminalize conduct only when performed in certain contexts, that is, in certain times and places, or under certain circumstances. The latter category includes the various forms of disturbing the peace and public indecency. Because very few people, if any, are unable to refrain from disturbing the peace, a defendant invoking a contextual reading of the Robinson doctrine as a defense to one of these charges would be unsuccessful.

On the other hand, a homeless litigant charged with sleeping in public--a contextual crime--can argue that he does not have a home and had nowhere else to sleep. Under a status/act reading of the Robinson doctrine, the argument would fail, because sleeping is an act. Under a volitional reading, his argument is correct, but, as Justice Marshall argued, so would be the argument of a person charged with homicide who "suffers from a compulsion to kill." No homicide defendant could employ the contextual reading as a defense, since his conduct is culpable regardless of the context in which he has committed it.

There are several acts, of course, whose culpability is a function of the context in which they are performed--and a contextual reading of the Robinson doctrine accommodates criminalization of these acts. For instance, a person who has a valid driver's license, but whose blood alcohol level is above the legal limit, is prohibited from driving. His conduct (driving) is unlawful only in a certain context (when he is intoxicated). Unless he is an alcoholic, a driver can avoid becoming drunk, and therefore he is liable for driving drunk. Even if the drunk driver is an alcoholic, he is not compelled to drive.[3]

The contextual reading of the Robinson doctrine has three benefits. First, it would quell the fears of adherents of the status/act reading, who warn that if the volitional reading is adopted, the State would lose the ability to punish even the compulsive killer for his act of homicide. In all jurisdictions in the United States, homicide is a crime whenever and wherever (within the jurisdiction) it is committed. Thus, under a contextual reading, punishing homicide would not violate the Eighth Amendment.

The second benefit of the contextual reading is that it would avoid arbitrary distinctions between status and act, because status is not the focal point of the analysis. As we have seen, judicial discussions of whether homelessness is a status under the meaning of Robinson lead to contrary conclusions. Such analyses, whatever their conclusions, neglect to mention that under the "evolving standards of decency" principle invoked by Robinson, the question of whether or not homelessness is a status is irrelevant: no state in 2006 would pass a law making it illegal simply to be

[3] Of course, a class of laws--sometimes known as "quasi-criminal" laws--has come to be accepted as a legitimate exercise of state power to regulate morally neutral aspects of public welfare. See Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 708 (2005). This class--which includes strict liability or "malum prohibitum" offenses lacking a mens rea element and carrying light penalties--should perhaps be excepted from the contextual reading of the Robinson doctrine advocated by this comment, because they often involve innocent conduct that can't be avoided by the offender. However, this exception is acceptable given the minimal stigma attached to these offenses. See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. Rev. 313, 319 (2003).

without a home.

Similarly, such an analysis would allow judges to avoid making ad hoc determinations of what defines conduct. Some courts put life-sustaining activity on the status side of the status/act divide, while others adhere to the principle that any action that can be described by a verb (unless, apparently, that verb is "to be") is conduct. A person's culpability should not come down to such linguistic niceties. Under the contextual reading the determination of culpability is made objectively, by reference to the state's penal code: if the conduct is criminalized by the state in all contexts, it is culpable.

The third benefit of the contextual reading is that it would continue to allow legislatures to ameliorate social ills through the criminal law, for example by creating "safe zones" for the homeless. Under such a scheme, the legislature could target socially undesirable conduct because the homeless would be able to avoid liability by moving to a designated safe zone. Under a contextual reading of the Robinson doctrine, a homeless person arrested for sleeping outside of the safe zone would not be able to mount a successful Robinson defense.

Although such a solution may seem distasteful--it effectively "quarantines" the homeless in designated areas--it is at least preferable to "quarantining" the homeless in jails and subjecting them to criminal liability. The scheme would also be fiscally beneficial to municipalities that lack adequate funding for social services. Moreover, delivering social services to the homeless may prove far simpler in a safe-zone city than in a city whose homeless population is widely dispersed. Finally, as sociologist Jane Jacobs described, whether by design or not, cities by their very nature tend to breed areas in which "unwelcome users" congregate, but which are not officially arrest-free zones.

However difficult it has been to encapsulate in a rule, Robinson's holding was designed to prevent branding people as criminals because of who they are (as opposed to what they do), and distinguishing between status and conduct has not furthered this goal. Because the Robinson doctrine has been controversial and subject to differing interpretations, those who favor the doctrine's continuing utility would be well-served by an expression of the doctrine that is maximally neutral, rigid, and objective.

Wayne Wagner, Homeless Property Rights: An Analysis of Homelessness, Honolulu's "Sidewalk Law," and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights under the U.S. Constitution, 35 U. Haw. L. Rev. 197 (2013)

V. HOMELESS AS SUSPECT CLASS UNDER THE EQUAL PROTECTION CLAUSE

As argued earlier, many of the prejudices against the homeless are likely rooted to some extent in the federal Constitution's prejudices against the propertyless. The Constitution originally reserved full citizenship rights to free land-owning white males. When one separates "free land-owning white male" into its four constituent elements, it becomes apparent that most of those who have been excluded for lacking these characteristics—slaves, blacks, other non-whites, and women—have received substantial constitutional redress either through Amendments or Supreme Court decisions. But the same does not hold true for those who lack real property. Granted, non-propertied individuals have received expanded constitutional protection of the right to vote, like women and non-whites.[173] Beyond this, however, non-propertied individuals do not enjoy the same equal protection rights that blacks/non-whites [174] and women now possess. Thus, of the

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[171] *Id.* at 14-20.

[172] *Id.* at 37-38. The only choice that suggested respondent's control was "lack of education or skills." *Id.*

[173] The 15th Amendment enfranchised black males in 1870, though blacks and other racial and ethnic minorities had to wait for the Voting Rights Act of 1965 for substantial protection against discriminatory voting practices. The 19th Amendment enfranchised women in 1920. The 24th Amendment, ratified in 1964, prohibited poll taxes in federal elections. Soon thereafter, the Supreme Court held that the poll tax for state elections were a violation of the Equal Protection Clause in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

[174] *See, e.g.*, Bowman, *supra* note 152, at 1753 (discussing problems with the Supreme Court's use of the White-Black binary, then White-Non-white binary, in school desegregation jurisprudence); RICHARD J. PAYNE, GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE 136 (1998).

original classifications at the heart of the Constitution's earliest requirements for full citizenship, only the non-propertied still seem to be excluded.[175]

To redress this inequality, we ought to consider to what extent homeless individuals can look to the equal protection doctrine for fuller citizenship rights. The doctrine encompasses not only the 14th Amendment's Equal Protection Clause, which declares that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[176] but also the 5th Amendment's Due Process Clause, which the U.S. Supreme Court interpreted in *Bolling v. Sharpe*[177] as creating the same equal protection standard for the federal government.[178]

Equal protection jurisprudence develops in part from the famous footnote four in *United States v. Carolene Products Co.*[179] In footnote four, Justice Stone wrote that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[180] This footnote signaled an intent to scrutinize statutes that "affect socially isolated minorities which have no reasonable hope of redress through the (formally available but, to them, useless) political processes."[181] But the footnote left for another day the specific contours of the standard of review.[182]

Subsequently, the Court decided that unless a group is a "discrete and insular minority," or that the law interferes with a fundamental right, courts must defer to the legislature by applying minimal scrutiny.[183] Thus, suspect classification, which can be seen as shorthand for a court's analysis of

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[175] I do not treat the classification of "slave" because the 13th Amendment abolished slavery in 1865, rendering the status categorically illegal. U.S. CONST. amend. XIII.

[176] U.S. CONST. amend. XIV, § 1. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that equal protection applies to the federal government through the Fifth Amendment's Due Process Clause.

[177] 347 U.S. 497 (1954).

[178] *Id.*

[179] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[180] *Id.*

[181] Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982).

[182] *Carolene Products*, 304 U.S. at 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

[183] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 678 (3d ed. 2006).

whether a group is a "discrete and insular minority" worthy of heightened protection, becomes key to homeless rights. Unfortunately, neither the U.S. nor Hawai'i Supreme Court[184] has answered whether or not homeless persons constitute a suspect class. Moreover, lower courts have used this lack of precedent perfunctorily to deny that the homeless are a suspect class.[185]

I argue that those who lack real property—the homeless—deserve some form of heightened scrutiny either as a suspect or quasi-suspect class[186] for

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[184] The Intermediate Court of Appeals did state that homeless are not a suspect class in *State v. Sturch*, 82 Hawaii 269, 276, 921 P.2d 1170, 1177 (Haw. Ct. App. 1996). Then-ICA Judge Acoba wrote, "[f]or purposes of equal protection analysis, we note at the outset that the statute in question does not discriminate on the basis of suspect categories and Defendant does not belong to any suspect class." *Id.* In reaching this conclusion, he cited the Hawai'i Supreme Court's statement of suspect classification in *Nachtwey v. Doi*, 59 Haw. 430, 434 n. 5, 583 P.2d 955, 958 n. 5 (1978) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)):

> [a] suspect classification exists where the class of individuals formed has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Sturch, 82 Hawaii at 276, 921 P.2d at 1177 n.8. Acoba problematically conflates homeless people with poor people in citing to this quotation, which arguably makes a strong case for homeless as a suspect class, as discussed below.

[185] *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1357-58 (11th Cir. 2000); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 n.36 (3rd Cir. 1992) (though the *Kreimer* court provided no discussion for holding that homeless are not a suspect class, eight cases cited *Kreimer* for support); Garber v. Flores, No. CV 08-4208DDPRNB, 2009 WL 1649727, at *10 (C.D. Cal. June 10, 2009). For cases that denied homeless suspect classification based on the Supreme Court's conclusion that wealth does not create a suspect classification; see, for example, Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996). *But see*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992):

> This court is not entirely convinced that homelessness as a class has none of these "traditional indicia of suspectness." It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.

[186] It is more likely that courts will grant homeless quasi-suspect class status versus suspect class status. The difference in status depends on whether the government may have legitimate reasons for treating members of a group differently than other people. The Supreme Court has extended suspect classification to race, national origin, and state discrimination against alienage. However, for discrimination against gender and non-marital children, the Court has applied intermediate scrutiny. According to Erwin Chemerinsky:

> the Court's choice of strict scrutiny for racial classifications reflects its judgment that race is virtually never an acceptable justification for government action. In contrast, the Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to

two reasons: First, unlike other groups, homeless by definition lack a fundamental buffer against arbitrary governmental interference—real property. Second, the homeless satisfy the factors that courts have used to determine suspect classification, but only when the third factor, immutability, is reformulated to better accord with current understandings of identity politics and with footnote four's process-based concerns.

In one sense, homeless deserve greater Equal Protection Clause solicitude because their lack of real property uniquely exposes them to governmental interference. Regardless of whether the Constitution should impose affirmative duties on the government, at the very least, the Constitution provides individuals with "negative liberties," which protect them from certain forms of governmental interference. Harking back to the earlier discussion of real property as fundamental to political liberty, the purpose of the Constitution aligns with the purpose of real property to the extent that both "house" liberty from governmental interference. As Charles Reich wrote in *The New Property*:

> Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done. . . . Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.[187]

Because homeless persons generally reside in public zones, where government exercises more regulatory power, they are exposed to greater risk of governmental interference than people who can retreat into the sanctity of their homes. Without the real property that not only serves a parallel function to the Bill of Rights in protecting liberty, but also enables an individual to access the benefits of the Bill of Rights fully, the homeless suffer the unique disadvantage of being doubly exposed to greater governmental interference.

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be instances where sex is a justifiable basis for discrimination.

CHEMERINSKY, *supra* note 183, at 672-73. For a discriminatory law to survive intermediate scrutiny, it "must serve important governmental objectives and must be substantially related to those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

[187] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

This lack of real property also makes the homeless better candidates for suspect classification than the poor. This is a necessary distinction because lower courts have generally denied suspect classification to the homeless by applying the U.S. Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*[188] that the poor do not constitute a suspect class.[189] In rejecting the district court's holding that wealth was a suspect classification,[190] the *Rodriguez* majority suggested that two questions were vital to determining whether the poor constitute a suspect class: 1) "whether . . . the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms"; and 2) "whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence."[191] The majority linked the two questions by concluding that a class might be identified by the fact that its members experienced an absolute deprivation because of a shared trait, such as the inability to pay for a desired benefit.[192] Because the plaintiffs could only allege the relative deprivation of having less ability to pay for an education, the majority refused to find the plaintiffs constituted a "definable category of 'poor' people."[193] *Rodriguez* suggested that the poor have failed to achieve suspect class status because poverty is an inherently relative term.[194] As a relative term, poverty creates an amorphous and unwieldy class unless there is an absolute deprivation to limit and frame the class. In contrast to the category of "poor," however, the homeless are a discrete and identifiable class to the extent that their lack of real property creates an

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[188] San Antonio Indep. Sch. Dist. v. Rodriguez,411 U.S. 1, 28 (1973); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) (citing Maher v. Roe, 432 U.S. 464, 470-71 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis").

[189] *Rodriguez* involved a class action lawsuit brought by the San Antonio School District on behalf of families residing in poor districts. Texas's school system relied on local property taxes, which lead to great disparities in education funds between wealthy and poor districts. Plaintiffs alleged that this system discriminated against the poor and violated the Fourteenth Amendment's Equal Protection Clause. *San Antonio v. Rodriguez*, 411 U.S. at 1.

[190] Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 282-84 (W.D. Tex. 1971) *rev'd*, 411 U.S. 1 (1973).

[191] *San Antonio v. Rodriguez*, 411 U.S. at 19.

[192] *Id.* at 20, 25 (The Court concluded that "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education-the disadvantaged class is not susceptible of identification in traditional terms.").

[193] *Id.* at 25.

[194] *See* JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES (1998), a seminal work arguing that modern consumer society relies on a logic of difference in defining affluence and poverty. Thus, poverty is always a relative term that is unintelligible by itself.

absolute deprivation of the rights conditioned on real property. For this very reason, the homeless are better candidates for suspect classification than the poor.

To determine suspect classification, courts generally have applied some combination of the following criteria: 1) whether a particular group has suffered a history of discrimination;[195] 2) whether the group is politically powerless;[196] and 3) whether the group is differentiated by an "obvious, immutable, or distinguishing characteristic . . . ."[197]

The first two factors patently favor suspect classification for the homeless. First, the homeless have suffered a well-documented history of discrimination, with courts recognizing that "discrimination against the homeless is likely to be a function of deep-seated prejudice."[198] As discussed above, there is considerable evidence of state and municipal governments continuing to engage in long-standing practices of discrimination against the homeless, both through harassing sweeps and various kinds of anti-homeless legislation.

Second, by almost any measure, homeless people lack political power.[199] Justice Marshall so noted when he wrote that:

> the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion. Moreover, homeless persons are likely to be denied access to the vote since the lack of a mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote.[200]

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[195] Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (citing *San Antonio v. Rodriguez*, 411 U.S. at 28).

[196] *Id.*

[197] Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[198] *See, e.g.*, Johnson v. City of Dallas, 860 F. Supp. 344, 356 (N.D. Tex. 1994) *rev'd in part, vacated in part sub nom.* Johnson v. City of Dallas, Tex., 61 F.3d 442 (5th Cir. 1995) (citing 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, 635–45 (1992)).

[199] According to Kenji Yoshino, the Court has used three tests for political powerlessness. In *Carolene Products*, the Court analyzed whether groups were "discrete and insular minorities." A plurality in *Frontiero* asked whether a group was underrepresented in the "[n]ation's decisionmaking councils." And the Court in *Cleburne* looked to whether the group was unable "to attract the attention of the lawmakers." Yoshino, *supra* note 151, at 565. For a discussion of the homeless' lack of participation in the political process, see Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 338 (2000).

[200] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting).

Justice Marshall acknowledged an obvious truth—that homeless cannot participate effectively in the political processes because they lack two main conditions for political participation: genuine voting power and money. Anti-homeless legislation such as Honolulu's "sidewalk law" further erodes the already attenuated ability of homeless to vote by putting them at considerable risk of losing identification and voting documents. Moreover, several states have recently scaled back voting procedures that homeless people especially rely upon, such as third-party registration, same-day voting and registration, and provisional ballots.[201] To the extent that homeless are effectively disenfranchised, one can argue that homeless share the same characteristic that the Supreme Court used in *Graham v. Richardson*[202] to extend suspect classification to aliens—the inability to protect themselves via the political process because of their inability to vote.[203]

The third factor has arguably garnered the most attention (and contention) in its focus on whether a potential suspect class possesses an immutable trait.[204] This factor has been savaged by scholars for its many flaws,[205] the first of which is that the word itself is highly misleading in that "immutability's" substantive legal definition does not match its lay definition of "unalterable."[206] Despite this, and despite not being a requirement, but a factor that courts have at times excluded,[207] immutability deserves in-depth treatment because it serves an important gatekeeping function to exclude potential groups. And so many courts have refused to surrender this factor.[208]

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[201] *See* Letter from Neil Donovan, Exec. Dir., National Coalition for the Homeless, to Eric H. Holder, Jr., Attorney Gen. of the United States (Aug. 17, 2011), *available at* http://www.nationalhomeless.org/projects/vote/NCH_HolderLetter_Aug11.pdf.

[202] 403 U.S. 365 (1971).

[203] *Id.* at 367.

[204] *See, e.g.*, M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards A More Progressive Equal Protection Rights Discourse*, 18 Am. U. J. Gender Soc. Pol'y & L. 439, 448 (2010) ("While the Supreme Court has 'never held that only classes with immutable traits' can achieve suspect classification status, the Court has 'often focused on immutability' in its equal protection jurisprudence.").

[205] *See infra* note 226 & accompanying text.

[206] *See* THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1317 (Thumb Indexed Edition 1993).

[207] Darmer, *supra* note 204, at 448-49; *see also* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 Va. J. Soc. Pol'y & L. 169, 172 n.16 (2011); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (not listing immutability as one of the "traditional indicia of suspectness"); Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997) *rev'd*, 155 F.3d 628 (2d Cir. 1998) (noting that the Supreme Court has declined to apply immutability on several occasions).

[208] Yoshino, *supra* note 151, at 558.

Because the current inquiry is analytically problematic but jurisprudentially useful, immutability likely will not be abandoned by the courts. But it should be revised. If the immutability inquiry must ask for a deep-seated trait, I argue that this inquiry should look at the trait as a prejudice held by the majoritarian society rather than as an inherent part of an individual. But before offering my alternative form of immutability, I begin by discussing the current form of immutability, specifically the considerations that shape it and the problems that discredit it.

The Court first introduced immutability in *Frontiero v. Richardson*[209] to explain why the classification of sex deserved heightened scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ..' And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[210]

The passage states that a central consideration of the Court's immutability analysis is whether the trait is within one's control.[211] The Court claims that this concern is borne out of a commitment to fairness expressed in the principle "legal burdens should bear some relationship to individual responsibility."[212] However, courts that have used the lack of immutability to disqualify a group show that the underlying rationale is none other than fault.[213] Such courts countenance majoritarian discrimination through the

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[209] 411 U.S. 677 (1973).

[210] *Id.* at 686-87 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

[211] *See* Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989). In *Watkins*, Judge Norris suggested three possible interpretations of immutability: 1) "strictly immutable"; "effectively immutable"; and what Kenji Yoshino refers to as "personhood immutability." *Id.*; Yoshino, *supra* note 151, at 494. However, Judge Norris argued that the Supreme Court could not have intended "strict immutability," or the inability to change, because people can have sex-change operations, aliens can naturalize, and blacks may "pass" or change their racial appearance through pigment injections. *Watkins*, 875 F.2d at 726. Instead, Judge Norris argued that the Supreme Court implicitly adopted the "effectively immutable" interpretation because "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity." *Id.*

[212] *Id.*

[213] *See infra* note 246 & accompanying text.

"prism of fault"[214] by exposing their willingness to withhold suspect status from groups who theoretically can change the trait-in-question. This is tantamount to a court announcing its unwillingness to help those that do not help themselves. Unfortunately for the homeless, courts are well-equipped to find against the homeless under this lack of control/fault-based rationale by resorting to longstanding beliefs that individuals are ultimately homeless because they have made poor decisions.[215]

Another consideration that disfavors homeless immutability is whether the trait exists within the individual class member—hence, courts have based immutability on the presence of permanent and visible biological traits comparable to race and sex that are said to inhere in the individual.[216] With race and sex as paradigms for immutability, homelessness again fails as a rationale for immutability, because although homelessness may in some cases be an "accident of birth," homelessness is not seen as biologically fixed like one's skin color or sex.

There are two considerations under the current immutability analysis that may or may not favor homeless immutability. The first is visibility, which courts have sometimes analyzed by construing the third factor as "an "obvious, immutable, or distinguishing characteristic."[217] Visibility, as a factor, encompasses at least two variations: "social visibility," or the power to attract political support[218] and "corporeal visibility," which describes a conspicuous physical trait that allows dominant groups to identify and harass minority groups.[219] On first glance, homeless should fare well under either form of visibility because the group has little power to attract political support and, as discussed earlier, there is a visual bias that skews the perception of homeless individuals as all exhibiting such negative traits as filth, mental disease, irresponsibility, and crime.[220] Moreover, homeless are more visible than other groups insofar as they predominantly reside in

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[214] Graham, *supra* note 202, at 185.

[215] *See* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997).

[216] Yoshino, *supra* note 151, at 498; *see, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[217] *See, e.g.*, Bowen, 483 U.S. at 602 (asking whether the group is differentiated by an "obvious, immutable, or distinguishing characteristic"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Witt v. Dep't of Air Force, 527 F.3d 806, 809 (9th Cir. 2008).

[218] Yoshino, *supra* note 151, at 494-95 (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973), which defined "visibility" in part as the amount of representation a group has in government).

[219] *Id.*

[220] *See supra* Part IV.C & Lee, *infra* note 248.

public spaces. However, as Professor Yoshino notes, courts have tended to require a specific form of corporeal visibility—i.e., visibly immutable traits such as skin or male/female physical characteristics.[221] To this extent, visibility does not favor homeless suspect classification because homelessness is not identifiable with any physical traits individuals are born with.

The second consideration that may go either way is whether the characteristic "frequently bears no relation to ability to perform or contribute to society."[222] Courts use this inquiry to differentiate between "such non-suspect statuses as intelligence or physical disability,"[223] which may be legitimate bases for differentiation, and such statutes as race or gender, which are illegitimate bases for differential treatment. This rationale disfavors homeless if based on the very prejudices that homeless are incompetent, incapable, and/or insane. Rid of these prejudices, homeless as a class only possesses one trait that qualifies them as homeless, with that trait much more neutral as to homeless individual's ability to perform: the simple lack of real property. That said, courts are not immune to those negative stereotypes, as the court in *Love v. Chicago* showed,[224] and so it is difficult to predict how the homeless would fare under this consideration.

In sum, homelessness is seen as behavioral rather than corporeal, and to that extent, it fails arguably the two most important considerations under the current test: whether group members lack control over their trait and whether the trait exists in the individual as a corporeal trait.[225] Thus, under the current form of immutability, it is no surprise that homeless are still a group on the outside looking in when it comes to suspect classification.

But the present test is a mistake, as shown by over two decades of scholarly criticism of immutability.[226] In fact, the calls for immutability's

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[221] Yoshino, *supra* note 151, at 499.

[222] Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973).

[223] *Id.*

[224] Love v. Chicago, No. 96 C 0396, 1998 WL 60804 (N.D. Ill. Feb. 6, 1998); see *supra* note 142 & accompanying text.

[225] These considerations are arguably the most important because they enable a court to narrow the spectrum of groups that could qualify for suspect status. *Cf.* Yoshino, *supra* note 151, at 557 (arguing that courts have retained the immutability factor because of its vital gatekeeping function in excluding potentially suspect classes).

[226] *See, e.g*, JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-16 (1994); Marc R. Shapiro, Comment, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409 (2003).

demise have been so compelling that Kenji Yoshino analogized further critique of immutability as "tantamount to cataloguing new ways to flog a dying horse."[227] For example, Laurence Tribe has pointed out the ways in which "features like immutability are neither sufficient nor necessary."[228] Immutability in itself is insufficient to determine whether a group deserves suspect classification when one considers that "[i]ntelligence, height, and strength are all immutable for a particular individual, but legislation that distinguishes on the basis of these criteria is not generally thought to be constitutionally suspect."[229] Immutability is unnecessary, as Professor Tribe goes on to explain, "[because] even if race or gender became readily mutable by biomedical means, I would suppose that laws burdening those who choose to remain black or female would properly remain constitutionally suspect."[230] Additionally, other scholars have criticized how courts have pegged immutability's criteria to the pre-existing suspect classifications of race and gender, thus rigging immutability to deny new candidate groups. [231] As a result, immutability has "evolved without a definite substantive definition because the [U.S. Supreme C]ourt tended to define 'immutability' by analogizing it to race or gender."[232]

Indeed, the U.S. Supreme Court itself has even questioned the wisdom of immutability. In *City of Cleburne, Tex. v. Cleburne Living Ctr.*,[233] the Court admitted to doubts about whether immutability provided a principled way to determine which groups merited heightened scrutiny:

> if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a

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[227] Yoshino, *supra* note 151, at 491.

[228] Tribe, *supra* note 226, at 1073.

[229] *Id.* at 1080 n.51.

[230] *Id.*; *see also*, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (applying heightened scrutiny to alienage even though it is not immutable).

[231] ELY, *supra* note 226, at 150 ("[N]o one has bothered to build the logical bridge, to tell us exactly why we should be suspicious of legislatures that classify on the basis of immutable characteristics. Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?"); *see also* Yoshino, *supra* note 151, at 559. According to Kenji Yoshino, "tracing the immutability and visibility factors to their roots demonstrates that they were formulated in an attempt to isolate the commonalities between the paradigm groups of race and sex in the early 1970s." *Id.* at 559.

[232] Shapiro, *supra* note 226, at 437.

[233] 473 U.S. 432 (1985).

> variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.[234]

Worryingly, the Court appears less concerned with the risk of excluding deserving classes and more concerned with potentially including underserving classes. As Kenji Yoshino states, "it can be read as an argument against "too much justice[.]"[235] This is further reason that it may be time to reformulate immutability, in light of immutability's failure to provide a principled way to determine suspectness and the Court's willingness to respond to this uncertainty by erring on the side of denying too many so as not to admit too many. Moreover, as the Supreme Court and many lower courts have failed to heed scholarly calls for immutability's demise, revising immutability perhaps offers a more realistic alternative than discarding immutability altogether.

What the immutability inquiry should ask is: to what extent is there a deep-seated—i.e., an immutable[236]—prejudice that the majoritarian society has created to identify and discriminate against a particular group? At its essence, this revised immutability still focuses on identifying a suspect trait, but simply situates the trait in the majoritarian society's prejudices rather than the minority's body. By doing so, this revised factor offers advantages

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[234] *Id.* at 445-46.

[235] Yoshino, *supra* note 151, at 491 (quoting McClesky v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting)).

[236] Though critics may claim that "deep-seated" is not the same as "immutable," courts have never actually used "immutable" in its strict sense as "changeless" or "unalterable." *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 506 (2004) ("The immutability requirement also finds itself in conflict with the factual reality that purportedly fixed traits, such as sex, are in fact more alterable and flexible than commonly presumed. Other characteristics deemed suspect or quasi-suspect, such as alienage and illegitimacy, may also be changed."); *see also* ELY, *supra* note 226, at 150 (criticizing the Court's reliance on immutable traits for suspect classification status, noting that "even gender is becoming an alterable condition"). The Ninth Circuit in *Watkins v. U.S. Army* has gone on record to state that "it is clear that by 'immutability' the [U.S. Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class" because no current suspect class, whether national origin, sex, alienage, illegitimacy, or even race—could satisfy that requirement." Watkins v. U.S. Army, 837 F.2d 1428, 1446 *superseded*, 847 F.2d 1329 (9th Cir. 1988) *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989). The word "immutability" has been a misnomer as "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty . . . ." *Id.* As such, "deep-seated" is appropriate because it more closely approaches the factor's focus on the difficulty, rather than the impossibility, of change.

over the current version of immutability: it moves away from a problematic fault-based model; it better fits with current understandings of identity politics; and it better serves the equal protection doctrine's promise, as suggested in footnote four of *Carolene Products*, of applying heightened scrutiny when "prejudice against discrete and insular minorities . . . [may] curtail the operation of political processes ordinarily to be relied upon to protect minorities[.]"[237]

The first reason for this shift is that current understandings of identity—racial, sex, and otherwise—require revised immutability. Cadres of scholars now accept that even race and gender are products of social construction.[238] It is society—not biology or nature—that identifies traits and instills them with meaning.[239] The so-called "accidents of birth"[240]—corporeal traits such as skin color or anatomy—are devoid of harmful meaning in themselves. The same is true of non-corporeal traits such as one's religion or country of origin. This understanding of identity reveals that focusing on a corporeal trait without reference to its social construction, as the current immutability analysis does, is like hearing a word but deciding to ignore its meaning. Instead, immutability analysis should focus on group traits as manifestations of social perception rather than biology realities, as revised immutability does.

Second, the version of immutability I propose also interlocks better with the vision laid out in footnote four of *Carolene Products*, which still merits our admiration despite the footnote's shortcomings.[241] Footnote four

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[237] *Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

[238] *See, e.g.*, IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (Lopez goes a step further by showing how laws actually helped to construct socio-racial identities in America in the 19th and 20th centuries); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 27, 28 (1994) ("Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. . . . [A]s human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations.").

[239] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (recognizing belief among some in the scientific community that "racial classifications are for the most part sociopolitical, rather than biological, in nature"); *see also, e.g.*, Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 Stan. L. Rev. 747, 777 (1994) ("Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning."); Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392 (2001) ("gender identity, rather than anatomy, is the primary determinant of sex")

[240] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[241] *See, e.g.*, David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1265 (2010) (noting the footnote's disregard for "anonymous and diffuse" minorities who are likely to be more systematically disadvantaged than "discrete and insular" minorities);

expresses a vision of the court's role in a democratic society that can be summarized as follows: In a well-functioning democracy, majorities should be allowed to do what they choose. However, if illegitimate prejudice systematically barricades certain groups from effective participation in the political process, the court's role is to cure the defect, protect these groups, and, in doing so, to maintain the integrity of the democratic political process.[242] The existence of illegitimate prejudice is key to any analysis under footnote four because the footnote did not intend to simply protect minorities from majorities. Justice Stone, its author, understood that "there are winners and losers in the democratic process, and the losers should not be able to reverse their losses by appealing to the courts."[243] Footnote four thus regards a group's persistent failures in the democratic process as symptomatic of a defect in the democratic process only when those failures are caused by majoritarian "prejudice."

To be more specific, the problem with the current form of immutability is that it conceptualizes traits as inhering within individuals, but also separates these traits as a distinct third factor. Footnote four shows that isolating these "inherent" traits is an analytical mistake, and the footnote does so by coupling prejudice and "discrete and "insular" minorities under the same analysis. After all, it is not the inherent trait *per se* that makes a group "discrete and insular." Rather, it is the prejudice that makes the group "discrete" in the sense that the majoritarian society can identify the group, and "insular" in the sense that the prejudice prevents other groups from forming coalitions with the group, leaving it systematically isolated. Unlike current immutability analysis, revised immutability is faithful to footnote four's identification of the "defect" as really being the majoritarian prejudice, which is always relational in nature, and not the minority's inherent trait, which is supposed to exist independently within the individual.

Arguably, the first two factors for suspect classification—the lack of political powerlessness and the history of purposeful discrimination—are attuned to these process concerns, but perhaps not sufficiently so. These factors may, but do not require, a court to extrapolate the specific prejudice(s) that led to the discrimination, and therein lies the insufficiency.[244] By not forcing the court to identify the specific prejudices

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Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1090 (1982) (obversing that the footnote is not, nor was never intended to be, a fully developed theory of heightened scrutiny).

[242] Powell, Jr., *supra* note 241, at 1088-89.

[243] Strauss, *supra* note 241, at 1257.

[244] *See, e.g.*, Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (applying a cursory one-sentence review of the "history of purposeful unequal treatment to the aged"

that led to a process defect, the two factors lack the predictive power of this revised immutability to anticipate the strength and longevity of the discrimination. In this way, this revised immutability does not simply repeat the first and second factors but in fact improves the court's predictive power regarding what should be a central concern: what is the likelihood that the majority's discrimination of a group based on a particular prejudice or trait will continue into the future without the court's intervention?

Third and finally, revised immutability is desirable because it corrects the current version's fault-based orientation,[245] which has led courts to deny protection if they judged the victim to bear some responsibility, regardless of whether the majoritarian society was guilty of discriminating against the victim. Correction is all the more important because certain lower courts have applied an uncompromising fault-based test by misinterpreting the Supreme Court's own use of immutability. The Supreme Court has never stated that an immutable characteristic was necessary for suspectness—the presence or absence of an immutable trait is just a factor to be considered.[246] However, lower courts have read the Supreme Court's immutability jurisprudence to impose such a condition—as a result, disqualifying potential suspect classes like homosexuals and the homeless because the class could not prove that the trait in question was immutable.[247]

By requiring an immutable trait, and punishing those that do not have it, the lower courts use immutability as a barricade to minorities who seem complicit in the discrimination they suffer—the tortured reasoning being that a minority is responsible for any harm s/he suffers because of a trait, if that trait is possible to control, but s/he refuses to change it. The problem with such a fault-based model is crystal clear. Such an argument is akin to

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without considering the actual prejudices involved).

[245] *See, e.g.*, Graham, *supra* note 202, at 185.

[246] Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *see also, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (listing immutability as a factor but not stating that it is a requirement for suspect class status); Plyler v. Doe, 457 U.S. 202, 220 (1982) (applying intermediate scrutiny despite finding that undocumented status is not immutable); Craig v. Boren, 429 U.S. 190, 212, n.2 (1976).

[247] *See, e.g.*, Andersen v. King County, 138 P.3d 963, 974 (2006); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("To be a 'suspect' or 'quasi-suspect' class, homosexuals *must* 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless.") (emphasis added); *see also* Johnson v. City of Dallas, 860 F. Supp. 344, 357 (N.D. Tex. 1994) *rev'd in part, vacated in part sub nom.* Johnson v. City of Dallas, Tex., 61 F.3d 442 (5th Cir. 1995) (noting that homeless satisfied a showing of a history of discrimination and perhaps political powerlessness, but had a weak case for suspectness because homelessness is not immutable).

saying that the perpetrator is innocent because the victim was asking for it. The revised factor shifts the "prism of fault" from the victim to the perpetrator, not to also shift punishment to the perpetrator, but to justify heightened protection of the victimized group.

Homeless as a class satisfy this revised immutability. They have been perpetual victims of deep-seated prejudices by the overarching society, which continues to associate the homeless with many of the same negative traits, like criminality, instability, mental illness, indolence, and filth, that have afflicted the homeless throughout America's history.[248] For example, in 1837, the U.S. Supreme Court, in upholding a law that allowed New York to deny admission to paupers arriving on ship, stated that it was "competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infections articles . . . ."[249] This is but one instance in a long tradition of legislation, jurisprudence, and policies that at their core viewed vagrancy and homelessness as crimes of condition or behavior because they associated such people with the negative traits listed at the start of this paragraph.[250] To the extent that these specific stereotypes have endured, the homeless can claim that they suffer from "immutable" negative traits woven into the very social fabric of our country. Satisfying this revised immutability, and fulfilling the other two factors courts use to determine suspect classification, the homeless deserve heightened scrutiny under the equal protection doctrine.

Now is a good time to link the earlier part of this section, which argues that homeless *need* the equal protection doctrine's help because their lack of real property makes them uniquely vulnerable to arbitrary governmental interference, with the second part of this section, which argues that homeless *deserve* equal protection doctrine's help because they satisfy the factors that courts should use to determine a group's suspectness. One of the main observations in the earlier part of this section was that the

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[248] *See, e.g.*, Barrett A. Lee, Chad R. Farrell & Bruce G. Link, *Revisiting the Contact Hypothesis: The Case of Public Exposure to Homelessness*, 69 AM. SOCIOLOGICAL REV. 40, 42 (2004) ("The substantial percentages of survey respondents blaming homeless people for being homeless and attributing deviant properties (substance abuse, mental illness, dangerous-ness, etc.) to them would seem to confirm the public's negative view of the homeless") (citing Barrett A. Lee, Sue Hinze Jones, & David W. Lewis, *Public Beliefs About the Causes of Homelessness*. 69 SOCIAL FORCES 253 (1990).

[249] Mayor, Aldermen & Commonalty of City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), *quoted in* Simon, *infra* note 250.

[250] *See, e.g.*, 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, 639 (1992).

Constitution discriminates against the homeless. Recognizing this constitutional discrimination, and recognizing that the equal protection doctrine prohibits both federal and state governments from arbitrary discrimination,[251] I wondered if the equal protection doctrine could not also be interpreted to impose a duty on the Constitution to purge itself of any discrimination against groups such as the homeless. The Constitution's "do as I say not as I do" approach to equal protection almost seems like a flawed contradiction. Almost. But the bottom line is that the Constitution does not require itself to adhere to the standards of equal protection. The equal protection doctrine, then, does not come along to erase the Constitution's preference for property, in general, even if the Fourteenth Amendment did help to erase the Constitution's preference for a specific type of property, slaves.[252]

Nonetheless, if scholars may not be able to argue that the equal protection doctrine revises the whole Constitution's discrimination against the propertyless, there is an argument that the Constitution's discrimination against the propertyless further intensifies an already strong claim by the homeless for suspect or quasi-suspect status under the equal protection doctrine. This constitutional discrimination makes the homeless uniquely deserving of equal protection solicitude in a few ways.

First, homeless are more vulnerable to government interference than perhaps any other groups because of their lack of real property, which translates into lesser constitutional protections. Second, homeless are uniquely deserving under the process-based concerns of *Carolene Products* footnote four and under revised immutability's concern with the immutability of social prejudices. For example, one critique of footnote four is that it seems to permanently extend heightened scrutiny to classes that eventually may not need it.[253] On this, Justice Powell once said, "Over our history many have been minorities, ineffective in politics, and often discriminated against. But these conditions do not remain static. Immigrant groups that once were neglected have become influential participants in the political process."[254] The two paradigmatic suspect classes—women and African Americans—are cited as groups with ever-increasing political participation and power,[255] perhaps in large part as a result of the equal

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[251] *See supra* note 10.

[252] *See* the "Reconstruction Amendments"—U.S. CONST. amends. XIII, XIV, XV.

[253] Strauss, *supra* note 241, at 1267.

[254] Powell, Jr., *supra* note 241, at 1091; Strauss, *supra* note 241, at 1267.

[255] Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 744 (1985) ("Thanks largely to the achievements of the generation that looked to *Carolene* for inspiration, black Americans today are generally free to participate in democratic politics—and do so by the millions in every national election.").

protection doctrine. In contrast, it is hard to foresee homeless ever becoming "influential participants in the political process,"[256] in part, because the discrimination also remains interwoven into the constitutional fabric of the country, which is no longer the case for other suspect classes. Though the federal Constitution, and state constitutions such as Hawaii's, are not the only forms of official discrimination against the homeless, their durability and ideological and legal power leave no doubt that the homeless both *need* and *deserve* equal protection solicitude because the prejudices they face threaten to be immutable.

[256] Powell, Jr., *supra* note 241, at 1091.

August 30, 2018

Via E-mail & U.S. Mail

Mayor Dan Gelber &
Miami Beach City Commission
1700 Convention Center Drive
Miami Beach FL 33139

RE: Chapter 74, Article III (Panhandling on Public Property)

Dear Mayor Gelber and City Commissioners,

We write with respect to Chapter 74, Article III (Panhandling on Public Property) (the "Ordinance"). Since the landmark Supreme Court *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – including many with features similar to the one in the City of Miami Beach ("the City"), has been found constitutionally deficient. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)*; see, e.g. Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015), *declaring ordinance unconstitutional on remand*, 144 F. Supp. 3d 218, 238 (D. Mass. 2015). In Florida, the U.S. District Court for the Middle District declared a Tampa panhandling ordinance unconstitutional. *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882, at *6 (M.D. Fla. Aug. 5, 2016). Florida state courts have also followed this precedent in striking down panhandling ordinances. *Toombs v. State of Florida*, 25 Fla. L. Weekly Supp. 505a, Case No. 15-220 AC (Fla. 11th Jud. Cir. 2017) (holding City of Miami ordinance unconstitutional).

Other cities in Florida, such as the City of Gainesville, have stopped enforcement or repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. After a lawsuit was filed against it, the City of Pensacola repealed its ordinance almost immediately after passing it. As was the case with these other Florida cities, the City's ordinance almost certainly violates the constitutional right to free speech protected by the First Amendment to the United States Constitution.

In 2017, the ACLU Greater Miami Chapter wrote a letter to the City raising constitutional concerns about a proposed ordinance creating a "no panhandling zone". Although the City did not adopt a new ordinance at that time, it has done nothing to address the Ordinance that was already in place and that suffers from similar constitutional deficiencies. We call on the City to immediately repeal the Ordinance and instead consider more constructive alternatives.

The First Amendment protects peaceful requests for charity in a public place. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."). The government's authority to regulate such public speech is exceedingly restricted, "[c]onsistent with the traditionally open character of public streets and sidewalks…." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quotation omitted). As discussed below, the Ordinance is outside the scope of permissible government regulation.

The Ordinance overtly distinguishes between types of speech based on "subject matter … function or purpose." *See Reed*, 135 S.Ct. at 2227 (internal citations, quotations, and alterations omitted; *see, e.g.*, *Norton*, 806 F.3d at 412-13 ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."). The Ordinance prohibits "all direct person-to-person requests for immediate contributions in the form of money or other thing of value" benefitting virtually any person or organization. *See* Sec. 74-76 (Definitions). This of course would clearly prohibit a request for spare change, or a cold drink on a blistering summer day. At the same time it would allow direct person-to-person interactions seeking signatures for a petition, recommendations for services, or directions to local amenities.

As a result, a court will likely hold the Ordinance is a "content-based" restriction on speech that is presumptively unconstitutional. *See Reed*, 135 S. Ct. at 2226; *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Courts use the most stringent standard – strict scrutiny – to review such restrictions. *See, e.g.*, *Reed*, 135 S. Ct. at 2226 (holding that content-based laws may only survive strict scrutiny if "the government proves that they are narrowly tailored to serve a compelling state interest"); *McCullen*, 134 S. Ct. at 2534. The Ordinance cannot survive strict scrutiny because neither does it serve any compelling state interest, nor is it narrowly tailored.

First, the Ordinance serves no compelling state interest. Distaste for a certain type of speech, or a certain type of speaker, is not even a legitimate state interest, let alone a compelling one. Shielding unwilling listeners from messages disfavored by the state is likewise not a permissible state interest. As the Supreme Court explained, the fact that a listener on a sidewalk cannot "turn the page, change the channel, or leave the Web site" to avoid hearing an uncomfortable message is "a virtue, not a vice." *McCullen*, 134 S. Ct. at 2529; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

Second, even if the City could identify a compelling state interest, there is no evidence to demonstrate that the Ordinance is "narrowly tailored" to such an interest. Theoretical discussion is not enough: "the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). The City may not "[take] a sledgehammer to a problem that can and should be solved with a scalpel." *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015) (holding ordinance restricting time, place, and manner of panhandling was unconstitutional).

Though "public safety" is an important state interest, the Ordinance is not narrowly tailored to serve it. *Browne*, 136 F. Supp. 3d at 1292-94 (rejecting claims that the ordinance served public safety); *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015) (requiring evidence to substantiate claims of public safety). The Ordinance, in prohibiting the solicitation of immediate contributions, singles out an entire category of speech while allowing other types of speech. There is nothing inherently dangerous to public safety in a request for contributions. As a result, the Ordinance cannot be said to further public safety.

Unsurprisingly, every court to consider a regulation that, like the Ordinance, bans requests for charity within an identified geographic area has stricken the regulation. *See, e.g.*, *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) ("[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals… rights under the First Amendment…); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne*, 136 F. Supp. 3d at 1293-94.

For these reasons, among others, the Ordinance cannot pass constitutional muster. Further, unlawful anti-panhandling ordinances such as Chapter 74, Article III are costly to enforce and only exacerbate problems associated with homelessness and poverty.

In Central Florida, a study found that communities were spending more than $30,000 per year in jail and hospital costs alone for every chronically homeless person. The study projected that by investing in permanent supportive housing, the region would save hundreds of millions of dollars over the course of a decade. *See* THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA (2014), https://www.cfchomelessness.org/wp-content/uploads/2018/04/Eco-Impact-Report-LOW-RES-2.pdf. Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. *See* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2016), https://www.nlchp.org/documents/Housing-Not-Handcuffs.

For example, Philadelphia, PA recently greatly reduced the number of homeless persons asking for change in a downtown subway station by donating an abandoned section of the station to a service provider for use as a day shelter. *See* Nina Feldman, *Expanded Hub of Hope homeless center opening under Suburban Station*, WHYY (Jan. 30, 2018) https://whyy.org/articles/expanded-hub-hope-homeless-center-opening-suburban-station/. In opening the Center, Philadelphia Mayor Jim Kenny emphasized "We are not going to arrest people for being homeless," stressing that the new space "gives our homeless outreach workers and the police a place to actually bring people instead of just scooting them along." These programs are how cities actually solve the problem of homelessness, rather than merely addressing its symptoms.

We can all agree that we would like to see a Miami Beach where homeless people are not forced to beg on the streets. But whether examined from a legal, policy, or fiscal standpoint, criminalizing any aspect of panhandling is not the best way to get to this goal. We request that Miami Beach cease enforcement, repeal this ordinance, and develop constructive approaches that will lead to the best outcomes for all the residents of Miami Beach, housed and unhoused alike.

We look forward to further discussing this matter with you, and we are hopeful to receive your response before October 1, 2018.

Sincerely,

/s/ Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit

/s/ Kirsten Anderson
Director of Litigation
Southern Legal Counsel

/s/ Carey Haughwout
President
Florida Public Defender Association

/s/ Jacqueline Azis
Staff Attorney
ACLU of Florida

/s/ Eric Tars
Senior Attorney
National Law Center on Homelessness & Poverty

/s/ *Christopher Jones*
Executive Director
Florida Legal Services

/s/ Mara Shlackman
Vice President
National Lawyers Guild South Florida Chapter

/s/ *Natalie N. Maxwell*
Housing Umbrella Group Co-Chair
Florida Legal Services

/s/ Patrice Paldino
Housing Umbrella Group Co-Chair
Legal Aid Service of Broward County

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December 6, 2017

Morgan Foley, Esq.
City Attorney
City Attorney's Office
200 Civic Center Way
El Cajon, CA 92020
hsavage@cityofelcajon.us

Dear Mr. Foley,

I am writing on behalf of the American Civil Liberties Union of San Diego and Imperial Counties ("ACLU") to express concerns about the City of El Cajon's Urgency Ordinance No. 5066 ("Ordinance"), which was enacted on October 24, 2017.

The Ordinance notes that "the San Diego County public health officer declared a local public health emergency due to ongoing outbreak of the Hepatitis A virus" and states that its purpose includes "prohibiting any persons or organizations from sponsoring, promoting or engaging in food sharing events on City owned property until the public health emergency is lifted by the County of San Diego."[1] The term "[f]ood sharing event" means "a non-social gathering … where food is distributed or offered for charitable purposes." It excludes "social gatherings such as family reunions, birthday parties, baptisms, youth sport team celebrations, school field trips, wedding anniversaries and similar events."

I appreciate the importance of protecting public health, but the government may not pursue worthy ends through unconstitutional means. On its face, the Ordinance presents significant First Amendment concerns, because it singles out expressive conduct based on its content. "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). If "charitable appeals for funds … are within the protection of the First Amendment," *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), the same is true for charitable giving, whether of money or food, which is necessarily intended to convey a particular message and reasonably understood as such. *See Save Westwood Vill. v. Luskin*, 233 Cal. App. 4th 135, 145 (2014) (like "a political campaign contribution … [t]he charitable donation made by the Foundation to UCLA is similarly an

[1] Although the Ordinance contains no language expressly making it unlawful to engage in "food sharing events," I presume it does in fact does prohibit such events.

expression of support for the university, and as such, constitutes conduct in furtherance of the constitutional right of free speech.").

By prohibiting food sharing only when done for "charitable purposes," the City is regulating food sharing because of its expressive content, punishing only those who share food to express their religious or political beliefs in ministry or charity but not those who share food for other purposes. Although "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it may not "proscribe particular conduct *because* it has expressive elements." *Johnson*, 491 U.S. at 406 (emphasis in original). On its face, the Ordinance "is related to the suppression of free expression" in the form of charitable giving and therefore subject to "the most exacting scrutiny." *Id.* at 403, 412. Strict scrutiny applies regardless of the City's motives. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015). Under strict scrutiny, the Ordinance is unconstitutional unless it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2231; *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (content-based restriction on speech in public forum is unconstitutional unless "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

The preservation of public health is a compelling interest, but the ban on food sharing for charitable purposes is likely not narrowly tailored to achieve that interest, for at least three reasons. First, to the extent the City is concerned with preventing transmission of disease, such transmission can also occur through non-charitable food sharing. Second, the ban is limited to municipal land, and there is no reason to believe the risk of disease transmission from food sharing is any lower on private land. Third, the City has less restrictive alternatives that would prevent disease transmission from food sharing or address "litter, trash and other debris left over from these food sharing events," such as an appropriate permitting and inspection program, proper sanitation and food handling requirements, and enforcement of existing laws against littering. Indeed, the Ordinance itself acknowledges the importance of "regulations that control the manner in which food is prepared, stored, transported, or served."

The Ordinance thus likely fails strict scrutiny because it is underinclusive with respect to its stated justifications and the City has less restrictive alternatives that would effectively protect public health. *See Reed*, 135 S. Ct. at 2232 ("The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs…. In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (where state restricted violent video games but not other speech depicting violence, the "regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (content-based regulation invalid "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (ordinances violated Free Exercise Clause as "underinclusive" with respect to "protecting the public health and preventing

cruelty to animals," because "[t]hey fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does").

Alternatively, assuming the City's interests are "unrelated to the suppression of free expression" and the Ordinance is subject to "the standard applied to time, place, or manner restrictions," *Johnson*, 491 U.S. at 407, the Ordinance likely remains unconstitutional even if treated as "content neutral," because it is not "narrowly tailored to serve a significant government interest," since the City has obvious alternatives for "achieving its stated goals" through adoption or enforcement of "various other laws at its disposal" that would protect public health without prohibiting charitable food sharing on municipal land. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945, 949 (9th Cir. 2011) (en banc). "Even under the intermediate scrutiny 'time, place, and manner' analysis, we cannot ignore the existence of these readily available alternatives," and "[t]he Ordinance is not narrowly tailored" because "there are a number of feasible, readily identifiable, and less-restrictive means of addressing the City's concerns." *Id.* at 950.

I look forward to the City's response and hope this matter can be resolved without litigation. If you have any questions or concerns, please do not hesitate to call me at 619.398.4496.

Sincerely,

David Loy
Legal Director

cc: Barbara Luck
Assistant City Attorney
Bluck@cityofelcajon.us

Lindsey v. Normet, 405 U.S. 56 (1972)

Appellants, month-to-month tenants of appellee Normet, refused to pay their monthly rent unless certain substandard conditions were remedied, and appellee threatened eviction. Appellants filed a class action seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer (FED) Statute was unconstitutional on its face, and an injunction against its continued enforcement. Appellants attacked principally (1) the requirement of trial no later than six days after service of the complaint unless security for accruing rent is provided, (2) the limitation of triable issues to the tenant's default, defenses based on the landlord's breach of duty to maintain the premises being precluded, and (3) the requirement of posting bond on appeal, with two sureties, in twice the amount of rent expected to accrue pending appellate decision, this bond to be forfeited if the lower court decision is affirmed. The District Court granted the motion to dismiss the complaint, concluding that the statute did not violate the Due Process or the Equal Protection Clause.

Mr. Justice WHITE delivered the opinion of the Court.

… We cannot agree that the FED Statute is invalid on its face under the Equal Protection Clause. It is true that Oregon FED suits differ substantially from other litigation, where the time between complaint and trial is substantially longer, and where a broader range of issues may be considered. But it does not follow that the Oregon statute invidiously discriminates against defendants in FED actions.

The statute potentially applies to all tenants, rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness. And classifying tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard ‘only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,’ or if the objective itself is beyond the State's power to achieve. It is readily apparent that prompt as well as peaceful resolution of disputes over the right to possession of real property is the end sought by the Oregon statute. It is also clear that the provisions for early trial and simplification of issues are closely related to that purpose. The equal protection claim with respect to these provisions thus depends on whether the State may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement. In making such an inquiry a State is ‘presumed to have acted within (its) constitutional power despite the fact that, in practice, (its) laws result in some inequality.’ ..

Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the ‘need for decent shelter’ and the ‘right to retain peaceful possession of one's home’ are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race and lineage are inherently suspect and must be justified by some ‘overriding statutory purpose.’ They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as ‘necessary to promote a compelling governmental interest.' …

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Since the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.

Ensuring the Right to Shelter:

The First Court Decision in *Callahan v. Carey* Requiring the Provision of Shelter for Homeless Men in New York City

Following is the text of the December 5, 1979, decision in Callahan v. Carey, the class action litigation brought by Coalition for the Homeless that established a legal right to shelter for homeless individuals in New York City. This decision by New York State Supreme Court Justice Tyler was the first time that the City and State governments were ordered to provide shelter from the elements for homeless individuals in New York City. The lawsuit was settled as a consent decree in August 1981.

"CALLAHAN v. CAREY – This is an application by three destitute and homeless men in behalf of all the destitute, homeless derelicts roaming the neighborhood of the Bowery for a temporary mandatory injunction directing state and city officials to furnish lodging and meals to the derelicts seeking lodging and shelter and meal at the 'Men's Shelter,' on the ground that such shelters for homeless men are mandated by the Constitutions of the United States and the State of New York, and that the failure to presently provide such relief will cause serious and permanent injury to some of the derelicts and possibly death to others during the winter cold.

"Defendants move to dismiss the action contending that the controversy is non-justiciable and that the complaint fails to state a cause of action.

"The number of derelicts on the Bowery and its environs vary, but no single statement by any responsible city or state official denies that there are derelicts on the Bowery. Nor do state and city officials offer one iota of proof that the Men's Shelter on the Bowery or its satellite 'hotels' are sufficient to house all of the destitute and homeless alcoholics, addicts, mentally impaired derelicts, flotsam and jetsam, and others during the winter months. Nor is there a scintilla of proof that the other 'hotels' vouchered at the Men's Shelter are sufficient to lodge these derelicts for the cold weather.

"Reverend Edward M. O'Brien, Executive Director of the Holy Name Centre for Homeless Men located at 18 Bleecker Street, New York, New York, states: 'During previous winters, indigent, homeless men living on or near the Bowery have suffered frostbite- including loss of limbs from frostbite- and in several instances death from exposure.' He further states that in his opinion this winter will be worse because of the closing down of several shelters that accommodate these derelicts during the winter months.

"State and city officials have not addressed themselves to the statement of Michael I. Drohan, an employee of Holy Name Centre: 'As part of my duties I identify at the New York City Morgue the bodies of certain persons who have died on the Bowery. On a number of occasions the cause of death for several of the persons whose bodies I identified was given as "hypothermia" (freezing)…'

" 'Since last winter, the number of beds available in Bowery lodging houses has decreased due to the closing of several of these lodging houses. The shortage of shelter for indigent homeless men living on or near the Bowery will be even more severe this winter than in previous winters.' Mr. Drohan sums it up by saying that in his opinion there will be more deaths from exposure than in previous years.

"The forthright statement of Calvin Reid, Director of the Men's Shelter at 8 East 3rd Street, Manhattan, states: 'The Men's Shelter is not primarily under budgetary restrictions in providing shelter care, since funding is open ended and all applicants can be given available services.' Mr. Reid then goes on to state that the problem is not monetary, but that lodging is in short supply: that the Men's Shelter utilizes lodging houses within a half-mile distance of the shelter to lodge the derelicts.

"Robert Trobe, Deputy Administrator of Family and Adult Services of the New York City Department of Social Services, suggests that the city and state provide more shelter space in accessible place, and this is a sensible contribution.

"Barbara B. Blum, Commissioner of the State Department of Social Services, states honestly that 'the group in question is extremely difficult to define,' falls within no specific category calling for public assistance, and that it is 'largely composed of individuals with histories of alcohol abuse, drug abuse, mental disorder or combinations thereof. These conditions are chronic and seriously preclude and prevent independent functioning.'

"It can thus be observed that every public official, from Governor Carey and Mayor Koch down to the Director of the Men's Shelter, is vitally concerned that no New Yorker (including the Bowery derelicts) freeze to death by reason of exposure to the cold of the winter, or starve to death due to deprivation of food. The difficulty is finding the necessary lodgings to accommodate them.

"The Court is of the opinion that the Bowery derelicts are entitled to board and lodging. However, there is no reason why these homeless and indigent men cannot be lodged and fed at institutions wherever

available in the State, and it is incumbent on those public officials responsible for caring for the needy to find such lodgings.

"Accordingly, the temporary injunction is granted to the extent noted above, and is otherwise denied. Defendants' motion and cross-motion to dismiss the action are denied.

"In the order to be entered hereon the defendants shall submit a plan to provide at least 750 beds (and board for 750 men) for the helpless and hopeless men of the Bowery, in addition to the Men's Shelter and its satellites, including LaGuardia.

"Under no circumstances shall the Department of Social Services close the Men's Shelter during the pendency of this action. Such action would be catastrophic.

"The application for counsel fees is referred to the trial court."

"*The legal authorities for the decision may be found in Article XVII, Sec. 1. of the New York State Constitution. Sections 61 (1) and (3) (1) and (3) of the Social Services Law. Section 604.1.0 (b) of the New York City Administrative Code. Matter of Jones vs. Berman, 37 N. Y. 2nd 42."

December 5, 1979

The *Callahan* Consent Decree

Establishing a Legal Right to Shelter for Homeless Individuals in New York City

Following is the complete text of the 1981 consent decree in Callahan v. Carey*, the class action litigation brought by Coalition for the Homeless that established a legal right to shelter for homeless individuals in New York City. The* Callahan *litigation was filed in 1979 on behalf of homeless men in New York City, and argued that a right to shelter for the homeless existed under the New York State Constitution. The right to shelter was extended to homeless women by* Eldredge v. Koch *(1983), also brought by Coalition for the Homeless, and to homeless families with children by* McCain v. Koch *(1983), brought by the Legal Aid Society.*

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ROBERT CALLAHAN, CLAYTON W. FOX, THOMAS DAMIAN ROIG, JAMES HAYES, JAMES SPELLMAN and PAULE E. TOOLE, on their own behalves and on behalf of all others similarly situated,

Plaintiffs,

-against-

HUGH L. CAREY, as Governor of the State of New York, BABARA BLUM, as Commissioner of the New York State Department of Social Service, EDWARD I. KOCH, as Mayor of the City of New York, JAMES A. KRAUSKOPF, as Commissioner of the New York City Human Resources Administration, and CALVIN REID, as Director of the Shelter Care Center for Men,

Defendants.

Index No. 42582/79

FINAL JUDGMENT BY CONSENT

Plaintiffs Robert Callahan, Clayton Fox and Thomas Roig, having brought this action on October 2, 1979 challenging the sufficiency and quality of shelter for homeless men in New York City, and plaintiffs Callahan, Fox, Roig, James Hayes, James Spellman and Paul Toole, having filed their Amended Complaint on March 31, 1980, and

defendants Hugh L. Carey, as Governor of the State of New York, and Barbara Blum, as Commissioner of the State of New York Department of Social Services (the "State defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and defendants Edward Koch, as Mayor of the City of New York, Stanley Brezenoff, as Administrator of the New York City Human Resources Administration, and Calvin Reid, as director of the Shelter Care Center for Men (the "Men's Shelter") (the "City defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and Plaintiffs and defendants by their respective attorneys, having consented to the entry of this Final Judgment without any final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any such issue:

NOW, therefore, without final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any issue, and upon consent of all parties, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

Provision of Shelter

1. The City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason to physical, mental or social dysfunction is in need of temporary shelter.

Shelter Standards

2. The City defendants shall provide shelter at facilities operated in accordance with the standards set forth in this paragraph as soon as practicable and not later than September 1, 1981. The term "shelter facility" refers to the Keener Building, Camp LaGuardia, the Men's Shelter and any other facility used by the City defendants to shelter homeless men. This paragraph does not apply to the Bowery lodging houses (Palace, Kenton, Union, Sunshine, Delevan and Stevenson) presently used by the City defendants to shelter homeless men (the "hotels"); if the City defendants choose to shelter homeless men in any additional Bowery lodging house, they will advise counsel for the plaintiffs and a good faith effort shall be made by plaintiffs and the City defendants to agree to operating standards for such facilities.

(a) Each resident shall receive a bed of a minimum of 30 inches in width, substantially constructed, in good repair an equipped with clean springs.
(b) Each bed shall be equipped with both a clean, comfortable, well-constructed mattress standard in size for the bed and a clean, comfortable pillow of average size.
(c) Each resident shall receive two clean sheets, a clean blanket, a clean pillow case, a clean towel, soap and toilet tissue. A complete change of bed linens and towels will be made for each new resident and at least once a week and more often as needed on an individual basis.
(d) Each resident shall receive a lockable storage unit.
(e) Laundry services shall be available to each resident not less than twice a week.
(f) A staff attendant to resident ratio of at least 2 per cent shall be maintained in each shelter facility at all times.
(g) A staff attendant trained in first aid shall be on duty in each shelter facility at all times.
(h) A minimum of ten hours per week of group recreation shall be available for each resident a each shelter facility.
(i) Residents shall be permitted to leave and to return to shelter facilities at reasonable hours and without hindrance.
(j) Residents of shelter facilities shall be provided transportation (public or private) to enable them to return to the site where they applied for shelter.
(k) Residents of shelter facilities shall be permitted to leave the facility by 7:00 a.m. if they so desire.
(l) Residents shall be permitted to receive and send mail and other correspondence without interception or interference.
(m) The City defendants shall make a good faith effort to provide pay telephones for use by the residents at each shelter facility. The City defendants shall bear any reasonable cost for the installation and maintenance of such telephones.

3. The capacity of shelter facilities shall be determined as follows:
(a) The capacity of newly constructed shelter facilities shall comply with the standards set forth in Appendix A, except in cases of emergency need as defined in Appendix B.
(b) The City defendants shall disclose to plaintiffs' counsel any plan to convert an existing structure to a shelter facility and the intended capacity for the facility at least 30 days in advance of the implementation or execution of any such conversion plan. A reasonable capacity for each such facility shall be established. The standards set forth in Appendix A shall be used as guidelines in determining whether the planned capacity of the City defendants is reasonable.

(c) Effective December 31, 1981, the capacity of the Keener Building shall not exceed _____ except in cases of emergency need as defined in Appendix B, in which case the maximum number of men who may be sheltered in the Keener Building is ____. Between the date of entry of this judgment and December 31, 1981, the capacity of the Keener Building shall not exceed____.

(d) The capacity of Camp LaGuardia shall comply — by construction of new dormitory buildings — with the standards set forth in Appendix A, except in cases of emergency need as defined in Appendix B, as soon as practicable and not later than December 31, 1982, except that the individual rooms in the "Main Building" may be used as sleeping rooms for one person each. The construction start of such new dormitory buildings shall occur no later than March 1, 1982.

Bowery Lodging Houses

4. Hotels presently used by the City defendants shall meet the following standards at the time of entry of this judgment and the City defendants shall maintain such standards thereafter:

(a) Each resident shall receive a bed, a clean mattress, two clean sheets, one clean blanket, one clean pillow and one clean pillow case. A complete change of bed linens (sheets and pillow case) shall be made for each new resident and at least once a week and more often as needed on as individual basis.

(b) Each resident shall be supplied with a clean towel, soap and toilet issue. A clean towel shall be provided to each new resident and towels shall be changed at least once a week and more often an needed on an individual basis.

(c) There shall be two trained security guards in the Palace Hotel between the hours of 8:00 p.m. and 4:00 a.m. and one trained security guard between the hours of 4:00 p.m. and 8:00 p.m., and 4:00 a.m. to 8:00 a.m. There shall be one trained security guard in the Kenton Hotel between the hours of 4:00 p.m. and 8:00 a.m. These security guards shall file with the City defendants incident reports on any incidents of violence or attempted violence occurring in the hotels.

(d) Showers shall be available at the Men's Shelter beginning at 7 a.m. and signs advising hotel residents of that fact shall be posted at the front desk in each hotel and at the door of each bathroom in each hotel. Persons showering at the Men's Shelter shall be provided adequate supervision (including safeguarding of personal property), a clean towel, soap and, if requested, a delousing agent.

(e) A lockable storage unit of adequate size to store personal property shall be available either at the Men's Shelter or at the hotels for each man sheltered by the City defendants at hotels.

(f) Heat shall be maintained in accordance with New York City guidelines for rental residences.
(g) Cleanliness shall be maintained throughout the hotels at all times.

Intake Centers

5. The City defendants shall accept applications for shelter at the Men's Shelter, 8 East Third Street, New York, New York and at 529 Eighth Avenue, New York, New York (the "central intake center"). Applications for shelter shall be accepted at all times at the Men's Shelter, and applications for shelter shall be accepted at 529 Eighth Avenue between the hours of 5:00 p.m. and 1:00 a.m., seven days per week. The City defendants shall provide direct transportation to shelter pursuant to paragraph 1, supra. The 529 Eighth Avenue intake center, shall be opened as a central intake center not later than September 1, 1981.

6. The City defendants shall operate additional satellite intake centers on a 24-hour basis Monday through Friday at the following locations:
(a) Harlem Hospital Center, 506 Lenox Avenue, New York, New York;
(b) King County Hospital Center, 451 Clarkson Avenue, Brooklyn, New York;
(c) Lincoln Hospital, 234 East 149th Street, Bronx, New York; and
(d) Queens Hospital Center, 82-69 164th Street, Jamaica, New York.
Men seeking shelter at the satellite intake centers shall be provided adequate fare for public transportation and clear written directions to either (i) a shelter facility, or (ii) a central intake center — according to the preference of the person seeking shelter. The City defendants shall provide direct transportation from the satellite intake centers to a shelter facility to all men who appear so physically or mentally disabled that they are unable to reach a shelter facility by public transportation. Satellite intake centers shall be opened not later than September 1, 1981. It is understood that the above satellite intake centers shall be operated in conjunction with borough crisis centers. In the event that the borough crisis center program is terminated, the City defendants may, in their discretion, reduce the hours of operation of the satellite intake centers to between 5 p.m. and 1 a.m.

7. The City defendants shall accept applications for shelter at shelter facilities providing that such applicants have applied for and have been found eligible for shelter by the City defendants within six months of the time of application at a shelter facility. Shelter facilities shall also provide shelter for one night to any person who has not previously applied for shelter who seeks shelter at a shelter facility after 8:00 p.m.

Community Participation

8. Each shelter facility, central intake center and satellite intake center, shall utilize the services of available community members to the maximum reasonable extent. These persons are not City employees or volunteers in a City sponsored program within the meaning of section 50(k) of the General Municipal Law and such persons shall execute statements to this effect.

Information

9. The City defendants shall provide applicants for shelter with clear written information concerning other public assistance benefits to which they may be entitled at the time applicants apply for shelter.

Compliance Monitoring

10. Defendant Krauskopf shall appoint qualified employees with no administrative responsibility for providing shelter to monitor defendants' shelter care program for men with respect to compliance with this decree.. These employees shall visit each shelter facility, central intake center, satellite intake center and hotel at least twice a month and will submit to defendant Krauskopf a written report at least twice a month describing compliance or lack thereof with each provision of the decree. These reports shall be made available to plaintiffs' counsel upon reasonable notice.

11. Plaintiffs' representatives shall have full access to all shelter facilities, central intake centers and satellite intake centers, and plaintiffs' counsel shall be provided access to any records relevant to the enforcement and monitoring of this decree.

12. Defendant Krauskopf shall deliver by hand each day to plaintiffs' counsel a statement listing:

(a) The number of men who applied for shelter at each central intake center and at each satellite intake center;

(b) The number of men who were provided shelter at each shelter facility or hotel;

(c) The number of men who were denied shelter at each shelter facility, central intake center and satellite intake center and the reason for each such denial;

(d) The number of men who were accepted for shelter at each central intake center and satellite intake center who did not reach a shelter facility; and

(e) The number of men who were provided direct transportation from each satellite intake center to a shelter facility.

13. It is the intention of defendant Krauskopf to conduct daily inspections of the Palace Hotel and to deliver reports of such inspections each day to plaintiffs. It is also the intention of defendant Krauskopf to conduct inspections of the other hotels used by defendants to shelter homeless men not less than three times per week and to deliver reports of such inspections not less than three times a week to plaintiffs' counsel. A sample of the inspection report form to be used is attached hereto as Exhibit C.

No Waivers

14. Nothing in this judgment permits any person, not-for-profit corporation, charitable organization, or governmental entity or subdivision to operate a shelter, as defined in New York Code of Rules and Regulations, Title 18, § 485.2(C), in violation of the requirements of the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

15. Nothing in this judgment should operate or be construed as res judicata or collateral estoppel so as to foreclose any signatory party from any claim or defense in any subsequent administrative or judicial proceeding.

16. Nothing in this judgment shall be deemed to authorize or to prevent the operation by the New York City Human Resources Administration of the Keener Building on Wards Island as a shelter or shelter facility after October 15, 1981, except in accord with a valid contract or agreement among the New York State Department of Social Services, the New York State Office of Mental Health and the New York City Human Resources Agency and with an operating certificate issued by the New York State Department of Social Services.

17. The Commissioner of the New York State Department of Social Services agrees to reimburse the New York City Human Resources Agency for the operation of a shelter facility or shelter facilities referred to in this judgment pursuant to New York Social Services Law 153, except if such shelter facility fails to comply with the requirements for shelters contained in the New York Social Services Law or the New York Code of Rules and Regulations, Title 18; provided that nothing in this judgment can or does obligate the Legislature of the State of New York to appropriate funds.

18. Nothing in this judgment shall prevent, limit or otherwise interfere with the authority of the Commissioner of the New York State Department of Social Services to enforce and carry out her

duties under the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

Continuing Jurisdiction

19. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification, or termination of this entire judgment or of any applicable provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

New York, New York
August 1981

Appendix A

Space Requirements for Shelters for Adults

(1) Every facility shall have space for dining and leisure activities.

(2) Sleeping areas shall not be considered as dining or leisure areas.

(3) Space provided for dining shall be:
(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds;
(ii) at least 12 square feet for each additional certified bed.

(4) Space provided for leisure areas shall be:
(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds.
(ii) at least 12 square feet per bed in facilities with a certified bed capacity of 10 or more beds

(5) When not in use, dining space may be used, with written approval from the New York State Department of Social Services ("Department"), as leisure space.

(6) An operator may request Department approval of a waiver to reduce the square footage requirements for dining and leisure space. A waiver shall be granted only upon demonstration by the operator that the food service and the program needs of residents can be met.

(7) Baths and Toilet Facilities
There shall be a minimum of one toilet and one lavatory for each six residents and a minimum of one tub or shower for each ten residents.

(8) Sleeping Rooms
(i) In single occupancy sleeping rooms, a minimum of 80 square feet per resident shall be provided;
(ii) In sleeping rooms for two or more residents, a minimum of 60 square feet per resident shall be provided;
(iii) A minimum of 3 feet, which is included in the per resident minima, shall be maintained between beds and for aisles;
(iv) Partitions separating sleeping areas from other areas shall be ceiling high and smoke tight;
(v) All bedrooms shall be:
(a) above grade level;
(b) adequately lighted;
(c) adequately ventilated;

(vi) light and ventilation for bedrooms shall be by means of windows in an outside wall;
(vii) bedrooms shall open directly into exit corridors;
(viii) bedrooms may not be used as a passageway, corridor or access to other bedrooms.

(9) Adequate storage space for cleaning supplies and equipment shall be provided.

Appendix B

Short term emergency shelter may be provided to a number of persons in excess of the capacity of the facility provided that all of the following conditions are met:

(1) Snow emergencies, excessive cold or other similar circumstances create an emergency need for additional shelter space;
(2) The operator is able to meet the food and shelter needs of all persons in residence;
(3) The facility remains in compliance with applicable local building, fire protection and health and sanitation codes;
(4) The operator advises plaintiffs' counsel of the maximum number of persons to be cared for during an emergency situation in any facility as soon as possible after an emergency situation develops;
(5) The operator provides shelter to additional persons no more than 30 days in any calendar year; and
(6) The operator maintains records which document adherence to these conditions.

James Welcome, Shocking the Conscience of the Court: The Case for a Right to Emergency Shelter for Families with Children in Connecticut, 8 Quinn. Health L.J. 1 (2004)

II. Background

State constitutions, even those having provisions identical to the U.S. Constitution's, provide for independent and sometimes greater protections of civil liberties than the U.S. Constitution. For the issue of a constitutional right to emergency shelter, poverty law advocates must look to state constitutions since the federal court has already spoken on the issue of a right to peaceful shelter. In Lindsey v. Normet, the Supreme Court held that the U.S. Constitution does not provide a right to shelter and further stated, "the Constitution does not provide judicial remedies for every social and economic ill." In Connecticut, as in other states, courts have recognized the role of the state constitution in protecting the civil liberties of its citizens, especially those low-income citizens in politically powerless groups who historically have experienced discrimination and neglect when seeking to exercise fundamental rights. For over twenty-five years, Connecticut courts have held that where both the state and federal constitutions have similar provisions for civil liberties, they have a "like meaning, although we fully recognize the primary independent vitality of the provisions of our own constitution."

Connecticut was one of a few states in the 1980s and early 1990s where poverty law advocates attempted to use the state constitution on behalf of their clients to establish that homeless people and people receiving general benefits had a constitutional right to shelter and/or welfare benefits. This advocacy was based upon a number of developments, including the recognition of state constitutions as independent and different documents from the U.S. Constitution and the landmark 1979 consent decree ruling in New York State, which determined that all homeless men have a state constitutional right to shelter. This case, Callahan v. Carey, and all the subsequent litigation in New York State establishing the right to shelter for other populations, is unique because of the clear language of the New York Constitution, which states, in relevant part, that:

> the aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

The Connecticut Constitution does not contain language similar to the New York Constitution.

Constitutional interpretation in Connecticut involves two unique applications of constitutional analysis that are entirely separate from federal constitutional analysis. The first doctrine of analysis involves the six "Geisler Factors," which have their origin in State v. Geisler.These factors are the legal framework to analyze constitutional claims under the Connecticut constitution. The factors are: (1) text, (2) holdings and dicta, (3) federal precedent, (4) other state decisions, (5) history in Connecticut, and (6) social and economic considerations (public policy). The second doctrine of analysis is found in Article First, 10 of the Connecticut Constitution. This section has been interpreted by the court as perpetuating any statutory or common law right that existed in the state prior to the adoption of the Constitution of 1818.

III. Discussion of the Right to Subsistence Cases in Connecticut

This section focuses on the background of the claims and the legal arguments used in both Hilton and Moore. Although both of these cases were transferred from the Appellate Court to the Connecticut Supreme Court, the cases presented very distinct legal arguments. A right to welfare benefits, or minimum subsistence, as argued in Moore is a much broader assertion for government protection for the poor than is a right to shelter, as argued in Hilton. A right to minimum subsistence argument essentially advocates for the recognition of this as a fundamental right as a means of obtaining a social policy objective. Such a broad argument seeks to blur the distinction between the functions of the legislative branch and the judicial branch as to the distribution of public welfare benefits.

A right to shelter should be considered separately from such a broad assertion of a right to minimum subsistence because it narrowly focuses on the specific denial of protection from emergency weather conditions for an individual or family. This assertion of a fundamental right to protection requires that the court articulate a standard that the legislature cannot fall below in its protection of homeless citizens who are unable to protect themselves from death or irreparable physical, mental, and emotional harm. Ideally, this argument incorporates all six Geisler factors to show Connecticut's history of protection for the poor and defenseless in true emergency situations.

Both Hilton and Moore were "facial challenges", as opposed to "as applied challenges," to legislative amendments to a statute involving emergency assistance for general assistance recipients. The choice to facially challenge the statute, instead of applying the statute to a particular plaintiff with a substantial factual record showing a life-threatening emergency situation of homelessness in severe winter weather, made it easier for the reviewing court to combine these two legal challenges into one broad argument at the Supreme Court.

A. Hilton v. City of New Haven

Originally brought in trial court before Judge Anthony DeMayo in 1989, the issue of a right to shelter in Connecticut revolved around Conn. Gen. Stat. 17-273 and 17-292, "which required that each town 'support' persons within the town who are in need." The court granted a permanent injunction and ordered the City of New Haven to provide shelter for "all homeless persons who request it." This decision was reconsidered in 1992, following a motion to reconsider by the City of New Haven, to address the revision of these two state statues by Public Act 92-16. The legislature adopted this public act in 1992 in order to limit the amount of support that towns were required to provide to homeless persons.

In hearing the motion to reconsider, the trial court, for the first time, dealt with the issue of a homeless person's constitutional right to shelter in Connecticut. The trial court found that the Connecticut Constitution does not provide for emergency shelter. The next motion, reconsidering the permanent injunction ordering the city to provide shelter to homeless persons, was denied. The defendant City of New Haven appealed the judgment and the plaintiff class of homeless persons cross-appealed. This case was then joined with Moore v. Ganim in an expedited appeal to be argued and decided on the same day.

The challenge forwarded by the plaintiff class of homeless persons was a facial challenge to a statutory scheme. The trial court stated that there exists "neither a common law duty nor an implicit right in the Connecticut Constitution that obligates the government to provide shelter to every indigent person." As noted previously, when the right to shelter argument was merged with the right to welfare argument, it became a broad assertion of a fundamental constitutional right to state assistance, as opposed to a more narrow "as applied" challenge to the constitutionality of a city denying homeless families shelter in emergency situations when they are without any other alternatives. The principle issue on appeal was "whether [the city] has an obligation to provide indigent individuals with shelter pursuant to Article first, 10, of the Connecticut Constitution or as an unenumerated right implicit in the state constitution" supported by the language in the preamble. In their complaint, the plaintiffs claimed the City of New Haven was abrogating its constitutional duty, "by limiting the provision of emergency shelter ... ."

Absent from the plaintiffs' claim was a factual record demonstrating detailed harm to the participants in this class of plaintiffs.

> We are hampered in our consideration of the plaintiffs' constitutional claims in this case because the plaintiffs did not seek a finding of facts from the trial court... . [a] party mounting a constitutional challenge tothe validity of a statute must provide an adequate factual record in order to meet its burden of demonstrating the statute's adverse impact on some protected interest of its own, in its own particular case, and not merely under some hypothetical set of facts as yet unproven.

When the court decided Hilton, therefore, it closed the door to future "hypothetical" cases claiming a violation of a fundamental right to shelter in Connecticut.

iii. The Hilton Plaintiffs

Justice Norcott discussed the testimony by the homeless plaintiffs from the record of a show cause hearing on April 26, 1989, in New Haven Superior Court concerning the plaintiffs' motion for a temporary injunction preventing the City of New Haven from closing its winter overflow shelter. Plaintiff Janet Cardin's testimony focused on her denial of shelter during summer nights and how she was forced to sleep on the New Haven Green. Bobby Walker and Thomas Sawyer testified that they slept in abandoned buildings or cars when they were denied shelter. Further testimony by some plaintiffs demonstrated how holding a job made it difficult to arrive at the shelter in time to reserve a space, since the overflow shelter operated on a first-come, first-served basis.

The court noted the testimony of Thomas Baines, a formerly incarcerated homeless man, who was denied shelter because he was found to have "inadequate documentation." He asserted a right to shelter based upon his fear that he would "return to his former life of selling drugs and living in abandoned buildings, cars or the graveyard." Robert Klopp was receiving veteran's benefits and was denied general assistance over his refusal to properly fill out a benefits application. Charles Beedy was a homeless man who obtained employment and subsequently became ineligible for general assistance. Mr. Beedy also noted that he hoped to obtain shelter in a privately funded shelter, and stated that he would be sleeping in the park or abandoned car if he was denied shelter.

Most notable was the testimony of Herbert Hilton, the named plaintiff. Mr. Hilton's testimony described a snowy, freezing night when he was denied a space in the shelter. Included in his testimony was a description of how he slept in an abandoned building, with only a blanket and a fire as protection from the cold weather. However, the Court's discussion of Mr. Hilton was merely in a footnote because this testimony was grouped with other plaintiffs "spending one or more nights on the streets, in parks or in abandoned buildings." For the purposes of the legal challenge, no seasonal distinction was ever made. The plaintiffs did not, through their arguments, appeal to the court to consider a relative scale of harm because, for purposes of the legal challenge before the court, an "emergency," was considered a situation where an individual was not receiving general assistance and would be forced to find other shelter once the overflow shelter was closed in the late spring. Unlike the Court's emphasis on certain plaintiffs in discussion of the facts, particularly Baines, Klopp, and Beedy for their inability to obtain general assistance benefits, the court barely mentions Mr. Hilton's testimony about sleeping in a building in the winter and how homeless people could face death. In addition, the court noted that the original testimony was provided to the trial court in 1989, and that the action for an injunction brought after the adoption of the Public Act in 1992 did not include new testimony "from individuals not currently living in the city shelters who were in need of shelter."

iv. The Court's Holding

The Court characterized the holding in Hilton as being "controlled by our decision today in Moore v. Ganim." The Court coupled a broad constitutional challenge in Moore with what potentially could have been a more narrow assertion of a constitutional right of a homeless person to shelter in Hilton. "Consistent with our reasoning and conclusions in [Moore v. Ganim], we conclude that the state does not have an obligation under the state constitution to provide subsistence benefits, including an obligation to provide shelter."

B. Moore v. Ganim

The plaintiffs brought this action in state trial court as a constitutional challenge to a statute limiting governmental general assistance to poor persons for a maximum of nine out of twelve months. The trial judge

denied the request for a temporary injunction against the implementation of this statute and the plaintiff class appealed. This case was then expedited to the Supreme Court along with Hilton.

The constitutional claim in Moore originally was phrased more broadly than in Hilton. The plaintiffs appealed to the court for recognition of "an affirmative obligation, under the Connecticut Constitution, to provide its indigent citizens with a minimal level of subsistence." Like Hilton, this was a facial challenge of a statute and the claim did not involve an "as applied" argument. The legislature essentially revised the statute governing state-administered general assistance to provide assistance to "an employable person ... [which] shall be limited to no more than nine months in a twelve-month period." The municipalities retained the discretion to extend this limit. The Court summarized the massive scope of the plaintiffs' arguments as follows: "the fundamental premise of the plaintiffs' claims is that the state has a constitutional obligation to supply them with subsistence level resources irrespective of the availability of food and shelter from family, friends, charitable organizations, religious **[*11]** institutions and other community sources. The court again commented on the lack of a factual record detailing actual harm to plaintiffs in this case to demonstrate "the adverse impact on some protected interest of its own."

iii. The Moore Plaintiffs

Surprisingly, the Court did not discuss the facts surrounding the struggles of the individual plaintiffs in Moore, except to note where they were living at the time of the litigation. This is a testament to the breadth of the actual relief the plaintiffs were seeking. Without individual facts, this becomes a hypothetical exercise in providing minimum subsistence to poor persons regardless of alternative sources of assistance and irrespective of the particular season in which they apply for benefits. The ultimate underlying question the court likely considered as it read the briefs and listened to arguments was what the actual scope of minimal subsistence should be. Based on this broad argument by the plaintiffs, it is tough to understand truly how they expected the Court to answer this question and to place limits on the extension of this right. To impress upon the Court the severity of the harm of each plaintiff, the plaintiffs could have included the individual circumstances of the lives of certain plaintiffs with a detailed description of the desperate circumstances of each person. They could have argued on behalf of the specific plights of each individual and applied the rich Connecticut history of supporting poor persons and showed how Connecticut's tradition had their exact situations in mind.

However, the legal argument in Moore was a facial challenge to the former Section 17-273b of the Connecticut General Statutes, which allowed for towns to discontinue benefits to recipients after nine months. The court's final holding is a reflection of the argument presented to the Court, as interpreted by the Court. The legal challenge by the plaintiffs in Moore failed to place on the record before the trial court an emphasis on the individual struggles of real indigent citizens and the ramifications of the State's decision to cut benefits to individuals who may not survive without these benefits. In the plaintiff's request to certify a class, the named plaintiffs were described as follows:

> The class of Bridgeport General Assistance recipients who are 'employable' as that term is used in General Statutes (Rev. to 1993) 17-273b; who have received or will receive benefits for a period of nine months; and who for said nine month period have or will have complied with all requirements of the General Assistance program.

Of the class of plaintiffs in this case, the court mentioned only William Simpson's testimony. Mr. Simpson, it was noted, was actually living in a shelter in Bridgeport while he was a named plaintiff in the action. Two other homeless witnesses, Ruben Sanchez and Michael Kennedy, were also living in the same shelter at the time of the action and were unable to afford rent. Testimony also included two low-income city residents who "expressed concern about their future ability to make rent payments." The Connecticut Supreme Court,

therefore, did not see any testimony in the trial court's record from the thousands of Connecticut citizens who could actually come in from the street to testify in court about the circumstances surrounding their inability to obtain minimum benefits for survival.

iv. The Court's Holding

The Moore Court decided that it was a purely legislative function to administer benefits to the poor. The court concluded that the Connecticut Constitution "does not compel the state to provide the cash assistance to which these plaintiffs claim to be entitled." The Court explained this holding by stating that the "scope of such a right, or of deciding what is the appropriate government response, illustrates the realistic limitations of a judicial decree in a case of this nature." Given the nature of such a broad facial challenge to the general assistance statute, without **[*13]** a factual finding of undeniable personal harm to any named plaintiff, the Court had no choice but to characterize this argument as a policy debate, better suited to the legislative arena. …

F. West Virginia - State ex rel. K.M. v. West Virginia Department of Health & Human Resources

The 1983 case of Hodge v. Ginsberg is the starting point for the development of a homeless person's right to shelter and welfare benefits in the state of West Virginia. Here, the claim was for both a statutory and a constitutional right to emergency shelter for homeless people in order to "sustain life and reasonable health." Although seemingly similar to the plaintiffs' arguments in Moore and Hilton, the plaintiffs in Hodge were defined as "individuals who [were] unable to provide for themselves adequate shelter necessary to sustain life and reasonable health." This narrow definition mirrors the legal approach of defining a right to shelter not as a general right, but as one essential to survival. In Hodge, the court never reached the issue of a right to emergency shelter because of the clear and protective language set forth in the West Virginia statute. This case, however, set the foundation for State ex rel. K.M. v. West Virginia Department of Health & Human Resources, a 2002 case declaring that the constitution of the state of West Virginia guarantees that "government has a moral and legal responsibility to provide for the poor."

State ex rel. K.M. was brought by a mother on behalf of her eight-year-old child to challenge the time limits of the state-administered Temporary Assistance to Needy Families ("TANF") welfare block grant program. Interestingly, the plaintiffs' advocates in this class action brought both a facial statutory challenge as well as a detailed "as applied" challenge to the state's administration of welfare benefits and adherence to federally mandated time limits. The plaintiffs were required to effectuate a finding of fact before a court appointed Special Commissioner. The West Virginia Supreme Court chose to review in great detail the testimony of three assistance recipients, including the mother of the eight-year-old child, so that they "might put a human face on the affected parties." Each recipient, ages 25, 27, and 40, detailed numerous problems, including clinical depression, physical disability, and a lack of available child care for young children. Based on this factual background, the women with children asserted a state constitutional guarantee to subsistence payments that was infringed by the statutory time limit sequence.

The West Virginia Supreme Court determined that the basis for a right to minimum subsistence, including a right to shelter, exists in the text of West Virginia's Constitution in the form of an "office of the Overseer of the Poor." Based upon the individual factual arguments, the historical arguments surrounding the adoption of the text, and the framers' attitudes toward the poor, the court found that the state had a moral and legal responsibility to provide for the poor. In contrast to the conclusion in Moore, the court here found the facts surrounding the lack of benefits to the children compelling and "of interest to every citizen of this State."

In State ex re. K. M., the court made numerous references to the circumstances that the children and families faced once these time limits were reached. This is far different from the sparse facts set forth in Moore and Hilton, where the court noted that the named petitioners had other benefits available to them and were all currently either renting an apartment or living in Prospect House shelter in Bridgeport.

G. Montana - Butte Community Union v. Lewis

Butte Community Union ("BCU") was a case heard by the Montana Supreme Court concerning a right to welfare in December 1985 and decided in January 1986. The arguments presented closely mirror those brought in Moore; however unlike Connecticut, Montana's Constitution contains a specific reference to welfare in Article XII. The challenge in BCU was brought by a group of community and civic organizations to contest a bill passed in the state house of representatives to the statute providing for general assistance to the state's indigent population. The legal argument centered on a facial challenge **[*26]** to the bill's proposed amendment to state administered general assistance; the court does not mention the potential impact of the changes to general assistance on the lives of individual poor and vulnerable recipients in its entire opinion.

At the trial court level, the court issued a preliminary injunction preempting Dave Lewis, the state director of the Department of Social and Rehabilitation Services (SRS), from implementing certain provisions of the bill. The court found that this bill was unconstitutional as a violation of Article XII. The Montana Supreme Court affirmed this injunction, but found that the constitutional language did not provide for a fundamental right to welfare in Montana. The Court held that the bill was subjected to heightened scrutiny, or a mid-tier standard of review, under an equal protection analysis, since the legislation was "discriminatory in nature" and since the "constitutional convention delegates deemed welfare to be sufficiently important to warrant reference in the Constitution." Without the language in Article XII of the Montana Constitution, the plaintiffs may not have fared differently than the plaintiffs in Moore.

BCU is unique from all the other decisions for two reasons: (1) the subsequent litigation and (2) the subsequent constitutional amendment. The second case, known as BCU II, was filed as a result of an attempt by the legislature to amend the general assistance statute to single out "able-bodied persons without dependent minor children ... for no more than two months of non-medical general relief assistance within a 12 month period." Following these two cases and other related litigation, BCU was overruled by a constitutional amendment to Article XII 3(3), which thereafter allowed the legislature to limit the distribution of general assistance to Montana's poor residents.

Bradley R. Haywood, The Right To Shelter as a Fundamental Interest under the New York State Constitution, 34 Colum. Hum. Rts. L. Rev. 157 (2002)

History of the New York State Welfare Amendment

"[S]tate constitutions are not exact replicas of the [F]ederal [C]onstitution. They differ in language, history, and in the values of the populace governed by them. A state court should take all of these considerations into account in interpreting its constitution." In New York's case, although its Equal Protection Clause is substantially the same as the federal version, the content of the rights protected by the state clause vary greatly from those protected by the federal version. In particular, the New York State Constitution recognizes an affirmative duty of the state to provide social welfare.

Article XVII, Section 1 of the New York State Constitution was passed in 1938, at New York's first post-Depression constitutional convention. The convention came on the heels of the Great Depression, obviously a time of economic and social instability in the United States; in New York, for example, total unemployment in the agricultural sector rose from 656,000 persons in 1930 to 2,061,000 in 1933. Without wages to support themselves, many of the unemployed lost their homes; the federal government estimated the total number of homeless in 1933 at one million persons, while experts and academics pegged the total at an even higher number, ranging from two to five million. With an increased burden on a social service scheme designed around local institutions, many of those affected by the Depression found themselves without aid. Lacking the institutional capacity to provide for their needy, the legislators shifted the burden of welfare responsibility to state institutions.

Led by then-Governor Franklin D. Roosevelt, New York sought to implement its welfare mandate through a variety of programs. In an address to the legislature, Roosevelt made clear what he felt the nature of any state sponsored solution must be: "Aid must be extended by the government--not as a matter of charity but as a matter of social duty." With that in mind, Roosevelt made welfare a part of "declared social policy" by establishing a temporary agency, funded by increased state income tax, to provide "home relief" to families in need. When Roosevelt left office to take office as President, his successor, Lieutenant Governor Herbert H. Lehman reinforced social welfare as an obligation of the State, based on the same philosophy as Roosevelt, that "social justice must never be confounded with charity." He shifted his focus from the temporary agency of the Roosevelt Administration to permanent reform, reorganizing the State Department of Social Welfare to be responsible for a large share of "home relief." At the time, however, the New York State Constitution likely barred the state from using its revenues for direct welfare services.

With this background, delegates convened in 1938 to consider amendments to the New York State Constitution that would allow for state financing of direct social welfare services. The proposed amendments ranged from affording the legislature complete discretion over welfare programs--including whether or not to implement them at all--to removing all discretion from their hands, describing not only the nature of the right, but also its content. The final version of the Welfare Amendment ratified by the convention struck a balance between the two extremes, affirming the mandatory character of social welfare by using words of obligation ("shall be provided"), while allowing the legislature discretion over the "manner" and "means" of its implementation. The language affording discretion to the legislature, however, does not allow it to determine whether or not to provide aid.

The legislative history affirms the mandatory character of the language in the Welfare Amendment. Notable among the statements of the delegates were the comments of the Chairperson of the

Social Welfare Committee, Edward Corsi, whose proposed amendment most closely mirrored the version finally approved by the delegates. A version of that amendment became Article XVII, Section 1. As a sponsor of the measure, his comments are entitled to "special weight" when attempting to discern intent.Among other things, Corsi noted that the measure codified "a concrete social obligation which no court may ever misread" and that "the obligation expressed in this recommendation is mandatory." Moreover, Corsi noted that the state "may . . . not shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government." Corsi went on to specifically mention the correlative to the state duty, and that which is most crucial to equal protection analysis--the fundamental right. Corsi emphasized that, in the scheme envisioned by the measure, "legislative discretion over the system of relief was subordinate to the 'fundamental right' of the poor to receive 'aid, care and support."'

Although the New York courts have since afforded a great deal of discretion to the state legislature in determining the "manner and means" of implementation, arguably more than the drafters of the provision intended, they remain steadfast to the idea of the mandatory nature of the welfare provision contained in Article XVII, Section 1 of the New York State Constitution. Tucker v. Toia is a particularly good exposition of the court's attitude towards the welfare provision. In Tucker, the plaintiffs challenged the validity of eligibility requirements for home relief, claiming that such regulations were "a substantive violation of Section 1 of Article XVII of the New York State Constitution."

The court's analysis of the constitutional question opened by stating that "the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution," a statement since affirmed in numerous subsequent cases. The court proceeded to uphold the rationale described in the recounting of the convention of 1938, namely that the purpose of the welfare provision was twofold: first, a welfare provision was necessary in order to protect state financing of public assistance from constitutional attack; and second, "it was intended as an expression of the existence of a positive duty upon the State to aid the needy." Furthermore, the court cited legislative history for support, looking to the statements of Chairman Corsi to affirm mandatory public assistance to the needy as "a definite policy of government, a concrete social obligation which no court may ever misread," and a responsibility "as fundamental as any responsibility of government." The Tucker court found in this legislative history an "affirmative duty to aid the needy." Clearly, the right to public assistance, and its mandatory and fundamental character, enjoy an explicit constitutional basis and judicial recognition.

It may be noted that, although public assistance is explicit within the text of the constitution, shelter is not. However, if the Welfare Amendment is to have any content at all, it must undoubtedly include some provision of shelter, one of the most basic human needs. It might even include provision of additional levels in the continuum of care, like transitional housing, permanent housing and supportive services.

* * *

Since Callahan, New York courts have upheld the obligation created by the consent decree to provide shelter for the homeless, extending it to cover other classes, including women and families. In McCain v. Koch, destitute families receiving emergency housing aid challenged arbitrary denials of shelter and, for those who did receive it, the quality of the accommodations provided by the City. The plaintiffs initially sought an injunction ordering "safe, suitable and adequate emergency housing." The Court of Appeals [held that] … a court could … require compliance with

minimal objective standards of adequacy for shelter [beyond what was in the consent decree]." The court ruled on only the limited question of whether a court can issue an injunction requiring the City, once it has undertaken to provide shelter, to provide shelter that satisfies minimal standards of adequacy. By limiting its scope of review, the court expressly avoided any resolution of the constitutional question about the right to shelter, or whether the standards embodied in the New York Department of Social Services (Department) regulations were in fact constitutionally inadequate or unreasonable. Instead, its reasoning rested on due process grounds--if the Department pledged to provide housing, it must abide by its own regulations. In reaching this decision, the court still left all discretion on establishing and promulgating standards to "legislative and executive prerogative."

The most recent challenge to the Callahan consent decree has involved Title 18, Section 352.35 of the New York Code. Section 352.35, a regulation promulgated by the New York Department of Social Services, required that individuals applying for or receiving shelter benefits comply with eligibility requirements, including an initial assessment, the development of and compliance with an "individual living plan," and workfare. Specifically, the regulation required that anyone seeking temporary shelter, "be it only for a night," had to undergo a series of complex eligibility assessments, with the immediate goal of creating an "independent living plan," and the ultimate goal of a transition to permanent housing. The assessments involved, among other things, an evaluation of housing availability, the need for temporary housing assistance, employment and educational needs, the need for protective or preventive services, the ability to live on one's own, and the need for health care, including treatment for substance abuse. The regulation also asserted, in plain terms, that emergency shelter was a "public assistance benefit," and thus, for an individual to receive emergency shelter, that person was required to comply with all of the eligibility conditions of public assistance programs, including participating in job training, rehabilitation, or child support programs, and any additional requirements for the receipt of social security income. Finally, the regulations charged the individual with the responsibility of undertaking an active job search and temporary housing search. Once the agency made its assessments, the individual had to comply with the independent living plan. Individuals or families who failed to comply were disqualified from receiving housing assistance "until the failure ceases, or for 30 days, whichever period is longer."

In McCain v. Giuliani, the appellate division addressed the facial constitutional validity of these regulations. Employing the rationality review standard established in Bernstein v. Toia and upheld in Eldredge v. Koch and McCain v. Koch, the court determined the regulations to be rationally related to the Department of Social Services's rulemaking objective of "assuring that temporary housing resources are not squandered on those having no real need of them" and to the related objective of reducing reliance on public benefits by encouraging work and independent living. Although the McCain court found Section 352.35 facially constitutional, the court with jurisdiction to enforce the consent decree has enjoined the city from enforcing the regulations. Most recently, the court noted that the regulation risked depriving needy persons of shelter, in contravention of the purpose of the consent decree. As a result, Section 352.35 remains enjoined due to its inconsistency with the Callahan consent decree.

In challenging the regulations as contrary to the consent decree, the plaintiffs relied partially on the first-hand accounts of those who might be affected by them. One of these persons was a homeless man named Damon Revells, a full-time cook who had been evicted by his landlord for missed rent. In an affidavit to the court, Revells described an arduous intake process that began on 1:00 a.m. on December 28, 1998, and did not conclude with an assignment until 6:00 p.m., a full seventeen hours later. Even after being assigned a bed, Revells had to travel by bus to the shelter. He arrived at midnight on December 29, ate a small meal, and went to bed at 1:00 a.m. Because of the long delay, Revells slept for only five hours. A similar process ensued each day he sought temporary shelter, with a long line for shelter bed assignment at the intake center, then a commute to the actual shelter placement. Because of the administrative delays, Revells attested to averaging roughly four hours of sleep a night while at the shelter. He also attested to sleeping at seven different city shelters in two weeks, throwing his transportation schedule into chaos. With his schedule unpredictable and his hours of sleep sharply limited, Revells additionally risked losing his job. [Another] example, described by a local homeless service organization, involved a Bellevue Men's Shelter resident named Johnny, a man in his forties, who was evicted with eleven others for violating a "minor rule-- smoking a cigarette in a non-smoking area." Following eviction, which was in accordance with strict shelter regulations and sanctions similar to Section 352.35, the evicted men spent seven days sleeping in public, on subways, park benches, and in hospitals. What was striking about Johnny's case, however, was that he was mentally retarded. He had been misdiagnosed by shelter staff upon intake. Had his condition been properly identified, he never would have faced such a sanction.

[Update from Coalition for the Homeless:[1]]

In October 2002, the City filed an appeal of the ruling, and in June 2003 the Appellate Division overturned the trial court's earlier ruling. In October 2003 the Court of Appeals denied a request to review the appellate court ruling on the grounds that that ruling was not a final decision.

Therefore, in late 2003 the City of New York began implementing shelter termination rules for homeless single adults, but was required by court order to provide Coalition for the Homeless and the Legal Aid Society with copies of each individual's shelter termination notice, allowing the Coalition and the Legal Aid Society to provide legal assistance, housing assistance, and social services to threatened homeless adults.

In 2006 the City initiated legal action to stop providing shelter termination notices to the Coalition and the Legal Aid Society. After three years of litigation and appeals, in 2009 the New York State Court of Appeals found for plaintiffs and the Coalition, and ordered the City and State to continue providing copies of termination notices.

December 2009, Coalition shelter monitors had witnessed hundreds of homeless men and women forced to sleep on the floors of waiting rooms, or transported in the middle of the night to distant shelter facilities only to get a few hours of sleep before being shipped

[1] http://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/

back. And due to the City's failure to plan, these crisis conditions existed even before the onset of winter.

On December 9, 2009, the Coalition and the Legal Aid Society, with the pro bono legal assistance of attorneys from Wilmer Cutler Pickering Hale LLP, filed a motion in New York State Supreme Court seeking enforcement of the *Callahan* consent decree. On December 20th, Justice Judith Gische issued two vital temporary orders that required the City (1) to shelter vulnerable men and women and (2) to halt the systemic, repeated use of overnight-only beds — thus banning the City's longstanding practice of "overnighting" hundreds of homeless men and women each night.

As a result of those orders, over the course of the 2009-2010 winter months the City was forced to add hundreds of shelter beds and to implement new procedures to ensure that homeless New Yorkers entering the shelter system get stable shelter placements. Indeed, by May 2010 when the motion was settled, the City had added more than 800 beds for homeless men and women to address a remarkable 12 percent increase in the adult shelter population.

In November 2011, Mayor Bloomberg launched the most aggressive attack on the legal right to shelter for homeless New Yorkers since the Giuliani and Pataki years. The Bloomberg administration proposed new shelter eligibility rules for homeless singe adults that would effectively deny shelter to thousands of homeless New Yorkers, including many living with mental illness and other serious health problems.

Coalition for the Homeless and the Legal Aid Society immediately filed a legal challenge seeking to block the shelter denial rules, and the City agreed not to implement the new rules pending the legal challenge. The Coalition and the Legal Aid Society argued that the proposed rules violated the *Callahan v. Carey* consent decree and that the City had failed to comply with New York City Charter provisions governing the issuance of new rules and policies. In late November, the New York City Council filed a similar legal challenge based on the same City Charter provisions. At a December hearing, New York State Supreme Court Justice Judith Gische declared that she would first rule on the City Charter issues and address the *Callahan* issues pending the outcome of the procedural claims.

On February 21, 2012, Justice Gische ruled for the plaintiffs and the City Council that the City had failed to comply with City Charter requirements regarding the issuance of rules, and declared the proposed shelter eligibility rules "a nullity." [The decision was upheld by the Court of Appeals.]

Thomas J. Main, Homelessness in New York City: Policymaking from Koch to de Blasio (2016)

Introduction

The jurisdiction that has developed the most ambitious policy to address the problem of homelessness is New York City. In April 2015, New York City sheltered 59,285 homeless people (including both single individuals and members of families), and an estimate based on a street survey done in February of that year indicates that there were an additional 3,182 persons living in public spaces. In fiscal year 2011 the city's Department of Homeless Services spent $1.47 billion. No other American city spends nearly as much on the homeless as New York or has close to as large a shelter system. The poor quality of life for at least some of the city's homeless has received wide attention. New York City's infamous welfare hotels were icons of the suffering of the urban poor. Just as disturbing are reports of a small population of homeless people who live in the city's tunnels and other underground spaces.

New York City is also the jurisdiction with the longest history of coping with homelessness. The plight of the so-called disaffiliated alcoholics of the Bowery was documented in the early 1960s and had been dealt with by the city in various ways for decades before then. The 1960s also saw the development of "hotel families," that is, families that had been burned out of or otherwise lost their housing and were put up in hotels at the city's expense. These episodes belong to what might be called the prehistory of homelessness policy in New York.

A whole new policy framework was created by the signing of a consent decree in the case of Callahan v. Carey on August 26, 1981. As a result of this and other litigation by advocates for the homeless, the city is one of the few local governments with a court-recognized and enforceable policy of providing shelter to anyone who requests it. New York City is therefore the main stage on which the pressing national problem of homelessness has been addressed.

In New York City, the process of establishing shelter as a right has gone through three distinct stages or moments.

Phase One: Entitlement

Simply establishing that there indeed is a right to shelter and then delivering on that entitlement is one of the central challenges to policy. The courts and various advocacy groups such as Coalition for the Homeless are primarily concerned with this aspect of homelessness policy. These interests push policy in the direction of developing a shelter system that is large, court supervised, and primarily concerned with service delivery. Establishing and implementing a right to shelter is one major theme in New York City's policy, a theme that was especially prominent in the early days—that is, through the eighties to the early nineties—of modern homelessness policy.

The right to shelter completely transformed the city's homelessness system. The system grew tremendously in the early eighties. While 7,584 individuals were sheltered in 1982, 21,154 were sheltered in 1985. Spending grew from $6.8 million in 1978, just before the litigation to establish a right to shelter began, to $100 million in 1985. To cope with the rapidly expanding demand, the city rushed to open large, barracks-style shelters where hundreds of clients would sleep in cots laid out in open spaces. During these years the city also relied on commercial welfare hotels to shelter

homeless families at the cost of $72 million in 1986. The shelter system during these years was satisfactory neither from a conservative nor from a liberal point of view. The right to shelter was absolute, and unbalanced by any requirements to work, participate in rehabilitation, or seek permanent housing. Moreover, shelter quality was often very poor, and few services were offered to clients. The city had created a system that guaranteed the right to free, low-quality shelter.

Phase Two: Paternalism

Entitlement is one axis around which New York City homelessness policy has spun. As time went by, however, the limits of this purely entitlement-based, emergency-oriented system showed themselves.

The unconditional right to shelter proved to be problematic in various ways. Behavioral problems—such as substance abuse, nonwork, and criminal activity—of some of the homeless required that the entitlement to shelter be conditioned on proper behavior, including participation in work and treatment programs. Strong conceptions of the rights of the mentally ill sometimes had to be limited in order to provide necessary protection and therapy. This set of challenges is of particular concern to mayors and administrators who, unlike the courts or advocates, are responsible for the actual operation of the shelter system. These bureaucracy-based actors therefore push policy in a paternalistic direction, one in which rights are conditioned on good behavior and on participation in programs such as drug treatment, work, and activities designed to move clients out of the shelters as soon as possible.

During the Giuliani administration, the shelter system was much changed from what it had been in the eighties and early nineties, mostly in a paternalistic direction. While in the 1980s most shelters were government run, the system was privatized or, more accurately, not-for-profitized. That change improved shelter quality. Not-for-profitization has also made it possible for the system to impose work or rehabilitation requirements on clients. The city still provided shelter to everyone who asked for it. But not-for-profit shelters can require their clients to work, or participate in rehabilitation, in order to stay in that particular shelter. (Clients who decline to participate are sent back to a city-run, general-intake shelter.) In other words, privatization made paternalism possible.

Beginning in the late Dinkins administration and continuing through the Giuliani administration and much of the Bloomberg administration, city homelessness policy developed in a paternalistic direction, one that emphasized the importance of getting homeless people who are able to do so to take responsibility for their housing situation. The drive to develop such a paternalistic policy has required the city to get itself out from under the constraints of the many lawsuits that drive the city's homelessness policy. The city has had to "reinvent" its Department of Homeless Services as a more decentralized and flexible system. In short, New York's homelessness system has evolved from its beginning as a centralized, highly constrained, and entitlement-based system to one that is much more decentralized and privatized and that emphasizes clients' responsibilities as well as their rights.

But paternalism turned out to have its limits, just as entitlement did. Paternalism greatly improved management of homeless services and responded to political demands for more responsibility on the part of recipients. What paternalism did not do was offer much hope of eventually "solving"

the problem of homelessness. Despite efforts to diagnose and then treat the "underlying causes" of homelessness, the number of people on the street and of families entering shelters remained frustratingly high. The overall shelter census continued to go up, as did the budget for services for the homeless. The paternalistic reforms, promoted under the Dinkins administration by a special commission led by Andrew Cuomo, and implemented with much fanfare during the Giuliani years, seemed not to be making a dent in these two fundamental measures of success. Paternalism had done a better job at managing homelessness but had failed as a strategy for solving homelessness.

Phase Three: Post-paternalism

The next moment in New York City homelessness policy had its origins in efforts to come up with a strategy that would "solve" homelessness. A crucial part of that effort was what amounted to a redefinition of the homelessness problem by the well-known researcher Dennis Culhane. In the late nineties, only 10 percent of the single homeless persons in New York—who were the most disabled and whom Culhane identified as the "chronic" homeless— accounted for almost half of the shelter days provided by the city. This discovery allowed the homelessness problem to be redefined in such a way that a "solution" seemed within reach: Focus on the relatively small chronic population, house them, thus making a disproportionate impact on reducing shelter use, and declare victory.

The question then became where to house the chronically homeless. … Sam Tsemberis, a psychologist experienced in outreach work to the street homeless and founder of the innovative service organization Pathways to Housing, came up with a response. His "Housing First" approach to outreach involved breaking with the paternalist quid pro quo and providing street dwellers with housing before asking them, or perhaps without asking them, for compliance with rehabilitation. Many single homeless people, it turned out, who had previously declined shelter on paternalistic terms were willing to take this deal.

Housing First was developed as an outreach strategy directed to street dwellers but also had an impact on policy toward homeless families. From the eighties to the mid-1990s, it was thought by some observers—including the present author—that homeless families were much more troubled than similar, nonhomeless poor families with problems such as drug use, mental illness, criminal activity, and "underclass" pathologies. Here again, the thought was that there was an underlying cause of the homelessness of many families. By the mid-1990s, research indicated that homeless families, though they suffered higher rate of such problems than similar poor families, were not as dramatically worse as had been thought. In any case, research also showed that whatever their problems, homeless families could generally stay stably placed in permanent housing even if they did not receive any rehabilitative services. The key to rapidly rehousing them was not services, but subsidies. Homeless families, whatever their troubles, could usually live outside the shelter system if they received access to public housing or Section 8 vouchers and other forms of rental subsidy. Thus, under the influence of the Housing First strategy for singles, policy for families began to move away from diagnosing underlying causes and providing appropriate services to planning for rapid rehousing of shelter families, with some form of subsidies being a prominent part of that plan.

The post-paternalistic features of the city's homelessness policy were broached during the early

Bloomberg years. It was under Bloomberg that, with much publicity and acclaim, a five-year plan was introduced, the expressed purpose of which was to "overcome" or end homelessness. Ending homelessness really meant having a disproportionate impact on the use of shelters and services by focusing on the chronically homeless, as Culhane had suggested, sending them to supportive housing, and doing so without demanding "good behavior" first, in keeping with the Housing First policy. Implementation of Housing First strategies proceeded apace under Bloomberg, as did the analogous family policy of rapid rehousing, which, in Bloomberg's first term, involved a reliance on various sorts of housing subsidies.

The results of post-paternalism have been mixed, perhaps because this policy philosophy has been incompletely implemented. The Housing First strategy for single homeless people has been effective in considerably reducing the city's population of street dwellers, by about 24 percent between 2005 and 2014. The situation with the shelter population was much different. The census in the shelter system rose throughout the Bloomberg years and was at an all-time high at the end of his final term. This may be the case because the Housing First strategy was never fully implemented for families. Rapid rehousing consisted mostly in planning to move families out of the shelter almost as soon as they entered, rather than waiting for various sorts of rehabilitative programs to take effect. But a signature Bloomberg policy for dealing with homeless families was "delinking," that is, ending priority access of homeless families to Section 8 vouchers and vacant public housing units. Such delinking was supposed to put an end to the "perverse incentive" of receiving subsidies upon becoming homeless, and was therefore expected to abate the flow of families into the shelter system. Also under Bloomberg, an important rent subsidy for homeless families, the Advantage program, came to an end under complicated circumstances. The delinking strategy and the end of rent subsidies were out of keeping with post-paternalism, which, when applied to families, implied reliance on rent subsidies to achieve rapid access to permanent housing.

We have, then, three stages in the development of homeless policy in New York City: entitlement, paternalism, and post-paternalism. Actually, these stages are more like facets or aspects. Paternalism did not end entitlement; paternalism assumed the homeless had a right to shelter but located the cause of homelessness in the homeless person and demanded that he or she "give something back" in return for shelter and services. Post-paternalism would have undermined paternalism, but has been incompletely implemented. The result is that paternalism has been imposed on top of entitlement, and postpaternalism on top of paternalism. The city's homeless policy is therefore quite complex, and is driven by three distinct "philosophies."

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976

Excerpts

PREAMBLE

The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The Government of the Republic of South Africa et al. v. Grootboom (Constitutional Court of South Africa, Case CCT 11/00, Judgment of 4 October 2000):

Yacoob, J.

A. *Introduction*

The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.

The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolera-

ble conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

Mrs. Irene Grootboom and the other respondents[13] were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants were ordered to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum." The appellants who represent all spheres of government responsible for housing challenge the correctness of that order.

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the "coloured labour preference policy." In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100,000 units in the Cape Metro at the time of the inception of the interim Constitution in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else.

Mrs. Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. . . . The conditions under which most of the residents of Wallacedene lived were lamentable. . . . About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare.

Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from

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[13] The respondents are 510 children and 390 adults. Mrs Irene Grootboom, the first respondent, brought the application before the High Court on behalf of all the respondents.

the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land "New Rust."

They did not have the consent of the owner and on 8 December 1998 he obtained an ejectment order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs. Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others. . . . The validity of the eviction order has never been challenged and must be accepted as correct. However, no mediation took place and on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings. . . . The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster.

[S]ection 26 of the Constitution . . . provides that everyone has the right of access to adequate housing. Section 26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources.

The [trial court] rejected an argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the programme to provide adequate housing. This submission was based on the provisions of certain international instruments. . . .[14]

D. *The relevant constitutional provisions and their justiciability*

The key constitutional provision[] at issue in this case [is] section 26:

(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and to health care, food, water and social security . . . and the right to education.

While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution. . . :

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[14] The International Covenant on Economic, Social and Cultural Rights, and the general comments issued by the United Nations Committee on Social and Economic Rights.

> [T]hese rights are, at least to some extent, justiciable. [M]any of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. . . .

E. *Obligations imposed upon the state by section 26*

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The right of access to adequate housing cannot be seen in isolation. . . . The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. . . .

Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality. . . .

ii) *The relevant international law and its impact*

Section 39 of the Constitution[15] obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane* Chaskalson P . . . said:

> . . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a

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[15] Section 39 of the Constitution provides:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum -
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  (b) must consider international law; and
  (c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

The *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant)[16] is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. [The Court cited Articles 2(1) and 11(1) of the Covenant.]

The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

(a) The Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing.
(b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee). The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the

[16] The Covenant was signed by South Africa on 3 October 1994 but has as yet not been ratified.

> Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

It is clear from this extract that the committee considers that every State party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. A State party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. . . .

[T]he real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.

. . .

iii) *Analysis of section 26*

Subsection (1) aims at delineating the scope of the right. . . . Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so

as to limit the inexorable migration of people from rural to urban areas in search of jobs.

The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system. . . . Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups.

Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. . . .

Reasonable legislative and other measures

What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. . . .

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. . . . A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.

The state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. . . . The formulation of a programme is only the first stage in meeting the state's obligations. . . .

Progressive realisation of the right

The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But . . . accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. . . . The committee has helpfully analysed this requirement in the context of housing as follows:

> Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être,* of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[17]

Within available resources

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources.

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

F. *Description and evaluation of the state housing programme*

In support of their contention that they had complied with the obligation imposed upon them by section 26, the appellants placed evidence before this Court of the legislative and other measures they had adopted. There is in place both national and provincial legislation concerned with housing. . . . The national Housing Act provides a framework which establishes the responsibilities and functions of each sphere of government with regard to housing. The responsibility for implementation is generally given to the provinces. Provinces in turn have assigned certain implementation

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[17] Para 9 of general comment 3, 1990.

functions to local government structures in many cases. All spheres of government are intimately involved in housing delivery and the budget allocated by national government appears to be substantial. . . . In addition, various schemes are in place involving public/private partnerships aimed at ensuring that housing provision is effectively financed.

What has been done in execution of this programme is a major achievement. Large sums of money have been spent and a significant number of houses has been built. Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realisation of the right of access to adequate housing.

A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. . . .

This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. . . .

. . . The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme. . . .

In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need. . . .

H. *Evaluation of the conduct of the appellants towards the respondents*

The final section of this judgment is concerned with whether the respondents are entitled to some relief in the form of temporary housing because of their special circumstances and because of the appellants' conduct towards them. . . . [W]e must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country.

The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.

There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejectment of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place.

The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

At the hearing in this Court, counsel for the national and Western Cape government, tendered a statement indicating that the respondents had, on that very day, been offered some alternative accommodation, not in fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism. Counsel for the respondents accepted the offer on their behalf.

This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind.

I. *Summary and conclusion*

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[S]ection 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa" (John M. Olin Program in Law and Economics Working Paper No. 124, 2001)

Here is one of the central differences between late eighteenth century constitutions and late twentieth century constitutions: The former make no mention of rights to food, shelter, and health care, whereas the latter tend to protect those rights in the most explicit terms. A remarkable feature of international opinion – firmly rejected in the United States – is that socio-economic rights deserve constitutional protection.

But should a democratic constitution really protect the right to food, shelter, and medical care? Do "socio-economic" rights of this sort belong in a Constitution? What do they have to do with citizenship? Do they promote or undermine democratic deliberation? If such rights are created, what is the role of the courts?

For many years, there has been a debate [on these questions] … The debate has occurred with special intensity in both Eastern Europe and South Africa. Of course the American Constitution, and most constitutions before the twentieth-century, protected such rights as free speech, religious liberty, and sanctity of the home, without creating rights to minimally decent conditions of life. But in the late twentieth century, the trend is otherwise, with international documents, and most constitutions, creating rights to food, shelter, and more.

Some skeptics have doubted whether such rights make sense from the standpoint of constitutional design. On one view, a constitution should protect "negative" rights, not "positive" rights. Constitutional rights should be seen as individual protections against the aggressive state, not as private entitlements to protection by the state. For people who share this view, a constitution is best understood as a bulwark of liberty, properly conceived; and a constitution that protects "positive" rights can be no such bulwark, because it requires government action, rather than creating a wall of immunity around individual citizens.

But there are many problems with this view. Even conventional individual rights, like the right to free speech and private property, require governmental action. Private property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such. So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs. Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support. In any case we might well think that the abusive or oppressive exercise of government power consists, not only in locking people up against their will, or in stopping them from speaking, but also in producing a situation in which people's minimal needs are not met. Indeed, protection of such needs might be seen as part of the necessary wall of immunity, and hardly as inconsistent with it.

If the central concerns are citizenship and democracy, the line between negative rights and positive rights is hard to maintain. The right to constitutional protection of private property has a strong democratic justification: If people's holdings are subject to ongoing governmental adjustment, people cannot have the security, and independence, that the status of citizenship requires. The right to private property should not be seen as an effort to protect wealthy people; it helps ensure deliberative democracy itself. But the same things can be said for minimal protections

against starvation, homelessless, and other extreme deprivation. For people to be able to act as citizens, and to be able to count themselves as such, they must have the kind of independence that such minimal protections ensure.

On the other hand, a democratic constitution does not protect every right and interest that should be protected in a decent or just society. Perhaps ordinary politics can be trusted; if so, there is no need for constitutional protection. The basic reason for constitutional guarantees is to respond to problems faced in ordinary political life. If minimal socio-economic rights will be protected democratically, why involve the Constitution? The best answer is that to doubt the assumption and to insist such rights are indeed at systematic risk in political life, especially because those who would benefit from them lack political power. It is not clear if this is true in every nation. But certainly it is true in many places.

Perhaps more interestingly, critics of socio-economic rights have made a point about democratic institutions. In particular, they have argued that socio-economic rights are beyond judicial capacities. On this view, courts lack the tools to enforce such guarantees. If they attempt to do so, they will find themselves in an impossible managerial position, one that might discredit the constitutional enterprise as a whole. How can courts possibly oversee budget-setting priorities? If a state provides too little help to those who seek housing, maybe it is because the state is concentrating on the provision of employment, or on public health programs, or on educating children. Is a court supposed to oversee the full range of government programs, to ensure that the state is placing emphasis on the right areas? How can a court possibly acquire the knowledge, or make the value judgments, that would enable it to do that? There is a separate point. A judicial effort to protect socio-economic rights might seem to compromise, or to preempt, democratic deliberation on crucial issues, because it will undermine the capacity of citizens to choose, in accordance with their own judgments, the kinds of welfare and employment programs that they favor. Of course some of these points hold for conventional rights as well. But perhaps social and economic rights are especially troublesome on this count, because they put courts in the position of overseeing largescale bureaucratic institutions.

It would be possible to respond to these institutional concerns in various ways. Perhaps constitutions should not include socio-economic rights at all. Perhaps such rights should be included, but on the explicit understanding that the legislature, and not the courts, will be entrusted with enforcement. Section IV of the Indian Constitution expressly follows this route, contained judicially unenforceable "directive principles" and attempting to encourage legislative attention to these rights without involving the judiciary.. [Could you mention the section(s) in the Indian Constitution?] The advantage of this approach is that it ensures that courts will not be entangled with administration of social programs. The disadvantage is that without judicial enforcement, there is a risk that the constitutional guarantees will be mere "parchment barriers," meaningless or empty in the real world. …

In *Grootboom*, the Constitutional Court of South Africa was confronted, for the first time, with the question of how, exactly, courts should protect socio-economic rights. The Court's approach suggests, also for the first time, the possibility of providing that protection in a way that is respectful of democratic prerogatives and the simple fact of limited budgets.

In making clear that the socio-economic rights are not given to individuals as such, the Court was at pains to say that the right to housing is not absolute. This suggestion underlies the Court's unambiguous suggestion that the state need not provide housing for everyone who needs it. What the constitutional right requires is not housing on demand, but a reasonable program for ensuring access to housing for poor people, including some kind of program for ensuring emergency relief. This approach ensures respect for sensible priority-setting, and close attention to particular needs, without displacing democratic judgments about how to set priorities. This is now the prevailing approach to the constitutional law of socio-economic rights in South Africa.

Of course the approach leaves many issues unresolved. Suppose that the government ensured a certain level of funding for a program of emergency relief; suppose too that the specified level is challenged as insufficient. The Court's decision suggests that whatever amount allocated must be shown to be "reasonable"; but what are the standards are resolving a dispute about that issue? The deeper problem is that any allocations of resources for providing shelter will prevent resources from going elsewhere – for example, for AIDS treatment and prevention, for unemployment compensation, for food, for basic income support. Undoubtedly the Constitutional Court will listen carefully to government claims that resources not devoted to housing are being used elsewhere. Undoubtedly those claims will be stronger if they suggest that some or all of the resources are being used to protect socio-economic rights of a different sort.

What is most important, however, is the Constitutional Court's adoption of a novel and highly promising approach to judicial protection of socio-economic rights. The ultimate effects of the approach remain to be seen. But by requiring reasonable programs, with careful attention to limited budgets, the Court has suggested the possibility of assessing claims of constitutional violations without at the same time requiring more than existing resources will allow. And in so doing, the Court has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights, and to do so without placing an undue strain on judicial capacities.