THE CRIMINALIZATION OF HOMELESSNESS
Spring 2026

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READINGS, Parts I, II & III

Part I

Part II

Part III

Brandon FULTON, Plaintiff-Appellant,

v.

FULTON COUNTY BOARD OF COMMISSIONERS, Defendant-Appellee,

Paul L. Howard, Jr., Esq.; in his individual capacity, et al., Defendants.

No. 22-12041

United States Court of Appeals, Eleventh Circuit.

Filed: 07/31/2025

Background: Property owner brought action against county, alleging county took his horses without justification and without paying for them in violation of the Takings Clause of the Fifth Amendment. The United States District Court for the Northern District of Georgia, No. 1:20-CV-01936-SCJ, Steve C. Jones, J., 2021 WL 8945248, denied owner's motion to amend complaint to substitute county for board of commissioners and to add alternative claim directly under the Takings Clause, and dismissed claim against board of commissioners without prejudice. Owner appealed.

Holdings: The Court of Appeals, Rosenbaum, Circuit Judge, held that:

(1) district court had federal question jurisdiction to independently evaluate merits of Takings Clause claim that was not patently without merit;

(2) owner's state-law claim for recovery of personal property taken by county seven years previously was barred for not providing that notice to county under state procedural requirement;

(3) four-year statute of limitations applied to claim directly under Takings Clause in Georgia for recovery of personal property taken by county;

(4) on issue of first impression, a litigant in Georgia can sue a county, a political subdivision of the state, directly under the Takings Clause to obtain just compensation for a taking;

(5) on issue of first impression, direct cause of action against county under Takings Clause was available to horse owner;

(6) Georgia, as exclusive forum, unilaterally and unconstitutionally imposed procedural bar on horse owner's Takings claim, assuming owner could have ever sought relief in Georgia courts, because of *Monell*; and

(7) on issue of first impression, sovereign immunity did not bar direct cause of action against county under Takings Clause by horse owner.

Vacated and remanded.

William Pryor, Chief Judge, filed dissenting opinion.

1. Federal Courts ⚿3665

On appeal from a denial of a motion for leave to amend the complaint, the Court of Appeals accepts as true the facts pled in the proposed amended complaint and construes them in the light most favorable to the plaintiff. Fed. R. Civ. P. 15.

2. Federal Courts ⚿3587(1)

A district court's denial of a motion for leave to amend a complaint is reviewed for abuse of discretion. Fed. R. Civ. P. 15.

3. Federal Civil Procedure ⚿851

Amendment is futile if the amended complaint still would be subject to dismissal. Fed. R. Civ. P. 15.

4. Federal Courts ⚿2028

"Subject-matter jurisdiction" is a federal court's statutory or constitutional

power to adjudicate a case. U.S. Const. art. 3, § 2, cl. 1.

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

5. Federal Courts ⚿2362

A federal court dismisses federal question claim for lack of subject matter jurisdiction only if claim clearly appears to be immaterial and made solely for purpose of obtaining jurisdiction, or is wholly insubstantial and frivolous. U.S. Const. art. 3, § 2, cl. 1.

6. Federal Courts ⚿2211

Federal courts enjoy jurisdiction over all cases arising under the Constitution, laws, or treaties of the United States. 28 U.S.C.A. § 1331.

7. Federal Courts ⚿2324(1)

Federal question statute was correct jurisdictional hook for owner's proposed amended claim alleging violation of Takings Clause under Fifth and Fourteenth Amendments when county took his horses without justification and did not pay for them, since claim depended upon construction or application of Constitution. U.S. Const. Amends. 5, 14.

8. Action ⚿1

Cause of action exists when particular plaintiff is member of class of litigants that appropriately may invoke power of court.

9. Action ⚿1

Whether plaintiff has alleged cause of action generally presents merits question.

10. Federal Courts ⚿2324(1)

Complaint raising open question on viability of cause of action directly under Takings Clause was not patently without merit, and therefore district court had federal question jurisdiction to independently evaluate its merits. U.S. Const. Amend. 5; 28 U.S.C.A. § 1331.

11. Limitation of Actions ⚿20

In Georgia, actions to recover personal property have a four-year statute of limitations from when the claim accrues. Ga. Code Ann. §§ 9-3-31, 9-3-32.

12. Limitation of Actions ⚿45

Four year limitation period for Georgia owner of horses to bring action to recover personal property accrued 30 days after county dropped criminal charges against owner for felony cruelty to animals after having seized those horses. Ga. Code Ann. §§ 9-3-31, 9-3-32, 17-5-54(c)(2).

13. Limitation of Actions ⚿105(2)

Horse owner's state-law claim for recovery of personal property taken by county seven years previously was not barred by Georgia four-year statute of limitations, since owner filed federal complaint arising from same set of facts within four-year window after state dropped criminal charges against owner for felony cruelty to animals. Ga. Code Ann. §§ 9-3-31, 9-3-32, 9-11-15(c), 17-5-54(c)(2).

14. Municipal, County, and Local Government ⚿3612

Horse owner's state-law claim for recovery of personal property taken by county seven years previously was barred for not providing that notice to county under state procedural requirement for all claims against counties to be presented within 12 months after they accrued or became payable, although claim would not have been barred by Georgia four-year statute of limitations because owner filed federal complaint arising from same set of facts within four-year window after state dropped criminal charges against owner for felony cruelty to animals. Ga. Code Ann. §§ 9-3-31, 9-3-32, 17-5-54(c)(2), 36-11-1.

15. Eminent Domain ⚿288(1)

Four-year statute of limitations applied to claim directly under Takings Clause in Georgia for recovery of personal property taken by county; although state procedural rule required all claims against counties to be presented within 12 months after they accrued or became payable, it was not statute of limitations. U.S. Const. Amend. 5; Ga. Code Ann. §§ 9-3-31, 9-3-32, 36-11-1.

16. Federal Courts ⚿3034(3)

When federal claim lacks express statute of limitations, court looks to forum state's limitations period applicable to state cause of action that bears closest substantive resemblance to federal cause of action.

17. Eminent Domain ⚿288(1)

In Georgia, inverse condemnation actions for recovering the value of real property have a four-year limitations period. U.S. Const. Amend. 5; Ga. Code Ann. § 9-3-30.

18. Limitation of Actions ⚿31

Georgia allows potential litigants only two years to file personal-injury actions. Ga. Code Ann. § 9-3-33.

19. Civil Rights ⚿1379

A two year limitation period applies to § 1983 actions in Georgia. 42 U.S.C.A. § 1983; Ga. Code Ann. § 9-3-33.

20. Eminent Domain ⚿288(1)

Four-year limitations period for inverse condemnation governed Georgia horse owner's claim against county, alleging county took his horses without justification and without paying for them, since that limitation period was most substantively similar action to his effort to pursue his federal just-compensation right. U.S. Const. Amend. 5; Ga. Code Ann. §§ 9-3-31, 9-3-32.

21. Civil Rights ⚿1379, 1381

Federal Courts ⚿3034(5)

Section 1983 cases in Georgia, which include Takings Clause claims, are subject to two-year personal injury statute of limitations because § 1983 is a general remedy for injuries to personal rights. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983; Ga. Code Ann. § 9-3-33.

22. Civil Rights ⚿1379, 1381

Federal Courts ⚿3034(5)

The two-year statute of limitations applicable to § 1983 claims in Georgia encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty. 42 U.S.C.A. § 1983; Ga. Code Ann. § 9-3-33.

23. United States ⚿1490

In Georgia, courts generally apply the two-year statute of limitations applicable to § 1983 causes of action to *Bivens* cases because *Bivens* created a remedy against federal officers, acting under color of federal law, that was analogous to the § 1983 action against state officials. 42 U.S.C.A. § 1983; Ga. Code Ann. § 9-3-33.

24. Limitation of Actions ⚿55(5)

Four-year limitations period applicable to Georgia horse owner's claim against county, alleging that his horses were taken without justification and without paying for them, accrued 30 days after county dropped criminal charges against owner for felony cruelty to animals after having seized those horses. U.S. Const. Amend. 5; Ga. Code Ann. § 9-3-33, 17-5-54(c)(2).

25. Eminent Domain ⚿285

In Georgia, a litigant can sue a county, a political subdivision of the state, directly under the Takings Clause to obtain just compensation for a taking. U.S. Const. Amend. 5; Ga. Code Ann. § 25-3-4.

26. Eminent Domain ⚿122

The Takings Clause guarantees "just compensation"—a monetary remedy—when the government takes private property. U.S. Const. Amend. 5.

27. Constitutional Law ⚿650

The Takings Clause is self-executing. U.S. Const. Amend. 5.

28. Eminent Domain ⚿270

The Fifth Amendment Takings Clause automatically provides Americans with the federal right to sue for "just compensation." U.S. Const. Amend. 5.

29. Eminent Domain ⚿122

The term "just compensation" under the Takings Clause of the Fifth Amendment refers to fair payment. U.S. Const. Amend. 5.

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

30. Eminent Domain ⚿122

To determine "just compensation" under the Fifth Amendment Takings Clause, a court asks what has the owner lost; a court does not consider what the taker gained or seek to put the owner in an equitable position with the taker. U.S. Const. Amend. 5.

31. Eminent Domain ⚿122

To determine "just compensation" under the Fifth Amendment Takings Clause, a court seeks to give the owner only the value of what the government took; "just compensation" is a compensatory remedy, like ordinary money damages. U.S. Const. Amend. 5.

32. Action ⚿1

A litigant must have cause of action to get any form of "legal relief" in federal courtroom.

33. Eminent Domain ⚿122

A person is automatically entitled to "just compensation" as soon as he or she suffers a Taking because the Takings Clause is self-executing; Congress need not recognize his or her injury or right to a remedy. U.S. Const. Amend. 5.

34. Eminent Domain ⚿69

The Takings Clause reflects that as soon as the government commits a taking, compensation must be awarded and the property owner already has suffered a constitutional violation at the time of the uncompensated taking. U.S. Const. Amend. 5.

35. Eminent Domain ⚿122

Property owners are instantly entitled under the Fifth Amendment Takings Clause to receive "just compensation" in courts and therefore they need not point to a statute recognizing a right to "just compensation" or an acknowledgment by the government of its willingness to pay; because they have automatic right to form of legal relief, they have automatic cause of action to get that relief. U.S. Const. Amend. 5.

36. Habeas Corpus ⚿912

The Suspension Clause secures the remedy of the writ of habeas corpus for detained or imprisoned individuals except in highly limited circumstances. U.S. Const. art. 1, § 9, cl. 2.

37. Federal Courts ⚿2015, 2016

Article III provides for just one mandatory federal court with constitutionally prescribed jurisdiction: the Supreme Court; it is up to Congress to provide for and structure lower federal courts and grant them jurisdiction. U.S. Const. art. 3, §§ 1, 2.

38. Eminent Domain ⚿122

Because "just compensation" under the Fifth Amendment Takings Clause is a constitutionally prescribed remedy, Congress cannot narrow the scope of that right through legislation. U.S. Const. Amend. 5.

39. Eminent Domain ⚿267

If legislative substitute for "just compensation" under the Fifth Amendment Takings Clause is not coextensive with constitutionally prescribed remedy of "just compensation," then constitutionally prescribed remedy remains directly available. U.S. Const. Amend. 5.

40. Eminent Domain ⚿3

The Takings Clause was an innovation designed as a unique constraint on legislative power that required mandatory enforcement. U.S. Const. Amend. 5.

41. United States ⚿222

Even though Congress must provide a forum for Takings claimants to pursue their constitutional cause of action, Congress retains authority to structure and assign the tribunal with jurisdiction over these claims. U.S. Const. art. 3, § 1; U.S. Const. Amend. 5.

42. Eminent Domain ⚿7

The federal government is liable for Takings only when its officers act within the general scope of their duties; so to owe "just compensation," Congress must pass legislation imbuing an officer with responsibilities that generally authorize her to take property and put the public on the hook for "just compensation." U.S. Const. Amend. 5.

43. Eminent Domain ⚿270

At a minimum, the Framers of the Fourteenth Amendment understood that they were constitutionalizing a right to sue for "just compensation" for an uncompensated taking by state and local governments in a federal forum. U.S. Const. Amends. 5, 14.

44. Constitutional Law ⚿3855

Takings clause applies to local governments only through Fourteenth Amendment. U.S. Const. Amends. 5, 14.

45. Eminent Domain ⚿267, 270

The Takings Clause directly mandates a federal remedy against local governments independent of a statutory cause of action. U.S. Const. Amend. 5.

46. Eminent Domain ⚿285

Direct cause of action against county under Takings Clause was available to horse owner, alleging county took his horses without justification and without paying for them, based on text, structure, and history of Fifth and Fourteenth Amendments; other constitutionally adequate remedy for takings of personal property by local governments did not exist because *Monell* categorically barred him from ever suing his local government in federal court for compensation it owed him and Georgia law did not allow him to seek compensation in its courts. U.S. Const. Amend. 5; U.S. Const. Amend. 14, § 5; 42 U.S.C.A. § 1983.

47. Civil Rights ⚿1448

A substitute remedy for a constitutional remedy may suffice if it is not narrower than the constitutional remedy.

48. Civil Rights ⚿1343

Section 1983 allows suits against local governments to recover "just compensation." 42 U.S.C.A. § 1983.

49. Civil Rights ⚿1351(1)

Local government may not be sued under § 1983 for injury inflicted solely by its employees or agents; rather, suits may move forward only when execution of government's policy or custom inflicts injury,

whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy. 42 U.S.C.A. § 1983.

50. Eminent Domain ⚿122

Under the Takings Clause, the duty to provide "just compensation" attaches to a government when its officer acts within the general scope of their duties; it does not matter whether that taking resulted directly from a regulation or statute, or ordinance, or miscellaneous decree. U.S. Const. Amend. 5.

51. Eminent Domain ⚿79

Horse owner, alleging under Takings Clause that county took his horses without justification and without paying for them, did not "waive" his right to "just compensation" when he conceded he could not meet policy-or-custom requirement under *Monell*, since Takings Clause offered broader protection than § 1983. U.S. Const. Amend. 5; 42 U.S.C.A. § 1983.

52. Eminent Domain ⚿266

The lesser showing courts have required in Takings cases does not relieve a litigant of his obligation to show that the taking is traceable to the governmental entity alleged to have committed it; it is not enough to find simply that an officer employed by the relevant government interfered with property. U.S. Const. Amend. 5.

53. Eminent Domain ⚿122

When an officer takes property within his typical responsibilities, the right to "just compensation" kicks in against his government. U.S. Const. Amend. 5.

54. Eminent Domain ⚿69

When local governments are political subdivisions of a state, they must furnish compensation for their takings. U.S. Const. Amend. 5.

55. Civil Rights ⚿1071

Any time officers seize property as part of lawful investigation but government later fails to return it for unknown reasons, § 1983 does not afford "just compensation" remedy. 42 U.S.C.A. § 1983.

56. Constitutional Law ⚿1061

Almost all constitutional rights are asserted against state action.

57. Eminent Domain ⚿267

Congress cannot prescribe an exclusive remedy for uncompensated takings that is more restrictive than the Takings Clause's guarantee of just compensation. U.S. Const. Amend. 5.

58. Civil Rights ⚿1005

Congress' authority to enact § 1983 comes from Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce, by appropriate legislation, the Amendment, but that provision does not gives any power to restrict, abrogate, or dilute the intrinsic protections of the Bill of Rights. U.S. Const. Amend. 14, § 5; 42 U.S.C.A. § 1983.

59. Eminent Domain ⚿69

Takings Clause mandates compensation for litigants who have suffered takings by government employees acting within the normal scope of their duties, whether under official local policy or not. U.S. Const. Amend. 5.

60. Federal Courts ⚿2374(2)

Section 1983 does not allow suits against state governments for takings because it does not abrogate their sovereign immunity; as a statutory cause of action, a § 1983 suit could move forward against state governments only if Congress abrogated their immunity. 42 U.S.C.A. § 1983.

61. Eminent Domain ⚿267

There is no federal statutory damages remedy for takings by a state.

62. Eminent Domain ⚿274(1)

In context of Takings claim, "equitable relief" would be order enjoining government from taking or possessing disputed property, requiring government to leave property in possession of its owner. U.S. Const. Amend. 5.

63. Eminent Domain ⚿307(1)

Congress may impose reasonable procedural rules on the adjudication of Takings claims to ensure the efficient administration of justice. U.S. Const. Amend. 5.

64. Eminent Domain ⚿288(1)

Congress may set a reasonable statute of limitations for Takings claims with its authority "to enforce" the Fourteenth Amendment. U.S. Const. Amends. 5, 14.

65. Eminent Domain ⚿307(1)

The Federal Rules of Civil Procedure apply to Takings claims in federal court. U.S. Const. Amend. 5.

66. Eminent Domain ⚿307(1)

State courts may follow their regular procedural rules when adjudicating Takings claims. U.S. Const. Amend. 5.

67. Eminent Domain ⚿286

States cannot be the exclusive forum for a Taking claim if they have procedures that narrow the availability of that remedy without any congressional blessing because the Takings Clause promises a federal remedy independent of the whims of states; only Congress can impose ultimate procedural bars because the Fourteenth Amendment charges Congress specifically with its enforcement. U.S. Const. Amends. 5, 14, § 5.

68. Eminent Domain ⚿288(1)

Georgia, as exclusive forum, unilaterally and unconstitutionally imposed procedural bar on horse owner's Takings claim alleging that county took his horses without justification and without paying for them, assuming owner ever could have sought relief in Georgia courts, because of *Monell*, since only time owner could have conceivably sought relief in any court would have been in state court within the one-year deadline Georgia alone set under procedural requirement for all claims against counties to be presented within 12 months after they accrued or became payable. U.S. Const. Amend. 5; U.S. Const. Amend. 14, § 5; Ga. Code Ann. § 36-11-1.

69. Eminent Domain ⚿266

Availability of any particular compensation remedy, such as inverse condemnation claim under state law, cannot infringe or restrict property owner's federal Takings claim under Fifth Amendment. U.S. Const. Amend. 5; U.S. Const. Amend. 14, § 5.

70. Eminent Domain ⚿122, 285

The Takings Clause demands the provision of "just compensation" regardless of any officer immunity. U.S. Const. Amend. 5.

71. Eminent Domain ⚿285

Once an officer commits a taking, it is his government, not necessarily the officer himself, that the Constitution puts on the hook for that compensation. U.S. Const. Amend. 5.

72. Eminent Domain ⚿285

Sovereign immunity did not bar direct cause of action against county under Takings Clause by horse owner alleging that county took his horses without justification and without paying for them. U.S. Const. Amends. 5, 11.

73. Federal Courts ⚿2371

Sovereign immunity cannot undermine a cause of action that the Constitution expressly makes a right. U.S. Const. Amend. 11.

74. Federal Courts ⚿2378
Habeas Corpus ⚿662.1

Sovereign immunity cannot defeat a writ of habeas corpus. U.S. Const. art. 1, § 9, cl. 2; U.S. Const. Amend. 11.

75. Federal Courts ⚿2393

A Takings suit brought under § 1983 is subject to a sovereign-immunity defense. U.S. Const. Amends. 5, 11; 42 U.S.C.A. § 1983.

76. Federal Courts ⚿2374(1)

Federal statutory cause of action abrogates state government's immunity only if Congress intended for it to do so. U.S. Const. Amend. 11.

77. Federal Courts ⚿2383(2, 3)

Under the traditional Eleventh Amendment paradigm, counties and similar municipal corporations are not entitled to sovereign immunity. U.S. Const. Amend. 11.

78. United States ⚿992, 998

The Tucker Act does not create substantive rights; a plaintiff relying on the Tucker Act must premise her damages action on other sources of law, which can be constitutional obligations. 28 U.S.C.A. § 1491(a)(1).

79. Federal Courts ⚿3868

Takings claim against federal officials may be brought under the Tucker Act. U.S. Const. Amend. 5; 28 U.S.C.A. § 1491(a)(1).

80. Eminent Domain ⚿285

A direct cause of action against federal officials is inherent in the Takings Clause. U.S. Const. Amend. 5.

Appeal from the United States District Court for the Northern District of Georgia, D.C. Docket No. 1:20-cv-01936-SCJ

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Before William Pryor, Chief Judge, and Rosenbaum and Abudu, Circuit Judges.

Rosenbaum, Circuit Judge:

In Greek mythology, the Greek gods condemned Tantalus to eternal hunger and thirst, all while forcing him to forever stand in a shallow pool of water under a tree with low-hanging fruit. Though the remedy for Tantalus's hunger and thirst was right at hand, he could not take advantage of it. The water receded when Tantalus bent down to drink, and the fruit rose to just above his grasp when Tantalus tried to reach it.

Our Founders did not do to us what the Greek gods did to Tantalus. Our Constitution explicitly promises exactly two remedies: "just compensation" if the government takes our property, and the writ of habeas corpus if it tries to take our lives or liberty. And the Constitution delivers directly on each. It doesn't taunt us by naming these remedies but then holding them out of reach, depending on the whims of the legislature.

So even if Congress doesn't legislate a procedure by which a person can obtain one of these remedies, the Constitution's promise is not illusory. A person can bring a case directly invoking either constitutional remedy.

This case involves the "just compensation" remedy. Bran-don Fulton alleges that Fulton County took his horses without justification and without paying for them. He asserts that the Fifth Amendment demands the County pay him "just compensation" for the taking of his property. *See* U.S. CONST. amend. V. So he seeks to sue to recover what he says the County owes him under the Constitution.

The problem: Congress has not provided him with a cause of action to secure "just compensation" in federal court. Fulton initially tried to bring an action under 42 U.S.C. § 1983. That statute allows suits against municipalities who, through official policies or customs, violate the Constitution. *See Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). But because Fulton is unable to plead an official policy or custom under which the County took his horses, he can't proceed under that statute—even though the Takings Clause doesn't require a plaintiff to clear that bar to be entitled to "just compensation."

So Fulton seeks a plan B. He asks to amend his complaint to sue directly under the Takings Clause itself.

Whether the Takings Clause contains a cause of action that allows a litigant to recover "just compensation" in federal court presents an open question. In *DeVillier v. Texas*, the Supreme Court confirmed that its "precedents do not cleanly answer the question . . . ." 601 U.S. 285, 292, 144 S.Ct. 938, 218 L.Ed.2d 268 (2024). Yet the Court also confirmed that "the absence of a case relying on the Takings Clause for a cause of action does not by itself prove there is no cause of action. It demonstrates only that constitutional concerns do not arise when property owners have other ways to seek just compensation." *Id.* Now, after careful review of the text, structure, and history of the Constitution, we conclude that the Takings Clause does directly authorize suit.

The Dissent responds by saying we are "creat[ing] a new right of action" and leaving "constitutional wreckage in the wake." Diss. Op. at 1281. But its answer that the Takings Clause includes no direct cause of action ignores the original public meaning of the Clause and transforms the Constitution's promise of "just compensation" into nothing more than a Tantalus-type taunt. Most respectfully, we don't think that's "judicial humility," *see id.* at 1281; we

think it's judicial abdication. We have a duty to apply the Constitution as written. So we respectfully decline to read out of the Constitution the relief it expressly promises for taken property.

The Framers of the Fifth and Fourteenth Amendments provided a real remedy in "just compensation" for government takings. They guaranteed the ability to recover "just compensation" directly under the Constitution. So we hold that Fulton's proposed amendment to his complaint is not futile.

I. BACKGROUND

[1] This case comes to us on appeal from a denial of a motion for leave to amend the complaint. So for purposes of our analysis, we accept as true the facts pled in the proposed amended complaint and construe them in the light most favorable to the plaintiff. *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004).

On April 22, 2017, Fulton County Animal Services arrested Brandon Fulton for felony cruelty to animals and seized seven horses in his possession. Nearly a year later, on April 5, 2018, Georgia dismissed the criminal charges against Fulton. But Fulton County didn't return the horses or otherwise compensate Fulton for the loss of his property.

So on May 5, 2020, Fulton brought this federal suit to recover his property. He initially sued the Fulton County Board of Commissioners under 42 U.S.C. § 1983, alleging that the seizure was an unconstitutional taking in violation of the Fifth Amendment.[1]

The Board of Commissioners moved to dismiss his claim. It argued that (1) it isn't an entity capable of being sued; (2) Fulton failed to state a claim under § 1983; and (3) the statute of limitations bars Fulton's claim. Fulton opposed the Board of Commissioners' motion. He also moved to amend his complaint to substitute the County as defendant in place of the Board of Commissioners and to add an alternative claim against the County directly under the Fifth Amendment.

The district court denied Fulton's motion to amend his complaint and dismissed his claim against the Board of Commissioners without prejudice. It determined that Fulton's proposed alternative claim would fail because plaintiffs who want to bring constitutional takings claims against a municipality must sue under § 1983 and cannot sue directly under the Takings Clause. And in the district court's view, Fulton couldn't maintain his § 1983 claim against the Board of Commissioners or against the County because he failed to allege that some official municipal policy or practice caused the constitutional violation, as *Monell v. Department of Social Services of New York City*, requires. 436 U.S. at 694, 98 S.Ct. 2018. Since any amendment would be futile, the district court reasoned, it declined to address whether Fulton's suit was timely.

Fulton appealed this order.

After we heard oral argument in this case, the Supreme Court decided *DeVillier*, which, as we've noted, considered whether to address whether the Takings Clause creates a direct cause of action. 601 U.S. at 292, 144 S.Ct. 938. The Supreme Court concluded that that case did not

1. Fulton also sued Paul L. Howard, Jr., the former District Attorney for the County, and Rebecca Guinn, the CEO for the organization that manages the Fulton County Animal Services, in their individual capacities under 42 U.S.C. § 1983 for violating his procedural due process rights. But Fulton ultimately withdrew the claim against Guinn. And the district court dismissed Fulton's claim against Howard. Fulton doesn't appeal that ruling.

require it to do so. *Id.* And faced with deciding a novel question without the Court's guidance, we invited the Institute for Justice and the cohort of Professor James W. Ely, Jr., Professor Julia D. Mahoney, and The Buckeye Institute, each group having briefed the issue in *DeVillier*, to brief several related questions here. We also asked the Solicitor General of Georgia to brief the same questions. We thank them all for their excellent briefs in keeping with the highest tradition of the legal profession.

II. STANDARD OF REVIEW

[2, 3] We review for abuse of discretion the district court's denial of a motion for leave to amend a complaint. *Spanish Broad. Sys.*, 376 F.3d at 1077. But we review de novo the district court's legal conclusion that amendment would be futile. *SFM Holdings, Ltd. v. Banc of Am. Sec., LLC*, 600 F.3d 1334, 1336 (11th Cir. 2010). Amendment is futile if the amended complaint still would be subject to dismissal. *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263 (11th Cir. 2004).

III. DISCUSSION

Fulton attempts to amend his complaint to bring a damages action directly under the Takings Clause. That requires us to consider whether the Takings Clause provides a cause of action to recover "just compensation." Recently, the Supreme Court declined to answer that question in *DeVillier*. But we cannot take that tack because we conclude that Fulton cannot amend his complaint to bring a state-law action and that any theoretical Takings Clause action would be timely. So we must confront the question head on.

To do so, we consider the text and history of the Fifth and Fourteenth Amendments. Based on our review, we hold that the Takings Clause contains a direct cause of action against local governments. As a result, Fulton's proposed amendment to his complaint would not be futile. So we vacate the district court's order denying the motion to amend, and we remand for further proceedings consistent with this opinion.

A. The district court would have had jurisdiction over Fulton's Takings Clause claim.

We begin with a clarification. In his opening brief, Fulton asserts that amendment wouldn't be futile because the district court would have federal-question jurisdiction over his proposed claim. But the district court never suggested that it might lack jurisdiction over a Takings Clause claim. Instead, the district court held that amendment would be futile because the Takings Clause doesn't provide a cause of action against municipalities. We briefly explain the difference.

[4, 5] Subject-matter jurisdiction is "the courts' statutory or constitutional power to adjudicate [a] case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (emphasis omitted) (citing 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350). We dismiss a claim for lack of subject-matter jurisdiction only if the claim (1) "clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction"; or (2) "is wholly insubstantial and frivolous." *Blue Cross & Blue Shield of Ala. v. Sanders*, 138 F.3d 1347, 1352 (11th Cir. 1998) (quoting *Bell v. Hood*, 327 U.S. 678, 682–83, 66 S.Ct. 773, 90 L.Ed. 939 (1946)).

[6, 7] For a claim based directly under the Constitution, 28 U.S.C. § 1331 provides

the statutory basis for jurisdiction.[2] Under this law, federal courts enjoy jurisdiction over "all cases aris[ing] under the Constitution, laws, or treaties of the United States." *Bush v. Lucas*, 462 U.S. 367, 374, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983) (quoting 28 U.S.C. § 1331 (1976)) (internal quotation marks omitted) (bracket in original). Here, Fulton's proposed amended claim alleges a violation of the Takings Clause under the Fifth and Fourteenth Amendments. So as long as his claim wouldn't have been "wholly insubstantial and frivolous," the district court would have had federal-question jurisdiction over this case.

[8, 9] The existence of a cause of action raises a distinct issue. *See Resnick v. KrunchCash, LLC*, 34 F.4th 1028, 1034–35 (11th Cir. 2022). A cause of action exists when "a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Davis v. Passman*, 442 U.S. 228, 239 n.18, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979). Whether a plaintiff has alleged a cause of action generally presents a merits question. *See Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 70, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978).

As an analogy, if court were an event like a play or a musical, a cause of action would be a ticket to the show. Jurisdiction, on the other hand, would be the right to put on the show. No ticket, no entry. But the show can still go on for other audience members, provided the venue finds those others have a valid ticket.

[10] Here, Fulton has attempted to state a cause of action directly under the Takings Clause. As we've noted, whether the Takings Clause creates a cause of action to obtain "just compensation" raises an open question. *DeVillier*, 601 U.S. at 292, 144 S.Ct. 938. So Fulton's alleged cause of action isn't "patently without merit." *McGinnis v. Ingram Equip. Co.*, 918 F.2d 1491, 1494 (11th Cir. 1990) (en banc) (citation omitted). And the district court had jurisdiction to evaluate whether the Takings Clause gave him a cause of action. As a result, we must independently evaluate that merits question. This case is about whether Fulton has a ticket, not whether the show can go on at all.

B. Georgia law bars Fulton from bringing a state-law action.

Before we get to the central question of the case, we must address whether we need to answer it at all. We might avoid the issue if we can remand the case to allow Fulton to press an action under *state law* to recover the value of his horses.

That is essentially what the Supreme Court did in *DeVillier*. Indeed, the *DeVillier* Court found it "imprudent to decide" whether the Takings Clause contains a cause of action. *DeVillier*, 601 U.S. at 292, 144 S.Ct. 938. Instead, it remanded the case for the plaintiffs there to amend their complaints to "pursue their claims under the Takings Clause through the cause of action available under Texas law." *Id.* at 293, 144 S.Ct. 938. And since Georgia permits inverse-condemnation actions to recover the value of uncompensated takings, *see Diversified Holdings, LLP v. City of*

2. Fulton also claims that the district court would have had jurisdiction under 28 U.S.C. § 1343(a)(3). But as the Board of Commissioners notes, he didn't plead this basis for jurisdiction in his complaint, so he can't rely on 28 U.S.C. § 1343(a)(3). *See Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994). And because his claim "depends ... upon construction or application of the Constitution," 28 U.S.C. § 1331 is the correct jurisdictional hook. *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 70, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) (internal quotation marks and citation omitted).

Suwanee, 302 Ga. 597, 807 S.E.2d 876, 884 (2017), Fulton argues for the first time after *DeVillier* in supplemental briefing that we could remand this case to allow him to bring a claim under a Georgia vehicle.

[11, 12] But we think Georgia law now bars any such claim. In Georgia, actions to recover personal property have a four-year statute of limitations from when the claim accrues. GA. CODE ANN. §§ 9-3-31 to 9-3-32 (2025). Here, Georgia seized Fulton's horses on April 22, 2017, for a criminal investigation. On April 5, 2018, it dropped the charges. And Georgia law may have required law enforcement to have returned Fulton's horses by May 5, 2018. *See id.* § 17-5-54(c)(2) (giving 30 days following a guilty verdict to return property taken as part of an investigation). So even assuming Fulton's state-law claim did not accrue until May 5, 2018, it wouldn't be timely now, over seven years later, if it were the first time Fulton raised the issue.

[13] That said, Fulton did file a federal complaint arising from the same set of facts on May 5, 2020, within the four-year window. And any claim added to his complaint would relate back to its original filing date, as though he had brought it on that date, May 5, 2020. *See Est. of West v. Smith*, 9 F.4th 1361, 1366 n.3 (11th Cir. 2021) (looking to the state law providing the statute of limitations to determine whether an amendment to the complaint will relate back); GA. CODE ANN. § 9-11-15(c) (2025) ("Whenever the claim or defense asserted in the amended pleading arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.") So a state-law claim wouldn't be barred by the four-year statute of limitations.

[14] The problem, though, is Georgia has a special rule for suits against counties. It requires that "[a]ll claims against counties ... be presented within 12 months after they accrue or become payable or the same are barred ...." *Id.* § 36-11-1. And the record contains no evidence showing Fulton satisfied this requirement. So this provision bars Fulton's state-law claim.

For this reason, we can't avoid the question of whether Fulton can proceed directly under the federal Constitution.

C. A direct Takings Clause action would not be time-barred.

[15] So we turn next to whether an action under the Takings Clause could move forward. But we still might not need to address the existence of that theoretical cause of action if it would also be time-barred. Indeed, we can't acknowledge Fulton's ticket—even if it's valid—if it's marked expired. For that reason, we first consider the appropriate statute of limitations for a claim directly under the Takings Clause. We conclude that, in Georgia, the statute of limitations would be four years. As a result, Fulton's claim would not be time-barred.

[16] When a federal claim lacks an express statute of limitations, we look to "the forum state's limitations period applicable to the state cause of action that bears the closest substantive resemblance to the federal cause of action." *Vigman v. Cmty. Nat'l Bank & Tr. Co.*, 635 F.2d 455, 459 (5th Cir. Jan. 1981) (citations omitted).[3]

3. "[T]he decisions of the United States Court of Appeals for the Fifth Circuit (the 'former Fifth' or the 'old Fifth'), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, [are] binding as precedent in the Elev-

Here, two potentially relevant limitations periods exist. [4]

[17] First, as we've mentioned, Georgia law requires actions to recover the value of personal property to be filed within four years. GA. CODE ANN. §§ 9-3-31 to 9-3-32 (2025). Similarly, inverse-condemnation actions for recovering the value of real property also have a four-year limitations period. *See id.* § 9-3-30.

[18, 19] But second, Georgia allows potential litigants only two years to file personal-injury actions. *Id.* § 9-3-33. And we apply this limitation period to § 1983 actions. *See Hillcrest Prop., LLC v. Pasco County*, 754 F.3d 1279, 1281 (11th Cir. 2014) ("Section 1983 claims are subject to a forum state's statute of limitations for personal injury claims." (citation omitted)).

[20] We conclude that the limitations period for the recovery of personal property—four years—governs. That's so because it's the most substantively similar action to Fulton's effort to pursue his federal just-compensation right. So if Fulton were able to bring a state-law claim grounded in the Takings Clause, the four-year period for the recovery of personal property is the one that would apply. *See* GA. CODE ANN. §§ 9-3-31 to 9-3-32 (2025); *Rowland v. Clarke Cnty. Schl. Dist.*, 272 Ga. 471, 532 S.E.2d 91, 93 (2000) (applying a four-year limitations period for the recovery of personal property from a county school district).

[21–23] True, as we've mentioned, § 1983 cases, which include Takings Clause claims, are subject to the personal-injury statute of limitations. *See Hillcrest Prop., LLC*, 754 F.3d at 1281. But that's so because § 1983 is a "general remedy for injuries to personal rights." *See Wilson v. Garcia*, 471 U.S. 261, 278, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). The statute "encompasses a broad range of potential tort analogies, from injuries to property to infringements of individual liberty." *Id.* at 277, 105 S.Ct. 1938. So the Supreme Court thought it appropriate to apply a statute of limitations that captured the "unifying theme" of the statute—even if other torts might also be analogues to more specific rights that § 1983 protects.[5] *Id.*

But we are determining the statute of limitations that would apply to a unique cause of action that, if it exists, arises directly under the Takings Clause. And the right to "just compensation" is most analogous to recovery for inverse condemnation rather than personal injury. So we

enth Circuit ...." *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

4. Not relevant is the special provision for counties requiring claims to be presented within 12 months. *See* GA. CODE ANN. § 36-11-1 (2025). That's so because it's not a statute of limitations. Rather, it's a state procedural requirement that a plaintiff formally notify the county before suit. *See Dates v. City of Atlanta*, 371 Ga.App. 824, 903 S.E.2d 289, 292 (2024). The legalistic Latin name for this type of requirement is *ante litem* notice. *See id.*

5. Because *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), "create[d] a remedy against federal officers, acting under color of federal law, that was analogous to the [§] 1983 action against state officials .... courts generally apply § 1983 law to *Bivens* cases." *Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996) (quoting *Abella v. Rubino*, 63 F.3d 1063, 1065 (11th Cir. 1995)). So *Bivens* actions brought in Georgia similarly use the state's two-year personal-injury statute of limitations. *Id.* But as we explain in Part III.D.5, *infra*, a cause of action directly under the Takings Clause would be completely independent of *Bivens* and unrelated to § 1983. So we don't see *Bivens* as a reason to apply the two-year statute of limitations to a direct just-compensation claim.

apply Georgia's statute of limitations that governs inverse-condemnation actions.

[24] When we do that, we conclude that Fulton's action directly under the Takings Clause would be timely. Law enforcement seized Fulton's horses in 2017, the charges were dropped in 2018, and he brought his action in 2020—within four years of the relevant facts. So the statute of limitations wouldn't bar Fulton's action.

Because a theoretical action directly under the Takings Clause would be timely, we must determine whether such a cause of action in fact exists.

D. The Takings Clause creates a direct cause of action for unconstitutional takings by local governments.

[25] Finally, we get to the main event (it may not be *Hamilton*, but we do have the two other authors of the Federalist Papers a little later). We must confront whether a litigant may sue a county in Georgia—a political subdivision of the state, *see* GA. CODE ANN. § 25-3-4 (2025)—directly under the Takings Clause to obtain "just compensation" for a taking. After reviewing the text, history, and structure of the Constitution, we hold that a litigant can.

1. The text of the Fifth Amendment and the structure of the Constitution show that the Takings Clause contains a direct cause of action.

[26–28] The Takings Clause provides that no "private property [shall] be taken for public use, without just compensation." U.S. CONST. amend. V. Three major points about this text and how it fits into the Constitution's overall structure stand out: (1) the Takings Clause guarantees "just compensation"—a monetary remedy—when the government takes private property; (2) the Takings Clause is "self-executing," *Knick v. Township of Scott*, 588 U.S. 180, 194, 139 S.Ct. 2162, 204 L.Ed.2d 558 (2019); and (3) the Takings Clause is one of only two constitutional guarantees that provides its own remedy. Together, these three points lead to the conclusion that the Constitution automatically provides Americans with the federal right to sue for "just compensation." In this subsection, we explain each point and why it supports that conclusion.

[29] We begin with the meaning of "just compensation." Dictionaries during the Founding period and in the early years of our Republic defined "just" to mean "[u]pright; incorrupt; *equitable* in the distribution of justice"—in other words, fair. SAMUEL JOHNSON, *Just. adj.*, A DICTIONARY OF THE ENGLISH LANGUAGE (1773), https://perma.cc/W4M8-T5C2 (emphasis added); *see also* NOAH WEBSTER, *Just, adjective*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://perma.cc/PD4F-PHYQ (defining "just," in relevant part, to mean "[e]quitable; due; merited; as a *just* recompense or reward"). And they defined "compensation" as "[r]ecompence; something equivalent; amends"—that is, payment for what's been taken. SAMUEL JOHNSON, *Compensa'tion. n.s*, A DICTIONARY OF THE ENGLISH LANGUAGE (1773), https://perma.cc/7RVU-GDKK; *see also* NOAH WEBSTER, *Compensation, noun*, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828), https://perma.cc/C3PP-EEBC ("That which is given or received as an equivalent for services, debt, want, loss, or suffering; amends; remuneration; recompense."). Together, then, the plain meaning of the term "just compensation" refers to fair payment.

[30, 31] So it's unsurprising that the Supreme Court has said that "just compensation" is monetary relief. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 710, 119 S.Ct. 1624, 143

L.Ed.2d 882 (1999). To determine "just compensation," we ask "what has the owner lost"? *See id.* (quoting *Bos. Chamber of Com. v. Boston*, 217 U.S. 189, 195, 30 S.Ct. 459, 54 L.Ed. 725 (1910)). We don't consider "what . . . the taker gained" or seek to put the owner in an equitable position with the taker. *See id.* Instead, we seek to give the owner only the value of what the government took. *See id.* In essence, then, "just compensation is, like ordinary money damages, a compensatory remedy." *Id.* So in legalistic terms, "just compensation" is "legal relief." *Id.* at 710–11, 119 S.Ct. 1624.

[32] And to get any form of "legal relief " in the federal courtroom, a litigant must have a cause of action. *See id.*; *Davis*, 442 U.S. at 239 n.18, 99 S.Ct. 2264. So with an express constitutional right to receive "just compensation" as a form of legal relief, we would expect a guaranteed cause of action to sue to recover that relief.[6] *See United States v. Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882) ("It cannot be denied that [the Takings Clause was] intended to be enforced by the judiciary as one of the departments of the government established by th[e] constitution.").

[33, 34] The Supreme Court has also told us that the Takings Clause's right to "just compensation" is "self-executing." *See Knick*, 588 U.S. at 194, 139 S.Ct. 2162. That means that a person is automatically entitled to this relief as soon as they suffer a taking. *See id.* at 190, 139 S.Ct. 2162. Congress need not recognize their injury nor their right to a remedy. *See id.* (discussing *Jacobs v. United States*, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142 (1933)). And based on the text of the Clause, that makes sense. By its terms, the Clause reflects that as soon as the government commits a "taking, compensation must be awarded" and the property owner "has *already* suffered [a constitutional violation] at the time of the uncompensated taking." *Id.* at 193, 139 S.Ct. 2162 (internal quotation marks and citation omitted).

[35] Because property owners have an automatic right to a form of legal relief, it follows they have an automatic cause of action to get that relief. They are instantly entitled to receive "just compensation" in the courts. *See id.* at 194, 139 S.Ct. 2162 (recognizing the ability to recover "just compensation" from federal officials directly under the Fifth Amendment pursuant to the Tucker Act and from local governments under 42 U.S.C. § 1983). And they need not point to a statute recognizing a right to "just compensation" or an ac-

6. Citing the work of Professor Jud Campbell, the Dissent argues that a constitutional right to a legal remedy does not necessarily supply a cause of action to get that relief. *See* Diss. Op. at 1268 (citing Jud Campbell, *Determining Rights*, 138 Harv. L. Rev. 921, 923, 944, 974 n.370, 981 (2025); and then citing William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 Stan. L. Rev. 1185, 1191 (2024)). But Campbell has argued that rights may be either legally determinate, and therefore judicially enforceable, or indeterminate. *See, e.g.*, Campbell, *Determining Rights*, *supra*, at 923 n.7 (''Many Founders accepted the judicial enforceability of legally determinate fundamental rights, whether enumerated or not.''); *cf. id.* at 931 (''Although natural law was 'law' in an abstract sense, it generally was not 'law' in a judicially enforceable sense because it lacked determinate content.''). And he has been clear that, under his theory, the right to ''just compensation'' is a determinate right, so it follows that it is judicially enforceable. *See id.* at 974 n.370 (describing ''the right against uncompensated takings'' as a ''legally determinate right[ ]''); Baude, Campbell & Sachs, *General Law and the Fourteenth Amendment*, *supra*, at 1236 (recognizing ''the right to compensation for takings'' as a ''centerpiece[ ]'' of both the Bill of Rights and the privileges or immunities of citizenship). As a result, an adherent to Campbell's views should remain comfortable with the conclusion that the Constitution supplies a direct cause of action for judicial enforcement of the Takings Clause.

knowledgment by the government of its willingness to pay. Rather, as the Supreme Court has explained, "[s]uch a promise [i]s implied because of the duty to pay imposed by the Amendment." *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) (quoting *Jacobs*, 290 U.S. at 16, 54 S.Ct. 26). In fact, as we explore in greater detail in Part III.D.5, the Supreme Court has already effectively held that the Takings Clause directly supplies a cause of action against the *federal government*. *See Jacobs*, 290 U.S. at 16, 54 S.Ct. 26 (Tucker Act takings suits are "founded upon the Constitution of the United States.").

It makes structural sense that the Constitution grants an automatic cause of action to recover "just compensation." As we explain further in Part III.D.2, because of the outsized burden legislatures placed on individual property owners before and during the Revolution, the Framers did not trust those bodies to ensure "just compensation" for takings. *See* Part III.D.2, *infra*. And if they did not provide the Takings Clause with a cause of action in the absence of legislation creating one, the provision's promised "just compensation" remedy would be empty.

So the intrinsic cause of action within the Takings Clause ensures meaning behind the constitutional guarantee. In other words, by expressly giving Americans the right to get payment from the government in the courtroom, the Constitution, of course, too gives them the ticket they need to enter in the first place. Otherwise, the government could just refuse to issue a ticket anytime it didn't want to pay. We don't think the Founders made an empty promise to Americans. A guaranteed remedy is a guaranteed remedy only if it's accessible.

Ultimately, the text is straightforward. The Takings Clause guarantees a legal damages-type remedy, and it is "self-executing". These characteristics are especially noteworthy because they make the Takings Clause a constitutional unicorn—no other constitutional guarantee expressly contains these two features. *Cf. DeVillier*, 601 U.S. at 291, 144 S.Ct. 938 ("Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." (citation omitted)).

As a result, the Framers did not have to be concerned that a cause of action directly under the Takings Clause would willy-nilly lead to the finding of direct causes of action under multiple other parts of the Constitution. In fact, only one other part of the Constitution—Article I, Section 9's Suspension Clause, which guarantees the writ of habeas corpus—even refers to any remedy at all, though not a compensatory one. RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330 (7th ed. 2015) [hereinafter HART & WECHSLER]; *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1509 n.329 (1987) ("[T]he non-suspension clause is the original Constitution's most explicit reference to remedies.").

That only two constitutional provisions expressly provide for a remedy upon violation "sets [them] apart from others and at least suggests these two rights—even if not all others in the Constitution—have special protections against congressional abrogation or dereliction" of their guaranteed remedies. *DeVillier v. Texas*, 63 F.4th 416, 439 (Oldham, J., dissenting from denial of rehearing en banc) (5th Cir. 2023), *denying reh'g from*, 53 F.4th 904 (5th Cir. 2023) (per curiam), *vacated*, 601 U.S. 285, 144 S.Ct. 938, 218 L.Ed.2d 268 (2024).

We can see that by how the Supreme Court has treated the Suspension Clause. Indeed, the Supreme Court has expressly compared the Constitution's only two guaranteed remedies. In *United States v. Lee*, the Court reasoned, if the Constitution offers "sufficient authority for [a] court to interfere to rescue a prisoner from the hands of those holding him under the asserted authority of the government [by issuing a writ of habeas corpus], what reason is there that the same courts shall not give remedy to the citizen whose property has been . . . devoted to public use without just compensation?" 106 U.S. at 218, 1 S.Ct. 240.

[36] So we take a look at how the Supreme Court has treated the Suspension Clause. The Suspension Clause guarantees "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. That is, the Suspension Clause secures the remedy of the writ of habeas corpus for detained or imprisoned individuals except in highly limited circumstances. The Supreme Court has construed this "Privilege" of habeas corpus to be at least as extensive as it existed at the time of the Founding. *Boumediene v. Bush*, 553 U.S. 723, 746, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) ("[A]t the absolute minimum the Clause protects the writ as it existed when the Constitution was drafted and ratified." (citation and internal quotation marks omitted)).

Over the years, Congress has enacted legislation that creates substitutes for the writ of habeas corpus. And the Supreme Court has ensured that the new frameworks preserved the constitutional guarantee. *See, e.g.*, *id.* In 1948, for instance, Congress passed 28 U.S.C. § 2255 as a substitute for the writ of habeas corpus for prisoners in custody under a sentence that a federal court imposed. *See United States v. Hayman*, 342 U.S. 205, 206–07, 72 S.Ct. 263, 96 L.Ed. 232 (1952). After a prisoner filed a § 2255 motion, a federal appeals court sua sponte raised concerns that the statute violated the Suspension Clause. *Id.* at 209, 72 S.Ct. 263. But the Supreme Court highlighted that the statute avoided those constitutional concerns because "where the Section 2255 procedure is shown to be 'inadequate or ineffective', the Section provides that the habeas corpus remedy shall remain open to afford the necessary hearing." *See id.* at 223, 72 S.Ct. 263 (quoting 28 U.S.C. § 2255 (1947)). The Court "implicitly held . . . that the substitution of a collateral remedy" that does not purport to narrow the writ of habeas corpus "does not constitute a suspension of the writ of habeas corpus." *Swain v. Pressley*, 430 U.S. 372, 381, 97 S.Ct. 1224, 51 L.Ed.2d 411 (1977) (discussing *Hayman*).

Similarly, when the District of Columbia adopted a law modeled on § 2255, the Supreme Court upheld it as constitutional under the Suspension Clause. *Id* at 381–84, 97 S.Ct. 1224. The Court explained that "[s]ince the scope of the remedy provided by [the District of Columbia law] is the same as that provided by § 2255, it is also commensurate with habeas corpus" in all relevant respects. *Id.* at 381–82, 97 S.Ct. 1224. So once again, when the substitute remedy did not narrow the writ of habeas corpus, leaving a coextensive remedy to the constitutional guarantee, it did not violate the Suspension Clause.

[37] But when Congress *did* narrow the constitutional remedy, the Court took issue with its legislation. In the aftermath of the September 11, 2001, terrorist attack, Congress enacted a statute that was "intended to circumscribe habeas review" for aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay. *Boumediene*, 553 U.S. at 776, 128 S.Ct. 2229. And "[u]n-

like in *Hayman* and *Swain*, ... there [was] no effort to preserve habeas corpus review as an avenue of last resort." *Id.* at 777, 128 S.Ct. 2229. Because the legislation narrowed the habeas corpus remedy, the Court concluded it was "an inadequate substitute for habeas corpus" and it "effect[ed] an unconstitutional suspension of the writ." *Id.* at 792, 128 S.Ct. 2229. So the petitioners still had access to the underlying constitutional remedy of a petition for a writ of habeas corpus.[7] *See id.* at 798, 128 S.Ct. 2229.

We draw two simple lessons from this line of precedent on habeas corpus substitutes: (1) Congress cannot narrow the scope of a constitutionally prescribed remedy, and (2) if it tries to do so, the underlying constitutional remedy remains directly available.

[38, 39] Because "just compensation" is a constitutionally prescribed remedy—indeed, the only other constitutionally prescribed remedy besides the writ of habeas corpus—Congress likewise cannot narrow the scope of that right through legislation. *See Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 304, 43 S.Ct. 354, 67 L.Ed. 664 (1923) ("Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute"); *cf. DeVillier*, 601 U.S. at 292, 144 S.Ct. 938 ("[C]onstitutional concerns do not arise when property owners have other ways to seek just compensation."). So if a legislative substitute for "just compensation" is not coextensive with the constitutionally prescribed remedy of "just compensation," then the constitutionally prescribed remedy remains directly available.

For all these reasons, the text of the Fifth Amendment and the structure of the Constitution require the conclusion that the Takings Clause includes a direct cause of action.

2. The history behind the Takings Clause and the Fourteenth Amendment shows that the Clause contains a direct cause of action against local governments.

The history of the Takings Clause and the Fourteenth Amendment also supports

7. The Dissent suggests, contrary to all the binding precedent we have cited, that the Constitution doesn't automatically secure access to the writ of habeas corpus in federal courts. *See* Diss. Op. at 1271–72. It highlights that the First Congress had to grant the lower federal courts *jurisdiction* to issue this constitutional remedy. *See id.* at 1271–72. But the Dissent muddles the concepts of subject-matter jurisdiction and causes of action. *Cf.* Part III.A, *supra* (explaining the distinction). Article III provides for just one mandatory federal court with constitutionally prescribed jurisdiction: the Supreme Court. *See* U.S. CONST. art. III, §§ 1, 2. It's up to Congress to provide for and structure lower federal courts and grant them jurisdiction. *See id.* § 1; Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. REV. 205, 212 (1985) ("Article III plainly imposes no obligation to create lower federal courts."); *but see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 331, 4 L.Ed. 97 (1816) ("It would seem ... that congress are bound to create some inferior courts ...."). Even so, though, Article III still requires eventual federal judicial review, in a federal court of Congress's choosing, for certain classes of cases. *See* Amar, *A Neo-Federalist View*, *supra*, at 238–54 (explaining that Article III requires judicial review of three categories of mandatory cases); *Martin*, 14 U.S. at 330–36 (same). And those mandatory cases include cases that seek relief under the Constitution's two guaranteed remedies: the writ of habeas corpus and "just compensation." *See* U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution ...."). To be sure, Congress can pick the stage for the show. But it must provide for some way to honor a valid ticket. It has done so for takings claims by granting the federal courts federal-question jurisdiction. *See* 28 U.S.C. § 1331.

the conclusion that the Takings Clause contains a direct cause of action against local governments. As we show below, the history tells us several things: (1) the Framers of the Takings Clause included the "just compensation" right to protect against government abuses—even by a well-meaning government that acts for the public good; (2) the Framers designed the Takings Clause with the intent that its "just compensation" remedy would not depend upon legislation; (3) even when states did not have their own versions of the Takings Clause, courts viewed the just-compensation principle as a fundamental right and regularly awarded "just compensation" in the form of damages in common-law actions; (4) even before Congress gave federal courts jurisdiction to hear specifically claims for "just compensation" for takings, federal courts resolved takings claims against federal and state officials when they had jurisdiction; and (5) the Framers of the Fourteenth Amendment intended for the amendment to make the Takings Clause remedy available against state and local governments in federal courts.

We start with colonial times. During that period, the fundamental protection against governmental seizure of property was limited: the government could seize property only *if the legislature or a jury authorized it*. *See* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785–88 (1995). But that protection contained no right to "just compensation" once a majoritarian body approved a taking.

This legislature-authorization protection traces to Article 39 of the Magna Carta. That article provided that "[n]o free man shall be ... dispossessed ... except by the legal judgment of his peers or by the law of the land." *Id.* at 787. And it fit the period when Parliament reigned supreme with near plenary powers over the empire. *See id.* at 786 n.15. Based on this historical background, several colonial legislatures authorized *uncompensated* takings—as long as a body representing the public good approved.[8] *See id.* at 787–88.

Still, two fundamental documents of the colonial era contained provisions mandating "just compensation:" the Massachusetts Body of Liberties of 1641 and the 1669 Fundamental Constitutions of Carolina (drafted by John Locke but never completely implemented). *Id.* at 785–86. Yet even those two provisions had limited applications, with Massachusetts applying the principle to personal property only and Carolina to real property. *Id.* Other colonies enacted statutes with compensation in select situations, but they recognized no fundamental right. *See* James W. Ely, Jr., *"That Due Satisfaction May be Made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 AM. J. LEGAL HIST. 1, 5–13 (1992).

Then the Revolution ushered in a new era for property law. In advancing one of the most important causes in American history for the public good, Washington's army seized personal property—including horses—without compensation. *See* Treanor, *The Original Understanding*, *supra*, at 790; AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 79–

8. William Blackstone in his famous *Commentaries* did recognize a right to "just compensation" for takings of real property, although he gave no citation for where English law recognized this principle. *See* Treanor, *The Original Understanding, supra,* at 786 n.15. And this appears to be a rare instance where his view did not convince English jurists of the time. *See id.*

80 (1998); Jed Rubenfeld, *Usings*, 102 YALE L.J. 1077, 1122–23 (1993).

That frustrated people. And those uncompensated seizures triggered a sudden interest in guaranteeing compensation for the unlucky few who suffered losses at the hands of even a well-meaning majority. Treanor, *The Original Understanding*, *supra*, at 790; AMAR, THE BILL OF RIGHTS, *supra*, at 79–80; Rubenfeld, *Usings*, *supra*, at 1122–23; *see also* 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. at 305-06 (Philadelphia, Birch & Small 1803) (opining that the eventual federal just-compensation guarantee "was probably intended to restrain the arbitrary and oppressive mode of obtaining supplies for the army, and other public uses, by impressment, as was too frequently practiced during the revolutionary war, without any compensation whatever").

Vermont, for instance, added a just-compensation principle to its 1777 Constitution. VT. CONST. of 1777, ch. I, art. II. Massachusetts followed suit in 1780. *See* MASS. CONST. of 1780, part I, art. X. The Confederation Congress wasn't far behind when it passed the Northwest Ordinance, governing the Northwest Territories, with a similar guarantee. *See* Northwest Ordinance of 1787, art. 2.

Meanwhile, when it came time to structure the new federal government, most of the Founding generation focused on the threat that a corrupt central government could pose to all Americans. *See* AMAR, THE BILL OF RIGHTS, *supra*, at 77. As a result, the Bill of Rights in large part emphasized constraining the power of federal officials who might engage in self-dealing. *Id.*

But some Framers, most notably John Jay and James Madison, zeroed in on the importance of checking even a good-natured government's abuses in the form of property takings. As the war proved, even a well-intentioned government could trample the individual in the name of the public good. So following Jay and Madison's lead, the Framers tacked the Takings Clause onto the Fifth Amendment. *Id.* at 77–80.

That Clause is the only Bill of Rights provision designed to act as a special outside check on Congress's treatment of disfavored persons. *See id.* at 77–78. It does so, as we've explained, by guaranteeing a remedy. And here's the key point: both Jay and Madison were centrally concerned with protecting the right to "just compensation" from the whims of the legislature. That's why they spearheaded an amendment that departed from the Magna Carta model and would guarantee compensation for taken property even when the legislature authorized the taking. *See* U.S. CONST. amend. V.

We start with Jay. In 1778, Jay penned a letter to the New York legislature, decrying "the Practice of impressing *Horses*, Teems, & Carriages by the military, without the Intervention of *a civil Magistrate*, and without any Authority from the Law of the Land." John Jay (A Freeholder), *A Hint to the Legislature of the State of New York*, FOUNDERS ONLINE, https://perma.cc/32NL-432K (emphases altered). Instead, Jay advanced a vision where "many who . . . severely feel this kind of oppression, may . . . *bring Actions and recover Damages*." *Id.* (emphasis added). Our first Chief Justice couldn't have been clearer that he thought a plaintiff like Fulton, who had his horses taken without compensation, should be able to sue for damages.

As for the author of the Fifth Amendment—James Madison—writing Federalist 10, Madison "was ahead of his time in arguing that the dominant danger in America came from a possibly overweening majority rather than from self-interested government agents." AMAR, THE BILL OF RIGHTS, *supra*, at 77; *see also* FEDERALIST

No. 10. In Madison's view, a majoritarian body without an outside check on its power offered insufficient protection for property rights. *See* James Madison, *For the National Gazette: Property* (Mar. 27, 1792), FOUNDERS ONLINE, https://perma.cc/K8EH-FU5N [hereinafter *Property*] ("Where an excess of power prevails, property of no sort is duly respected.").

So Madison crafted the Takings Clause. That Clause was unique: it created a right that applied even when the government didn't misuse its power and instead acted "for public use." *See* U.S. CONST. amend. V; Madison, *Property*, *supra* (stating that no property "shall be taken *directly* even for public use without indemnification to the owner . . ."). Madison envisioned the protection of that right through "independent tribunals of justice [who] will consider themselves in a peculiar manner [its] guardians . . . ." James Madison, *Amendments to the Constitution* (June 8, 1789), FOUNDERS ONLINE, https://perma.cc/ZF5L-W9ZN.

And as a congressman, Madison tried to honor that plan by proposing a law granting the Supreme Court appellate jurisdiction to review decisions on federal claims. *See* Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 638 & n.94 (1985). In his view, the adjudication of a federal claim was a "judicial rather than executive" power. *Id.* (citing 1 ANNALS OF CONG. 611–12 (J. Gales ed. 1834)) (recording Madison as having stated that "deciding upon the lawfulness and justice of . . . claims, and accounts subsisting between the United States and particular citizens . . . partakes strongly of the judicial character . . . .").

But of course, at the Founding, the federal judiciary was largely undeveloped. Indeed, Congress didn't grant the lower federal courts federal-question jurisdiction until almost a hundred years later—in 1875. *See* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470; *see also* HART & WECHSLER, *supra*, at 22–24, 27–28 (discussing the grounds for subject-matter jurisdiction for lower federal courts at the Founding through Reconstruction). And it wasn't until 1887 that Congress passed the Tucker Act, which gave the Court of Claims jurisdiction to hear cases requiring payment from the United States. *See* Tucker Act, ch. 359, § 1, 24 Stat. 505, 505 (1887). Without that, federal courts generally lacked the jurisdiction to hear cases brought directly under the Fifth Amendment—even if litigants theoretically had a cause of action directly under it. Litigants might have had a ticket, but federal courts had no right to put on the show.

And in any case, litigants filed few takings cases against the federal government because the federal government used states to condemn property for federal use. Treanor, *The Original Understanding*, *supra*, at 794 n.69; William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1762 (2013) ("During the first twenty years of the federal government, Congress built quite a few things and sometimes needed eminent domain . . . . [T]he use of state power was uniform and unquestioned.").

Still, federal courts did zealously enforce the Takings Clause in the limited instances they had jurisdiction and a relevant suit came up. In 1815, for example, the Supreme Court discussed the "just compensation" right when it was reviewing a state-law action brought to recover possession of property that federal officials occupied. In *Meigs v. McClung's Lessee*, the Defendants were United States officers who erected a garrison on property in North Carolina, under the authority of the United States. 13 U.S. (9 Cranch) 11, 12, 3

L.Ed. 639 (1815) (bill of exceptions). Plaintiff McClung's lessee claimed to have leased the property where Meigs and the others resided. *Id.* He asserted that the officers were on the property improperly. *See id.* So he filed a common-law action of ejectment, a state-law action to recover possession of property from any wrongful occupier.[9] *See id.*

The Defendants argued "[t]hat the United States had a right by the constitution to appropriate the property of individual citizens" and they had done so "as officers of the United States, for the benefit of the United States, and by their direction . . . ." *Id.* at 13. But the trial court rejected that defense. Instead, it instructed the jury that "if the land . . . was at the time vacant land[,] the United States could appropriate it as they pleased; but if it was private property[,] the United States could not deprive the individual of it without making him just compensation therefor." *Id.* at 14. The trial court awarded judgment to McClung's lessee. *See generally id.*

Then the Supreme Court affirmed. *See id.* at 18. In upholding the ejectment remedy, Chief Justice Marshall, writing for the Court, explained that the land was "certainly the property of [McClung's lessee]; and the United States cannot have intended to deprive him of it by violence, and without compensation." *Id.* In other words, the Court would not allow the United States to claim possession of property without paying for it.

Meigs shows that the Marshall Court understood that, where it had jurisdiction, the Constitution required it to enforce the right to "just compensation." And the Court enforced that right even though that meant allowing a private citizen to sue officers of the United States in federal court without the government's consent. *See Lee*, 106 U.S. at 210–11, 1 S.Ct. 240 (discussing how *Meigs* recognized a private plaintiff can sue federal officers for possession of taken property).

Still, *Meigs* was a rarity. And during those early years of the Republic, in the absence of federal-question jurisdiction in lower federal courts for alleged Takings Clause violations, Congress served as the primary "forum for takings claims." Treanor, *The Original Understanding*, *supra*, at 794 n.69. Yet the terms of the Takings Clause ensure that Congress lacked "discretion to deny takings claims mandated by the Takings Clause." *Id.* After all, the Takings Clause guaranteed the "just compensation" remedy. And Congress instead acted only as the lawful judicial tribunal to hear damages actions stemming directly under the Clause. *See id.*; Shimomura, *The History of Claims*, *supra*, at 638 & n.94 (discussing Madison's view that the adjudication of federal claims was a judicial power). So even before the federal courts had the jurisdiction to hear claims for damages arising out of federal takings, litigants enjoyed an effective direct cause of action for "just compensation"—only Congress, not the courts, sat as the "judicial" tribunal to determine the just amount.

The Dissent disagrees with our understanding of this early history. It says Congress didn't exercise a judicial function when it adjudicated takings claims. *See* Diss. Op. at 1274–75. Rather than acting as "a pseudo-judicial tribunal," the Dissent argues, Congress exercised its legislative "power over the purse" to pay claims as it pleased. *See id.* at 1274. For support, the Dissent draws from scholarship on how the early Congresses resolved all federal

9. Although the case does not state why federal-court jurisdiction existed below, we can surmise that there must have been diversity of citizenship between the parties. *Cf.* HART & WECHSLER, *supra*, at 22–24, 27–28.

claims—not specifically takings claims. *See id.* at 1274–75 (first citing Shimomura, *The History of Claims*, *supra*; then citing 2 WILSON COWEN, PHILIP NICHOLS, JR. & MARION T BENNETT, THE UNITED STATES COURT OF CLAIMS: A HISTORY (1978); and then citing William M. Wiecek, *The Origins of The United States Court of Claims*, 20 Admin. L. Rev. 387 (1968)).

[40–42] But a practice of discretionarily declining to pay valid claims, while maybe permissible for most federal claims, would be a clear violation of the text of the Fifth Amendment if extended to takings claims. *See* U.S. CONST. amend. V (No "private property [shall] be taken for public use, without just compensation."). As we've explained, the Takings Clause was an innovation at the Founding—designed as a unique constraint on legislative power that required mandatory enforcement. In other words, Congress could act only consistently with the Constitution's just-compensation guarantee when it served as a tribunal for takings.[10]

And to the extent that early Congresses treated takings claims like all other claims—to be clear, we don't think the Dissent has established they did—then Congress did so contrary to leading Founders like Madison and Jay's understanding of the Takings Clause. In contrast to the "just compensation" remedy, early Congresses drew the general claims-resolution process from early English practice when the "just compensation" principle did not constrain legislatures. *See* Shimomura, *The History of Claims*, *supra*, at 627–37 (describing the evolution of a legislative model of federal claims resolution). Congress extended that common-law practice after the Founding as it quickly moved to assert its dominance over a yet-to-be-established judiciary. *Id.* at 637.

But in its zeal to cement power over the courts, Congress sometimes took blatantly unconstitutional acts, often to kneecap and subserviate the judiciary. *See Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.*, 1 L.Ed. 436 (1792) (providing circuit court opinions that an act of Congress requiring the judiciary to evaluate pensioner claims subject

10. The Dissent implies that Congress must retain jurisdiction over takings claims to heed the Appropriations Clause, which provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ...." *See* Diss. Op. at 1275 (quoting U.S. CONST. art. I, § 9, cl. 7). We start by noting that the Appropriations Clause has no relevance in the case before us because we are considering whether the Takings Clause provides a cause of action against *local governments*, who are not encompassed by the Appropriations Clause. *See* U.S. CONST. art. I, § 9, cl. 7. But even when it comes to federal takings, for at least two reasons, Congress always maintains control over the fisc, even when courts handle takings claims. First, even though Congress must provide a forum for takings claimants to pursue their constitutional cause of action, Congress retains authority to structure and assign the tribunal with jurisdiction over these claims. *See* U.S. CONST. art. III, § 1; *cf. Vishnevsky v. United States*, 581 F.2d 1249, 1256 (7th Cir. 1978) (collecting "a long line of cases" where "the Supreme Court has itself ... specifically affirmed the appropriateness of mandamus relief to compel federal officers to pay monies out of the public treasury, where the duty to do so was clear and ministerial"). Second, the federal government is liable for takings only when its officers act "within the general scope of their duties." *See Darby Dev. Co. v. United States*, 112 F.4th 1017, 1024 (Fed. Cir. 2024); Part III.D.3, *infra*. So to owe "just compensation," Congress must pass legislation imbuing an officer with responsibilities that generally authorize her to take property and put the public on the hook for "just compensation." *See* Part III.D.3, *infra*; *cf. CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 431, 144 S.Ct. 1474, 218 L.Ed.2d 455 (2024) ("[T]he origins of the Appropriations Clause confirm that appropriations needed to designate particular revenues for identified purposes. Beyond that, however, early legislative bodies exercised a wide range of discretion.").

to review by the Secretary of War and Congress was unconstitutional); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803) (concluding Congress unconstitutionally attempted to expand the original jurisdiction of the Supreme Court); *cf. Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 2 L.Ed. 115 (1803) (acquiescing to a congressional act, which wholly eliminated properly appointed Article III judgeships). A weak early judiciary could do little to push back when Congress disregarded the tripartite structure of our Constitution. *See* Shimomura, *History of Claims*, *supra*, at 645–46 (discussing how the Supreme Court permitted congressional adjudication of federal claims "as a political fact" and "an extension of colonial history [rather] than a deduction of logic from the new Constitution" and "refused to dignify it with any theoretical or policy justification" (footnote omitted)).

And the results of such congressional contempt for the proper role of the judiciary were disastrous—as early as 1838, the House of Representatives's Committee on Claims released a report that Congress had been inundated with private claims, consuming time and resources and causing injustice. *See id.* at 648–51 (discussing early disfunction in the private bill system of claim adjudication). By the Civil War, President Lincoln echoed Madison, telling Congress that "the investigation and adjudication of claims in their nature belong to the judicial department . . . ." Wiecek, *The Origins of The United States Court of Claims*, *supra*, at 398 (quoting 7 MESSAGES AND PAPERS OF THE PRESIDENTS 3252 (James D. Richardson, ed., New York, 1897–1911)).

All of this is to say that early congressional practice didn't always conform to the Constitution's structure as ratified and as leading Founders understood it. Even assuming the Dissent's understanding of early congressional treatment of takings claims is correct (again, we don't think it is), that practice would be one such case. And we couldn't summarily declare its constitutionality as a "contemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, [that] fixes the construction to be given [the Constitution's] provisions." *Eldred v. Ashcroft*, 537 U.S. 186, 213, 123 S.Ct. 769, 154 L.Ed.2d 683 (2003) (quoting *Myers v. United States*, 272 U.S. 52, 175, 47 S.Ct. 21, 71 L.Ed. 160 (1926)). After all, it wasn't.

In fact, we don't have an "unbroken practice since the founding generation" of resolving takings claims through legislative rather than judicial adjudication. *Cf. id.* Americans did not acquiesce to that practice. Instead, through the early nineteenth century, the public grew even more attached to the idea of *judicial enforcement* of the right to "just compensation"—vindicating Jay and Madison in any dispute with Congress.

Specifically, the inclusion of a just-compensation principle in the Fifth Amendment led to a wave of recognition of the right at the state level. And as a result, our history contains repeated acknowledgment that citizens were entitled to recover "just compensation" in the courts. Indeed, by the middle of the century, it became clear that state just-compensation clauses inherently contained a right to bring damages actions. This history offers important context to understand the intent of the Framers of the Fourteenth Amendment, who extended the reach of the *federal* Takings Clause to the states. So we take a moment to review it.

When the country ratified the Fifth Amendment, only one of the first thirteen states, Massachusetts, recognized a right to "just compensation" in its constitution. AMAR, THE BILL OF RIGHTS, *supra*, at 79. By

1800, two had. J.A.C. Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 6 WIS. L. REV. 67, 70 (1931). By 1850, six did. *Id.* And by 1868, eight. *Id.* Plus, nearly every new state admitted to the union included a just-compensation provision. *Id.* Not only that, but leading American jurists proclaimed a right to "just compensation" as a fundamental right undergirding free government. *See, e.g.*, 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 339 (New York: O. Halsted, 1832) (just compensation "is founded in natural equity, and is laid down by jurists as an acknowledged principle of universal law"); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784, at 661 (Boston: Hilliard, Gray, 1833) (same).

Ultimately, courts in virtually every state extended the principle of "just compensation" against state and local governments. AMAR, THE BILL OF RIGHTS, *supra*, at 269. And they did so even if their state constitutions didn't mention "just compensation." Rather, courts discerned the just-compensation principle to be a fundamental right. *See, e.g.*, *Gardner v. Newburgh*, 2 Johns. Ch. 162, 166 (N.Y. 1816) ("a fair compensation must, in all cases, be previously made to the individuals affected .... This is a necessary qualification accompanying the exercise of legislative power, in taking private property for public uses; the limitation is admitted by the soundest authorities, and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice."); *Sinnickson v. Johnson*, 17 N.J.L. 129, 146 (1839) (describing just compensation as "operative as a principle of universal law"); *Young v. McKenzie*, 3 Ga. 31, 44 (1847) (enforcing the right declared in the Takings Clause because it embodies a "great common law principle ... applicable to all republican governments, and which derived no additional force, as a *principle*, from being incorporated into the Constitution of the United States."); *Bradshaw v. Rodgers*, 20 Johns. 103, 105–06 (N.Y. Sup. Ct. 1822) (same); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 265 (1828) (opinion of Carr, J.) (same); *The Proprietors of the Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 66 (1834) (same); *L.C. & C.R.R. Co. v. Chappell*, 24 S.C.L. (Rice) 383, 387 (1838) (same); *Hall v. Washington County*, 2 Greene 473, 478 (Iowa 1850) (same); *State v. Glen*, 52 N.C. (7 Jones) 321, 330–31 (1859) (same).

When they had jurisdiction, federal courts, including the Supreme Court, also invoked or applied the just-compensation principle against the actions of states as a fundamental right against all governments. *See, e.g., VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (C.C.D. Pa. 1795) ("The [Pennsylvania] legislature ... had no authority to make an act devesting one citizen of his freehold, and vesting it in another, without a just compensation."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135, 3 L.Ed. 162 (1810) ("It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation."); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 52, 3 L.Ed. 650 ("[T]hat the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the state, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the consti-

tution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 38, 5 L.Ed. 547 (1823) ("[B]y the common law of Virginia, if not by the universal law of all free governments, private property may be taken for public use, upon making to the individual a just compensation."); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 828 (C.C.D.N.J. 1830) (The Takings Clause "is the declaration of what in its nature is the power of all governments and the right of its citizens . . . .").

And once a court recognized a just-compensation right against a state, a plaintiff could recover damages for the violation of that right. Plaintiffs brought their actions to recover compensation for takings in common-law forms of action—typically a trespass action against an offending official. *See* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth Century State Just Compensation Law*, 52 VAND. L. REV. 57, 67–83 (1999). That official would justify their action as authorized under state law. And the court would invalidate that defense when the action was an uncompensated taking.[11] *See id.* at 67–68, 83–97. And then courts could award damages available in trespass actions. *Id.* at 97–100; *see also Sinnickson*, 17 N.J.L. at 147; *Bradshaw*, 20 Johns. at 103, 106; *Bos. & R. Mill Corp. v. Gardner*, 19 Mass. (2 Pick.) 33, 43 n.2 (1823); *Thayer v. Boston*, 36 Mass. (19 Pick.) 511, 515–17 (1837); *State v. Hooker*, 17 Vt. 658, 672 (1845); *Pumpelly v. Green Bay Co.*, 80 U.S (13 Wall.) 166, 175–80, 20 L.Ed. 557 (1871). Although these damages were initially limited to retrospective relief, by 1860 some courts had allowed plaintiffs to recover full permanent damages.[12] Brauneis, *The First Constitutional Tort*, *supra*, at 100; *see also, e.g.*, *Mayor & Council of Rome v. Perkins*, 30 Ga. 154 (1860). In effect, courts allowed direct damages actions for "just compensation" to move forward.

And during the later nineteenth and early twentieth centuries, states abandoned rigid common-law forms of action as prerequisites for suits for damages and combined the courts of law and equity. *Cf.* Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 171 (2008) ("Anglo-American law abolished the writ system, and merged the courts of law and equity, over roughly a century from 1848 . . . to 1937 . . . . In the nineteenth century, we begin to see transsubstantive treatises on damages . . . ."). As part of this process, courts in the 1870s and 1880s described damages actions to recover "just compensation" not only as trespass but also as *actions derived directly from constitutional guarantees*. *See* Brauneis, *The First Constitutional Tort*, *supra*, at 109–15; *see also, e.g.*, *City of Elgin v. Eaton*, 83 Ill. 535, 536–37 (1876) ("[T]he right to recover damages was given by the constitution . . . .").

Even as some state courts conceptualized just-compensation clauses as not expressly providing a remedy, they held that the right necessarily implied the existence of a guaranteed judicial remedy allowing for recovery. *See, e.g.*, *Johnson v. City of*

11. Although rarer, as in *Meigs*, these state-law suits could also be brought against federal officials who took property claiming official authority but violated the Federal Takings Clause. *See, e.g., Meigs,* 13 U.S. 11; *Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171; Amar, *Of Sovereignty and Federalism, supra,* at 1512 (discussing how a state-law trespass action allowed suit against federal officials in *Lee* for an uncompensated taking).

12. Retrospective relief might allow Fulton full recovery here because no evidence in the record shows the possibility of return of his horses. So his retrospective loss would be their full value.

Parkersburg, 16 W. Va. 402, 426 (1880) ("Where the Constitution forbids a *damage* to the private property of an individual, and points out no remedy, and no statute gives a remedy, for the invasion of his right of property thus secured, the common law, which gives a remedy for every wrong, will furnish the appropriate action for the redress of his grievance.") (emphasis in original); *Householder v. City of Kansas*, 83 Mo. 488, 495 (1884) (quoting *Tapley v. Forbes*, 84 Mass. (2 Allen) 20, 24 (1861)) ("Wherever a statute or the organic law creates a right, but is silent to the remedy, the party entitled to the right 'may resort to any common law action which will afford him adequate and appropriate means of redress.' ").

Federal courts, too, inferred causes of action, directly under state constitutions, against local governments for damages. *See, e.g.*, *Blanchard v. City of Kansas*, 16 F. 444, 446 (W.D. Mo. 1883) (Miller, J.) ("[S]ince the positive declaration of the constitution is that private property shall not be taken or damaged for public use without just compensation, ... it is bound in some way to make that just compensation, and ... the law shall compel it to do it."); *see also Sumner v. Philadelphia*, 23 F. Cas. 392 (C.C.E.D. Pa. 1873) (awarding damages for common-law taking).

We emphasize that these courts recognized actions directly under state constitutions without acknowledging that doing so marked a fundamental change from the previous common-law actions litigants used to obtain "just compensation" in the form of damages. *See Elgin*, 83 Ill. at 536–37; *Johnson*, 16 W. Va. at 424–26; *Householder*, 83 Mo. at 495; *Blanchard*, 16 F. at 446–47.[13] For these courts, "the limitation, turning as it did on compensation, obviously and necessarily encompassed the remedial grant ...." Brauneis, *The First Constitutional Tort*, *supra*, at 113. And so, in effect, these courts recognized as direct actions the same damages actions that other courts earlier did as trespass actions. *See, e.g.*, *Blanchard*, 16 F. at 447 ("[T]he other party has ... the right that the law gave her to recover these damages in any proper form of action.").

In sum, through the nineteenth century, it became clear that state just-compensation clauses inherently contained a right to bring damages actions.[14]

13. West Virginia came the closest to acknowledging an innovation. It partially justified its decision by stating that "[a] constitutional prohibition forbidding an injury to the property of a citizen is certainly as effective as a statute framed for the same purpose ...." *Johnson*, 16 W. Va. at 425. But it made this statement after a long summary describing how "the pride of the common law [was] that it furnishes a remedy for every wrong." *Id.* at 424. So West Virginia framed its decision as a logical extension of traditional common-law practices.

14. The Dissent chastises us for "point[ing] to *no* decision from the early republic that permitted a suit at law against the government for compensation under the Takings Clause." *See* Diss. Op. at 1276–77 (emphasis in original). It emphasizes that at the Founding, actions to recover "just compensation" proceeded in rigid common-law forms. *See id.* But it misunderstands the key point. True, at the Founding, litigants had to bring state actions for damages like "just compensation" in statutorily prescribed vehicles or rigid common-law forms like trespass. *See* Brauneis, *The First Constitutional Tort*, *supra*, at 69–71. That was how the legal system worked back then. *See id.* But states *abolished* rigid forms of action over the mid-nineteenth to early-twentieth century. *See* Laycock, *How Remedies Became a Field*, *supra*, at 171. As part of the process, courts described the old common-law actions for "just compensation" as actions directly under state takings clauses. *See* Brauneis, *The First Constitutional Tort*, *supra*, at 109–15. But, at bottom, both the common-law and direct-takings actions were the *same kind of actions* with a shared lineage. *See id.* They both ensured that citizens could always exercise their constitutional rights to obtain

And as we've mentioned, this history of a just-compensation right under state law helps explain why a direct *federal* right of action exists. That's so because despite the availability of state remedies for state and local-government takings, the Framers of the Fourteenth Amendment thought state damages actions for "just compensation" were an insufficient remedy.

So with Section One of the Fourteenth Amendment, they constitutionalized a right to bring a *federal* action against local governments. In doing so, the Framers overruled *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

In *Barron*, the Supreme Court considered the case of a plaintiff who sought "to recover damages for injuries to [his] wharf- property ... arising from the actions" of the local government of Baltimore. 32 U.S. 243 (syllabus). The plaintiff contended that the Takings Clause directly applied to the states. *Id.* at 247. So, he asserted, Baltimore committed "an actionable tort" by "depriv[ing] a citizen of his property, though for public uses, without indemnification ...." *Id.* at 245 (syllabus). The Supreme Court disagreed. It held that the Takings Clause "is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." *Id.* at 250–51. As a result, the Court, as the ultimate federal court, determined it "ha[d] no jurisdiction of the cause ...." *Id.* at 251.

The Framers of the Fourteenth Amendment intended for the Amendment to overturn *Barron*. Despite extensive state-law protections for "just compensation" by the 1860s, the Framers made it clear that they wanted federal enforcement against state and local uncompensated takings to be available.

For his part, John Bingham, the author of Section One of the Fourteenth Amendment, noted that before Reconstruction, the Takings Clause was not a "limitation[ ] upon the States as can be enforced by Congress and *the judgment of the United States courts*." *See* CONG. GLOBE, 39TH CONG., 2d Sess. 811 (1867) (emphasis added); *see also id.* 1st Sess. 1065 (1866) (statement of Rep. Bingham) (Section One was "proposed ... to protect the thousands and tens of thousands and hundreds of thousands of loyal ... citizens of the United States whose property, by State legislation, has been wrested from them under confiscation ...."). So he expressed the desire for the Fourteenth Amendment to change that state of affairs. *See id.* 2d Sess. 811 (1867).

Bingham later explained that he "had read" *Barron*, which he described as a case where "the *city* had taken private property for public use, without compensation as alleged, and *there was no redress for the wrong in the Supreme Court of the United States*." *Id.*, 42D CONG., 1st Sess. App. 84 (1871) (emphasis added). *Barron* "induced [Bingham] to attempt to impose by constitutional amendments new limitations upon the power of the States ...." *Id.* As Bingham saw things, when left to their own devices, the States "took property without compensation, and the [citizen]

''just compensation'' in the courts. *Compare Bos. & R. Mill Corp.*, 19 Mass. at 43 n.2, *with Householder*, 83 Mo. at 495. Today, we have a federal right to ''just compensation'' against local governments that guarantees Americans may recover damages in a federal forum with jurisdiction. *See* U.S. CONST. amends. V; XIV, § 1. And we have a federal judicial system that recognizes only ''one form of action—the civil action.'' *See* FED. R. CIV. P. 2. So we translate the language of the Founding to the modern world and recognize the Constitution provides a cause of action directly under the Takings Clause. And it may be brought in federal courts with appropriate jurisdiction.

had no remedy." *Id.* at App. 85. But the Fourteenth Amendment was intended to fix that.[15]

Another leading Framer of the Fourteenth Amendment echoed Bingham's call for federal protections against takings. Senator Jacob Howard highlighted the need to pass the Fourteenth Amendment because "it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation . . . ." *Id.*, 39TH CONG., 1st Sess. 2765 (1866). Instead, "the States [were] not restrained from violating the principles embraced in [the Bill of Rights] except by their own local constitutions, which may be altered from year to year." *Id.* at 2766.

[43] Howard and Bingham believed that state protection for the right to "just compensation" just wasn't enough. Rather, they thought, federal law needed to independently protect the just-compensation principle. And they thought so even though, as we've noted, by the late 1860s and 70s, when the Fourteenth Amendment was ratified, the law had developed under state courts to the point where a right to "just compensation" included a right to sue for damages from an uncompensated taking. So at a minimum, the Framers of the Fourteenth Amendment understood that they were constitutionalizing a right to sue for "just compensation" against state and local governments in a federal forum.

The Dissent offers no persuasive retort to all this antebellum and Reconstruction history. *See* Diss. Op. at 1277. Instead, it dismisses evidence from state law because, it says, "[m]any jurists viewed state constitutional declarations of rights differently than federal declarations of the same rights."[16] *See id.* at 1277 (citing Jud Camp-

15. Bingham made these later comments in debates over the Ku Klux Klan Act of 1871, 17 Stat. 13 (1871), section one of which is now codified as 42 U.S.C. § 1983. It might be easy to construe his advocacy for § 1983, proclaiming that "[t]he people of the United States are entitled to have their rights guaranteed to them by the Constitution of the United States, protected by national law," as a belief that no remedy yet secured "just compensation" in court. *See* CONG. GLOBE, 42D CONG., 1st Sess. App. 85 (1871). But Bingham clarified that while "the negative limitations imposed by the Constitution on States can be enforced by law against individuals and States," Congress can also provide for additional enforcement on top of that. *See id.* So, for example, the Thirteenth Amendment bars slavery, a prohibition that could presumably be enforced in court, even in the absence of legislation. But Congress can (and did) add an extra protection, making it a felony to enslave someone. *Id.* Bingham's fierce advocacy for the Ku Klux Klan Act can also be explained by his emphasis on the other parts of the Act beyond § 1983, on which he appeared more focused. *See id.* For example, the Act provided additional civil and criminal penalties for those who conspiratorially interfered with civil rights. Ku Klux Klan Act of 1871, §§ 2–6, 17 Stat. at 13–15. Indeed, he highlighted that some "combinations . . . destroying the property of the citizen" may be "too powerful to be overcome by judicial process . . . ." *See* CONG. GLOBE, 42D CONG., 1st Sess. App. 85 (1871). And we must also consider his comments against the background of a lack of federal-question jurisdiction for the lower federal courts until 1875, *see* Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. at 470, and the Supreme Court's failure to recognize the right to "just compensation" as applicable to the states until 1897. *See Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979 (1897). Faced with that judicial environment, legislation affirmatively providing a cause of action for takings likely seemed more important.

16. Ironically, the Dissent also asserts that almost all rights in the Constitution, including the right to "just compensation," draw their meaning from pre-Ratification understandings. *See* Diss. Op. at 1268. So under the Dissent's view, the Takings Clause would have to draw its meaning from its few precursors—— namely the Vermont and Massachusetts constitutions. *See* Part III.D.2, *supra*. Put

bell, *Constitutional Rights Before Realism*, 2020 U. Ill. L. Rev. 1433, 1441–42); *but see* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1199 & n.81, 1236 (2024) (explaining that antebellum "Americans enjoyed certain fundamental legal rights with determinate legal content—rights that 'no state could rightfully abridge,' " including the right to just compensation for takings). And it effectively dismisses the intent of the Framers of the Fourteenth Amendment as irrelevant. *See* Diss. Op. at 1276–77.

[44] *But the Takings Clause applies to local governments only through the Fourteenth Amendment.* So the original intent of Americans when they ratified that Amendment governs its meaning. *See generally* AMAR, THE BILL OF RIGHTS, *supra*. And leading up to the Civil War, Americans loudly confirmed that they believed the "just compensation" right to be judicially enforceable. They also made clear they intended the new Amendment to overturn *Barron* and make the right *federally* enforceable.[17]

Given this robust support for the just-compensation principle after the Civil War, it's no wonder that the Supreme Court recognized it as the first provision of the Bill of Rights to apply to the States. *See Chi., B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 241, 17 S.Ct. 581, 41 L.Ed. 979 (1897). In fact, the Court did so fifty years before Justice Hugo Black launched a conversation about whether the Fourteenth Amendment incorporated the protections of the Bill of Rights. *See Adamson v. California*, 332 U.S. 46, 74–75, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947) (Black, J., dissenting) (concluding the Framers of the Fourteenth Amendment intended to apply the protections of the Bill of Rights to the states).

more generally, the *federal* right to "just compensation" would be defined with the same contours as the *state* rights to "just compensation." *Cf.* Baude, Campbell & Sachs, *General Law and the Fourteenth Amendment*, *supra* n.6, at 1199 & n.81, 1236 (explaining that certain rights had "determinate legal content," including the right to just compensation). As a result, whether state constitutional guarantees of "just compensation" automatically secured judicial relief for takings would be critically relevant. And Vermont's and Massachusetts's constitutions did. *See Bos. & R. Mill Corp.*, 19 Mass. at 43 n.2 ("Where it appears that a resolve of the legislature, directing the location of a road, makes no provision for a 'just compensation' to the owners of property to be taken for the purposes of the road, agreeably to the provisions of the constitution, the agents of the State in constructing the road are liable to be treated as trespassers by those whose property is so taken, or upon whose property such agents enter for locating the road. Compensation in such case should be made or provided for when the property is taken." (internal citation omitted)); *Thayer*, 36 Mass. at 515–17 (recognizing broad municipal liability for the actions of municipal officers); *Hooker*, 17 Vt. at 672 ("[I]f the sheriff [unlawfully] takes property ... he must answer in a suit for damage ....").

17. We note that the Dissent's minimum enforcement mechanism for the Takings Clause—private bills—is an ill fit for violations by local governments. Congress isn't liable for violations by local governments, so it has no obligation to pay for them. And Congress likely can't force state legislatures to pass bills paying for takings by local governments. *See New York v. United States*, 505 U.S. 144, 179, 112 S.Ct. 2408, 120 L.Ed.2d 120 (highlighting that "[n]o ... constitutional provision authorizes Congress to command state legislatures to legislate"). So even if at the Founding Congress could handle takings violations through private bills, the Fourteenth Amendment demands an alternative remedy. *Cf. Fuld v. Palestine Liberation Org.*, 606 U.S. 1, 145 S. Ct. 2090, 2105, 222 L.Ed.2d 296 (2025) (recognizing a difference in the appropriate jurisdictional inquiries under the Due Process Clauses of the Fifth and Fourteenth

[45] And the Court later heard several equitable cases against local governments proceeding directly under the Takings Clause (with no reference to § 1983 or any other statutory cause of action). *See Norwood v. Baker*, 172 U.S. 269, 276, 19 S.Ct. 187, 43 L.Ed. 443 (1898); *Cuyahoga River Power Co. v. Akron*, 240 U.S. 462, 463, 36 S.Ct. 402, 60 L.Ed. 743 (1916); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384, 47 S.Ct. 114, 71 L.Ed. 303 (1926); *Del., L. & W. R. Co. v. Morristown*, 276 U.S. 182, 188, 48 S.Ct. 276, 72 L.Ed. 523 (1928); *Dohany v. Rogers*, 281 U.S. 362, 364, 50 S.Ct. 299, 74 L.Ed. 904 (1930).[18] So once the court incorporated the right to "just compensation" against the states, it was clear that the Takings Clause included a direct federal remedy for its violation by state and local governments.

Altogether, this history establishes that from the Founding through Reconstruction, Americans believed that the just-compensation principle, when it applied, offered relief—even if at times, the provided forum was actually in Congress or before state courts in common-law actions. And that relief always included damages. The Framers of the Fourteenth Amendment then ensured a federal guarantee of the "just compensation" remedy against state and local governments. This history supports the conclusion that a federal cause of action for damages exists directly under the Takings Clause.

3. The direct cause of action under the Takings Clause is available here against Fulton County.

[46] As we've discussed, the text, structure, and history of the Constitution all lead to the conclusion that the Takings Clause contains a direct cause of action. Now, we consider whether that direct cause of action is available to Fulton. We conclude that it is.

[47] The Supreme Court's habeas jurisprudence teaches us that a substitute remedy for a constitutional remedy may suffice, if it's no narrower than the constitutional remedy. *See* Part III.D.1, *supra*. But no other remedy available to Fulton at least duplicates the scope of the just-compensation remedy under the Fifth and Fourteenth Amendments.

Congress hasn't provided for an adequate remedial system for uncompensated takings by local governments in situations like this one—leaving Fulton remediless. Two forms of federal judicial relief might be adequate to vindicate the just-compensation right: damages actions under 42 U.S.C. § 1983 and equitable relief. But neither completely captures the constitutional guarantee here.

[48] We begin with § 1983. Fulton filed under § 1983, which allows a litigant to seek damages against "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects ... any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution ...." 42 U.S.C. § 1983. That allows suits against local governments to recover "just compensation." *Knick*, 588 U.S. at 194, 139 S.Ct. 2162. But a limitation on § 1983 cases bars a class of Fifth Amendment plaintiffs.

Amendments to "respect ... the distinct sovereignties" the two Amendments govern).

18. The Supreme Court observed that "the mere fact that the Takings Clause provided the substantive rule of decision for ... equitable claims ... does not establish that it creates a cause of action for damages, a remedy that is legal, not equitable, in nature." *DeVillier*, 601 U.S. at 292, 144 S.Ct. 938. So these cases aren't conclusive on the question before us. Still, they offer additional support that the Takings Clause directly mandates a federal remedy against local governments independent of a statutory cause of action.

[49] Under *Monell v. Department of Social Services*, a local government may not be sued under § 1983 "for an injury inflicted solely by its employees or agents." 436 U.S. at 694, 98 S.Ct. 2018. Rather, suits may move forward only "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . ." *Id.*

[50, 51] This limitation makes the § 1983 remedy narrower than the Takings Clause's direct cause of action in some cases, like Fulton's. That's so because under the Takings Clause, the duty to provide "just compensation" attaches to a government when its officer acts "within the general scope of their duties." *See Darby Dev. Co. v. United States*, 112 F.4th 1017, 1024 (Fed. Cir. 2024). And it doesn't matter whether that taking resulted directly from a "regulation (or statute, or ordinance, or miscellaneous decree)." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149, 141 S.Ct. 2063, 210 L.Ed.2d 369 (2021). So Fulton could satisfy that showing here, even though he can't establish that the County took his horses under an official policy or custom.[19]

[52] To be sure, the lesser showing courts have required in takings cases doesn't relieve a litigant of his obligation to show that the taking is traceable to the governmental entity alleged to have committed it. And it's not enough to find simply that an officer employed by the relevant government interfered with property. *See, e.g., In re Chi., Milwaukee, St. Paul & Pac. R.R. Co.*, 799 F.2d 317, 326 (7th Cir. 1986) ("Accidental, unintended injuries inflicted by governmental actors are treated as torts, not takings.").

[53] But even so, the Supreme Court has repeatedly found the government liable for takings that occur "without express statutory authority or prohibition . . . . as a consequence of a[n] . . . officer's discharge of his normal responsibilities . . . ." *See Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 151–53 (D.C. Cir. 1983) (Scalia, J.) (collecting cases), *vacated & reheard*, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), *vacated sub nom.*, *Weinberger v. Ramirez de Arellano*, 471 U.S. 1113, 105 S.Ct. 2353, 86 L.Ed.2d 255 (1985).[20] So when an officer takes property within his typical responsibilities, the right to "just compensation" kicks in against his government.

Great Falls Manufacturing Co. v. Garland shows how this works. 124 U.S. 581, 8 S.Ct. 631, 31 L.Ed. 527 (1888). There, the Court weighed whether a compensable taking occurred when the Secretary of War took property to construct a dam outside a surveyed area Congress authorized for takings. *Id.* at 595–96, 8 S.Ct. 631. Even though the Secretary's actions were not fully in accord with official policy, the Court determined that "still the United

19. For this reason, Fulton didn't "waive" his right to "just compensation" when he conceded he could not meet *Monell*'s policy-or-custom requirement as the Dissent contends. *See* Diss. Op. at 1266. The Takings Clause offers a broader protection than § 1983. The key point is the statute sets a higher bar for relief than the Constitution imposes on Fulton.

20. Although the en banc court vacated the panel opinion in *Ramirez de Arellano*, it "did not disagree with the panel's analysis of the authorization issue." *Del-Rio Drilling Programs, Inc. v. United States*, 146 F.3d 1358, 1363 (Fed. Cir. 1998). On this point, then-Judge Scalia's opinion remains persuasive.

States [was] under an obligation imposed by the constitution to make just compensation for all that ha[d] been in fact taken and [was] retained for the proposed dam." *Id.* at 596, 8 S.Ct. 631. The Court emphasized that the Secretary "honestly and reasonably exercise[d] the discretion with which he was invested," even if he ultimately went beyond official policy. *Id.* at 597, 8 S.Ct. 631.

Or consider *Portsmouth Harbor Land & Hotel Co. v. United States*. 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922). There, the Supreme Court considered whether a plaintiff properly alleged a taking when officers manning a fort neighboring his resort property planned to repeatedly shoot cannon projectiles over that property. *Id.* at 328–30, 43 S.Ct. 135. The Court found the plaintiff met his burden for his case against the government to proceed, even though he did not allege a specific policy authorizing the firing. *See id.* at 330, 43 S.Ct. 135. It was enough that the "United States built the fort and put in the guns and the men . . . ." *Id.* But if the plaintiff had to meet § 1983's added requirement to plead an official policy or custom, his claim would have likely failed because all he could allege was that his harm stemmed from the actions of the government's agents.

United States v. Causby presents yet another example. 328 U.S. 256, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946). In that case, the Supreme Court found the government on the hook for a taking when the Civil Aeronautics Authority authorized flights that passed 83 feet above the plaintiff's property. That was so even though Congress had authorized the taking of only "navigable airspace"—defined by regulation as at least 300 feet above the ground. *Id.* at 258–60, 263–64, 66 S.Ct. 1062.

[54] This requirement of "just compensation" applies just as equally to local governments as it does to the federal government. When, as in Georgia, local governments are political subdivisions of a state, *see* GA. CODE ANN. § 25-3-4 (2025), they must furnish compensation for their takings. *See Knick*, 588 U.S. at 189, 139 S.Ct. 2162 ("If a local government takes private property without paying for it, that government has violated the Fifth Amendment—just as the Takings Clause says . . . . "). After all, the Takings Clause is "applicable to the States through the Fourteenth Amendment . . . ." *Cedar Point Nursery*, 594 U.S. at 147, 141 S.Ct. 2063. And the Framers of the Fourteenth Amendment, as we've mentioned, specifically sought to reverse *Barron v. Baltimore*, the decision where the Supreme Court held that, before the Fourteenth Amendment, the Takings Clause did not apply to the actions of a *city*. *See* CONG. GLOBE, 42D CONG., 1st Sess. App. 84 (1871) (statement of Rep. Bingham) (discussing how *Barron* was top of mind when drafting Section One of the Fourteenth Amendment).

So if like in *Great Falls Manufacturing Co.*, a city official exercised eminent domain outside a limited area that official policy authorized, his local government would still be liable. Or if, as in *Portsmouth*, a local police force engaged in repeated firing practice over private property, its government would be responsible. Or, as in *Causby*, if a fire department consistently flew helicopters 83 feet over an individual's property when the city council only authorized flights at a minimum altitude of 300 feet, the local government would pay the price. In all these examples, a plaintiff would be entitled to "just compensation" from his local govern-

ment but would not necessarily be able to plead a § 1983 action.[21]

[55, 56] The gap between § 1983 liability for a county's taking and a county's liability for the same taking under the Takings Clause leaves a substantial class of plaintiffs who can't recover "just compensation" under § 1983. *Compare Ramirez de Arellano*, 724 F.2d at 151 (describing takings liability as "a concept akin to, though not as liberal as, the 'scope of employment' test for application of the doctrine of *respondeat superior* in private law"), *with Monell*, 436 U.S. at 691, 98 S.Ct. 2018 ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").[22] As Fulton's own case shows, any time officers seize property as part of a lawful investigation but the government later fails to return it for unknown reasons, § 1983 does not afford a "just compensation" remedy. *Cf. Jenkins v. United States*, 71 F.4th 1367, 1373–74 (Fed. Cir. 2023) (recognizing "just compensation" liability where officers do not return seized property at the conclusion of an investigation); *Frein v. Pa. State Police*, 47 F.4th 247, 252–53 (3d Cir. 2022) (same).

[57–61] Congress can't prescribe an exclusive remedy for uncompensated takings that is more restrictive than the Takings Clause's guarantee of "just compensation."[23] Its authority to enact § 1983 comes from Section 5 of the Fourteenth Amendment, which authorizes Congress "to en-

21. The Dissent acknowledges that the federal government is liable for takings "perpetrated by its officers acting in 'the normal scope of [their] duties.' " *See* Diss. Op. at 1279 (alteration in original). Yet it contends the Takings Clause offers less protection for takings that officers of local governments commit. *See id.* This position is inconsistent with its argument that the Fourteenth Amendment's protections apply identically between the federal and state governments. *See id.* at 1277. And it's also odd given the well-documented focus of the Framers on overturning *Barron*, which, as we've noted, held that the Takings Clause applied to only those takings by the federal government, not the local-government defendant in that case. *See* Part III.D.2, *supra*. Bingham and Howard couldn't have been clearer that they sought to extend the federal protections of the Takings Clause to local governments. *See id.* Indeed, we doubt the action brought in *Barron* itself would have satisfied *Monell*'s policy-or- custom requirement. *See Barron*, 32 U.S. at 243–44 (syllabus) (summarizing that the plaintiff's injuries were caused by flooding from streams of water diverted by the city "partly by adopting new grades of streets, and partly by the necessary results of paving, and partly by mounds, embankments and other artificial means" that don't appear to have resulted from an officially adopted policy or custom as *Monell* and its progeny construe the term).

22. Amicus Institute for Justice contends that *Monell*'s policy-or-custom requirement does not apply to takings claims because "[a] just-compensation claim necessarily sounds against governmental entities." But *Monell* expressly considered that takings actions would proceed under § 1983, yet it carved out no exception to its policy-or-custom requirement for takings violations. *See Monell*, 436 U.S. at 686–87, 694, 98 S.Ct. 2018. Nor does anything in the text of § 1983 suggest a special carveout for takings violations. *See* 42 U.S.C. § 1983. And almost all constitutional rights are asserted against state action. *See, e.g.*, U.S. CONST. amends. I; II; III; IV; V; VI; VII; VIII; XIV, § 1; XV, § 1; IX; XXIV, § 1; XXVI, § 1.

23. We also emphasize another way § 1983 offers an incomplete remedy for takings violations: The statute does not allow suits against state governments for takings because it doesn't abrogate their sovereign immunity. *See Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992); Part III.D.4, *infra* (explaining the doctrine of sovereign immunity does not bar a direct takings action). As a statutory cause of action, a § 1983 suit could move forward against state governments only if Congress abrogated their immunity, which Congress did not. *See Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). So there is no federal statutory damages remedy for takings by a state.

force, by appropriate legislation" the Amendment. *See Monell*, 436 U.S. at 665, 98 S.Ct. 2018. But that provision gives "no power to restrict, abrogate, or dilute" the intrinsic protections of the Bill of Rights. *See Katzenbach v. Morgan*, 384 U.S. 641, 651 n.10, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). And the Takings Clause mandates compensation for litigants who have suffered takings by government employees acting within the normal scope of their duties, whether under official local policy or not. So some other federal mechanism must allow litigants who have suffered takings by their local government to recover "just compensation."

[62] The other federal remedy that might apply is equitable relief. *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). In the context of a takings claim, equitable relief would be an order enjoining the government from taking or possessing the disputed property, requiring the government to leave the property in the possession of its owner. *See First English*, 482 U.S. at 319, 107 S.Ct. 2378. But the Supreme Court has already recognized that equitable relief is inadequate because it does not allow for recovery of the rental value of property that the government temporarily possesses. *See id.* Nor does it offer any remedy in a case like the one here, where the government already took property and its location is unknown—or worse, its value is destroyed. At bottom, "just compensation" is a form of "legal relief," *see City of Monterey*, 526 U.S. at 710–11, 119 S.Ct. 1624, so a system for the recovery of legal relief necessarily must exist to fulfill the promise of "just compensation."

One final remedy could be sufficient under the Fifth Amendment: relief that state-law causes of action authorize. As we've mentioned, the Supreme Court has said that "constitutional concerns do not arise when property owners have other ways to seek just compensation," including state-law vehicles. *Id.* at 292, 144 S.Ct. 938. But we have no evidence, and some doubts, that all states permit actions to recover "just compensation" for *personal* property loss, like horses. *Cf. Raylu Enters., Inc. v. City of Noblesville*, 205 N.E.3d 260, 264 (Ind. Ct. App. 2023) (rejecting an argument that Indiana's inverse-condemnation actions allow for the recovery of compensation for personal property taken); *Holmes Protection of Pittsburgh, Inc. v. Port Auth. of Allegheny Cnty.*, 90 Pa.Cmwlth. 342, 495 A.2d 630, 633 (1985) (holding that an inverse-condemnation action could not be sustained where there was a taking of personal but no real property); *Vaughn v. City of Muskogee*, 359 P.3d 192, 196 n.1 (Okla. Civ. App. 2015) (refusing to opine on whether a plaintiff can bring an inverse-condemnation action for a taking of personal property unrelated to real property); *Allianz Global Risks U.S. Ins. Co. v. State,* 161 N.H. 121, 126, 13 A.3d 256 (2010) (declining to address whether inverse-condemnation actions are cognizable for loss of personal property); WIS. STAT. § 32.19(3)(a) (2025) (capping compensation for losses to personal property from condemnation "at an amount equal to the reasonable expenses that would have been required to relocate such property").

In Georgia, where Fulton is, to our knowledge, the state supreme court has not ruled on the issue. *See Pribeagu v. Gwinnett County*, 336 Ga.App. 753, 785 S.E.2d 567, 571 (Ga. Ct. App. 2016). And it wasn't until 2016 that a single panel of the intermediate appellate court in the state, *reversing a lower court on the issue*, found personal property damage recoverable in

an inverse condemnation action.[24] *Id.* That doesn't offer assurances that all inverse-condemnation actions allow recovery of personal property.

[63–68] Plus, we've noted that Georgia requires "[a]ll claims against counties [to] be presented within 12 months after they accrue or become payable or the same are barred ...." GA. CODE ANN. § 36-11-1 (2025). And it's too late now for Fulton to comply with that requirement. But a direct action under the Takings Clause includes no such limitation. So Georgia's state remedy is narrower than the direct cause of action under the Takings Clause.[25]

[69] At bottom, "[t]he availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim ...." *Knick*, 588 U.S. at 191, 139 S.Ct. 2162. We reiterate "[t]he fact that

24. We do note, however, that other panels seemed to take it for granted that compensation could be awarded for personal property takings. *See, e.g., Howard v. Gourmet Concepts Intern, Inc.*, 242 Ga.App. 521, 529 S.E.2d 406, 410 (2000) (''Personal injury, however, for purposes of inverse condemnation does not constitute personal property that can be taken.''); *Rutherford v. DeKalb County*, 287 Ga. App. 366, 651 S.E.2d 771, 774 (2007) (same).

25. The Dissent takes issue with our observation that Georgia's notice requirement makes the state's inverse-condemnation action narrower than the Takings Clause directly provides. *See* Diss. Op. at 1280-81. It warns that our logic demands that any procedural constraint on a constitutional action unconstitutionally narrows it. *Id.* But the Dissent misconstrues our point. The problem is that Georgia, a *state*, unilaterally imposed this requirement on a remedy that the federal Constitution guarantees. *See Knick*, 588 U.S. at 194, 139 S.Ct. 2162 (rejecting that a Fifth Amendment claim could be contingent on plaintiffs pursuing state procedures). We agree with the Dissent that *Congress* may impose reasonable procedural rules on the adjudication of takings claims to ensure the efficient administration of justice. *See* Diss. Op. at 1280–81. We see a problem only if Congress attempts to add a substantive constraint on the scope of the Takings Clause, wholesale barring a class of litigants entitled to relief. That's the result under § 1983 claims against local governments, as *Monell* construes the statute. We similarly would take issue if Congress were to adopt a procedural rule so unreasonably restrictive as to unfairly prevent takings claimants from having their day in court. *See* U.S. CONST. amend. XIV, § 5 (authorizing Congress ''to enforce, *by appropriate legislation*'' the protections of the Fourteenth Amendment, which include the incorporated Takings Clause (emphasis added)). But we think the Constitution permits Congress, for example, to set a reasonable statute of limitations for takings claims with its authority ''to enforce'' the Fourteenth Amendment. *See id.* And nobody is suggesting that the Federal Rules of Civil Procedure don't apply to takings claims. Similarly, state courts have no obligation to dispense with their regular procedural rules when adjudicating takings claims. *See DeVillier*, 601 U.S. at 292, 144 S.Ct. 938. But they can't be the *exclusive* forum for this constitutional remedy if they have procedures that narrow the availability of that remedy without any congressional blessing. *Cf. id.* at 293, 144 S.Ct. 938 (remanding only because petitioner had a cause of action under state law, and the state promised not to oppose amendment of his complaint to pursue it); *Knick*, 588 U.S. at 194, 139 S.Ct. 2162. That's because the Takings Clause promises a federal remedy independent of the whims of states. *See Knick*, 588 U.S. at 194, 139 S.Ct. 2162; Part III.D.1 & 2, *supra*. And only Congress can impose ultimate procedural bars because the Fourteenth Amendment charges Congress specifically with its enforcement. *See* U.S. CONST. amend. XIV, § 5. But, here, because of *Monell*, the only time Fulton could have conceivably sought relief in any court would have been in state court within the one-year deadline Georgia alone set. GA. CODE ANN. § 36-11-1 (2025). So Georgia, as the exclusive forum, has unilaterally and unconstitutionally imposed a procedural bar on Fulton's takings claim—assuming Fulton could have ever sought relief in Georgia courts, which remains unclear. *Cf. Pribeagu*, 785 S.E.2d at 571.

the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." *Id.* A federal right guarantees a federal remedy not dependent on the whims of states.

[70, 71] The Dissent suggests one other remedy that it claims Fulton could have availed himself of: suits against the officers who conducted the takings under § 1983 or state law. Diss. Op. at 1266–68, 1280. But even the Dissent recognizes why that doesn't offer Fulton relief—officers receive qualified immunity under federal law and official immunity under Georgia law. *See id.* at 1267–68 (citing *Griffith v. Robinson*, 366 Ga.App. 869, 884 S.E.2d 532, 534–35 (2023) and then citing *Lee v. Ferraro*, 284 F.3d 1188, 1193–94 (11th Cir. 2002)). The parties have not presented, and we are not aware of, any clearly established law in this circuit to overcome qualified immunity in a § 1983 action against the relevant officers that took Fulton's horses. *Cf. Gilmore v. Ga. Dep't of Corr.*, No. 23-10343, 144 F.4th 1246, 1257–58 (11th Cir. July 11, 2025) (en banc) (articulating the standard for overcoming qualified immunity under our precedents.). But the Takings Clause demands the provision of "just compensation" regardless of any officer immunity. *See* U.S. CONST. amend. V. Plus, just as fundamentally, once an officer commits a taking, it's his government, not necessarily the officer himself, that the Constitution puts on the hook for that compensation. *See Knick*, 588 U.S. at 189, 139 S.Ct. 2162 ("If a local government takes private property without paying for it, that government has violated the Fifth Amendment . . . .").

At the end of the day, both we and the Dissent agree that Fulton currently has access to neither federal nor state relief. *Monell* categorically bars him from ever suing his local government in federal court for the compensation it owes him. And Georgia law does not allow him to seek compensation in its courts today. But unlike the Dissent, we don't think the Constitution authorizes the conclusion that he must go remediless. The Constitution doesn't promise "just compensation" only to allow a local government's whim not to provide it.

Because no other constitutionally adequate remedy for takings of personal property by local governments exists here, we hold that the Takings Clause directly provides for judicial relief.

4. Sovereign immunity does not bar a direct cause of action under the Takings Clause.

[72] The Dissent disagrees with our textual, structural, and historical analysis. Besides concluding that the Takings Clause's guaranteed damages remedy doesn't give a litigant the right to sue for damages, it argues that sovereign immunity bars a direct takings cause of action. Diss. Op. at 1272–74. We agree that it would be odd for the Constitution to provide an outside check on Congress only to require Congress to waive its sovereign immunity to enforce that limitation. But we disagree that sovereign immunity has relevance here. Unlike the Dissent, we think the Takings Clause has bite.

[73] To start, sovereign immunity can't undermine a cause of action that the Constitution expressly makes a right. *See PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 508, 141 S.Ct. 2244, 210 L.Ed.2d 624 (2021) ("[A] State may be sued if it has agreed to suit in the 'plan of

the Convention,' which is shorthand for 'the structure of the original Constitution itself.' " (citation omitted)). That's why the Supreme Court has been clear that when "there [is] no remedy by which [a] plaintiff could have recovered compensation for [a] taking . . .," he may at least sue to recover his taken property under a "constitutional exception to the doctrine of sovereign immunity . . . ." *Malone v. Bowdoin*, 369 U.S. 643, 647–48, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 696–97, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949)) (internal quotation marks omitted); *see also First English*, 482 U.S. at 316 n.9, 107 S.Ct. 2378 (rejecting arguments that "principles of sovereign immunity" prevent recognition that the Fifth Amendment is a "remedial provision"); *Lee*, 106 U.S. at 221, 1 S.Ct. 240 (asserting if the government can defeat a takings claim by invoking sovereign immunity "it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well-regulated liberty and the protection of personal rights").

[74] After all, sovereign immunity cannot defeat the other textually guaranteed remedy in the Constitution: the writ of habeas corpus. *See* U.S. CONST. art. I, § 9, cl. 2; *Lee*, 106 U.S. at 218, 220, 1 S.Ct. 240 (comparing the power to issue a writ of habeas corpus to judicially enforcing the Takings Clause). Otherwise, the government could detain an individual without ever being required to undergo judicial review, and the writ of habeas corpus would be effectively suspended in violation of the Constitution. *See* U.S. CONST. art. I, § 9, cl. 2; *Lee*, 106 U.S. at 220, 1 S.Ct. 240.

[75, 76] It's true, as the Dissent points out, *see* Diss. Op. at 1273–74, that a takings suit *brought under § 1983* is subject to a sovereign-immunity defense. *See Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992). But that's because § 1983 is a statutory cause of action. And a statutory cause of action abrogates a state government's immunity only if Congress intended it to, which Congress did not. *See Quern v. Jordan*, 440 U.S. 332, 341, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979). But the Dissent offers no binding authority that a cause of action *directly from the Constitution* can be restricted by sovereign immunity. If sovereign immunity applied to a constitutional cause of action, that constitutional cause of action would offer no protection against a fickle legislature.

[77] And even if we were to agree with the Dissent that sovereign immunity generally bars takings causes of action—as should be clear by now, we don't—immunity has no place here. Fulton seeks to sue a local government. And "[u]nder the traditional Eleventh Amendment paradigm . . . . counties and similar municipal corporations are not" entitled to sovereign immunity. *United States ex rel. Lesinski v. S. Fla. Water Mgmt. Dist.*, 739 F.3d 598, 601 (11th Cir. 2014). So Fulton County has no sovereign immunity, and the doctrine poses no bar to relief in this suit.

At the end of the day, we read the words of the Takings Clause to mean what they say. When a government takes private property, it's on the hook for "just compensation." We find common ground with the Dissent by heeding the words of Chief Justice Marshall: "[W]e must never forget, that it is a *constitution* we are expounding." Diss. Op. at 1274 (quoting *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819)). As Marshall explained, we must give "a fair construction of the whole instrument." *M'Culloch*,

17 U.S. at 406. And a "fair construction" recognizes that when the Constitution grants an express right to damages, the American people have a right to recover them.

5. The Takings Clause's cause of action stands independent of "implied" *Bivens* actions.

One final note: some, including the Dissent, have suggested that a direct cause of action under the Takings Clause would run into the headwinds of the Supreme Court's *Bivens* jurisprudence. *See, e.g.*, *DeVillier*, 63 F.4th at 420 (Higginson, J., concurring in denial of rehearing en banc); Diss. Op. at 1268–70. They note that the practice of "implying constitutional causes of action" against federal officials, which began with *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), is "a disfavored judicial activity." *DeVillier*, 63 F.4th at 420 (Higginson, J., concurring in denial of rehearing en banc) (quoting *Egbert v. Boule*, 596 U.S. 482, 491, 142 S.Ct. 1793, 213 L.Ed.2d 54 (2022)). But most respectfully, we think closer scrutiny reveals that the Court's *Bivens* guidance is of no relevance to this case.

We are, of course, aware that the Supreme Court, in dicta, has pointed out that "there is no express cause of action under the Takings Clause ...." *Me. Cmty. Health Options v. United States*, 590 U.S. 296, 323 n.12, 140 S.Ct. 1308, 206 L.Ed.2d 764 (2020). But the Supreme Court has been equally clear that its "precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause." *DeVillier*, 601 U.S. at 292, 144 S.Ct. 938.

[78, 79] And the Court has also recognized that plaintiffs may sue to acquire "just compensation" from the federal government under the Tucker Act. *See Me. Cmty. Health Options*, 590 U.S. at 323 n.12, 140 S.Ct. 1308. That's so, even though the Tucker Act "does not create substantive rights." *Id.* at 322, 140 S.Ct. 1308 (citation and internal quotation marks omitted). Instead, "[a] plaintiff relying on the Tucker Act must premise her damages action on other sources of law ...." *Id.* (citation and internal quotation marks omitted). Those sources can be constitutional obligations because the act permits the Court of Federal Claims to hear "claim[s] against the United States founded ... upon the Constitution ...." 28 U.S.C. § 1491(a)(1). In essence, "[t]he Tucker Act ... is itself only a jurisdictional statute ...." *United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976). So claims under the Tucker Act proceed with the Takings Clause directly supplying the cause of action against federal officials. The Tucker Act gives the Court of Federal Claims the right to put on the show, but it doesn't grant litigants a ticket.

Yet at the very same time that the Supreme Court has acknowledged the viability of takings claims under the Tucker Act, it has found only three causes of actions under *Bivens*. *See Egbert*, 596 U.S. at 490–91, 142 S.Ct. 1793 (describing how the Court has only recognized *Bivens* actions under the Fourth Amendment for excessive force by federal agents, under the Fifth Amendment for workplace discrimination against federal employees, and under the Eighth Amendment for inadequate care to federal prisoners). But it has not listed the just-compensation cause of action as one of them.[26] *See id.*

We think that shows that the Takings Clause cause of action stands independent

26. Even if we were to conceptualize a Tucker Act takings action as a *Bivens* action, it's not

of *Bivens*. So for example, it is irrelevant that the Court has instructed that "a court may not fashion a *Bivens* remedy if Congress already has provided, or has authorized the Executive to provide, an alternative remedial structure." *Id.* at 493, 142 S.Ct. 1793 (internal quotation marks and citation omitted).

[80] The Takings Clause's independence from *Bivens* makes sense. "The cause of action for takings claims predated *Bivens* by over a hundred years .... It therefore cannot be dismissed as 'judicial genesis' of the same sort that begat *Bivens*." *DeVillier*, 63 F.4th at 440 (Oldham, J., dissenting from denial of rehearing en banc); *see also O'Connor v. Eubanks*, 83 F.4th 1018, 1029 (2023) (Thapar, J., concurring) ("Perhaps our circuit should also allow suits against officials directly under the Takings Clause. There's some historical support for this approach .... The right to just compensation shouldn't depend on any statute—the Constitution requires it."). We "create" nothing by recognizing it. *See Egbert*, 596 U.S. at 490, 142 S.Ct. 1793 (describing *Bivens* as "creat[ing] a cause of action" (internal quotation marks and citation omitted)). We instead have read text that mandates monetary damages and reviewed a history supporting a guaranteed right to sue. And because the Court has already recognized a direct cause of action against federal officials inherent in the Takings Clause, its own precedents suggest it must extend that protection against state and local governments. *Cf. Timbs v. Indiana*, 586 U.S. 146, 154, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019) ("[W]hen a Bill of Rights protection is incorporated, the protection applies identically to both the Federal Government and the States." (internal quotation marks and citation omitted)).

We further recognize the limited practical effect of our decision today. Litigants are still likely to proceed under § 1983 where it is available because it authorizes consequential damages and attorney's fees. *See City of Monterey*, 526 U.S. at 749 n.10, 119 S.Ct. 1624 (Souter, J., concurring in part & dissenting in part) ("Respondents in this [§ 1983] case sought damages for the fair market value of the property, interim damages for a temporary taking, holding costs, interest, attorney's fees, costs, and other consequential damages."); 42 U.S.C. § 1988(b) (authorizing the award of attorney's fees in § 1983 suits). Only plaintiffs who don't already have a recognized cause of action are likely to sue directly under the Takings Clause without access to these additional damages.

Still, the Founders included the "just compensation" remedy as one of only two remedies the Constitution expressly identifies. And they meant for those remedies to be meaningful and accessible—regardless of legislative action or inaction. So today we pay heed to the text, structure, and history of the Fifth and Fourteenth Amendments and of the Constitution more broadly and recognize a direct cause of action under the Takings Clause.

clear what relevance the *Bivens* framework has for recognizing a constitutional cause of action against a local government. Every *Bivens* case the Court has considered has been against the federal government. *See Egbert*, 596 U.S. at 486, 490–91, 142 S.Ct. 1793 (collecting cases). The rights implicated are directly in the Founding's Bill of Rights, not incorporated through the Fourteenth Amendment birthed during a separate historical period. *See id.* These differences may alter the appropriate test to assess claims raised against local governments. And in any case, as we've explained, Congress cannot narrow the scope of the expressly guaranteed "just compensation" remedy through legislation.

IV. CONCLUSION

Fulton is not trying to receive relief from a past injury. He alleges that Fulton County, to this day, is violating his constitutional rights. That's because, under his allegations, the County took his property and ever since has had an active obligation under the Fifth Amendment to pay him "just compensation." We don't think the Constitution's promise of "just compensation" is an empty promise. It doesn't taunt the American public like the Greek gods did Tantalus. So Fulton can bring an action directly under the Takings Clause. And because he may do so, amendment of his complaint is not futile. For these reasons, we vacate the district court's order and remand for further proceedings consistent with this opinion.

VACATED and REMANDED.

William Pryor, Chief Judge, dissenting:

In the more than 230 years since the Bill of Rights was ratified, neither the Supreme Court nor this Court nor our predecessor circuit has ever held that the Takings Clause of the Fifth Amendment creates an implied right of action for damages against a government—federal, state, or local—and for good reason. The text and history of the Clause, the structure of the Constitution, and Supreme Court precedent make clear that we should not imply a right of action. But the majority ignores that history, usurps the role of Congress, and invents a right of action directly under the Constitution against a county even though property owners today have more ways to vindicate their constitutional right to just compensation than ever before. These ample alternatives undermine any need to imply a constitutional right of action, yet the majority "overhaul[s] constitutional doctrine" by ignoring them. Ann Wool-handler, Julia D. Mahoney & Michael G. Collins, *Takings and Implied Causes of Action*, 2023–2024 CATO SUP. CT. REV. 249, 250 (2024). I would instead follow the Supreme Court's lead in *Knick v. Township of Scott*, 588 U.S. 180, 139 S. Ct. 2162, 204 L.Ed.2d 558 (2019), and *DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938, 218 L.Ed.2d 268 (2024), and hold that the statutory action for federal civil-rights violations, 42 U.S.C. § 1983, and state law provide adequate remedies for takings by local governments. Because Fulton failed to pursue his many federal and state remedies against proper parties in a timely manner and because we have no business creating a constitutional remedy for him, I respectfully dissent.

I. BACKGROUND

Although the majority describes the basic facts of this appeal well enough, it fails to explain the many paths Brandon Fulton *did not* take to vindicate his takings claim. Instead, it assumes that because "Fulton seeks a plan B" to vindicate his constitutional right to just compensation, we must create one for him. Majority Op. at 1232. But, as the history of this litigation and the litany of remedies available establish, the many alternative paths that Fulton could have taken obviate any need to create a new remedy for him.

Fulton County Animal Services officers arrested Fulton for felony cruelty to animals and seized seven of his horses on April 22, 2017. On April 5, 2018, Georgia dismissed the felony charges against Fulton, but County officers did not return his horses or their equivalent value. Fulton then waited over two years to bring claims under section 1983 against the Fulton County Board of Commissioners; Paul L.

Howard, Jr., the former District Attorney for Fulton County; and Rebecca Guinn, the CEO of Lifeline Animal Project, Inc., the "managing organization" of Fulton County Animal Services. 42 U.S.C. § 1983. Fulton then voluntarily dismissed his claim against Guinn under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). That voluntary dismissal was Fulton's first waiver of a potential remedy. The district court also dismissed the claim against Howard.

The Board also moved to dismiss Fulton's complaint on the grounds that it was untimely, that the Board was not an entity capable of being sued, and that Fulton had failed to allege municipal liability. Fulton responded by moving to amend his complaint by swapping the Board for Fulton County. He also sought leave to add an alternative claim against the County for an uncompensated taking based on the Fifth Amendment. The district court granted the Board's motion to dismiss and denied Fulton's motion to amend as futile. The district court reasoned that both a claim against the County under section 1983 and a direct claim under the Takings Clause would fail because Fulton pleaded no "official policy or practice," *see Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), so neither amendment would save Fulton's complaint. And the original section 1983 claim against the Board failed for the same "municipal liability deficiencies."

Fulton appeals *only* the denial of his motion for leave to amend. He concedes that the district court "was right that *Monell* ... bars [his] Takings Clause claim raised through [section] 1983 against Fulton County." So Fulton admits that he cannot allege that a policy or custom of the County caused his deprivation. That concession bars our review of the dismissal of his section 1983 claim against the County—Fulton's second road-not-taken to remedy his alleged taking. Yet the majority permits Fulton to sue the County directly under the Takings Clause without having to prove that any County policy or custom caused his alleged deprivation.

Fulton also could have availed himself of several other remedies. Under section 1983, he could have sued the officers and any other persons acting under color of law who seized his horses. *See Hudson v. Palmer*, 468 U.S. 517, 537–39, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984) (O'Connor, J., concurring) (explaining that although "the Fourth Amendment does not protect a prisoner against indefinite dispossession[,] ... [t]he Due Process and Takings Clauses of the Fifth and Fourteenth Amendments stand directly in opposition to state action intended to deprive people of their legally protected property interests"). Under Georgia law, Fulton also could have sued those individuals for conversion to obtain damages and detinue or replevin to obtain possession of his horses. *See* GA. CODE ANN. § 51-10-1; *Mims v. Exclusive Ass'n Mgmt., Inc.*, 372 Ga.App. 777, 906 S.E.2d 799, 802 (2024) (explaining that the statute "embodies the common law action of trover and conversion"); *Decatur Auto Ctr. v. Wachovia Bank, N.A.*, 276 Ga. 817, 583 S.E.2d 6, 7 (2003) ("Conversion consists of an unauthorized assumption and exercise of the right of ownership over personal property belonging to another ... [or] an act of dominion over the personal property of another inconsistent with his rights." (citation and internal quotation marks omitted)); *Md. Cas. Ins. Co. v. Welchel*, 257 Ga. 259, 356 S.E.2d 877, 879 (1987) ("Trover in Georgia embraces the common-law actions of trover, detinue, and replevin.... [R]eplevin was an action to recover specific chattels unlawfully taken

and wrongfully withheld; while the action of detinue was allowable to recover specific chattels wrongfully retained, though lawfully acquired." (alteration adopted) (citation and internal quotation marks omitted)); *Fla. State Hosp. for the Insane v. Durham Iron Co.*, 194 Ga. 350, 21 S.E.2d 216, 218 (1942) (stating that individual-capacity tort suits are "generally maintainable" under Georgia law, including suits "to recover property wrongfully withheld from the true owner, or to recover damages . . . in tort for an injury to person or property"). And under Georgia law, he could have sued the County for inverse condemnation. *See Bowers v. Fulton County*, 221 Ga. 731, 146 S.E.2d 884, 889–90 (1966) (concluding that the Georgia Constitution forbids the uncompensated "taking or damaging . . . of any species of property," including "things real and personal owned"); *Duffield v. DeKalb County*, 242 Ga. 432, 249 S.E.2d 235, 237 (1978) ("[A] county is liable for inverse condemnation of property under [the Georgia] Constitution."); *see also Pribeagu v. Gwinnett County*, 336 Ga.App. 753, 785 S.E.2d 567, 570–71 (2016) (holding that an inverse-condemnation action for damage to personal property was cognizable).

The majority's assertion that "Congress has not provided [Fulton] with a cause of action to secure 'just compensation' in federal court" is absurd. Majority Op. at 1232. Fulton had access to both federal and state courts to seek just compensation and more. An action under section 1983 can be filed in either federal or state court, and the district court would have supplemental jurisdiction over any claim under state law that forms part of the "same case or controversy." 28 U.S.C. § 1367(a). Had he succeeded in securing relief under section 1983, Fulton also could have recovered attorney's fees. *See* 42 U.S.C. § 1988(b). Whether any of Fulton's hypothetical claims might have succeeded is beyond the scope of this appeal. For example, we have no occasion to consider whether a claim against an individual officer could overcome official or qualified immunity. *See Griffith v. Robinson*, 366 Ga.App. 869, 884 S.E.2d 532, 534–35 (2023) (discussing state official immunity); *Lee v. Ferraro*, 284 F.3d 1188, 1193–94 (11th Cir. 2002) (discussing qualified immunity). But one thing is clear: Fulton had *many* remedies, federal and state, to vindicate his takings claim.

II. DISCUSSION

To explain the majority's errors, I divide my discussion in three parts. First, I explain why neither the text nor structure of the Constitution supports the creation of an implied right of action under the Takings Clause. Second, I explain how our constitutional history also leads to that conclusion. Third, I explain that section 1983 and Georgia law provide Fulton adequate remedies that counsel against our creation of an implied right of action.

A. Neither the Constitutional Text nor Structure Supports Creating an Implied Right of Action under the Takings Clause.

The text of the Takings Clause provides in its entirety, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. "[T]his provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). If a government "pa[ys] for the property . . . no constitutional injury" will arise "from the taking alone." *City of Mon-*

terey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 710, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999). In other words, the text of the Takings Clause imposes an *obligation* on the government to provide payment for any property it takes. The enforcement of that obligation is another matter.

To be sure, "in the event of a taking, the compensation remedy is required by the Constitution." *First English*, 482 U.S. at 316, 107 S.Ct. 2378. But as the Supreme Court acknowledged in *Maine Community Health Options v. United States*, the text of the Takings Clause does not provide an express cause of action to vindicate that right. 590 U.S. 296, 140 S. Ct. 1308, 1328 n.12, 206 L.Ed.2d 764 (2020). So "any cause of action in the Takings Clause ... if it exists, is implied." *DeVillier v. Texas*, 63 F.4th 416, 420 (5th Cir. 2023) (Higginson, J., concurring in the denial of rehearing en banc). The Supreme Court has explained that "just compensation is, like ordinary money damages, a compensatory remedy ... traditionally associated with legal relief." *Del Monte Dunes*, 526 U.S. at 710–11, 119 S.Ct. 1624 (citation and internal quotation marks omitted). But *recognition* of a compensatory remedy does not necessarily mean that the Constitution directly *supplies* a cause of action to pursue the remedy. *Cf.* Jud Campbell, *Determining Rights*, 138 HARV. L. REV. 921, 923, 981 (2025) (explaining that "some rights were determined ... by common law" and "enumerating rights in constitutional text did not automatically transform them into determinate legal objects"). Even where the Constitution enumerates "legally determinate rights"—rights whose contours were well-defined when they were enumerated—it enshrined and clarified "the content of *existing* rights" and "rarely *created* rights out of whole cloth." *Id.* at 944, 974 n.370 (emphasis added); *cf.* William Baude, Jud Campbell & Stephen E. Sachs, *General Law and the Fourteenth Amendment*, 76 STAN. L. REV. 1185, 1191 (2024) (making a similar argument that Section One of the Fourteenth Amendment "*secured* but did not *confer*" rights).

"Constitutional rights do not typically come with a built-in cause of action to allow for private enforcement in courts." *DeVillier*, 144 S. Ct. at 943 (citing *Egbert v. Boule*, 596 U.S. 482, 142 S. Ct. 1793, 1802–03, 213 L.Ed.2d 54 (2022)). Instead, rights-holders rely on common-law remedies and statutory causes of action to supply the procedural vehicles to enforce their rights. *See, e.g.*, *Del Monte Dunes*, 526 U.S. at 710, 119 S.Ct. 1624 (explaining that "in a strict sense" the section 1983 suit was not a suit for "just compensation *per se* but rather damages for the unconstitutional denial of such compensation"); *First English*, 482 U.S. at 308, 107 S.Ct. 2378 (explaining that plaintiffs sued under a California statute and in inverse condemnation and tort). That the Takings Clause guarantees a substantive right to monetary compensation does not mean that it also creates a procedural vehicle to vindicate that right. *Cf. DeVillier*, 144 S. Ct. at 943 ("Texas does not dispute the nature of the substantive right to just compensation[,] ... only ... the procedural vehicle by which a property owner may seek to vindicate that right."); *Alexander v. Sandoval*, 532 U.S. 275, 290, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("[S]ome remedial schemes foreclose a private cause of action to enforce even those statutes that admittedly create *substantive* private rights." (emphasis added)).

"[I]n all but the most unusual circumstances, prescribing a cause of action is a job for Congress, not the courts." *Egbert*,

142 S. Ct. at 1800. The Supreme Court, in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, "held that it had authority to create 'a cause of action under the Fourth Amendment.' " *Id.* at 1802 (quoting 403 U.S. 388, 397, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)). But since then, the judicial creativity used to imply causes of action has fallen out of favor. *See id.*; *Hernandez v. Mesa*, 589 U.S. 93, 140 S. Ct. 735, 742–43, 206 L.Ed.2d 29 (2020). Today, "[i]n both statutory and constitutional cases, our watchword is caution." *Hernandez*, 140 S. Ct. at 742. The Court has explained that it has "come 'to appreciate more fully the tension between' judicially created causes of action and 'the Constitution's separation of legislative and judicial power.' " *Egbert*, 142 S. Ct. at 1802 (quoting *Hernandez*, 140 S. Ct. at 741–42). As a result, it has declared that "creating a cause of action is a legislative endeavor." *Id.* And we have gotten the message, *Johnson v. Terry*, 119 F.4th 840, 847–52 (11th Cir. 2024) (describing precedents "drastically restrict[ing]" *Bivens*'s "reach")—until today.

The majority contends that the *Bivens* precedents do not bear on the question before us because the Takings Clause is somehow different from other provisions of the Bill of Rights. Majority Op. at 1263–64. But the admonition to adhere closely to the text of the Constitution in respect of the separation of powers should give us pause before we construe the Fifth Amendment to create an implied right of action. A constitutional reference to a remedy, without more, does not mean that the Constitution creates a right of action for that remedy.

Keep in mind too that the short-lived experiment of *Bivens* remedies—which the Supreme Court later came to regret, *see Hernandez*, 140 S. Ct. at 742–43 ("[I]f the Court's three *Bivens* cases had been decided today, it is doubtful that we would have reached the same result." (alterations adopted) (citation and internal quotation marks omitted)); *Goldey v. Fields*, 606 U.S. 942, 145 S.Ct. 2613, 222 L.Ed.2d 1006 (2025) ("For the past 45 years, this Court has consistently declined to extend *Bivens* to new contexts. We do the same here." (citation omitted))—involved civil-rights violations committed by federal, *not* state, officers. *See* 403 U.S. at 395, 91 S.Ct. 1999. The *Bivens* Court created a damages remedy for federal violations because Congress had not done so. *Id.* at 397, 91 S.Ct. 1999. In his dissenting opinion, Justice Black argued that the power to create that remedy belonged to Congress, not the Court, *id.* at 427–28, 91 S.Ct. 1999 (Black, J., dissenting), and that section 1983 could serve as "a model" for future legislation should Congress choose to exercise its power, *id.* at 429, 91 S.Ct. 1999. Yet, the majority here invents a remedy, under the Fifth Amendment, against a local government even though Congress created a remedy, under section 1983, more than 150 years ago, that remains available to property owners today.

Contrary to the majority's confusion, Majority Op. at 1239–40, Supreme Court precedents that describe the Takings Clause as "self-executing" do not suggest that the Clause creates an implied right of action. In *Jacobs v. United States*, for example, the Supreme Court explained that a suit for just compensation under the Tucker Act vindicates a "right to recover ... guaranteed by the Constitution." 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142 (1933). *Jacobs* considered whether suits under the Tucker Act for just compensation proceeded under a theory of implied contract—where interest would not be allowed—or

"rested upon the Fifth Amendment"—where interest would be. *Id.* Because the Tucker Act suits "were based on the right to recover just compensation for property taken by the United States for public use," it did not matter that the United States had not initiated condemnation proceedings in which the plaintiff challenged the taking. *Id.* "The form of the remedy did not qualify the right." *Id.* The United States had to pay for the taking, including interest, even without an *additional* promise to pay. *Id.* So the Court held that the Fifth Amendment required no further action to impose an obligation on the government. *Id.* The Takings Clause imposed a "self-executing" obligation. *See Self-Executing*, BLACK'S LAW DICTIONARY (12th ed. 2024). Yet the Tucker Act waived sovereign immunity and gave federal courts jurisdiction over an action to enforce that obligation, so the Act, not the Fifth Amendment, supplied the procedural vehicle to enforce the self-executing constitutional right. *Jacobs*, 290 U.S. at 15, 54 S.Ct. 26 (stating that petitioners sued "under the Tucker Act").

In *First English*, the Supreme Court held that a property owner in a *state* judicial proceeding was entitled to pursue compensation for an alleged "temporary" regulatory taking. 482 U.S. at 308, 310, 107 S.Ct. 2378 (internal quotation marks omitted). The Court held that, due to the "self-executing character" of the Takings Clause, the property owner was entitled to seek compensation even if the property was no longer burdened by the regulation. *Id.* at 315–19, 322, 107 S.Ct. 2378 (citation and internal quotation marks omitted). Compensation was owed when the property was taken. *Id.* at 319, 321, 107 S.Ct. 2378. And invalidating the regulation would not provide compensation for any interim violation. *Id.* at 321, 107 S.Ct. 2378. But the Court did *not* hold or even hint that the property owner had an implied right of action under the Takings Clause for any temporary taking. The property owner instead proceeded by inverse condemnation under California law and sought relief in tort and under a provision of the California Code. *Id.* at 308, 107 S.Ct. 2378.

In *Knick*, a property owner sued a municipality for violating the Takings Clause. 139 S. Ct. at 2168. The Court described how section 1983 also allows property owners to enforce the "self-executing" Takings Clause against state officials in federal court: "[a] property owner has an actionable Fifth Amendment takings claim when the government takes his property without paying for it." *Id.* at 2167. When the taking occurs, the owner's constitutional right has been violated, and he may use whatever cause of action Congress has provided to vindicate that right. *See id.* at 2168 ("[W]hen the government takes his property without just compensation, [the plaintiff] may bring his claim in federal court under [section] 1983 at that time."). The Court explained that "the existence of the Fifth Amendment right ... allows the owner to proceed directly to federal court under [section] 1983." *Id.* at 2171. *Knick* held that "because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action. Takings claims against local governments should be handled the same as other claims under the Bill of Rights." *Id.* at 2177. But the Court again did not hold or even suggest that the Constitution creates an implied right of action.

None of these decisions held that the "self-executing character" of the Takings Clause creates a right of action. Instead, each precedent makes clear that "self-exe-

cuting" means only that violations of the Takings Clause occur as soon as the government fails to comply with its obligation of just compensation and that just compensation is the remedy, regardless of the method of its vindication. And the precedents contemplate three procedural vehicles through which a property owner can vindicate his right to compensation: the Tucker Act, state-law actions, and section 1983.

Indeed, the Supreme Court recently clarified in *DeVillier* that repeated acknowledgments of the Takings Clause's "self-executing character . . . do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause." 144 S. Ct. at 943–44 (citation and internal quotation marks omitted). The Court acknowledged "[i]nstead, constitutional rights are generally invoked defensively in cases arising under other sources of law, or asserted offensively pursuant to an independent cause of action designed for that purpose, see, *e.g.*, 42 U.S.C. § 1983." *Id.* at 943. That is, the constitutional right is self-executing even if the method for remedying its violation is not.

The majority frames the Takings Clause as "a constitutional unicorn," unique in its "damages-type remedy" and " 'self-executing' " nature. Majority Op. at 1240–41. But there is scarce evidence that a "constitutional unicorn" exists. And it would be odd for us to construe the Takings Clause as so different from its sister provisions as to provide an implied right of action. This unicorn, like others, is a myth.

Notwithstanding the majority's suggestion to the contrary, *see* Majority Op. at 1231–32, 1240–42, even the Suspension Clause, the only other explicit reference to a remedy in the Constitution, *see* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 330 (7th ed. 2015), does not *create* a right of action. Instead, it secures the preexisting writ of *habeas corpus*—a creature of common law that predates and exists independent of the Constitution, *see id.* at 1193 & n.1 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *129–32); *see also Boumediene v. Bush*, 553 U.S. 723, 739–42, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (explaining that the writ developed in English common-law courts before Parliament passed the Habeas Corpus Act of 1679 to "establish[ ] procedures for issuing the writ")—from legislative suspension, *Boumediene*, 553 U.S. at 745, 128 S.Ct. 2229. But it does not extend the writ "beyond its scope 'when the Constitution was drafted and ratified.' " *Jones v. Hendrix*, 599 U.S. 465, 143 S. Ct. 1857, 1871, 216 L.Ed.2d 471 (2023) (quoting *Dep't of Homeland Sec. v. Thuraissigiam*, 591 U.S. 103, 140 S. Ct. 1959, 1963, 207 L.Ed.2d 427 (2020)). Because the Founding generation understood that the Constitution did *not* create that remedy for unlawful detention, the First Congress promptly granted federal courts the power to issue writs of habeas corpus in section 14 of the Judiciary Act of 1789. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81–82. Although this grant of jurisdiction *also* did not create the writ of *habeas corpus* (it already existed), that Congress empowered inferior federal courts to grant the writ underscores that it did not understand the Constitution to create a new remedy.

The Takings Clause is similar. The Clause conditions the taking of property on compensation for it. It does not *create* a right to sue. Instead, it guarantees the substantive right of compensation that is enforced in a separate form of action, like inverse condemnation, ejectment, or tres-

pass: *if* the government takes property, it *will* provide just compensation, and should it fail to do so, the property owner may use existing forms of action to recover his property or its value. *See* Campbell, *Determining Rights*, *supra*, at 943–44 (explaining that even "[s]pecificatory enumerations" of rights "usually clarified the content of *existing* rights that were otherwise grounded in natural law or custom").

Construing the Takings Clause to create an implied right of action would offend the structural premise of sovereign immunity. The Framers understood that the very "nature of sovereignty" meant that the United States, though bound by the Constitution, would "not ... be amenable to the suit of an individual *without its consent*." THE FEDERALIST No. 81, at 486 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *accord* FALLON ET AL., HART AND WECHSLER, *supra*, at 877–78; *see also United States v. Bormes*, 568 U.S. 6, 9–10, 133 S.Ct. 12, 184 L.Ed.2d 317 (2012) ("Sovereign immunity shields the United States from suit absent a consent to be sued that is unequivocally expressed." (citation and internal quotation marks omitted)). Throughout the nineteenth century, this understanding required the pursuit of takings claims through officer suits, tort actions, and private bills. *See, e.g.*, *United States v. Lee*, 106 U.S. 196, 206–08, 219–23, 1 S.Ct. 240, 27 L.Ed. 171 (1882) (holding that although the United States could not be sued, the property owners could sue for ejectment of federal officers). True, a cause of action might exist even if barred by sovereign immunity, *see Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 692–93, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949), but a cause of action *provided by the Constitution* would be ineffectual without a waiver of that bar by Congress. And it would be odd for us to conclude that the Constitution created an ineffective right of action. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 4, at 63 (2012) ("The presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered.")

Congress did not generally provide for claims against the federal government based on the Constitution until it passed the Tucker Act in 1887. FALLON ET AL., HART AND WECHSLER, *supra*, at 897–98; *see also Bormes*, 568 U.S. at 12, 133 S.Ct. 12 (citing Act of Mar. 3, 1887, ch. 359, 24 Stat. 505 (codified as amended at 28 U.S.C. § 1491(a)(1))). That Act primarily waived sovereign immunity and vested jurisdiction in the Court of Claims over "any claim against the United States founded ... upon the Constitution ... or upon any express or implied contract with the United States ... or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). The Tucker Act was construed to allow claims under any constitutional provision that "c[ould] fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967); *see also United States v. Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 47 L.Ed.2d 114 (1976) (adopting that test); *Me. Cmty.*, 140 S. Ct. at 1328 (same). But the Tucker Act does not supply any substantive right; it relies on other provisions imposing duties and obligations on the federal government (like the Takings Clause) to provide the right that can then be enforced under the Act. *See United States v. Navajo Nation*, 556 U.S. 287, 290, 129 S.Ct. 1547, 173 L.Ed.2d 429 (2009).

"[T]here cannot be a right to money damages without a waiver of sovereign

immunity, and ... [not] all substantive rights of necessity create a waiver of sovereign immunity such that money damages are available to redress their violation." *Testan*, 424 U.S. at 400–01, 96 S.Ct. 948. The Takings Clause provides a substantive right to compensation, but there was not a *judicially enforceable* right to money damages against the United States until the Tucker Act waived sovereign immunity for those claims. *Cf. Me. Cmty.*, 140 S. Ct. at 1328 n.12 (noting that "Congress enacted the Tucker Act to 'supply the missing ingredient for an action against the United States for the breach of monetary obligations not otherwise judicially enforceable' " (alteration adopted) (quoting *Bormes*, 568 U.S. at 12, 133 S.Ct. 12)).

Nor does the acknowledgment that the Takings Clause provides a basis for a damages remedy for an uncompensated taking, *see First English*, 482 U.S. at 316 n.9, 107 S.Ct. 2378, undermine the presumption of sovereign immunity. *First English*—like the authorities it cited—did not rely on that basis to serve as the cause of action. *Id.* at 308, 316, 322, 107 S.Ct. 2378 (concluding that the Takings Clause serves as the basis for awarding damages under state causes of action and determines the scope of those damages); *see also Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 3–7, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984) (statutory condemnation proceeding); *United States v. Causby*, 328 U.S. 256, 267, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946) (relying on the Tucker Act); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 302 & n.2, 43 S.Ct. 354, 67 L.Ed. 664 (1923) (statutory right of action under the Lever Act, ch. 53, § 10, 40 Stat. 276, 279, waiving sovereign immunity); *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 312–14, 324, 13 S.Ct. 622, 37 L.Ed. 463 (1893) (noting appeal from condemnation proceeding). Judicial remedies for takings require a separate right of action, either against an officer or against the government itself based on a clear waiver of sovereign immunity, to proceed in federal court. *See, e.g.*, *Lee*, 106 U.S. at 219–23, 1 S.Ct. 240 (permitting ejectment suit against federal officers); *see also Larson*, 337 U.S. at 696–97, 69 S.Ct. 1457 (explaining that *Lee*'s "constitutional exception to the doctrine of sovereign immunity" involved a suit "against federal officers" based on the theory that their "possession of the land was illegal," so "a suit against them was not a suit against the sovereign"); *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 141 S. Ct. 2244, 2254–55, 2258–59, 210 L.Ed.2d 624 (2021) (holding that states consented to eminent domain actions *by the federal government* or those with delegated federal power "in the plan of the Convention").

Moreover, even if the Takings Clause *had* waived sovereign immunity for suits against the federal government, it did *not* abrogate *state* sovereign immunity. *See Ladd v. Marchbanks*, 971 F.3d 574, 578–80 (6th Cir. 2020) (holding that there was no Eleventh Amendment immunity waiver for a direct Fifth Amendment takings claim or a section 1983 takings claim); *see also Robinson v. Ga. Dep't of Transp.*, 966 F.2d 637, 640 (11th Cir. 1992) (holding that there was no waiver in section 1983 takings suit); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) (same); *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019) (similar, but not specifying cause of action). A direct action against a state government under the Fifth and Fourteenth Amendments would be barred by the Eleventh Amendment. And the Supreme Court in *DeVillier* embraced the sufficiency of state-law remedies for tak-

ings claims against states, *instead of* implying a federal right of action that would silently abrogate state immunity. 144 S. Ct. at 944.

From this textual and structural analysis, we should draw two lessons. First, any direct right of action under the Takings Clause must be implied, not express. Second, the Constitution generally creates no right of action and contemplates structural barriers to suits against the government, which counsel against implying a right of action for takings. In the words of Chief Justice Marshall, "we must never forget, that it is *a constitution* we are expounding." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 4 L.Ed. 579 (1819). There is no textual or structural reason to think that *we* should create an implied right of action for takings of property.

B. The History of the Takings Clause Also Establishes that It Does Not Create an Implied Right of Action.

The majority focuses on colonial and revolutionary rationales for including the Takings Clause in the Bill of Rights. But even accepting the majority's account of that pre-constitutional history, it fails to answer the question before us. For example, the majority points to statements from John Jay and James Madison suggesting that takings claims should be judicially enforceable. *See* Majority Op. at 1244–45, 1247–48. But supporting judicial enforceability does not necessarily mean endorsing a *direct* right of action under the Constitution. Nor does it mean that the Founding generation understood the Constitution to create a direct right of action. To the contrary, our constitutional history establishes that takings claims depend on external remedies, such as congressional resolution of private claims against the government and common-law forms of actions to recover taken property. And later changes—like the ratification of the Fourteenth Amendment—did not alter this structure.

In the early days of the republic, "Congress retained sole responsibility for paying takings claims against the federal government." William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 794 n.69 (1995). In doing so, Congress did not sit as a pseudo-judicial tribunal but instead considered private bills as part of its "power over the purse." Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 627–28, 637 (1985) (first discussing the roots of legislative resolutions for claims against the government in English parliamentary practice, then explaining how Congress maintained that power after the Constitution was adopted). *But see* Majority Op. at 1246 (describing Congress as "the lawful judicial tribunal to hear damages actions stemming directly under the Clause"). Private bills reflected the early republic's solution to the fundamental tension between an "individual's interest in receiving fair consideration and prompt payment of a meritorious claim" and "society's interest in maintaining democratic control over the allocation of limited public revenue among competing public needs." Shimomura, *supra*, at 626. So as part of its appropriations power, Congress meted out compensation for takings claims on an individual basis. *See* 2 WILSON COWEN, PHILIP NICHOLS, JR. & MARION T. BENNETT, THE UNITED STATES COURT OF CLAIMS: A HISTORY 5 (1978).

When Congress delegated its authority over these claims, it did so to executive

and legislative bodies—*not* courts. For example, shortly after the Constitution was ratified, Congress empowered "the auditors and the Comptroller within the newly established Treasury Department" to review claims against the United States. Shimomura, *supra*, at 637 (citing 2 COWEN, NICHOLS & BENNETT, *supra*, at 4). But Congress retained control over the resolution of those claims through appeals from the Comptroller's decisions and "by simply refusing to appropriate the necessary funds" to satisfy a claim. *Id.* Congress expressly rejected judicial review of the Comptroller's decisions. *See* William M. Wiecek, *The Origin of the United States Court of Claims*, 20 ADMIN. L. REV. 387, 390 (1968) (noting that James Madison's proposal that "appeals from the Comptroller's decisions be allowed to the United States Supreme Court ... was not adopted"). Indeed, "when Congress enacted the Judiciary Act of 1789 and extended federal court jurisdiction over the federal government," it provided jurisdiction over "only those situations where 'the United States are plaintiffs ... or petitioners.' " Shimomura, *supra*, at 638 (quoting Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78).

In addition to its delegations to the Treasury, Congress continued to process private bills. The First Congress entertained more than 700 private and public petitions. *Id.* And, in 1794, Congress further entrenched its jurisdiction over claims against the federal government. The House established a Committee of Claims, which "had jurisdiction over all money claims against the United States" and would "report their opinion thereupon" to the House. *Id.* at 644 (citation and internal quotation marks omitted). "By 1832, half of Congress'[s] time was consumed with ... private business—Fridays and Saturdays being fully set aside for such purposes." *Id.* (citing 8 MEMOIRS OF JOHN QUINCY ADAMS 479 (Phila., Charles Francis Adams ed., 1876)). And the Supreme Court acquiesced to Congress's authority over claims against the federal government as "[t]he universally received opinion [was], that no suit can be commenced or prosecuted against the United States." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12, 5 L.Ed. 257 (1821). The Court explained that "without ... an appropriation" from Congress, "no ... remedy lies against any officer of the Treasury Department" for "claim[s] on the United States." *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291, 13 L.Ed. 693 (1851) (affirming the denial of a writ of mandamus).

This early commitment to congressional resolution of takings claims establishes that neither Congress nor the federal courts recognized a right of action directly under the Takings Clause. Reliance on private bills continued at least until Congress created the Court of Claims and later vested it with final jurisdiction over most claims against the United States in the Tucker Act. Shimomura, *supra*, at 652, 663–64. The upshot of this history is that although Congress may have been constitutionally compelled to pay just compensation in a way that it was not compelled to pay discretionary claims, *see* Treanor, *supra*, at 794 n.69, the appropriation of those funds lay with *Congress*, not the courts, *see* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law ...."); *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 424, 110 S.Ct. 2465, 110 L.Ed.2d 387 (1990) ("For ... a claim for money from the Federal Treasury, the [Appropriations] Clause provides an explicit rule of decision. Money may be paid out only ... [as] authorized by a statute."); *Consumer Fin. Prot. Bureau v.*

Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 144 S. Ct. 1474, 1484, 218 L.Ed.2d 455 (2024) ("By the time of the Constitutional Convention, the principle of legislative supremacy over fiscal matters engendered little debate and created no disagreement.").

Tellingly, the majority points to *no* decision from the early republic that permitted a suit at law against the government for compensation under the Takings Clause. *See Meigs v. McClung's Lessee*, 13 U.S. (9 Cranch) 11, 16, 3 L.Ed. 639 (1815) (ejectment action); *Lee*, 106 U.S. at 198, 1 S.Ct. 240 (ejectment action); *Bonaparte v. Camden & A.R. Co.*, 3 F. Cas. 821, 831, 834 (C.C.D.N.J. 1830) (No. 1,617) (bill in equity); *see also Gardner v. Trs. of the Vill. of Newburgh*, 2 Johns. Ch. 162, 166–68 (N.Y. Ch. 1816) (bill in equity); *Bradshaw v. Rodgers*, 20 Johns. 103, 105–06 (N.Y. Sup. Ct. 1822) (trespass); *Bos. & Roxbury Mill Corp. v. Gardner*, 19 Mass. (2 Pick.) 33, 40 (1823) (statutory cause of action under an act of incorporation); *Crenshaw v. Slate River Co.*, 27 Va. (6 Rand.) 245, 256 (1828) (opinion of Carr, J.) (bill in equity); *Proprietors of the Piscataqua Bridge v. N.H. Bridge*, 7 N.H. 35, 72 (1834) (bill in equity); *Thayer v. City of Boston*, 36 Mass. (16 Pick.) 511, 514 (1837) (nuisance); *L. C. & C. R.R. Co. v. Chappell*, 24 S.C.L. (Rice) 383, 384, 398 (1838) (eminent domain petition); *Sinnickson v. Johnson*, 17 N.J.L. 129, 129, 144 (1839) (trespass on the case); *State v. Hooker*, 17 Vt. 658, 672 (1845) (indictment for assault on sheriff, and stating that sheriffs acting unlawfully may be sued for taking property); *Young v. McKenzie*, 3 Ga. 31, 37 (1847) (bill in equity "to restrain . . . action of ejectment"); *Hall v. Washington County*, 2 Greene 473, 477 (Iowa 1850) (implied contract based on statute); *State v. Glen*, 52 N.C. (7 Jones) 321, 330 (1859) (defense to indictment).

Takings claims instead proceeded through common-law forms of action against the offending *officers*. The Supreme Court and inferior courts (and state courts) often used proceedings at "common law to provide redress for state and local takings." *See* Ann Woolhandler & Julia D. Mahoney, *Federal Courts and Takings Litigation*, 97 Notre Dame L. Rev. 679, 684 (2022). In these common-law actions, the property owner would sue the officer or government corporation in trespass or another common-law action. *See, e.g.*, *Thacher v. Dartmouth Bridge Co.*, 35 Mass. (18 Pick.) 501, 501–02 (1836); *see also Knick*, 139 S. Ct. at 2176. The official would respond that "his trespass was lawful because [it was] authorized by statute or ordinance." *Knick*, 139 S. Ct. at 2176. The property owner would in turn attack the constitutionality of that statute or ordinance under the Fifth Amendment. *See id.* Although property owners could bring "various causes of action" for takings violations, *DeVillier*, 63 F.4th at 435 (Oldham, J., dissenting from the denial of rehearing en banc), those causes of action were not created by the Takings Clause. *See, e.g.*, *Monongahela Navigation Co.*, 148 U.S. at 313–14, 324, 13 S.Ct. 622 (condemnation action initiated by United States); *Van-Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310, 316 (C.C.D. Pa. 1795) (claim to title under Pennsylvania law); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 127–28, 3 L.Ed. 162 (1810) (breach of covenant action); *Fair-fax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 603–04, 607–08, 3 L.Ed. 453 (1813) (ejectment action); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 45, 55, 3 L.Ed. 650 (1815) (quiet title action); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 3, 5 L.Ed. 547 (1823) (action "to recover certain lands"); *Bonaparte*, 3 F. Cas. at 831 (bill in equity). Common-law forms of

action provided the only ways for courts to redress takings.

That states added just compensation guarantees to their constitutions tells us nothing about the existence of a right of action under the federal Takings Clause. *But see* Majority Op. at 1248–51 (implying the opposite). Many jurists viewed state constitutional declarations of rights differently than federal declarations of the same rights. *See* Jud Campbell, *Constitutional Rights Before Realism*, 2020 U. ILL. L. REV. 1433, 1441–42 (explaining that "recognizing a *common set* of rights, applicable against the state and federal governments alike, did not necessarily mean that those rights had the same *legal* boundaries"). And the development of common-law remedies under state takings clauses did not alter the structure of the federal Takings Clause. Indeed, contrary to the majority's contention, where state takings clauses predated the ratification of the Fifth Amendment, state courts relied on statutory or common-law rights of action to judicially enforce the clauses. *See Bos. & Roxbury Mill Corp.*, 19 Mass. at 40–43, 43 n.2 (discussing a Massachusetts statute that provided a right of action to property owners damaged by the erection of bridges or dams, and explaining that if the government *had not* made such a provision, the state takings clause would permit suits in trespass against the agents perpetrating the taking); *Thayer*, 36 Mass. at 515–16 (embracing tort liability against city where the "act is done by the authority and order of the city government" or its branches); *Hooker*, 17 Vt. at 672–73 (observing that an officer acting unlawfully—such as in violation of the state takings clause—could be sued in trespass). *But see* Majority Op. at 1253–54 n.16 (citing the same decisions but concluding that the constitutions of Massachusetts and Vermont "automatically secured judicial relief for takings"). So the development of these takings remedies under state law reaffirmed that alternative remedial schemes—most often common-law forms of action—were the primary and often sole vehicle for vindicating takings claims at both the state and federal level.

Nor did the Fourteenth Amendment change the scope of the Takings Clause. *See Campbell*, supra, at 1448–50 (explaining the early view of the Fourteenth Amendment as "refer[ing] to" rights, not "creat[ing]" them (citation and internal quotation marks omitted)). Incorporation does not change the fundamental character of the protection extended; it takes prohibitions that operate against the federal government and applies parallel prohibitions against the states. *See McDonald v. City of Chicago*, 561 U.S. 742, 765, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (plurality opinion) (noting that "incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment *according to the same standards* that protect those personal rights against federal encroachment" (emphasis added) (citation and internal quotation marks omitted)). The Fourteenth Amendment did not change the structure of the Takings Clause or imbue it with a previously unknown right of action. And all the textual and structural limitations discussed above apply with equal force to claims against states as they would against the federal government.

The Fourteenth Amendment grants *Congress* the power to enforce its provisions through legislation. U.S. CONST. amend. XIV, § 5; *Katzenbach v. Morgan*, 384 U.S. 641, 648 & n.7, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In other words, the Fourteenth Amendment provides Congress the authority to decide whether to

abrogate state immunities and whether to provide a cause of action for constitutional violations and how to define its contours. A direct right of action against the states or local governments, under the Fifth and Fourteenth Amendments, would undermine this textual delegation. *Cf. Cale v. City of Covington*, 586 F.2d 311, 316–17 & n.8 (4th Cir. 1978) (suggesting that implying rights of action under the Fourteenth Amendment flouts Congress's power to create remedies). So although the majority is correct that private congressional bills would be "an ill fit" for takings by local governments, Majority Op. at 1254 n.17, the Fourteenth Amendment permits Congress to create statutory causes of action. And as I explain below, Congress did so when it enacted section 1983.

This constitutional history reveals *no* evidence that the Takings Clause impliedly provides a right of action for property owners. History instead establishes that property owners pursued their right to just compensation through alternative means: private bills, common-law forms of action, and suits in equity. And today property owners enjoy more remedies for takings than ever before.

C. Section 1983 and Georgia Law Provide Adequate Remedies for Takings.

Even if the text and history of the Takings Clause demanded judicial enforcement, an adequate alternative remedy would still obviate the need to imply a right of action. "[C]onstitutional concerns do not arise when property owners have other ways to seek just compensation." *DeVillier*, 144 S. Ct. at 944. Property owners like Fulton have many remedies for takings under both federal law, *see* 42 U.S.C. § 1983, and state law.

Section 1983 provides a right to sue state officers. *Id.* And in *Monell*, the Supreme Court held that "[l]ocal governing bodies . . . can be sued directly under [section] 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690, 98 S.Ct. 2018. It also held that this "official policy" rule could be satisfied if a plaintiff proved that a "governmental custom" resulted in the violation. *Id.* at 690–91, 98 S.Ct. 2018 (internal quotation marks omitted).

Monell's requirement of a "policy or custom" ensures that the local government, which acts through its officers, is responsible for the alleged violation before liability attaches. *See id.* at 663 n.7, 694, 98 S.Ct. 2018 (first clarifying that respondeat superior liability could not serve as the basis for holding local governments liable for employees' constitutional violations, then confirming that local governments may only be sued "when [the] execution of a government's policy or custom . . . inflicts the injury [such] that the government as an entity is responsible under [section] 1983"). A contrary holding would subject local treasuries to liability for every constitutional violation perpetrated by the police, sheriff's deputies, animal-control officers, parks-and-recreation employees, sanitation workers, clerks, or other officials. *See Owen v. City of Independence*, 445 U.S. 622, 657, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980) (concluding that *Monell* protects the public, as represented through a local government, from liability for actions not directly caused by its decisions, so local governments did not need the protection of qualified immunity). In other words, *Monell*'s "policy or custom" rule ensures that

the plaintiff sues the proper "offending party," not to circumscribe the underlying right. *Id.* at 651, 100 S.Ct. 1398.

Monell does not limit the constitutional right to just compensation. Indeed, section 1983 *expands* the scope of constitutional remedies against wrongdoers to include "[e]very person" acting "under color of " state law, including both officers and local governments. After *Monell*, there is no reason to imply a right of action against local governments under the Fourteenth Amendment. Thanks to Congress, that cause of action already exists under section 1983. *See Owen v. City of Independence*, 589 F.2d 335, 337 (8th Cir. 1978) ("By enacting section 1983, Congress has provided an appropriate and exclusive remedy for constitutional violations committed by municipalities."), *overruled on other grounds by* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673; *Turpin v. Mailet*, 591 F.2d 426, 427 (2d Cir. 1979) (en banc) ("[T]here is no place for a cause of action against a municipality directly under the 14th Amendment, because the plaintiff may proceed . . . under [section] 1983.").

We should respect *Monell*'s rejection of vicarious liability for local governments before fashioning a broader implied right of action for takings. Although the United States may sometimes be held liable for takings violations perpetrated by its officers acting in "the normal scope of [their] duties," *Darby Dev. Co. v. United States*, 112 F.4th 1017, 1024–27 (Fed. Cir. 2024) (discussing *Great Falls Mfg. Co. v. Garland*, 124 U.S. 581, 597, 8 S.Ct. 631, 31 L.Ed. 527 (1888), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 330, 43 S.Ct. 135, 67 L.Ed. 287 (1922)), local governments are liable only through state action under the Fourteenth Amendment. True, they are creatures of state law. Yet local governments are *separate* entities. That is, a local government is *not* a "state" within the meaning of the Amendment. Local governments are "persons" that act under color of state law, *cf. Will v. Mich. Dep't of State Police*, 491 U.S. 58, 62–64, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (holding that "a State is not a person within the meaning of [section] 1983"), and do not enjoy Eleventh Amendment immunity, *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994). The Amendment does not establish that local governments are vicariously liable for the actions of their employees. *See Kostka v. Hogg*, 560 F.2d 37, 44 (1st Cir. 1977). And it grants *Congress* the discretion to create remedial schemes for its enforcement, "rather than the judiciary." *Katzenbach*, 384 U.S. at 648 & n.7. The constitutional text supplies no reason to undermine the statutory rejection of vicarious liability by creating an end-run around Congress's chosen remedial scheme.

That section 1983 does not abrogate state sovereign immunity is also no bar to the conclusion that an alternative remedial scheme fully vindicates takings claims. Sovereign immunity would protect only the federal government and state governments from suit. *Cf. Owen*, 445 U.S. at 638, 100 S.Ct. 1398 ("[T]here is no tradition of immunity for municipal corporations."). The Tucker Act solves any problem posed by the former. And state law solves the latter.

Although we have no occasion to address the adequacy of other states' rights of action today, *but see* Majority Op. at 1259–60 (discussing whether a sufficient inverse-condemnation action lies for takings of personal property in Indiana, Pennsylvania, Oklahoma, New Hampshire, and Wisconsin), every state in the Union provides

a remedy under state law for uncompensated takings. *See Knick*, 139 S. Ct. at 2168 & n.1. In most, including Georgia, property owners may bring inverse-condemnation actions against the state. *See Bray v. Dep't of Transp.*, 324 Ga.App. 315, 750 S.E.2d 391, 393 (2013). And the two commonly cited exceptions, Ohio and Louisiana, also provide remedies. In Ohio, plaintiffs may petition by a writ of mandamus to compel a condemnation proceeding. *Knick*, 139 S. Ct. at 2168 n.1. In Louisiana, plaintiffs may bring an inverse-condemnation action and enforce a judgment in their favor through a writ of mandamus. *See Constance v. State Through Dep't of Transp. & Dev., Off. of Highways*, 626 So. 2d 1151, 1156 (La. 1993); *Watson Mem'l Spiritual Temple of Christ v. Korban*, 387 So. 3d 499, 512 (La. 2024). The key lesson from these alternative schemes and the history of takings litigation is that although American law has always provided *some* remedial scheme for takings claims—whether petitions to Congress for private bills, trespass and ejectment actions against individual federal officers, the Tucker Act and section 1983 actions, or state inverse condemnation—the Takings Clause has *never* been understood as creating an implied right of action.

That some property owners—like Fulton—might be barred from seeking compensation from a local government under section 1983 does not mean that they lack remedies. Fulton could have sued the officers who seized his horses either under section 1983 or under state law. Georgia law provides causes of action for both inverse condemnation against the government and conversion against an individual officer. *See Bray*, 750 S.E.2d at 393; *Decatur Auto Ctr.*, 583 S.E.2d at 7 (defining conversion); *Fla. State Hosp. for the Insane*, 21 S.E.2d at 218 (noting that individual-capacity tort suits against state officials are "generally maintainable" under Georgia law). If the officers responded that their seizure of Fulton's horses was lawful, Fulton could have replied that any authority to take the horses violated the Takings Clause—like centuries of takings litigants before him. Simply put, Fulton's takings claim is not unique, and we need not create an unprecedented constitutional remedy for him.

Nor do the procedural rules attendant to each of these alternative remedial schemes constitute "limits" on the scope of the Takings Clause. As renowned legal scholars James Ely and Julia Mahoney explain in their *amicus curiae* brief for the Buckeye Institute, "legislatures may regulate jurisdictional and procedural issues that govern how claimants seek and obtain" "redress for uncompensated takings." That property owners must choose from "a complex network of remedies" does not undermine legislative authority to define and shape those remedies. Woolhandler, Mahoney & Collins, *supra*, at 266.

For example, Georgia's one-year notice requirement for suits against counties does not "narrow" the right to just compensation. Under state law, "[a]ll claims against counties must be presented within 12 months after they accrue or become payable or the same are barred." GA. CODE ANN. § 36-11-1. But holding that this bar "narrow[s]" the scope of the underlying right upsets the role of procedural rules in our judicial system. *See* Majority Op. at 1260–61. Nothing would stop that logic from being applied to any statute of limitations, for example. If statutes of limitations and other procedural rules narrow constitutional rights, then none of those rules could ever apply to constitutional claims. *See Seaboard*, 261 U.S. at 304, 43 S.Ct. 354

(explaining that Congress cannot narrow a constitutional right). And if, as the majority contends, the narrowing problem only arises when states are the "exclusive" forum for a claim, then it should give us no pause here. Majority Op. at 1260 n.25 (emphasis omitted). Georgia is not the exclusive forum for Fulton's takings claim. He instead failed to sue the right parties at the right time to take advantage of his alternative federal forum.

After reaching the opposite conclusion on each of these points, the majority transgresses the separation of powers to decide yet another novel question of law: what statute of limitations should apply to an implied right of action under the Takings Clause? *See* Majority Op. at 1236–38. On the one hand, our precedents apply the state statute of limitations for personal-injury torts in actions brought under section 1983. *See, e.g.*, *McNair v. Allen*, 515 F.3d 1168, 1173 (11th Cir. 2008) (citing *Wilson v. Garcia*, 471 U.S. 261, 275–76, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985)); *Hillcrest Prop., LLC v. Pasco County*, 754 F.3d 1279, 1281 (11th Cir. 2014). And we apply the same statute of limitations to the few *Bivens* claims brought "directly" under the Constitution. *See Kelly v. Serna*, 87 F.3d 1235, 1238 (11th Cir. 1996). To break with that precedent would allow substantively identical claims to follow dramatically different tracks through the federal courts because, at least in Georgia, personal-injury actions must be brought within two years, and inverse-condemnation and conversion claims must be brought within four years. GA. CODE ANN. §§ 9-3-30, -32, -33; *Wise Bus. Forms, Inc. v. Forsyth County*, 317 Ga. 636, 893 S.E.2d 32, 37 (2023). On the other hand, takings claims are like inverse-condemnation or conversion claims. And when a federal claim lacks a specific limitations period, we borrow the statute of limitations that applies to the most similar state law. *Vigman v. Cmty. Nat'l Bank & Tr. Co.*, 635 F.2d 455, 459 (5th Cir. Jan. 1981). "At bottom," weighing the costs and benefits of alternative limitation periods "is a legislative endeavor" we have no authority to undertake. *Egbert*, 142 S. Ct. at 1802. And that constitutional principle is especially evident where section 5 of the Fourteenth Amendment expressly delegates enforcement questions to Congress, which has already weighed the costs and benefits to provide an adequate remedy with the shorter borrowed limitations period.

III. CONCLUSION

Let us survey the constitutional wreckage in the wake of the majority opinion. Contrary to the text and structure of the Fifth Amendment and our history and tradition, the majority creates a new right of action for takings of property by local governments. It flouts recent Supreme Court precedents instructing that we should not imply a right of action whenever statutory and common-law remedies already exist. It ignores Supreme Court precedents that reject vicarious liability for local governments and instead require proof of a municipal policy or custom to establish a constitutional violation. And it borrows a statute of limitations twice as generous as the one we use both for actions under section 1983 and for *Bivens* actions. The resulting destruction from this step-by-step rejection of judicial humility is as unnecessary as it is regrettable.

Georgia law and section 1983—alone or in combination—provide property owners more than adequate alternative remedies against local governments and their officers to vindicate their constitutional right to just compensation. That Fulton failed to

bring his claims against the appropriate parties or in a timely manner does not make his otherwise available remedies inadequate. The text, structure, and history of the Takings Clause provide no support for creating an implied right of action. The majority's tale of a "constitutional unicorn" is a fantasy.

Because I would affirm the judgment of the district court, I respectfully dissent.

Eric ANDRE, Clayton English, Plaintiffs-Appellants,

v.

CLAYTON COUNTY, GEORGIA, Chief of the Clayton County Police Department, Aimee Branham, Michael Hooks, Tony Griffin, individually and in their official capacities as police officers of the Clayton County Police Department, et al., Defendants-Appellees,

C. Smith, individually and in his official capacity as a police sergeant of the Clayton County Police Department, Defendant.

No. 23-13253

United States Court of Appeals, Eleventh Circuit.

Filed: 08/15/2025

Background: Airline passengers filed § 1983 action against county and county police officers alleging that county's law-enforcement practice of selectively stopping airline passengers on jet bridge as they attempted to board departing flights violated their Fourth Amendment and equal protection rights. The United States District Court for the Northern District of Georgia, No. 1:22-cv-04065-MHC, Mark H. Cohen, J., 2023 WL 12129804, dismissed complaint, and passengers appealed.

Holdings: The Court of Appeals, Branch, Circuit Judge, held that:

(1) passengers plausibly alleged that they were "seized";

(2) it was not clearly established at time of incidents that officers had seized passengers;

(3) passengers plausibly pled municipal liability claims based on unlawful arrests;

(4) passenger plausibly alleged unlawful search claim;

(5) officers were entitled to qualified immunity on unlawful search claim;

(6) passenger plausibly pled municipal liability claim based on unlawful search; and

(7) officers' enforcement of county's drug interdiction program did not violate passengers' equal protection rights.

Affirmed in part and reversed in part.

1. Federal Courts ⚿3587(1), 3667

Court of Appeals reviews de novo district court's ruling on motion to dismiss for failure to state claim, accepting allegations in complaint as true and construing them in light most favorable to plaintiff. Fed. R. Civ. P. 12(b)(6).

2. Federal Civil Procedure ⚿1772

To prevent dismissal for failure to state claim, plaintiff must allege sufficient

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.
_____/

2017 AUG -3 AM 8:00
TANYA D. BENNETT

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).

[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

(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

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;

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.

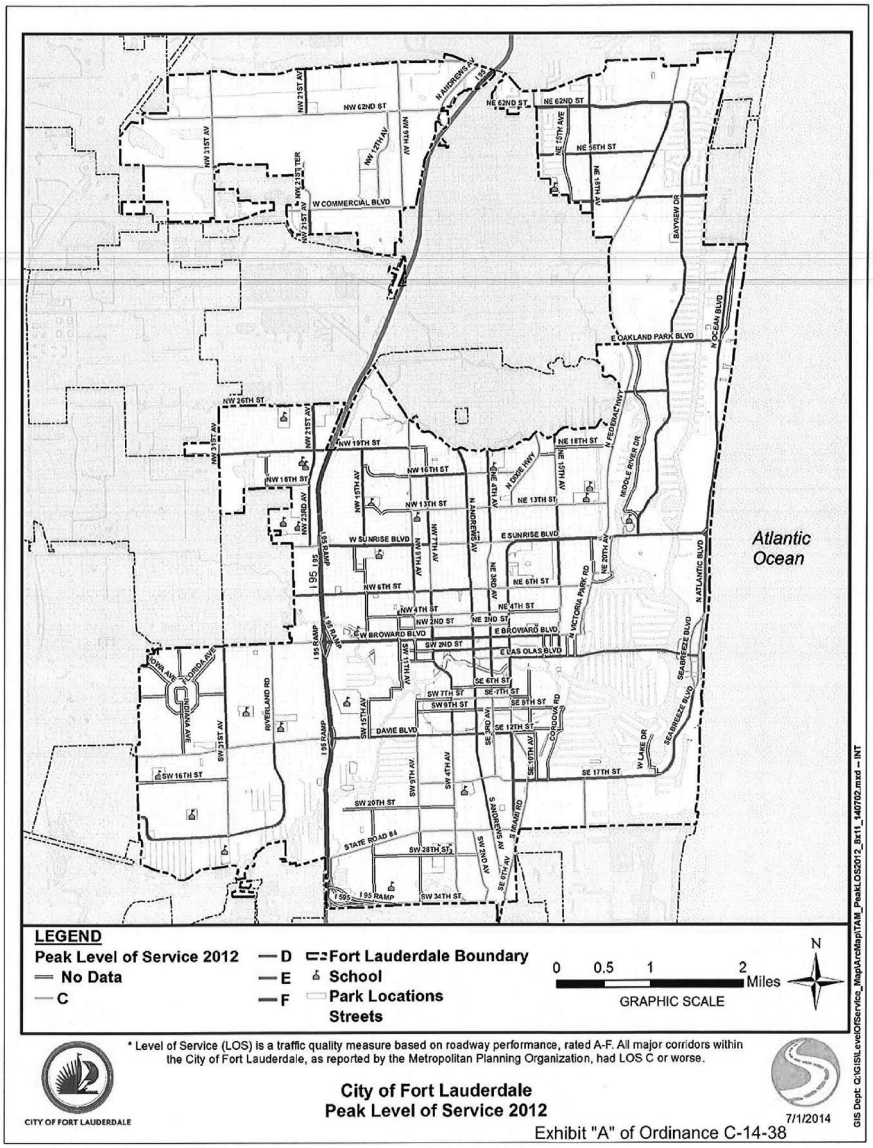
(e) Nothing in this section shall be construed to apply to:

(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.



WEST KEY NUMBER SYSTEM

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.

JORDAN, Circuit Judge:

In understanding what is going on around us, context matters. Food shared with company differs greatly from a meal eaten alone. Unlike a solitary supper, a feast requires the host to entertain and the guests to interact. Lady Macbeth knew this, and chided her husband for "not giv[ing] the cheer" at the banquet depicted in Shakespeare's play. As she explained: "To feed were best at home; From thence, the sauce to meat is ceremony. Meeting bare without it." William Shakespeare, The Tragedy of Macbeth, Act III, scene 4 (1606).

Fort Lauderdale Food Not Bombs, a non-profit organization, hosts weekly events at a public park in Fort Lauderdale, sharing food at no cost with those who gather to join in the meal. FLFNB's members set up a table and banner with the organization's name and emblem in the park and invite passersby to join them in sitting down and enjoying vegetarian or vegan food. When the City of Fort Lauderdale enacted an ordinance in 2014 that restricted this food sharing, FLFNB and some of its members (whom we refer to collectively as FLFNB) filed suit under 42 U.S.C. § 1983. They alleged that the ordinance and a related park rule violated their First Amendment rights of free speech and free association and were unconstitutionally vague.

The district court granted summary judgment in favor of the City. It held that FLFNB's outdoor food sharing was not expressive conduct protected by the First Amendment and that the ordinance and park rule were not vague. *See Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 2016 WL 5942528 (S.D. Fla. Oct. 3, 2016) (final judgment). FLFNB appeals those rulings.

Resolving the issue left undecided in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc), we hold that on this record FLFNB's outdoor food sharing is expressive conduct protected by the First Amendment. We therefore reverse the district court's grant of summary judgment in favor of the City. On remand, the district court will need to determine whether the ordinance and park rule violate the First Amendment and whether they are unconstitutionally vague.

I

FLFNB, which is affiliated with the international organization Food Not Bombs, engages in peaceful political direct action. It conducts weekly food sharing events at Stranahan Park, located in downtown Fort Lauderdale. Stranahan Park, an undisputed public forum, is known in the community as a location where the homeless tend to congregate and, according to FLFNB, "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness." D.E. 41 at 8.

At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message.

FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members (or, as the City describes them, volunteers) eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. *See* D.E. 40-23. FLFNB's set-up includes a banner with the name "Food Not Bombs" and the

organization's logo—a fist holding a carrot—and individuals associated with the organization pass out literature during the event. *See id*.

On October 22, 2014, the City enacted Ordinance C-14-42, which amended the City's existing Uniform Land Development Regulations. Under the Ordinance, "social services" are

> [a]ny service[s] provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment of assistance; and day shelter or any combination of same.

D.E. 38-1, § 1.B.6. The Ordinance regulates "social service facilities," which include an "outdoor food distribution center." D.E. 38-1, § 1.B.8. An "outdoor food distribution center" is defined as

> [a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein. A food distribution center shall not be considered a restaurant.

D.E. 38-1, § 1.B.4.

The Ordinance imposes restrictions on hours of operation and contains requirements regarding food handling and safety. Depending on the specific zoning district, a social service facility may be permitted, not permitted, or require a conditional use permit. *See* D.E. 38-1 at 9. Social service facilities operating in a permitted use zone are still subject to review by the City's development review committee. *See id.*

Stranahan Park is zoned as a "Regional Activity Center—City Center," D.E. 38-34, and requires a conditional use permit. *See* D.E. 38-1 at 9. To receive a conditional use permit, applicants must demonstrate that their social service facilities will meet a list of requirements set out in § 1.E of the Ordinance.

The City's "Parks and Recreation Rules and Regulations" also regulate social services. Under Park Rule 2.2,

> [p]arks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

D.E. 38-35.

The City has voluntarily not enforced Ordinance C-14-42 and Park Rule 2.2 since February of 2015.

II

FLFNB contends that the Ordinance and Park Rule 2.2 violate its rights to free speech and free association guaranteed by the First Amendment, which is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. *See* D.E. 1 at 21; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). It also argues that the ordinance and regulation are unconstitutionally vague, both facially and as applied. *See* D.E. 1 at 27.

The City defends the district court's summary judgment ruling. It asserts that the food sharing events at Stranahan Park are not expressive conduct because the act of feeding is not inherently communicative of FLFNB's "intended, unique, and particularized message." *See* City's Br. at 35. Understanding the events, according to the City, depends on explanatory speech, such as the signs and banners, indicating that FLFNB's conduct is not inherently expressive.

We review the district court's grant of summary judgment *de novo*. *See Rodriguez v. City*

of Doral, 863 F.3d 1343, 1349 (11th Cir. 2017). The same plenary standard applies to questions of constitutional law. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017) (en banc). In reviewing the parties' cross-motions for summary judgment, we "draw all inferences and review all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (quotation marks omitted and alteration adopted).

There is an additional twist to these standards of review in the First Amendment context. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace ... we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). *See also Flanigan's Enters., Inc. v. Fulton Cnty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (applying First Amendment independent review standard in a summary judgment posture).

III

Constitutional protection for freedom of speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The First Amendment guarantees "all people [ ] the right to engage not only in 'pure speech,' but 'expressive conduct' as well." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). As one First Amendment scholar has explained, "[a] sharp line between 'words' and 'expressive acts' cannot ... be justified in Madisonian terms. The constitutional protection is afforded to 'speech,' and acts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution." Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993).

Several decades ago, the Supreme Court formulated a two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment: (1) whether "[a]n intent to convey a particularized message was present;" and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since then, however, the Court has clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection" because "if confined to expressions conveying a 'particularized message' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (citing *Spence*, 418 U.S. at 411, 94 S.Ct. 2727). So, "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis in original) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*") (explaining that, to merit First Amendment protection, conduct must be "inherently expressive").

A

On this record, we have no doubt that FLFNB intended to convey a certain message. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. Neither the district court nor the City suggest otherwise. *See* D.E. 49 at 1, 2; D.E. 78 at 24. As noted, the message is "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Food sharing in a visible public

space, according to FLFNB, is "meant to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." *Id*. at 2.

"Whether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge[.]" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). The critical question, then, is "whether the reasonable person would interpret [FLFNB's conduct] as *some* sort of message." *Holloman*, 370 F.3d at 1270. In answering this question, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation. *See* James E. Leahy, *Flamboyant Protest, the First Amendment, and the Boston Tea Party*, 36 Brook. L. Rev. 185, 210 (1970). *Cf.* Rodney A. Smolla, Free Speech in an Open Society 26 (1992) (maintaining that mass demonstrations "are perhaps the single *most* vital forms of expression in human experience"); Thomas I. Emerson, The System of Freedom of Expression 293 (1970) ("The presence of people in the street or other open public place for the purpose of expression, even in large numbers, would also be deemed part of the 'expression.' ").

It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not. Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade. *See United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."); *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 ("[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."). Context also differentiates the act of sitting down—ordinarily not expressive—from the sit-in by African Americans at a Louisiana library which was understood as a protest against segregation. *See Brown v. Louisiana*, 383 U.S. 131, 141–42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). And context divides simply "[b]eing in a state of nudity," which is "not an inherently expressive condition," from the type of nude dancing that is to some degree constitutionally protected. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quotation omitted). *Compare also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing is expressive conduct, although "only marginally so"), *with City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (noting that "recreational dancing" by clothed dance hall patrons is not sufficiently expressive).[11]

The district court concluded that "outdoor food sharing does not convey [FLFNB's] particularized message unless it is combined with other speech, such as that involved in [FLFNB's] demonstrations." D.E. 78 at 24. This focus on FLFNB's particularized message was mistaken. As *Holloman* teaches, the inquiry is

[1] *See also Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1501, 1505 (11th Cir. 1990) (holding that a school employee's "quiet and non-disruptive" early departure from a mandatory meeting communicated an objection to the superintendent's position).

whether the reasonable person would interpret FLFNB's food sharing events as "*some* sort of message." 370 F.3d at 1270.

B

The district court also failed to consider the context of FLFNB's food sharing events and instead relied on the notion that the conduct must be "combined with other speech" to provide meaning. *See* D.E. 78 at 24. As we explain, the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message. That puts FLFNB's food sharing events on the expressive side of the ledger.

First, FLFNB sets up tables and banners (including one with its logo) and distributes literature at its events. This distinguishes its sharing of food with the public from relatives or friends simply eating together in the park. *Cf. Hurley*, 515 U.S. at 570, 115 S.Ct. 2338 (holding that participation in a parade was expressive in part because group members "distributed a fact sheet describing the members' intentions" and held banners while they marched).

Second, the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time. That, in and of itself, has social implications. *See* Mary Douglas, "Deciphering a Meal," in Implicit Meanings: Selected Essays in Anthropology 231 (1975) ("Like sex, the taking of food has a social component, as well as a biological one.").

Third, FLFNB holds its food sharing in Stranahan Park, a public park near city government buildings. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. The parties agree that Stranahan Park is a traditional public forum. *See* D.E. 39 at ¶ 9; D.E. 49 at ¶ 9. That agreement is not surprising, for, public parks have, "time out of mind, [ ] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *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) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). They are places "historically associated with the exercise of First Amendment rights." *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). And they are places that "commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). Although the choice of location alone is not dispositive, it is nevertheless an important factor in the "factual context and environment" that we must consider. *See Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. *Cf. Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (concluding that a flag burning demonstration at Dallas City Hall conveyed an anti-government/lack of patriotism message).

Fourth, the record demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community. The City itself admits that its elected officials held a public workshop "on the Homeless Issue" in January of 2014, and placed the agenda and minutes of that meeting in the summary judgment record. *See* City's Br. at 12; D.E. 38 at ¶ 16; D.E. 38-19. That workshop included several "homeless issues, including public feedings in the C[ity's] parks and public areas." D.E. 38 at ¶ 16. It is also undisputed that the status of the City's homeless population attracted local news coverage beginning years before that 2014 workshop. We think that the local discussion regarding the City's treatment of the homeless is significant because it provides background for FLFNB's events, particularly in light of the undisputed fact that many of the participants are homeless. This background adds to the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message. *See Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (noting that flag burning "coincided with the

convening of the Republican Party and its renomination of Ronald Reagan for President"); *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (noting that the exhibition of a peace symbol taped on a flag "was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy"); *Tinker*, 393 U.S. at 505, 89 S.Ct. 733 (noting that a black armband was worn during the Vietnam War).

Fifth, it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it. *See Monroe v. State Court of Fulton Cnty.*, 739 F.2d 568, 571 n.3 (11th Cir. 1984) (explaining that, to be sufficiently expressive, "the actor must have reason to expect that his audience will recognize his conduct as communication") (citation omitted). In *Johnson*, for example, the Supreme Court explained the historical importance of our national flag, noting that it is "the one visible manifestation of two hundred years of nationhood" and that "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner." 491 U.S. at 405, 109 S.Ct. 2533 (quotations and citations omitted). Given this history, the American flag was recognized as a symbol for the United States, and its burning constituted expressive conduct. *See id*. at 405–06, 109 S.Ct. 2533. *See also Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015) (affirming the district court's determination on summary judgment that tattooing is protected activity, and relying in part on a historical analysis).

Like the flag, the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes. *See Mark* 2:13–17; *Luke* 5:29–32. In 1621, Pilgrims and Native Americans celebrated the harvest by sharing the First Thanksgiving in Plymouth. President Abraham Lincoln established Thanksgiving as a national holiday in 1863, proclaiming it as a day of "Thanksgiving and Praise to our beneficent Father" in recognition of blessings such as "fruitful fields and healthful skies." John G. Nicolay & John Hay, 2 Abraham Lincoln: Complete Works 417–418 (1894). Americans have celebrated this holiday ever since, commonly joining with family and friends for traditional fare like turkey and pumpkin pie.

On this record, FLFNB's food sharing events are more than a picnic in the park. FLFNB has established an intent to "express[ ] an idea through activity," *Spence*, 418 U.S. at 411, 94 S.Ct. 2727, and the reasonable observer would interpret its food sharing events as conveying *some* sort of message. *See Holloman*, 370 F.3d at 1270.

C

The City, echoing the district court's analysis, relies on *FAIR*, in which the Supreme Court explained that "[t]he fact that [ ] explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*." 547 U.S. at 66, 126 S.Ct. 1297. This language from *FAIR*, however, does not mean that conduct loses its expressive nature just because it is also accompanied by other speech. If it did, the fact that the paraders in *Hurley* were "carrying flags and banners with all sorts of messages" would have placed their conduct outside the realm of First Amendment protection. *See Hurley*, 515 U.S. at 569, 115 S.Ct. 2338. *See also Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam) (considering the denial of a stay of an injunction in a case where members of the National Socialist Party of America sought to parade in uniforms displaying a swastika). The critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct.

In *FAIR*, a number of law schools claimed that

the Solomon Amendment—which denies federal funding to an institution that prohibits the military from gaining access to its campus and students " 'for purposes of military recruiting in a manner that is at least equal in quality and scope to access to campuses and to students that is provided to any other employer' "—violated their rights under the First Amendment. *See* 547 U.S. at 55, 126 S.Ct. 1297 (quoting 10 U.S.C. § 938(b)). Among other things, the schools asserted that their restriction of military recruiters' access to law students due to a disagreement with the government's then-existing policy excluding homosexuals from the military (such as, for example, requiring them to interview students on the undergraduate campus) was protected expressive conduct. *See id*. at 51, 126 S.Ct. 1297.

The Supreme Court held that it was not. *See id*. at 66, 126 S.Ct. 1297. It noted that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id*. at 66, 126 S.Ct. 1297. Such speech was necessary to provide explanation because "the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.' An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id*. (citation omitted). Thus, the "explanatory speech" in *FAIR* was speech that was necessary to explain the law school's conduct. Without it, the conduct alone (requiring military recruiters to see students off-site) was not sufficiently expressive and the reasonable observer would not be likely to infer some message.

Explanatory speech is not necessary in this case. Although such speech cannot create expressive conduct, *see id.* at 66, 126 S.Ct. 1297, context still matters. Here, the presence of banners, a table, and a gathering of people sharing food with all those present in a public park is sufficiently expressive. The reasonable observer at FLFNB's events would infer some sort of message, e.g., one of community and care for all citizens. Any "explanatory speech"—the text and logo contained on the banners—is not needed to convey that message. Whether those banners said "Food Not Bombs" or "We Eat With the Homeless" adds nothing of legal significance to the First Amendment analysis. The words "Food Not Bombs" on those banners might be required for onlookers to infer FLFNB's *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying "some sort of message." *See Holloman*, 370 F.3d at 1270 (holding that a "generalized message of disagreement or protest directed toward [a teacher], the school, or the country in general" is sufficient under the *Spence* test, as modified by *Hurley*) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338).

We decline the City's invitation, *see* City's Br. at 21, to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (a "narrow, succinctly articulable message is not a condition of constitutional protection"), and it is not appropriate for us to bring it back to life.

The district court expressed some concern that *FAIR* does not align with the understanding in "*Holloman*[ ] and perhaps also *Hurley*[ ] ... of a particularized message." D.E. 78 at 21. We do not believe that *FAIR* undermines *Hurley* or that it abrogates *Holloman*. *FAIR* does not discuss the need for a particularized message at all. Nor does it cite to how *Spence* phrased that requirement. *FAIR* did, however, discuss *Hurley*. The Supreme Court explained that "the law

schools' effort to cast themselves as just like ... the parade organizers in *Hurley* ... plainly overstates the expressive nature of their activity," and was therefore unavailing. *FAIR*, 547 U.S. at 70, 126 S.Ct. 1297. In our view, FLFNB's conduct here is more like that of the paraders in *Hurley* than that of the law schools in *FAIR*. The reasonable observer of the law schools' conduct in *FAIR* was not likely to infer *any* message beyond that the interview rooms were full or that the military preferred to interview elsewhere. *See id*. at 66, 126 S.Ct. 1297. FLFNB's food sharing events are markedly different. Due to the context surrounding them, the reasonable observer would infer some sort of message.

IV

"[T]he nature of [FLFNB's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [FLFNB] engaged in a form of protected expression." *Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. We therefore reverse the district court's grant of summary judgment in favor of the City.

We decline to address whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague. These issues are best left for the district court to take up on remand.[2]

REVERSED AND REMANDED.

[2] The district court stated that its rejection of FLFNB's vagueness challenges was affected, although "to a lesser extent," by its ruling that FLFNB's conduct was not protected by the First Amendment. *See* D.E. 78 at 27. Given our ruling that FLFNB's food sharing events constitute expressive conduct, we think that the district court is in the best position to reassess its ruling on the vagueness issues in the first instance.

Before LAGOA, HULL, and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

This case presents the second appellate skirmish in Fort Lauderdale Food Not Bombs's ("FLFNB") challenge to Fort Lauderdale's efforts to shut down the practice of sharing food with the homeless in downtown Stranahan Park. FLFNB hosts food-sharing events in order to communicate the group's message that scarce social resources are unjustly skewed towards military projects and away from feeding the hungry. In Round One, a panel of this Court held FLFNB's food sharing to be expressive conduct protected by the First Amendment and remanded the case to the district court to address whether the City's regulations actually violated the First Amendment. Now, in Round Two, we must decide whether Fort Lauderdale Park Rule 2.2, which requires City permission for social service food-sharing events in all Fort Lauderdale parks, can withstand First Amendment scrutiny as applied to FLFNB's demonstrations.

It cannot. The Park Rule commits the regulation of FLFNB's protected expression to the standardless discretion of the City's permitting officials. The Park Rule bans social service food sharing in Stranahan Park unless authorized pursuant to a written agreement with Fort Lauderdale (the "City"). That's all the rule says. It provides no guidance and in no way explains when, how, or why the City will agree in writing. As applied to FLFNB's protected expression, it violates the First Amendment. It is neither narrowly drawn to further a substantial government interest that is unrelated to the suppression of free expression, nor, as applied, does it amount to a reasonable time, place, and manner regulation on expression in a public forum. Accordingly, we reverse the district court's order granting summary judgment in favor of the City and remand for further proceedings consistent with this opinion.

…

II.

Before we can consider the merits of the Plaintiffs' claims, we are required to address three threshold matters. …

A.

First, the City argues that FLFNB, as an unincorporated association, is not a "person" that may bring suit under § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added). There is some historical support for the City's reading, but this view stands in tension with the text's ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City's invitation to bar all unincorporated associations (other than unions) from being able to sue under § 1983.

"As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.' " United States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) (citation omitted). When examining the phrase

"any citizen of the United States or other person," "person" must refer to something beyond individuals who are United States citizens; otherwise, the term would be redundant. See, e.g., Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (noting 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' ") (citation omitted and alteration accepted). At the very least, the phrase extends a § 1983 cause of action to non-citizen individuals. Congress enacted Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), the original version of what is now § 1983, in order to enforce the Fourteenth Amendment. See, e.g., Ngiraingas v. Sanchez, 495 U.S. 182, 187, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990). The word "person" in the Fourteenth Amendment includes not only citizens but also non-citizens within the United States. E.g., Graham v. Richardson, 403 U.S. 365, 371, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); see also Hague v. Comm. for Indus. Org., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Stone, J.) ("It will be observed that the cause of action, given by [Section 1 of the 1871 Civil Rights Act], extends broadly to ... those rights secured to persons, whether citizens of the United States or not, to whom the [Fourteenth] Amendment in terms extends the benefit of the due process and equal protection clauses."). We also know that the word "person" in § 1983 extends to corporations, both municipal and otherwise. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Indeed, in Monell, the Supreme Court observed that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." Id. at 687, 98 S.Ct. 2018.

However, the Supreme Court has also ruled that Native American Tribes seeking to vindicate sovereign rights, States, State officers acting in their official capacities, Territories, and Territory officers acting in their official capacities are not "persons." Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 712, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003) (reasoning that § 1983 "was designed to secure private rights against government encroachment" to reach this conclusion in the case of a Tribe suing to vindicate its right to sovereign immunity from state process); Ngiraingas, 495 U.S. at 187–92, 110 S.Ct. 1737 (examining historical sources and the context surrounding amendments to § 1983 to reach this conclusion with respect to Territories and their officers); Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (relying on federalism concerns, the Eleventh Amendment, and the "often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it' " to reach this conclusion regarding States and their officials) (alterations accepted and citation omitted). Monell, Ngiraingas, and Will each interpreted the first use of the word "person" in § 1983, which relates to which entities may be proper § 1983 defendants -- "[e]very person" who under color of law causes a deprivation of federal rights shall be liable to the party injured. By contrast, today we interpret § 1983's second use of the word "person" -- "any citizen or other person" -- a phrase that delineates which entities may be proper § 1983 plaintiffs. But these cases are nonetheless instructive, because we "generally presume that 'identical words used in different parts of the same act are intended to have the same meaning.' " United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (citation omitted).

In order to decide whether FLFNB has a cause of action in this case, we must determine whether "other persons," in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations.

The words "other person," by themselves, do not definitively answer the question. Cf. Ngiraingas, 495 U.S. at 187, 110 S.Ct. 1737 ("[Section 1983] itself obviously affords no clue as to whether its word 'person' includes a Territory."). Unlike sovereign entities, there is no presumption that unincorporated associations are not persons. To the contrary, the ordinary meaning of "person" in legal contexts includes unincorporated associations. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 273 (2012) ("Traditionally the word person ... denotes not only natural persons (human beings) but also artificial persons such as corporations, partnerships, associations, and both public and private organizations.") (second emphasis added). Thus, the most natural reading of § 1983 extends a cause of action to unincorporated associations.

On the other hand, we "normally interpret[ ] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton Cnty., —— U.S. ——–, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). And in 1871, unincorporated associations were not legal persons with the capacity to sue or be sued absent some express authorization. United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 385, 42 S.Ct. 570, 66 L.Ed. 975 (1922) ("Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."); Wesley A. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383, 383 (1924) (citing authorities dating as far back as 1884 to observe that "[t]he cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name").

Moreover, reading the word "person" to exclude unincorporated associations is fully consonant with the 1871 version of the Dictionary Act, which expressly limited "person" to "bodies politic and corporate." See, e.g., Will, 491 U.S. at 69 n.8, 109 S.Ct. 2304. The Dictionary Act -- a statute that provides general definitions for common terms used across the United States Code, see 1 U.S.C. § 1 -- did not expand to include "associations" until 1948. See Act of June 25, 1948, Pub. L. No. 80-772, § 6, 62 Stat. 683, 859 (1948); Lippoldt v. Cole, 468 F.3d 1204, 1214 (10th Cir. 2006). The 1871 Dictionary Act definition matches the definition of "person" found in the first edition of Black's Law Dictionary, published in 1891, which confirms that an entity needed some express authorization in positive law to achieve legal personhood. Person, Black's Law Dictionary (1891) ("Persons are divided by law into natural and artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws, for the purposes of society and government, which are called 'corporations' or 'bodies politic.' ").

What's more, the legislative history surrounding the adoption of the 1871 Civil Rights Act does not suggest any departure from the established legal meaning of "person" as it related to the capacity to sue in 1871. See Monell, 436 U.S. at 690, 98 S.Ct. 2018 (analyzing the legislative history of Section 1 to interpret § 1983). The drafters of Section 1 of the 1871 Civil Rights Act likely did not contemplate that unincorporated associations were "persons" under the Act. The Republican sponsors of the Civil Rights Act were aghast at reports of widespread vigilante violence against federal officials, northern transplants, Blacks, and Republicans in the post-war South. These attacks, they believed, were the work of recalcitrant Confederates, including individuals organized as the Ku Klux Klan, who faced only weak opposition from ineffectual state officials. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 320 (1871) (hereinafter "Globe") (Rep. Stoughton) ("There exists at this time in the southern States

a treasonable conspiracy against the lives, persons, and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion."); id. at 820 (Sen. Sherman) (observing that the bill was based on the fact that "an organized conspiracy, spreading terror and violence, murdering and scourging both white and black, both women and men, and pervading large communities of this country, now exists unchecked by punishment, independent of law, uncontrolled by magistrates" and that "of all the multitude of injuries not in a single case has redress ever been meted out to one of the multitude who has been injured").

Section 1 itself "was the subject of only limited debate and was passed without amendment." Monell, 436 U.S. at 665, 98 S.Ct. 2018. At most, read together with statements about the 1871 Act generally, floor discussions of Section 1 suggest that both proponents and opponents of the 1871 Act believed that the typical plaintiff would be an individual who suffered a violation of constitutional rights, especially the denial of the equal protection of the laws at the hands of state officials. Thus, for example, proponent Senator Dawes spoke of "citizen[s]" who suffered violations of their rights -- phrasing that implies a concern for the individual plaintiff. Globe at 477 ("I conclude ... [that] Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done ... [b]y giving him a civil remedy in the United States courts for any damage sustained in that regard."). For their part, Democrats who opposed the passage of Section 1 generally claimed that it was too broad, but notably did not argue that the word "person" did anything to expand the range of entities that could traditionally sue. They, too, seemed to envision individual plaintiffs. E.g., id. at 337 (Rep. Whithorne) (complaining that "any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution" would be able to sue and conjuring the hypothetical example of a drunk suing a police officer who had confiscated his pistol).

All told, historical context suggests that the word "person" as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of the United States Code as it exists today, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of "person" that may have informed Congress's decision to perpetuate that term across amended versions of § 1983. Indeed, the Supreme Court in Ngiraingas looked not only to the history of the 1871 Civil Rights Act but also to "the successive enactments of [§ 1983], in context" -- and to changes to the definition of "person" in the Dictionary Act -- in order to interpret the word "person." 495 U.S. at 189, 191 n.10, 110 S.Ct. 1737.

Congress amended the text of § 1983 twice after the 1948 amendment to the Dictionary Act -- which made clear that "person" in "any Act of Congress" includes "associations" and "societies" in addition to "corporations," "companies," "firms," "partnerships," "joint stock companies," and "individuals." See 62 Stat. at 859; 1 U.S.C. § 1. A congressional amendment in 1979 extended § 1983's coverage to injuries inflicted by those acting under the color of District of Columbia law; a 1996 amendment limited the availability of injunctive relief against judicial defendants. See Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (1979); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996). In neither re-enacted version of § 1983 did Congress narrow the definition of "person" in light of the intervening clarification in the Dictionary Act that associations are "persons" as that term is

used in federal statutes. Cf. United States v. Bryant, 996 F.3d 1243, 1258 (11th Cir. 2021) ("[W]hen interpreting statutes, what Congress chose not to change can be as important as what it chose to change.").

Similarly, Congress enacted both of these amendments after the 1937 promulgation of Federal Rule of Civil Procedure 17(b), which provided "that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States." Parties, 1937 Rep. Advisory Comm. on Civ. Rules 47 (1937); see also Fed. R. Civ. P. 17(b)(3) (the Rule's current text remains nearly identical to that of the original version); Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 954 F. Supp. 2d 127, 137 (E.D.N.Y. 2013) (relying on Rule 17(b)(3) to conclude that "an unincorporated association[ ] ha[d] legal capacity to bring [a § 1983] suit because all of its claims allege[d] violations of the United States Constitution"), aff'd, 868 F.3d 104 (2d Cir. 2017), and aff'd, 705 F. App'x 10 (2d Cir. 2017); Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R., 698 F. Supp. 401, 413–14 (D.P.R. 1988) (similar analysis regarding the unincorporated Puerto Rico Cable Television association), aff'd as modified on other grounds, 906 F.2d 25 (1st Cir. 1990).

And perhaps most significantly, the Supreme Court held in 1974 that an unincorporated union could "sue under 42 U.S.C. § 1983 as [a] person[ ] deprived of [its] rights secured by the Constitution and laws." Allee v. Medrano, 416 U.S. 802, 819 n.13, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). Thus, by the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were "persons" that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term "person" when it re-enacted amended versions of § 1983. See Pollitzer v. Gebhardt, 860 F.3d 1334, 1340 (11th Cir. 2017) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (emphasis added) (quoting Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.") (emphasis added) (quoting Lorillard, 434 U.S. at 583, 98 S.Ct. 866); Scalia & Garner, supra, at 322 ("The clearest application of the prior-construction canon occurs with reenactments: If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction ... a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). Whatever "person" meant in 1871, its meaning included unincorporated associations by the time Congress "perpetuated" the word "person" in new versions of § 1983 in 1979 and 1996. See Scalia & Garner, supra, at 322.

Even setting these textual and historical considerations aside, Allee suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a "person" for § 1983 purposes. In Allee, individual organizers and a union brought a § 1983 action against Texas officials on behalf of a class of union members, alleging that law enforcement had threatened and harassed them for engaging in union organizing activities, including by bringing criminal charges in bad faith. 416 U.S. at 804–09, 94 S.Ct. 2191. A question arose as to whether there were pending state prosecutions against any of the plaintiffs -- if not, the plaintiffs' request for injunctive relief would be partially moot. Id. at 818, 94 S.Ct. 2191. The Supreme Court instructed that on remand, if there were indeed pending prosecutions against the unnamed class members, the district court

"must find that the class was properly represented" by the named plaintiffs in part because the named-plaintiff union was a "person[ ]" that could sue under § 1983 and that had standing to complain of the unlawful intimidation of its members. Id. at 819, 94 S.Ct. 2191 n.13; see also id. at 831, 94 S.Ct. 2191 (Burger, C.J., concurring in the result in part and dissenting in part) (acknowledging that the union plaintiff was unincorporated).

In holding that "[u]nions may sue under 42 U.S.C. § 1983 as persons," the Court in Allee did not rest on any distinctive features of unions or suggest that unions should be treated differently than any other kinds of unincorporated associations. Id. at 819, 94 S.Ct. 2191 n.13. The Court might have relied on, but did not so much as mention, characteristics surrounding unions that other types of unincorporated associations may not share, such as their affirmative recognition and privileges in federal and state law. See Coronado Coal Co., 259 U.S. at 385–90, 42 S.Ct. 570. Instead, the Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 "persons." The understanding of the meaning of the term "person" at the time the Civil Rights Act was passed in 1871 presented no obstacle to the result the Supreme Court reached in Allee. A union was neither an individual nor a corporation, yet the Supreme Court held that it still fell within the ambit of the term "other person."

In keeping with a broad reading of Allee, most federal courts to have confronted the question of whether a non-union unincorporated association is a "person" under § 1983 have answered in the affirmative. In Barrett v. United States, the Second Circuit reasoned that an estate administratrix could bring a § 1983 suit on behalf of the estate beneficiaries because they were a group of individuals "associated for a special purpose." 689 F.2d 324, 333 (2d Cir. 1982) ("Unions and unincorporated associations have also been found to possess standing to assert a § 1983 claim."). The Second Circuit weighed in again in Jund v. Town of Hempstead, this time to hold that unincorporated local Republican committees were proper § 1983 defendants. 941 F.2d 1271, 1279–80 (2d Cir. 1991). And at least two district courts have adopted this reading. In Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., a court in the Southern District of Florida held that an "unincorporated, voluntary association of students" at a Florida high school was a § 1983 "person." 477 F. Supp. 2d 1246, 1248, 1249–51 (S.D. Fla. 2007). A court in the Northern District of Illinois similarly held that an unincorporated organization representing the interests of a public housing development could bring a § 1983 suit and noted that "[u]nincorporated organizations have been found to be 'persons' entitled to bring suit under § 1983." Cabrini-Green Loc. Advisory Council v. Chi. Hous. Auth., No. 04 C 3792, 2005 WL 61467, at *3 (N.D. Ill. Jan. 10, 2005).

Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. See, e.g., First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 758 (11th Cir. 2011) (en banc) (Orlando Food Not Bombs); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1031 (9th Cir. 2006) (Santa Monica Food Not Bombs); Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1034 (9th Cir. 1999) (Students for Legal government, an unincorporated association of University of Oregon students); Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255, 256–57 (6th Cir. 1993) (Citizens Against Tax Waste, an "unincorporated association of property owners in the Westerville City School District"); Marcavage v. City of New York, 918 F. Supp. 2d

266, 267 (S.D.N.Y. 2013) (Repent America, an unincorporated association dedicated to Christian evangelism); Occupy Fresno v. Cnty. of Fresno, 835 F. Supp. 2d 849, 853 (E.D. Cal. 2011) (Occupy Fresno, an unincorporated association of individuals who wished to assemble in a park); Good News Emp. Ass'n v. Hicks, No. C-03-3542 VRW, 2005 WL 351743, at *1 (N.D. Cal. Feb. 14, 2005), aff'd, 223 F. App'x 734 (9th Cir. 2007) (unincorporated association organized to promote a faith-based concept of "Natural Family and Marriage"); Nat'l Ass'n of Alzheimer's Victims & Friends v. Pa. Dep't of Pub. Welfare, No. CIV.A. 88-2426, 1988 WL 29338, at *1 (E.D. Pa. Mar. 23, 1988) (National Association of Alzheimer's Victims & Friends, an "unincorporated association founded for the purpose of providing a mutual care and support group for persons suffering from Alzheimer's disease and their families and concerned friends"); Republican Coll. Council of Pa. v. Winner, 357 F. Supp. 739, 740 (E.D. Pa. 1973) (Republican College Council of Pennsylvania). The same is true of a historically significant set of § 1983 plaintiffs, the unincorporated local chapters of the NAACP. See N.A.A.C.P. v. Brackett, 130 F. App'x 648 (4th Cir. 2005).

This body of practice is not a body of holdings and, of course, cannot alter the meaning of the word "person" as used in the statute. But when combined with the ordinary meaning of the text, persuasive interpretations from other courts, and the body of law informing Congress's amendments to § 1983 -- all of which indicate that unincorporated associations are "persons" -- it at least underscores the need for compelling evidence before we adopt the City's contrary interpretation. See Nasrallah v. Barr, —— U.S. ——, 140 S. Ct. 1683, 1697–98, 207 L.Ed.2d 111, (2020) (Thomas, J., dissenting) (protesting that when "presented with two competing statutory interpretations[,] one of which ma[de] sense of" the statute "without upending settled practice, and one of which significantly undermine[d the statute] by removing a vast swath of claims from its reach," the Supreme Court majority should have "justif[ied]" its choice of the latter interpretation and "candidly confront[ed] its implications"); Fowler v. U.S. Parole Comm'n, 94 F.3d 835, 840 (3d Cir. 1996) (While "a practice bottomed upon an erroneous interpretation of the law is not legitimized merely by repetition," "general acceptance of a practice must be considered in any reasoned [statutory interpretation] analysis.").

The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as "persons." See Lippoldt, 468 F.3d at 1216 (holding that Operation Save America, an unincorporated association devoted to anti-abortion advocacy, was not a "person" within the meaning of § 1983); see also Tate v. Univ. Med. Ctr. of So. Nev., No. 2:09-CV-01748-LDG (NJK), 2013 WL 1249590, at *11 (D. Nev. Mar. 26, 2013) (stating, in a single sentence devoid of analysis, that an unincorporated association was not a "person" subject to suit under § 1983), rev'd on other grounds, 617 F. App'x 724 (9th Cir. 2015). The Tenth Circuit's otherwise thorough discussion of the legislative history of the 1871 Civil Rights Act, the background law in 1871, and the 1871 Dictionary Act did not account for the fact that Congress re-enacted the word "person" in § 1983 twice after intervening developments in federal law clarified that unincorporated associations were "persons."

At bottom, in enacting § 1983, Congress "intended to give a broad remedy for violations of federally protected civil rights." Monell, 436 U.S. at 685, 98 S.Ct. 2018. And the Supreme Court has instructed us that "Congress intended § [1983] to be broadly construed." Id. at 686, 98 S.Ct. 2018. "[A]ny plan to restrict the scope of § 1983 comes with a heavy burden of justification -- a burden that is both constitutional and historical." Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or

Fade Away?, 60 N.Y.U. L. Rev. 1, 28 (1985). Absent some indication from the Supreme Court that unincorporated associations are not "persons," we decline the City's invitation to upset longstanding practice recognizing that unincorporated associations are "persons" that may sue under § 1983. See id. at 3 (warning "that any restriction of what has become a major symbol of federal protection of basic rights [should] not be made in irresponsible haste" and that absent strong historical evidence, the scope and "underlying principles of § 1983 liability should be secure"). We hold that FLFNB is a person that may bring suit under § 1983.

…

C.

The third, and last, of the threshold issues concerns Article III standing. The City argues that all of the Plaintiffs lack standing to assert damages claims based on the Ordinance and the Park Rule because these regulations, by the City's account, were not enforced against any of the Plaintiffs. According to the City, the Plaintiffs cannot prove a concrete injury connected to the Ordinance or the Park Rule. Like the district court before us, we remain unpersuaded. Both the Individual Plaintiffs and FLFNB have standing to bring damages claims against the City based on its enforcement of the Ordinance and the Park Rule. They also have standing to bring claims for declaratory and injunctive relief against the Park Rule.

…

1. Individual Plaintiffs. The City applied the Ordinance and the Park Rule to the Individual Plaintiffs insofar as they each participated in a November 7, 2014 FLFNB food-sharing event in Stranahan Park that the police broke up under their authority drawn from the Ordinance and the Park Rule. Plaintiff Nathan Pim, testifying on behalf of FLFNB, explained that the police "stopped" the event "short." We have already concluded that the Individual Plaintiffs were engaging in constitutionally protected expression, and the City forced them to stop and disperse. Undeniably, the Ordinance and the Park Rule injured them by directly interfering with and barring their protected expression. "[E]very violation [of a right] imports damage."

In this way, the Individual Plaintiffs sustained an injury in fact sufficient to confer standing that does not depend on the arrests of their FLFNB colleagues at the same demonstrations. What's more, those arrests provide an additional basis for standing, even though the Individual Plaintiffs were not personally arrested or cited. "[S]tanding exists at the summary judgment stage when the plaintiff has submitted evidence indicating '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.' "

Each Individual Plaintiff has declared under penalty of perjury that he or she will continue to participate in FLFNB's protected food-sharing demonstrations in Stranahan Park, and there is no dispute that this conduct is arguably proscribed by the Park Rule (and was proscribed by the Ordinance when it was in effect). Of course, the threat of prosecution must be "genuine," not "imaginary" or "speculative," Leverett v. City of Pinellas Park, 775 F.2d 1536, 1538 (11th Cir. 1985), but the Individual Plaintiffs easily meet this requirement. Each directly witnessed the police arrest and/or cite their co-demonstrators or others under the Ordinance and the Park Rule. Citations issued to the Individual Plaintiffs' fellow demonstrators referenced both the Ordinance and the Park Rule. These arrests and citations of the Individual Plaintiffs' "companion[s]" render the threat of enforcement "non-chimerical."

2. FLFNB. FLFNB does not claim that it has associational standing to sue on behalf of its members; rather it claims "standing in its own right." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214

(1982). An advocacy organization like FLFNB suffers injury in fact when the defendant's conduct "perceptibly impair[s] [the organization's] ability" to carry out its mission, including by causing "drain on the organization's resources."

It is undeniable, as the district court found, that the City's enforcement of the Ordinance and the Park Rule "impair[ed]" FLFNB's "ability to engage in its projects" -- food-sharing demonstrations to criticize society's allocation of resources between food and war -- in a number of ways. Most directly, the police shut down an FLFNB food-sharing demonstration on November 7, 2014. This blocked FLFNB from holding its traditional post-meal organizational meeting in Stranahan Park and cut short an exercise of its chief means of advocacy. Moreover, the challenged regulations caused FLFNB to expend resources in the form of volunteer time, including efforts to collect bail money and organize legal representation for its members who were arrested under the Ordinance and the Park Rule. The threat of arrest also has practically hindered would-be volunteers from participating in FLFNB demonstrations. Thus, for example, FLFNB had to stop accepting high school volunteers because it did not want to risk subjecting them to criminal liability. These injuries will continue, because FLFNB continues to hold demonstrations under the threat of Park Rule enforcement.

FLFNB volunteers who would have normally worked on preparing for food-sharing demonstrations had to divert their energies to advocacy activities such as attending City meetings and organizing protests against the Ordinance, as well as arranging for transportation and supplies for these events. FLFNB's Rule 30(b)(6) representative unambiguously testified that this "drew away time and resources from free time we would be spending on preparing for ... feedings."

Nor, as the City suggests, does the fact that FLFNB is an informal organization with no formative documents, formal leadership offices, or written proof of membership. The City has not offered any authority to suggest that an unincorporated association's informal structure somehow renders it incapable of sustaining actual and concrete injury. To the contrary, unincorporated associations by their nature lack a charter and often lack formal organizational structures. On this record as a whole, FLFNB's relaxed organizational style does not denude it of standing.

III.

B.

Finally, we come to the merits of the Plaintiffs' as-applied challenge to the Park Rule. Our review of the district court's summary judgment holding that the Park Rule was constitutional is de novo. FLFNB I, 901 F.3d at 1239. We draw all reasonable inferences in the light most favorable to the Plaintiffs, the non-moving parties. Id.

But first, we pause to clarify what is not up for debate in this appeal. In FLFNB I, a panel of this Court held that FLFNB's food-sharing demonstrations in Stranahan Park are expressive conduct protected by the First Amendment. Id. at 1245. This holding binds us under both the law of the case doctrine and our Court's prior precedent rule, Andrews v. Biggers, 996 F.3d 1235, 1236 (11th Cir. 2021). The sole remaining question for us, then, is whether the Park Rule's regulation of this protected conduct passes First Amendment scrutiny.

To answer this question, we must first decide whether the Park Rule is content neutral or content based, for a content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny. See Texas v. Johnson, 491 U.S. 397, 403–04, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); Burk v. Augusta-Richmond Cnty., 365 F.3d 1247, 1255 (11th Cir. 2004). As we explain, the Park Rule

is content neutral. So, we only apply intermediate scrutiny. Specifically, we apply the United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), test for content-neutral regulations of expressive conduct and ask whether the Park Rule "is narrowly drawn to further a substantial governmental interest ... unrelated to the suppression of free speech." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing O'Brien, 391 U.S. at 377, 88 S.Ct. 1673).

Alternatively, we evaluate the Park Rule as a time, place, and manner restriction on expressive conduct. This sort of law also must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. These standards substantially overlap and yield the same result in this case. Either way, the Park Rule violates the First Amendment as applied to the Plaintiffs' food-sharing events.

1. Content Neutrality. Johnson instructs us that a regulation of expressive conduct is content neutral if the justification for the regulation is unrelated to the suppression of free expression. 491 U.S. at 403, 109 S.Ct. 2533. Even a content-neutral purpose, however, cannot save a regulation that " 'on its face' draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

The Park Rule does not draw content-based distinctions on its face:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

The Rule applies not just to food sharing events but also to a host of other social services, including the provision of clothing, shelter, and medical care. These services usually do not involve expressive conduct. Even most social-service food sharing events will not be expressive. See FLFNB I, 901 F.3d at 1242 (holding that FLFNB's food sharing was protected expressive conduct only after a close examination of the specific context surrounding the events). That the Park Rule regulates a range of activity, most of which has no expressive content at all, suggests its application does not vary based on any message conveyed. The Rule does not single out messages which relate to food or the importance of sharing food with the homeless.

Instead, the Park Rule's application to food sharing (and other services) turns on whether the services are provided "in order to meet [the recipients'] physical needs." This distinction does not depend on the content of the message associated with any food sharing that happens to be expressive. The Park Rule (at least in the City's view) applies to FLFNB's sharing of low-cost food with the homeless in order to communicate a message about the societal allocation of resources between food and the military, but it would also apply to an organization that shared low-cost food with the homeless in order to communicate that the City's homeless shelters serve food that lacks vital nutrients. It would likewise apply to an organization that shared low-cost food with struggling veterans in order to emphasize the debt our society owes for their sacrifice, and so on. Indeed, it would apply to organizations that share food with those in need to communicate any number of messages. Simply put, the Rule does not "draw[ ] distinctions based on [any] message" food-sharers convey. Reed, 576 U.S. at 163, 135 S.Ct. 2218.

The Plaintiffs rely on Reed's allusion to the possibility that some facial distinctions might be content based because they define

"regulated speech by its function or purpose" to argue that the Park Rule's social-service-purpose distinction is content based. Id. at 163–64, 135 S.Ct. 2218. But we have characterized this language in Reed as "dicta." Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1319 (11th Cir. 2020). In any event, as just described, the purpose on which the regulatory definition turns -- sharing food to provide for physical welfare -- is not one that draws a distinction based on the content of any expression. See Recycle for Change v. City of Oakland, 856 F.3d 666, 671 (9th Cir. 2017) (holding, after Reed, that a regulation that applied to unattended donation boxes that collected personal items "for the purpose of distributing, reusing, or recycling those items" did not turn on "communicative content"); Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905, 915 (8th Cir. 2017) (regulation that applied to photography for commercial purposes, but not non-commercial purposes, was not content based under Reed). To be sure, it seems likely that most expressive food sharings subject to the Park Rule's regulation will involve some sort of message related to the importance of sharing food with those in need. "But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen v. Coakley, 573 U.S. 464, 480, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

Likewise, the City's justifications for the Park Rule do not relate to content. "A regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The City enacted the Park Rule, and the Ordinance designed to facilitate its enforcement, in order to address a series of problems associated with large group food events in public parks, including loitering and crowds, trash build-up, noise, and food safety issues, as well as to ensure that similar uses of public property did not concentrate in one area. Citizens had complained about some of these problems in connection with food-sharing events. In January 2014, the City Commission held a workshop on homelessness in the community where stakeholders debated public food distribution and related topics. More generally, the Ordinance states that its purpose is "to regulate social service facilities in order to promote the health, safety, morals and general welfare of the residents of the City of Fort Lauderdale." (This statement illuminates the Park Rule's purpose as well, since the City enacted the Ordinance so that it could resume enforcement of the Park Rule.)

These concerns, which boil down to an interest in maintaining public parks and other property in a pleasant, accessible condition, are not related to the suppression of the Plaintiffs' (or any other party's) expression, so they are content neutral. See First Vagabonds Church of God, 638 F.3d at 762 ("[T]he interest of the City in managing parks and spreading large group feedings to a larger number of [locations] is unrelated to the suppression of speech."); see also McCullen, 573 U.S. at 480–81, 134 S.Ct. 2518 (public safety, the need to protect security, and regulation of congestion are content-neutral concerns); Ward, 491 U.S. at 797, 109 S.Ct. 2746 ("The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.").

One could phrase the City's motives in terms that are perhaps less flattering. The district court said the City was concerned "that food sharing as a social service attracts people who act in ways inimical to" keeping parks safe, clean and enjoyable; the Plaintiffs put a finer point on it and accuse the city of "deter[ring] homeless and hungry people from parks because of how they might act." Fort Lauderdale's elected officials seem to have decided that sharing food with large groups of homeless people in public parks causes problems that

make those parks less useful to the broader public. But even accepting these descriptions does not alter the First Amendment analysis, which at this stage asks only whether the City's desire to prevent groups of homeless people from gathering in public parks is a goal related to the content of the Plaintiffs' or any other party's expression. The First Amendment does not permit us to go further and comment upon whether this objective is virtuous public policy. We hold simply that the Park Rule is not related to expressive conduct; it has nothing to do with the Plaintiffs' critique of society's allocation of scarce resources between welfare and defense spending.

The Plaintiffs are wrong to say that the City's concern with the behavior of the crowds that gather at FLFNB expressive food-sharing events is a justification related to "[l]isteners' reaction to speech," which they correctly point out would not be "a content-neutral basis for regulation." Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Forsyth and related cases stand for the principle that a city may not regulate speech because it "cause[s] offense or ma[kes] listeners uncomfortable," McCullen, 573 U.S. at 481, 134 S.Ct. 2518, or because it might elicit a violent reaction or difficult-to-manage counterprotests, Forsyth Cnty., 505 U.S. at 134, 112 S.Ct. 2395. The City is concerned not that FLFNB's expression will offend or cause violence, but that it will cause the gathering of crowds -- participants in the meals, rather than a bystander audience -- and associated logistical problems such as the accumulation of trash. Addressing the practical problems crowds pose is a content-neutral concern. See McCullen, 573 U.S. at 481, 134 S.Ct. 2518 ("Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks."); cf. Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1317–18 (11th Cir. 2000) (a regulation that distinguished between events based on whether they would require municipal services to "accommodate ... large public gatherings" was "justified without reference to the content of the regulated speech") (emphasis omitted).

2. Intermediate Scrutiny. Since the Park Rule is a content-neutral regulation of expressive conduct, it is subject only to intermediate scrutiny, not the more demanding requirements of strict scrutiny. Specifically, under United States v. O'Brien, the Park Rule may regulate the Plaintiffs' expressive food sharing only so long as food sharing "itself may constitutionally be regulated" (no one has suggested it may not) and the Park Rule "is narrowly drawn to further a substantial governmental interest" that is "is unrelated to the suppression of free speech." Clark, 468 U.S. at 294, 104 S.Ct. 3065 (1984) (citing O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

The City does have a "substantial interest in ensuring the ability of [its] citizens to enjoy whatever benefits the city parks have to offer." Ward, 491 U.S. at 797, 109 S.Ct. 2746. More specifically, the Park Rule seeks to further the City's "substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area." First Vagabonds Church of God, 638 F.3d at 762. As we have explained, the regulations are concerned with avoiding concentration of similar park uses and with sanitation and other logistical problems that crowded food distribution events cause -- substantial government interests that are unrelated to the suppression of free speech.

However, the Park Rule is not narrowly tailored to the City's interest in park maintenance. Under intermediate scrutiny, the regulation " 'need not be the least restrictive or least inclusive means' of serving the government's interests." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citation omitted). Rather, "the requirement of narrow tailoring is satisfied 'so long as

the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,' " and "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 799–800, 109 S.Ct. 2746 (citation omitted and alterations accepted).

Fatally, the Park Rule imposes a permitting requirement without implementing any standards to guide City officials' discretion over whether to grant a permit. The Rule bans social-service food sharings in City Parks "unless authorized pursuant to a written agreement with City." That's it. Under the terms of the Rule, a City official may deny a request for permission to hold an expressive food sharing event in the Park because he disagrees with the demonstration's message, because he doesn't feel like completing the necessary paperwork, because he has a practice of rejecting all applications submitted on Tuesdays, or for no reason at all. In a word, the complete lack of any standards allows for arbitrary enforcement and even for discrimination based on viewpoint.

Generally, subjecting protected expression to an official's "unbridled discretion" presents "too great" a "danger of censorship and of abridgment of our precious First Amendment freedoms." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). "[D]istaste for [such] censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Id. It comes as no surprise, then, that "a long line" of Supreme Court decisions makes it abundantly clear that a regulation which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (quoting Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

The facts of Shuttlesworth illustrate the point. A Birmingham, Alabama ordinance empowered the city commission to deny parade permits whenever they thought it necessary for "public welfare," "decency," "morals," or "convenience." Id. at 148–50, 89 S.Ct. 935. In 1963, city officials used this ordinance to arrest and prosecute participants in a peaceful civil rights march held without a license, including Rev. Fred Shuttlesworth. Id. But the Supreme Court invalidated Shuttlesworth's conviction. Id. at 159, 89 S.Ct. 935. The risk that the ambiguity in the licensing regime would permit officials to target individuals, like Shuttlesworth, on the basis of their disfavored expression was too great for the First Amendment to bear.

The reasoning of these prior restraint cases controls the as-applied narrow tailoring inquiry we conduct in this case: "[e]xcessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." Burk, 365 F.3d at 1256. The Park rule does not even supply malleable standards like those found in Shuttlesworth; it doesn't provide any standards at all. As applied to the Plaintiffs' protected expression, the Park Rule fails First Amendment scrutiny.

Moreover, the Park Rule's sweeping grant of discretion to City permitting officials is not necessary to further the City's interests in crowd control and park conservation. The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citations omitted). Of course, the mere availability of less restrictive alternatives will not cause a regulation to fail narrow tailoring scrutiny, and we may not "replace the City as the manager of its parks." First Vagabonds Church of God, 638 F.3d at 762 (citation omitted and alterations accepted). But an abundance

of targeted alternatives may indicate that a regulation is broader than necessary. See McCullen, 573 U.S. at 490–94, 134 S.Ct. 2518 (relying in part on available alternatives to conclude that a regulation of speech near abortion clinics burdened more speech than necessary).

The Park Rule amounts to an outright ban on public food sharing in all of Fort Lauderdale's parks; any exception is subject only to the standardless whims of City permitting officials. For a model of a narrower regulation targeting more or less the same interests, the City need only have looked 218 miles to the northwest. In First Vagabonds Church of God, we upheld an Orlando regulation that permitted public food distribution without a license in sixty-six parks. 638 F.3d at 761. For the group of forty-two parks in the central downtown district near City Hall, each organization was entitled to two licenses per year. Id. And the Orlando ordinance applied only to events likely to attract twenty-five or more people. Id. at 759.

Fort Lauderdale offers no reason it could not have similarly narrowed the Park Rule's permission requirement or tailored it in some other way. Thus, for example, in addition to adding "narrowly drawn, reasonable and definite standards" to guide officials' permitting discretion, Forsyth Cnty., 505 U.S. at 133, 112 S.Ct. 2395 (citation omitted), the City could have required permission only for events likely to attract groups exceeding a certain size. Or it could have required City permission only for certain parks. Central to the City's conclusion that public food distribution causes problems in parks is a collection of seven citizen and organizational complaints about food-sharing events. Six of these are specific to the downtown Fort Lauderdale area. The City could have required permission only in downtown parks or designated limited areas within parks for sharing food. See McCullen, 573 U.S. at 493, 134 S.Ct. 2518 (evidence of disruptive demonstrations at a single Boston clinic did not justify a statewide regulation of demonstrations at abortion clinics); see Clark, 468 U.S. at 295, 104 S.Ct. 3065 (rejecting challenge to a limited ban on camping in Washington, D.C.'s Lafayette Park as applied to an anti-homelessness demonstration; the Park Service allowed camping in designated areas in other parks); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956–57 (11th Cir. 1999) (upholding ban on begging that applied only to a five-mile "designated, limited beach area" and did not ban begging in "many other public fora"). The City also might have allowed groups like FLFNB a limited annual number of food distribution events in Stranahan Park as of right. Again, we do not presume to tell the City exactly how it should manage its parks; all this is only to say that the Park Rule's utterly standardless permission requirement is "substantially broader than necessary to achieve" the City's interest in maintaining its parks. Ward, 491 U.S. at 782–83, 109 S.Ct. 2746. The Park Rule therefore cannot qualify as a valid regulation of the Plaintiffs' expressive conduct.

Alternatively, we evaluate the Park Rule under Clark's standard for time place, and manner restrictions. A content-neutral law regulating the time, place, and manner of expression in a public forum must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. Stranahan Park is "an undisputed public forum." FLFNB I, 901 F.3d at 1238. We underscore that parks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." McCullen, 573 U.S. at 476, 134 S.Ct. 2518 (quotation omitted); United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (Public parks are "historically associated with the free exercise of expressive activities."); Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). "[T]he government's ability to permissibly restrict expressive conduct" in Stranahan Park is therefore "very limited." Grace, 461 U.S. at 177, 103 S.Ct. 1702. But the government nevertheless "may enforce reasonable time, place, and manner regulations" on expression in the park. See id.

As a practical matter, there is little difference between this standard and the O'Brien test we have just discussed, and, in any event, they yield the same result in this case. Clark, 468 U.S. at 298, 104 S.Ct. 3065 (observing that the O'Brien standard "is little, if any, different from the standard applied to time, place, or manner restrictions"); see First Vagabonds Church of God, 638 F.3d at 761–62 (analyzing a similar ordinance under both standards). Both require that the regulation be narrowly tailored to serve a significant government interest. Clark, 468 U.S. at 293, 298, 104 S.Ct. 3065. Just as it does under O'Brien, the Park Rule's grant of standardless discretion to the City's permitting officials causes it to fail time, place, and manner scrutiny: "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' " Forsyth Cnty., 505 U.S. at 130–31, 112 S.Ct. 2395 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)); Burk, 365 F.3d at 1256 ("[T]ime, place, and manner regulations must contain narrowly drawn, reasonable and definite standards, to guide the official's decision and render it subject to effective judicial review.") (internal quotation marks and citations omitted). Since the Park Rule fails because it is not narrowly tailored, we need not address whether it leaves open ample alternative channels for the communication of the Plaintiffs' message.

The long and short of it is that the Park Rule as applied to the Plaintiffs' expressive food sharing activities violates the First Amendment. Accordingly, we **REVERSE** the district court's summary judgment order and **REMAND** for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HULL, Circuit Judge, with whom LAGOA, Circuit Judge, joins, concurring:

I concur in full in the panel opinion. I write separately to emphasize that this is the second appeal in this case and that our panel is bound by this Court's holding as to whether the plaintiff FLFNB's food-sharing conduct is sufficiently expressive to warrant First Amendment protection. See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

In that prior appeal, this Court held that, "on this record," the nature of the plaintiff FLFNB's weekly food-sharing activity in a public park, "combined with the factual context and environment in which it was undertaken," led to the conclusion that FLFNB's food sharing conduct "express[es] an idea through [that] activity," conveys "some sort of message" to a reasonable observer, and constitutes "a form of protected expression" under the First Amendment. Id. at 1240–45 (quotation marks omitted). This holding relied on a well-developed factual record about the plaintiff FLFNB's many years of food-sharing events (1) that are held in the City's Stranahan Park, a public forum where the homeless congregate, and (2) that are accompanied by FLFNB's banners and distribution of literature. Id. As the panel opinion points out, "most social-service food sharing events will not be expressive." Here, however, we are bound by the holding in the prior appeal that was based on a particular and extensive list of factual circumstances.

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December 6, 2017

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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.

coalition for the homeless

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."

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May 23, 2022

Honorable Deborah Kaplan
Deputy Chief Administrative Judge
for the New York City Courts
Supreme Court, New York County, Civil Term
New York, New York 10007

Re: *Callahan v. Carey,* Index No. 42582/1979
Letter application for modification of provision of Final Judgment on Consent, dated August 26, 1981

Dear Justice Kaplan:

On behalf of Defendant The City of New York[1] ("City Defendant") and pursuant to the requirements of a post-judgment Order in the above-referenced matter, dated October 15, 1984 ("Post-Judgment Order") (annexed as Appendix 1), I am writing to seek the permission of this Court to move for relief from, and modification of, a provision of the Final Judgment on Consent, dated August 26, 1981 ("Judgment") (annexed as Appendix 2). Given the antiquity of this matter, commenced nearly 44 years ago, I provide the following background and context for the Court's benefit.

Plaintiffs commenced this action on October 2, 1979, challenging the adequacy of shelter then offered by the City Defendant to homeless men in New York City. With the issuance of the Judgment, the parties – Plaintiffs, the City Defendant, and New York State

[1] The City of New York was sued herein as 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.

defendant officials[2] – agreed to numerous substantive terms regarding the provision of shelter to homeless men and to specified standards applicable thereto.[3] Pursuant to Paragraph 19 of the Judgment, this Court retained jurisdiction "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 appliable provisions thereof . . . ."

By the subsequent Order, dated October 15, 1984, this Court set forth the following process for any such application made under Paragraph 19 of the Judgment:

> [H]enceforth no motions are to be made except with the permission of the court. Such permission is to be sought by letter from counsel addressed to the court briefly describing the relief needed and setting forth proposals for the submission of proof and argument. Responses from opposing counsel are also to be made by letter addressed to the court and should be received by the court within two or three days thereafter. Should the party seeking leave to make a motion wish to reply, such will be received by the court if delivered to chambers within a day or two after delivery of the responding letter. In a written order the court will then determine whether to entertain the proposed motion and, if so, schedule its submission.

Order at 1. The City Defendant submits this pre-motion letter for modification and relief as authorized by Paragraph 19 of the Judgment and in accordance with the process outlined in the Order, as set forth above.

For the purposes of the instant application, the substantive provision of the Judgment from which the City Defendant seeks relief is Paragraph 1, providing as follows:

> 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 of physical, mental or social dysfunction is in need of temporary shelter.

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[2] The Defendant State officials named in the caption were Hugh L. Carey, as Governor of the State of New York; and Barbara Blum, as Commissioner of the New York State Department of Social Services.

[3] The *Callahan* obligations for homeless men were subsequently extended to homeless women in a subsequent action. *Eldredge v. Koch,* 118 Misc. 2d 163 (Sup. Ct. N.Y. City, 1983), *rev'd in part on other grounds,* 98 A.D.2d 675 (1st Dep't 1983).

Callahan Judgment, Para. 1. The City Defendant requests an opportunity to move to amend Paragraph 1 as follows:

- Change "Paragraph 1" to "Paragraph 1(a)," and, within that sub-paragraph, replace "each homeless man" with "homeless single adults," consistent with *Eldridge*, *supra*; and

- Add a new Paragraph 1(b), providing for the staying of both Paragraph 1 obligations to homeless single adults, as well as similar (but not equivalent) obligations to adult families.[4]

The resulting provision would read as follows:

> 1(a) The City defendants shall provide shelter and board to each homeless ~~man~~ single adult who applies for it provided that (a) ~~the man~~ such single adult meets the need standard to qualify for the home relief program established in New York State; or (b) ~~the man~~ such single adult by reason of physical, mental or social dysfunction is in need of temporary shelter.
>
> 1(b) The obligations to provide shelter to both homeless adults and to adult families shall be stayed when the City of New York, acting through the New York City Department of Homeless Services ("DHS"), lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter.

Should the City Defendant be permitted to move for the above-described relief, it will provide affidavits from high-ranking City officials establishing the following facts:

> (1) Starting in April 2022, the City Defendant, through DHS, began experiencing an unprecedented increase in the number of single adults, adult families, and families with children seeking emergency shelter. The main driver of this increase was an influx of asylum-seekers arriving here from the southern border of the United States, in large part orchestrated by out-of-State actors seeking to score political points by exporting the responsibility and attendant fiscal burdens of caring for this population out of their state and, by political calculation, to the City of New York. These asylum-

[4] City Defendant, by this application, seeks no relief regarding its obligations to families with children. The provision of shelter to families with children has its roots in a judgment in a separate case, *Boston v. City of New York,* Index No. 402295/08 (Sup. Ct., N.Y. Cty. Dec. 12, 2008).

seekers arrived without housing and, in many cases, without any resources to care for themselves.

(2) Since the Spring of 2022, tens of thousands of asylum-seekers have arrived in the City and been provided a temporary place to stay in various City locations. By October of 2022, more than 17,000 asylum-seekers had entered the City's DHS shelter system. Last Summer, the State of Texas and the City of El Paso began chartering buses of migrants to various major cities, with by far the majority of this population sent to New York City. While El Paso has provided the City with scheduling and other basic information regarding the buses and their passengers, the State of Texas has refused any outreach by the City to coordinate this process. Consequently busloads of asylum-seekers arrive at the Port Authority Bus Terminal at unpredictable hours.

(3) By May 15, 2023, more than 65,000 asylum-seekers had arrived in the City, and currently, more than 44,000 asylum-seekers remain in locations provided by the City, with more arriving every day.

(4) This ongoing flood of asylum-seekers arriving in New York City from the southern border represents a crisis of national, indeed international dimension; yet, the challenges and fiscal burden of this national crisis have fallen almost exclusively upon the City. As the country's by-default backstop for international and national policy failures, as well as inter- and intra-state political maneuvering, all entirely outside of its control, the City is now facing an unprecedented demand on its shelter capacity. These unprecedented demands on the City's shelter resources confront the City Defendant with challenges never contemplated, foreseeable, or indeed even remotely imagined by any signatory to the *Callahan* Judgment.

(5) Notwithstanding that the influx of asylum-seekers from the border has been orchestrated in large measure by out-of-State actors without regard for the City's ability to provide care, the City has responded, to date, with compassionate concern for the welfare of migrant individuals and families who have endured unimaginable hardships before arriving here.

(6) The City has made extraordinary efforts to meet the needs of these tens of thousands of asylum-seekers, including the establishment of numerous DHS emergency shelters; the declaration of a state of emergency by Mayor Adams on October 7, 2022 (Emergency Executive Order Number 224)

(annexed as Appendix 3)[5]; the corresponding direction to city agencies to establish Humanitarian Emergency Response and Relief Centers to provide, among other things, immediate respite and sleeping accommodations to asylum-seeking individuals and families; and the recent urgent response by the New York City Office of Emergency Management to open Emergency Respite Centers. However, even as these emergency measures are undertaken, stretching the City's fiscal and personnel resources to the breaking point, waves upon waves of asylum-seekers continue to arrive, with those numbers only now increasing upon the expiration of the Title 42 Order.[6]

(7) Including both asylum-seekers and the City's "resident homeless" population, the City Defendant is currently providing shelter for over 93,000 individuals, over 81,000 of whom are being provided for by DHS. This represents an over 75 % increase in the DHS shelter population in a single year and far exceeds the City's previous highest-ever-recorded population of 61,000 individuals.

(8) While the City is endeavoring to enlist other localities within New York State to share the shelter burdens imposed almost exclusively upon the City by out-of-State actors, those efforts are meeting with local resistance including executive orders and related legal challenges that, even if of questionable merit, effectively hamstring the City's efforts at modest burden-sharing at a time when the City has reached the extended outer limits of its shelter capacity, both in terms of sites and staffing.

(9) The dire extremity of this crisis does not represent a failure of will or commitment on the City's part to asylum-seeking individuals and families seeking refuge from the peril and hardship in their countries of origin; rather it results precisely from that commitment: the City has done far more than many other – if not all – other jurisdictions in the United States for this desperate population. The unfortunate reality is that the City has extended itself further than its resources will allow, placing in jeopardy the City's obligations to manage its fisc in order to maintain critical infrastructure and services and provide for the well-being of all of its citizens.

---

[5] Emergency Executive Order Number 224 has been extended by subsequent executive orders.

[6] Pursuant to sections 362 and 365 of the Public Health Services Act (42 U.S.C. §§ 362, 365) and the implementing regulation at 32 C.F.R. § 71.40, the Director of the United States Center for Disease Control ("CDC") issued the *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* (the "Title 42 Order").

Based upon the above summary, on behalf of the City Defendant, I respectfully request that Your Honor assign this 44-year-old matter to a newly-assigned justice for consideration of City Defendant's request for leave to move for partial relief from the Judgment. I thank Your Honor for your consideration of this application.

Very truly yours,

Jonathan Pines
Assistant Corporation Counsel

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Attorneys for State Defendants

APPENDIX 1

Callahan 1984 Order

SUPREME COURT : STATE OF NEW YORK
TRIAL TERM : PART 23

- X

ROBERT CALLAHAN, et al.,

Plaintiffs

- against -

HUGH L. CAREY, as Governor of the State of New York, et al.,

Defendants

Index No. 42582/79
10/15/87

- X

WALLACH, RICHARD W., J.:

The parties are advised that henceforth no motions are to be made except with the permission of the court. Such permission is to be sought by letter from counsel addressed to the court briefly describing the relief needed and setting forth proposals for the submission of proof and argument. Responses from opposing counsel are also to be made by letter addressed to the court, and should be received by the court within two or three days thereafter. Should the party seeking leave to make a motion wish to reply, such will be received by the court if delivered to chambers within a day or two after delivery of the responding letter. In a written order the court will then determine whether to entertain the proposed motion, and, if so, schedule its submission.

Service of all papers herein is to be made in the same manner as delivery is effected upon the court.

In the event that there is a need for immediate, temporary relief pending the submission and decision of a motion, this too is to be sought by letter, clearly alerting that immediate, temporary relief is being sought and covering any affidavits or other evidentiary materials necessary to warrant the granting of immediate, temporary relief. Upon receipt thereof, the other sides should hold themselves ready to appear in chambers within 48 hours for argument on the question of whether immediate, temporary relief should be granted, bringing with them any evidentiary materials they deem appropriate for purposes of opposition. They may also bring with them a responding letter opposing submission of the proposed motion. The conference in chambers will be set up by way of telephone communications with chambers.

In the event the question of immediate, temporary relief is not resolved consensually in chambers, the court, by oral order dictated into the record, will decide whether to grant such relief; if so, the court will schedule the submission of formal proof and argument; if not, whether the proposed motion should be entertained at all will remain

an open question to be decided by the court in a subsequent written order.

Defendants are requested to respond forthwith to the letter dated October 15, 1984 from Mr. Hayes to the court.

The foregoing constitutes an order of the court made sua sponte pursuant to its inherent power of control over its own calendar and the disposition of business before it.

FILED
OCT 15 1984
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 15, 1984

J.S.C.

APPENDIX 2

Callahan Order

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 PAUL 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, BARBARA BLUM, as Commissioner of the New York State Department of Social Services, 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 of 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 Kaener 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 and 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 at 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 that 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 416 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 450. Between the date of entry of this judgment and December 31, 1981, the capacity of the Keener Building shall not exceed 450.

(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 an individual basis.

(b) Each resident shall be supplied with a clean towel, soap and toilet tissue. A clean towel shall be provided to each new resident and towels shall be changed at least once a week and more often as 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 centers"). 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 facilities from the central intake centers to all homeless men for whom the City defendants must provide 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) Kings County Hospital Center, 451 Clarkson Avenue, Brooklyn, New York;

(c) Lincoln Hospital, 234 East 149th Street, Bronx, New York; and

(d) Queens Hospital Center, 82-68 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 persons 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 this 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

Ward's 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.

Dated: New York, New York
August 26, 1981

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By: _____
Amy Juvilet
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Attorney for the State Defendants

So ordered:

_____
J.S.C.

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.

APPENDIX 3

Emergency Executive Order No. 224

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EMERGENCY EXECUTIVE ORDER NO. 224

October 7, 2022

WHEREAS, over the past several months, thousands of asylum seekers have been arriving in New York City, from the Southern border, without having any immediate plans for shelter; and

WHEREAS, as of October 5, 2022, the asylum seekers who have entered the City's shelter system operated by the Department of Homeless Services (DHS Shelter System") include approximately 17,429 individuals, comprised of 2,896 families with children; 6,014 adults; and 734 adult families; and

WHEREAS, to date, the City has opened 42 DHS shelters in response to this influx of asylum seekers;

WHEREAS, the state of Texas, and the city of El Paso, have pledged to continue sending asylum seekers on buses to New York City, and

WHEREAS, Texas has not provided notice to New York City, and has indicated that it will continue not providing notice to New York City, regarding how many busloads of people will be arriving, or the dates and times of their arrival; and

WHEREAS, many of the buses arrive at the Port Authority Bus Terminal unannounced and unscheduled, in the early morning or late night hours; and

WHEREAS, many of the asylum seekers are coping with the effects of trauma and exhaustion, as well as other physical and mental health concerns; and

WHEREAS, the stress on the asylum seekers has been compounded by the additional days of travel to New York City, during which time it has been reported that many have been afforded limited food and water, and limited opportunities to leave the bus; and

WHEREAS, the DHS Shelter System is nearing its highest ever recorded population of over 61,000 individuals and is not designed to serve the influx of asylum seekers arriving to New York City from the Southern border;

WHEREAS, if asylum seekers continue to enter the City at the current rate, the total population within the DHS Shelter System will exceed 100,000 individuals next year;

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law, the New York City Charter and the Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:

Section 1. State of Emergency. A state of emergency is hereby declared to exist within the City of New York based on the arrival of thousands of individuals and families seeking asylum.

§2. Humanitarian Emergency Response and Relief Centers.

a. I hereby direct New York City Emergency Management (NYCEM) to coordinate with the New York City Health and Hospitals Corporation (H+H), the Department of Information Technology and Telecommunications, also known as the Office of Technology and Innovation (OTI), the Department of Design and Construction (DDC), the Mayor's Office of Immigrant Affairs, and other agencies as appropriate, to establish and operate temporary humanitarian relief centers to be known as "Humanitarian Emergency Response and Relief Centers" ("HERRCs") that will provide assistance for arriving asylum seekers, helping them by immediately offering respite, food, medical care, case work services, and assistance in accessing a range of settlement options, including through connections to family and friends inside and outside of New York City, in addition to, if needed, direct referrals to alternative emergency supports.

b. I hereby authorize the Deputy Mayor of Health and Human Services to enter into a memorandum of understanding with H+H concerning the establishment and operation of the HERRCs, which shall, among other things, provide for the establishment of policies and procedures for the operation of the HERRCs, provide for the confidentiality of information collected from the persons served in the HERRCs, and provide restrictions on disclosure of information about an individual's immigration status consistent with the policies set forth in Executive Order 34 (dated May 13, 2003) and Executive Order 41 (dated September 17, 2003).

§ 3. Cooperation of all agencies.

I hereby direct all agency heads, including but not limited to the Mayor's Office of Immigrant Affairs, the New York City Emergency Management, the Department of Health and Mental Hygiene, the Mayor's Community Affairs Unit, the Fire Department, the Police Department, the Sheriff's Office, the Chief Privacy Officer, and the Departments of Buildings, Housing Preservation and Development, Sanitation, Social Services, Homeless Services, Environmental Protection, and Parks and Recreation, to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.

I hereby direct all agency heads, including but not limited to the Mayor's Office of Immigrant Affairs, the New York City Emergency Management, the Department of Health and Mental Hygiene, the Mayor's Community Affairs Unit, the Fire Department, the Police Department, the Sheriff's Office, the Chief Privacy Officer, and the Departments of Buildings, Housing Preservation and Development, Sanitation, Social Services, Homeless Services, Environmental Protection, and Parks and Recreation, to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.

§ 4. Suspension of laws and rules.

a. I hereby direct that the following laws and rules related to the Uniform Land Use Review Procedure, and other procedures applicable to the City planning and land use review processes, to the extent they would apply to the siting, construction and operations of the HERRCs, impose limitations on the amount of time permitted for the holding of public hearings, the certification of applications, the submission of recommendations, any required or necessary voting, the taking of final actions, and the issuance of determinations, are suspended, and that any such time limitations are tolled for the duration of the State of Emergency: sections 195, 197-d, 203 , and 3020 and subdivisions (b) through (h) of section 197-c of the Charter, sections 25-303, 25-306, 25-308, 25-309, 25-310 and 25-313 of the Administrative Code, and sections 1-05.5 and 1-07.5 of Title 2 and sections 2-02 through 2-07 of Title 62 of the Rules of the City of New York.

b. I hereby direct that section 14-140 of the Administrative Code and section 12-10 of Title 38 of the Rules of the City of New York are suspended, to the extent they impact the disposition of personal property at the HERRCs.

§ 5. Effective date. The State of Emergency declared in section 1 of this Order shall remain in effect for 30 days and may be extended. The remaining provisions of this Order shall take effect immediately and shall remain in effect for five (5) days unless they are terminated or modified at an earlier date.

Eric Adams

Eric Adams
Mayor

The New York Times https://www.nytimes.com/2023/05/10/nyregion/nyc-right-to-shelter-migrants.html

Adams Weakens Right-to-Shelter Rules, Anticipating Migrant Surge

Saying New York City had "reached our limit," the Adams administration said it would loosen regulations that have protected homeless families seeking shelter.


By Emma G. Fitzsimmons and Andy Newman

May 10, 2023

New York City is temporarily suspending some of the rules related to its longstanding guarantee of shelter to anyone who needs it as officials struggle to find housing for migrants arriving from the southern border.

Under an executive order, the city is suspending rules that require families to be placed in private rooms with bathrooms and kitchens, not in group settings, and that set a nightly deadline for newly arriving families to be placed in shelters.

A spokesman for Mayor Eric Adams confirmed the decision on Wednesday night, saying that the city had "reached our limit" and ended up having to place newly arrived migrants in gyms last week.

"This is not a decision taken lightly," the spokesman, Fabien Levy, said in a statement, "and we will make every effort to get asylum seekers into shelter as quickly as possible, as we have done since Day 1."

Republican governors of border states have been sending buses of asylum seekers to New York and other Democrat-led cities since last spring, but the city's decision came as a federal pandemic-era rule that allowed the government to eject thousands of migrants, known as Title 42, is set to expire Thursday night. City officials have said they expect as many as 1,000 people a day to come after the rule is lifted.

Already people have been crossing into the United States from Mexico in anticipation of the change.

New York City has opened eight humanitarian relief centers as city officials have moved to help more than 61,000 migrants who have arrived over the last year.

New York is the only major city in the country that provides “right to shelter,” the result of a legal agreement that requires the city to provide a bed to anyone who needs one under certain conditions.

“We all hope that they never have to take any actions that would be in violation of these rules that they’re suspending,” said Joshua Goldfein, a staff lawyer for the Legal Aid Society, which represents the nonprofit that is the court-appointed monitor for the shelter system, the Coalition for the Homeless.

Under the nightly-deadline rule, homeless families with children who arrive at a shelter-system office by 10 p.m. must be given beds in a shelter the same night. Last July, as the number of migrants was accelerating, some families spent the night in chairs at the main office in the Bronx; it was the first time the nightly deadline had been violated since at least 2014.

“We know that they are working hard to avoid putting people in harm’s way,” Mr. Goldfein said, “but we have learned over and over again that putting families with children in congregate settings or leaving them in city offices for days on end is dangerous and harmful to children and their families.”

The city is also suspending protections for families who have been in emergency shelter hotels for more than 30 days, which officials say make it impossible to evict them without taking them to housing court.

Mr. Goldfein pushed back against that suspension, saying, “They want the ability to turn off their key cards and lock them out,” as the city did earlier this year to families who had been staying in a Lower Manhattan hotel since being displaced by Hurricane Ida in 2021.

As of Tuesday, there were 78,763 people in the city’s main shelter system, a record that has been broken nearly every day since October. Nearly half of them are migrants, the city says, spread among 120 emergency shelters and the eight larger centers.

Mr. Adams has said that housing the migrants is costing the city billions of dollars, warning last month that the city is "being destroyed" by the crisis and criticizing President Biden for his handling of the situation.

Still, the city is mandated by the longstanding legal settlement to observe the right to shelter, and Mr. Adams is likely to face criticism over his decision to reduce some of the protections. The right to shelter, rooted in court cases launched in 1979, is one reason New York City doesn't have the same level of street homelessness as some cities in California and elsewhere.

Mr. Levy, the mayoral spokesman, said that the city was doing the best it could under difficult circumstances, "but without more support from our federal and state partners, we are concerned the worst may be yet to come."

Raúl Vilchis contributed reporting.

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A version of this article appears in print on , Section A, Page 16 of the New York edition with the headline: Officials Loosen Shelter Rules As City Runs Short of Housing

The New York Times https://www.nytimes.com/2023/05/23/nyregion/right-to-shelter-nyc.html

New York City Asks for Relief From Its Right-to-Shelter Mandate

City officials say that the arrival of 65,000 asylum seekers has presented the city "with challenges never contemplated, foreseeable or indeed even remotely imagined."

By Jeffery C. Mays

May 23, 2023

Mayor Eric Adams asked a judge for permission on Tuesday to relieve New York City of its unique and longstanding obligation to provide shelter for anyone who asks, asserting that the immense influx of asylum seekers has overwhelmed its ability to accommodate all those in need.

"Given that we're unable to provide care for an unlimited number of people and are already overextended, it is in the best interest of everyone, including those seeking to come to the United States, to be upfront that New York City cannot single-handedly provide care to everyone crossing our border," Mr. Adams said in a statement. "Being dishonest about this will only result in our system collapsing, and we need our government partners to know the truth and do their share."

In a letter to Deborah Kaplan, the deputy chief administrative judge for New York City Courts, the city's lawyers asked for changes to the 1981 consent decree that set New York's requirement to provide shelter for anyone who applies for it.

The city asked that the wording be changed to allow it to deny shelter to homeless adults and adult families if it "lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter."

The city did not request relief from its obligations to provide shelter to families with children.

Mr. Adams said that he was not seeking to permanently end the right to shelter. But he said that the 1981 consent decree, issued in the Callahan v. Carey case, could not have anticipated "a mass influx of individuals entering our system — more than doubling our census count in slightly over a year."

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The letter to Judge Kaplan underscored that theme, saying that the "unprecedented demands on the city's shelter resources confront the city defendant with challenges never contemplated, foreseeable or indeed, even remotely imagined."

City officials say more than 70,000 migrants have arrived since the spring and more than 40,000 are in the city's care. There are more than 81,000 people in the city's main shelter system.

The city has struggled to find places to house migrants, opening more than 150 sites to house the newcomers, including 140 hotels. Migrants have also been housed in a cruise ship terminal in Brooklyn and in tents on Randall's Island. A plan to place migrants in school gyms was quickly reversed last week after protests.

Mr. Adams says the city will spend as much as $4.3 billion through June 2024 to feed and house the asylum seekers. It has spent more than $1 billion so far. Camille Joseph Varlack, Mr. Adams's chief of staff, said during an interview Tuesday on NY1 that the city wanted to sit down with all of the parties in the consent decree and "revisit all of it," in light of the record number of people under the city's care during an "unprecedented humanitarian crisis."

This is the second time the Adams administration has sought relief from the right-to-shelter mandate. Earlier this month, the mayor issued an executive order that suspended rules requiring families to be placed in private rooms with bathrooms

and kitchens, not in group settings, and that set a nightly deadline for newly arriving families to be placed in shelters.

The Legal Aid Society, which filed the litigation that led to the right to shelter, and the Coalition for the Homeless issued a joint statement strongly opposing the city's move. The groups argued that the changes would hurt homeless New Yorkers as much as asylum seekers.

"The administration's request to suspend the long-established state constitutional right that protects our clients from the elements is not who we are as a city," the groups said. "New Yorkers do not want to see anyone, including asylum seekers, relegated to the streets. We will vigorously oppose any motion from this administration that seeks to undo these fundamental protections that have long defined our city."

Brad Lander, the city comptroller, said the Adams administration was not doing enough to relieve the pressure on the shelter system by moving people more quickly into permanent housing. Mr. Adams opposes legislation from the City Council that would eliminate a rule requiring people to be in shelter for 90 days before becoming eligible for city-funded housing vouchers.

"Attempting to rollback the Right to Shelter while lobbying against legislation that will help get more homeless New Yorkers into their own apartments is wrong," said Christine Quinn, the former City Council speaker and chief executive of WIN, a network of shelters for women and children that has housed more than 270 migrant families. "It is both bad policy and bad politics, and New Yorkers will not stand for it."

Jeffery C. Mays is a reporter on the Metro desk who covers politics with a focus on New York City Hall. A native of Brooklyn, he is a graduate of Columbia University. More about Jeffery C. Mays

A version of this article appears in print on , Section A, Page 20 of the New York edition with the headline: Adams Seeks To Reduce City's Role As a Shelter

Mayor Adams' Statement on New York City's Right to Shelter Law

May 23, 2023

NEW YORK – New York City Mayor Eric Adams today released the following statement after the New York City Department of Law filed an application for modification of provision of final judgment following a 1984 consent decree in *Callahan v. Carey* related to the city's Right to Shelter law:

"From the start, let us be clear, that we are in no way seeking to end the right to shelter. Today's action will allow us to get clarity from the court and preserve the right to shelter for the tens of thousands in our care — both previously unhoused individuals and asylum seekers. Given that we're unable to provide care for an unlimited number of people and are already overextended, it is in the best interest of everyone, including those seeking to come to the United States, to be upfront that New York City cannot single-handedly provide care to everyone crossing our border. Being dishonest about this will only result in our system collapsing, and we need our government partners to know the truth and do their share.

"For more than a year, New York City has — largely on its own — provided shelter, food, clothing, and more to over 70,000 migrants who have arrived in our city. We now have more asylum seekers in our care than New Yorkers experiencing homelessness when we came into office. When the original Callahan consent decree came down almost 40 years ago, no one could have contemplated, foresaw, or even remotely imagined a mass influx of individuals entering our system — more than doubling our census count in slightly over a year. Our city has done more to support asylum seekers than any other city in the nation, but the unfortunate reality is that the city has extended itself further than its resources will allow."

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Media Contact

Greg B. Smith & Gwynne Hogan, Adams Admin Takes Second Shot at Suspending 'Right to Shelter' in New Court Filing, The City, Oct. 3, 2023

Mayor Eric Adams on Tuesday asked a court to temporarily suspend the city's decades-old practice of offering shelter to any adult who asks, proposing that the protocol deserves an emergency pause while the city grapples with the still-ongoing wave of asylum seekers who have arrived in New York for more than a year.

HELP ran an intake system for single women entering the homeless shelter system, Oct. 3, 2023.

In a letter to Manhattan State Supreme Court, Assistant Corporation Counsel Daniel Perez asserted that if the court grants the city's request to suspend the 1980s court decree guaranteeing a right to shelter, "The City will simply have the same obligations as all other jurisdictions throughout New York State. And the City will have significantly more flexibility in its response to the present crisis."

The city's application outlines the conditions under which the right to shelter would be suspended: The governor or the mayor would have to declare a state of emergency, and the average number of single adults in city shelters would have to be 50% greater than the daily average over the past two years.

The modification, if approved by a judge, would mark the first major change to a practice that's been on the books since 1981 when the city agreed to settle a lawsuit filed by the Legal Aid Society to provide shelter to any adult who requested it.

The so-called right to shelter codified in the case, Callahan v. Carey, has emerged as a flashpoint after thousands of migrants first began flooding the city's shelter system in the spring of 2022, initially mostly from South and Central America and now from all over the world.

As of Tuesday, Mayor Adams said the total number of asylum seekers who've arrived in New York since the diaspora began has topped 122,000. The mayor has warned that the ongoing wave, which now amounts to about 3,000 new arrivals a week, will "destroy" the city if the federal government doesn't intervene to stem the flow and arrange for a more equitable distribution of migrants around the nation.

Adams' Department of Law argued that the right-to-shelter commitment agreed to 42 years ago is "outmoded and cumbersome" and "has unnecessarily deprived policy makers of much-needed flexibility" to confront a crisis that could not have been imagined in 1981.

Shortly after his Department of Law filed this request, Mayor Adams issued a statement emphasizing that the Callahan decree "was never intended to apply to the extraordinary circumstances our city faces today."

Now estimating the projected cost for city taxpayers to address this crisis at $12 billion over three years, he asserted, "It is abundantly clear that the status quo cannot continue." More conservative estimates from the city comptroller's office put the amount closer to $5.3 billion.

The filing by Perez took a different approach from the administration's previous approach.

Last year the Adams administration asked the court for a broad waiver to the right to shelter requirement to allow the city to determine whether it could provide shelter based on the resources it had at its disposal.

That motion reopened the decades-old case but was never resolved. Last week Adams announced he intended to file a new modification request, and the judge assigned to the case, Manhattan Supreme Court Justice Erika Edwards, ordered him to do so by Tuesday. She then recused herself from the case, stating that she wanted to avoid potential conflict because "it may appear" that she has an unspecified "motive to favor one party over another." A new judge has yet to be appointed to the case.

The Legal Aid Society and the Coalition for the Homeless issued a joint statement calling the city's move "the most significant and damaging attempt to retreat on its legal and moral obligation." They warned if granted by a judge, the move would allow the city to "end the Right to Shelter as we know it."

"The City would have the ability to declare an emergency, and effectively end the Right to Shelter for thousands of New Yorkers — including working poor individuals who rely on the shelter system and, alarmingly, individuals who rely on disability benefits," they said. "This abhorrent and unnecessary maneuver is a betrayal of the City's commitment towards ensuring that no one is relegated to living — or dying — on the streets of our city."

In his statement accompanying the request, Mayor Adams stated the modification "is not seeking to terminate" the agreement reached under the Callahan consent decree.

'Close the Borders'

The city's latest request comes as the number of people staying in shelters continues to climb to historic heights. As of Sept. 24, a record 115,200 people were staying in city shelters including 61,400 migrants, spread out all across the five boroughs in 210 emergency shelters.

In recent months, city officials have ramped up steps to try to discourage people from staying in shelters, including reducing the amount of time adult migrants could stay down to 60 days, then down to just 30 days, before they have to return to the intake center to seek another cot.

Adams and his top staff have resorted to increasingly alarmist rhetoric to describe the situation. Adams has said repeatedly migrants were "destroying" New York City and over the weekend, Chief Advisor Ingrid Lewis-Martin urged President Joe Biden to "close the borders."

"Until you close the borders you need to come up with a full on decompression strategy where you can take all of our migrants and move them throughout our 50 states," she said in an interview on Pix11. "The right to shelter was intended for our indigenous homeless population, so we argue that we should not have to shelter all of these immigrants."

At a press conference Tuesday, Adams walked back her remarks.

"We believe the borders should remain open. That's the official position of this city," he said.

While the city has taken steps to attempt to dissuade adult migrants from staying in shelters, the vast majority of migrants in city care are in

families with children. The latest tallies released to the City Council in August indicated that of nearly 60,000 migrants in city facilities, 44,148 were parents and children.

But thus far the city has refrained from issuing 60-day or 30-day notices to families with children, though officials have been mulling this as an option, THE CITY reported.

At Tuesday's press briefing Deputy Mayor Anne Williams-Isom said more than 400 people were waiting at the Roosevelt Hotel for a place to sleep and city officials said they expected more lines to form outside the migrant arrival center there in the coming days, as they had over the summer. Adams, who has announced plans to travel to Mexico, Ecuador and from Bogotá in Colombia to the Darién Gap to further dissuade migrants traveling to New York City, issued an ominous warning.

"New Yorkers are going to start to see visibly what being out of room means," he said, refusing to provide specifics. "We are out of room. We're getting ready to take a real shift in this whole crisis."

Emma Whitford, NYC Mayor's Latest Bid to Suspend Adult Shelter Rights Cools in Court, City Limits, Oct. 19, 2023

Mayor Eric Adams' administration is not proceeding with a formal request to suspend the right to a shelter bed for single adults in New York City—at least for now.

In a Manhattan courtroom on Thursday, following 90 minutes of closed-door discussions, New York State Supreme Court Judge Gerald Lebovits said attorneys for the city, state and homeless advocates will instead continue meeting in private, with an eye toward a possible settlement.

"The parties have agreed that for now there should not be a war of legal papers," Judge Lebovits said. "That for now, the solution is to try to settle the matter if possible and to solve any problem that may exist."

The news was welcome to the Legal Aid Society, which has been locked in negotiations for months on behalf of Coalition for the Homeless. Talks started in the late spring, after Mayor Adams first sought relief from the 1981 consent decree in Callahan v. Carey, a lawsuit that established the right to shelter for single men.

"We are very grateful that the court and the parties agreed that we should continue to discuss how to solve the problem," said Josh Goldfein of Legal Aid. "No one wants to see people on the streets of New York exposed to the elements."

New York City is uniquely obligated to provide a shelter bed to anyone in need, at least temporarily—part of a set of rules that grew from the Callahan decree and subsequent court decisions.

But the Adams Administration has argued that an influx of recently-arrived immigrants since early 2022 has pushed New York City's shelter system beyond capacity. There are now 118,000 people staying in city shelters—over 64,000 of whom are asylum seekers—compared to about 60,500 in January 2022, according to City Hall.

Advocates had condemned Adams' latest proposal to suspend shelter rights as extreme, arguing that it would result in people being turned out to the streets ahead of the cold winter months.

In an Oct. 11 letter to the court, Legal Aid included graphic images of frostbite sustained by a person who slept outside in freezing temperatures in Massachusetts, that had been submitted previously in the decades-old case.

Gov. Kathy Hochul, meanwhile, endorsed the mayor's proposal in a court filing, calling it a "measured and appropriate modification."

The request is distinct from city policies limiting stays to one or two months for recently-arrived immigrants in certain shelters—including, as of recently, for families with children.

While advocates say the time limits are unfairly disruptive, Legal Aid so far has not challenged them in court, saying shelter rights aren't violated so long as everyone has the option to land a new shelter bed once their time is up.

Reached by email, a spokesperson for Mayor Adams said the administration's latest petition to modify Callahan remains pending while the parties go into mediation.

"As we have said before, the Callahan decree—entered over 40 years ago, when the shelter population was a fraction of its current size—was never intended to apply to the extraordinary circumstances our city faces today as more than an average of 10,000 migrants continue to enter our city every month seeking shelter," they said.

A spokesperson for the governor's office reiterated support of the mayor's proposal for Callahan relief, and expressed hope for a "timely, appropriate resolution" through mediation.*

Before dismissing the parties Thursday, Judge Lebovits previewed private talks starting next week, in the "robing room" adjacent to his bench.

"The proper path forward is to discuss logistics and nuts and bolts confidentially in the robing room and that's what the court and the parties will be doing a lot of beginning next week," he said. "The public will not be able to attend."

Thursday marked Judge Lebovits' first appearance in Callahan. He stepped into the case after Judge Erika Edwards recused herself in September, citing concerns about perceived impartiality. A state supreme court judge since 2015, Lebovits first took the bench in New York City Housing Court, from 2001 to 2010.

Sateesh Nori, a clinical adjunct professor at NYU Law School, appeared before Judge Lebovits while working as a tenant lawyer at Legal Aid. He also co-authored a law journal article with the judge in 2009 called "Section 8: New York's Legal Landscape."

"He will take it very seriously and he's very knowledgeable about the issues," Nori said of Judge Lebovits' new role in the Callahan case. "He's a scholar of housing law and legal practice."

Asked what a judge with Lebovits' background might bring to a case about shelter rights, Goldfein of Legal Aid said housing court judges are used to negotiating resolutions between parties without getting into protracted litigation.

"Any judge comes to the courtroom with their own life experience," he said. "Certainly housing court is a forum where most cases are resolved and we are grateful that Justice Lebovits wants to use those skills to try to see if this case can also be resolved."

Gynne Hogan, New York's 'Right to Shelter' No Longer Exists for Thousands of Migrants, The City, Dec. 18, 2023

After 42 years, New York City's "right to shelter," which was supposed to guarantee a bed to anyone who sought one the same day, has functionally ended.

Mayor Eric Adams has warned for months this moment was approaching, and even went to court this past spring to try to have the city released from the consent decree it entered into decades ago.

Migrants wait in line outside the St. Brigid shelter reticketing site in the East Village. Dec. 13. 2023.

But the end of the right to shelter for adult migrants didn't come by way of a press release or a court order. Instead, it happened quietly.

For months, as the number of migrants arriving in New York climbed, city workers raced to open more and more shelters in increasingly ad hoc settings to accommodate them. Now that era has come to an end, with the Adams administration letting the chips, and the people, fall where they may.

That new reality is on stark display outside an East Village "reticketing center," where every morning for the past few weeks, hundreds of people — mostly men — have queued in the frigid pre-dawn hours in a line that snakes around the block.

The building, the former St. Brigid's Catholic School on East 7th Street, is now the centralized intake point for adult migrants who've run out their time in shelters — since the city has begun to put that on a clock — and are seeking a bed for another 30 days.

Those seeking a place to sleep are given a wristband with a number and a date scribbled in sharpie, indicating how many people are before them in line. The number of those waiting for cots, spread out across a network of emergency shelters across the city, is likely in the thousands, and it now takes more than a week to secure one.

Dozens of migrants told THE CITY over the past two weeks that they have been waiting more than seven days to get a shelter cot, with many spending their nights on the streets, in trains or they're directed to an increasingly overcrowded waiting room in The Bronx near Crotona Park overseen by the city's Office of Emergency Management.

As the number of those waiting for beds grew this week, and temperatures slumped below freezing, the city opened additional satellite waiting rooms, where migrants are not always allowed to lie down on the floor, have limited access to food, and nowhere to bathe.

"Why is the government letting us sleep in the streets? With this cold, it's really ugly," said 19-year-old Bryan Arriaga, from Mexico, who described being turned away from a mobbed shelter intake office on Dec. 7.

He then spent a night on the floor of a city waiting room in The Bronx and another few nights sleeping in a public restroom in Jamaica, Queens.

Migrant Bryan Arriaga waited in line outside the East Village shelter re-ticketing center, Dec. 13, 2023.

On Dec. 12, he returned to the East Village, along with hundreds of others in much the same situation. Perched on a park bench across from the throngs of people surrounding the intake site, he debated his next move.

"I want a place to sleep, a place to bathe, a place to lie down, sleep like eight hours," he said. "I'm really stressed, I'm sad."

The collapse of the city's right to shelter protections currently impacts adult migrants, who are now allotted just 30-days in a shelter before they have to seek a new placement and brave the line of hundreds at the intake center. While Adams has said repeatedly that the goal is never to have families with children sleeping on the streets, new restrictions are coming for thousands of migrant families with children too who account for a vast majority of migrants in shelters.

Thousands of 60-day eviction notices were scheduled to begin expiring in the weeks after Christmas, part of the city's multipronged efforts to deter more migrants from coming to New York and to encourage those in shelters here to leave.

City Hall didn't return a request for comment on the functional end to the city's right to shelter and the situation for thousands of migrants awaiting shelter.

'You're Killing Us'

At the East Village reticketing site, meals of sandwiches and fruit are provided for those who make it inside. While a lucky few get assigned a new cot each day, hundreds more are shooed away each night when the facility closes at 7 p.m., directed to a series of waiting rooms across the city with chairs, but no cots.

The main overnight waiting room where migrants have been sent each night The Bronx, an hour and a half commute away from the East Village site. Migrants told THE CITY it's increasingly cramped, smelly and dirty, with no shower on site. The only things available to eat there are crackers and tuna.

Migrants take shelter in the Bathgate waiting room in the Bronx, Dec. 11, 2023.

Some have abandoned the nightly schlep to The Bronx altogether. Nearly every night for the past two weeks, a group of migrants have set up camp outside the East Village site, a group that dwindles to under a dozen when temperatures dip particularly low, and has grown to as many as four dozen on warmer nights.

One evening last week, a group of them fortified shelters made of cardboard boxes, salvaged plastic tarps, and wooden slats from discarded bed-frames while trading tips on how to brave the cold. Some said they had too much luggage to carry halfway across the city, others said they preferred the sidewalk to the overcrowded waiting rooms.

"I'm wearing two pairs of gloves, three pairs of pants and four jackets," said Yaleiza Goyo, 55, from Venezuela, who said she'd spent four of the past five sleeping on the sidewalk outside the reticketing center. "I have to fight it out, because what else am I going to do?"

On Sunday night it rained, and city workers sent those sleeping outside to a NYPD gym in Gramercy Park but there, Goyo said, they were barred from laying on the floor and had to spend the rest of the night sitting up in folding chairs.

"You're killing us. How can you sleep sitting up? But it was raining. We had to stay," she said. As she put the finishing touches on the cardboard hut where she would spend another night, she chuckled. "You have to laugh at life, so as not to cry."

Goyo was one of an increasing number of women camping outdoors. Another Venezuelan migrant, 38-year-old Nailett Aponte, said she'd spent the past week waiting for a cot, sleeping outdoors on most nights.

"They don't have beds for couples. They don't have beds for single women. There's nothing," she said in Spanish.

Aponte later told THE CITY, she finally got a cot assignment on Wednesday, seven days since she began her wait for one.

Migrants who spoke with THE CITY said they'd lost jobs in restaurants and construction while waiting. They'd skipped appointments, scheduled weeks in advance, to get their NYC ID cards, a vital piece of identification, and feared they would end up without the paperwork — mailed by the federal government to their former shelters — that would allow them to work legally.

The days they'd spent trying to secure another cot, had likely set them back weeks in their effort towards being able to support themselves and move out of shelters for good.

"I should be working, not smoking cigarettes and drinking coffee outside here," said Krist Benitez, in Spanish, who said he'd lost work as a dishwasher in the days he'd been sleeping outside waiting for a shelter cot. Clasping a folder of paperwork, he said both his city ID and his Occupational Safety and Health Administration certification, needed to work most construction gigs, were set to be shipped to his old shelter, and he had no idea if he'd be able to get his hands on them.

"I don't understand it," he said.

Still countless others have already given up on the waiting. The lucky ones found a room to rent, or a couch to crash on. Others have accepted free tickets out of the city and are trying out life in other cities and states. Countless more have slipped into precarious living situations on the streets and subways. While city officials say only 20 percent of people evicted from shelters are returning for another placement, they have no data on where all the other people go.

One Venezuelan migrant, David, who declined to share his full name, said after his 30 days in shelters ran out, he'd given up on seeking another placement, having heard through the grapevine about the chaotic reticketing center.

In the days since, he's been sleeping in a friend's van.

"It's difficult," he told THE CITY in Spanish. "I'll stay here until I can find a room."

'New Yorkers Are Pissed'

The chaos over the past two weeks is the culmination of more than a year over which more than 140,000 migrants have made their way to New York City, many drawn by the city's right to shelter, that up until recently had meant they could count on some roof over their heads while they got on their feet.

For months, Mayor Adams has argued the city's "right to shelter" is an antiquated rule that was more than New Yorkers could afford to maintain on behalf of an unprecedented number of new arrivals.

When the 1981 legal consent decree establishing it was hammered out, it applied only to adult men and the city had to provide just 125 beds for homeless New Yorkers. Now there are more than 122,100 people living in shelters, including 65,000 migrants, a larger population than Hartford, Connecticut.

At a press conference in October, Adams put it bluntly:

> "There's two schools of thought in the city right now. One school of thought states you can come from anywhere on the globe and come to New York and we are responsible, on taxpayers limited resources, to take care of you for as long as you want: Food, shelter, clothing, washing your sheets, everything, medical care, psychological care for as long as you want. And it's on New York City taxpayer's dime," he said. "And there's another school of thought: that we disagree."

Other mayors, including Rudy Giulani and Michael Bloomberg, have tried to walk back the requirements of the 1981 Callahan decree, none successfully. In 2009, When shelter waiting rooms overflowed with men and women sleeping on the floors in 2009, the Legal Aid Society and the Coalition for the Homeless took the city to court, and a judge forced the city to open up hundreds more beds to homeless New Yorkers.

Over the past year, as tens of thousands of migrants made their way to New York, the rules laid out in the decree have been breached countless times. Longstanding protections under the decree — requiring beds to be spaced three feet apart, for example — were abandoned months ago. Over the summer the protections briefly collapsed altogether, with hundreds of migrants sleeping on the sidewalk for a week straight during a heat wave.

And for months Adams has been teasing an unspecified next phase where the city would identify large outdoor spaces, where migrants would get individual tents, and some kind of access to bathrooms and showers, in the absence of meaningful federal funds to federal immigration policy.

That next phase is here, albeit not in the form hinted at by the mayor. It started when the Adams administration quietly opened the East Village "reticketing sight" in October, and for the first time the city began explicitly telling migrants they were not guaranteed a cot, though they could get a plane ticket to any state or country. For several weeks, the number of cots freed up across shelters was enough to accommodate those seeking another 30-day stay within a reasonable amount of time.

But that tedious equilibrium collapsed over the Thanksgiving holiday, when the city saw another unexpected wave of migrant adults coming from the southern border. The city has been short hundreds of cots for adults every day since.

It's a moment Diane Enobabor, founder of the Black and Arab Migrant Solidarity Alliance, calls "organized abandonment." Some will wait it out, some will leave, untold others will fall through the cracks.

"Some will die. I don't think we should be shy about that," Enobabor said. "Some will die."

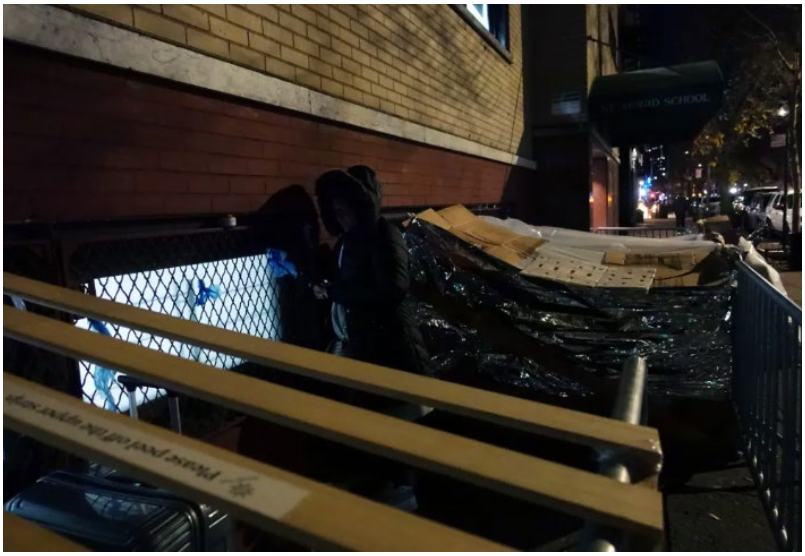
Attorney Joshua Goldfein with the Legal Aid Society, which represents Coalition for the Homeless, said while it may be currently impossible to secure a cot in a timely manner, it doesn't mean New Yorkers right to one is gone. Goldfein said he is in regular touch with city officials, pressuring them to uphold the rules.

"There is a court order and it is on the books and it remains in effect," he said. "I don't think anyone would deny that they are not in compliance. So the question is what is gonna be the remedy for that?"

'I Don't Have Deportation Powers'

While Adams has faced increasingly loud criticism from the progressive left, polls indicate he's not out of step with most New Yorkers, who are increasingly souring on the situation. The mayor has blamed the cost of migrant care for a surprise round of big mid-year budget cuts that would affect services including police, fire, sanitation, schools and libraries.

For the billions the city has spent on the crisis, the federal government has offered to reimburse just $159 million, though federal immigration policies that allow people to cross the border to seek asylum also prevent them from working legally for months.



Migrants sleep in makeshift shelters overnight outside the St. Brigid re-ticketing site in the East Village, Dec. 11, 2023.

While Adams has a record low approval rating, according to a Quinnipiac poll from early earlier this month, 62% of New Yorkers agreed with his assessment that migrants could destroy New York City — even as 66% of the respondents said they disapproved of how the mayor was handling the new arrivals.

Responding to the poll numbers at a press briefing Tuesday, Adams said people he talks to "are pissed off" and that he shared their anger:

"Why are you allowing the buses in, Eric? Why aren't you stopping them from coming in?," he said people ask him. His response: "I don't have deportation powers. I don't have the power to turn buses around. … And all I have the power to do is to balance the budget."

'No One Told Me the Truth'

Jesus Lopez, an 18-year-old from Venezuela, said he'd crossed the border alone around a month ago, and first got a free bus from Texas to Chicago, where he spent three weeks sleeping on the floor of a police precinct. From there he heard from other migrants things would be easier for him in New York, but when he arrived by bus he was lost, and wandered around the streets for about a week without a jacket, sleeping on the subways and any warm spot he could find.

Eventually, someone on a train told him about the main migrant intake center at Roosevelt Hotel in Midtown.

While city officials have said adults just arriving in New York get top priority for

placements there, ahead of those who've already had their 30-days in shelters, Lopez said he was turned away and directed to the reticketing site, where he joined thousands of others seeking a 30-day stint. For the better part of the past week, Lopez said, he spent days in and out of the East Village waiting room, and nights in the waiting room in The Bronx, hardly sleeping or eating, and not showering at all.

His teeth rattled in the subzero temperatures Tuesday night, as he got some air outside the overcrowded overnight waiting room in The Bronx. Lopez said his time in New York had, thus far, been better than his experience in Chicago, but the ordeal was jarring just the same.

"No one told me the truth. I'm shocked," he said in Spanish, adding he'd been given the number 3,752 in line for a cot. "I don't know what to think. I'm speechless."

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.

The Negative Right to Shelter

Ben A. McJunkin*

For over forty years, scholars and advocates have responded to the criminalization of homelessness by calling for a "right to shelter." As traditionally conceived, the right to shelter is a positive right—an enforceable entitlement to have the government provide or fund a temporary shelter bed for every homeless individual. However, traditional right-to-shelter efforts have failed. Despite the continuing prominence of right-to-shelter rhetoric, only four U.S. jurisdictions have embraced such a right. Moreover, the shelter systems in these jurisdictions are troublingly inadequate, mired in administrative bureaucracy and cabined by strict eligibility limits. The right-to-shelter movement has even proven pernicious. Centering a positive right to shelter in the discourse surrounding homelessness has rendered the weaknesses in shelter offerings invisible, and courts increasingly reify temporary emergency shelters as a justification for criminalizing unsheltered homelessness.

This Article proposes an alternative conception of the right to shelter as a negative right. It outlines a framework for recognizing a fundamental, constitutional right to shelter oneself without government interference. Self-sheltering activities, in this sense, would include everything from the simple use of blankets or bedding to the erection of temporary encampments in public spaces. It situates this new right within the traditions of constitutional due process jurisprudence premised on respecting human dignity. As the Article details, human dignity in the constitutional sense is understood both as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships, and as protecting against group-based subordination of disfavored

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classes. These interests are inescapably implicated by the decision to self-shelter while homeless. Recognizing a negative right to shelter is therefore an essential step to protect the dignity of homeless individuals while dismantling the plethora of criminal laws that currently plague them.

INTRODUCTION

At age seventeen, I was homeless. As homelessness goes, I had it better than most.[1] For one thing, I had a car—a decade-old, two-door import that I had purchased with my earnings from a high school fast-food job. My car was my most essential piece of personal property; it protected me from the elements, provided me the luxury of mobility, and ensured some measure of physical safety.[2] Importantly, it also secured my few other belongings, mostly clothes, blankets, a few music CDs, photographs, and school yearbooks.[3] At night, I parked my car in one of my hometown's nicer residential neighborhoods, where I hoped that I would be less likely to be harassed or attacked while unsheltered.

In other ways, my homelessness was typical. Like nearly half of those experiencing homelessness, my circumstances were a product of a turbulent family environment.[4] And like the majority of those individuals, I was confident that it was a temporary setback that I would overcome.[5] I did not want—and indeed would have refused—government assistance, including a bed in a shelter, had one been available.[6] In fact, I was too proud to even tell friends of my

1. Among other things, I had the social privileges of a cisgender, heterosexual, White male. For information on the role of race, gender, and sexuality in the experience of homeless youths, see Jama Shelton, Jonah DeChants, Kim Bender, Hsun-Ta Hsu, Diane Santa Maria, Robin Petering, Kristin Ferguson, Sarah Narendorf & Anamika Barman-Adhikari, *Homelessness and Housing Experiences Among LGBTQ Young Adults in Seven U.S. Cities*, 20 CITYSCAPE 9 (2018).

2. Studies have consistently found high rates of victimization among homeless adolescents—more often physical abuse for males and sexual abuse for females. *See* Angela J. Stewart, Mandy Steiman, Ana Mari Cauce, Bryan N. Cochran, Les B. Whitbeck & Dan R. Hoyt, *Victimization and Posttraumatic Stress Disorder Among Homeless Adolescents*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 325, 329 (2004). Homeless youths report high rates of hypervigilance and avoidance as strategies to reduce the risks of victimization, likely at the expense of long-term psychological and emotional health. *See id.* at 329–30.

3. Individuals experiencing homelessness frequently must carry all their belongings with them, a burden that can impede their sense of autonomy and even hinder their ability to find work. *See, e.g.*, Zarina Khairzada, *This Backpack Isn't for Sale, but It's Helping the Homeless*, SPECTRUM NEWS 1 (Aug. 16, 2019), https://spectrumnews1.com/ca/la-west/news/2019/08/15/this-backpack-isn-t-for-sale--but-it-s-helping-the-homeless [https://perma.cc/VY62-C9QP]. Even something as simple as a high-quality backpack "makes a difference and this creates a sense of dignity, a sense of safety." *Id.* (internal quotation omitted).

4. E.C. HEDBERG & BILL HART, A NEW LOOK: A SURVEY OF ARIZONA'S HOMELESS POPULATION 7–9 (2013), https://morrisoninstitute.asu.edu/sites/default/files/newlook-homelesssurvey.pdf [https://perma.cc/MW7N-KUNC].

5. Despite popular perceptions of homelessness as a chronic and persistent condition, the more common experience is for individuals to experience homelessness in brief, transitional episodes. *See* Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOCIO. INQUIRY 343, 345 (2015). A 2017 report from the U.S. Department of Housing and Urban Development found that only about 24 percent of individuals experiencing homelessness nationally had chronic patterns of homelessness. MEGHAN HENRY, RYAN WATT, LILY ROSENTHAL & AZIM SHIVJI, U.S. DEP'T OF HOUS. & URB. DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 62 (2017), https://www.huduser.gov/portal/sites/default/files/pdf/2017-AHAR-Part-1.pdf [https://perma.cc/2PQU-H4S9].

6. Phoenix Community Action Response Engagement Services (CARES) statistics indicate that nearly 75 percent of people refused services when contacted. *See* Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments. See Where They Are*, AZ CENTRAL (May 7, 2019),

situation, though they undoubtedly would have offered me a couch or some food. Instead, I parked my car every night facing east, woke at sunrise, and began my day collecting the fallen change from fast-food drive-throughs in order to pay for the day's meal or for a gallon of gas.

There is one other key way in which my experience was typical: I was a criminal.[7] My crime—frequently called "urban camping"[8]—is just one of the countless criminal violations that individuals experiencing homelessness commit every day, often through no fault of their own.[9] Though there are subtle variations between cities, urban camping ordinances typically prohibit sleeping, preparing to sleep, or storing belongings on public property.[10] This includes sleeping in private vehicles parked on a public road.[11]

Urban camping ordinances prevent homeless individuals from taking the most fundamental steps to shelter themselves from their environment. Tents, bedding, and even blankets become telltale signs of criminal activity when used to protect oneself, whether from the elements or from other people.[12] These ordinances are part of a suite of criminal prohibitions aimed at removing tragic poverty from public view.[13] Although urban camping laws ostensibly regulate the allocation of shared public spaces, I could not help but notice the irony that although my car was permitted to occupy the street—I was not permitted to occupy it.

Had I been arrested for urban camping, my car may have been impounded, the status of my worldly possessions uncertain.[14] The impound and storage fees—the cost of having the government protect the very property they had taken

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https://www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenix-homelessness-increase-reported-encampments-community-services/3410072002/ [https://perma.cc/J3AJ-3EHP].

7. *See generally* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 110 (2019) ("Bans on sleeping in vehicles—the thin tin line that separates a human being from the street—increased by a staggering 143% nationwide since 2006.") (citing TRISTIA BAUMAN, JANET HOSTETLER, JANELLE FERNANDEZ, ERIC TARS, MICHAEL SANTOS, JENIFER BREWER, ELIZABETH DENNIS, RUTH EL & MARIA FOSCARINIS, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 11 (2018), https://web.archive.org/web/20190331135117/https://nlchp.org//wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf).

8. Boehm, *supra* note 6.

9. Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 955 (2020) (noting that typical laws criminalizing homelessness include "loitering in parks, resting at bus stops, obstructing sidewalks, pitching tents, asking for money, asking for work, and sleeping just about anywhere").

10. *See, e.g.*, PHX., ARIZ. CITY CODE § 23-30(B) (defining "camping" to include "sleeping activities, or making preparations to sleep, including the laying down of bedding for the purpose of sleeping, or storing personal belongings").

11. *See, e.g.*, *id.* § 23-30(A).

12. *See, e.g.*, *id.* § 23-30(B).

13. *See* Rankin, *supra* note 7, at 102 ("Key drivers for the criminalization of homelessness are increasingly popular laws and policies that seek to expel visibly poor people from public space.").

14. *See* Matt Tinoco, *It's (Still) Against the Law to Sleep in Your Car in LA*, LAIST (Aug. 1, 2019), https://laist.com/news/los-angeles-homeless-sleeping-car-rv [https://perma.cc/W6KD-5FZV].

from me—would potentially be greater than the fine for the violation itself.[15] And, of course, those fines and fees would have exacerbated my already-vulnerable position by conditioning my very freedom on my ability to turn over the resource I lacked most: money. Crucially, a misdemeanor conviction also would have sabotaged my ability to pull myself out of homelessness. It would have appeared on background checks for housing and employment.[16] It would have impacted my eligibility for social services and governmental assistance programs.[17] I would have been required to disclose it when applying for a college education,[18] and again for law school.[19] My entire professional career potentially hung in the balance.

For over forty years, advocates have responded to the criminalization of homelessness by calling for a "right to shelter."[20] The right to shelter has traditionally been understood in positive terms: an enforceable right to have the government provide or fund a temporary shelter bed for every homeless individual.[21] Understood this way, the right to shelter ensures a physical location where individuals can escape the threat of the criminal law. However, only four U.S. states have embraced this positive conception of the right to shelter, two via litigation under state constitutions and two via express legislative enactments.[22] The remaining states continue to criminalize urban camping despite not recognizing shelter as a right guaranteed to homeless individuals.

15. *See id.* ("The fine for sleeping in your car in an off-limits zone starts at $25 for first-time offenders.").

16. *See generally* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) ("The consequences of these convictions are significant: in addition to the stigma of a criminal record, misdemeanants are often heavily fined or incarcerated, and can lose jobs, housing, or education opportunities.").

17. Rankin, *supra* note 7, at 108 ("Once individuals are saddled with a misdemeanor or a warrant, they are often rendered ineligible to access shelter, food, services, and other benefits that might support their ability to emerge from homelessness.").

18. *See* Judith Scott-Clayton, *Thinking "Beyond the Box": The Use of Criminal Records in College Admissions*, BROOKINGS (Sept. 28, 2017), https://www.brookings.edu/research/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions/ [https://perma.cc/D2FF-3ZZ7] ("Three national surveys of institutional admissions practices, conducted in 2009, 2010, and 2014 by separate research teams, indicate that 60 to 80 percent of private institutions and 55 percent of public institutions require undergraduate applicants to answer criminal history questions as part of the admissions process.").

19. *See, e.g.*, *Applying with a Criminal Record*, YALE L. SCH., https://law.yale.edu/centers-workshops/law-school-access-program/applying-criminal-record [https://perma.cc/XVN9-8CNP].

20. *See infra* Part II.

21. The distinction between "positive" and "negative" rights is generally traced to Isaiah Berlin's seminal lecture, *Two Concepts of Liberty* (1958), reprinted in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191, 194 (Henry Hardy & Roger Hausheer eds., 1997). "Positive" rights are typically portrayed as those requiring affirmative action to fulfill a specific entitlement—for example, they may best be characterized as a right *to* something, rather than a right to the be free *from* something. *See generally Positive and Negative Liberty*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 19, 2021), https://plato.stanford.edu/entries/liberty-positive-negative [https://perma.cc/7WHW-A9S4].

22. *See infra* Part II.A–B.

Courts, however, have recently flipped the script on the right to shelter. In 2018, the Ninth Circuit Court of Appeals ruled that the Eighth Amendment prohibits criminalizing urban camping unless alternative shelter is reasonably available.[23] While ostensibly a victory for homeless advocates, the ruling ties the provision of government-funded shelters to the justifications for criminalizing homelessness.[24] This result obscures the true motivations for criminalization, transforming the narrative from punishing visible poverty to punishing the failure of homeless individuals to use government resources. It also complicates the efforts of right-to-shelter advocates. Securing additional shelter services from the government now authorizes more extensive criminal enforcement against homeless individuals who do not, or cannot, utilize those services.[25]

This Article proposes an alternative conception of the right to shelter as a negative right. Recognizing that government-funded shelter services are not a universal solution to the social problem of homelessness, it outlines a framework for recognizing an essential right to *shelter oneself* without government interference.[26] Self-sheltering activities, in this sense, would include everything from the simple use of blankets or bedding to the erection of temporary encampments in public spaces. Essentially, the Article presents a roadmap for decriminalizing urban camping as it has been traditionally understood.

The Article upends the traditional conception of a right to shelter by focusing on the right to human dignity guaranteed by the U.S. Constitution's due process clauses.[27] Legally, dignity is understood as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships.[28] That capacity has been undermined by centering right-to-shelter efforts in both legal and political discourse surrounding homelessness. The positive right to shelter has eventually come to justify, rather than constrain, the criminalization of unsheltered homeless individuals.[29]

Part I examines the criminalization of urban camping and related forms of self-sheltering. It explores the consequences of relying on criminal laws to resolve deep-seated social problems. And it details the long, and largely ineffective, history of constitutional challenges to criminalization. Part II chronicles the history of legislative and litigative efforts to secure a positive "right to shelter" for homeless individuals. Although the most noteworthy of

23. Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

24. *See infra* Part II.C.

25. *See* Cameron Baskett, Note, *Cruel and Unusual Camping*, 109 KY. L.J. 593, 604 (2020) (describing how proposals to construct "large, centralized facilities that are available to the homeless twenty-four hours a day" would undercut the impact of the *Martin* decision).

26. *See infra* Part IV.

27. Although the word "dignity" does not appear in the due process clauses of either the Fifth or Fourteenth Amendments, much of the Supreme Court's due process jurisprudence over the past half-decade has identified human dignity as a core value protected by those clauses. *See infra* Part IV.A.

28. *See infra* Part IV.A.

29. *See infra* Part II.C.

these efforts took place in the 1980s and 1990s, this Part considers how the rhetoric demanding a positive right to government-run or government-funded shelter may continue to infect constitutional litigation about the rights of the homeless. Part III offers a deep exploration of the myriad considerations that inform whether homeless individuals elect to use available shelter services. It demonstrates that some homeless individuals may rationally prefer "self-sheltering"—making do on streets, in public spaces, or in homeless encampments—to the forms of shelter traditionally offered by the state. Part IV then constructs an alternative vision of the "right to shelter" as a negative right to be free from government interference while self-sheltering. It situates this right within the traditions of constitutional due process jurisprudence premised on human dignity. Fundamentally, this Article argues that a proper respect for human dignity requires tolerating the individual preference to self-shelter in public spaces. In a brief coda, Part IV also explores three forms of state regulation of homeless self-sheltering that may survive constitutional scrutiny.

I.
CRIMINALIZING SELF-SHELTERING

On any given night in the United States, an estimated 580,000 people are without a home.[30] About six in ten will utilize some form of officially recognized "shelter."[31] Some of them will find refuge in temporary emergency shelters provided by the state. Others may benefit from transitional housing or privately run shelters, which are frequently funded with the help of religious charities.[32] But the remaining 226,000 will exist "unsheltered," living in places not designed for human habitation—tents, vehicles, makeshift encampments, or simply exposed to the elements.[33] Unsheltered homelessness is rapidly increasing. It is up more than 30 percent over the past five years, while sheltered homelessness decreased almost 10 percent during the same period.[34]

Even these numbers do not capture the enormity of the problem. Point-in-time counts do not include homeless individuals who are sleeping on floors or couches of family and friends, those who intentionally seek to avoid detection,

30. MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN & THOMAS JOE BEDNAR, U.S. DEP'T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 6 (Jan. 2021), https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf [https://perma.cc/Y2T6-YQ8E] [hereinafter HUD 2020 AHAR].

31. *Id.*

32. NAT'L ALL. TO END HOMELESSNESS, FAITH-BASED ORGANIZATIONS: FUNDAMENTAL PARTNERS IN ENDING HOMELESSNESS 2 (May 2017), http://endhomelessness.org/wp-content/uploads/2017/06/05-04-2017_Faith-Based.pdf [https://perma.cc/3VKN-AGKN] ("In 2016, as a conservative estimate, faith-based organizations provided over 41 percent of the emergency shelter beds for single adults and nearly 16 percent of beds for families.").

33. HUD 2020 AHAR, *supra* note 30, at 8.

34. *See* HUD 2020 AHAR, *supra* note 30, at 6 (providing point-in-time estimates of 391,440 sheltered and 173,268 unsheltered individuals in 2015, compared to 354,386 sheltered and 226,080 unsheltered individuals in 2020).

and the temporarily incarcerated.[35] Because many people transition into and out of homelessness episodically, anywhere from one to five million Americans may experience homelessness in a given year.[36] More than twenty million—about one in sixteen people—are expected to experience homelessness in their lifetime.[37]

Most Americans are closer to homelessness than they realize. The United States has a well-documented deficit of affordable housing.[38] Nationally, rents are rising at a record rate.[39] Combined with a stagnant minimum wage, the affordable housing deficit has left roughly seven million American renters spending more than 50 percent of their income just on shelter.[40] For these folks, it takes only a minor shift in circumstances to make a rent payment impossible.[41]

35. DARRELL STANLEY, MARIA FOSCARINIS & JENNIFER WANG, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 28 (2017), https://nlchp.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf [https://perma.cc/KTK6-WVSH]. Point-in-time counts are administered by the U.S. Department of Housing and Urban Development through its Continuum of Care (COC) programs, which counts sheltered and unsheltered homeless individuals at a "point-in-time"—typically a day. *Id.* at 8, 10. The point-in-time, or the length of the count, varies, however. While most COCs conduct the count in a single night, some conduct it over several. *Id.* at 10.

36. *See* Stephen Metraux, Dennis Culhane, Stacy Raphael, Matthew White, Carol Pearson, Eric Hirsch, Patricia Ferrell, Steve Rice, Barbara Ritter & Stephen J. Cleghorn, *Assessing Homeless Population Size Through the Use of Emergency and Transitional Shelter Services in 1998: Results from the Analysis of Administrative Data from Nine U.S. Jurisdictions*, 116 PUB. HEALTH REPS. 344, 344 (2001) (finding that the annual number of homeless individuals is 2.5 to 10.2 times greater than can be obtained using a point-in-time count). Estimating the number of individuals who experience homelessness annually has proven challenging because homelessness is typically temporary and cyclical. *See* Lippert & Lee, *supra* note 5, at 345. The most-commonly cited estimate of homelessness is the Department of Housing and Urban Development's Point-in-Time Count, which captures only visible homelessness on a single (or a couple) night(s) of the year. *See* Lillian Kilduff & Beth Jarosz, *How Many People in the United States Are Experiencing Homelessness?*, PRB (Sept. 22, 2020), https://www.prb.org/resources/how-many-people-in-the-united-states-are-experiencing-homelessness [https://perma.cc/RD4A-PLJB].

37. Researchers have found that about 6 percent of a studied population from the Baby Boomer demographic experienced homelessness in their lifetime. *See* Vincent A. Fusaro, Helen G. Levy & Luke H. Shaefer, *Racial and Ethnic Disparities in the Lifetime Prevalence of Homelessness in the United States*, 55 DEMOGRAPHY 2119, 2123 (2018) (finding that approximately 6.2 percent of Baby Boomer adults have experienced at least a single spell of homelessness). If that rate holds across populations, then roughly 20.4 million living Americans should be expected to experience homelessness at least once in their lifetimes.

38. *See The Gap: A Shortage of Affordable Rental Homes*, NAT'L LOW INCOME HOUS. COAL., https://reports.nlihc.org/gap/about [https://perma.cc/Q3HE-42LV].

39. Abha Bhattarai, Chris Alcantara & Andrew Van Dam, *Rents Are Rising Everywhere. See How Much Prices Are up in Your Area*, WASH. POST (Apr. 21, 2022), https://www.washingtonpost.com/business/interactive/2022/rising-rent-prices/ [https://perma.cc/845S-JNYS].

40. *Id.*

41. The COVID-19 pandemic in 2020 has made this reality evident. An estimated twenty to forty million workers lost their jobs as business shut down or paused. *See* Eric Morath, *How Many U.S. Workers Have Lost Jobs During the Coronavirus Pandemic? There Are Several Ways to Count*, WALL ST. J. (June 3, 2020), https://www.wsj.com/articles/how-many-u-s-workers-have-lost-jobs-during-coronavirus-pandemic-there-are-several-ways-to-count-11591176601 [https://perma.cc/9UGJ-DHGJ]. In 2020, federal and state governments passed temporary eviction moratoriums that restricted landlords from filing new eviction actions based on non-payment of rent. *See, e.g.*, Coronavirus Aid, Relief, and

In fact, there is no longer any corner of the country where a minimum wage worker can comfortably afford their own apartment.[42] It is no surprise, therefore, that as many as 25 percent of homeless people report that they cannot afford housing despite working full- or part-time.[43]

The societal response to this heartbreaking fact has been to meet homelessness with criminalization. Cities and states across the country have passed laws prohibiting acts intrinsically connected to the condition of homelessness.[44] These laws outlaw sitting, lying, sleeping, or loitering in public places, as well as more attenuated conduct such as asking for food, asking for money, and asking for work.[45] Legal scholars have long denounced criminalization as an ineffective solution to the social problem of homelessness.[46] Much of what constitutes the "policing" of individuals experiencing homelessness are simply orders to decamp and relocate, backed up by the threat of arrest.[47] Arrests, when they do happen, tend to retrench poverty, making escaping homelessness even harder.[48]

This Part surveys the criminal response to homelessness, with a particular emphasis on laws outlawing self-sheltering activities, such as urban camping ordinances. It begins by detailing both the origins of criminal laws against homelessness and the recent proliferation of such laws. It then examines the

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Economic Security Act, H.R. 748, 116th Cong. (2020) ("CARES Act"), Sec. 4024; A.B. 3088 (Cal. 2020); New York Covid-19 Emergency Eviction and Foreclosure Prevention Act, S.B. 9114 (N.Y. 2020). As those moratoriums expired, millions of individuals were suddenly at risk of eviction. Michael Casey, *'A Lot of People Will Be Displaced': Tenants Prepare for End of Federal Eviction Moratorium*, USA TODAY (July 31, 2021), https://www.usatoday.com/story/money/2021/07/31/millions-tenants-face-evictions-homelessness-federal-eviction-moratorium-ends/5442925001/ [https://perma.cc/VY8B-SC3Y]. Early estimates predicted that as many as forty million people could become homeless at the expiration of these moratoriums. *See* Marc Ramirez, Sarah Taddeo & Tiffany Cusaac-Smith, *The Federal Eviction Moratorium Expires in January. It Could Leave 40 Million Americans Homeless*, USA TODAY (Dec. 24, 2020), https://www.usatoday.com/story/news/nation/2020/12/24/covid-eviction-moratoriums-could-eventually-leave-americans-homeless/4018226001/ [https://perma.cc/9YHE-VMBH].

42. ANDREW AURAND, ABBY COOPER, DAN EMMANUEL, IKRA RAFI & DIANE YENTEL, OUT OF REACH 2 (2019) (explaining that there is no metropolitan area in the country in which a minimum wage worker working forty hours per week can afford market rent for a two-bedroom apartment).

43. Veronica Harnish, *I've Been Homeless 3 Times. The Problem Isn't Drugs or Mental Illness—It's Poverty*, VOX (Mar. 8, 2016), https://www.vox.com/2016/3/8/11173304/homeless-in-america [https://perma.cc/DQ7B-6ENB].

44. TRISTIA BAUMAN, RAJAN BAL, KARIANNA BARR, MARIA FOSCARINIS, BRANDY RYAN, ERIC TARS, TAYLOR DE LAVEAGA, JOY KIM, DARREN O'CONNOR & SCOTT PEASE, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12–14 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/GDC3-3CA2] [hereinafter NLCHP, HOUSING NOT HANDCUFFS].

45. *Id.*

46. *See, e.g.*, Rankin, *supra* note 7, at 122.

47. *See, e.g.*, Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penality: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 137 (2020); Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFFS. REV. 41, 64 (2019).

48. McJunkin, *supra* note 9, at 962.

substantial human toll criminal responses inflict on those who are subjected to them. Lastly, this Part reviews the history of legal challenges that have been levied against criminal responses to homelessness, focusing on constitutional arguments grounded in the Fifth, Eighth, and Fourteenth Amendments.

A. The Proliferation of Criminal Laws

Laws against homelessness have existed since the country's founding.[49] Early American legislatures typically outlawed "vagrancy," an ill-defined concept that encompassed various forms of existing in public without obvious means of support.[50] Historical vagrants included not only the homeless, as we might understand them today, but also "rogues and vagabonds," "common gamblers," "common drunkards," "habitual loafers," and "persons able to work but habitually living upon the earnings of their wives or minor children."[51] Ostensibly, the goal of early American vagrancy laws was not to punish poverty, but rather to distinguish individuals worthy of social services from those whose needs seemed self-inflicted.[52] The laws also empowered discretionary policing as a prophylactic measure to prevent other, future crimes.[53]

The justifications for early American vagrancy laws fostered specific stigmas about homelessness that persist to this day.[54] By focusing on the idle but able-bodied, vagrancy laws perpetuated the view that homelessness is primarily caused by laziness or substance abuse—a consequence of individuals who are simply unwilling to work, or who are voluntarily too drunk or high to function productively.[55] These laws also contributed to the belief that homeless

49. *See, e.g.*, *An Act for Suppressing and Punishing of Rogues, Vagabonds, Common Beggars, and Other Idle, Disorderly, and Lewd Persons*, *in* THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 411 (2d ed., 1801) (1788), https://books.google.com/books?id=ADw4AAAAIAAJ [https://perma.cc/F6ZK-2SZK].

50. 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, 633–34 (1992).

51. *See* Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1208–09 (1953); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (providing an example of a city's vagrancy ordinance).

52. Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209, 215–16 (1989). The roots of American vagrancy legislation run all the way back to fifteenth century attempts at wage stabilization in England following the Black Death. *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615–16 (1956). However, the adoption and enforcement of vagrancy laws in America also reflects the country's racist history. *See* KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965, at 36 (2017) (explaining that nineteenth century municipal codes in California were primarily enforced against Indigenous populations).

53. *See* Lacey, *supra* note 51, at 1217 ("Though vagrancy statutes no longer have the aim of forcing the idle to work or reducing the cost of poor relief, they very definitely do retain their historic purpose as a method of preventing crime."); Foote, *supra* note 52, at 614 ("Administratively, vagrancy-type statutes are regarded as essential criminal preventives, providing a residual police power to facilitate the arrest, investigation and incarceration of suspicious persons.").

54. *See* Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 21–24 (2016) (discussing the contemporary stigmas that homelessness is self-inflicted and indicative of future criminality).

55. *See* McJunkin, *supra* note 9, at 970.

individuals are merely criminals in waiting.[56] Under the guise of preventing more serious crime, vagrancy rose to become one of the most common causes of arrest nationally.[57]

The constitutionality of vagrancy laws drew heightened attention in the 1960s and 1970s, in part because of a series of police abuses.[58] "Vagrancy law became a tool for policing political dissidents, gay men and lesbians, Beatniks, civil rights activists, interracial couples, antiwar protestors, and hippies, along with gangsters and petty criminals."[59] This new wave of challenges drove major court decisions that ultimately forced American legislatures to disaggregate the crime of vagrancy. Most notably, in *Papachristou v. City of Jacksonville*, the Supreme Court invoked its "vagueness" jurisprudence to strike down a relatively typical ordinance prohibiting vagrancy.[60] It concluded that the historical definition of vagrancy "makes criminal activities which by modern standards are normally innocent."[61] Citing no less authorities than Walt Whitman and Vachel Lindsay, the Supreme Court declared that vagrancy ordinances infringed upon the "unwritten amenities" of life.[62] The broad proscriptions of the typical vagrancy ordinance required "poor people, nonconformists, dissenters, [and] idlers" to live a lifestyle deemed appropriate by police and the courts, rather than one dictated by their individual consciences.[63]

Around the same time, however, public attention crystalized on the blight of visible poverty.[64] Prior to 1970, the homeless population had been largely obscured from public view—homeless individuals often sheltered in cheap hotels, flophouses, or single room occupancy hotels (SROs) concentrated within skid rows, rather than occupying streets and public places.[65] By 1980, the United

56. These narratives were even accepted legally. *See, e.g.*, District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947) ("A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life."); *see generally* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE. L.J. 1 (1960) (criticizing vagrancy laws for permitting arrests on mere suspicion of criminality).

57. Foote, *supra* note 52, at 614 ("[V]agrancy-type crime accounts for more than one third of all arrests tabulated in the Uniform Crime Reports.").

58. *See* Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 596 (1997).

59. Laura Weinrib, *The Vagrancy Law Challenge and the Vagaries of Legal Change*, 43 LAW & SOC. INQUIRY 1669, 1670 (2018).

60. 405 U.S. 156, 162 (1972).

61. *Id.* at 163.

62. *Id.* at 164.

63. *Id.* at 170. It is worth noting that four of the *Papachristou* defendants contended that their arrest was motivated by their racial composition—Black men driving in a car with White women. *See* Petitioner's Brief at 5–7, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (No. 70-5030), 1971 WL 133167.

64. *See, e.g.*, Maria Foscarinis, *Homelessness in America: A Human Rights Crisis*, 13 J.L. SOC'Y 515, 515–16 (2012) (explaining that rising homelessness in the early 1980s "resulted in the emergence of homelessness as a serious national crisis affecting a broad range of the population and the country").

65. *Id.*; NAT'L ACADS. OF SCIS., ENG'G, & MED., PERMANENT SUPPORTING HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING

States would experience a confluence of social, economic, and political changes like gentrification, deinstitutionalization, and a reduction in affordable housing options that would serve to alter and exacerbate homelessness across the nation.[66]As a result, homelessness almost tripled between 1981 and 1989.[67] These compounding socioeconomic forces diversified the homelessness population, and by the 1980s, the average homeless individual was markedly younger, poorer, and more at risk for illness and addiction.[68] Increasingly, homelessness afflicted people of color,[69] who now comprise about 68 percent of the contemporary homeless population.[70] Homeless women and families also appeared in significant numbers for the first time.[71]

As the demographics of homelessness changed, so did its visibility. Because governments refused to fund homeless assistance and actively cut back on social welfare spending, this generation experienced "'literal homelessness' with no access to conventional dwellings, such as houses, apartments, mobile homes, rooming houses, or SROs."[72] Charities became the primary providers for emergency aid and shelter services.[73] Consequently, shelter provisions across the country differed drastically in capabilities and capacity.[74]

Legislatures responded to this reality by passing a plethora of criminal laws tailored to more narrowly target conduct associated with homelessness.[75] Although it undoubtedly had some substantive benefit, the Supreme Court's *Papachristou* decision effectively invited overcriminalization as a means of salvaging the police's longstanding discretion to supervise the socially "undesirable." In the place of a single vagrancy statute, a typical city may now have a dozen or more "public order" ordinances, separately punishing

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CHRONIC HOMELESSNESS 175–76, 178 (2018) [hereinafter THE HISTORY OF HOMELESSNESS IN THE UNITED STATES].

66. THE HISTORY OF HOMELESSNESS IN THE UNITED STATES, *supra* note 65, at 176 (internal citation omitted).

67. *How Many People Experience Homelessness?*, NAT'L COAL. FOR THE HOMELESS (July 2009) (internal citation omitted), https://www.nationalhomeless.org/factsheets/How_Many.html [https://perma.cc/BQQ3-YACW].

68. THE HISTORY OF HOMELESSNESS IN THE UNITED STATES, *supra* note 65, at 178.

69. Katie J. Wells, *Policy-Failing: A Repealed Right to Shelter*, 41 URB. GEOGRAPHY 1139, 1143 (2019).

70. Rankin, *supra* note 7, at 101.

71. Wells, s*upra* note 69, at 1143.

72. *Id.;* THE HISTORY OF HOMELESSNESS IN THE UNITED STATES, *supra* note 65, at 178 (internal citation omitted).

73. *See* Leon Lazaroff, *Shelters Go Private: Is It a Help or Hinderance?*, CHRISTIAN SCI. MONITOR (July 8, 1998), https://www.csmonitor.com/1998/0708/070898.us.us.3.html [https://perma.cc/7UKM-KF6Y] (explaining that "privately run shelters under the management of groups such as the Salvation Army and Volunteers of America are characteristic of most cities and rural communities").

74. *See* Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy, and Strategy*, 12 ST. LOUIS U. PUB. L. REV. 37, 44 (1993).

75. *See* Livingston, *supra* note 58, at 601–06 (detailing the legislative responses to *Papachristou* and similar court cases).

individuals for standing, sitting, sleeping, eating, begging, or sheltering themselves from the elements.[76] Indeed, the number of such ordinances has rapidly increased over recent years as cities continue to expand their arsenal for dictating public order.[77]

In the contemporary regime, the most essential forms of criminalizing homelessness are bans on what is known as "urban camping." These broad prohibitions punish people for devising any form of living arrangement in public spaces.[78] Urban camping encompasses both things as elaborate as pitching a tent or constructing a makeshift shelter and things as simple as laying down blankets for bedding or sleeping in one's car.[79] Camping ordinances can cover both public and private land, leaving virtually no space in a city for unhoused persons to take shelter.[80] The National Law Center on Homelessness and Poverty now estimates that 72 percent of America's major cities have at least one ban on urban camping.[81] Moreover, urban camping ordinances have increased by 15 percent nationwide in just the last five years.[82]

Punishments for urban camping vary. At the lighter end, some cities enforce urban camping ordinances with purely civil penalties—at least for first-time offenders—consisting of tickets and fines.[83] At the most severe end, these laws can authorize incarceration of up to six months.[84] In many cases, police leverage the threat of arrests to relocate homeless individuals via "move along" orders.[85] These orders are hard to track because they leave no paper trail, but surveys indicate that between 80 and 90 percent of homeless individuals will experience at least one such order in a given year.[86] The constant displacement of homeless individuals disrupts social relationships, complicates employment and treatment opportunities, and increases the risk of physical violence.[87]

76. *See, e.g.*, PHX., ARIZ. CITY CODE §§ 23-7 (aggressive solicitation), 23-8 (loitering), 23-9 (obstructing sidewalks), 23-11 (nuisance), 23-30 (urban camping), 33-2 (pitching tents), 36-131.01 (soliciting employment), 36-401(4) (remaining at a transit station).

77. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 37 ("Our research reveals that laws punishing the life-sustaining conduct of homeless people have increased in every measured category since that time, and in some cases dramatically so.").

78. *See id.* at 38.

79. *See, e.g.*, PHX., ARIZ. CITY CODE § 23-30(B) (defining camping to include: "sleeping activities, or making preparations to sleep, including the laying down of bedding for the purpose of sleeping, or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities").

80. *See, e.g.*, GLENDALE, ARIZ. MUN. CODE art. VIII § 25-90(a) (2018) ("It shall be unlawful for any person to camp upon any public or private land, whether or not such camping takes place in a motor vehicle.").

81. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 38.

82. *Id.*

83. *Id.* at 50.

84. *Id.*

85. *Id.* at 53.

86. *Id.*

87. *Id.*

Criminal responses to the social problem of homelessness are largely motivated by ignorance of homelessness's causes and long-standing prejudice against the individuals experiencing it.[88] Socially, homelessness is frequently—and inaccurately—attributed to poor personal choices, including voluntary drug use and alcoholism.[89] In fact, "the top five causes of homelessness are lack of affordable housing, lack of a living wage, domestic violence, medical bankruptcy, and untreated mental illness."[90] Instinctive responses to confronting homelessness typically range from fear and anger to disgust and distancing.[91] These psychological responses contribute to a persistent stigma that renders individuals experiencing homelessness among the most disfavored of all marginalized groups.[92]

Public misperceptions of homelessness have a direct impact on homeless communities because criminal enforcement frequently follows civilian complaints.[93] Civilian complaints about homelessness are multiplying at rates outpacing the growth of homelessness itself.[94] These complaints put pressure on cities to use public resources to minimize homeless visibility, especially in wealthy or attractive city districts.[95] Business owners and homeowners associations, in particular, drive civilian complaints because they view the presence of homelessness as antithetical to their financial interests.[96] Likewise, other government actors, including street cleaners and public park managers, frequently coordinate with law enforcement to remove homeless individuals.[97] With public tolerance of visible homelessness waning, police interventions

88. *Id.* at 15.

89. *See* Rankin, *supra* note 7, at 123–24 (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (2015), https://homelesslaw.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf [https://perma.cc/T634-SWKU]).

90. Rankin, *supra* note 7, at 123.

91. *Id.* at 122.

92. *Id.*

93. *See* Christopher Herring, Cruel Streets: Criminalizing Homelessness in San Francisco 43 (2020) (Ph.D. dissertation, University of California, Berkeley), https://escholarship.org/uc/item/39k7400g [https://perma.cc/3SNX-CXQ2] (explaining that, in San Francisco, an estimated "90% of police and homeless interactions across the city are initiated through complaints").

94. Sarah Holder, *Why Calling the Police About Homeless People Isn't Working*, BLOOMBERG (Sept. 25, 2019), https://www.bloomberg.com/news/articles/2019-09-25/should-you-call-to-report-a-homeless-person [https://perma.cc/53H5-DD7A].

95. *See* Herring, *supra* note 93, at 34 ("[S]cholars have characterized quality of life ordinances and their associated policing as cornerstones of the carceral city and urban revanchism aimed at purifying the streets and sidewalks of visible poverty for businesses, tourists, and wealthier residents under the banner of reclaiming the public space for bourgeois consumption.") (internal citations omitted).

96. *Id.* at 44–45; McJunkin, *supra* note 9, at 971–72; Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight - Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. POVERTY L. & POL'Y 145, 162 (1999).

97. *See, e.g.*, Herring, *supra* note 93, at 97–98.

with—and criminal responses to—unsheltered homeless populations should only increase.

B. Criminalization's Consequences

The legal response to homelessness often differs substantially from the social one. As just noted, the goal of criminalization in many instances is not to sanction morally culpable behavior, but instead to authorize police interventions with homeless populations.[98] And the nature of police intervention is rapidly changing.[99] While many cities have outlawed urban camping, some are nevertheless more tolerant of homeless encampments than others. During the coronavirus pandemic, several cities and police departments publicly adopted a "hands-off" approach to dealing with homeless communities.[100] In other cities, relocation is considered the first response before criminal enforcement.[101] Homeless encampments may be tolerated in some areas of the city, but not in others, with police actively shepherding homeless individuals to the preferred parts of town.[102] A few cities have even created designated homelessness areas, either formally or informally, such as Los Angeles's famous Skid Row.[103]

98. Rankin, *supra* note 7, at 106–07; *see also* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 589 (2021) ("For cities, criminalization is the common default. It empowers the most immediate, albeit temporary, removals of homeless people from public view and creates the short-term illusion that the problem has been mitigated.").

99. *See* KEVIN MORISON, RACHEL ARIETTI, ALLISON HEIDER, SARAH MOSTYN, DAN ALIOTO, JAMES MCGINTY, JASON CHENEY & CRAIG FISCHER, THE POLICE RESPONSE TO HOMELESSNESS 3 (2018).

100. *See, e.g.*, Joel Grover & Josh Davis, *Homeless Encampments Spread to Beaches, Golf Courses as City Takes Hands-Off Approach*, NBC L.A. (Sept. 4, 2020), https://www.nbclosangeles.com/investigations/omeless-encampments-spread-to-beaches-golf-courses-as-city-takes-hands-off-approach/2423332/ [https://perma.cc/TCC3-4R5X] ("City officials have publicly stated that during the pandemic, no one who is homeless will be moved from their current location, citing CDC guidance, which says moving anyone could help spread COVID."); Eric Marotta, *Akron to Start Clearing Homeless Camps, Citing "Housing First" Policy*, AKRON BEACON J. (June 20, 2021), https://www.beaconjournal.com/story/news/2021/06/20/adoping-housing-first-policy-akron-begins-clearing-homeless-camps-monday/7731457002/ [https://perma.cc/K8D3-989A] ("During the pandemic, the city chose a hands-off approach to the city's homeless, as shelter space was scarce due to population restrictions on group settings, and many homeless were fearful of being grouped up in such settings.").

101. *See* Bryan Gallion, Brenda Wintrode, Julia Lerner, Maya Pottiger, Nick McCool, Lilian Eden, Katy Seiter, Megan Calfas, Joe Dworetzky, Vanessa Ochavillo, Everitt Rosen & Jonmaesha Beltran, *As the Wealthy Move in, Homeless People Are Pushed out*, CAP. NEWS SERV. MD. (July 13, 2020), https://homeless.cnsmaryland.org/2020/07/13/as-the-wealthy-move-in-homeless-people-are-pushed-out [https://perma.cc/DP9R-9J8T].

102. *See id.*

103. *See, e.g.*, Brittany Scott, *Is Urban Policy Making Way for the Wealthy? How a Human Rights Approach Challenges the Purging of Poor Communities from U.S. Cities*, 45 COLUM. HUM. RTS. L. REV. 863, 884–89 (2014) (discussing Los Angeles's Skid Row). Phoenix lawmakers recently proposed a designated homeless encampment area. Jessica Boehm, *Bill Would Establish Homeless Camping Areas, Make It Illegal for People to Sleep on the Street in Arizona*, AZ CENTRAL (Apr. 1, 2021), https://www.azcentral.com/story/news/politics/legislature/2021/04/01/arizona-bill-would-ban-street-camping-create-sanctioned-homeless-camps/4837941001/ [https://perma.cc/G88D-R7SQ].

Nevertheless, the criminalization of homelessness has increased the connection between unhoused individuals and the criminal justice system. Nationally, an individual experiencing homelessness is up to eleven times more likely to be arrested than a housed individual.[104] "Disproportionate arrests of homeless people contribute to the problem of mass incarceration, the criminalization of poverty, and racial inequality."[105] And quasi-criminal interventions—everything from civil citations to "move along" orders backed by the threat of arrest—continue to impact homeless individuals as debilitating forms of state punishment.[106]

Meanwhile, criminal responses do nothing to actually combat homelessness. Police have a limited arsenal of tools at their disposal—citations, arrests, and the threat of physical force.[107] None of these tools improve the condition of homeless individuals or reduce the number of people experiencing homelessness. The criminal justice system is also not designed to accommodate homeless individuals. For example, written notices containing essential court dates are frequently mailed, an ineffective way of notifying those without a permanent mailing address.[108] Court hearings also pose challenges related to transportation and temporarily securing accumulated property.[109] The result is that citations given to homeless individuals lead to arrest warrants at a disproportionate rate.[110]

These criminal responses to homelessness tend to entrench poverty, often burdening homeless individuals with fines and fees that can total in the thousands of dollars.[111] These fines and fees divert money from personal necessities like food, medicine, and transportation, and make it harder for homeless individuals

104. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 50.

105. *Id.* at 51.

106. *See* Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 406–08 (2021).

107. *See* MORISON ET AL., *supra* note 99, at 5–7 (explaining that the police tools of arrest and incarceration should be a last resort and encouraging other agencies' involvement with homeless populations).

108. *See, e.g.*, Allison Frankel, Scout Katovich & Hillary Vedvig, *Forum: Forced into Breaking the Law*, NEW HAVEN REG. (Nov. 17, 2016), https://www.nhregister.com/columnists/article/Forum-Forced-into-breaking-the-law-11319038.php [https://perma.cc/N4SZ-3FEF].

109. *See* Melissa Hellmann, *For Homeless Seattleites, A Reprieve from the Debilitating Burden of Warrants*, SEATTLE WKLY. (Jan. 10, 2018), https://www.seattleweekly.com/news/for-homeless-seattleites-a-reprieve-from-the-debilitating-burden-of-warrants/ [https://perma.cc/7WCK-27TS] (citing transportation, illness, and mental health as additional factors that reduce homeless attendance at court dates).

110. *See* Ethan Corey & Puck Lo, *The "Failure to Appear" Fallacy*, APPEAL (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy/ [https://perma.cc/CFH5-NPBY] (explaining that a disproportionate number of failures to appear can be attributed to individuals who are homeless or mentally ill).

111. In Phoenix, urban camping is a Class 1 misdemeanor, punishable by up to six months in jail and up to a $2500 fine. AM. C.L. UNION OF ARIZONA, HOMELESS IN PHOENIX: KNOW YOUR RIGHTS 3, https://www.acluaz.org/sites/default/files/field_documents/homeless_rights_in_phoenix.pdf [https://perma.cc/CNR4-R3EQ].

to find stability.[112] When criminal activity involves a vehicle, such as sleeping in one's car, police may tow and impound the vehicle, depriving individuals of their property and tallying up additional fees.[113] Further, criminal warrants and convictions can render individuals ineligible for housing, employment, and other needed social services.[114]

As I have detailed elsewhere, arrests are particularly destructive to homeless individuals.[115] In addition to the loss of liberty and dignity, custodial arrests threaten the physical safety of homeless individuals in numerous ways, including by heightening the risk of sexual assault.[116] Custodial arrests also interfere with homeless individuals' already limited property rights.[117] Personal possessions left behind during arrests—ranging from bedding and clothing to medicine and legal documents—are subject to theft or destruction.[118]

The costs of policing homelessness through uniformed officers, courts, and jails diverts public money from organizations that could provide genuine services to homeless individuals.[119] Cities and states that have embraced housing-first and public-service models for addressing homelessness have been rewarded with significant decreases in their homeless populations.[120] The commitment to housing-first solutions has recently waned, however, and the federal government backed away from housing-first strategies during the Trump

112. *See* MADELINE BAILEY, ERICA CREW & MADZ REEVE, NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 7, VERA INST. OF JUST. (Aug. 2020), https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf [https://perma.cc/89Y8-4MTW] (finding that homeless individuals burdened with legal debt "experienced nearly two additional years of homelessness, after considering the effects of race, age, and gender").

113. *See* Jessica Guynn, *"Hidden Homeless Crisis": After Losing Jobs and Homes, More People Are Living in Cars and RVs and It's Getting Worse*, USA TODAY (Feb. 15, 2021), https://www.usatoday.com/story/money/2021/02/12/covid-unemployment-layoffs-foreclosure-eviction-homeless-car-rv/6713901002/ [https://perma.cc/VY9W-68E3]; Edwin Caro, *Homelessness and Health Justice*, 30 ANNALS HEALTH L. ADVANCE DIRECTIVE 143, 144 (2020).

114. Hellmann, *supra* note 109.

115. McJunkin, *supra* note 9, at 963–68 (describing the punitive and costly nature of custodial arrest).

116. *Id.* at 965–66.

117. *Id.* at 965.

118. *Id.*

119. *See* Rankin, *supra* note 7, at 109 ("Several studies show it is far more expensive to criminalize poverty and homelessness than it is to pursue non-punitive alternatives such as permanent supportive housing, and mental health and substantive abuse treatment.").

120. Audrey Jensen, Jill Ryan, Chloe Jones & Madeline Ackley, *Two Cities Tried to Fix Homelessness, Only One Succeeded*, CRONKITE NEWS (Dec. 14, 2020), https://cronkitenews.azpbs.org/howardcenter/caring-for-covid-homeless/stories/homeless-funding-housing-first.html [https://perma.cc/GWJ4-NA4N] (documenting reductions in homeless populations in Houston and San Diego); *Supportive Housing Reduces Homelessness—And Lowers Health Care Costs by Millions*, RAND CORP. (June 27, 2018), https://www.rand.org/blog/rand-review/2018/06/supportive-housing-reduces-homelessness-and-lowers.html [https://perma.cc/V2FV-XZFE]. *But see* Stephen Eide, *Housing First and Homelessness: The Rhetoric and the Reality*, MANHATTAN INST. (Apr. 21, 2020), https://www.manhattan-institute.org/housing-first-effectiveness [https://perma.cc/944W-DQYR] (explaining that housing-first models are more effective on the individual, rather than community, level).

Administration.[121] In their place, cities and states have developed new versions of the criminal response, centered on policing and punishment.[122]

C. Legal Challenges to Criminalization

Ordinances prohibiting urban camping have survived varied legal challenges over the years. As mentioned above, early litigants emphasized procedural defects with the ordinances, such as vagueness and overbreadth. *Papachristou v. City of Jacksonville* is illustrative. The ordinance at issue was exceptionally broad, criminalizing more than twenty classes of individuals as "vagrants."[123] In striking down the ordinance as vague, the Supreme Court explained that classifying individuals in general terms, such as "habitual loafers" and "disorderly persons," would allow criminality to be defined by the whims of the police, an outcome "not compatible with our constitutional system."[124]

Victories, however, were often short-lived. Ordinances struck down on such grounds were easily repaired and reenacted, resulting in little lasting change in the lived experience of homelessness. Following the *Papachristou* decision, Jacksonville—like many cities with similar ordinances—recast its prohibitions to focus on more discrete conduct, such as camping, loitering, begging, or creating nuisances.[125] These laws proliferated while the sphere of homeless liberty largely remained unchanged.

More recently, legal challenges to camping bans have turned their attention to the Eighth Amendment. The Supreme Court has held that the Eighth Amendment "imposes substantive limits on what can be made criminal."[126] In

121. In September 2019, the Council of Economic Advisors released a white paper advocating increased policing and "quality of life" ordinances to reduce unsheltered homelessness by making living on the streets less "tolerab[le]." *See* COUNCIL OF ECON. ADVISORS, THE STATE OF HOMELESSNESS IN AMERICA 18–19 (2019), https://www.nhipdata.org/local/upload/file/The-State-of-Homelessness-in-America.pdf [https://perma.cc/2YCE-ED7A].

122. Baskett, *supra* note 25, at 601 (describing cities' widespread adoption of the "velvet hammer" approach to homelessness, which involves "stripping away social services and criminalizing [behaviors] that 'enable' homelessness").

123. Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972). The city's ordinance outlawed the following:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children.

Id. at 158 n.1.

124. *Id.* at 166–69.

125. *See* Liz Daube, *The Rules of Being Homeless*, JACKSONVILLE DAILY REC. (Aug. 10, 2006), https://www.jaxdailyrecord.com/article/rules-being-homeless [https://perma.cc/P868-Z468].

126. Ingraham v. Wright, 430 U.S. 651, 667 (1977).

particular, crimes that target "status" rather than conduct are considered an impermissible use of the government's police power.[127]

Initially, the status-crimes doctrine appeared to be a viable theory for dismantling general vagrancy statutes. In the 1962 case of *Robinson v. California*, the Supreme Court overturned a law that premised criminal punishments on the status of addiction.[128] In *Robinson*'s wake, courts across the country overturned vagrancy laws that purported to punish statuses, such as joblessness.[129] But just four years later, a plurality of the Court narrowed *Robinson*'s holding to the uncontroversial proposition that "criminal penalties may be inflicted only if the accused has committed some act."[130]

Homeless advocates had comparatively less success leveraging the status-crimes doctrine to reach contemporary prohibitions on urban camping. Relying on the tenuous distinction between a "status" and an "act," many courts have rejected Eighth Amendment challenges to camping ordinances, because the act of camping is deemed to be volitional, rather than an inescapable incident of homelessness as a status.[131] Other courts have rejected the notion that homelessness is a status at all, finding that it is insufficiently permanent or unavoidable.[132]

One place where Eighth Amendment arguments have recently gained traction, however, is in the Ninth Circuit. In 2006, a panel of that court overturned a Los Angeles camping ban, concluding that homelessness was sufficiently analogous to addiction despite neither being "innate or immutable," nor "a disease, such as drug addiction or alcoholism."[133] That case was ultimately resolved by settlement, however, and the opinion was vacated.[134] In 2018, the court evaluated a similar camping ban in Boise, reaching a similar conclusion. The case—*Martin v. City of Boise*—was widely lauded by homeless advocates for its holding that sleeping in public reflects status rather than conduct whenever alternatives, such as government-provided shelter beds, are not practically available.[135] As I discuss more fully below, however, *Martin* reflects a rather narrow way of thinking about the constitutional implications of urban camping.

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127. *See generally* Robinson v. California, 370 U.S. 660 (1962) (holding unconstitutional a state statute that punished the "status" of drug addiction).

128. *Id.* at 667. The law at issue was a California statute that made it a criminal offense to "be addicted to the use of narcotics." *Id.* at 660 (internal citation omitted).

129. *See, e.g.*, Headley v. Selkowitz, 171 So. 2d 368, 370 (Fla. 1965); Alegata v. Commonwealth, 231 N.E.2d 201, 207 (Mass. 1967); Wheeler v. Goodman, 306 F. Supp. 58, 64 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

130. Powell v. Texas, 392 U.S. 514, 533 (1968).

131. *See, e.g.*, Tobe v. City of Santa Ana, 892 P.2d 1145, 1166–67 (Cal. 1995); Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000).

132. *See, e.g.*, Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

133. Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006).

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

135. Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018); *see, e.g.*, Baskett, *supra* note 25, at 596 (noting that "*Martin v. City of Boise* has been celebrated as a victory against these ordinances"); Rankin, *supra* note 98, at 562 (noting that "homeless rights advocates celebrated" the *Martin* decision);

Of all legal challenges to urban camping ordinances, substantive due process arguments have been perhaps the least successful. Initially, this seems surprising; the conventional understanding of substantive due process is that it demarcates a sphere of personal liberty within which criminal regulation is constitutionally impermissible.[136] This would seem to be fertile ground for direct challenges to particular acts of criminalization. The reason may be, as Professor Heather Gerken has observed, that "[s]ubstantive due process is a topic better suited for religious scholars or philosophers than pragmatic lawyers."[137] In the last twenty-five years, the only substantive due process challenges to urban camping ordinances that have reached federal circuit courts of appeals have been rejected.[138] A small number of cases have fared better at the trial level or when brought under state constitutional provisions.[139] But the trend is overwhelmingly negative.

Historically, such challenges have been rejected due to weaknesses in the briefing or chosen argument, rather than the inapplicability of substantive due process more generally. A few examples are illustrative. In 1996, the Ninth Circuit rejected a due process challenge to a Seattle ordinance that criminalized sitting or lying on sidewalks.[140] Several homeless plaintiffs had brought a civil rights action against the city alleging that the purpose of the ordinance was to exclude homeless individuals from the city's commercial districts.[141] But a Ninth Circuit panel rejected the argument in substantial part because the plaintiffs had leveled a facial challenge to the ordinance, rather than an as-applied challenge.[142] The choice of challenge eased the burden on the defendant city—in response to the facial challenge, Seattle needed only to show that some legitimate public safety reason supported the ordinance.[143]

Press Release, *Settlement Reached in Groundbreaking* Martin v. City of Boise *Case*, NAT'L HOMELESSNESS L. CTR. (Feb. 8, 2021), https://homelesslaw.org/settlement-martin-v-boise-case [https://perma.cc/ZFT6-KGVQ] (noting that "[a]dvocates have hailed" the *Martin* decision).

136. As the Supreme Court has explained, substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993) (emphasis in original) (citations omitted).

137. Heather K. Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 849 (2007).

138. *See* Joel v. City of Orlando, 232 F.3d 1353, 1359–62 (11th Cir. 2000); Roulette v. City of Seattle, 97 F.3d 300, 315–16 (9th Cir. 1996).

139. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992); Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 949 (E.D. Mo. 1994); *see generally* Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413 (2006) (arguing that anti-homeless ordinances are most effectively challenged under due process clauses of state constitutions).

140. *Roulette*, 97 F.3d at 300.

141. *Id.* at 306.

142. *Id.*

143. *Id.*

In 2000, the Eleventh Circuit rejected a due process challenge to an urban camping ordinance.[144] The defendant, however, argued primarily that the ordinance was impermissibly vague, both facially and in application.[145] Although the defendant had made a "cursory" substantive due process argument, the panel dismissed it as substantially identical to the vagueness challenge.[146]

Of the few successful substantive due process challenges, many have relied on the fundamental right to travel.[147] As the argument goes, ordinances that seek to restrict homeless individuals from occupying public spaces impede their liberty to travel throughout the city.[148] However, that right is also frequently self-defeating. "Travel" implies movement, and many courts have struggled to reconcile the right to free movement with a desire to remain encamped.[149]

The history of legal challenges to urban camping ordinances reveals an ever-shifting patchwork of constitutional arguments that homeless advocates may deploy for temporary expediency, but which fail to capture the foundational harms of criminalization. The injustice of urban camping ordinances runs deeper than procedural defects, such as vagueness and overbreadth. Nor is it encapsulated by the counterintuitive right to travel. What individuals experiencing homelessness have so far lacked is a constitutional principle that captures the lived experience of existing at the mercy of the criminal regulatory state.

II.
"RIGHT TO SHELTER" EFFORTS

As early as the early 1970s, homeless advocates began to turn their attention from constitutional arguments for decriminalization to securing a positive "right

144. Joel v. City of Orlando, 232 F.3d 1353, 1359–62 (11th Cir. 2000). The defendant also unsuccessfully challenged the ordinance under the Constitution's Equal Protection Clause and Eighth Amendment.

145. *Id.* at 1359.

146. *Id.* at 1359 n.3.

147. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992); Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004). The Supreme Court has recognized on numerous occasions that the right to interstate travel is "fundamental," and is therefore subject to strict scrutiny when infringed upon by the government. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

148. *See, e.g.*, Streetwatch v. Nat'l R.R. Passenger Corp., 875 F. Supp. 1055, 1064 (S.D.N.Y. 1995).

149. *See, e.g.*, Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *10 (D. Or. July 31, 2009) (explaining that plaintiffs "allege that police officers have told them to 'move along' when sleeping in public and conducted camp clean-ups and seized their property," but that such allegations do not demonstrate "that the City has attempted to restrain their movement"); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996) ("The Defendants' action does not impede the travel of any of the named plaintiffs because they do not seek to *travel* anywhere; they seek only to remain.") (emphasis in original).

to shelter."[150] The goal of these efforts was to secure for homeless individuals a legal entitlement to adequate shelter provided, or at least funded, by the government.[151] Despite early setbacks, the campaign to recognize a right to shelter exploded in the 1980s against a backdrop of increasing and evolving homelessness.[152] Importantly, however, the campaign to establish a right to shelter was neither concerted in its effort nor undertaken by the actual homeless population.[153] Rather, the right-to-shelter movement describes a patchwork of developments born out of housed advocates dominating the discourse in the 1980s about how to aid the homeless.[154]

Right-to-shelter advocates advanced on two fronts. They found some limited success in the courts, where they primarily attempted to find a legal hook for the right to shelter in a variety of disparate state constitutional provisions and federal funding contracts.[155] As discussed below, New York City became the archetype for establishing the right to shelter through litigation. The right to shelter similarly found some small successes in legislative politics, where Massachusetts and the District of Columbia managed to adopt new laws straightforwardly guaranteeing temporary emergency shelter.[156]

Despite decades of effort, only four United States jurisdictions currently recognize an enforceable right to shelter, all of which are grounded in legal or political developments between 1979 and 1990.[157] Moreover, even these states can hardly be called success stories. The implementation of a right to shelter is typically mired in layers of administrative bureaucracy and is frequently tied to burdensome eligibility criteria that obstruct access to the right.[158] The result is that, even in right-to-shelter states, shelter is available to some homeless people, some of the time, and under conditions that are far-too-often onerous for shelter residents.

This Part first details the twin efforts of the right-to-shelter movement before exploring a curious consequence of securing government-provided shelter—increasingly, and counterproductively, courts have cited the availability of such shelter as an additional justification for criminalizing urban camping.

150. *See* Lindsey v. Normet, 405 U.S. 56, 73 (1972) (arguing for the "need for decent shelter" and the "right to retain peaceful possession of one's home").

151. Dennis D. Hirsch, *Making Shelter Work: Placing Conditions on an Employable Person's Right to Shelter*, 100 YALE L.J. 491, 491 (1990) ("One of the major responses by members of the legal community has been to argue for a right to shelter that would obligate the government (generally state or local) to provide housing to all homeless persons who request it.").

152. *See, e.g.*, *id.*; Kevin P. Sherburne, Comment, *The Judiciary and the Ad Hoc Development of A Legal Right to Shelter*, 12 HARV. J.L. & PUB. POL'Y 193, 202–15 (1989).

153. Ben Holtzman, *When the Homeless Took over*, SHELTERFORCE (Oct. 11, 2019), https://shelterforce.org/2019/10/11/when-the-homeless-took-over/ [https://perma.cc/5RAL-RNN6].

154. *Id.*

155. *See infra* Part II.A.

156. *See infra* Part II.B.

157. *See infra* Part II.A–B.

158. *See infra* Part II.A–B.

A. Litigating a Right to Shelter

Beginning in the early 1970s, the right-to-shelter movement took to the courts, with little success. Focusing initially on constitutional litigation, homeless advocates contended that the due process and equal protection clauses of the Fifth and Fourteenth Amendments should be construed to require government-provided shelter for individuals experiencing homelessness.[159] But the theory was soundly defeated in the Supreme Court. Writing for a five-justice majority, Justice White proclaimed that "the Constitution does not provide judicial remedies for every social and economic ill."[160] In particular, the Court could find no basis for a "constitutional guarantee of access to dwellings of a particular quality."[161] The Court declared "the assurance of adequate housing" to be exclusively a legislative function.[162]

Despite failure on the federal level, homeless advocates brought similar lawsuits based on state constitutional provisions that are arguably broader than the federal Constitution.[163] The most successful of such cases arose in New York, where Wall Street lawyer Robert Hayes filed a class action lawsuit on behalf of homeless men in New York City, requesting that the city provide shelter to any homeless man that asked for it.[164] Hayes based the request for shelter, in part, on a provision of the state constitution that declares: "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."[165]

In 1979, the New York State Supreme Court ordered the city and state to provide shelter for all "needy, indigent men" in a landmark decision, *Callahan v. Carey*.[166] However, *Callahan* was far from a conclusive victory. While the court's order ensured that shelters would have sufficient beds to meet demand, it did little to guarantee habitable conditions inside the shelters. "Conditions

159. *See* Lindsey v. Normet, 405 U.S. 56, 58 (1972).

160. *Id.* at 74.

161. *Id.*

162. *Id.*

163. *See, e.g.*, Hilton v. City of New Haven, 661 A.2d 973, 984 (Conn. 1995) (rejecting plaintiffs' claim to an affirmative right to shelter under three unique provisions of the Connecticut Constitution); *see also* Sherburne, *supra* note 152, at 220 (citing ALA. CONST. art. IV. § 88 (authorizing legislature to require counties to provide for poor individuals); KAN. CONST. art. 7, § 4 (requiring counties to provide aid to misfortunate individuals); MONT. CONST. art. XII, § 3(3) (requiring legislature to provide economic assistance to needy individuals); OKLA. CONST. art. 17, § 3 (requiring counties to provide for persons in need); GA. CONST. art. IX, § V (empowering counties to provide support for poor individuals); HAW. CONST. art. IX, § 3 (empowering the state to provide aid to needy individuals)).

164. *See* Callahan v. Carey, No. 79-42582 (N.Y. Sup. Ct. Aug. 26, 1981) (final judgment by consent decree).

165. N.Y. CONST. art. XVII, § 1.

166. Kim Hopper, *The Ordeal of Shelter: Continuities and Discontinuities in the Public Response to Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 318 (1990) (citing Callahan v. Carey, 188 N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979)).

. . . remained dismal and the treatment of the men harsh and degrading."[167] So even if there were enough beds in a shelter, the conditions were so horrendous that homeless individuals were often deterred from seeking shelter.[168]

Faced with a wealth of testimony detailing the gross insufficiency of shelters and the intolerable conditions inside shelters, New York City and the state entered prolonged negotiations with the plaintiffs.[169] The result was a consent decree in August of 1981 that reaffirmed the right to shelter and established baseline standards of decency that shelters had to maintain.[170] New York City thus became the first jurisdiction in the nation to recognize a state-protected right to shelter.[171]

Despite the broad guarantee of shelter in *Callahan*, eligibility criteria in New York significantly narrow the types of individuals and families that can access the government-provided shelter services. At the state level, services are run through the Office of Temporary and Disability Assistance's Housing and Support Services program.[172] That agency administers an alphabet soup of support programs with different eligibility criteria, including "Solutions to End Homelessness Program (STEHP), New York State Supportive Housing Program (NYSSHP), Housing Opportunities for Persons with AIDS Program (HOPWA), Emergency Needs for the Homeless Program (ENHP), [and the] Operational Support for AIDS Housing Program (OSAH)."[173] Among other things, every applicant for shelter needs valid original identification and proof of their recent place of residence.[174] These details can make accessing shelter difficult for some homeless individuals, particularly those who are not U.S. citizens, who may not have had a consistent prior place of residence, or who are escaping an abusive partner that withheld vital documentation as a form of control.

In New York City, shelter services are provided through the Department of Homeless Services (DHS), under the Department of Social Services.[175] At the time of writing, the DHS website stated that "DHS *requires* shelter clients to gain employment, connect to work supports and other public benefits, save their income, and search for housing, to better prepare for independent living."[176] New York City shelters have a specific on-site police-type force, established in 1993,

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. Wells, *supra* note 69, at 1143.
172. *Housing and Support Services*, OFF. TEMP. & DISABILITY ASSISTANCE, https://otda.ny.gov/programs/housing/#header [https://perma.cc/ZPE4-UHAV].
173. *Id.*
174. *Frequently Asked Questions*, N.Y.C. DEP'T HOMELESS SERVS., https://www1.nyc.gov/site/dhs/about/frequently-asked-questions.page [https://perma.cc/RR2S-9N4Y].
175. *Inside DHS*, N.Y.C. DEP'T OF HOMELESS SERVS., https://web.archive.org/web/20220124150115/https://www1.nyc.gov/site/dhs/about/inside-dhs.page.
176. *Id.*

called "Peace Officers,"[177] who maintain the basic powers of police.[178] DHS cites Peace Officers as the reason shelters are safe places in NYC, yet the presence of law enforcement may also deter eligible individuals from utilizing available shelter services.

New York is not the only state to have found a right to shelter through litigation. West Virginia courts have similarly recognized an enforceable right to temporary emergency shelter in limited circumstances. Under West Virginia law, the state's Department of Welfare is authorized to institute proceedings to abate any abuse or neglect of a vulnerable adult or to abate an emergency situation.[179] An "emergency situation" covers any "set of circumstances which presents a substantial and immediate risk of death or serious injury to a vulnerable adult."[180] A vulnerable adult is one who is "unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health and protection."[181] In a path-marking 1983 case, *Hodge v. Ginsberg*, the West Virginia Supreme Court held that homelessness was an emergency situation that the Department of Welfare must work to abate.[182] The Court granted a writ of mandamus to homeless individuals seeking adult protective services on this basis, requiring the "Commissioner of the Department of Welfare to provide emergency shelter, food and medical care to the petitioners and other similarly situated persons."[183]

Pursuant to *Hodge*, the assistance provided to homeless individuals in West Virginia must be such as "will meet the individual's needs with the least necessary restrictions on his liberty and civil rights."[184] The Court also dictated that the Department of Welfare "is required to provide such services as are 'appropriate in the circumstances' . . . and which 'meet the individual's needs.'"[185] The Court, however, did not specify particular resources, programs, or benefits that must be provided beyond finding that "[t]he lack of shelter, food and medical care . . . poses a substantial and immediate risk of death or serious permanent injury."[186]

177. *Frequently Asked Questions*, *supra* note 174.

178. N.Y. CRIM. PROC. LAW § 2.20(1) (McKinney 2005). These powers include *inter alia*:

> (a) The power to make warrantless arrests pursuant to section 140.25 of this chapter.
>
> (b) The power to use physical force and deadly physical force in making an arrest or preventing an escape pursuant to section 35.30 of the penal law.
>
> (c) The power to carry out warrantless searches whenever such searches are constitutionally permissible and acting pursuant to their special duties.

Id.

179. W. VA. CODE § 9-6-4.

180. W. VA. CODE § 9-6-1(6).

181. W. VA. CODE § 9-6-1(5).

182. 303 S.E.2d 245, 251 (W.Va. 1983).

183. *Id.*

184. *Id.* (internal quotation omitted).

185. *Id.*

186. *Id.*

In practical terms, the mandate of *Hodge* is limited. West Virginia programs based on the *Hodge* decision require an individual seeking assistance to be over the age of eighteen, to meet a specific definition of "homeless," and to "lack sufficient resources to obtain needed emergency shelter, food or medical care" in order to be eligible for services.[187] They also require that the individual is not merely a "transient," a person capable of being helped with more limited Emergency Assistance.[188]

The West Virginia Department of Health and Human Resources provides a Homeless Services Policy manual.[189] This manual explains that *Hodge v. Ginsberg* mandates that the Department provide services, but also indicates that a homeless person "who has decision-making capacity . . . has the option of accepting or refusing certain intervention and services when offered."[190] The policy manual recognizes that homelessness is precipitated primarily by external factors, such as "unemployment/underemployment; personal and family difficulties; alcoholism; drug abuse; family abuse; the lack of affordable housing; inappropriate behavior; mental disorders; or a combination of these or other factors."[191] The policy manual explicitly states, however, that homeless individuals are accountable for their behavior and the "policy is not intended to mandate benefits to those who are homeless as a result of their unwillingness to change [inappropriate] behavior."[192]

The federal Department of Health and Human Services notes that West Virginia faces unique challenges in combatting homeless due to the rural nature of the state.[193] The federal government provides West Virginia with funding for Projects for Assistance in Transition from Homelessness (PATH) services, which are run through a variety of grantee organizations.[194] West Virginia allows independent nonprofit organizations to apply for funding when they meet certain qualifications.[195] According to HomelessShelterDirectory.org, which is among the best sources for finding existing shelter placements across the nation,[196] West

187. W. VA. DEP'T OF HEALTH & HUM. RES., FUNDING ANNOUNCEMENT FOR HOMELESS SERVICES 3–4 (2019), https://dhhr.wv.gov/bcf/Providers/Documents/Homeless%20Services%20Announcement.pdf [https://perma.cc/A7CT-C762].

188. W. VA. DEP'T OF HEALTH & HUM. RES., HOMELESS SERVICES POLICY 10 (2016), https://dhhr.wv.gov/bcf/policy/Documents/Homeless Policy.pdf [https://perma.cc/K73F-WFR2].

189. *Id.*

190. *Id.* at 3.

191. *Id.* at 8.

192. *Id.*

193. *West Virginia PATH Program Addresses Rural Homelessness*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Apr. 30, 2020), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/path-program-rural-homelessness [https://perma.cc/UB29-Z5N2].

194. *Id.*

195. *See* W. VA. DEP'T OF HEALTH & HUM. RES., *supra* note 187, at 7–9.

196. The Department of Housing and Urban Development also has a "Resource Locator" feature, although it is significantly less user-friendly. *See Homeless Information: West Virginia*, U.S. DEP'T OF

Virginia has emergency shelters, general homeless shelters, and limited transitional housing opportunities.[197] They also note that many shelters now have long waiting lists.[198] This is particularly problematic, given that it is difficult to find any information about how to apply for a shelter in advance of simply showing up.[199] Overall, the West Virginia network of homeless shelters resembles that of the District of Columbia, discussed below.

B. Legislating a Right to Shelter

Inspired by the successful litigation in New York, Mitch Snyder—former Wall Street broker and once-homeless founder of the Community for Creative Nonviolence (CCNV)—sought to achieve recognition of the right to shelter in Washington, D.C.[200] However, in contrast to the New York Supreme Court opinion, the D.C. courts were less receptive to the idea of judicial pronouncement of a positive right to shelter. Two courts ultimately agreed that "the government assumes no obligation to house and feed indigent people and "there is not 'a constitutional or other legal right to city-provided shelter.'"[201]

Thus, in 1983, Snyder and CCNV launched an initiative to put the right to shelter on the ballot.[202] If litigation could not achieve a right to shelter, then perhaps legislation would. CCNV circulated petitions throughout D.C. to put "The Right to Overnight Shelter Initiative 17" on the 1984 ballot.[203] Despite opposition and a counter-campaign by then-Mayor Marion Berry, CCNV garnered enough support for the initiative to make it onto the ballot.[204] On November 6, 1984, 72 percent of the D.C. voters approved the right to shelter initiative, and four months later, the right to shelter became law.[205]

The success of Snyder and CCNV's efforts would ultimately be short-lived. This first incarnation of the right to shelter only remained on the books in D.C. for five years.[206] Faced with the city's ongoing resistance to the law, consistent refusal to implement the initiative, and persistent court challenges, the D.C.

HOUS. & URB. DEV., https://www.hud.gov/states/west_virginia/homeless [https://perma.cc/TG57-K5LT].

197. *See West Virginia Homeless Shelters*, HOMELESS SHELTERS DIRECTORY, https://www.homelessshelterdirectory.org/westvirginia.html [https://perma.cc/AWU2-PVLR]

198. *Id.*

199. *See, e.g.*, *Homeless Information: West Virginia*, *supra* note 196.

200. Wells, *supra* note 69, at 1143–45.

201. *Id.* at 1144 (internal citations omitted).

202. *Id.* at 1145.

203. *Id.*

204. *Id.* As researcher Katie Wells has reported: "The apex of CCNV's activism in 1984 was a vow to fast until the federal government agreed to renovate a federal building in Washington, D.C. in which CCNV sheltered 850 people each night. After CCNV's most prominent member, Mitch Snyder, fasted for 51 days, federal officials agreed to the demand. That night a *60 Minutes* television segment covered the story. The timing of the fast no doubt helped to ensure the passage of the right to shelter initiative three days later." *Id.* at 1147.

205. *Id.*

206. *Id.*

Council eventually nullified the right to shelter, thereby undoing the CCNV's year-long campaign to recognize a right to shelter through legislation.[207]

D.C.'s right to shelter was ultimately replaced with the D.C. Emergency Overnight Shelter Amendment Act of 1990. The Act created a statutory right to shelter that depends on environmental factors; it exists only during hypothermic conditions.[208] The original sections of the Act were later repealed and replaced with even narrower language, including that "[n]o provision of this act shall be construed to create an entitlement (either direct or implied) on the part of any individual or family to any services within [DC homelessness services], other than shelter in severe weather conditions[.]"[209]

D.C. Law 21-141, the Homeless Shelter Replacement Act of 2016 ("2016 Act"), provided the Mayor with authority to appropriate funds to create additional space and resources for the DC General Family Shelter, which houses families experiencing homelessness.[210] In the text of the legislation, the D.C. Council made findings of fact, including that "[t]he DC General Family Shelter is antiquated and inadequate, and its current conditions limit the District's ability to provide necessary services[.]"[211] But the 2016 Act's plan to create short-term family housing in each of the city's wards failed to deliver the promised results in a timely manner.[212] Ward Two still lacks any family housing, and its housing for women closed due to maintenance issues that were not resolved until 2022.[213]

Currently, shelters in D.C. are operated by nonprofit organizations under contract with the Department of Human Services.[214] There are programs for transitional housing for single adults and families, and year-round shelter available for eligible families.[215] Some, but not all, contracted nonprofits are parochial in nature, spanning various denominations of primarily Christian faith.[216] The variance among these programs, including divergent eligibility criteria, create a confusing web of obstacles for those seeking services to navigate.

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207. *Id.* at 1148.

208. *Id.* at 1149–50.

209. D.C. CODE § 4-755.01(a) (2005).

210. D.C. LAW 21-141 (2016).

211. *Id.* at § 2(3).

212. Ward 1's shelter just finished construction in early 2021 and was projected to start serving families around March 2021, at the earliest. *See* Jenny Gathright, *D.C. Completes Ward 1 Family Homeless Shelter, Capping Years-Long Effort*, NPR (Feb. 4, 2021), https://www.npr.org/local/305/2021/02/04/964014402/d-c-completes-ward-1-family-homeless-shelter-capping-years-long-effort [https://perma.cc/MT3H-2J4W].

213. *Id.*

214. *See, e.g.*, *How to Access Shelter*, DEP'T OF HUM. SERVS., https://dhs.dc.gov/page/how-access-shelter [https://perma.cc/5JG7-FX7Z].

215. *Services for Individuals Experiencing Homelessness*, DEP'T OF HUM. SERVS., https://dhs.dc.gov/page/services-individuals-experiencing-homelessness [https://perma.cc/Q5VC-77XB].

216. *Id.*

Around the same time as D.C., the right to shelter movement reached Massachusetts. In 1983, then-Governor Michael Dukakis signed legislation mandating that every municipality must provide temporary emergency shelter to any family who is eligible for services, every night.[217] Despite the breadth of this promise, the reality is far less rosy. The Massachusetts Department of Housing and Community Development, the agency responsible for providing shelter services, typically denies about 40 percent of all applications for shelter.[218]

One reason for this discrepancy is that Massachusetts has narrow criteria for shelter eligibility, requiring individuals to prove that their homelessness is due to a preapproved reason.[219] Preapproved reasons for homelessness include fire or other natural disaster, a current living situation that poses a threat to their health or safety, or income eligibility for homeless families with children.[220]

Such narrow grounds for eligibility pose evident problems. For example, the eligibility rules exclude those who own property worth over $2,500.[221] The ban on property ownership effectively forces homeless families with a car to choose between either living in that car or getting rid of it to become eligible for services. Under these rules, I arguably would have been ineligible during my period of homelessness.

Shelter services also deny residents any control over their location. Although Massachusetts has a preference for providing individuals a shelter placement within twenty miles of their hometown, individuals could be offered shelter anywhere in the state if a better placement is unavailable.[222] For those who wish to remain in closer proximity to their support systems, including children's schools, this lack of choice can be a dealbreaker.[223] At the same time, the state's location preference rules make it easier for abusive partners to hunt

217. MASS. GEN. LAWS ch. 450 (1983) (amended 2014). *But cf.* Laticia Walker-Simpson, *Life Raft or Quicksand?: Emergency Assistance's Role in Greater Boston's Homeless Crisis*, 64 BOS. BAR J. 23, 23 (2020) (mentioning that Massachusetts' eligibility requirements are much more restrictive than they first appear).

218. *Basic Facts on Homelessness and Housing in Massachusetts*, MASS. COAL. FOR THE HOMELESS, https://mahomeless.org/basic-facts/ [https://perma.cc/Z767-738Q].

219. Lucy Ellis, *Massachusetts Family Homelessness System*, BOS. FOUND. (Feb. 22, 2017), https://www.tbf.org/old-blog/2017/february/massachusetts-family-homelessness-system [https://perma.cc/PZ9W-6K4L].

220. Ruth Bourquin, *Basic Shelter Rights (Emergency Assistance)*, MASSLEGALHELP (Jan. 2011), https://www.masslegalhelp.org/income-benefits/basic-shelter-rights [http://perma.cc/6EGU-4RP9]. The income level eligibility determination for Emergency Assistance is based on a comparison of family size with monthly and yearly total salary. *Emergency Assistance Income Limits*, MASSLEGALHELP (Jan. 2022), https://www.masslegalhelp.org/income-benefits/emergency-assistance-income-limits [https://perma.cc/3SRX-5HAW].

221. Bourquin, *supra* note 220.

222. *Id.*

223. *See, e.g.*, Sascha Brodsky, *Choosing Between Shelter and School*, ATLANTIC (Dec. 8, 2016), https://www.theatlantic.com/education/archive/2016/12/shelter-versus-school/509825/ [https://perma.cc/H792-4P8P].

down people who might prefer to relocate to more distant shelters.[224] Unfortunately, a homeless person or family cannot refuse a shelter placement without being banned from receiving shelter services for twelve months.[225]

The shelter services provided are of dubious quality. The Department of Housing and Community Development (DHCD) outlines four types of potential shelter for eligible families and pregnant women: scattered sites, co-shelter sites, congregate sites, and hotels.[226] According to the Massachusetts Coalition for the Homeless, "[o]n any given night in Massachusetts, the approximately 3,000 shelter beds for individuals usually are full or beyond capacity (supplemented by cots and sleeping bags)."[227]

Most recently, California's Legislature considered—but ultimately rejected—a right to shelter. Following Governor Gavin Newsom's announcement in 2019 that he would prioritize helping the homeless, Newsom convened his Council of Regional Homeless Advisors, who suggested a "right to shelter" plan modeled after New York City.[228] Sacramento Mayor Darrell Steinberg, in particular, advocated for an "aggressive" strategy that would pair a

224. *See, e.g.*, Alexa Gagosz, *She Took Her Daughter and Ran from an Abusive Relationship. Now They're Homeless*, BOS. GLOBE (Oct. 21, 2021), https://www.bostonglobe.com/2021/10/21/metro/she-took-her-daughter-ran-an-abusive-relationship-now-theyre-homeless/ [https://perma.cc/YCC6-ZP7K].

225. Bourquin, *supra* note 220.

226. *Overview of the Department of Housing and Community Development*, MASS.GOV, https://www.mass.gov/info-details/overview-of-the-department-of-housing-and-community-development [https://perma.cc/PTK8-MM8D].

Their website defines the types of housing as follows:

> Scattered site: Pregnant women and families live in an apartment where they have their own bedroom/s, bathroom, kitchen, and living room. This accommodation can be in a multifamily home or in an apartment building. These buildings may also house families that are not in the EA program.
>
> Co-shelter site: Pregnant women and families share an apartment with another woman or family in the EA program. They have their own bedroom/s but share common areas that include a living room, kitchen, and bathroom. These apartments are located in multifamily buildings, which may contain other units that are not part of the EA program.
>
> Congregate site: Each pregnant woman or family lives in their own room at the shelter and shares communal spaces such as living rooms, dining rooms, and kitchens with the other resident families. Some of these facilities may also include residential and day programs other than the EA program.
>
> Hotel: Pregnant women and families live in hotel rooms with a refrigerator, microwave, and toaster oven; bathroom; and sleeping area. The Commonwealth has reduced the reliance on hotels and now shelters all pregnant women and families in the EA program in the same hotel.

Id.

227. MASS. COAL. FOR THE HOMELESS, *supra* note 218.

228. *Governor's Council of Regional Homeless Advisors Convenes in LA*, CNTY. OF L.A., https://ridley-thomas.lacounty.gov/index.php/governors-regional-homeless-advisory-council-convenes-in-la/ [https://perma.cc/5K9X-QG6L]; Matt Levin & Jackie Botts, *Cities Should Act on Homelessness or Face Lawsuits, Newsom Task Force Says*, CAL MATTERS (Jan. 14, 2020), https://calmatters.org/housing/2020/01/gavin-newsom-homelessness-task-force/ [https://perma.cc/8GPZ-VYAK].

right to shelter with an obligation to use it, backed by criminalization.[229] He emphasized that "[l]iving on the streets should not be considered a civil right."[230]

Ultimately, the Council put forward a moderate plan calling for an amendment to the California Constitution.[231] The amendment would have created a legally enforceable mandate against California cities and municipalities to reduce their homeless populations.[232] Failure to meet the mandated goals in a timely manner would result in a public official having the capability to file suit against that city or municipality in order to compel them to take appropriate actions.[233] Professor Erwin Chemerinsky was among those who supported the plan.[234]

In February 2020, Assembly Bill 3269 was introduced in the California Legislature to enact the Council's plan.[235] The bill would have created a ballot measure in the November 2020 election, seeking citizen approval to amend the California Constitution to address homelessness in a number of ways, including the creation of a right to shelter.[236] However, after countless revisions, the bill was sidelined at the end of the 2020 legislative session and never reached California's voters.[237]

C. Right to Shelter as a Condition to Criminalization

Right-to-shelter efforts have centered government-provided or government-funded shelter beds in the public discourse about how best to resolve the problem of homelessness. Likewise, two recent decisions by the Ninth Circuit have similarly centered the provision of shelter beds in the legal debates over the criminalization of homelessness. These decisions interpret the Eighth Amendment to prohibit enforcing urban camping laws unless a bed in a local shelter is reasonably available. When a shelter bed is available, these decisions

229. Darrell Steinberg, *Op-Ed: Building More Permanent Housing Alone Won't Solve Homelessness in California*, L.A. TIMES (July 17, 2019), https://www.latimes.com/opinion/story/2019-07-16/op-ed-building-more-permanent-housing-alone-wont-solve-homelessness-in-california [https://perma.cc/UR2G-SRCW].

230. *Id.*

231. Anita Chabria, Benjamin Oreskes, & Taryn Lunca, *Voters Could Decide if California Cities Will Be Punished for Not Reducing Homelessness*, L.A. TIMES (Jan. 13, 2020), https://www.latimes.com/california/story/2020-01-13/homeless-housing-task-force-california-constitutional-amendment [https://perma.cc/SEA2-ARPU].

232. *Id.*

233. Andrea Noble, *California Plan to Reduce Homelessness Forces Cities, Counties to Step up*, ROUTE FIFTY (Jan. 24, 2020), https://www.route-fifty.com/health-human-services/2020/01/california-plan-reduce-homelessness-forces-cities-counties-step/162653/ [https://perma.cc/5DRJ-8QKG].

234. Chabria et al., *supra* note 231.

235. A.B. 3269, State Leg., Reg. Sess. (Cal. 2020).

236. Patrick McGreevy, *No Deal Yet in Sacramento to Help Struggling California Renters*, L.A. TIMES (Aug. 20, 2020), https://www.latimes.com/california/story/2020-08-20/no-deal-yet-on-help-california-renters-evictions-housing [https://perma.cc/KB8X-UVRM].

237. *See Bill Status, AB-3269 State and Local Agencies: Homelessness Plan*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB3269 [https://perma.cc/4VL7-GCSG].

support criminalizing urban camping as a morally culpable "choice" made by homeless individuals. This narrative whitewashes the history of urban camping laws and transforms their justifications in a way that threatens to entrench the criminalization of homeless individuals.

As noted above, early Eighth Amendment challenges to urban camping ordinances found some limited success with the argument that punishing urban camping means punishing the "status" of homelessness.[238] The seeds for linking the status-crimes doctrine to the availability of shelter beds were likely sown innocently enough. In the well-known class action litigation, *Pottinger v. City of Miami*, for example, the U.S. District Court made a number of dramatic factual findings about the plight of homeless individuals in Miami.[239] The case involved a class of homeless plaintiffs who challenged Miami's systematic removal of homeless individuals from tourist and business districts.[240] Notably, the court's findings included that the city had nearly ten times as many homeless individuals as shelter beds.[241] Based on this finding, the *Pottinger* court held that the plaintiffs "do not have a single place where they can lawfully be," and thus "the challenged ordinances . . . effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment—sleeping, eating, and other innocent conduct."[242]

Although the direct effects of the *Pottinger* ruling were limited,[243] the shelter-based rationale for Eighth Amendment protection that it articulated has taken root. Courts in recent years have increasingly followed *Pottinger*'s approach, pointing to the unavailability of shelter beds as a justification for upholding Eighth Amendment challenges.[244] In these courts' views, the absence

238. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) ("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 eighth amendment—sleeping, eating and other innocent conduct."); Johnson v. City of Dallas, 860 F. Supp. 344, 351 (N.D. Tex. 1994) ("[A]s long as the homeless have no other place to be, they may not be prevented from sleeping in public."); Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006) ("Undisputed evidence in the record establishes that at the time they were cited or arrested, Appellants had no choice other than to be on the streets.").

239. *Pottinger*, 810 F. Supp. at 1557–60.

240. *Id.* at 1554.

241. *Id.* at 1564.

242. *Id.* at 1565. The Eighth Amendment claim was one of many constitutional victories for the plaintiff class. The Court also ruled that Miami's practices violated the Due Process and Equal Protection clauses, as well as the Fourth Amendment's prohibition on unreasonable searches and seizures. *Id.* at 1583.

243. The case eventually settled after multiple appeals and nearly ten years of litigation. *See* Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1179 (S.D. Fla. 2019). Since the terms of settlement are binding only on the municipality that is a party to the litigation, the District Court's constitutional rulings have no precedential value, even in that District. McJunkin, *supra* note 9, at 977. As I have noted elsewhere, the frequency of settlement, combined with the protracted nature of these class-action suits, makes constitutional litigation an ineffective tool for broad decriminalization efforts by homeless advocates. *Id.* at 977–79.

244. *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1136–38 (9th Cir. 2006).

of available shelter beds in a city meant that criminalization punished inescapable incidents of the status of homelessness, rather than punishing freely chosen—hence culpable—criminal conduct.[245]

In 2006, a panel of the Ninth Circuit resolved *Jones v. City of Los Angeles* and concluded that the defendants had not made an "informed choice" to sleep in public because of the lack of shelter availability.[246] Six homeless individuals had sought injunctive relief against a Los Angeles city ordinance prohibiting urban camping.[247] Reversing the trial court's grant of summary judgment in favor of the defendant city, the Ninth Circuit panel reasoned that homelessness is "a chronic state that may have been acquired 'innocently or involuntarily.'"[248] Consequently, the mere act of sleeping in public, without more, may not be punished under the Eighth Amendment because it may reflect status, rather than conduct.[249] The "more," of course, related to the availability of shelter beds. In *Jones*, the record revealed that Los Angeles's Skid Row had a homeless population that outnumbered its shelter beds by about one thousand each night.[250] Ultimately, the case settled, but the court's reasoning stood as a precursor of what was to come.

In 2018, the Ninth Circuit again confronted the issue of homeless ordinances in *Martin v. City of Boise*.[251] Six plaintiffs brought suit against the city of Boise for being subjected to urban camping and disorderly conduct ordinances.[252] The plaintiffs argued that their arrests were unconstitutional because shelters—even when not full—were not practically available to them, given residency limitations and religious program requirements.[253] The Ninth Circuit panel agreed, holding that the Eighth Amendment bars "imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."[254]

The initial response to *Jones* and *Martin* was largely positive.[255] And, to be sure, the cases lightened the weight of criminalization borne by individuals

245. *See id.* at 1132 ("Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.").

246. *Id.* at 1137, 1123.

247. *Id.* at 1120.

248. *Id.* at 1136.

249. *Id.* at 1132.

250. *Id.* at 1122.

251. Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

252. *Martin*, 902 F.3d at 1035.

253. *Id.* at 1036–37, 1041.

254. *Id.* at 1048.

255. *See, e.g.*, Press Release, *Appeals Court Ruling Ends the Criminalization of Homelessness*, AM. C.L. UNION (Apr. 14, 2006), https://www.aclu.org/press-releases/aclu-southern-california-wins-

experiencing homelessness. In at least some cities, police departments developed new procedures to check shelter availability in advance of citing or arresting unsheltered individuals.[256] In others, departments elected to stop enforcing their urban camping laws altogether.[257]

But academic commentators soon noticed the limitations of the *Martin* opinion. Professor Sara Rankin recently dismantled the *Martin* decision for simply giving the criminalization of homelessness a "makeover."[258] Rankin describes a process she labels "transcarceration," whereby cities achieve the goals of criminalization—a reduction in visible homelessness—by hiding and confining homeless individuals through compulsory shelter use and involuntary commitment.[259]

According to Rankin, the *Martin* holding has accelerated the transcarceration of homeless individuals in three ways. First, cities such as Seattle have embraced "more frequent and less regulated encampment sweeps as a pipeline to confinement."[260] Sweeps tend to operate on a theory of perpetual displacement—they do little to advance the interests or well-being of homeless individuals, while also destroying property, disrupting communities, and unwittingly ensnaring individuals in criminal justice and mental health systems.[261] Second, there has been a "renewed interest in involuntary commitment and conservatorship" as a response to the homelessness of those with mental illnesses and substance abuse disorders.[262] Involuntary commitment and conservatorship laws typically authorize physical confinement of those who "cannot secure their own food, clothing, or shelter" due to serious mental illness or chronic substance abuse.[263] Third, several West Coast cities have begun experimenting with "partnering a 'right to shelter' in giant FEMA-style tents or similar mass shelters with a legal obligation to use it."[264] These "shelters"

historic-victory-homeless-rights-case [https://perma.cc/JMU9-7TK6]; *Settlement Reached in Groundbreaking* Martin v. City of Boise *Case*, *supra* note 135.

256. *See* Erasmus Baxter, *Phoenix's Draft Homelessness Plan Raises Hopes and Concerns*, PHX. NEW TIMES (July 7, 2020), https://www.phoenixnewtimes.com/news/phoenix-draft-homeless-plan-hopes-portal-advocates-community-gallego-11478370 [https://perma.cc/D276-MLZ6].

257. *See* Madeline Ackley, *Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protestors Say*, AZ MIRROR (Jan. 9, 2020), https://www.azmirror.com/2020/01/09/phoenix-still-criminalizes-homelessness-despite-court-ruling-protesters-say [https://perma.cc/8EV6-F26C] (reporting that Glendale and Tempe have stopped enforcing urban camping laws).

258. Rankin, *supra* note 98, at 566.

259. *See id.* at 580. "Sociologists sometimes refer to this dynamic of interchangeability between mental hospitals and incarceration as transcarceration because vulnerable people are transferred between carceral confinement and other forms of forced institutionalization." *Id.* at 583.

260. *Id.* at 565, 590–94.

261. *Id.* at 592–94.

262. *Id.* at 594–98.

263. *Id.* at 595.

264. *Id.* at 598–99.

succeed in hiding the blight of visible poverty, but do little else to benefit homeless residents.[265]

Transcarceration efforts of these sorts are enabled by certain key limitations in the *Martin* opinion. For one thing, the *Martin* holding does not dictate any standards for the adequacy or beneficence of government-provided shelter before justifying criminalization. On the pure logic of the *Martin* opinion, even mass shelters in emergency tents suffice to transform urban camping from an inescapable incident of "status" to a voluntary "choice" for unsheltered homeless populations.[266] Moreover, by prohibiting criminal enforcement only when shelter beds are unavailable, the opinion implicitly denies any broader constitutional protections for homeless individuals from consequences like involuntary commitment.[267] The opinion also explicitly accommodated the government's right to "clear homeless camps, arrest those who refuse to leave, and force those arrested to show that shelters are full."[268] Rankin paints *Martin* as a "missed opportunity" to embrace a more de-carceral framework for responding to homelessness—cities need to adopt nonpunitive measures and supportive ways to integrate, rather than hide, homeless individuals in the community.[269]

Rankin's account of "transcarceration" aligns with how marginalized groups have historically been excluded, surveilled, and regulated within public spaces as a means of reinforcing existing social and status hierarchies. In her essay, *Policing Marginality in Public Space*, Professor Jamelia Morgan reveals how the policing of unsheltered individuals is part of a long history of criminal regulation of public spaces.[270] According to Morgan, "quality of life" offenses—including those that have long criminalized behaviors attendant to homelessness—"confine, segregate, and impede movement of otherized and oft-racialized bodies in public places."[271] These vague and broad offenses have historically been used by more privileged segments of a community to define their community's legitimate boundaries—they define who can access public spaces, who can occupy those spaces free from interference, and which behaviors

265. *Id.* at 600–02.

266. *See* Baskett, *supra* note 25, at 605. "Because the cornerstone of Director Marbut's 'velvet hammer' approach is the construction of large, centralized facilities that are available to the homeless twenty-four hours a day, there may be very few instances in which no alternative sleeping space is available and, therefore, little protection for the homeless population against the criminalization of persons sleeping outside on public property." *Id.* at 604.

267. R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on a Constitutional Right to Housing*, 93 ST. JOHN'S L. REV. 427, 436–37 (2019).

268. *Eighth Amendment – Criminalization of Homelessness – Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public.* – Martin v. City of Boise, *920 F.3d 584 (9th Cir. 2019)*, 133 HARV. L. REV. 699, 704 (2019).

269. *See* Rankin, *supra* note 98, at 612–13.

270. *See* Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045, 1045 (2020).

271. *Id.* at 1047.

are permitted in those spaces.[272] By regulating who has access to, and use of, public spaces, states and privileged segments of the community reinforce existing hierarchies and relegate marginalized groups to positions of inferiority.[273]

Morgan's work highlights how constitutional protections that prohibit status crimes do little to prevent the overcriminalization of marginalized groups. Morgan specifically attacks the *Martin* decision as an example of inadequate constitutional rulemaking. Despite focusing on individual "choice" as a prerequisite for criminalization, the *Martin* court neglected to grapple with the social and cultural conditions that drive these choices.[274] Furthermore, Morgan argues that centering the criminalization of homelessness on a rhetoric of "choice" ignores the underlying function of criminal law—public ordering.[275] Under *Martin*, a city can still regulate unsheltered populations in accessing and occupying public spaces so long as the city can show that a "choice" for shelter—however unrealistic or impracticable—exists for the unsheltered population. According to Morgan, only by centering how public ordering of public spaces is used to subordinate marginalized groups and reinforce existing hierarchies can the harms of quality-of-life policing be better accounted for in constitutional decisions.[276]

Under the reasoning of cases like *Jones* and *Martin*, the availability of shelter beds is the dispositive issue in distinguishing between impermissibly punishing status and permissibly punishing voluntary conduct. Other courts have similarly pointed to the availability of shelter beds as a reason for dispensing with Eighth Amendment challenges to camping ordinances.[277] The logic of these opinions elevates shelters as an escape from the "status" of homelessness. When shelter is available, it is compulsory, backed by the threat of criminal sanctions.[278] The decision not to use it is painted as morally culpable.

One of the more pernicious consequences of the *Martin* and *Jones* decisions is that the opinions shift the legal discourse about the criminalization of homelessness. Cities and states that have criminalized urban camping have

272. *Id.* at 1053–54.

273. *See id.*

274. *Id.* at 1059–60. For instance, the Court fails to address how the quality of homeless shelter or the location of a homeless shelter may factor into whether a shelter is considered "practically available." *Id.*

275. *Id.* at 1060.

276. *Id.* at 1062–63.

277. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (finding that the ordinance challenged did not criminalize involuntary behavior as shelter beds were available).

278. *See* Martin v. City of Boise, 902 F.3d 1031, 1048 n.8 (9th Cir. 2018) ("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.") (emphasis in original).

typically done so unconditionally.[279] The actual motivations behind such laws involve empowering police to physically control access to public spaces.[280] The goal is to remove the blight of poverty from public view.[281] The immanent justifications for the practice have nothing to do with shelter use or shelter avoidance.

Martin and *Jones* shift this discourse by creating a narrative in which eschewing available shelter is a conscious "choice," and therefore is a permissible target of criminal sanctions. Rather than grapple with the constitutionality of the law's actual motivations, these opinions frame criminalization as a matter of punishing voluntary decisions by individuals experiencing homelessness.[282] This new discourse echoes early narratives about self-inflicted homelessness that motivated some of the earliest vagrancy laws.[283] Those laws targeted the able-bodied but unemployed for criminal sanction and furthered decades of damaging social discourse about chosen or voluntary homelessness.[284]

By holding that criminal ordinances only punish the "status" of homelessness when shelter beds are unavailable, these decisions depict homelessness as a status that is escaped by a seemingly simple choice to seek shelter. The opinions never grapple with whether the compulsory requirement to use shelters, at the risk of criminal enforcement, is also a form of social punishment that targets homelessness as a status. The opinions make no effort to justify the imposition of criminal punishment on individuals who rationally choose not to utilize available shelter services.

III.
THE CHOICE TO USE SHELTERS

One of the primary costs of centering temporary emergency shelters in the discourse about homelessness is that doing so tends to elide discussion about the deficiencies of many shelters. When shelters are valorized as an end goal of litigation or legislation—as with the right-to-shelter movements discussed above—they hold a revered place in the discourse that does not permit of nuance. They are held up broadly as the solution to the problem of homelessness, rather

279. *See, e.g.*, PHX., ARIZ. CITY CODE § 23-30 (criminalizing urban camping without regard to shelter availability).

280. *See* Morgan, *supra* note 270, at 1053 ("[L]ocal jurisdictions and communities have used a number of criminal laws . . . to police access to use and enjoyment of public space."); Rankin, *supra* note 98, at 589 (noting that "narratives generally frame the visibility of homeless people as the problem . . . [s]o rather than prioritize solutions to homelessness, cities continue to excise homeless people").

281. Rankin, *supra* note 98, at 589 ("[Criminalization] empowers the most immediate, albeit temporary, removals of homeless people from public view and creates the short-term illusion that the problem has been mitigated.").

282. *See Martin*, 902 F.3d at 1048 & n.8.

283. *See* Adler, *supra* note 52, at 215–16.

284. *See supra* text accompanying notes 54–55.

than as a temporary offering designed to alleviate the circumstances of some people some of the time. We see this cost most clearly in the judicial treatment of shelters under the Eighth Amendment. In concluding that urban camping laws no longer punish "status" when shelter services are available, courts have reified shelters as a one-size-fits-all solution to elevating individuals out of homelessness.

The reality is far less rosy. Estimates are that 77 percent of homeless individuals would prefer living unsheltered rather than occupying temporary emergency shelters provided by the state.[285] Individuals experiencing homelessness may choose to avoid shelters for a myriad of rational reasons, including ensuring their physical safety, navigating their need for accessibility, protecting their property, and maintaining contact with their community and social support network.[286] Some scholars have suggested that the strength of these reasons should be considered when assessing whether shelter is "practically available" under the Eighth Amendment analysis mandated by *Martin*.[287] But adopting this approach would still reduce a complex set of personal trade-offs to a judicially determined binary conclusion: shelter is either available, in which case it is mandatory, or unavailable, in which case it is not.

In this Section, I highlight these considerations to drive home a different point: respect for homeless individuals as persons ought to require us to defer to their intimate personal choices about how best to live their lives in the face of overwhelming constraints. This Section surveys just a few of the various considerations that individuals must weigh in deciding whether shelter services are appropriate for them. It does so to emphasize both the complexity and the intimacy of the choices that face individuals experiencing homelessness.

A. Physical Safety Considerations

One of the most central considerations for individuals deciding whether to use available shelter services is whether the shelter increases their physical safety. Life for unsheltered homeless individuals involves a considerable amount

285. LINDSEY DAVIS, COAL. FOR THE HOMELESS, VIEW FROM THE STREET: UNSHELTERED NEW YORKERS AND THE NEED FOR SAFETY, DIGNITY, AND AGENCY 11 (2021) ("Seventy-seven percent of respondents stated that they have tried the municipal shelter system and instead choose to stay on the streets."); *see also* Jeremy Jojola & Katie Wilcox, *We Asked 100 Homeless People if They'd Rather Sleep Outside or in a Shelter*, 9 NEWS (Nov. 21, 2017), https://www.9news.com/article/news/investigations/we-asked-100-homeless-people-if-theyd-rather-sleep-outside-or-in-a-shelter/73-493418852 [https://perma.cc/FK2A-L3V5] (conducting informal survey of one hundred homeless individuals in Denver and finding that 70 percent prefer sleeping on the streets to shelter services).

286. *See infra* Part III.A–D.

287. Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1176–84 (2020) (exploring the lack of choice for individuals experiencing homelessness—even when shelter is "available").

of interpersonal violence.[288] In addition, individuals living on the street have increased risks of physical ailments and diseases.[289] But utilizing shelter services does not necessarily ameliorate these risks to physical safety. In fact, shelters can exacerbate them for some people, lowering the overall physical safety of shelter residents.

Violence within shelters is always a concern.[290] The typical temporary emergency shelter comprises a single, open-air room, or a series of large rooms, filled with individual cots.[291] Physical space is at a premium, in order to maximize the number of nightly residents.[292] Beds are often no more than a few inches apart.[293] No walls, doors, or locks separate residents, meaning that people need to trust absolute strangers.[294] Reported rates of physical violence vary, but conservative estimates are that roughly half of shelter residents will experience some form of abuse during their stay.[295]

Apart from actual rates of violence, the perceived risk of physical violence may also deter many homeless individuals—especially women—from utilizing shelter services.[296] Studies have found that as many as 90 percent of homeless women have been victims of severe physical or sexual violence at some point in

288. Joshua T. Ellsworth, *Street Crime Victimization Among Homeless Adults: A Review of the Literature*, 14 VICTIMS & OFFENDERS 96, 112 (2019) ("When pooled, extant data on homeless street crime victimization indicates that assault occurs roughly 11 times more frequently; incidence of robbery may be more than 12 times more prevalent, while theft may occur more than 20 times as frequently as in the general population.").

289. INST. OF MED. COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, *Health Problems of Homeless People*, *in* HOMELESSNESS, HEALTH, AND HUMAN NEEDS 39, 41 (1988) ("Homelessness increases the risk of developing health problems such as diseases of the extremities and skin disorders; it increases the possibility of trauma, especially as a result of physical assault or rape.").

290. *See* JASON ALBERTSON, DAISY ANARCHY, RACHEL BRAHINSKY, JENNIFER FRIEDENBACH, CHANEL KENNEDY, JONATHON HOOTMAN, BOB OFFER-WESTORT, TOMAS PICARELLO & BRENT SIPES, SHELTER SHOCK: ABUSE, CRUELTY, AND NEGLECT IN SAN FRANCISCO'S SHELTER SYSTEM 7 (May 2007), https://www.cohsf.org/wp-content/uploads/2014/08/ShelterShock.pdf [https://perma.cc/LA98-YC4L] ("More than half of respondents, or 55%, reported experiencing abuse inside the shelter," 14% percent reported experiencing physical violence, 4% reported experiencing sexual abuse, and "one-third (32%) of respondents reported they did not feel safe [inside a shelter].").

291. *See* LEONARD C. FELDMAN, CITIZENS WITHOUT SHELTER: HOMELESSNESS, DEMOCRACY, AND POLITICAL EXCLUSION 96 (Cornell Univ. Press 2004).

> Degrading conditions, extensive rules, lack of privacy, and surveillance by emergency shelter staff demonstrate certain values and conceptions. Minimal provisions (a cot and a blanket) and minimal privacy (rows of cots in large undivided warehouse spaces) express a vision of the homeless as bare life, as beings stripped of human personhood and individual identity[.]

292. *See id.*

293. *See id.*

294. *See id.*

295. ALBERTSON ET AL., *supra* note 290, at 7 ("More than half of respondents, or 55%, reported experiencing abuse inside the shelter.").

296. *See* Janny S. Li & Lianne A. Urada, *Cycle of Perpetual Vulnerability for Women Facing Homelessness near an Urban Library in a Major U.S. Metropolitan Area*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH (SPECIAL ISSUE) 7 (Aug. 18, 2020), https://www.mdpi.com/1660-4601/17/16/5985/htm [https://perma.cc/KCD5-K72S] ("Women's only accommodations were said to be important because of the safety issues that women may feel among men, particularly for women escaping intimate partner violence or traveling with children.").

their lives.[297] A history of physical trauma can make individuals less comfortable in exposed environments like temporary emergency shelters, particularly mixed-gender shelters.[298] Physical violence is one of the reasons commonly given for disparities in rates of shelter use between women and men.[299]

In early 2020, the coronavirus pandemic highlighted another way in which the traditional shelter structure threatens the physical health of residents. Coronavirus is a respiratory virus that spreads from infected persons to healthy ones through the accumulation of airborne droplets in enclosed spaces.[300] Among the Centers for Disease Control's primary recommendations to reduce transmission of coronavirus were maintaining at least six feet of distance between persons and wearing masks indoors.[301] Shelters—particularly temporary emergency shelters—were not well suited to meet these requirements.[302] Some shelters reduced capacity to try to meet physical distancing guidelines.[303] Others were unable to do so or chose not to do so, in

297. Amaka Uchegbu, *Homeless Women Find Sexual Violence Part of Life on the Street*, PITTSBURGH POST-GAZETTE (Aug. 17, 2015), https://www.post-gazette.com/news/health/2015/08/18/Homeless-women-find-sexual-violence-part-of-life-on-the-street/stories/201507130149 [https://perma.cc/S99N-YQQD].

298. *See* Kathleen Guarino & Ellen Bassuk, *Working with Families Experiencing Homelessness: Understanding Trauma and Its Impact*, SIGNAL, Jan.–Mar. 2010, at 14, 16, https://perspectives.waimh.org/wp-content/uploads/sites/9/2017/05/5-Working-with-Families-Experiencing-Homelessness.-Understanding-Trauma-and-its-Impact.pdf [https://perma.cc/CKN5-36LJ] ("As a result of these challenges, women who are homeless and have experienced chronic trauma have considerable difficulties trusting others and accessing help and support for themselves and their children.").

299. Instead of going to shelters, women are more likely than men to turn to families, friends, or acquaintances as a means of finding shelter. *See* Paula Mayock, Sarah Sheridan, & Sarah Parker, *'It's Just Like We're Going Around in Circles and Going Back to the Same Thing': The Dynamics of Women's Unresolved Homelessness*, 30 HOUS. STUD. 877, 880 (2015); *see also id.* at 894 (noting that because of intimate partner violence, women attempted to resolve homelessness "independently, primarily because they had lost faith in the ability of 'the system' to find a resolution to their situations").

300. *Coronavirus Disease (COVID-19): How Is It Transmitted?*, WORLD HEALTH ORG. (Dec. 23, 2021), https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted [https://perma.cc/J4QQ-UL7K].

301. *Id.*

302. *See* Marissa J. Lang, Justin Wm. Moyer & Nitasha Tiku, *Cities Struggle to Protect Vulnerable Homeless Populations as Coronavirus Spreads*, WASH. POST (Mar. 20, 2020), https://www.washingtonpost.com/local/cities-struggle-to-protect-vulnerable-homeless-populations-as-coronavirus-spreads/2020/03/20/1144249c-67be-11ea-b5f1-a5a804158597_story.html [https://perma.cc/K6Q2-GMUA].

> In some shelters, people share rooms and sleep in bunk beds. In others, mats line the floor of empty rooms to squeeze in as many people as possible during the winter months . . . Many shelters do not have room to isolate someone for an extended period. Some already are running low on cleaning supplies, hand sanitizer, food and volunteers to relieve overworked staff. Others have told volunteers to stay home—an effort to limit the number of people in and out of shelters at a time when experts say even asymptomatic people can spread the coronavirus.

Id.

303. Daniella Silva, *With Winter Approaching, Homeless Shelters Face Big Challenges Against Coronavirus*, NBC NEWS (Dec. 5, 2020), https://www.nbcnews.com/news/us-news/winter-approaching-homeless-shelters-face-big-challenges-against-coronavirus-n1249906

order to maximize the number of beds available.[304] Few were able to effectively enforce mask mandates, especially while residents slept.[305]

Throughout the year, coronavirus rapidly spread within shelters. Estimated transmission rates were upwards of 67 percent.[306] By contrast, individuals living in homeless encampments fared relatively well. In one study, experts estimated that only about 3 percent of self-sheltered individuals contracted coronavirus, a rate dramatically lower than those occupying shelters.[307]

Coronavirus provides a poignant example of a broader point. Crowded shelters dramatically increase the transmission risk of many common diseases.[308] Colds, flus, airborne infections like tuberculosis, and skin infections like scabies all tend to pass through shelters at substantially increased rates relative to the population as a whole.[309] Compounding the situation, individuals experiencing homelessness tend to have an increased risk of contracting infectious diseases due to compromised immune systems.[310] Together, these realities highlight the physical risks associated with the decision to utilize shelter services, when available.

[https://perma.cc/SV92-E8Y5] ("Homeless shelters have had to adapt this year, with most reducing the number of people allowed inside to limit virus exposure for guests and staff members.").

304. Sarah Holder & Kriston Capps, *No Easy Fixes as COVID-19 Hits Homeless Shelters*, BLOOMBERG (Apr. 17, 2020), https://www.bloomberg.com/news/articles/2020-04-17/no-easy-fixes-as-covid-19-hits-homeless-shelters [https://perma.cc/7BWN-PWX7] (observing that "some shelters aren't necessarily eagerly welcoming state or local government interventions to reduce crowding").

305. Matt Leseman, *As the Mask Order Rolls out, Homeless Shelters Ask for Flexibility*, KTUU (June 29, 2020), https://www.alaskasnewssource.com/content/news/As-the-mask-order-rolls-out-homeless-shelters-ask-for-flexibility-571557301.html [https://perma.cc/3QZH-GQR3] ("Asking someone to leave for not wearing a mask runs counter to the goal of providing them with a temporary home.").

306. *See* Lloyd A.C. Chapman, Margot Kushel, Sarah N. Cox, Ashley Scarborough, Caroline Cawley, Trang Q. Nguyen, Isabel Rodriguez-Barraquer, Bryan Greenhouse, Elizabeth Impert & Nathan C. Lo, *Comparison of Infection Control Strategies to Reduce COVID-19 Outbreaks in Homeless Shelters in the United States: A Simulation Study*, 19 BMC MED. 2 (2021), https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-021-01965-y#MOESM1 [https://perma.cc/JL3G-JZHK] (reporting data from several cities, including San Francisco, Boston, Seattle, Atlanta, and Los Angeles).

307. Ed Susman, *Homeless Camps Less Risky Than Shelters for COVID-19*, MEDPAGE TODAY (Oct. 27, 2020), https://www.medpagetoday.com/meetingcoverage/idweek/89353 [https://perma.cc/CX8H-B8CR] (reporting results from Denver).

308. *See* Michelle Moffa, Ryan Cronk, Donald Fejfar, Sarah Dancausse, Leslie Acosta Padilla & Jamie Bartram, *A Systematic Scoping Review of Environmental Health Conditions and Hygiene Behaviors in Homeless Shelters*, 222 INT'L J. HYGIENE & ENV'T HEALTH 335, 342 (2019) (finding that, although less than 20 percent of the shelters they surveyed qualified as "overcrowded," over half of the shelters surveyed reported shelter clients had tuberculosis likely due to crowding and poor ventilation).

309. Sékéné Badiaga, Didier Raoult & Philippe Brouqui, *Preventing and Controlling Emerging and Reemerging Transmissible Diseases in the Homeless*, 14 EMERGING INFECTIOUS DISEASES 1353, 1354 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2603102/ [https://perma.cc/MC7U-G3P5] ("The primary health concerns for this population are the overcrowded living conditions that expose them to airborne infections, especially TB, and the lack of personal hygiene and clothing changes that expose them to scabies, infestation with body lice, and louse-borne diseases.") (internal citation omitted).

310. Kim, *supra* note 287, at 1178.

B. Accessibility Considerations

Many shelters also have barriers to use that complicate the decision of whether an individual might benefit from them. For those with mental and physical disabilities, shelters are often intolerable, if not outright inaccessible. Shelter buildings frequently lack basic accessibility accommodations required under federal law—such as ramps, elevators, handrails, and automatic doors.[311] Further, medical issues may necessitate special diets, which require access to cooking equipment not generally available, or may be exacerbated by things like air quality, requiring a rare air-conditioned space.[312] In New York City, which has roughly sixty thousand residents in state-run shelters, only thirty-two beds are estimated to be fully accessible.[313]

Shelters may be similarly inaccessible to those with mental health and substance abuse issues. An estimated 21 percent of homeless individuals have a severe mental health condition, and an estimated 17 percent have a chronic substance abuse disorder.[314] Such individuals may be expelled or barred from shelters if their conditions are considered disruptive to the greater population.[315] Mental health crises are a common basis for shelter resident expulsion.[316] Moreover, the crowded shelter environment can be a trigger for certain mental health conditions, including schizophrenia and post-traumatic stress disorder.[317]

C. Personal Property Considerations

Property loss is another key consideration for individuals deciding whether to utilize shelter services. For individuals experiencing homelessness, the accumulation and retention of personal property is a constant struggle.[318] In addition to essentials, such as food, clothing, and medicine, many individuals must carry birth certificates, social security cards, or medical and legal

311. Nikita Stewart, *As Shelter Population Surges, Housing for Disabled Comes up Short*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/nyregion/as-residents-surge-in-new-york-shelters-housing-for-disabled-comes-up-short.html [https://perma.cc/26BB-ZY2X].

312. *See id.*

313. *Id.*

314. U.S. DEP'T OF HOUS. & URB. DEV, HUD 2020 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS 2 (Dec. 15, 2020), https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2020.pdf [https://perma.cc/G74H-84DD] (finding that, out of a sample of 580,455 homeless persons, 120,642 were severely mentally ill and 98,646 had a chronic substance abuse disorder).

315. Kim, *supra* note 287, at 1179–82.

316. *See, e.g.*, *id.* at 1180 & n.188 (internal citation omitted).

317. *See* NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 70 ("Being surrounded by strangers at nighttime can also induce stress in people with mental health conditions.").

318. *See, e.g.*, Lu Zhao, *Losing Things: Holding on to Possessions Is a Daily Struggle, with Deeper Symbolism, for Homeless People*, SOC. JUST. NEWS NEXUS (June 27, 2019), https://sjnnchicago.medill.northwestern.edu/blog/2019/06/27/losing-things-holding-on-to-possessions-is-a-daily-struggle-with-deeper-symbolism-for-homeless-people/ [https://perma.cc/68LA-ZN9K].

paperwork.[319] The unsheltered must also juggle blankets, bedding, and other items, such as tents or tarps, used to shelter themselves from the elements.[320]

The typical shelter model prevents people from bringing these possessions into the shelter.[321] Storage space at shelters is often limited, and size restrictions are strictly enforced.[322] At New York shelters, for example, each shelter resident is limited to two bags of personal belongings.[323] In North Carolina, all personal items must fit into provided dresser drawers.[324]

Individuals deciding whether to use shelter services must often weigh the value of lost property against the value of a roof for a night. Because many shelters operate on a night-by-night model, a consistent bed in a shelter is not always guaranteed.[325] Indeed, some shelters limit the number of consecutive nights an individual can stay.[326]

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319. *See* Rick Paulas, *Encampment Sweeps Take Away People's Most Important Belongings*, VICE (Mar. 4, 2020), https://www.vice.com/en/article/v74pay/encampment-sweeps-take-away-homeless-peoples-most-important-belongings [https://perma.cc/SP3V-5KBY] ("[The police] give you 15 minutes to get what you want . . . 'They ended up taking my birth certificate, my Social Security card, my mother's necklace that her mother gave her, the only pictures of my brother and my dad, both of who are no longer here.'").

320. *Cf. id.* ("Sometimes they lose tents or beds, or basic necessities like clothing or toiletries.")

321. *See* EVE GARROW & JULIA DEVANTHÉRY, "THIS PLACE IS SLOWLY KILLING ME": ABUSE AND NEGLECT IN ORANGE COUNTY EMERGENCY SHELTERS 67 (Mar. 2019), https://www.aclusocal.org/sites/default/files/aclu_socal_oc_shelters_report.pdf [https://perma.cc/4MK4-FJ2G] ("Residents are subjected to tolls when they come in to the shelter, the staff destroys or takes their belongings when they are evicted without notice, and the staff forces residents to throw away their property as a price of admission to shelter."); Jessica Boehm, *Garbage Bins and Zip Ties Create 'Lifesaver' Storage Program for Phoenix Homeless Population*, AZ CENTRAL (Feb. 10, 2022), https://www.azcentral.com/story/news/local/phoenix/2022/02/10/phoenix-homelessness-new-storage-program-lifesaver/6585998001/ [https://perma.cc/9JF2-SGQH] ("Schwabenlender said many people miss appointments or refuse to stay in the shelter because there are limits on how many items they can bring inside."); Jerusalem Demas, *Los Angeles's Quixotic Quest to End Homelessness*, VOX (May 14, 2021), https://www.vox.com/22420753/homelessness-los-angeles-skid-row-judge-carter-housing-crisis-zoning [https://perma.cc/9NRJ-8G9T] ("Tars tells Vox that shelters frequently don't allow homeless people to bring their possessions with them, even though they're often the only items people have been able to keep safe since becoming homeless.").

322. *See* GARROW & DEVANTHÉRY, *supra* note 321, at 67 (noting that staff forces residents to throw away their property as a price of admission to shelter).

323. N.Y.C. DEP'T OF HOMELESS SERVS., STATEMENT OF CLIENT RIGHTS AND CLIENT CODE OF CONDUCT 2, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/DHS-Statement-of-Client-Rights-and-Client-Code-of-Conduct2009.pdf [https://perma.cc/N9GY-QJ6A].

324. ONSLOW CMTY. OUTREACH, INC., HOMELESS SHELTER STANDARD OPERATING PROCEDURES (2020), https://onslowco.org/sites/onslowco.org/files/Shelter%20Standard%20Operating%20Procedures.pdf [https://perma.cc/6PCK-TEMX].

325. Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE (Feb. 24, 2020), https://www.vice.com/en/article/v74y3j/this-is-why-homeless-people-don't-go-to-shelters [https://perma.cc/45ZC-LG2A].

326. *Id.* ("Some shelter stays are for one night at a time, forcing people to leave when the sun comes up. Other shelters allow stays for longer periods, generally maxing out at around 90 days. But these spaces never provide a space you can truly call your own.").

Homelessness takes a variety of forms, and so the kinds of property that individuals accumulate also can take many forms.[327] Many homeless individuals are employed full- or part-time and require access to work uniforms, tools, or equipment that might not comply with shelter property rules and limits.[328] For example, a carpenter may need hammers, saws, or knives that are banned as dangerous weapons.[329] Many people lacking homes still have bikes or cars that they would prefer not to leave unguarded in order to spend the night in a shelter.[330] Similarly, many temporary emergency shelters do not allow animals.[331] Although this is a reasonable restriction from the perspective of the shelter, homeless individuals may be unwilling to give up their pets—and potentially only companions—in exchange for a temporary bed.[332]

Even if a person decides to take a shelter bed, theft is unfortunately rampant. One formerly homeless individual described how stories of shoe theft kept him from using shelter services for a long time.[333] When he finally took up residence in a shelter, he in fact had his shoes stolen.[334] As another individual explained, "If I could get into a place where it was quiet and clean and a place that I could actually lay my head down and not worry about my stuff getting

327. *See* Trevor Wilhelm, *For Windsor's Homeless, Taking Shelter Can Mean Leaving Belongings Behind*, WINDSOR STAR (Feb. 1, 2019), https://windsorstar.com/news/local-news/for-windsors-homeless-taking-shelter-can-mean-leaving-belongings-behind [https://perma.cc/B69X-XWFM] ("A tattered tarp, some old clothes and a grimy tin of shoe polish may not seem like much, but for John Rollo, they're worth the risk of frostbite and hypothermia. Rollo, who has been living on the streets for several years, said many homeless people face a difficult decision when temperatures plunge: abandon their few belongings for a spot in a warm shelter, or freeze with them outside.").

328. *See* Emma Woolley, *How Many People Experiencing Homelessness Are Employed?*, HOMELESS HUB (July 15, 2016), https://www.homelesshub.ca/blog/how-many-people-experiencing-homelessness-are-employed [https://perma.cc/C6HV-QJUQ] ("A 2013 story in *The New York Times* interviewed people working full-time jobs (sometimes more than one) and estimated that 28% of families experiencing homelessness included at least one working adult, and 16% of homeless individuals had jobs.").

329. *See, e.g.*, N.Y.C. DEP'T OF HOMELESS SERVS., POLICY AND PROCEDURE NO. AS 98-401, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/control-and-confiscation-of-contraband-DHS-policy-AS-98-401.pdf [https://perma.cc/2EEF-TLCS] (listing the following as prohibited "contraband": knives, sticks, bats, scissors, box cutters, sharpened tools or utensils, hammers, screwdrivers, and razors).

330. *See, e.g.*, Thacher Schmid, *Vehicle Residency: Homelessness We Struggle to Talk About*, NATION (Nov. 11, 2021), https://www.thenation.com/article/society/homelessness-vehicle-residency-housing/ [https://perma.cc/M9XU-VZ6Y] (explaining that vehicle residents are "the nation's fastest-growing homeless subpopulation").

331. *See, e.g.*, Paulas, *supra* note 325 (noting shelters in Oakland do not allow people with pets).

332. *See* Nick Kerman, *What Can Be Done to Better Support People Experiencing Homelessness with Pets?*, HOMELESS HUB (Dec. 1, 2020), https://www.homelesshub.ca/blog/what-can-be-done-better-support-people-experiencing-homelessness-pets [https://perma.cc/76KC-23BY] ("Given the strength of the human-animal bond and the importance of this relationship, it is perhaps unsurprising then that many pet owners say they 'would never go' to a shelter if they could not bring their animals.").

333. Ari Shapiro, David Pritie, James Greene & Kathy Sibert, *Why Some Homeless Choose the Streets over Shelters*, NPR (Dec. 6, 2012), https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters [https://perma.cc/H2UH-UE6E].

334. *Id.*

stolen right underneath my nose, then yeah I would love to go inside."[335] One study found that rates of theft in shelters were more than twice the rates of theft for those residing on the streets.[336]

D. Interpersonal Considerations

Another significant, but often overlooked, consideration for those considering whether to use available shelters is the loss of interpersonal connections.[337] Homeless encampments commonly develop because individuals find safety and security in a familiar community.[338] Physical and sexual violence is reduced within encampments relative to those individuals living alone and unsheltered.[339] Theft is likewise reduced in encampments.[340] Particularly long-standing and highly organized encampments may even establish rotating security patrols in addition to mutually enforced norms of behavior.[341]

But as these social bonds form and flourish, the connections grow beyond the expediency of physical safety to create something akin to a family.[342] It has long been recognized that these social relationships critically influence individual and community health and well-being.[343] Becoming homeless is a

335. Jojola & Wilcox, *supra* note 285.

336. EMILY SPENCE-ALMAGUER, GABRIANNA SAKS & SANDY HOGAN, "IT HAPPENS OUT HERE": THE VICTIMIZATION EXPERIENCES AND HEALTH CHALLENGES OF WOMEN WHO ARE HOMELESS 16 (July 16, 2013), https://www.ahomewithhope.org/wp-content/uploads/HWHVS-Final-Report-to-the-Communityx.pdf [https://perma.cc/6RW7-DQEQ] (finding, in a study of 150 women, 22 percent stated that someone had stolen something from them outside, compared to almost 52 percent in a shelter).

337. *See, e.g.*, Paulas, *supra* note 325.

338. *See* Emily Alpert Reyes, Benjamin Oreskes & Doug Smith, *Why Did So Many Homeless People Die While Staying at One Hotel Used in Project Roomkey?*, L.A. TIMES (June 28, 2021), https://www.latimes.com/homeless-housing/story/2021-06-28/la-homeless-people-died-after-entering-covid-hotel-why [https://perma.cc/TJ9B-CSJA] ("Orendorff said the clearing of encampments also broke up some of the familiar networks that people relied on for safety.").

339. *See* REBECCA COHEN, WILL YETVIN & JILL KHADDURI, UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING HOMELESSNESS AND COMMUNITY RESPONSES 5 (Jan. 7, 2019), https://www.huduser.gov/portal/sites/default/files/pdf/Understanding-Encampments.pdf [https://perma.cc/3WEU-UTMA] ("People who stay in encampments may see them as offering greater safety and protection . . . from assaults . . . than if they were unsheltered on their own. This sense of 'safety in numbers' may be particularly prevalent in long-standing and highly organized encampments, in which residents have established around-the-clock security patrols and mutually enforced norms and standards for behavior.") (internal citations omitted).

340. *Id.*

341. *Id.*

342. *Why People Experiencing Homelessness Don't Accept Shelter*, PALLET (May 20, 2020), https://www.palletshelter.com/blog/2020/5/20/why-the-homeless-dont-accept-shelter [https://perma.cc/CA7W-YQXH] ("Every homeless encampment or gathering on the street is a community of its own with residents that look out for each other. For the homeless without family or a traditional support network, their fellow friends on the street act as their 'family,' and in some cases are their only safety net they have in times of trouble.").

343. Micheal L. Shier, Marion E. Jones & John R. Graham, *Social Communities and Homelessness: A Broader Concept Analysis of Social Relationships and Homelessness*, 21 J. HUM. BEHAV. SOC. ENV'T 455, 455 (2011).

destabilizing experience. Homelessness is not just the loss of a home, but also the loss of social ties, resources, and a sense of belonging.[344] Losing one's home often results in undermined identity, self-esteem, and autonomy, which in turn engenders anxiety, depression, and decreased social and functional abilities that are critical to psychosocial well-being.[345] A sense of belonging both can improve community health by decreasing vulnerabilities to anxiety and depression and can increase access to material resources by providing a forum through which individuals develop social networks.[346]

By contrast, shelters do not tend to be long-term spaces for people, which means that individual residents have little control over who they see and how often.[347] "Residence in a shelter is usually provided only for limited periods of time. Often, rules determine when one can and cannot use shelter facilities to eat, bathe, and relax."[348] Consequently, studies have found that many homeless individuals often choose to stay in encampments rather than shelters, even when shelter beds are readily accessible.[349] Relative to shelters, encampments allow for increased autonomy over one's chosen community.[350] "Social networks formed and facilitated by participation in the community become the source of the emotional and material support that were once provided by friends and family prior to the onset of homelessness."[351]

Romantic relationships also frequently inform the choice of whether to utilize shelter services.[352] It is well-documented that romantic relationships engender life satisfaction and contribute to individuals' overall well-being.[353] On the streets, homeless couples build intimacy by "searching for resources, panhandling, and just waiting for tomorrow" together.[354] However, most

344. Lisa M. Vandemark, *Promoting the Sense of Self, Place, and Belonging in Displaced Persons: The Example of Homelessness*, 21 ARCHIVES PSYCHIATRIC NURSING 241, 243 (2007).

345. *Id.* at 241–42.

346. *Id.* at 244–45.

347. *See* Stacy Rowe, *Panhandlers and Sidewalk Encampments: Social Networks for the Homeless in Los Angeles*, 11 PRACTICING ANTHRO. 14, 14 (1989).

348. *Id.* at 15.

349. *See* COHEN ET AL., *supra* note 339, at 4.

350. *See* Rowe, *supra* note 347, at 14.

351. *Id.* at 15.

352. *See* Rachel L. Rayburn & Jay Corzine, *Your Shelter or Mine? Romantic Relationships Among the Homeless*, 31 DEVIANT BEHAV. 756, 758 (2010) (noting that "[r]omantic relationships are one of the most important components of life satisfaction and well-being throughout a person's life"); *id.* at 764 ("Some participants had been in relationships before they became homeless and were trying to work things out while they were living at the homeless shelter."); *id.* at 766 (noting that for a woman who was not allowed to have male guests in her room at the women's shelter, "she just spends the night at another shelter or a friend's house when she wanted to [be sexually active].").

353. *See id.* at 760 ("When individuals enter committed relationships, the way they exercise, go to the doctor, and eat change for the better.").

354. *Will You Still Be Mine? Couples Experiencing Homelessness*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (July 31, 2019), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/couples-experiencing-homelessness [https://perma.cc/BFY5-EXSM].

temporary emergency shelters are segregated on the basis of sex.[355] Although seemingly rational, sex-segregation policies create difficult choices for homeless couples and families.[356] Physical separation of homeless couples in shelters can undermine and place an enormous strain on their relationships, as distance between the couples may incite mistrust, "particularly around the use of drugs and fidelity."[357]

Many homeless couples thus prefer to sleep on the streets rather than to separate their family.[358] In one study, homeless individuals reported going to great lengths to be alone with their romantic partners when such an arrangement was not available or permitted at shelters—this included sleeping in a car, sleeping on a beach or street, and even buying a tent and camping equipment to camp out in a park.[359] In a different study, nearly all the couples interviewed reported that they would not use homeless shelters because they would be separated.[360]

Shelter policies can also separate homeless parents from their children.[361] Establishing and securing a firm parent-child relationship is integral to child development.[362] The challenges of homelessness already burden a parent's ability to offer consistent, stable, and sensitive support to their child. But homeless parents face the additional fear that their children will be taken from them if they were to utilize shelter services.[363] "Some family shelters may not admit all members of a family because they lack space, while others do not allow men—and adolescent boys—to stay with their female companions/relatives and children."[364] Moreover, the heightened scrutiny inherent within shelters can lead homeless families to experience increased encounters with the child welfare

355. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 34.

356. *See* Greg C. Cheyne, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, 1 U. CHI. LEGAL F. 459, 468 (2009) (noting how such policies may lead to "increase [of] the proportion of female headed households among homeless families," the "dissolution of low-income families," or the "plac[ing] [of] children in foster care").

357. Caral Stevenson & Joanne Neale, *'We Did More Rough Sleeping Just to Be Together'—Homeless Drug Users' Romantic Relationships in Hostel Accommodation*, 19 DRUGS: EDUC., PREVENTION & POL'Y, 234, 240 (2012).

358. *Will You Still Be Mine? Couples Experiencing Homelessness*, *supra* note 354.

359. *See* Stevenson & Neale, *supra* note 357, at 239.

360. Amy M. Donley & James D. Wright, *Safer Outside: A Qualitative Exploration of Homeless People's Resistance to Homeless Shelters*, 12 J. FORENSIC PSYCH. PRAC. 288, 299 (2012).

361. Namkee G. Choi & Lidia Snyder, *Voices of Homeless Parents: The Pain of Homelessness and Shelter Life*, 2 J. HUM. BEHAV. SOC. ENV'T 55, 57 (2008).

362. Elizabeth R. Anthony, Aviva Vincent & Yoonkyung Shin, *Parenting and Child Experiences in Shelter: A Qualitative Study Exploring the Effect of Homelessness on the Parent-Child Relationship*, 23 CHILD & FAM. SOC. WORK 8, 9 (2017).

363. *See* Becca Savransky, *A Lot of Homeless People Referred to Shelters in Seattle Don't Go. These Are Some Reasons Why*, SEATTLE PI, (Oct. 10, 2019), https://www.seattlepi.com/homeless_in_seattle/article/A-lot-of-homeless-people-the-city-refers-to-14504490.php [https://perma.cc/9XJ6-KP92].

364. Choi & Snyder, *supra* note 361.

system.[365] Many homeless parents become involuntarily separated from their children as a result of child welfare services orders.[366]

Even when a parent is not separated from their child, parenting inside homeless shelters carries its own array of obstacles that might make staying in a shelter unappealing and impracticable. In one study, participants with infant children and toddlers reported that living in an emergency shelter negatively impacted their children in a number of ways, including causing "confusion, sadness, anxiety or depression, withdrawal, altered relationships with food, aggression, disregard for authority, and developmental regressions."[367] Aside from psychological and emotional well-being, children staying in a shelter can also experience negative physiological consequences.[368] Parenting in homeless shelters can also negatively affect the parents. Study participants have reported that dealing with these challenging child behaviors in tandem with the shelter's rules and regulations contributed to feelings of parental disempowerment.[369]

Make no mistake, the use of government-run or government-funded shelter services is the right decision for some individuals some of the time. What this Part endeavors to show is not that these shelter services are universally insufficient. Rather, it highlights that they are not the universal, one-size-fits-all solution to homelessness that they are sometimes portrayed as. By centering shelter services in the political and legal discourses surrounding homelessness, both the right-to-shelter efforts of previous generations and the recent constitutional rulings of the Ninth Circuit have elided the complicated set of trade-offs entailed in individual decisions about how best to seek shelter while homeless. Ultimately, the choice between using available shelter services and self-sheltering is intimate, highly contextual, and deeply personal—an expression of one's autonomous decision-making as a free individual.

IV.
WHAT DIGNITY DEMANDS

What if homeless advocates have been misperceiving the right to shelter? If government-funded shelter services are not a universal solution for homeless individuals, perhaps it is time to consider an alternative conception of the right to shelter—the right to shelter as a negative right. Such a right would protect the decision of homeless individuals to undertake self-sheltering activities—from the simple use of blankets or bedding to the erection of temporary encampments in public spaces—free from the threat of criminalization. A negative right to

365. *See* Marybeth Shinn, Jessica Gibbons-Benton & Scott R. Brown, *Poverty, Homelessness, and Family Break-Up*, 94 CHILD WELFARE 105, 105 (2015).

366. *See id.* at 112–13.

367. Anthony, Vincent & Shin, *supra* note 362, at 11.

368. *Id.* at 12 ("Several mothers talked about how their children lost weight while staying at the shelter: '. . . he barely ate their food because, I don't know, it would give him the runs, and so yeah, so he lost a lot of weight.'").

369. *Id.*

shelter would ensure that homeless individuals have the freedom to choose where and how to find shelter, to protect themselves and their property, and to build meaningful connections with others.[370]

Because it is founded on respect for the right of the individual to a specific form of self-determination, a negative right to shelter is perhaps most at home as an outgrowth of the right to human dignity guaranteed by the U.S. Constitution's due process clauses.[371] Human dignity is a contested concept. In moral philosophy, its contours are unsettled.[372] In political philosophy, it seems to simultaneously ground more specific rights and yet also be something that one has a right *to*.[373] But human dignity has increasing purchase in American constitutional decision-making. Despite not appearing in the U.S. Constitution, dignity has been mentioned in more than nine hundred Supreme Court opinions.[374] With increasing frequency, dignity has been understood as a central component of the guarantee of due process.[375]

The dignity guaranteed by substantive due process is best understood as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships, and as opposed to the subordinating effects of criminalization. This Part outlines the due process dimensions of constitutional dignity and examines their implications for individuals experiencing homelessness. It begins with a reexamination of the 2003 decision in *Lawrence v. Texas*,[376] an opinion that began to establish the complicated double-helix of the Court's recent "equal dignity" jurisprudence.[377] This Part then proceeds to draw an analogy between the decriminalizing logic of *Lawrence* and the individual choice of whether to self-shelter. It concludes with

370. In recent years, some homelessness advocates have advanced a similar idea under the rubric of a "right to rest." *See* HEATHER MAREK, KATIE SAWICKI, ZOE LA DU, CORRINE FLETCHER, ELENA STROSS & FRANZ BRUGGEMEIER, DECRIMINALIZING HOMELESSNESS: WHY RIGHT TO REST LEGISLATION IS THE HIGH ROAD FOR OREGON 23 (2017), https://aclu-or.org/sites/default/files/field_documents/aclu-decriminalizing-homelessness_full-report_web_final.pdf [https://perma.cc/Q63R-PTCS] (explaining that a right to rest would ideally include the rights of homeless individuals to "(1) move freely and sleep in public spaces without discrimination, (2) sleep in a parked vehicle, (3) eat and exchange food in public, and (4) have 24-hour access to hygiene facilities"). To date, however, efforts to legislate a right to rest have fallen far short of a true right to self-shelter in public spaces. *See, e.g.*, H.B. 3115, 81st Leg., Reg. Sess. (Or. 2021) (permitting homeless individuals an affirmative defense in prosecutions for urban camping if the law is "not objectively reasonable").

371. Although the word "dignity" does not appear in the due process clauses of either the Fifth or Fourteenth Amendments, the Supreme Court's recent due process jurisprudence has identified human dignity as a core value protected by those clauses. *See infra* Part IV.A.

372. *See* Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, *in* UNDERSTANDING HUMAN DIGNITY 1, 8–10 (Christopher McCrudden ed., 2013) (reviewing scholars' theories of dignity).

373. *See* JEREMY WALDRON, DIGNITY, RANK, & RIGHTS 212 (Meir Dan-Cohen ed., 2012).

374. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178 (2011).

375. *See infra* Part IV.A.

376. 539 U.S. 558 (2003).

377. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

a brief coda examining specific ways that the government may plausibly continue to regulate homeless individuals even following the recognition of a negative right to shelter.

A. Dignity as Due Process

Nearly twenty years later, it can be easy to forget just how revolutionary the Supreme Court's decision in *Lawrence* was. Consensual sodomy was criminalized in thirteen states.[378] Public opinion about homosexuality was fractured.[379] Although there was a growing acceptance of LBGTQ persons socially,[380] a majority of Americans believed that same-sex sodomy was always wrong.[381] And a brief seventeen years earlier, the Court had upheld criminal statutes outlawing substantially the same conduct that was being challenged as within a state's prerogative to legislate in the interest of health, safety, and morals.[382]

By now, the facts are well-understood. John Geddes Lawrence, an older White man, was arrested along with Tyron Garner, a younger Black man, for engaging in consensual sodomy in Lawrence's Texas apartment.[383] Police had been responding to an anonymous call reporting a weapons disturbance.[384] Upon entering the apartment, the officers observed the two men engaging in sex acts.[385] Lawrence and Garner were charged with misdemeanors under Texas's anti-sodomy law and fined two hundred dollars, but each contested the constitutionality of their convictions.[386]

Court watchers at the time predicted a narrow decision. If the defendants should win, the majority opinion was expected to vindicate a formal equality guaranteed by the Fourteenth Amendment's Equal Protection Clause.[387] After

378. Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352, at *23 & n.17 (collecting case law repealing sodomy laws after Bowers).

379. *See* Pew Rsch. Ctr., *Religious Beliefs Underpin Opposition to Homosexuality* 1–3 (Nov. 18, 2003), https://www.pewresearch.org/politics/2003/11/18/religious-beliefs-underpin-opposition-to-homosexuality/ [https://perma.cc/L2SM-M6SM] (concluding that, while the public had shifted from the 1980s and now widely opposed discrimination against same-sex couples, backlash was growing).

380. ANDREW R. FLORES, NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 10, 15 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf [https://perma.cc/4W47-J7Q8].

381. TOM W. SMITH, CROSS-NATIONAL DIFFERENCES IN ATTITUDES TOWARDS HOMOSEXUALITY 19 (Apr. 2011), https://gss.norc.org/Documents/reports/cross-national-reports/CNR%2031.pdf [https://perma.cc/3HBP-7M6P] (reporting results from the International Social Survey Program).

382. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

383. Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1477 (2004)

384. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

385. *Id.* at 563. *But see* Carpenter, *supra* note 383, at 1478–91 (detailing the conflicting accounts of the arrests, and reasoning that officers were unlikely to have witnessed the sex acts at issue).

386. Lawrence v. State, 41 S.W.3d 349, 350 (Tex. App. 2001), *rev'd*, 539 U.S. 558 (2003).

387. *See* Katherine Franke, Comment, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1339, 1401 (2004) ("While it was widely expected that the Court would find the Texas

all, the Texas statute at issue criminalized only sodomy performed by same-sex sexual partners, rather than all sodomy.[388] Indeed, Justice O'Connor wrote just such an opinion, as a concurrence.[389]

An alternative outcome—less likely, but still plausible—was that the *Lawrence* Court would vindicate the privacy interest in sexual activity behind closed doors. Drawing from decisions like *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the defendants had argued that governments ought not be policing private bedrooms for evidence of deviant sex.[390]

Writing for five members of the Court, however, Justice Kennedy eschewed these narrow grounds in favor of a broader opinion grounding sexual freedom in a robust account of liberty, autonomy, and, ultimately, human dignity. The first paragraph of the opinion opens expansively: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[391] It closes similarly sweepingly:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[392]

Together, these paragraphs establish the contours of the twin pillars upon which the *Lawrence* decision primarily rests: respecting a robust version of individual autonomy (controlling one's destiny) and denouncing group subordination (not demeaning one's existence). The lesson from *Lawrence*'s discussion of autonomy is that human dignity demands a certain capacity to direct the course of one's life. The right to engage in relationships free from state interference is an artifact of a broader entitlement to something like self-government.[393] Moreover, the case's anti-subordination themes were a unique evolution in the Court's substantive due process jurisprudence.

Between those two passages, the Court was surprisingly vague about whether the conduct at issue was a "fundamental right"—though the Court used

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sodomy law unconstitutional, the sweeping—indeed moving—language that Justice Kennedy uses in the majority's opinion came as quite a surprise.").

388. *See Lawrence*, 539 U.S. at 564.

389. *Id.* at 579–85 (O'Connor, J., concurring).

390. Brief of Petitioners, *supra* note 378, at *9 (arguing that governments ought not to be policing private bedrooms given *Griswold v. Connecticut* and *Eisenstadt v. Baird*).

391. *Lawrence*, 539 U.S. at 562.

392. *Id.* at 578.

393. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1905 (2004) (explaining that allowing the state the power to regulate sexual relationships "would have drained those relationships of their unique significance as expressions of self-government").

the word "fundamental" no less than eight times in the majority opinion.[394] Fundamental rights are most commonly identifiable by their deep roots in the nation's history and traditions,[395] a claim that could scarcely be made about legal recognition of same-sex sexual intercourse. Compounding the confusion, the *Lawrence* Court declared that the Texas statute at issue would fail even under rational basis review,[396] leading some—including the dissenters—to cabin the opinion as a relatively narrow holding.[397]

But the Court's prolonged exploration of the "transcendent" dimensions of due process should leave no doubt that it was articulating the contours of a fundamental right. As Professor Larry Tribe observed in *Lawrence*'s immediate wake, Justice Kennedy took a novel approach to defining the right at issue. Rather than seek a historical grounding for the particular practice that the defendants had engaged in—the approach taken by the *Bowers* Court years earlier[398]—Justice Kennedy traced a line between prior rights identified as fundamental and the conduct at issue to connect shared themes, including the importance of self-definition.[399] As Tribe explains of the *Lawrence* majority opinion:

> It treated the substantive due process precedents invoked by one side or the other not as a record of the inclusion of various activities in—and the exclusion of other activities from—a fixed list defined by tradition, but as reflections of a deeper pattern involving the allocation of decision-making roles, not always fully understood at the time each precedent was added to the array.[400]

The fundamental right articulated by *Lawrence* is grounded in a respect for individual self-definition or self-governance and centered on intimate personal choices. This right, though framed by reference to the Constitution's invocation of "liberty," more closely tracks contemporary definitions of human dignity. For example, Professor Gregory Alexander defines human dignity as "both a potential for autonomy [conceived of as self-authorship] and a right to develop that potential."[401]

Lawrence's version of this self-definition right had two further essential features. First, Justice Kennedy took pains to emphasize the role of interpersonal

394. *See Lawrence*, 539 U.S. at 565–67.

395. *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

396. *Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

397. *See id.* at 586 (Scalia, J., dissenting) ("Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute 'furthers no legitimate state interest which can justify' its application to petitioners under rational-basis review.").

398. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986).

399. Tribe, *supra* note 393, at 1898–99.

400. *Id.* at 1899.

401. Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991, 1005 (2019).

relationships in providing meaning to life.[402] Although the anti-sodomy laws at issue "purport[ed] to do no more than prohibit a particular sexual act," Kennedy noted that they in fact "s[ought] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[403] As a general rule, Kennedy admonished, the state should not attempt "to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[404]

Second, *Lawrence*'s origins are grounded in Supreme Court opinions that emphasize the intimacy of personal decisions broadly protecting bodily autonomy. Consider *Griswold v. Connecticut*, the seminal Supreme Court case striking down Connecticut's law outlawing the use of contraception,[405] which Justice Kennedy identified as "the most pertinent beginning point" for the Court's analysis.[406] While often reduced to a singular observation about the "sacred precincts of marital bedrooms,"[407] the opinion in fact resolves the legality of medical doctors prescribing contraceptive devices or medications for their patients' medical use.[408] The connection between contraception and bodily autonomy became even more evident in the subsequent case of *Eisenstadt v. Baird*.[409] In *Eisenstadt*, the majority opinion decoupled marital privacy, recasting it as the combined rights of two individuals, who each have a liberty interest in being "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[410]

402. *Lawrence*'s vision of liberty was admittedly less liberal than some scholars of gender and sexuality had hoped. Noting that the opinion emphasized personal relationships, rather than sexual activity, Professor Katherine Franke described the liberty principle articulated as "less expansive, rather geographized, and, in the end, domesticated." Franke, *supra* note 387, at 1401.

403. *Lawrence*, 539 U.S. at 567; *cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.").

404. *Lawrence*, 539 U.S. at 567.

405. Griswold v. Connecticut, 381 U.S. 479 (1965).

406. *Lawrence*, 539 U.S. at 564.

407. *Griswold*, 381 U.S. at 485.

408. *Id.* at 480.

409. Eisenstadt v. Baird, 405 U.S. 438 (1972).

410. *Id.* at 453. Arguably, that liberty interest reached its apex in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), since overruled by *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (June 24, 2022). In *Casey*, the Court explained that both the decision to carry a child to term and the decision to terminate a pregnancy involve physical and emotional burdens that are "too intimate and too personal for the State to insist, without more, upon its own vision of the woman's role." 505 U.S. at 852. Indeed, the *Casey* Court famously proclaimed, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. Although the current Court has since rejected the view that the right to terminate a pregnancy is "fundamental," a faithful recounting of the *Lawrence* decision must acknowledge the role that this precedent played in constructing the case for the decriminalization of sodomy. *See Lawrence*, 539 U.S. at 574 (quoting *Casey*'s "mystery of human life" passage at length).

The strongest connection to human dignity in the *Lawrence* opinion, however, comes not from the Court's embrace of a self-definition right, but from its recognition that the criminal law is frequently used to subordinate unpopular social groups. In eschewing the more formalistic and technocratic Equal Protection analysis advanced by Justice O'Connor's concurrence, Justice Kennedy argued that the Court must not leave unexamined the denigrating social stigma of criminalization, even where the law technically extends universally.[411] This is not to say that Kennedy ignored equality concerns. Instead, he observed, "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[412]

The dignity analysis of *Lawrence* thus casts inequality concerns as a matter of substantive subordination, rather than formal equality.[413] It also emphasizes the distinctive harms of lending an official imprimatur to existing social dislike for marginalized groups: "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[414] Even if the crime in question is a misdemeanor, as was the crime in *Lawrence*, "it remains a criminal offense with all that imports for the dignity of the persons charged."[415]

This intermingling of both substantive liberty—liberty as self-definition—and substantive equality—equality as anti-subordination—defines what Professor Tribe has coined as the Supreme Court's jurisprudence of "equal dignity."[416] As he observes:

> *Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The "liberty" of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.[417]

To be clear, *Lawrence*'s conception of dignity as due process is not exclusively an invention of Justice Kennedy's jurisprudence. Dating back to 1923, the Supreme Court has frequently blurred the formalist distinctions between equality and liberty in its analysis of substantive due process, rendering decisions that, with the benefit of hindsight, should be best understood as

411. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

412. *Id.*

413. This commitment to substantive equality mirrors the work of Professor Catherine MacKinnon elsewhere. *See, e.g.*, Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

414. *Lawrenc*e, 539 U.S. at 575.

415. *Id.*

416. Tribe, *supra* note 393, at 1898–99.

417. *Id.* at 1898.

sounding in the sort of dignity that *Lawrence* makes central.[418] This line of decisions has been particularly applied to marginalized communities. As Professor Kenji Yoshino has explained, "The Court has long used the Due Process Clauses to further equality concerns, such as those relating to indigent individuals, national origin minorities, racial minorities, [and] religious minorities."[419]

Nor does it stop with *Lawrence*. That decision is the focus of this Section because it provides particularly analogous tools for the dismantling of criminalization based on social status. But the Supreme Court has since extended its dignity jurisprudence, and its more recent cases are instructive for understanding the scope of the principles at play. In *United States v. Windsor*, the Court relied on the principle of human dignity in striking down a key provision of the Defense of Marriage Act (DOMA).[420] In *Obergefell v. Hodges*, the Court extended its dignity jurisprudence to recognize a nationwide right to same-sex marriage.[421]

Windsor explained that dignity can be conferred—and, by implication, denied—by the government's provision of statutory rights. The Court claimed that providing the right to marry to cross-sex couples "enhanced the recognition, dignity, and protection of the class in their own community."[422] DOMA, on the other hand, prevented individual states from deeming same-sex relationships "worthy of dignity in the community equal with all other marriages."[423] The *Windsor* Court concluded that this interference with dignity was the very "essence" of DOMA, rendering it an unconstitutional interference with liberty under the Fifth Amendment.[424] As Justice Kennedy explained, "the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does."[425]

Obergefell's depiction of dignity emphasized the anti-subordination dimensions of due process introduced in *Lawrence* and extended in *Windsor*. The *Obergefell* Court explained that the Due Process Clause of the Fourteenth Amendment protected "fundamental liberties," including "certain personal

418. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008); Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1506–08 (2002); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011).

419. Yoshino, *supra* note 418, at 749–50.

420. United States v. Windsor, 570 U.S. 744, 775 (2013) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

421. Obergefell v. Hodges, 576 U.S. 644, 681 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

422. *Windsor*, 570 U.S. at 768.

423. *Id.* at 769.

424. *See id.* at 746.

425. *Id.* at 774.

choices central to individual dignity and autonomy."[426] The history of criminalization of same-sex intimacy had long denied homosexuals "dignity in their own distinct identity."[427] *Lawrence*, alone, had been insufficient to heal these dignitary wounds because same-sex couples remained subordinated in other respects, including through the denial of the right to marriage.[428] Professor Yoshino dubbed the *Obergefell* approach "antisubordination liberty," describing the Court's self-styled "synergy" between equal protection and traditional substantive due process concerns that serve to better identify and define fundamental constitutional rights.[429]

Given this history, it may be tempting to see the Supreme Court's dignity jurisprudence as exclusively about the stages of political legitimization for those who identify as LGBTQIA+. *Lawrence* decriminalized same-sex sodomy, *Windsor* undermined DOMA, and *Obergefell* extended the privilege of marriage to all. Even *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* involved Justice Kennedy invoking dignity as a means to recognize the "community-wide stigma" that might affect gay couples who are denied services.[430]

But there are strong reasons to believe that dignity extends beyond this narrow context. For one, consider the pains that the *Lawrence* majority took to reframe the nature of the rights claim. *Bowers v. Hardwick* had seemingly resolved the constitutionality of same-sex sodomy laws less than two decades prior to *Lawrence*. It had done so by denying that the Constitution "confers a fundamental right upon homosexuals to engage in sodomy."[431] The *Lawrence* majority pilloried this characterization, explaining that reducing relational autonomy to specific sex acts "demeans the claim the individual put forward."[432] As framed by the Court, the issue in *Lawrence* was "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[433] The criminalization of sex acts, the Court would go on to explain, has dignitary consequences that sound in not only the right to sexual liberty, but also in the freedom of association and the protections of the home.[434]

Nor are *Lawrence*'s predecessors limited to cases exclusively focusing on sexual intimacy and its consequences. As Justice Souter observed in his

426. *Obergefell*, 576 U.S. at 663.

427. *Id.* at 660; *see also id.* at 660–61 ("[T]he argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.").

428. *Id.* at 666–67.

429. *See* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 172, 174 (2015); *see also Obergefell*, 576 U.S. at 673.

430. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

431. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

432. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

433. *Id.* at 564.

434. *See id.*

concurring opinion in *Washington v. Glucksberg*, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[435] The "liberty" protected by the Due Process clauses of the Fifth and Fourteenth Amendment is as equally offended when the state seeks evidence by forcibly invading a defendant's body as when the state criminalizes intimate sexual choices.[436] The Court has held that substantive liberty is similarly implicated by a patient's decision whether to proceed with or decline medical treatment.[437]

Lawrence itself then shifts this narrower discussion of bodily integrity into a broader principle of interpersonal associative freedoms. In *Lawrence*, the Court emphasized that the physical act of sexual intercourse is "but one element in a personal bond that is more enduring."[438] It described its prior precedent as protecting "personal decisions" relating to everything from familial relationships to child rearing.[439] This realm of decisional autonomy appears in the *Lawrence* decision to serve as a recognition that interpersonal relationships are multifaceted, and that criminalizing any single course of conduct may unconstitutionally burden an individual's ability to express relational bonds.

In sum, the *Lawrence* decision recast constitutional "liberty" as something more than a narrow right to sexual autonomy. The dignitary dimensions of the decision both cabin and contextualize the rights claim at issue, which allows the case to serve as a touchstone for future interpretations of the Fifth and Fourteenth Amendments. At its core, *Lawrence* counsels in favor of decriminalization when laws burden intimate personal decisions that implicate fundamental interests in bodily integrity and interpersonal relationships, including familial relationships. Further, *Lawrence* demonstrates the sensitivity of due process analysis to the role that criminalization plays in subordinating populations. When the criminal law operates to stigmatize and subordinate a group defined by its intimate personal choices about how best to craft a life worthy of meaning, substantive due process stands as a bulwark against the tyranny of the majority.

435. Washington v. Glucksberg, 521 U.S. 702, 777 (1997) (Souter, J., concurring) (internal citation omitted).

436. *See* Rochin v. California, 342 U.S. 165, 173 (1952) (holding that due process was violated when police directed a doctor to pump the defendant's stomach to retrieve evidence of drug use).

437. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); Vitek v. Jones, 445 U.S. 480, 494 (1980) (transferring a person to a mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); Parham v. J.R., 442 U.S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.").

438. *Lawrence*, 539 U.S. at 567.

439. *Id.* at 573–74.

Last term, however, in *Dobbs v. Jackson Women's Health Organization*,[440] the Supreme Court cast doubt on the future of *Lawrence*'s dignity jurisprudence. Applying a unique interpretive methodology,[441] Justice Alito asserted that fundamental rights "*must* be 'deeply rooted in this Nation's history and tradition' *and* 'implicit in the concept of ordered liberty.'"[442] By contrast, *Lawrence* explicitly stated that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[443] While Alito's historical account has been subject to extensive criticism,[444] the demand that fundamental rights be historically grounded is seemingly at odds with *Lawrence*'s constellation-of-interests approach, which recognized that rights can *become* fundamental as society evolves.[445] Commentators immediately latched onto this tension and questioned whether *Lawrence* itself might withstand a second look by the current Court.[446]

Nevertheless, the *Dobbs* decision formally leaves *Lawrence* undisturbed.[447] Helpfully, it does so for reasons that have nothing to do with history or tradition. Rather, *Dobbs* declares that abortion may be "sharply" distinguished from other exercises of personal autonomy because abortion alone involves the destruction of a "potential life."[448] Indeed, the opinion explains that this singular, "critical distinction" supports the possibility in other cases that the Court may recognize

440. No. 19-1392, 597 U.S. __ (June 24, 2022).

441. As numerous commentators have noted, Justice Alito's opinion in *Dobbs* should not properly be considered "originalist," despite its emphasis on history and tradition. *See, e.g.*, Ilan Wurman, *Opinion: Hard to Square* Dobbs *and* Bruen *with Originalism*, DENVER POST (July 12, 2022), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns/ [https://perma.cc/87XD-JV5V]; Cass Sunstein, The Alito Draft (May 23, 2022) (preliminary draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117446 [https://perma.cc/6N57-9SE9].

442. *Dobbs*, No. 19-1392, slip op. at 5 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (emphasis added).

443. *Lawrence*, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (internal quotation marks omitted)).

444. *See, e.g.*, Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 [https://perma.cc/6BP3-Q9AL]; Lawrence Hurley, *Alito's Abortion History Lesson in Dispute*, REUTERS (May 6, 2022), https://www.reuters.com/legal/government/us-supreme-court-justice-alitos-abortion-history-lesson-dispute-2022-05-06/ [https://perma.cc/GPG8-BAQR]; Gillian Brockell, *Abortion in the Founders' Era: Violent, Chaotic, and Unregulated*, WASH. POST (May 15, 2022), https://www.washingtonpost.com/history/2022/05/15/abortion-history-founders-alito/ [https://perma.cc/87AT-NPQK].

445. *See Lawrence*, 539 U.S. at 572 (citing an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"). Note that Justice Alito quite explicitly challenges this approach to jurisprudence, claiming that recognizing "a broader right to autonomy" "could license fundamental rights to illicit drug use, prostitution, and the like." *Dobbs*, No. 19-1392, slip op. at 32.

446. *See e.g.*, Kathryn Rubino, *The Supreme Court Has Only Scratched the Surface of Awful*, ABOVE THE LAW (May 3, 2022), https://abovethelaw.com/2022/05/the-supreme-court-has-only-scratched-the-surface-of-awful/ [https://perma.cc/GXM7-KQX4].

447. *Dobbs*, No. 19-1392, slip op. at 66 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

448. *Id.* at 32.

a substantive sphere of liberty that is not constrained by "the specific practices of the States at the time of the adoption of the Fourteenth Amendment."[449] Meanwhile, three dissenting members of the Court openly embraced the analytical approach reflected in *Lawrence*, noting that the last half century of substantive due process decisions has woven a "constitutional fabric, protecting autonomous decision making over the most personal of life decisions."[450] These arguments thus leave some (small) room for optimism that the dignitary dimensions of due process have not (yet) been extinguished.

B. The Dignity in Self-Sheltering

Like the right to make choices about one's sexual relationships, the ability to make autonomous choices about how best to navigate periods of housing instability protects and promotes essential human dignity. As the previous Section illustrated, the form of dignity protected by constitutional due process is intimately connected to notions of self-definition and self-governance. It is principally concerned with respecting the most intimate choices of an individual, regardless of that individual's membership in a disfavored social group.[451] In fact, the imprimatur of official disfavor cast by criminalization is relevant to the antisubordination components of constitutional dignity.

Laws criminalizing urban camping threaten a homeless individual's interest in bodily integrity and intimate associations by dictating the outcome of one of the most intimate decisions that a homeless individual must make—when and whether to utilize available shelter services. The choice of where to shelter is a sensitive, key decision central to one's existence, family life, community welfare, and their development of human personality. Urban camping laws take away from homeless individuals the freedom to make the decision—based upon their values, their assessment of their self-interest, and their personal relationships with others—about where best to build a life under extreme constraints. Absent some exceptional need, the state ought not to interfere in this personal and important decision about individuals' private lives.

State regulation of urban camping implicates the well-recognized liberty interest in bodily integrity.[452] Control over one's own body is fundamentally at stake in the decision of where and how to find shelter. As detailed above, that decision involves, among other things, considerationabout where one will be physically safest from private violence, where one will be physically healthiest, including most protected from disease, and where one will face reduced risks of sexual assault. These decisions are profoundly personal, analogous to the already recognized liberty interests in whether to engage in sexual relationships[453] and

449. *See id.* at 32–33 (quoting *Casey*, 505 U.S. at 848) (internal quotation marks omitted).
450. *Id.* at 5 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
451. *See* Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1329 (2019).
452. *See supra* text accompanying notes 401–06, 431–33.
453. *See, e.g.*, *Lawrence*, 539 U.S. at 57–79.

whether to accept or decline medical procedures.[454] States invade this liberty interest when they dictate that citizens may not find shelter anywhere other than in locations approved by the legislature.

Moreover, the Supreme Court's substantive due process jurisprudence has recognized that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[455] "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[456] The essential associational freedom here is the freedom to define one's relevant living community. As detailed above, homeless individuals living in encampments find considerable value in their community ties to other encampment residents.[457] And shelter residents must frequently make the unconscionable decision to separate from family in order to utilize available shelter. Urban camping ordinances thus impinge upon fundamental freedoms by making shelter use compulsory, backed by the threat of criminal sanction.

Existing urban camping ordinances place homeless individuals in a double bind. Either the individual must subject themself to shelter services that may negatively impact their physical well-being, property rights, and established community ties, or the individual must risk criminal sanctions for choosing to construct a life unsheltered. Bodily health, property, and community are not merely isolated considerations, though essential in their own right, but combine to reflect the "rational continuum" of liberty ensured by the Constitution.[458]

In arriving at the correct constitutional balance, we must also remember that criminal law both stigmatizes and subordinates. Cities and states with urban camping prohibitions are enforcing their preference for shelter services using the full power of the criminal law. Individuals who are caught self-sheltering are subject to arrest and incarceration, loss of property, and separation from their community. The social stigma against homeless individuals is cemented by laws and ordinances that denounce as "criminal" behaviors that are essential to survival in desperate circumstances.

The depiction of dignity that emerges from the Supreme Court's recent Due Process jurisprudence contains a strong antisubordination norm. Professor Reva Siegel has noted that "the case law is rich with diverse expressions of

454. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

455. Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

456. *Id.* at 619.

457. *See supra* text accompanying notes 337–69.

458. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

antisubordination values."[459] These cases are "concerned with the material and dignitary injuries inflicted on members of particular social groups by public actions."[460] Dignity's antisubordination norm arguably cabins the application of this branch of substantive due process doctrine.[461] Although nearly every claim that a fundamental right was denied can be framed as a matter of equality, dignity is only properly invoked where unequal treatment at the hands of the law "has the result of further entrenching stigma against the group on the basis of its differentiating characteristic."[462]

By casting self-sheltering activities as criminal, the state automatically brands homeless individuals, and their attempts to craft some meaningful existence out of a deeply unequal situation, as inferior to those who build meaning within the structures of established privilege. Criminalization creates a lens through which the social denigration of the indigent can be legitimately channeled. People of means need not attempt to justify condemning poverty if they are free to condemn criminal *activities*, such as camping, loitering, urinating, or begging—activities that they are able to psychologically distance themselves from by dint of their own circumstances.

Troublingly, criminalization is animated by social stigma grounded in inaccurate characterizations of poverty and vagrancy. Like homosexuality, homelessness has long been targeted by criminal laws that are motivated by moral condemnation and denigration, rather than public safety. The earliest laws against "vagrancy" targeted characteristics, rather than conduct.[463]

One of the things that *Lawrence* makes clear is that the criminalization of homelessness cannot be insulated from scrutiny by the glib observation that such laws apply "equally" to the housed and unhoused alike. Had such an approach been endorsed in *Lawrence*, Texas would have been able to preserve its sodomy laws by modifying them to also reach opposite-sex participants. That result would have ignored the targeted discrimination and stigmatization that, at least partially, animated Justice Kennedy's substantive due process analysis.[464] Rather, *Lawrence* highlighted "how the very fact of criminalization . . . can cast already misunderstood or despised individuals into grossly stereotyped roles,

459. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 353 (1992). Kenji Yoshino has similarly described the Court's more recent cases as articulating a vision of "antisubordination liberty." *See* Yoshino, *supra* note 429, at 174.

460. Siegel, *supra* note 459, at 353.

461. *See* Yoshino, *supra* note 429, at 174–75 ("What *Obergefell* does is to drive this idea further to the surface—asserting that in the common law adjudication of new liberties, the effect on those subordinated groups should matter.").

462. *Equal Dignity*, *supra* note 451, at 1334.

463. *See supra* notes 49–63 and accompanying text.

464. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003); Tribe, *supra* note 393, at 1896, 1910–14 (explaining how the *Lawrence* decision recognized that the "social and cultural meaning of the ban on sodomy operates to deny the equal worth and equal liberty" of same-sex couples).

which become the source and justification for treating those individuals less well than others."[465]

A popular interpretation of *Lawrence*, however, posits that the Court subtextually relied on something like the classic principle of desuetude. This is the version of *Lawrence* advocated by Professor Cass Sunstein.[466] Desuetude is the idea that laws lose legitimacy over time if they can no longer claim to have strong moral support in the relevant community.[467] To Sunstein, *Lawrence*—like several of its predecessors—is a case reflecting an uncommon enforcement of a statute that has lost its moral basis.[468] "In those circumstances, the statutory ban was a recipe for arbitrary and even discriminatory action, in a way that does violence to democratic ideals . . . because a law plainly lacking public support is nonetheless invoked to regulate private conduct."[469]

One of the central concerns of a desuetude interpretation of *Lawrence* is that it substantially narrows the future applications of the liberty principles the case announced. To some—like Sunstein—this is a virtue.[470] The breadth of the liberty-endorsing language in *Lawrence* would arguably justify judicial interrogation of many existing criminal laws, especially those involving private sexual choices.[471] By contrast, a desuetude-based reading of *Lawrence* would limit its precedential power to challenging laws that are both frequently underenforced—rendering any particular prosecution arbitrary—and grounded in anachronistic moral reasoning no longer supported by the general populace.[472]

On this view, the moral grounding of laws prohibiting urban camping becomes a fundamental inquiry. To be sure, such laws are currently popular with legislatures. Homeless advocacy organizations that track the proliferation of criminal prohibitions have consistently found that the number of such laws has increased over the past decade.[473] But the presence of laws on the books does not necessarily equate with overriding public support. The latter is an empirical question that remains to be answered. Moreover, a secondary question lingers about the moral sentiment behind any public support. Homelessness scholars have long documented how the animating motivation for criminalizing

465. Tribe, *supra* note 393, at 1896.

466. *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49 ("These points suggest that the Court's decision was less about sexual autonomy, as a freestanding idea, and closer to a kind of due process variation on the old common law idea of desuetude.").

467. *See, e.g.*, MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 129–31 (1973).

468. Sunstein, *supra* note 466, at 49–50 (citing *Griswold v. Connecticut* as another example of desuetude).

469. *Id.* at 50.

470. *See id.* at 49 ("A simple autonomy reading would have consequences that the Court did not likely intend.").

471. *Id.* (citing incest and bestiality as examples).

472. *Id.* at 50.

473. *See supra* notes 76–77 and accompanying text.

homelessness is to empower police to remove offending conduct from public view, by force if necessary. Criminalization is not primarily motivated by a shared agreement that offenders have done something morally culpable that is worthy of public sanction.

Thus, even on a desuetude view of *Lawrence*, one may plausibly question the defensibility of criminalizing essential activities like urban camping. We know that urban camping ordinances are inconsistently enforced. In practice, the criminal sanction frequently operates as a background threat, inducing compliance with simple orders to "move along."[474] In many cities, first-order policing strategies include driving unsheltered homeless individuals to government-funded shelters, or even relocating them into other jurisdictions to resolve the "problem" of visible homelessness. And if public support of urban camping ordinances is more grounded in the practical convenience provided by the implicit threat of incarceration—rather than, say, a strong moral conviction that urban camping is condemnable conduct—that would certainly raise concerns that urban camping laws, to borrow Sunstein's phrase, provide "a recipe for arbitrary and even discriminatory action, in a way that does violence to democratic ideals."[475]

One common rejoinder to the rights claim that I am making is that *Lawrence*'s own conception of liberty was explicitly confined to private spaces. Articulating a list of potential exceptions to the sexual liberty just established, Justice Kennedy included the fact that *Lawrence* did not involve "public conduct."[476] Few would argue that *Lawrence*'s logic compels a right to engage in public sex, despite the decision's soaring rhetoric about the intimacy and dignity of personal sexual choices. By contrast, urban camping is a right that necessarily gets exercised in public spaces. It is fundamentally "public conduct." To succeed, then, my argument depends not only on the strength of the analogy between sexual decision-making and urban camping, but also on distinguishing *Lawrence*'s private-space limitation.

The answer to this rejoinder can be found in assessing the state's justifications for interfering with personal liberty. We must begin by accepting, as *Lawrence* dictates, that personal autonomy is a right of such importance that it implicates not only sexual decision-making, but also fundamental questions about the mysteries of human life.[477] To curtail that right in public spaces, the

474. *See supra* note 85 and accompanying text.

475. *Id.* at 50.

476. Lawrence v. Texas, 539 U.S. 558, 560 (2003). *But see id.* at 562 (describing "other spheres of our lives and existence, outside the home, where the State should not be a dominant presence").

477. *See id.* at 574, 588 (explaining that "[p]ersons in a homosexual relationship may seek autonomy" for purposes that include "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life") (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

state's justifications must be particularly weighty.[478] In the case of public sex, a weighty government interest may very well exist. Criminal prohibitions on indecent exposure or public lewdness are "intended to prohibit the display of body parts or sex acts before *nonconsenting* observers."[479] While the extent of the harm from nonconsensual observation of body parts or sex acts is debatable,[480] there can be little question that Western societies have a long and deeply held taboo against lewd nudity.[481] Public sex is viewed as dangerous, disruptive, and infectious.[482]

No similar potential for causing third-party harm derives from urban camping—from merely *existing* in public spaces. As discussed, the best understanding of laws against urban camping is that they exist to remove unimaginable poverty from public view, either by coercing homeless individuals into shelters or by empowering police to physically remove them from streets.[483] Merely exposing poverty to nonconsenting viewers, in contrast to exposing sex acts or sex organs, neither generates harm nor violates strong moral norms. At most, it generates strong feelings of disgust and discomfort, which are generally considered insufficient grounds for criminal interventions, and which may in fact be valuable in motivating social change.[484]

An alternative justification that is occasionally offered in support of urban camping ordinances is that homeless individuals unfairly convert shared public spaces. A homeless encampment, the charge goes, transforms a parcel of public land into an effectively private one, available solely for the use and enjoyment of its occupants. Although there is some logic to this claim, public spaces exist to be occupied, and homeless individuals are no less a part of the "public" to

478. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) ("Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms . . . the statutory classification would have to be not merely *rationally related* to a valid public purpose, but *necessary* to the achievement of a *compelling* state interest.").

479. Stuart P. Green, *To See and Be Seen: Reconstructing the Law of Voyeurism and Exhibitionism*, 55 AM. CRIM. L. REV. 203, 211 (2018) (emphasis in original).

480. Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After* Lawrence v. Texas, 54 DEPAUL L. REV. 671, 689–90 (2005).

481. *See* Lawrence M. Friedman & Joanna L. Grossman, *A Private Underworld: The Naked Body in Law and Society*, 61 BUFF. L. REV. 169, 174, 180 (2013) (distinguishing between simple nudity and lewd nudity, the latter of which is "overtly sexual, and is thought of as perverse, or threatening").

482. *Id.* at 207. This view is shared by such thinkers as John Stuart Mill and H.L.A. Hart. *See* JOHN STUART MILL, ON LIBERTY 90 (Batoche Books 2001) (1859) ("Of this kind are offenses against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so."); H.L.A. HART, LAW, LIBERTY, AND MORALITY 45 (1963) ("Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency.").

483. *See* Rankin, *supra* note 98, at 589; *see generally* Foscarinis et al., *supra* note 96 (surveying criminal laws designed to reduce the visibility of homelessness without addressing root causes).

484. *See* Rankin, *supra* note 98, at 568 ("If constituents can literally 'see' changes in unsheltered homelessness on the street, they are more likely to support investments in solutions for homelessness broadly.").

whom these spaces are dedicated than anyone else. By definition, physical spaces occupied by any member of the public cannot be simultaneously occupied by others. Many accepted everyday activities "convert" public spaces in this way: setting up chairs and shade at a beach, spreading out a blanket in the park, etc.

The true concern is not that homeless individuals are occupying public spaces—it is that they are putting public spaces to undesirable uses. Consider laws against "loitering." Typically defined as remaining in a particular public place without a "lawful purpose," loitering laws preclude homeless individuals from existing in public spaces for prolonged periods.[485] But what is evident in the language of loitering laws is that those same public spaces may be occupied so long as individuals have a "lawful purpose." Loitering laws are therefore not about the allocation of limited public spaces, but about limiting the kinds of purposes to which those spaces may be put. The defining characteristic of loitering laws is that they seek to remove unproductive forms of existing in public—existence that serves no further end. These laws function to isolate and punish unproductive individuals in a capitalist system.[486]

Or take, for example, my own personal experience with homelessness that opened this Article. Under the relevant city ordinance, sleeping in a vehicle parked on a public residential street is defined as an illegal "use" of a vehicle for dwelling.[487] Note that my car was lawfully allowed to be parked on the residential street—it was adequately licensed, registered, and insured—provided that I did not "dwell" inside it. Again, the argument about converting public spaces fails: there were no restrictions on the time limits for which I could have remained parked in that space. My violation was in using the space I was otherwise entitled to occupy in the wrong way. It was a violation of propriety and social expectations, not an improper allocation of limited public resources.

If I am correct about the essential liberty interest involved in deciding to camp in public, then much more is needed from the state's justifications. A bare majoritarian desire to remove poverty from public view is insufficient. Arguments about allocating scarce public resources are unsubstantiated. In truth, the criminalization of urban camping is driven by the voting majority's negative attitudes toward homelessness, including disgust, discomfort, and condemnation.[488] Laid bare, this is not a substantially different set of motivations

485. *See, e.g.*, CAL. PENAL CODE §§ 647(a), 647(c)–(f). Such laws may also include existing on *private* property—even if one just wanders upon it. *See* CAL. PENAL CODE § 647(h).

486. Professor Dorothy Roberts has argued that the vague definitions of acceptable purposes in loitering laws "incorporate[] racist notions of criminality and legitimate[] police harassment of Black citizens." Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 790 (1999).

487. L.A., CAL. MUN. CODE § 85.02 (regulating the use of vehicles for dwelling). This provision imposed a blanket prohibition on sleeping in vehicles dating back to 1983, Desertrain v. City of Los Angeles, 754 F.3d 1147, 1149 (9th Cir. 2014), but was recently amended following a successful vagueness challenge. *See id.* at 1157.

488. *See* Rankin, *supra* note 7, at 122–23 ("These deeply rooted 'psychological mechanisms' compel us to prevent contact with homeless people because we implicitly associate them with disease,

than those criminalizing same-sex sodomy in *Lawrence*.[489] The *Lawrence* Court noted that historical discrimination against a marginalized minority cannot be "the ending point of the substantive due process inquiry."[490] Likewise, *Obergefell* explained that new rights may arise "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[491] Such motivations may not even meet the minimal requirement that criminal legislation be rationally related to a legitimate state interest.[492]

C. The Scope of Decriminalization

Decriminalization is not without its limits. Even if urban camping ordinances are held unconstitutional for impinging upon the dignity of individuals experiencing homelessness, the state retains a plethora of options for regulating visible homelessness, which I would expect to be the next frontier of legal challenges. This Section examines three such options, each of which I believe would be likely to withstand constitutional scrutiny. The first option is zoning. If cities are no longer permitted to respond to urban camping with blanket criminalization, they may nevertheless be able to control the spaces in which visible homelessness exists through the reasonable exercise of zoning powers. Second, cities may retain the power to criminalize harm-causing behaviors by individuals experiencing homelessness. A lynchpin of the argument for decriminalizing urban camping is that the laws serve insufficiently substantial government interests because the behavior causes no third-party harms. Decriminalization therefore likely fails to extend to conduct, such as violent crime, drug use, and arguably public urination or defecation, which all have a claim to third-party harms.[493] Lastly, governments may retain the power

perceiving them as 'pathogenic threats' we must avoid through 'physical distancing' to avoid potential contamination."); *see also* Rankin, *supra* note 98, at 584 ("Studies show that humans react to traditional markers of unsheltered chronic homelessness with unparalleled rates of negativity and disgust, which may become even more pronounced when the stigma of homelessness inevitability intersects with other prejudices."); *cf.* Mayor of New York v. Miln, 36 U.S. 102, 142 (1837) (announcing that it is "as 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 physical pestilence").

489. *See* Lawrence v. Texas, 539 U.S. 558, 570 (2003) (explaining that criminalization of same-sex sodomy was primarily motivated by centuries-old moral condemnation of the practice).

490. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

491. Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015).

492. *See Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *see also* Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 784–85 (1968) ("[W]here the offense consists merely in being idle, indigent, or itinerant, as in most statutes that retain in some form the common-law crime of vagrancy, the legitimacy of the state's interest in imposing criminal sanctions is not clear.")

493. Although public urination or defecation less obviously *harm* third parties and may be necessarily connected to the protected conduct of self-sheltering, I nevertheless acknowledge that dignity in the constitutional sense—rather than the moral sense—may not extend far enough to decriminalize these behaviors. *See infra* notes 523–528 and accompanying text.

to engage in civil enforcement efforts designed to protect public safety and health. These efforts include sweeps and uninvited cleanups of homeless encampments that tend to displace self-sheltered homeless individuals.

Zoning has been a foundational power of local governments for roughly a century.[494] Despite well-documented flaws, ex ante zoning regulation has obvious efficiency benefits over piecemeal, ex post nuisance litigation.[495] Moreover, the legitimate ends of zoning regulation have been broadly construed to include the "spiritual as well as physical, aesthetic as well as monetary."[496] As a result, zoning boards—as agents of legislators—have considerable latitude to control the various uses of both public and private property within municipal borders.

In 1977, the Supreme Court declared that the power of local governments to zone may not trample upon fundamental due process rights. In *Moore v. City of East Cleveland*, the Court held that an East Cleveland housing ordinance violated the Due Process Clause of the Fourteenth Amendment when it purported to limit dwelling occupancy to members of a single, nuclear family.[497] In so doing, the zoning ordinance made it illegal for a grandson to reside with his grandmother, denying him access to East Cleveland schools, which were resisting integration, and subjecting her to criminal charges.[498] The Court concluded that the restrictive nature of the city's statute was not narrowly tailored to serve the purposes identified by the state.[499]

In a now-famous concurring opinion,[500] Justice Brennan affirmed that "the zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life."[501] He explained that a preference for nuclear families—the "pattern so often found in much of white suburbia"—may not be elevated at the expense of patterns of living that, "under the goad of brutal economic necessity," provide "a

494. In 1922, the U.S. "Commerce Department promulgated the Standard Zoning Enabling Act," intended as model authorizing legislation for states to empower local government zoning. Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 755 (2020). In 1926, the Supreme Court upheld the practice of local zoning against a constitutional attack. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

495. Serkin, *supra* note 494, at 758.

496. Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

497. Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (plurality opinion).

498. *Id.* at 496.

499. *Id.* at 499–500.

500. *See* Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on* Moore v. City of East Cleveland, 85 FORDHAM L. REV. 2655, 2659 (2017) ("Justice Brennan's concurrence became the subject of longstanding praise in legal academia because it acknowledged how notions of family can be raced and classed.").

501. *Moore*, 431 U.S. at 507 (Brennan, J., concurring).

means of survival for large numbers of the poor and deprived minorities of our society."[502]

Despite *Moore*'s affirmation that cities may not use zoning to deny individuals certain fundamental rights, courts have upheld as reasonable zoning schemes that merely incidentally burden such rights.[503] Courts have generally distinguished between zoning regulations that have "a direct and substantial impact" on fundamental rights and those that operate more tangentially.[504] The adjudication of residency restrictions for sex offenders is illustrative. When faced with challenges to sex offender restrictions, federal circuit courts have taken pains to define the scope of fundamental rights narrowly.[505] In particular, if an ordinance merely "restricts where a residence may be located," it is unlikely to be viewed as directly and substantially impacting protected rights.[506]

Consequently, cities will likely retain the power to regulate the location of public homeless encampments within their borders, notwithstanding a fundamental right to self-shelter. To date, a handful of cities have already experimented with establishing specifically designated zones for homeless residents.[507] The most famous of these may be Los Angeles's Skid Row. While not officially zoned for homeless encampments, skid rows have traditionally been a place where homelessness was tolerated and the police role, if any, has been to contain disorder to pre-established boundaries.[508] In other prominent examples, however, cities have installed public facilities and provided social services in "campuses" specifically designed to attract homeless residents.[509]

502. *Id.* at 508.

503. *See, e.g.*, Doe v. Miller, 405 F.3d 700, 710 (8th Cir. 2005) ("Thus, the reasoning of the *Moore* plurality does not require strict scrutiny of a regulation that has an incidental or unintended effect on the family . . . or that 'affects or encourages decisions on family matters' but does not force such choices.").

504. State v. Seering, 701 N.W.2d 655, 663 (Iowa 2005).

505. *See Miller*, 405 F.3d at 710.

506. *Id.* at 710; *see also* Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1014–15 (8th Cir. 2006) (holding that sex offender residency restrictions do not unconstitutionally violate substantive due process, equal protection, or the fundamental right to travel).

507. Mary Kay Thill, *Zoning out the Homeless People*, NW. COMPASS (Apr. 1, 2017), https://northwestcompass.org/zoning-homeless-people/ [https://perma.cc/3CKJ-B9JQ].

508. *See, e.g.*, Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOCIO. REV. 699, 704 (1967); s*ee also* CHARLES HOCH & ROBERT A. SLAYTON, NEW HOMELESS AND OLD: COMMUNITY AND THE SKID ROW HOTEL 105 (1989) ("[T]he job of the patrolman was primarily to maintain the spatial order by seeing that the accepted boundaries of Skid Row were maintained. This was done by confining the men to their specific neighborhood and prohibiting spillover into middle-class sections.") (internal quotations omitted). *But see* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1102 (2005) ("As skid row declined, however, police officers, faced with more severe social deviancy and greater societal hostility, felt pressure to exercise a greater amount of control within skid row as well.").

509. *See* Garnett, *supra* note 508, at 1085–88 (discussing the phenomenon of homeless campuses).

Campuses of this sort may increasingly become part of cities' comprehensive zoning plans.[510]

While zoning of this sort may be legally permissible, it primarily functions to concentrate and obscure extreme poverty, which can be damaging to the individuals subjected to it.[511] Zoning laws have a long history of being used to exclude and marginalize already vulnerable populations.[512] And cities have shown little appetite for tolerating even sheltered homelessness—exclusionary zoning schemes designed to limit homeless shelters or the provision of homeless services are frequent.[513] We should expect, then, that many cities' responses to recognizing a negative right to shelter will involve concentrating self-sheltering activities in undesirable and underserved areas, to the detriment of homeless residents.[514]

Beyond zoning, cities and states will likely also retain the ability to criminalize behaviors attendant to homelessness to the extent that those behaviors cause third-party harms. Laws against vagrancy and urban camping have long been justified as prophylactic measures designed to empower police to prevent more serious crimes.[515] These laws, and others like them,[516] are touted as tools to identify and incapacitate crime-prone individuals. Crime rates among the homeless are the subject of considerable debate.[517] But many people equate the presence of unsheltered homelessness with increased risks of serious crime, including violent assaults, property theft, and drug use.[518] Moreover, urban

510. *See* Serkin, *supra* note 494, at 758 (explaining that, under the Standard Zoning Enabling Act, zoning ordinances must be part of a comprehensive city plan).

511. *See* Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1227 (2006) (explaining how concentrated poverty has negative effects on education, safety, and children).

512. *See, e.g.*, Serkin, *supra* note 494, at 754–60.

513. Foscarinis et al., *supra* note 96, at 147 n.2.

514. Many years ago, Professor Robert Ellickson suggested that zoning laws should be used to concentrate disorder, including homelessness, into specifically designated public spaces akin to skid rows. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1220–23 (1996).

515. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972) ("Future criminality, however, is the common justification for the presence of vagrancy statutes.").

516. Roberts, *supra* note 486, at 783 (examining loitering laws as a prophylactic measure to fight crime and maintain public order).

517. *Compare* Randeep Ramesh, *A Fifth of All Homeless People Have Committed a Crime to Get off the Streets*, GUARDIAN (Dec. 22, 2010), https://www.theguardian.com/society/2010/dec/23/homeless-committing-crimes-for-shelter [https://perma.cc/YFK4-YKYN], *with* Thacher Schmid, *No Link. Between Homeless Villages and Crime Rates, Guardian Review Suggests*, GUARDIAN (May 23, 2018), https://www.theguardian.com/us-news/2018/may/23/homeless-villages-crime-rate-seattle-portland [https://perma.cc/J5V9-UD42]. *See generally* John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 815 (2000) ("While the current effort in cities focuses on prosecution of the homeless for their crimes, it is, in fact, the poor and homeless who are more likely to be the victims of crime than they are to be the criminals.").

518. *See* Sara Shortt, *We Don't Need Protection from the Homeless. They Need Protection from Us*, L.A. TIMES (Oct. 15, 2018), https://www.latimes.com/opinion/op-ed/la-oe-shortt-homeless-victims-20181015-story.html [https://perma.cc/S8E5-Y453].

camping raises concerns about certain bodily necessities, including urination, defecation, and sexual activity, that are currently criminal when done in public.[519]

Under the Supreme Court's well-established framework, even fundamental rights must bend to accommodate narrowly tailored laws that serve compelling state interests.[520] While *Lawrence* rejected moralistic justifications for criminal prohibitions, preventing third-party harms has traditionally been recognized as a compelling government interest.[521] Thus, the decriminalization of urban camping would not affect direct prohibitions on more serious conduct—such as violent crime and drug use[522]—that prophylactic justifications targeted circuitously.

A more interesting question arises with respect to conduct that engenders substantial disdain or disgust, but that less obviously *harms* third parties. Here, I am thinking particularly of public urination and defecation, along with public sex. Unlike other forms of crime among the unsheltered homeless, these activities may be thought of as intimately connected to the protected conduct of self-sheltering. Moreover, a robust theory of dignity grounded in moral philosophy would likely view such conduct as an inescapable component of public existence.[523] Nevertheless, I think there are legitimate doubts that dignity in the constitutional—rather than moral—sense extends to decriminalize these behaviors.

As noted earlier, there are at least nontrivial arguments for keeping human nudity and certain bodily activities from non-consenting viewers.[524] Public sex

519. Anya Zoledziowski, *Homeless People Have Nowhere to Go to the Bathroom Because of Coronavirus*, VICE (Apr. 8, 2020), https://www.vice.com/en/article/dygqna/homeless-people-have-next-to-zero-bathrooms-because-of-coronavirus [https://perma.cc/4GTU-Z2CV].

520. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

521. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 756–57 (1982).

522. Although drug use does not, alone, implicate third-party harms, some members of the Supreme Court have indicated that it is a sufficiently serious criminal matter to qualify as a "compelling" interest. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 904–05 (1990) (O'Connor, J., concurring). Individuals experiencing homelessness are often stigmatized as drug users, saddled with the unstated implication that drug use is a primary cause of their homelessness, a barrier to escaping homelessness, or both. *See, e.g.*, Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?*, 22 FORDHAM URB. L.J. 1, 2 (1994). While homeless individuals experience drug and alcohol abuse at roughly twice the rate of housed individuals, *see* Rankin, *supra* note 7, at 105, it is the criminal response to drug use that most threatens the security of homeless drug users. An emerging consensus recognizes the failures of American drug policy. *see* GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR & SUCCESSFUL DRUG POLICIES (2009), https://www.tni.org/files/publication-downloads/greenwald_whitepaper.pdf [https://perma.cc/VW4G-ACLN]; *see generally* GLOB. COMM'N ON DRUG POL'Y, TIME TO END PROHIBITION 7–11 (2021), https://www.globalcommissionondrugs.org/wp-content/uploads/2021/12/Time_to_end_prohibition_EN_2021_report.pdf [https://perma.cc/DF7R-43W7] (bolstering the consensus with the examples of countries that have decriminalized drug use).

523. *See, e.g.*, Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. REV. 205, 234 (2020) ("In the United States, and much of the Western world, the ability to use the bathroom in private is synonymous with dignity.").

524. *See supra* notes 471–476, and accompanying text.

involves complicated questions about the line between immorality, offensiveness, and genuine harm.[525] Public urination and defecation raise additional questions about health and safety, in addition to offensiveness when observed.[526] "Exposure to urine and feces can result in . . . shigella, hepatitis, tapeworm, and hookworm."[527] These concerns may very well rise to the level of "compelling" in the due process analysis dictated by the Supreme Court's jurisprudence.[528]

Those who fear that the decriminalization of urban camping will necessitate tolerating increased crimes of violence, drug use, or acts of public indecency can therefore rest easy.[529] The recognition of a fundamental right to self-shelter will scarcely affect the plethora of criminal laws available to police the conduct of those existing in public. The cost of decriminalization, such as it is, may merely be the inability to use public existence as a catch-all proxy for other forms of crime that may be more difficult to police directly. It is the loss of prophylactic justifications and a public reckoning with our assumptions about the link between homelessness and deeper crime.

Lastly, and perhaps most troublingly, recognizing a negative right to shelter likely leaves unaffected the government's power to sweep, deconstruct, or relocate homeless encampments in furtherance of health and sanitation goals. Sweeps of this nature have long been part of communities' responses to the creation of homeless encampments.[530] Even where urban camping itself is tolerated, specific homeless encampments can interfere with essential rights of

525. *See* Strahilevitz, *supra* note 480, at 689–90; *see also* Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 13 (2008) ("[T]hose who do not want to observe the sex in question—individuals whom we can refer to as 'unwilling gazers'—have a legitimate interest in not having sex thrust upon them.").

526. *See* People v. McDonald, 40 Cal. Rptr. 3d 422, 434–35 (Cal. Ct. App. 2006) (discussing justifications for laws against public urination and defecation).

527. Hochbaum, *supra* note 523, at 236.

528. An interesting possibility is that such activities, while not decriminalized as a violation of Due Process, may be protected by the Eighth Amendment as involuntary incidents of the status of homelessness when inadequate public restrooms are provided by the state.

529. Meanwhile, those of us who fear that the policing of these crimes will continue to be disproportionately directed at homeless populations must embrace the reality that there will be more work to do to truly ensure the dignity of these populations.

530. *See, e.g.*, Kevin Bundy, *"Officer, Where's My Stuff?": The Constitutional Implications of a De Facto Property Disability for Homeless People*, 1 HASTINGS RACE & POVERTY L.J. 57, 59 (2003).

way,[531] pose threats to public health,[532] raise sanitation issues,[533] or otherwise contribute to public nuisance.[534]

Encampment sweeps motivated by these concerns are civil, rather than criminal, undertakings.[535]

> While there are specific quirks for each municipality, the general process is largely the same. A notice is posted nearby with an allotted time frame, usually three days or so, during which people need to vacate the area. (Sometimes notices don't appear at all.) At some point after that time elapses (if it's raining or if there is a protest, the sweep may be delayed a few days), a combination of police officers and sanitation workers invade. Police escort those living in the tents away, and may fence off the area. Once the area is "secure," sanitation workers begin throwing everything into the idling garbage truck.[536]

While they still must comport with the dictates of due process,[537] civil regulations in pursuit of health and sanitation arguably do not raise the specter of subordinating effects that animated the dignity-based analysis offered above.

To be sure, the effects of encampment sweeps can be truly devastating to those individuals affected.[538] "Instead of improving homelessness, sweeps destroy property and disrupt fragile communities, often leaving unsheltered people more likely to remain homeless."[539] And cities nationwide have

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531. *See* ANDRÉE TREMOULET, ELLEN BASSETT & ALLISON MOE, HOMELESS ENCAMPMENTS ON PUBLIC RIGHT-OF-WAY: A PLANNING AND BEST PRACTICES GUIDE (2012), https://ppms.trec.pdx.edu/media/137530914651f98d5a443e9.pdf [https://perma.cc/N9VB-Z3VB]; Anna Maria Barry-Jester, *Sweeps of Homeless Camps in California Aggravate Key Health Issues*, NPR (Jan. 10, 2020), https://www.npr.org/sections/health-shots/2020/01/10/794616155/sweeps-of-homeless-camps-in-california-aggravate-key-health-issues [https://perma.cc/TV98-T44K].

532. Elizabeth Chou, *LA Activists, Public Health Experts Fear Revived Encampment Sweeps Could Spread Coronavirus*, L.A. DAILY NEWS (Sept. 10, 2021), https://www.dailynews.com/2021/09/10/l-a-activists-public-health-experts-fear-revived-encampment-sweeps-could-spread-coronavirus/ [https://perma.cc/KD7Y-AJSS] (detailing the spread of COVID-19within homeless encampments).

533. Benjamin Oreskes & David Zahniser, *Minority of Sanitation Workers Report Being Vaccinated, Worrying Homeless Advocates*, L.A. TIMES (Sept. 30, 2021), https://www.latimes.com/homeless-housing/story/2021-09-30/la-doesnt-know-if-most-sanitation-works-are-vaccinated-but-theyre-still-cleaning-encampments [https://perma.cc/K9TQ-4MF5] (explaining the sanitation justification for encampment sweeps in Los Angeles).

534. Nadra Nittle, *Surprise Homeless Sweeps Aren't Just Disruptive, Say Activists—They Aren't Working*, CURBED L.A. (Apr. 26, 2019), https://la.curbed.com/2019/4/25/18516026/homeless-sweeps-encampments-clean-streets [https://perma.cc/7BSK-SQTV] (explaining that one justification for encampment sweeps in Los Angeles is to remove sidewalk obstructions in order to maintain compliance with the Americans with Disabilities Act).

535. Rankin, *supra* note 98, at 590–91 ("By justifying sweeps as necessary for public health or safety, cities attempt to distinguish such practices from the criminal punishment *Martin* rejects.").

536. Paulas, *supra* note 319.

537. Cities, however, should be mindful that encampment sweeps may arguably violate due process to the extent that they put homeless individuals at increased risk of danger, such as from extreme weather conditions. *See* Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1102 (E.D. Cal. 2012).

538. Rankin, *supra* note 98, at 593–94.

539. *Id.* at 594.

increasingly come under scrutiny for the arbitrary manners in which such sweeps are sometimes affected.[540] I therefore worry deeply about the pervasive abuse of sanitation sweeps to needlessly disrupt homeless communities following the recognition of a negative right to shelter.

But there are also real health and safety concerns at the heart of many sweeps. When these interests genuinely motivate encampment sweeps—rather than pretextually provide cover for sweeps in service of other interests, such as aesthetic concerns or housed citizen satisfaction[541]—those sweeps at least arguably comport with the due process requirement that they be narrowly tailored to serve a compelling government interest. While we must be sensitive to the many constraints and challenges facing our homeless neighbors, I admit to finding satisfying the symmetry between a negative right to shelter, on the one hand, and a corresponding responsibility to conduct one's public affairs in a dignified manner, on the other. The right to exist in public spaces is an essential component of personhood. But it is not—indeed, cannot be—untethered from our responsibilities as citizens to care for ourselves and others within our communities. The three options just discussed, while each prone to excesses that must be jealously guarded against, in theory comprise an obligation that those who exercise a negative right to shelter do so in a reasonably controlled manner: in appropriate locations, free from crime, and in as safe and sanitary a manner as available constraints allow.

CONCLUSION

For over forty years, advocates have responded to the criminalization of homelessness by calling for a "right to shelter." But these calls have been about the wrong right to shelter. Attempts to frame shelter as a positive right—an enforceable entitlement to have the government provide or fund a temporary shelter bed for every homeless individual—have largely floundered. Moreover, the prominence of this right-to-shelter rhetoric in the discourse surrounding homelessness has had pernicious consequences, eliding weaknesses in shelter offerings and reifying temporary emergency offerings as the solution to a truly intractable problem.

This Article takes a different tack. It has articulated and defended a negative right to shelter as a fundamental right to shelter oneself free from government interference, especially criminalization. This new right to shelter emerges from

540. *See, e.g.*, Jessica Boehm, *Homeless Encampment Cleanups in DOJ Probe Were Unanimously Approved by Phoenix City Council*, AZ CENTRAL (Sept. 8, 2021), https://www.azcentral.com/story/news/local/phoenix/2021/09/08/phoenix-doj-investigation-homeless-camp-cleanups-were-unanimously-approved/5572425001 [https://perma.cc/FV7S-DTKB] (detailing a Department of Justice investigation into Phoenix encampment sweeps); Paulas, *supra* note 319 (noting a class action lawsuit challenging Los Angeles sweeps).

541. *See* Foscarinis et al., *supra* note 96, at 156 ("Government policies that attempt to 'sweep' homeless people from public areas are quick-fix measures offered by politicians in response to pressure from a vocal minority of businesses or residents to 'do something' about homelessness.").

our constitutional due process jurisprudence premised on maintaining and defending human dignity. To be clear, I have little hope that the Supreme Court, as currently constituted, would have an appetite for recognizing a negative right to shelter. But I think that a faithful adherence to existing precedent—and, in particular, to the potential for *Lawrence v. Texas* to have applications beyond the realms of sex and sexuality—reveals a path to identifying such a negative right that may hold sway in lower courts. Substantive due process has long protected the human capacity for self-determination while rejecting group-based subordination enshrined through criminalization.

Respect for homeless individuals as persons ought to require us to defer to their intimate personal choices about how best to live life in the face of overwhelming constraints. This means learning to confront, rather than hide, the realities of visible poverty. It means protecting the decisions of those homeless individuals who rationally prefer to undertake self-sheltering activities—from the use of blankets or bedding to the erection of temporary encampments in public spaces—from the threat of criminalization. True decriminalization would ensure that homeless individuals have the freedom to choose where and how to find shelter, to protect themselves and their property, and to build meaningful connections with one another.

The New Homelessness

Mila Versteeg*, Kevin L. Cope** & Gaurav Mukherjee***

For the over half-million people currently homeless in the United States, the U.S. Constitution has historically provided little help. In 2018, this changed. A series of Ninth Circuit Court of Appeals decisions gave homeless individuals a right to occupy public spaces with some of their belongings. The surprising source of the right was the Eighth Amendment. The courts held that for people with no way of complying with laws banning public sleeping, punishing them for doing so constituted cruel and unusual punishment.

This line of cases has changed the face of homelessness in America, giving rise to a sociopolitical phenomenon that we call "The New Homelessness." Specifically, it has catalyzed the erection of sanctioned encampments throughout America's urban landscapes. As this new jurisprudence first emerged, many politically progressive, legally risk-averse local officials gave these cases an implausibly broad interpretation, effectively nullifying local anti-camping ordinances altogether. But after a public backlash, officials adopted a far narrower interpretation, giving rise to designated encampments coupled with new city-wide camping bans. The outgrowth of these developments has been profound: Homeless people in America increasingly began to live in public encampments.

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In 2024, a six-justice majority of the U.S. Supreme Court in City of Grants Pass v. Johnson *overturned the Ninth Circuit's right-to-camp doctrine and, with it, the possibility of a nationwide right to camp on public land based in the Eighth Amendment. But we argue that the New Homelessness will nonetheless remain a fixture of American law and politics. As a legal matter, it has generated state and local legislation that has supplanted federal constitutional doctrine. Just as important, the New Homelessness has offered political lessons, prompted evolving social norms, and created an encampment infrastructure, which together will ensure the sociopolitical institution's survival regardless of federal doctrine. Absent radical measures to address the root causes of homelessness, the New Homelessness will form part of the American legal, political, and urban landscape for the foreseeable future.*

INTRODUCTION

> "…the law, in its majestic equality, forbids rich and poor alike to sleep under the bridges, [and] to beg in the streets . . . ."
>
> – Anatole France (1894)[1]

> "Squalor in tents is not the way, despite this [law] of naïveté. Quit enabling, if you will, our children's desire for the fentanyl pill, which drives them to steal and turn tricks in tents, and break the windows of those who pay rent."
>
> – Jeffrey S. Merrick (2023)[2]

Almost two in every thousand Americans are currently homeless.[3] This is a tragic social and political reality, but it is not traditionally a constitutional issue. As the French poet Anatole France once observed: "the law[]," "in its majestic equality . . . forbids rich and poor alike to sleep under the bridges."[4] The U.S. Constitution is certainly majestic in this way: It is committed strongly to formal

1. ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., John Lane Co. 1910).

2. Jeff Merrick, *How do I Hate Thee? Let Me Count the Ways*, https://olis.oregonlegislature.gov/liz/2023R1/Downloads/PublicTestimonyDocument/96412 [https://perma.cc/B3M2-JRNX] (part of submission opposing "Right to Rest" bill pending before the Oregon legislature).

3. TANYA DE SOUSA, ALYSSA ANDRICHIK, ED PRESTERA, KATHERINE RUSH, COLETTE TANO & MICAIAH WHEELER, U.S. DEP'T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS—PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 16 (2023) [hereinafter AHAR 2023], https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf [https://perma.cc/U463-HNDR]. A note about the terms used in this Article: In referring to people without regular access to a residence, we acknowledge that there is no consensus on the most appropriate set of terminology with preferences routinely shifting. *See* Kayla Robbins, *Homeless, Houseless, Unhoused, or Unsheltered: Which Term is Right?*, INVISIBLE PEOPLE (Aug. 25, 2022), https://invisiblepeople.tv/homeless-houseless-unhoused-or-unsheltered-which-term-is-right/ [https://perma.cc/F8TG-FVPA]. But we opt to follow the longstanding, prevailing practices of federal courts and federal regulations. We therefore use the term "homeless" to denote an individual "who lacks a fixed, regular, and adequate nighttime residence, meaning: . . . a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings," such as a park or automobile. 24 C.F.R. § 582.5 (2024). At any given time, a homeless individual is either "sheltered" (residing "[i]n an emergency shelter" or "transitional housing") or "unsheltered" (residing "[i]n a place not meant for human habitation"). U.S. DEP'T OF HOUS. & URB. DEV., OFF. OF CMTY. PLAN. & DEV., A GUIDE TO COUNTING UNSHELTERED HOMELESS PEOPLE 4 (2004), https://www.hudexchange.info/sites/onecpd/assets/File/Guide-for-Counting-Unsheltered-Homeless-Persons.pdf [https://perma.cc/K9BB-ZY9E] (emphasis omitted). Many, but not all, homeless individuals are "chronically" homeless. *See* 42 U.S.C. § 11360(2) (defining "chronically homeless" as an "individual or family" that "(i) is homeless and lives or resides in a place not meant for human habitation, a safe haven, or in an emergency shelter; (ii) has been homeless and living or residing in a place not meant for human habitation, a safe haven, or in an emergency shelter continuously for at least 1 year or on at least 4 separate occasions in the last 3 years; and (iii) has an adult head of household (or a minor head of household if no adult is present in the household) with a diagnosable substance use disorder, serious mental illness, developmental disability (as defined in section [102 of the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. § 15002)]), post traumatic stress disorder, cognitive impairments resulting from a brain injury, or chronic physical illness or disability, including the co-occurrence of 2 or more of those conditions").

4. FRANCE, *supra* note 1.

equality, but it lacks any commitment to social welfare rights.[5] Indeed, time and again, the Supreme Court has reaffirmed this insight, holding that there is no federal constitutional right to a minimal subsistence,[6] education,[7] or healthcare.[8] The Court has made equally clear that there is no constitutional right to housing.[9]

But in late 2018, that became less obvious. In a series of decisions, the Ninth Circuit, the court with federal appellate jurisdiction over nearly 20 percent of Americans and 42 percent of the nation's total homeless population (that is, 275,000 people),[10] inadvertently created a right unique in American constitutional law: essentially, a legal license to sleep on public land. The surprising basis for this new right was the Eighth Amendment: for people with no residence—and therefore no way of complying with laws banning sleeping in public places—punishing them for doing so amounted to "cruel and unusual punishment[]."[11] In a 2018 decision, *Martin v. City of Boise*, the Ninth Circuit held that so long as the city of Boise lacked enough adequate available shelter beds for the city's homeless individuals, it could not enforce its city-wide anti-camping or related ordinances.[12] The city was thus forced to accommodate the homeless population on some public spaces unless and until it made more shelter available. In a 2022 decision, *City of Grants Pass v. Johnson*, the Ninth Circuit expanded *Martin* to give homeless people the right to stay on public land with their bedding and some other belongings.[13] Following *Martin*, homeless individuals and their advocates filed over one hundred lawsuits against cities

5. *See, e.g.*, Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) ("The men who wrote the Bill of Rights were not concerned that [the federal] government might do too little for the people but that it might do too much to them.").

6. Dandridge v. Williams, 397 U.S. 471 (1970).

7. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

8. Harris v. McRae, 448 U.S. 297 (1980).

9. Lindsey v. Normet, 405 U.S. 56 (1972).

10. Brief of Int'l Mun. Laws. Ass'n., Nat'l League of Cities, Nat'l Ass'n of Cntys., North Dakota League of Cities, Cities of Albuquerque, Anchorage, Colorado Springs, Henderson, Las Vegas, Milwaukee, Providence, Redondo Beach, Saint Paul, San Diego, Seattle, Spokane, and Tacoma, The City and Cnty. of Honolulu, and the Cnty. of San Bernardino as *Amici Curiae* in Support of Petitioner at 8, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) [hereinafter IMLA *Grants Pass* Amicus Brief] ("42 percent of the Nation's homeless [population] reside[s] in the nine states in the Ninth Circuit."); *see also* AHAR 2023, *supra* note 3, at 16 (reporting that 49 percent of the nation's unsheltered population resides in California); BARRY J. MCMILLION, LEGISLATIVE PROPOSALS TO CHANGE THE GEOGRAPHIC BOUNDARIES OF THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT: HISTORICAL OVERVIEW AND ANALYSIS, CONG. RSCH. SERV., R48242 3 (2024), https://crsreports.congress.gov/product/pdf/R/R48242 [https://perma.cc/2QFB-7G3U].

11. U.S. CONST. amend. VIII.

12. Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019). The relevant ordinances usually seek to prohibit urban camping. As one commentator observes, "Though there are subtle variations between cities, urban camping ordinances typically prohibit sleeping, preparing to sleep, or storing belongings on public property." *See* Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 130 (2023).

13. Johnson v. City of Grants Pass, 72 F.4th 868, 890–91 (9th Cir. 2022).

seeking to enforce these decisions, including *Grants Pass*, in state and federal court and other circuits likewise engaged with this jurisprudence.[14]

These decisions are the basis of a phenomenon we call *The New Homelessness*[15]: a trend of America's homeless increasingly residing in long-term encampments in urban centers with legal impunity.[16] Across the country, people erected encampments in public parks, under bridges, and on sidewalks and could remain largely undisturbed by law enforcement.[17] This phenomenon unfolded in three stages. First, many local jurisdictions interpreted *Martin* to prohibit anti-camping ordinances. Second, cities permitting camping saw the establishment and growth of homeless encampments. Third, after public backlash, city officials restricted these encampments to certain designated areas, which, in turn, brought about the final stage of the New Homelessness: legally sanctioned encampments.

In the first stage of the New Homelessness, many local jurisdictions interpreted the *Martin* decision considerably more broadly than the court

14. Homelessness and Anti-Camping Ordinance Litigation Post-*Martin v. City of Boise*, WESTLAW, https://1.next.westlaw.com (search: ""Martin v. City of Boise" & ("anti-camping ordinances" OR "homelessness") & (lawsuit OR litigation) & DA (aft 2018)"; filter by jurisdiction to include both state and federal courts) (last visited Feb. 11, 2025).

15. Starting in the 1980s, the term "new homelessness" was sometimes used in the sociology literature to refer to the homelessness spike that began early that decade in North America during a relatively prosperous period. *See generally, e.g.*, Anne B. Shlay & Peter H. Rossi, *Social Science Research and Contemporary Studies of Homelessness*, 18 ANN. REV. SOCIO. 129, 131 (1992) (noting the changing demographic affiliation of, and research into the "new homeless" from the 1980s onward); BRENDAN O'FLAHERTY, MAKING ROOM: THE ECONOMICS OF HOMELESSNESS (1996); Barrett A. Lee, Kimberly A. Tyler & James D. Wright, *The New Homelessness Revisited*, 36 ANN. REV. SOCIO. 501 (2010). As elaborated below, our definition is related but distinct.

16. LAUREN DUNTON, JILL KHADDURI, KIMBERLY BURNETT, NICHOLE FIORE & WILL YETVIN, U.S. DEP'T OF HOUS. & URB. DEV., EXPLORING HOMELESSNESS AMONG PEOPLE LIVING IN ENCAMPMENTS AND ASSOCIATED COST: CITY APPROACHES TO ENCAMPMENTS AND WHAT THEY COST 4 (2020), https://www.huduser.gov/portal/sites/default/files/pdf/Exploring-Homelessness-Among-People.pdf [https://perma.cc/EQR7-84DG] (observing that "[t]he term *encampment* is widely used . . . to describe groups of people living in tents or other temporary structures in public spaces in cities across the country" but that there is no fixed definition, though "several concepts are often included: the presence of structures; the continuity of location; and the permanency of people staying there").

17. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA'S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 7 (2017), https://homelesslaw.org/wp-content/uploads/2018/10/Tent_City_USA_2017.pdf [https://perma.cc/4REV-NYGQ] (reporting the emergence of encampments); DUNTON ET AL., *supra* note 16, at ES1–ES2 (observing an unprecedented number of encampments in 2019, higher than in any year before, and noticing the impact of the Ninth Circuit jurisprudence); *see also* Rachel M. Cohen, *The Little-Noticed Court Decision that Changed Homelessness in America*, VOX (June 12, 2023), https://www.vox.com/23748522/tent-encampments-martin-boise-homelessness-housing [https://perma.cc/4CUX-5229] (noting how *Martin* was pivotal in shaping how cities responded to tent encampments); Greg Kim, *One Court Case Changed How West Coast Cities Deal with Homeless Encampments*, SEATTLE TIMES (Oct. 15, 2023), https://www.seattletimes.com/seattle-news/homeless/one-court-case-changed-how-west-coast-cities-deal-with-homeless-encampments/ [https://perma.cc/X9AE-NAAM] (noting how public officials stated that *Martin* was "hamstringing" their ability to address the crisis of homeless encampments).

apparently intended or than the decision's language supported. In fact, the Ninth Circuit itself described its holding as "narrow," giving substantial discretion to local officials to regulate the time, location, and structure of urban camps.[18] Nonetheless, many local officials acted as though they were enjoined from enforcing *any* anti-camping or related ordinances so long as there were not enough available shelter beds in their jurisdiction.

Why such a broad interpretation of *Martin*? One key reason was the substantial uncertainty over the precise parameters of the decision, which made many local officials especially risk averse regarding potential lawsuits and legal liability. Indeed, many cities were sued, and district courts enforcing *Martin* created further legal uncertainty by adopting conflicting interpretations. For example, a district judge in San Francisco enjoined the city from enforcing its anti-camping ordinances altogether, implicitly adopting the same broad interpretation as some other city officials had.[19] *Martin* also seemed to give some officials political cover to enact measures they already preferred but were legally prevented from implementing at scale.[20] Many homeless-rights advocates view a right to urban camping as complementary to Housing First strategies, which prioritize securing supportive housing before addressing other needs.[21] Many also portray "self-sheltering" in community camps as more humane than shelters: Tent encampments, unlike most shelters, offer privacy, impose no strict rules or curfews, and allow residents to stay with their pets and romantic partners.[22] And during the COVID-19 pandemic, allowing encampments was

18. Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019); *see also id.* at 589 (Berzon, J., concurring in the denial of rehearing en banc) ("[O]nly . . . municipal ordinances that criminalize sleeping, sitting or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment.").

19. *See infra* Part II.B.

20. *See id.*

21. On the importance of Housing First and its nature, see generally LAVENA STATEN, HOMELESS RTS. ADVOC. PROJECT, PENNY WISE BUT POUND FOOLISH: HOW PERMANENT SUPPORTIVE HOUSING CAN PREVENT A WORLD OF HURT (Sara K. Rankin ed., 2019), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1016&context=hrap [https://perma.cc/8HRP-X2AX] (discussing the feasibility and benefits of permanent supportive housing and other policy alternatives to the homelessness crisis); *Supreme Court Lets* Martin v. Boise *Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives*, NAT'L HOMELESSNESS L. CTR. (Dec. 16, 2019), https://homelesslaw.org/supreme-court-martin-v-boise/ [https://perma.cc/A8N7-E976] (noting that the right established in *Martin* should be seen as an imperfect alternative to Housing First strategies); JUSTIN PATRICK JONES, KHALIA PARISH, PETER RADU, TAYLOR SMILEY & JENNY VAN DER HEYDE, GOLDMAN SCH. PUB. POL'Y, UNIV. OF CAL., BERKELEY, A PLACE TO BE: ALTERNATIVES TO UNSANCTIONED HOMELESS ENCAMPMENTS 86 (May 1, 2015), https://gspp.berkeley.edu/assets/uploads/page/15-13160_-_Goldman_Student_Report_-_Final_Draft_-_May_11_2015_reduced_size.pdf.pdf [https://perma.cc/WKR9-TNGB] ("[S]anctioned encampments provide one potential short-term solution that might be implemented while longer-term solutions are being discussed.").

22. *See, e.g.*, Nicholas Olson & Bernadette (Bernie) Pauly, '*Forced to Become a Community': Encampment Residents' Perspectives on Systemic Failures, Precarity, and Constrained Choice*, 3 INT'L. J. HOMELESSNESS 124, 128, 132 (2023); NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, IMPACT OF ENCAMPMENT SWEEPS ON PEOPLE EXPERIENCING HOMELESSNESS 1–2 (2022),

consistent with guidance from public health officials such as the Centers for Disease Control, which warned of the spread of COVID-19 from people's moving in and out of housing shelters.[23] The New Homelessness jurisprudence had such a profound impact, then, in part because it aligned with the policy preferences of many local decision-makers.

In the second stage of the New Homelessness, permissive urban camping policies meant not only that tent camps sprang up across cities, but also that homeless individuals were legally free to abandon shelters for camps. And many did so.[24] Predictably, many homeless people also chose to migrate to jurisdictions with more permissive urban camping policies.[25] Jurisdictions with permissive camping policies saw not only an explosion of encampments but also an increase in their unsheltered populations. For example, many view city officials' implausibly broad interpretation of *Martin*—which led to lax enforcement and, in some cases, complete non-enforcement of existing anti-camping laws—as responsible for "the Zone" in Phoenix, a camp with some thousand residents.[26] And in Los Angeles, commentators observed that Skid Row-style tent cities had sprung up all over the city.[27]

In the third stage of the New Homelessness, public backlash to indiscriminate public camping led officials to confine encampments to designated areas. As homeless individuals were erecting camps, public opinion was turning against them.[28] The public seemed increasingly unwilling to criminalize homelessness. But, as reflected by Oregon attorney Jeffrey Merrick's "[s]qualor in tents is not the way" comments on Oregon's pending right-to-rest legislation,[29] the public also did not support indiscriminate urban camping. In

https://nhchc.org/wp-content/uploads/2022/12/NHCHC-encampment-sweeps-issue-brief-12-22.pdf [https://perma.cc/ZFB8-UUKR]; McJunkin, *supra* note 12, at 163–74, 185–86 (arguing in favor of a right to urban camping over a right to a traditional shelter); *infra* notes 165–66 and accompanying text.

23. *CDC Advises Against Clearing Homeless Encampments if Alternate Housing Is Not Available During Coronavirus Outbreak*, NAT'L LOW INCOME HOUS. COAL. (Mar. 30, 2020), https://nlihc.org/resource/cdc-advises-against-clearing-homeless-encampments-if-alternate-housing-not-available [https://perma.cc/2HC5-DQZ5].

24. AHAR 2023, *supra* note 3, at 11 (reporting a 2.5 percent increase in homelessness overall between 2010 and 2023, but a 9.9 percent increase in the unsheltered population, along with a 1.7 percent decrease in the sheltered population); *see also* McJunkin, *supra* note 12, at 133 (reporting a "rapid[] increas[e]" in "[u]nsheltered homelessness" and observing that "[i]t is up more than 30 percent over the past five years, while sheltered homelessness decreased almost 10 percent during the same period").

25. *See infra* notes 191–198 and accompanying text.

26. *See infra* notes 174–181 and accompanying text. The camp was closed in November 2023. *See* Helen Rummel, *Phoenix's Largest Homeless Encampment, 'The Zone,' Is Now Gone*, ARIZ. REPUBLIC (Nov. 2, 2023), https://www.azcentral.com/story/news/local/phoenix/2023/11/02/phoenixs-largest-homeless-encampment-the-zone-is-now-gone/71415236007/ [https://perma.cc/PRV4-TMMT].

27. *See infra* notes 128–130 and accompanying text (detailing the New Homelessness in Los Angeles).

28. *See, e.g.*, Shawn Hubler, *In Rare Alliance, Democrats and Republicans Seek Legal Power to Clear Homeless Camps*, N.Y. TIMES (Sept. 27, 2023), https://www.nytimes.com/2023/09/27/us/in-rare-alliance-democrats-and-republicans-seek-legal-power-to-clear-homeless-camps.html [https://perma.cc/LA5Z-U2P5].

29. Merrick, *supra* note 2.

response to public backlash, many local officials reconsidered their positions, narrowed their interpretation of *Martin*, and started imposing time, location, and condition restrictions on urban camping.[30] Thus arose the phenomenon of legally sanctioned and designated encampments along with the reintroduction of camping bans in the rest of the cities.[31] Such sanctioned encampments represent a kind of bipartisan consensus: They are promoted by conservative activists,[32] yet they have been adopted by some of the nation's most progressive cities. For local officials, sanctioned encampments have become the quick-and-cheap fix to a seemingly unsolvable problem. The encampments constitute a balancing act involving the rights of the homeless, for whom permanent housing remains unavailable, and the growing public demand to reclaim public spaces. Indeed, a flurry of state-level legislation has focused on sanctioned encampments.[33] Instead of being arrested or issued move-along orders at the threat of arrest, the nation's homeless increasingly live in sanctioned tent cities.[34]

This five-year build-up of socio-legal infrastructure at state and local levels has guaranteed that the New Homelessness is here to stay. In early 2024, the Supreme Court overturned *Grants Pass*.[35] It held that the Eighth Amendment may prevent criminalizing a person's mere *status* (e.g., "drug addiction" or "homelessness"), but it does not protect *acts* that are linked to that status—even involuntary ones—such as sleeping in public spaces.[36]

Even though the federal doctrine changed, the New Homelessness is unlikely to. Despite its power to interpret the federal Constitution nationwide, the Supreme Court cannot easily reverse the effects of a newly recognized right. That recognition has spurred a flurry of state-level legislation that will remain

30. Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 598–602 (2019) (describing this third stage and arguing against the rise of this phenomenon).

31. *See infra* Part II.C.

32. See *infra* notes 226–228 and accompanying text.

33. *See infra* notes 229–241 and accompanying text.

34. Comprehensive national data on the prevalence and impact of sanctioned homeless encampments remains limited, but see NAT'L L. CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA'S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 7–15 (2017), https://homelesslaw.org [https://perma.cc/LK3D-YQLY] (documenting the rise of sanctioned encampments as a response to homelessness but noting the difficulty in tracking their scope and effectiveness); Kirk Siegler, *Why Some Cities Are Operating Legal Homeless Camps—Even in the Dead of Winter*, NPR (Jan. 7, 2022), https://www.npr.org/2022/01/07/1070966346/why-some-cities-are-operating-legal-homeless-camps-even-in-the-dead-of-winter [https://perma.cc/7ZP3-U84N] (discussing sanctioned encampments in cities like Missoula, Mont., and Tacoma, Wash., while noting uncertainty about their long-term impact); Tomas Hoppough, Why Cities Are Turning to Sanctioned Homeless Encampments, DENVER7 (Jan. 8, 2022), https://www.denver7.com/news/national/why-cities-are-turning-to-sanctioned-homeless-encampments [https://perma.cc/UT4X-PWM6] (highlighting the expansion of sanctioned encampments in cities like Seattle and Denver but acknowledging gaps in data assessing their effectiveness).

35. *See* City of Grants Pass v. Johnson, 603 U.S. 520 (2024).

36. *See id.* at 542–47.

despite the Court's holding. Some progressive states and cities have enacted legislation that codifies core parts of the Ninth Circuit's *Martin* and *Grants Pass* holdings into state law. And conservative state legislatures have tended to enact legislation allowing cities to create sanctioned encampments while requiring camping bans in the rest of the city.

Even though the Supreme Court returned federal doctrine to the pre-*Martin* status quo, the socio-legal reality of legally sanctioned encampments is likely to persist. After all, these encampments are favored by a coalition of odd bedfellows: conservative lawmakers, homeless encampment residents who prefer sanctioned encampments over shelters, and progressive city officials forced to balance homeless rights with demands from the general public. Local jurisdictions have also made substantial investments in the encampments' infrastructure, such as public-health resources, facilities, and welfare services. And the encampments align better with changing values on homelessness than a return to the pre-*Martin* status quo of criminalizing homelessness. Even the city of Grants Pass itself created a series of designated encampment venues in the summer of 2024, in which its homeless community can stay indefinitely, although they must periodically rotate between camps.

In the decades to come, homeless-rights advocates might succeed in creating a sea change in U.S. housing law and policy or in otherwise enacting measures addressing the root causes of homelessness. But until then, the New Homelessness phenomenon will remain part of the American legal and urban landscape for the foreseeable future.

Before proceeding, we acknowledge that homelessness is complex and multicausal. Constitutional rules can help to alleviate or exacerbate it, but, collectively, other forces and institutions are surely just as or more important. Labor and housing markets; local welfare, drug, and housing policies; the availability of mental health services; and a broad set of sociocultural factors all play a role.[37] Countless articles and books in economics, history, sociology,

37. *See generally, e.g.*, Marah A. Curtis, Hope Corman, Kelly Noonan & Nancy E. Reichman, *Maternal Depression as a Risk Factor for Family Homelessness*, 104 AM. J. PUB. HEALTH 1664 (2014) (finding that maternal depression during the postpartum year significantly increases the risk of subsequent homelessness among families with young children); Marah A. Curtis, Hope Corman, Kelly Noonan & Nancy E. Reichman, *Life Shocks and Homelessness*, 50 DEMOGRAPHY 2227 (2013) (finding that the birth of a child with a severe health condition significantly increases the likelihood of family homelessness, especially in cities with high housing costs); Stefanie DeLuca & Eva Rosen, *Housing Insecurity Among the Poor Today*, 48 ANN. REV. SOCIO. 343 (2022) (reviewing recent sociological research on housing insecurity, including forced moves, landlord practices, and the role of social relationships in housing stability); Vincent A. Fusaro, Helen G. Levy & H. Luke Shaefer, *Racial and Ethnic Disparities in the Lifetime Prevalence of Homelessness in the United States*, 55 DEMOGRAPHY 2119 (2018) (finding that lifetime experiences of homelessness vary significantly by race and ethnicity, with Black and Hispanic individuals facing a substantially higher risk of homelessness compared to White individuals and highlighting structural inequalities as key drivers of these disparities); Zachary Giano, Amanda Williams, Carli Hankey, Renae Merrill, Rodica Lisnic & Angel Herring, *Forty Years of Research on Predictors of Homelessness*, 56 CMTY. MENTAL HEALTH J. 692 (2020) (reviewing four decades of research to identify persistent and emerging predictors of homelessness across various

public health, law, and other disciplines have explored these relationships. Our claim here is that recent constitutional developments are a significant cause, though certainly not the only such cause, of the qualitative developments that we call the New Homelessness.

The remainder of this Article proceeds as follows. Part I sketches out the precursor to the New Homelessness doctrine, beginning with the 1960s constitutional response to anti-vagrancy laws and culminating in *Martin* and *Grants Pass*, and notes the many questions the Ninth Circuit has left open. Part II then describes the emergence of the New Homelessness as a sociopolitical institution, documenting how it has accelerated the growth of tent cities across the nation, first through the non-enforcement of camping ordinances and later through the rise of sanctioned encampments. Part III shows why the institution is likely to survive the Supreme Court's 2024 decision and the fall of the federal constitutional legal institution. Finally, the Article concludes by discussing the potential future of homelessness in America.

I.
THE EVOLVING LEGAL STATUS OF HOMELESSNESS

For over a century, the rights of Americans who lack a home or domicile have been expanding, albeit in fits and starts. To be sure, the last century has seen political backlashes to homelessness[38]—often producing local, state, or federal legislation intended to protect property owners and the general public and restrict, conceal, or otherwise marginalize the homeless.[39] And the expanded de jure rights have certainly not addressed the root economic, sociological, or public-health causes of homelessness. Indeed, the fraction of the population without reliable residence has actually increased in recent decades.[40] Yet under the auspices of due process, property-seizure protection, and free expression, a trend emerged of courts recognizing more formal constitutional rights of the homeless. The rights giving rise to the New Homelessness were the latest developments in that trend.

populations, including adolescents, veterans, and families, highlighting factors such as family instability, unemployment, mental illness, and substance use).

38. *See* Scott Clifford & Spencer Piston, *Explaining Public Support for Counterproductive Homelessness Policy: The Role of Disgust*, 39 POL. BEHAV. 503, 503–04 (2017).

39. *See* McJunkin, *supra* note 12, at 136–41; U.S. DEP'T OF HOUS. & URB. DEV., THE 2024 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 5–6 (Dec. 2024), https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf [https://perma.cc/E8Q4-AHEQ]; Daniel Soucy, Makenna Janes & Andrew Hall, *State of Homelessness: 2024 Edition*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/ [https://perma.cc/LBQ6-MVSM].

40. McJunkin, *supra* note 12, at 136–41; Maria Foscarinis, *Homelessness, Litigation and Law Reform Strategies: A United States Perspective*, 10 AUSTL. J. HUM. RTS. 105, 110–14 (2004).

A. Evolution of Homeless Rights

To understand this transformation, consider where we started. At the Founding, non-property owners were barred from voting in most states. The rationales for limiting the franchise to property owners ranged from protectionist to merely elitist: The property ownership requirement may have simply represented a cynical effort by state legislators to protect the property interests of landed gentry (like themselves) from divestment or heavy taxation.[41] Only slightly less cynically, lawmakers may have distrusted non-landowners (who, on average, had less formal education) to make prudent policy decisions, or perhaps lawmakers believed non-landowners were not sufficiently attached to the society they would help govern; i.e., without fee simple, maybe they were just "passing through."[42] Whatever the initial rationale, in 1856, North Carolina became the last state to abolish the voting requirement of land-ownership, giving the franchise to nearly all White men twenty-one and over—with or without a domicile.[43]

Throughout much of U.S. history, having no domicile was not only disenfranchising, but it could also subject one to criminal punishment. The colonies inherited laws from Great Britain prohibiting "vagrancy," meaning the status of having no means of financial support or permanent residence.[44] Authorities applied such laws for much of the nineteenth and early twentieth centuries to effectively criminalize poverty and homelessness, permitting selective detention and incarceration of "undesirables."[45] Following the Civil War, existing and new state laws were applied selectively to freed Black people with the goal of temporarily sending them back into forced labor and incentivizing them to stay away from certain communities.[46]

Many vagrancy laws were repealed or declared unconstitutional on due process vagueness grounds in the second half of the twentieth century.[47] But more narrowly tailored laws criminalizing acts like loitering, public drunkenness, and aggressive panhandling, and—most relevant here—"anti-

41. Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335, 364–65 (1989).

42. *Id.* at 356–59 (explaining the justifications provided for property requirements for voting in the colonies of Massachusetts and Virginia).

43. Stanley L. Engerman & Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 J. ECON. HIST. 891, 907 (2005).

44. *See* Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209, 212 (1989).

45. *See* Arthur H. Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 558–60 (1960); Amy Dru Stanley, *Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America*, 78 J. AM. HIST. 1265, 1274–78 (1992).

46. Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 912, 921 (1998); Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595, 1606 (2015).

47. *E.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 158–62 (1972); *see* RISA GOLUBOFF, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S 253 (2016).

camping," "anti-sleeping," "sit/lie," and unattended-property seizure-and-destruction laws remained valid and enforced throughout much of the country into the twenty-first century.[48]

Until very recently, having no place to store one's personal property in many cities made it especially vulnerable to unilateral government seizure—especially from sidewalks and public parks—and summary destruction. Many municipal governments made a practice of confiscating personal property left unattended.[49] Some cities argued that, given the property's location in public spaces, the homeless had no cognizable constitutional interest in their property.[50] In *Lavan v. City of Los Angeles*, the Ninth Circuit had a different view: A divided panel held that the homeless plaintiffs' interest in their chattels was a recognized property interest, triggering due process rights before its destruction.[51] The court, therefore, "reject[ed] the City's suggestion that we create an exception to the requirements of due process for the belongings of homeless persons."[52]

B. The Anti-Anti-Sleeping Legal Movement

The prevalence of U.S. homelessness has ebbed and flowed over the last several decades. Homelessness prevalence, however, is not the same thing as homelessness *visibility*. Even as the population of people classified as homeless, i.e., those without regular shelter access, decreased slightly between 2007 and 2020, the (smaller) number of people unsheltered on any given night increased by approximately fifty thousand between 2014 and 2020.[53] In other words, at any given time, there are more people "who lack[] a fixed, regular, and adequate

48. *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, 633–34 (1992).

49. For example, the city of Los Angeles had a longstanding policy of "summarily confiscating and destroying" people's briefly unattended carts containing things like "documents," "family memorabilia," "cell phones, [and] sleeping bags," all without warning or notice. Lavan v. City of L.A., 693 F.3d 1022, 1024–26, 1032 (9th Cir. 2012). The city justified the "seizure[s] and disposal[s]" by arguing that the affected had violated a city ordinance stating that "[n]o person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk." *Id.* at 1026.

50. *See id.* at 1027–28, 1031. Other jurisdictions faced with similar governmental actions have produced varied decisions. *See, e.g.*, Proctor v. District of Columbia, 310 F. Supp. 3d 107, 110–11, 116 (D.D.C. 2018) (distinguishing *Lavan* in that the plaintiffs failed to show that District officials did not reasonably consider the property abandoned).

51. *Lavan*, 693 F.3d at 1031–32. The *Lavan* panel also held that expectation of privacy was irrelevant to a Fourth Amendment seizure claim: It noted that the standard for property seizure is "some meaningful interference with an individual's possessory interests in that property," and reasonable privacy expectations are relevant only to unlawful search cases. *Id.* at 1027–28 (9th Cir. 2012) (quoting United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

52. *Id.* at 1033.

53. MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN & THOMAS JOE BEDNAR, U.S. DEP'T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS—PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 6 (2021), https://www.huduser.gov/portal/sites/default/files/pdf/2020-ahar-part-1.pdf [https://perma.cc/2KHJ-ZCTG].

nighttime residence,"[54] often residing outside, in a car, abandoned building, or another "place not meant for human habitation," as opposed to, say, a shelter or transitional housing.[55]

As U.S. homelessness visibility began to increase, cities increasingly enacted measures prohibiting camping (anti-camping ordinances) and sleeping or lying down (sit-lie ordinances) on some or all public property.[56] Between 2006 and 2019, the number of local laws throughout the country banning sitting or lying in public ways increased by 78 percent, laws banning living in vehicles increased by 213 percent, and laws banning camping city-wide increased by 92 percent.[57] These laws jointly produced thousands of arrests, citations, and incarcerations of homeless people in the 2010s and early 2020s.

Homeless people and their advocates, most notably the National Homelessness Law Center (NHLC),[58] have developed several legal tactics to fight these laws. The tactics include First Amendment challenges to anti-panhandling measures, Fourth Amendment challenges to property seizures, as reviewed above, and substantive due process attacks on anti-sleeping laws for those with no other place to sleep.[59] But perhaps the most successful tactic has come from an unexpected, though not entirely illogical, source: the prohibition of cruel and unusual punishment under the Eighth Amendment.[60]

1. Anti-Sleeping Laws as Cruel and Unusual Punishment

The Eighth Amendment as a basis for a right to sleep is a bit of a surprising doctrinal development: How can imposing a small fine or short jail stint be cruel and unusual? But since the early 1960s, the Eighth Amendment has not only categorically prohibited certain punishments (like torture)[61] and disproportional punishments (e.g., the death penalty for rape),[62] but it has also restricted the

54. 24 C.F.R. § 582.5 (2024).

55. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 3, at 4.

56. Eric S. Tars, *Criminalization of Homelessness*, *in* NAT'L LOW INCOME HOUS. COAL., ADVOCATES' GUIDE '21: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS & POLICIES 6–36 (2021), https://nlihc.org/sites/default/files/AG-2021/2021_Advocates-Guide.pdf [https://perma.cc/7UB8-PYWR].

57. *Id.*

58. *History & Mission*, NAT'L HOMELESSNESS L. CTR., https://homelesslaw.org/history-mission/ [https://perma.cc/E9C6-LDNU].

59. *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 77–81 (2019) [hereinafter HOUSING NOT HANDCUFFS], https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/35CR-SWMC] (providing an overview of strategies).

60. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

61. Ingraham v. Wright, 430 U.S. 651, 665–67 (1977).

62. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the death penalty as punishment for rape of an adult was disproportionate and therefore cruel and unusual punishment).

offenses that the government may punish at all.[63] The origin of this restriction on *what* may be punished is the Supreme Court's 1962 decision in *Robinson v. California*. There, the Court held that the government may not criminalize the simple status of "narcotic addiction," unless some act or behavior (such as drug use or possession) is also a requisite element.[64]

Six years later, in *Powell v. Texas*, the Court had the opportunity to clarify the scope of *Robinson* when it considered the Eighth Amendment constitutionality of a Texas statute criminalizing "public drunkenness."[65] The Court upheld the law, with four justices, led by Justice Thurgood Marshall, reasoning that appearing drunk in public is distinguishable from having a chronic condition: The former is a behavior, not a condition, even if the condition may compel the behavior. Justice Marshall believed that *Robinson* did not prohibit the government's criminalization of "involuntary" conduct and that Mr. Powell's public-drunkenness conviction should be upheld.

A group of four other justices, led by Justice Abe Fortas, disagreed, reasoning that criminalizing the behavior that a condition (here, alcoholism) compels is not materially different from criminalizing the condition itself: "[C]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," wrote Justice Fortas.[66]

With the Court evenly split 4–4, that left Justice Byron White, who joined the four justices led by Justice Marshall to uphold the conviction, but only because the defendant, Mr. Powell, had not shown that alcoholism compelled both his intoxication and his *public* intoxication.[67] Justice White implied he would have voted differently had Mr. Powell been homeless or otherwise forced to be in public.[68] Thus, it seems that a majority of the Court (the four-justice dissent plus Justice White) would have held the law unconstitutional as applied to Mr. Powell had he shown that his behavior was involuntary or, in other words, completely compelled by his status.

Twenty-four years later, in *Pottinger v. City of Miami*, a Southern District of Florida district judge built on Justice White's *Powell* concurrence to hold that Miami's practice of arresting homeless people for sleeping on public property violated the Eighth Amendment.[69] The court reasoned that Michael Pottinger and

63. *Ingraham*, 430 U.S. at 666–67.

64. Robinson v. California, 370 U.S. 660, 667 (1962) (noting that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold").

65. Powell v. Texas, 392 U.S. 514, 517, 531–32 (1968). Two circuit courts had previously invalidated public drunkenness laws on reasoning similar to that of the *Powell* dissenters. *See* Easter v. District of Columbia, 361 F.2d 50, 53–55 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761, 764–65 (4th Cir. 1966); *Powell*, 392 U.S. at 559–70 (Fortas, J., dissenting).

66. *Powell*, 392 U.S. at 554, 567–68 (Fortas, J., dissenting).

67. Jones v. City of L.A., 444 F.3d 1118, 1134–35 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007); *Powell*, 392 U.S. at 553–54 (White, J., concurring).

68. *See Jones*, 444 F.3d at 1135–36; *Powell*, 392 U.S. at 553–54 (White, J., concurring).

69. Pottinger v. City of Miami, 810 F. Supp. 1551, 1554, 1563–65 (S.D. Fla. 1992), *remanded*, 40 F.3d 1155 (11th Cir. 1994), *and ordered to begin settlement discussions*, 76 F.3d 1154 (1996).

his co-plaintiffs, unlike the plaintiff in *Powell*, had "no realistic choice but to live in public places."[70] The Eleventh Circuit Court of Appeals never reviewed the Eighth Amendment issue because the parties eventually agreed to a court-supervised program that regulated several aspects of how the city treated homeless individuals (the "Pottinger Agreement"), which continued until its court-approved dissolution in 2019.[71]

Fourteen years after *Pottinger*, in 2006, a divided Ninth Circuit panel in *Jones v. City of Los Angeles* also drew on Justice White's *Powell* concurrence. White had written that "[t]he proper subject of inquiry is whether volitional acts brought about the 'condition' and whether those acts are sufficiently proximate to the 'condition'" to permit penal sanctions on such condition.[72] Faced with claims by homeless plaintiffs that the city had criminalized their sleeping on the sidewalks of Skid Row, the *Jones* majority reasoned that "sitting, lying, and sleeping"[73] are ancillary to being human, and that, for those with the condition of homelessness, they must be done in public.[74] As such, as long as there were not enough shelter beds for the city's homeless, the city could not constitutionally criminalize homeless people's "involuntarily sitting, lying, and sleeping in public."[75]

2. *A Constitutional Shift:* Martin v. City of Boise *&* Johnson v. City of Grants Pass

Jones was vacated following a settlement. But in 2019, another Ninth Circuit panel adopted the "reasoning and central conclusion" of *Jones*, importing

Eighteen years later, the Eleventh Circuit considered and rejected a similar Eighth Amendment challenge to an Orlando ordinance that prohibited "sleeping out-of-doors" on all public property. *See* Joel v. City of Orlando, 232 F.3d 1353, 1356, 1361–62 (11th Cir. 2000) (quoting ORLANDO, FLA., CITY CODE § 43.52). Crucially, however, the ordinance would likely have passed muster even under the Ninth Circuit's *Martin-Grants Pass* jurisprudence: A surplus of adequate shelter existed in the city every day during the period in question. Although the court mentioned that the ordinance "targets conduct, and does not provide criminal punishment based on a person's status," *id.* at 1362, the court appeared to reason that the criminalized behavior of public sleeping is based on conduct, not status, because it entails voluntary rejection of open shelter spaces out of preference for public camping. In other words, unlike with the conduct of the plaintiffs living in Boise and Grants Pass, the *Joel* plaintiffs' sleeping on Orlando public property was not a compulsory act adjunct to their homelessness status. Regardless, this language is unnecessary to the outcome, so it is, at most, dicta. The court does not repudiate the central Eighth Amendment analysis of the *Pottinger* district court.

70. *Pottinger*, 810 F. Supp. at 1563; *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).

71. Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1179, 1181–82 (S.D. Fla. 2019).

72. *Jones*, 444 F.3d at 1136 (alteration in original) (quoting *Powell*, 392 U.S. at 550 n.2 (White, J., concurring)).

73. *Id.* at 1136.

74. *Id.* at 1125, 1136.

75. *Id.* at 1138.

much of its logic into the panel's binding decision in *Martin v. City of Boise*.[76] In *Martin*, six current or former homeless people had challenged two ordinances of Boise, Idaho.[77] One ordinance, the "Camping Ordinance," prohibited using "any of the streets, sidewalks, parks, or public places as a camping place at any time,"[78] with "camping" defined as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."[79] Another, the "Disorderly Conduct Ordinance," prohibited "[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."[80] The unanimous *Martin* panel first determined that homelessness is a status immune from criminal punishment.[81] The panel then used the reasoning of the patched-together Fortas–White opinions in holding that, for the involuntarily homeless with no other place to sleep, the status of homelessness compels the behavior of sleeping in a public place, and is therefore also involuntary and may not be criminalized.[82] An ordinance violates the Eighth Amendment, the panel held, where "it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[83]

The city unsuccessfully petitioned for rehearing en banc, and several judges filed opinions dissenting from that denial. On the Eighth Amendment issue, Judge Milan Smith took issue with the panel's interpretation of *Powell* as prohibiting the criminalization of involuntary activity.[84] He argued that, under Supreme Court precedent, a dissent (here, Justice Fortas's dissent) cannot be considered in determining the Court's holding.[85] Instead, he argued, the Circuit was bound to follow Justice Marshall's *Powell* opinion, which reasoned that even behavior compelled by status could be criminalized under the Eighth Amendment.[86] During these proceedings, the original panel also emphasized that its holding was a narrow one. As Judge Marsha Berzon clarified in her concurrence in the denial of rehearing en banc, only "municipal ordinances that

76. Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584, 604 (9th Cir. 2019).

77. *Martin*, 920 F.3d at 603.

78. *Id.* (quoting BOISE, IDAHO, CITY CODE § 9-10-02).

79. *Id.* at 603–04 (quoting BOISE, IDAHO, CITY CODE § 9-10-02).

80. *Id.* at 604 (alteration in original) (quoting BOISE, IDAHO, CITY CODE § 6-01-05).

81. The panel was unanimous on the substantive issue. Judge Owens dissented on procedural grounds but concurred on the substantive Eighth Amendment question. *See id.* at 618–20 (Owens, J., concurring in part and dissenting in part).

82. *Id.* at 616–17.

83. *Id.* at 604.

84. One of the authors served as a law clerk to Judge Milan D. Smith, Jr. in 2008–09, before the *Martin* litigation was initiated. None of the authors have corresponded with Judge Smith about this line of cases; this Article's characterizations of Judge Smith's views come exclusively from his published opinions.

85. *Martin*, 920 F.3d at 590–93 (Smith, J., dissenting from the denial of rehearing en banc).

86. *See id.* at 591.

criminalize sleeping, sitting or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment."[87] The Supreme Court denied cert without comment.[88] And so, the *Martin* panel decision remained binding precedent in the Ninth Circuit.

Three years later, a divided Ninth Circuit panel expanded *Martin*'s holding in *Johnson v. City of Grants Pass*.[89] In *Grants Pass*, a group of homeless individuals in Grants Pass, Oregon, challenged a set of local ordinances that, in relevant essence, prohibited sleeping on sidewalks at any time; prohibited "campsites" (including any bedding, blankets, or pillows) at any time on public property, including parks and benches; and banned cars from public parks overnight.[90] Other ordinances provided for civil fines and, for those who receive two citations within a year, a thirty-day exclusion order from city parks, with order-violators subject to criminal trespass charges.[91] Like the city of Boise, Grants Pass did not have enough shelter beds for its homeless population.[92]

Collectively, then, the Grants Pass laws were marginally less restrictive than the Boise laws challenged in *Martin*: They would seem to allow a person to sleep overnight on a bench or the ground in a public park, just without any bedding. Moreover, violating the laws did not necessarily or immediately trigger criminal liability. *Martin* did not, therefore, dictate the outcome in *Grants Pass*; that panel could have limited *Martin* to criminal laws prohibiting all overnight presence in public spaces.

The court nonetheless expanded the *Martin* rule in two ways. First, it extended *Martin*'s notion of compulsory behavior resulting from the condition of homelessness. Whereas *Martin* considered only the act of sleeping, the *Grants Pass* court was presented with laws banning items that, while not always strictly essential for sleep, are certainly considered integral to sleep for people without homes: "rudimentary forms of protection from the elements," e.g., blankets, sleeping bags, and pillows.[93] The court reasoned that for the involuntarily homeless, putting down one's bedding on public property at night was nearly as compulsory as sleeping in public.[94] Second, the court broadened the constitutional prohibition on "cruel and unusual punishment" in this context to include civil fines, so long as those fines increase the violator's vulnerability to

87. *Id.* at 589 (Berzon, J., concurring in the denial of rehearing en banc).

88. City of Boise v. Martin, 140 S. Ct. 674 (2019) (mem.) (denying petition for certiorari).

89. 72 F.4th 868 (9th Cir. 2023).

90. *Id.* at 875–76; *see* GRANTS PASS, OR., MUN. CODE § 5.61.010 (2023) (amended 2024) (defining a campsite as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live").

91. *Grants Pass*, 72 F.4th at 876.

92. *Id.* at 875.

93. *Id.* at 890–91, 896.

94. *Id.* at 891.

criminal punishment and the "civil and criminal punishments are closely intertwined."[95]

Judge Daniel Collins dissented.[96] He concluded that the holding "effectively requires the City of Grants Pass to allow all but one of its public parks to be used as homeless encampments."[97] In other words, he characterized the court's holding as requiring the city to provide residents with a license to its property for the purpose of sleeping—along with one's bedding and perhaps, other sleeping accessories.

What should we make of Judge Collins's characterization? There appeared to be nothing in the majority opinion that required a city to allow "all but one of its public parks" to be used as encampments. What the opinion probably did require was the inverse: for the city to allow *one* of its public spaces to be used for sleeping, including with bedding. But whether it is one park or all-but-one park is not particularly material to the nature of the right. All seemed to agree that a government must provide the involuntarily homeless with a license to use at least one of its public spaces in a way that allows them to sleep in relatively humane conditions. Yet local officials and courts may have seized on this characterization in deciding that cities are prohibited from removing encampments, wherever they may lie.[98]

Grants Pass filed a petition for rehearing en banc (already having had its petition for initial hearing en banc denied). The Ninth Circuit narrowly denied the petition, issuing a slew of dueling opinions for and against the en banc vote and an additional statement from the panel.[99]

C. Martin*'s Legal Legacy*

As the above discussion implies, *Martin* and its predecessors left open several questions for district courts to hash out. Indeed, Grants Pass's cert petition cited cities' complaints about the many open questions and the legal uncertainty created thereby. It was these questions and other uncertainties that brought about the New Homelessness as a legal institution, as many risk-averse local officials adopted implausibly broad interpretations to minimize risk of liability.[100] We explore some of these questions in the subsections that follow.

95. *Id.* at 889–90, 896.
96. *Id.* at 896–914 (Collins, J., dissenting).
97. *Id.* at 896.
98. *See infra* Part II.B.
99. *See Grants Pass*, 72 F.4th at 868.
100. Other secondary, open questions include whether the *Martin* rule giving the homeless a right to public spaces includes some spaces that are typically off-limits to the general public, such as abandoned lots, *see* Rios v. Cnty. of Sacramento, 562 F. Supp. 3d 999, 1020 (E.D. Cal. 2021) (holding that *Martin* prevented removal from "a publicly owned lot that ha[d] been vacant for over ten years"), and whether civil removal orders—with no criminal ramifications—triggers a *Martin* claim, *see* Spinks v. Cal. Dep't of Transp., No. 3:22-cv-05067-WHO, 2023 WL 2347422, at *2, *6 (N.D. Cal. Mar. 2, 2023) (holding no Eighth Amendment *Martin* claim lies from *civil* removal for trespassing).

1. Who May Invoke the Right?

In *Martin,* the Ninth Circuit stated that the right to stay on public property applied only to those who are "sitting, lying, and sleeping in public" "involuntarily," that is, those who have "no option of sleeping indoors."[101] "We . . . hold that an ordinance violates the Eighth Amendment," the court stated, "insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[102] The court elaborated: "[O]nly 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.'"[103] By making the right to remain on public property expressly conditional on "no alternative shelter [being] available to [the person,]" and conditional on the person sitting, lying, or sleeping in public "involuntarily," the court made clear that only those with no access to any residence or shelter may invoke the right.[104] It further clarified that "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," may not invoke the right.[105]

The rule appeared to create a form of objective test, requiring inquiry into whether an available shelter was "adequate" and whether it was "realistically available." But this test "prove[d] all but impossible to administer in practice," as Justice Neil Gorsuch would later observe.[106] Under *Martin*, it would apparently not have been sufficient to invoke the right that a person had a reasonable temporary shelter available, but subjectively and unreasonably chose not to take advantage of it. This fact required courts—and more directly, city officials and police officers—to make a reasonableness determination on a case-by-case basis. If someone had an uncle nearby with an extra bed, but she had not spoken with him in years, did she have "realistically available" shelter such that she could have been arrested for sleeping in public? What if there were an adequate shelter, but it was across town, and the person had no means of transportation? What if those who had been homeless for years, and, despite having the capacity to do so, had stopped making efforts to obtain access to permanent shelter? Other issues were raised by those who declined to accept shelter because of a lack of accommodation for pets or couples, or for fear of theft or violence. Yet another unresolved issue was the case of the 25–40 percent

101. Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019).
102. *Id.* at 604.
103. *Id.* at 617 (alteration in original).
104. *Id.* at 604.
105. Johnson v. City of Grants Pass, 72 F.4th 868, 877 (9th Cir. 2023) (quoting *Martin*, 920 F.3d at 617 n.8 (9th Cir. 2019)).
106. City of Grants Pass v. Johnson, 603 U.S. 520, 552–53 (2024).

of the homeless population who suffer from severe mental illness, which may prevent them from taking steps to obtain shelter.

As Judge Milan Smith noted in his dissent from denial of rehearing en banc in *Grants Pass*,[107] cities struggled with the task of determining who is involuntarily homeless on any given night.[108] Police officers, who determine whether to cite a given individual, are ill-suited to make this determination; they have neither the time nor the information-gathering resources.[109] Indeed, cities and states argued in their Supreme Court amicus briefs supporting Grants Pass's cert petition that they lacked guidance on how they must carry out censuses of the nightly homeless population in order to determine whether shelter is available, or "how often . . . such counts [must] be performed—nightly, monthly, annually, or at some other interval."[110]

2. What Shelter is "Adequate"?

As stated, *Martin* stressed that its urban camping right did not apply to those who have access to "adequate temporary shelter."[111] What then, constituted an "adequate" temporary shelter? In *Martin*, a church-run shelter had space each night in question, but the court held that it was insufficient to relieve the city of the obligation, because it coerced residents into participating in religious-themed activities. [112] The court noted that, in light of its 2007 holding that "coerc[ing]" people into a "religion-based treatment program[]" violates the Establishment Clause,[113] coercing homeless people into a religious-themed shelter was likewise unconstitutional.[114]

Other than having a secular theme, what other characteristics must a shelter possess to be adequate under *Martin*?[115] The Ninth Circuit stated that a shelter

107. *Grants Pass*, 72 F.4th at 935–36 (M. Smith, J., dissenting).

108. *See, e.g.*, Brief of *Amici Curiae* City of Phoenix & the League of Ariz. Cities and Towns Supporting Petitioner at 11, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) [hereinafter Phoenix *Grants Pass* Merits Amicus Brief].

109. *See id.* at 11–12.

110. Petition for a Writ of Certiorari at 33–34, City of Boise v. Martin, 140 S. Ct. 674 (2019) (mem.) (No. 19-247) [hereinafter Boise *Martin* Cert. Petition]; Phoenix *Grants Pass* Merits Amicus Brief, *supra* note 108, at 3 (noting the unworkability of the law following *Martin* and *Grants Pass*); Brief of *Amicus Curiae* City of Los Angeles in Support of Petitioner at 15, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) [hereinafter Los Angeles *Grants Pass* Amicus Brief] (noting how it is easier for smaller towns and cities to comply with the *Grants Pass* and *Martin* "homeless versus shelter beds counting requirement," but "cities like Los Angeles, San Francisco, San Diego, Sacramento, Seattle, Portland, Las Vegas, Phoenix – and a host of others – simply cannot").

111. Martin v. City of Boise, 920 F.3d 584, 617 n.8 (9th Cir. 2019).

112. *Id.* at 609–10.

113. *Id.* at 610 (citing Inouye v. Kemna, 504 F.3d 705, 712–13 (9th Cir. 2007)).

114. *See id.*

115. Boise *Martin* Cert. Petition*, supra* note 110, at 33 (observing that the Ninth Circuit "gives virtually no guidance as to what ['practically available'] means . . . [W]hat about other forms of shelter [other than formal homeless shelters,] such as the home of a friend or relative? The court also held that some shelters, despite having beds available, may not be 'practically available' because the shelter has certain rules or features by which individuals may be unwilling to abide, such as check-in times,

must be indoors, and a subsequent California district court interpreted the holding as such, holding that an airport tarmac "with no roof and no walls, no water and no electricity" was insufficient.[116] But if it had the features of a traditional residence, was there a location requirement? That is, must the shelter be reasonably proximate to the core of the homeless population? Indeed, consistent with past practices, city officials often wish to move homeless people as out of sight as possible. Lastly, under *Martin*, was the ability to stay in a shelter indefinitely required for the law to pass muster?

Lower courts took responsibility for deciding whether available shelters were "adequate." A Los Angeles district court held that shelters were adequate only if they met several requirements, including having nursing staff, on-site security, and testing for communicable diseases.[117] The court further held that, without enough such adequate shelters, a city may not enforce its anti-camping laws at all. In light of such strict interpretations, the Supreme Court later noted an amicus brief's claim that "*Martin* and its progeny have 'paralyzed' communities and prevented them from implementing even policies designed to help the homeless while remaining sensitive to the limits of their resources and the needs of other citizens."[118]

3. Does the Right Apply to Other Actions Incidental to Homelessness and Beyond?

Martin's reasoning might extend to other acts that flow involuntarily from homelessness status, and in at least one case, it did. The Supreme Court majority noted that "[t]here is uncertainty . . . over whether *Martin* requires cities to tolerate other acts no less 'attendant [to] survival' than sleeping, such as starting fires to cook food and 'public urination [and] defecation.'"[119] Indeed, in denying a motion for a temporary restraining order after public toilets were removed from a public space, one district court relied on *Martin* in prohibiting the city of Sacramento from citing homeless individuals for public urination or defecation.[120]

One district court similarly applied the Ninth Circuit's logic to invalidate, as applied to the indigent homeless registered sex-offenders, a statutory scheme

limitations on the duration of one's stay, restrictions on ingress and egress, or religious 'messaging on the shelter's intake form' and 'iconography on the shelter walls'").

116. Warren v. City of Chico, No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648, at *4 (E.D. Cal. July 8, 2021).

117. *See* L.A. Alliance for Hum. Rts. v. City of Los Angeles, No. LA CV 20-02291-DOC-KES, 2020 WL 2512811, at *3–4 (C.D. Cal. May 15, 2020).

118. City of Grants Pass v. Johnson, 603 U.S. 520, 554 (2024)

119. *Id.* at 555 (2024) (quoting Brief of *Amici Curiae* City of Phoenix & the League of Ariz. Cities and Towns Supporting Petitioner at 29–30, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) [hereinafter Phoenix *Grants Pass* Cert. Amicus Brief]) (second and third alterations in original)).

120. Mahoney v. City of Sacramento, No. 2:20-cv-00258-KJM-CKD, 2020 WL 616302, at *1, *3, *4 (E.D. Cal. Feb. 10, 2020).

requiring sex offenders incarcerated in Illinois to secure a "qualifying host site" before being released from prison.[121] Judge Virginia Kendall held that the scheme, which forced sex offenders to remain incarcerated until they located housing, effectively punished that class of people for their status of being indigent and, ultimately, homeless.[122]

4. To What Extent Can the Government Create "Designated Spaces"?

Assuming there is no available shelter, to what extent could a government have limited the set of public spaces in which people may sleep or occupy? That is, could a government have prohibited the occupation of all public spaces except for a certain designated space? If so, were there requirements for this space, such as safety or proximity to the core of the homeless population?

As already noted, *Martin*'s holding appeared limited to cases where a city ordinance barred use of all public spaces. If this were not clear from the decision, recall that panel member Judge Berzon attempted to clarify the court's intent in her concurrence to the denial of rehearing en banc. She said the only municipal ordinances that are unconstitutional are those "that criminalize sleeping, sitting or lying in *all* public spaces, when *no* alternative sleeping space is available."[123] Thus, it seemed clear that cities could designate some areas as off limits—"an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible," the court noted[124]—so long as at least one area was available. That is, cities could generally create designated camping areas, as many had done.[125]

Consistent with this language, courts interpreting *Martin* and *Grants Pass* generally allowed ordinances to stand so long as they did not prohibit sitting or lying everywhere in the jurisdiction.[126] But one district court considering a Santa Barbara sit-lie ordinance allowed the Eighth Amendment challenge to survive a motion to dismiss, even though the ordinance allowed sleeping everywhere but "downtown areas."[127] And the city of Phoenix was enjoined from enforcing

121. Murphy v. Raoul, 380 F. Supp. 3d 731, 763–66 (N.D. Ill. 2019). The case was not appealed to the Seventh Circuit.

122. *Id.*

123. Martin v. City of Boise, 920 F.3d 584, 589 (9th Cir. 2019) (Berzon, J., concurring in the denial of rehearing en banc).

124. *Id.* at 617 n.8 (9th Cir. 2019); *see also* Phoenix *Grants Pass* Cert. Amicus Brief, *supra* note 119, at 23 ("*Martin* appears to possibly allow regulations for time, place, and manner of encampments.").

125. *See infra* Part II.D.

126. *See* Bacon v. City of Chula Vista, No. 22-cv-1278-GPC-WVG, 2022 WL 3924268, at *2 (S.D. Cal. Aug. 30, 2022); Tournahu v. Flynn, No. 22-cv-03220-EMC, 2022 WL 3549682, at *3 (N.D. Cal. Aug. 18, 2022).

127. Boring v. Murillo, No. LA CV 21-07305-DOC(KES), 2022 WL 14740244, at *6 (C.D. Cal. Aug. 11, 2022) ("[U]nlike the city-wide bans in *Jones* and *Martin*, the Santa Barbara ordinance applies in only one area of the City. This geographic limitation may ultimately mean the ban does not violate the Eighth Amendment . . . [But g]iven . . . the similarities to previously overturned ordinances, Plaintiffs have adequately pled an Eighth Amendment violation at this stage of litigation.").

camping and sleeping ordinances, although it was allowing people to camp in a mass encampment ("the Zone").[128] Moreover, where plaintiffs challenged city-wide sit-lie ordinances, rather than judicially carving out a designated location in the city for sleeping, courts often enjoined the entire ordinance, thus allowing sleeping everywhere.[129]

And so, the Ninth Circuit's New Homelessness jurisprudence left several strategies to operationalize its central holding difficult to implement and left important questions unanswered. We show in Part II that this vagueness, combined with logistical enforcement challenges, often caused officials to err on the side of laxity, suspending enforcement of anti-sleeping and anti-camping ordinances entirely, even when not required to do so.

II.
THE RISE OF THE NEW HOMELESSNESS

A. Tracing the Ninth Circuit's Impact

Law can bring about social change under certain circumstances. In addition to the coercive power of court-imposed mandates, law can be impactful in indirect and non-coercive ways, such as by signaling a moral commitment or coordinating voluntary behavior.[130] But in most cases, a legal rule is most significant when it directly forces behavioral change. Legal historians, political scientists, and law-and-society scholars have offered different insights into the circumstances under which law is most impactful. One insight is that legal change will produce policy and social change when it aligns with political incentives and is supported by a significant fraction of relevant policymakers and empowered stakeholders.[131]

This is how *Martin* became a primary cause of the late-2010s surge in mass urban camping. Instead of staying in shelters or sleeping on isolated benches and sidewalks, the chronically homeless population increasingly began living in clusters of camps scattered throughout urban areas. As we made clear above, *Martin*'s and *Grants Pass*'s urban camping rights are highly qualified. So, how

128. *See* Fund for Empowerment v. City of Phoenix, 646 F. Supp. 3d 1117, 1123, 1125 (D. Ariz. 2022) ("Defendants allegedly rely on [the camping and sleeping] statutes to cite unsheltered individuals, move them into the Zone, and destroy their property . . . .").

129. *See, e.g.*, Coal. on Homelessness v. City and Cnty. of San Francisco, 647 F. Supp. 3d 806, 841–42 (N.D. Cal. 2022) (enjoining five related state and local ordinances); *Fund for Empowerment*, 646 F. Supp. 3d at 1123, 1132 ("It is therefore ordered that . . . the City, its agents and employees, are preliminarily enjoined from . . . [e]nforcing the Camping and Sleeping Bans against individuals who practically cannot obtain shelter as long as there are more unsheltered individuals in Phoenix than there are shelter beds available . . . ." (emphasis omitted)).

130. *See generally* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (law as a focal point); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) (law as expressive signaling).

131. *See, e.g.*, Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2017, 2057–58 (2020) (describing the importance of making "law and politics align").

and why did the Ninth Circuit's cases cause this mass urban camping phenomenon?

We outline a three-step process by which the *Martin-Grants Pass* jurisprudence led to the shift in the nature of American homelessness. First, after the *Martin* mandate in 2019, city officials and courts struggled to interpret the decision, and many officials and some trial courts misinterpreted it, giving it an implausibly broad reading. In some cases, this misreading may have been motivated in part by officials' normative views about criminalizing homelessness. Second, in response to this new permissive regime toward camping in public spaces, large numbers of homeless individuals increasingly shifted to openly camping in parks, sidewalks, and other public spaces. Homeless individuals have long been forced to sleep in parks and other public spaces, but under this new regime, they were now able to do so with legal impunity. Without risk of disruption from law enforcement, a large fraction of the homeless population shifted away from resting in less visible venues like shelters and other more surreptitious private or public spaces. Crucially, the homeless population's new visibility in public spaces triggered a public backlash. Third, in response to this public backlash, officials restricted camping to designated locations, which, in turn, spawned a new social-political infrastructure around these encampments.

In making the case for this causal chain of events, we use process tracing. This means that we "form multiple hypotheses about what caused an outcome," the "what" here being either *Martin-Grants Pass*, or else some other socio-legal-political phenomenon, and the "outcome" here being the surge in urban encampments.[132] We then "identify implications of each hypothesis" and determine which best matches the observable phenomena.[133]

Our primary hypothesis is that it was the *Martin* decision that largely caused the explosion in urban encampments during the late 2010s and early 2020s. An alternative explanation for this trend is that nonlegal forces were primarily responsible and that it would have occurred even if the *Martin* decision had never happened. Hinting at this possibility two years prior to *Martin*, the Seattle University School of Law Homeless Rights Advocacy Project authored a policy brief stating that "due to an acute shortage of affordable housing and even a lack of emergency shelters, homeless encampments not only exist but are also increasing in many cities."[134] If true, *Martin* contributed nothing to the rise of urban encampments. We can view this as the "null-hypothesis" against which we evaluate our findings.

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132. *See* Katerina Linos & Melissa Carlson, *Qualitative Methods for Law Review Writing*, 84 U. CHI. L. REV. 213, 231 (2017).

133. *See id.* at 231–32 (citing David Collier, *Understanding Process Tracing*, 44 PS: POL. SCI. & POL. 823, 825–26 (2011)).

134. SAMIR JUNEJO, HOMELESS RTS. ADVOC. PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS i (Suzanne Skinner & Sara K. Rankin eds., 2016), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1006&context=hrap [https://perma.cc/JV36-TTS2].

Process tracing also involves evaluating evidence implying that one phenomenon of interest (the effect) would not have happened without some other phenomenon (the cause). In our case, urban camping is the effect, while *Martin* is the cause we investigate. Such evidence can take several forms.

First, one piece of evidence of a law's impact is that the policymakers cite the legal rule in enacting policy and legal subjects reference the rule in explaining their changed behavior. Of course, citation is neither necessary nor sufficient for causation: A policymaker or subject might act pursuant to a legal rule without mentioning it, or she may make a legal rule the scapegoat for an unpopular policy or action, even if she would have done the same thing regardless. Yet even though citing a law is not dispositive that the law is causing the policy or behavior, it constitutes some evidence of such a causal effect. In our case, we look for statements of local officials citing *Martin* when announcing encampment-promoting policy changes and for statements of homeless individuals and their advocates who shifted away from shelters and toward public camping.

A second piece of evidence of a law's policy impact is that policy changes follow shortly in time after the legal change. We look for newly adopted laws, changes in how existing laws are enforced, and whether they are pre- or post-*Martin*.

Taken together, this means we examine jurisdictions' policy changes and analyze the statements of public officials and their critics, including homeless-rights advocates and disgruntled constituents. An important source of information for our analysis is the twenty-nine amicus briefs filed as part of Grants Pass's Supreme Court cert petition and the forty-one briefs filed in the actual case (both for affirmance and reversal), which offer a comprehensive analysis by governments themselves of how the New Homelessness jurisprudence has affected their policies and by nonprofits of how it has affected the homeless community. We also rely on other sources, such as press releases, academic writing, and the advocacy of homelessness-rights organizations.

B. City Officials and Some Trial Courts Misinterpret Martin

There is substantial evidence that, because of *Martin*, many cities simply stopped enforcing anti-camping and sit-lie ordinances shortly after the decision. To start, most cities did not (and still do not) have enough shelter beds for their homeless populations, meaning they could have complied with *Martin* by facilitating more overnight shelter arrangements. For example, in 2024, Los Angeles County reported approximately 75,312 homeless individuals, with only about 22,947 shelter beds available, indicating a significant shortfall in shelter capacity.[135] And Phoenix reported in its Supreme Court cert petition amicus brief

135. L.A. HOMELESS SERVS. AUTH., *2024 Greater Los Angeles Homeless Count: Key Findings* 4 (2024), https://www.lahsa.org/news?article=976-2024-greater-los-angeles-homeless-

that in 2023, there were over thirty-three hundred homeless individuals in the city but "not enough shelter beds to accommodate all the unsheltered downtown, let alone the entire City."[136] And while San Francisco has dedicated substantial resources to building shelters, it has a reported shortage of almost twenty-seven hundred shelter beds on any given night.[137]

Many cities opted to comply in a different way. In the aftermath of the decision, cities including Portland, Phoenix, Thousand Oaks, Sacramento, Santa Cruz, Aberdeen, Fillmore, Garden Grove, Glendora, Chino, and Murrieta, among others, stopped enforcing their anti-camping ordinances.[138] Los Angeles was already refraining from overnight enforcement of its anti-camping and public dwelling ordinances pursuant to the settlement vacating the prior Ninth Circuit decision in *Jones v. City of Los Angeles*,[139] in which the Circuit first set out its reasoning.[140] Specifically, the city had agreed to halt enforcement of its ordinances until it had made 1,250 additional units of permanent affordable housing available. Half of these units needed to be near Skid Row, which has long been notorious for visible homelessness. Observers noted that the settlement caused "Skid Row conditions" to emerge "everywhere in the city," while Skid Row itself also grew.[141] And although the city met its settlement obligations in

count-data [https://perma.cc/CQV9-YVTK] (reporting that 75,312 homeless individuals resided in Los Angeles County, with a shelter capacity far below demand).

136. Phoenix *Grants Pass* Cert. Amicus Brief, *supra* note 119, at 8–9.

137. Coal. on Homelessness v. City & Cnty. of San Francisco, 647 F. Supp. 3d 806, 811 (N.D. Cal. 2022); Brief of *Amicus Curiae* City and Cnty. of San Francisco and Mayor Breed in Support of Petitioner at 1, 5, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175).

138. Boise *Martin* Cert. Petition, *supra* note 110, at 33; Quintero v. City of Santa Cruz, No. 5:19-cv-01898-EJD, 2019 WL 1924990, at *3 (N.D. Cal. Apr. 30, 2019) (containing a claim from the city of Santa Cruz that, in response to *Martin*, it "has suspended the enforcement of its camping ordinance to ensure that no indigent homeless individual will be cited for sleeping outdoors or camping"); *see* Gregory Scruggs, *Western Cities Scramble to Comply with Court Ruling on Homelessness*, U.S. NEWS & WORLD REP. (Feb. 10, 2020), https://www.usnews.com/news/cities/articles/2020-02-10/western-cities-scramble-to-comply-with-court-ruling-on-homelessness [https://perma.cc/3SF2-VJGF] (stating that Modesto, California "[f]aced . . . a new legal reality that the city could not enforce its camping ban"); Patrick Sisson, *Homeless People Gain 'de Facto Right' to Sleep on Sidewalks Through Federal Court*, CURBED (Dec. 16, 2019), https://www.curbed.com/2019/4/5/18296772/homeless-lawsuit-boise-appeals-court [https://perma.cc/ZK77-DD5V] (observing that Portland, San Francisco, and Sacramento halted enforcement); Rankin, *supra* note 30, at 574 (noting that initially *Martin* caused cities to stop enforcing anti-camping ordinances); Brief of Amici Curiae Ten California Cities and the Cnty. of Orange at 14–19, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) [hereinafter Ten Cities *Grants Pass* Amicus Brief] (reporting this for Fillmore, Garden Grove, Glendora, Chino, and Murrieta); Aitken v. City of Aberdeen, 393 F. Supp. 3d 1075, 1079–80 (W.D. Wash. 2019) (observing that the city of Aberdeen does not enforce its anti-camping ordinances when there are not enough shelter beds, and that this exception is in effect at all times).

139. 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

140. *See* Los Angeles *Grants Pass* Amicus Brief, *supra* note 110, at 9 ("The City has been grappling with the ramifications of [the *Jones*] settlement (*i.e.* the strain of having a large population of persons experiencing homelessness dwelling on shared public spaces) for more than 15 years.").

141. *See* Susan Shelley, *LA Should Revisit Lawsuit Settlement that Allowed Skid Row Conditions Everywhere*, L.A. DAILY NEWS (Aug. 28, 2017), https://www.dailynews.com/2017/06/20/la-should-

2018, that same year, the *Martin* panel decision resulted in the ordinance's non-enforcement becoming permanent.[142]

Though not binding outside the Ninth Circuit, the decision appears to have reverberated in cities around the country. The National League of Cities (NLC) represents nineteen thousand cities and local jurisdictions in the United States and often advises local leaders on legal and policy matters.[143] In the months after *Martin*, it made a simple recommendation to local governments nationwide: stop enforcing camping bans altogether.[144] As the NLC memo puts it, *Martin* "doesn't require cities to do anything; instead it requires cities in the Ninth Circuit *not* do something—arrest people experiencing homelessness for sleeping outside in public spaces when they have nowhere else to go."[145] Indeed, when Austin, Texas, decided to stop enforcing its anti-camping ordinances in 2019, it cited *Martin* as a reason, even though the decision obviously did not bind cities within the Fifth Circuit Court of Appeals.[146] And in July 2023, a twenty-four-hour tent encampment spontaneously emerged in Charlottesville, Virginia's Market Street Park (ground zero for the deadly 2017 "Unite the Right" demonstrations), in violation of park closing hours.[147] The city had no blanket sleeping ban, so park occupants could presumably have slept legally in public spaces nearby, such as around the Main Street pedestrian strip. No binding or on-point authority existed in the Fourth Circuit Court of Appeals (in which Virginia sits) holding that cities

revisit-lawsuit-settlement-that-allowed-skid-row-conditions-everywhere-susan-shelley/ [https://perma.cc/93DQ-4MZB].

142. *See* Brief *Amicus Curiae* of Brentwood Community Council in Support of Petitioner at 7, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175). However, in 2019, the city adopted an ordinance "restricting unsheltered people from sleeping within five hundred feet of homeless shelters, parks, bike paths, tunnels, or bridges along school routes." Rankin, *supra* note 30, at 579.

143. IMLA *Grants Pass* Amicus Brief, *supra* note 10, at 1.

144. *What the Ninth Circuit's Camping Ruling Means for Housing First Strategies in Cities*, NAT'L LEAGUE OF CITIES (Sept. 19, 2018), https://www.nlc.org/article/2018/09/19/what-the-ninth-circuits-camping-ruling-means-for-housing-first-strategies-in-cities/ [https://perma.cc/SR4R-K7ZW].

145. *Id.* (emphasis added). The NLC later changed tracks and publicly opposed the *Martin* decision. *See, e.g.*, Rankin, *supra* note 30, at 563.

146. Aaron Barnes, *Homelessness Rights and Wrongs*, TEX. LAW. (Apr. 28, 2020), https://www.law.com/texaslawyer/2020/04/28/homelessness-rights-and-wrongs/ [https://perma.cc/KZ3W-VUGU] ("Proponents of the city of Austin's repeal of its ban on homeless encampments and other vagrancy laws have tried to justify their support by pointing to a recent federal court decision out of Idaho."); GREGORIO "GREG" CASAR, CITY OF AUSTIN, FREQUENTLY ASKED QUESTIONS FOR HOMELESSNESS DECRIMINALIZATION ORDINANCES COMMONLY KNOWN AS PANHANDLING, SIT/LIE, AND CAMPING, https://services.austintexas.gov/edims/document.cfm?id=321210 [https://perma.cc/2JHT-9QV3] (last visited Jan. 15, 2025) (stating that existing ordinances "increase the City's legal risk," that "[a] recent 9th Circuit Court of Appeals case, *Martin v. Boise*, found that their camping ordinance was unconstitutional based on the 8th Amendment because it is cruel and unusual to punish people for sleeping outside if there are no other options," and that "[a] 2015 Supreme Court case has also recently been used to strike down various panhandling ordinances in other cities that are similar to Austin's ordinances").

147. *See* Maggie Glass, *Legalities of Tent Encampment at Market Street Park*, 29 NEWS (Sept. 26, 2023), https://www.29news.com/2023/09/26/legalities-tent-encampment-market-street-park/ [https://perma.cc/3W2C-5UMV].

may not enforce camping bans.[148] Even so, the rhetoric surrounding the decision was based on *Martin*'s logic: The city could not send people away if they had nowhere to go.

Local officials' decisions to stop enforcing anti-camping and related ordinances and to permit encampments were not necessarily foreseeable, and they certainly expanded *Martin*'*s* holding. What, then, explains them? One common explanation by local officials is that *Martin* and *Grants Pass* caused them significant uncertainty about the law's requirements, which, in turn, created litigation risks for cities, pushing them to the most risk-averse course. As Boise's 2019 certiorari petition in *Martin* put it, the Ninth Circuit's "novel scheme" would be "resolved through endless litigation in federal courts instead of through local democratic deliberation," which would leave municipalities "paralyzed, unable or unwilling to act out of fear of substantial liability."[149] This is not entirely unreasonable: As described in Part I.C. above, the Ninth Circuit jurisprudence left crucial questions unanswered, such as what it meant to be involuntarily homeless, or when shelter is "adequate" or "practically available."[150] For example, in its amicus brief, Phoenix notes the confusion over whether *Martin* and *Grants Pass* merely required "application of a mathematical formula—if the number of homeless individuals exceeds the available shelter beds, public sleeping bans are entirely unenforceable" or whether "the dispositive issue" is "the immediate availability of shelter space for a specific individual on a particular day?"[151] This is not a small matter: It was the difference between having enough shelter beds or not and, thus, enforcing or not enforcing anti-camping ordinances. Other briefs describe similar challenges.[152]

Such legal uncertainty shapes the actions of local officials only if there is a genuine risk of litigation. Even though one may not view the homeless community as a generally legally or politically powerful constituency, a network of nonprofit organizations has adopted strategic litigation as a central strategy to pressure jurisdictions into respecting homeless rights and interests.[153] Key

148. That said, a 2019 Fourth Circuit en banc case relied on *Grants Pass* in holding that, for a civilly designated "habitual drunkard," mere possession of alcohol may not be criminalized, as it constitutes a compulsory response to holding the status of alcoholic. Manning v. Caldwell, 930 F.3d 264, 281–84 (4th Cir. 2019) (en banc). City officials may have speculated that the Fourth Circuit could eventually expand on its logic in *Manning* to embrace that in *Martin*.

149. Boise *Martin* Cert. Petition*, supra* note 110, at 34.

150. *See, e.g.*, Brief of the California State Ass'n of Cntys. and the League of California Cities as Amici Curiae in Support of Petitioner at 6, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175) (citing Judge Milan Smith as noting that *Martin* left cities "without a clue" on what the law required).

151. Phoenix *Grants Pass* Cert. Amicus Brief, *supra* note 119, at 18–19.

152. *See* Los Angeles *Grants Pass* Amicus Brief, *supra* note 110, at 13–15; Brief of Amici Curiae Cal. State Sheriffs' Ass'n, Cal. Police Chiefs Ass'n, Cal. Cities of San Juan Capistrano, Placentia and Westminster and the Ass'n of Cal. Cities – Orange Cnty. in Support of Petitioner at 11, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175).

153. *See generally* Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215 (2003) (discussing the evolving role of legal

players in this network include the National Homelessness Law Center,[154] the Oregon Law Center,[155] the National Alliance to End Homelessness,[156] Coalition for the Homeless,[157] and the Institute for Constitutional Advocacy and Protection (ICAP).[158] These organizations have long coordinated legal strategies amongst themselves and have played a role in bringing both cases and arguments to state and federal courts.[159] ICAP and the Oregon Law Center were central to the *Grants Pass* litigation,[160] while the NHLC teamed up with Idaho Legal Aid Services to litigate *Martin*.[161] *Jones* and *Martin* might not have existed without these organizations' strategies. And in the wake of *Martin*, these groups were responsible for a wave of litigation seeking to enforce the decision. About thirty suits were filed against municipalities since *Martin*,[162] while numerous other jurisdictions were threatened with litigation.[163] As with the role of strategic litigation in bringing about "rights revolutions" in other social movements,[164] the

advocacy in addressing homelessness and emphasizing the integration of legal and non-legal services to tackle its root causes).

154. NAT'L HOMELESSNESS L. CTR., *supra* note 58.

155. *Our Mission*, OR. L. CTR., https://oregonlawcenter.org/about-olc/our-mission/ [https://perma.cc/4823-YFZK].

156. *Our Mission and History*, NAT'L ALL. TO END HOMELESSNESS, https://endhomelessness.org/who-we-are/our-mission-and-history/ [https://perma.cc/P6D8-X3J7].

157. *About Us*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/about-cfh/ [https://perma.cc/Y9ZC-YF27].

158. *Our Work*, INST. FOR CONST. ADVOC. & PROT., https://www.law.georgetown.edu/icap/our-work/ [https://perma.cc/85BR-U333].

159. *See, e.g.*, *Our History*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/our-history/ [https://perma.cc/2ELW-LZ2A] (providing a timeline of litigation and other developments, including cases where the Coalition has collaborated with other advocacy organizations); *Court Cases*, NAT'L HOMELESSNESS L. CTR., https://homelesslaw.org/court-cases/ [https://perma.cc/8W2P-SNSW] (listing cases concerning homelessness that the Center has been or is currently involved in).

160. *See* INST. FOR CONST. ADVOC. AND PROT., 2023 ANNUAL REPORT 2, https://www.law.georgetown.edu/icap/wp-content/uploads/sites/32/2023/08/2023-AR-Final-accessible.pdf [https://perma.cc/6NU6-QNNU]; Brief in Opposition, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) [hereinafter Respondents' *Grants Pass* Brief in Opposition].

161. NAT'L HOMELESSNESS L. CTR., *supra* note 159; *see* Brief in Opposition, City of Boise v. Martin, 140 S. Ct. 674 (2019) (mem.) (No. 19-247).

162. Brief of Neighbors for a Better S.F., S.F. Chamber of Com., Cal. Bus. Roundtable, Cal. Retailers Ass'n, and More Than 300 S.F.-Based Cos., Bus. Owners and Execs., Civic Orgs., Pros., and Neighborhood Leaders as *Amici Curiae* in Support of Petitioner at 15a-17a, *Grants Pass*, 603 U.S. 520 (No. 23-175) (listing cases filed against local jurisdictions) [hereinafter San Francisco Neighbors *Grants Pass* Amicus Brief].

163. *See, e.g.*, San Bernardino PD, *[ARCHIVED] Press Release - The Adverse Impacts of Martin v. Boise on the City of San Bernardino*, CITY OF SAN BERNARDINO (Sept. 18, 2023), https://sbcity.org/CivicAlerts.aspx?AID=155&ARC=130 [https://perma.cc/UY2D-97EN].

164. *See* CHARLES R. EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE 15–22, 45–50 (1998); *see also* Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 441 (2018) (examining "the 'progressive legal canon' . . . and explor[ing] the implications of canon construction and critique for the study of lawyers and social movements"); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 89–94 (1994) (explaining how "legal tactics and practices contributed significantly to the process of building the pay equity movement").

role of strategic litigation is a critical element in the rise of the New Homelessness.

The legal uncertainty and litigation risks caused many jurisdictions to simply stop enforcing any camping bans as long as there was a shelter-bed shortfall. As the amicus brief by the municipalities of Southern California explains, out of a fear of litigation, cities settled on a "conservative interpretation": that they may not enforce "*any* anti-camping type ordinance against a" homeless individual unless "there are enough realistically available and adequate shelter beds within their jurisdictions for *every* person experiencing homelessness."[165] This interpretation seems to have pervaded municipal governments. As an amicus brief by the International Municipal Lawyers Association and others puts it: "As a practical matter, these decisions compel local governments to choose between providing shelter or surrendering public lands to encampments that harm local communities."[166] One lawyer for the L.A. Alliance for Human Rights summarizes the local response as cities giving up: "They said, '[w]e don't know what we're allowed to do constitutionally,'" and since "[w]e're going to get sued no matter what we do . . . we're just not going to do anything."[167]

Though *Martin* did not require ultra-cautious policy responses, some district courts also interpreted *Martin* similarly broadly, thus reinforcing cities' risk aversion. For instance, in 2022, a district court enjoined Phoenix from "[e]nforcing [its] [c]amping and [s]leeping [b]ans against individuals who practically c[ould] not obtain shelter as long as there [we]re more unsheltered individuals in Phoenix than there [we]re shelter beds available," thereby disregarding the restrictions that the Ninth Circuit explicitly allowed.[168] A district court also declined to dismiss an Eighth Amendment challenge to Santa Barbara's anti-camping ordinance, which applied only to the downtown area and was unenforced between two and seven a.m.[169] Likewise, in 2022, a Northern District of California judge 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," even though the city claimed to be offering shelter beds to those against whom the ordinances were enforced.[170] Although the court determined that the city had provided insufficient evidence that it had indeed offered shelter to everyone against whom it enforced its

165. Ten Cities *Grants Pass* Amicus Brief, *supra* note 138, at 5 (emphasis added).

166. IMLA *Grants Pass* Amicus Brief, *supra* note 10, at 3.

167. Sam Quinones, *Skid Row Nation: How L.A.'s Homelessness Crisis Response Spread Across the Country*, L.A. MAG. (Oct. 6, 2022), https://lamag.com/news/skid-row-nation-how-l-a-s-homelessness-crisis-response-spread-across-the-country [https://perma.cc/M9HR-J738].

168. *See* Fund for Empowerment v. City of Phoenix, 646 F. Supp. 3d 1117, 1132 (D. Ariz. 2022). For a discussion, *see* Phoenix *Grants Pass* Cert. Amicus Brief, *supra* note 119, at 23 n.37.

169. Boring v. Murillo, No. LA CV 21- 07305-DOC (KES), 2022 WL 14740244, at *6 (C.D. Cal. Aug. 11, 2022).

170. Coal. on Homelessness v. City & Cnty. of San Francisco, 647 F. Supp. 3d. 806, 842 (N.D. Cal. 2022).

ordinances, the court opined in dicta that it is "beyond dispute that homeless San Franciscans have no voluntary 'option of sleeping indoors,' and as a practical matter 'cannot obtain shelter.'"[171] The amicus brief by the Bay Area Council et al. in *Grants Pass* describes the decision against San Francisco: "Essentially, the district court found an implied requirement that cities maintain and provide sufficient shelter to every homeless individual or allow them to take up permanent residence in public spaces."[172] Thus, rational concerns about court injunctions partly guided cities' encampment policies.

But risk averseness is not the only explanation for why local officials misread *Martin*; a broad reading of *Martin* also aligned with the progressive values of many city officials and homelessness advocates, who have long argued against criminalizing urban camping.[173] The claim that localities were "criminalizing poverty" did not sit well with many local officials. Much of homelessness rights advocacy has focused on Housing First policies, which prioritize (as the name implies) securing long-term housing before addressing other underlying causes of homelessness, like mental illness and poverty.[174] And although camping ban non-enforcement does little to directly promote long-term housing, many Housing First advocates came to see it as a complementary effort. Consider the NLC's response to *Martin*. In a September 2018 publication, the NLC observed that "the spirit of the decision falls in line with a Housing First strategy" since, it argued, criminalizing homelessness hampers efforts to provide permanent housing.[175] Many understood that providing stable, long-term housing on the necessary scale takes time.[176] Moreover, advocates for the homeless population have long noted that many homeless individuals in fact prefer urban camping over shelters, as shelters are widely viewed as unsafe.[177] Additionally, encampments often provide more privacy, allowing residents to be with their romantic partners and pets, and encampments have neither curfews nor most of the other rules that shelters do.[178] For these reasons, many homeless encampment residents like the fact that encampments enable "self-determination" and can more "effectively and equitably respond to the physical,

171. *Id.* at 836.

172. Brief of Amici Curiae Bay Area Council et al. in Support of Petitioner City of Grants Pass at 11, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175).

173. *See, e.g.*, HOUSING NOT HANDCUFFS, *supra* note 59, at 75–77; Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 110–11 (2019); McJunkin, *supra* note 12, at 132 (criticizing "government-funded shelter" as not "a universal solution to the social problem of homelessness" and proposing "an essential right to *shelter oneself* without government interference").

174. *See, e.g.*, Rankin, *supra* note 30, at 568 n.51.

175. *See* NAT'L LEAGUE OF CITIES, *supra* note 144.

176. *See, e.g.*, *id.*

177. *See* McJunkin, *supra* note 12, at 164–66.

178. NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, *supra* note 22, at 2 ("Encampments prevent the need to carry around one's belongings all day and can offer a stability that overnight shelters cannot. Encampments also allow families to stay together and will accommodate pets."); McJunkin, *supra* note 12, at 164 ("Estimates are that 77 percent of homeless individuals would prefer living unsheltered rather than occupying temporary emergency shelters provided by the state.").

mental, and emotional needs of residents."[179] Thus, like Housing First policies, unrestricted urban camping policies are primarily concerned with the autonomy and dignity of homeless individuals. Indeed, homeless rights advocates' initial response to *Martin* was overwhelmingly positive.[180]

The quick pace at which local officials stopped enforcing local ordinances also revealed that a change in values was already underway. While advocates for the homeless had been arguing that city criminalization ordinances constituted cruel and unusual punishment within the meaning of the Eighth Amendment since at least the 1990s,[181] this argument gained judicial recognition and greater traction with the Ninth Circuit's 2006 decision in *Jones v. City of Los Angeles*.[182] Although *Jones* was vacated pursuant to a settlement agreement,[183] its basic insight continued to resonate, affecting homelessness policy in Los Angeles, the Ninth Circuit's largest city. Los Angeles stopped enforcing its anti-camping ordinances and inspired some other cities to follow suit.[184] Indeed, some reports suggest that urban camping started to emerge in some cities around this time, albeit not nearly as rapidly as post-*Martin*.[185] But importantly, by 2018, values had already begun to shift in the wake of the *Jones* settlement.[186]

But even if values and discourse had already started to shift, it seems unlikely that cities would have voluntarily halted anti-camping ordinance enforcement without *Martin*. It was easy for political officials to imagine that unrestricted urban camping would encounter some backlash. Then, *Martin* gave officials political cover to implement the change. The growth of the Zone in Phoenix, Arizona, illustrates this phenomenon. The Zone was a sprawling encampment in downtown Phoenix, which, at its height, included one thousand homeless residents. City officials directly attributed the Zone to *Martin*, and, indeed, it emerged as city officials stopped enforcing camping bans after the

179. *See* Olson & Pauly, *supra* note 22, at 130–32.

180. *See, e.g.*, Press Release, Nat'l L. Ctr. on Homelessness & Poverty, Federal Appeals Court Affirms Right of Homeless Persons to Not Be Punished for Sleeping in Public in Absence of Alternatives, (Sept. 4, 2018), https://homelesslaw.org/wp-content/uploads/2018/12/09.04.18_Boise_ruling.pdf [https://perma.cc/9TZU-V8TH]; McJunkin, *supra* note 12, at 159–60 (documenting the positive response); Rankin, *supra* note 30, at 562 (noting that "homeless rights advocates celebrated" the decision).

181. Pottinger v. City of Miami, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).

182. Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006).

183. *See supra* Part I.B.2.

184. *See, e.g.*, Jessie Speer, *The Rise of the Tent Ward: Homeless Camps in the Era of Mass Incarceration*, 62 POL. GEOGRAPHY 160, 166 (2018) (In 2007, homeless residents of Fresno "spoke against a proposed anti-camping ordinance, saying, 'If this ordinance is passed it will be challenged. It was challenged in Los Angeles and they had to back down because it is not good for the people.'").

185. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 17, at 21 (noting the existence of at least nineteen encampments nationwide in 2007).

186. *Cf.* GOLUBOFF, *supra* note 47, at 250–60 (2016) (noting that by the time the Supreme Court decided *Papachristou v. City of Jacksonville*, values with respect to vagrancy had already started to shift, which made it easier to implement this decision).

decision.[187] A 2022 public nuisance lawsuit brought against the city by business owners shows how officials pinned the Zone's emergence on *Martin*.[188]

> The City has never made it a point to allow people to come into an area of town and set up shop and camp. . . [S]ome of the most recent legal decisions that have come down out of the federal courts . . . are . . . definitely giving us some guidance as to what we. . . can and cannot do. . . [T]his is not the City . . . having some choice . . . to allow people to do this. We are constitutionally required based on at least the majority decision in the 9th Circuit . . . .[189]

Others argued that officials in Phoenix used the case to justify what they wanted to do anyway. In its brief to the Supreme Court, the libertarian Goldwater Institute claimed, "the City—like many municipal governments in the Ninth Circuit—actually welcomes the confusion *Martin* has caused" since "enforcing the law against homeless individuals is hard work, and often politically unpalatable, which creates a strong incentive for local politicians to disclaim their responsibility for such matters."[190] *Martin* and *Grants Pass*, Goldwater claims, "offer them an exceptionally convenient device for doing so."[191] The brief further notes that the city actively contributed to the growth of the Zone, as it brought resources and services to it and then directed homeless throughout the city to this area.[192] Although when the city began restricting urban camping in 2022, a district court enjoined it from doing so by adopting the broad interpretation of *Martin*.[193] More generally, as the Johnson et al. respondents' brief opposing certiorari in *Grants Pass* put it, "in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial

187. *See* Jill Jacobson, Brown v. City of Phoenix*: Can Common Law Make Up for a Lack of Common Sense?*, FEDERALIST SOC'Y (Apr. 19, 2023), https://fedsoc.org/commentary/fedsoc-blog/brown-v-city-of-phoenix-can-common-law-make-up-for-a-lack-of-common-sense [https://perma.cc/4G35-DSYA] (describing the creation of the Zone in 2019 and linking it to *Martin*, since city officials have taken *Martin* as a "carte blanche" to stop enforcing existing city ordinances).

188. *See* Brief of Amici Curiae Freddy Brown et al. in Support of Petitioner City of Grants Pass at 3–5, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) [hereinafter Freddy Brown *Grants Pass* Amicus Brief] (providing evidence that "the City routinely cited the *Boise* and *Grants Pass* decisions as a defense to the public nuisance claim—and as the reason why the City has experienced a growth in public encampments"); Brown v. City of Phoenix, Nos. 1 CA-CV 23-0273, 1 CA-CV 23-0689 (consolidated), 2023 WL 8524162, No. CV 2022-010439 (Ariz. Super. Ct. Sept. 20, 2023).

189. Freddy Brown *Grants Pass* Amicus Brief*, supra* note 188, at 4–5 (second alteration in original).

190. *See* Brief Amicus Curiae of Goldwater Inst. in Support of Petitioner at 14, *Grants Pass*, 603 U.S. 520 (No. 23-175).

191. *Id.*

192. *Id.* at 11 ("Not only does the city abide such behavior, it actively encourages it, both by refusing to enforce the law in [t]he Zone, and by actually transporting homeless people from other locations in Phoenix *into* [t]he Zone.").

193. Fund for Empowerment v. City of Phoenix., 646 F. Supp. 3d 1117, 1124–25 (D. Ariz. 2022).

mandate . . . . [C]laims to the contrary are nothing more than an exercise in political expediency."[194]

The COVID-19 pandemic provided another justification for sustaining the encampments. In early 2020, public health officials generally advised governments against breaking up camps for fear of further spreading the virus,[195] and, with little incentive to disregard it, most officials followed the advice.[196]

* * *

These other contributing phenomena, local policymakers sympathetic to the plight of the homeless and the pandemic restrictions from 2020 to 2022, raise the possibility that mass encampments may have emerged in the 2020s even without the Ninth Circuit's decisions. The evidence reviewed above suggests otherwise or at least suggests that the holdings served as a substantial accelerant. For most jurisdictions, the political costs of halting anti-camping enforcement en masse would have been too high, at least without a legal scapegoat. But by blaming constitutional rules for a city's inability to prevent the surge of urban camping (even if sometimes without justification), officials have been able to shift responsibility to the courts.

Moreover, the pandemic did not instigate the phenomenon: It merely accentuated it. After all, one of the first public-health responses to COVID-19 was to urge distancing and discourage or prohibit mass gatherings. Had encampments not existed in the spring of 2020, when COVID-19 first struck the U.S. West Coast in earnest, it is hard to imagine that officials would have cited public health as the basis for allowing them for the first time.

C. Homeless Populations Shift to Camping

These broad interpretations of *Martin* led more of America's homeless to reside in public-space encampments throughout the country.[197] Not enforcing anti-camping ordinances in practice meant that localities allowed the homeless

194. Respondents' *Grants Pass* Brief in Opposition, *supra* note 160, at 3.

195. NAT'L LOW INCOME HOUS. COAL., *supra* note 23 ("The Centers for Disease Control and Prevention (CDC) issued guidance . . . on March 22 advising municipalities not to clear homeless encampments during the coronavirus outbreak unless individual housing units are available."). The CDC also urged against using traditional shelters since many people sharing close quarters could also accelerate its spread. *See Guidance on Management of COVID-19 in Homeless Service Sites and in Correctional and Detention Facilities*, CTR. FOR DISEASE CONTROL & PREVENTION (May 11, 2023), https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/community/homeless-correctional-settings.html [https://perma.cc/PWQ8-MFCX]. The CDC recommended that municipalities should break up camps only when individual housing units were available. NAT'L LOW INCOME HOUS. COAL., *supra* note 23.

196. *See, e.g.*, Joel Grover & Josh Davis, *Homeless Encampments Spread to Beaches, Golf Courses as City Takes Hands-Off Approach*, NBC L.A. (Sept. 4, 2020), https://www.nbclosangeles.com/investigations/omeless-encampments-spread-to-beaches-golf-coursesas-city-takes-hands-off-approach/2423332/ [https://perma.cc/V3SH-M4S5].

197. *See, e.g.*, Jacobson, *supra* note 187 (describing the creation of the Zone in 2019 and linking it to *Martin*, since city officials have taken *Martin* as a "carte blanche" to stop enforcing existing city ordinances).

to create encampments. This, in turn, made homelessness more visible. That is, even if the unsheltered population had stayed constant (which it did not), the fact that the homeless were no longer moving from bench-to-bench and town-to-town but instead were residing in urban camps made homelessness much more visible to the general public.

Several expert reports suggest an explosion in camps. One report by the National Law Center on Homelessness and Poverty documents nineteen camps in 2007 and 274 in 2016, only 4 percent of which were formally legal under local law.[198] While precise and comparable post-2019 figures have not yet been published, experts have observed an "unprecedented" growth of encampments since 2019, with the size and numbers having multiplied several times.[199]

Total unsheltered homelessness also increased post-*Martin*, partly due to a preference for encampments. The causes of this increase are many, but one possible reason is that some of the homeless people moved out of shelters and into newly permitted encampments. According to a brief for property owners near Phoenix's Zone, estimates show "77 percent of homeless individuals would prefer living unsheltered rather than occupying temporary emergency shelters provided by the state."[200] With officials relaxing or eliminating anti-camping ordinances, this preference apparently translated to people shifting away from shelters and into such newly permitted camps. As one expert report notes: "[F]ewer and fewer people were staying in shelters" in 2020, and "[this] trend . . . continued into 2021."[201] In Grants Pass, the city shelter reported that its utilization rates had fallen by about 40 percent since the district court's injunction.[202] And San Francisco reported in a Supreme Court filing that it had recently "seen over half of its offers of shelter and services rejected by unhoused individuals, who often cite[d] the district court's order [pursuant to *Martin*] as their justification to permanently occupy and block public sidewalks."[203] As noted, many homeless individuals view urban camping as safer, more stable, and less restrictive than shelters.

Moreover, like members of most communities, homeless individuals respond to incentives like favorable legal environments. Since 2019, reports

198. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 17, at 7.

199. DUNTON ET AL., *supra* note 16, at ES1, 5 (observing an unprecedented number of encampments in 2019 and noticing the impact of the Ninth Circuit jurisprudence).

200. McJunkin, *supra* note 12, at 164; Freddy Brown *Grants Pass* Amicus Brief, *supra* note 188, at 8 ("At trial, the evidence revealed that the vast majority of individuals on the streets in the Zone are voluntarily homeless . . . because they would refuse access to temporary shelter if offered."); IMLA *Grants Pass* Amicus Brief, *supra* note 10, at 22.

201. NAT'L ALL. TO END HOMELESSNESS, STATE OF HOMELESSNESS: 2022 EDITION (2022), https://endhomelessness.org/wp-content/uploads/2023/05/StateOfHomelessness_2022.pdf [https://perma.cc/W6DB-VP4J].

202. *See* Brief of *Amicus Curiae* Grants Pass Gospel Rescue Mission in Support of Petitioner at 4–5, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175).

203. Brief for City and Cnty. of San Francisco and Mayor Breed as *Amici Curiae* in Support of Neither Party at 7–9, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (No. 23-175).

suggest that at least some homeless individuals have relocated to cities with laxer camping policies.[204] Indeed, many states and local jurisdictions within the Ninth Circuit reported a significant increase in unsheltered homelessness in the wake of *Martin*. For example, in Sacramento, the population of homeless individuals grew by 67 percent between 2019 and 2022,[205] with over 70 percent (about sixty-five hundred people) sleeping outside in public spaces.[206] In the area of Nevada surrounding Las Vegas, the number of people without shelter increased by more than 10 percent from 2022 to 2023.[207] In Phoenix, the unsheltered population surged by a whopping 40 percent between 2020 and 2023.[208] Similar trends occurred in Los Angeles[209] and San Diego.[210]

These figures from cities within the Ninth Circuit far exceeded the nationwide growth in the homeless population during the same period. Of the five states whose unsheltered population grew the most between 2015 and 2022, four (California, Washington, Arizona, and Oregon) are within the Ninth Circuit.[211] A notable exception is San Francisco: There, unsheltered homelessness decreased by 15 percent between 2019 and 2022.[212] But at least part of the reason for this decline is the city's distinct response to *Martin*. San

204. Freddy Brown *Grants Pass* Amicus Brief*, supra* note 188, at 12 (recalling expert testimony that "revealed that the unsheltered population is generally mobile, and many move to cities with more permissive camping policies" and explained "that anywhere from one-third to one-half of unsheltered individuals became homeless in another city").

205. *2022 Point in Time Count Report Released*, SACRAMENTO CNTY. (June 28, 2022), https://www.saccounty.gov/news/latest-news/Pages/2022-Point-in-Time-Count-Report-Released.aspx [https://perma.cc/R73W-JP6L].

206. *See* Cynthia Hubert, *Sacramento State Researchers Document Startling Jump in Homelessness in County*, SACRAMENTO ST. (July 5, 2022), https://www.csus.edu/news/newsroom/stories/2022/7/homeless-count-2022.html [https://perma.cc/WB5W-5JTW]; Caroline Morales & Becca Habegger, *Sacramento County's Homeless Population Nearly Doubled Between 2019 and 2022, Report Finds*, ABC10 (June 28, 2022), https://www.abc10.com/article/news/local/sacramento/sacramento-point-in-time-count-homeless/103-73e01412-f1ab-4e6e-8b3a-08453373918c [https://perma.cc/3UCY-XHMC].

207. *See* NEV. HOMELESS ALL., 2023 SOUTHERN NEVADA POINT-IN-TIME COUNT, https://nevadahomelessalliance.org/wp-content/uploads/2023/10/Help-Hope-Home-2023-PIT-Results.pdf [https://perma.cc/G3AJ-WECL].

208. *See* Phoenix *Grants Pass* Cert. Amicus Brief, *supra* note 119, at 7.

209. Doug Smith & Ruben Vives, *Homelessness Continues to Soar, Jumping 9% in L.A. County, 10% in the City*, L.A. TIMES (June 29, 2023), https://www.latimes.com/california/story/2023-06-29/la-county-homelessness-unhoused-population-count-jumps-increase [https://perma.cc/L6SR-R99W] (showing a 14 percent increase in unsheltered individuals).

210. Lisa Halverstadt, *Regional Census Tracks Unprecedented Spike in Homelessness*, VOICE OF SAN DIEGO (June 8, 2023), https://voiceofsandiego.org/2023/06/08/regional-census-tracks-unprecedented-spike-in-homelessness/ [https://perma.cc/M7U5-KYSC] (showing a 26 percent increase in people sleeping outside).

211. *See* JOINT CTR. FOR HOUS. STUD. OF HARVARD UNIV., THE STATE OF THE NATION'S HOUSING 2023 7 (2023), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf [https://perma.cc/R7TE-3D7X].

212. APPLIED SURV. RSCH., S.F. HOMELESS COUNT AND SURVEY: 2022 COMPREHENSIVE REPORT 53 (2022), https://hsh.archive.sf.gov/wp-content/uploads/2022/08/2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf [https://perma.cc/F4CQ-VFD6].

Francisco has made getting the chronically homeless off the street a priority since 2017.[213] As part of this strategy, it has made substantial investments in both Housing First policies and shelters.[214] But notably, when *Martin* was decided, the city suspended enforcing anti-camping ordinances only briefly, resuming quickly thereafter.[215] Thus, until it was enjoined from enforcing its anti-camping ordinances in 2022, it followed a different path from most other cities in the West.[216]

D. City Officials Facing Public Backlash Restrict Camps to Designated Locations, Spawning a Social-Political Infrastructure

With these developments, local officials' responses to *Martin* soon started to shift. City officials faced a dual reality: growing encampments in desirable public spaces and increasing public backlash.[217] Many therefore abandoned the broad interpretation of *Martin* in favor of a narrower one: The government could enforce anti-camping bans if it provided some space in the city for camping, that is, "sanctioned encampments." Sanctioned encampments are legally designated areas, usually on public property, where people without shelter are permitted to stay.[218] Sanctioned encampments offered cities one way to avoid violating *Martin*, while also controlling the geographic spread of homeless encampments.[219] Indeed, in many cities, sanctioned encampments have gone hand in hand with the reintroduction of anti-camping ordinances throughout the rest of the city.[220]

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213. In 2017, San Francisco, in partnership with Tipping Point Community, launched the Chronic Homelessness Initiative (CHI), a five-year effort aimed at reducing chronic homelessness in the city by 50%. This initiative focused on creating additional permanent supportive housing units and improving public systems to address the underlying causes of homelessness. *See generally*, Chronic Homelessness Initiative (CHI), *Tipping Point Community*, https://tippingpoint.org/project-investments/chi/ [https://perma.cc/4GR9-B8QX].

214. *See* DEP'T OF HOMELESSNESS AND SUPPORTIVE HOUS., *Foreword by HSH* to APPLIED SURV. RSCH., *supra* note 212.

215. *See* San Francisco Neighbors *Grants Pass* Amicus Brief, *supra* note 162, at 13–14; Sisson, *supra* note 138.

216. *See supra* notes 162–163 and accompanying text.

217. Respondents' *Grants Pass* Brief in Opposition, *supra* note 160, at 3–4 (noting the unpopularity of cities' choice to stop enforcing camping bans); *see also* Brian E. Adams, Megan Welsh Carroll & Nicolas Gutierrez III, *Community Acceptance of, and Opposition to, Homeless-Serving Facilities*, 3 INT'L J. ON HOMELESSNESS 156, 157 (2023) (examining factors influencing public support and resistance to homeless shelters and services).

218. *See generally* JUNEJO, *supra* note 134, at 4–5 (defining sanctioned encampments and distinguishing them from unsanctioned and private property encampments).

219. *1A Remaking America: State-Sanctioned Homeless Encampments*, NPR (May 4, 2023), https://www.npr.org/2023/05/04/1174017993/1a-remaking-america-state-sanctioned-homeless-encampments [https://perma.cc/5FKT-UB3M].

220. *See* Cynthia Griffith, *Are Municipalities Turning to Sanctioned Encampments to Get Around* Martin v. Boise*?*, INVISIBLE PEOPLE (Sept. 29, 2023), https://invisiblepeople.tv/are-municipalities-turning-to-sanctioned-encampments-to-get-around-martin-v-boise/ [https://perma.cc/56A8-F339].

Consider the case of Sacramento. Like many other cities, Sacramento stopped enforcing its anti-camping ordinances in 2019 after *Martin*.[221] According to one estimate, the number of people living without shelter in Sacramento increased "from 3,900 in 2019 to 6,664 in 2022," an increase of close to 80 percent.[222] But in 2022, the city shifted to sanctioned encampments and a gradual reinstatement of camping bans. The main impetus was the Emergency Shelter and Enforcement Act of 2022 (known as Measure O), a Sacramento voter initiative that passed with 52 percent support.[223] Measure O allows the city to enforce anti-camping bans and clear encampments, while at the same time providing for sanctioned encampments.[224] The measure sets out a complex scheme for gradually creating more shelter.[225] As part of Measure O's implementation, the city has created "Safe Ground" camping sites, where the city provides tents and trailers, serves meals, and offers basic sanitation—all outdoors.[226] Soon after, the city came under pressure to step up this initiative as residents' dissatisfaction was compounded by a lawsuit filed by the county of Sacramento alleging that the city had failed to protect "public health and safety" in light of the homelessness crisis.[227] Sanctioned encampments, then, became the city's focus in its attempt to balance demands by constituents with its obligation to care for the homeless.

Or take the example of Portland, Oregon. Portland also stopped enforcing its anti-camping bans in the wake of *Martin*,[228] but as encampments and public

221. *See* Sasha Abramsky, *Fed Up with the Homelessness Crisis, the Sacramento County DA Sues the City*, THE NATION (Sept. 22, 2023), https://www.thenation.com/article/society/sacramento-homelessness-thien-ho-lawsuit/ [https://perma.cc/HJ8G-ZYUM] (describing how the city has justified non-enforcement of municipal ordinances by arguing that "its hands have been largely tied by a series of court rulings and injunctions against sweeps of the encampments").

222. *Id.*

223. OFF. OF THE CITY AUDITOR, CITY OF SACRAMENTO, REPORT# 2023/24-11, PRELIMINARY REPORT ON THE CITY'S HOMELESS RESPONSE 45 (2024), https://cityofsacramento.gov/content/dam/portal/auditor/Audit-Reports/City%20Auditors%20Preliminary%20Report%20on%20the%20Citys%20Homeless%20Response.pdf [https://perma.cc/JH6D-SKWP].

224. *See* Chris Nichols, *Sacramento's Measure O: Voters to Decide Whether to Ban Homeless Camps on Public Property*, CAPRADIO (Nov. 1, 2022), https://www.capradio.org/articles/2022/11/01/sacramentos-measure-o-voters-to-decide-whether-to-ban-homeless-camps-on-public-property/ [https://perma.cc/5DAN-BC5Y]; Jeremiah Martinez, *Sacramento Measure Regarding Encampments Goes into Effect Next Month, Here's What It Will Do*, FOX40 (June 2, 2023), https://fox40.com/news/local-news/sacramento/sacramento-measure-regarding-encampments-goes-into-effect-next-month-heres-what-it-will-do/ [https://perma.cc/CN3S-7RZH].

225. *FAQ for Measure O/ESEA*, CITY OF SACRAMENTO, https://www.cityofsacramento.gov/city-manager/projects-and-programs/measureo/faq [https://perma.cc/G2UX-89XK].

226. Chris Nichols, *Sacramento Reopens Sanctioned Homeless Campsite at Miller Park*, CAPRADIO (July 14, 2023), https://www.capradio.org/articles/2023/07/14/sacramento-reopens-sanctioned-homeless-campsite-at-miller-park [https://perma.cc/MH8U-TS5Q].

227. First Amended Complaint at 1–2, 45 People v. City of Sacramento, No. 23CV008658 (Cal. Super. Ct. Dec. 5, 2023).

228. Brandon Thompson & Aimee Plante, *'Terrified of Being Sued': Portland Leaders Say Federal Rulings Limit Homelessness Law*, KOIN (Sept. 28, 2023),

unrest grew,[229] the city likewise transitioned to sanctioned encampment policies.[230] In November 2022, it adopted a plan that would approve six large camping sites, hosting up to 250 people each, while allowing the city to reinstate camping bans elsewhere.[231] Shortly thereafter, it adopted an ordinance allowing camping on public property at night but requiring campsites to be dismantled during the day.[232] Yet city officials reported that, as of late 2023, while the city was working to move people into the sanctioned encampments, the camping ban was not yet being enforced as the city was "terrified of being sued."[233]

Homeless-rights advocates have mostly decried this narrower interpretation of *Martin*. Professor Sara Rankin, for example, observes that while *Martin* initially seemed promising, cities are now adapting "not by curbing punishment for homelessness, but by giving punishment a makeover."[234] She further notes that "[p]ost-*Martin* narratives reframe what many progressive urbanites now find distasteful—mass incarceration, internment, and detention of undesirable populations—into practices that accomplish similar outcomes but seem more palatable."[235] Thus, she observes, "post-*Martin* cities appear to be adapting—creating a more nuanced framework that still allows the relentless expulsion of unsheltered people."[236] Homelessness advocates further observe that sanctioned encampments are used as a substitute for permanent housing for the chronically homeless, instead creating "permanent shantytowns."[237] Others, however, are more positive about sanctioned encampments, seeing them as a necessary complement to Housing First, or, in any case, preferable to shelters for many homeless people (even if less desirable than an unrestricted urban camping right).[238]

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https://www.koin.com/news/terrified-of-being-sued-portland-leaders-say-federal-rulings-limit-homelessness-law/ [https://perma.cc/5B8V-5FU2] (citing city officials as stating that *Martin* and subsequent decisions "paralyze[d] what cities can do to address those in public spaces").

229. *See* Brief of Amici Curiae League of Or. Cities, City of Portland, Ass'n of Idaho Cities, Special Districts Ass'n of Or., and the Wash. State Ass'n of Mun. Att'ys in Support of Petitioner at 7–8, 15–16, City of Grants Pass v. Johnson, 603 U.S. 520 (2024) (mem.) (No. 23-175) (reporting a 30 percent increase in homelessness "between 2019 and 2022," even though more shelter beds were built).

230. Rebecca Ellis, *Portland Leaders Approve Plan to Ban Homeless Camping, Create Large Government-Sponsored Shelters*, OR. PUB. BROAD. (Nov. 3, 2022), https://www.opb.org/article/2022/11/03/portland-leaders-approve-plan-to-ban-homeless-camping-set-up-large-sites/ [https://perma.cc/CL92-7L9L].

231. *Id.*

232. PORTLAND, OR., CITY CODE § 14A.50.020(C)(1) (2023) (repealed 2024).

233. Thompson & Plante, *supra* note 228 (quoting city commissioner Gonzales, saying "[i]t dramatically reduces the city's ability to enforce unsanctioned camping ordinances so we are hoping the Supreme Court unwinds some really bad case law").

234. *See* Rankin, *supra* note 30, at 566.

235. *Id.*

236. *Id.* at 580.

237. *Position Statement on Sanctioned Encampments*, NAT'L COAL. FOR THE HOMELESS, https://nationalhomeless.org/sanctioned-encampment-policy/ [https://perma.cc/85EK-QGQU]; Siegler, *supra* note 34.

238. *See* JUNEJO, *supra* note 134, at 11.

But while homelessness advocates push back against sanctioned encampments, the encampments have become a focus for conservative activism. Conservative commentators point out that sanctioned encampments are a cheaper alternative than Housing First initiatives, which they say are ineffective and expensive.[239] Sanctioned encampments, however, are both inexpensive and practical for providing services.[240] In line with this, the conservative Cicero Institute has drafted and promoted model state-level legislation that incentivizes cities to enforce camping bans and makes illegal camping a class C misdemeanor. The model legislation also permits states to create sanctioned encampments.[241] So far, nine states have considered, enacted, or continue to debate the Cicero model bill: Arizona,[242] Florida,[243] Georgia,[244] Iowa,[245] Missouri,[246] Oklahoma,[247] Kentucky,[248] Texas,[249] and Wisconsin.[250] Donald Trump also embraced it during his 2024 presidential campaign,[251] and polling data suggest that the proposal is popular among the general public.[252] Some have noted that these legislative efforts focus on sanctioned encampments in part because they represent a relatively cheap and easy fix to the increasingly unpopular unsanctioned encampments that emerged post-*Martin*, while also complying with the narrower reading of the *Martin* ruling.[253]

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239. *See* Judge Glock, *Solving Texas's Street Homelessness Problem*, CICERO INST. (Dec. 21, 2020), https://ciceroinstitute.org/research/solving-texass-street-homelessness-problem/ [https://perma.cc/3RA4-C92B]; Kyle Swenson, *The Right's War on 'Housing First' Lands in Middle America*, WASH. POST (Dec. 22, 2023), https://www.washingtonpost.com/dc-md-va/2023/12/22/rights-war-housing-first-lands-middle-america/ [https://perma.cc/LW8J-T825].

240. *See* Glock, *supra* note 239.

241. *See* CICERO INST., REDUCING STREET HOMELESSNESS ACT MODEL BILL, https://ciceroinstitute.org/wp-content/uploads/2021/11/Reducing-Street-Homelessness-Act-Model-Bill.090821.pdf [https://perma.cc/F86L-X34R].

242. H.R. 2668, 55th Leg., 1st Reg. Sess. (Ariz. 2021) (failed to pass).

243. H.R. 1365, 2024 Leg., 126th Reg. Sess. (Fla. 2024) (passed).

244. S. 62, 157th Gen. Assemb., 2023–2024 Reg. Sess. (Ga. 2023) (passed).

245. S. 3175, 90th Gen. Assemb., 2024 Sess. (Iowa 2024) (failed to pass).

246. H.R. 2614, 101st Gen. Assemb., 2d Reg. Sess. (Mo. 2022) (failed to pass).

247. S. 1560, 58th Leg., Reg. Sess. (Okla. 2022) (failed to pass).

248. H.R. 5, 2024 Gen. Assemb., Reg. Sess. (Ky. 2024) (passed).

249. H.R. 1925, 87th Leg., Reg. Sess. (Tex. 2021) (passed).

250. State Assemb. 604, 105th Leg., 2021–2022 Reg. Sess. (Wis. 2021) (failed to pass).

251. *See* Olympia Sonnier & Ben Kamisar, *Trump Says He'll Ban Homeless Camping, Create "Tent Cities,"* NBC NEWS (Apr. 19, 2023), https://www.nbcnews.com/meet-the-press/meetthepressblog/trump-says-ban-homeless-camping-create-tent-cities-rcna80480 [https://perma.cc/72AB-LQC6].

252. *See Poll: Missourians Call for Bold Action on Homelessness*, CICERO INST. (Jan. 23, 2024), https://ciceroinstitute.org/research/poll-missourians-call-for-bold-action-on-homelessness/ [https://perma.cc/43XY-W6BE]; *Cicero Institute Spotlights Key Insights from Kentucky Homelessness Poll*, CICERO INST. (Jan. 12, 2024), https://ciceroinstitute.org/news/cicero-institute-spotlights-key-insights-from-kentucky-homelessness-poll/ [https://perma.cc/PFC7-TURN].

253. *See* Roshan Abraham, *A Palantir Co-Founder Is Pushing Laws to Criminalize Homeless Encampments Nationwide*, VICE (Mar. 13, 2023), https://www.vice.com/en/article/qjvdmq/a-palantir-co-founder-is-pushing-laws-to-criminalize-homeless-encampments-nationwide [https://perma.cc/DV8V-SSZN].

Ironically, however, while sanctioned encampments have become a key talking point for conservative activists, it is some of the nation's most progressive cities—such as Sacramento and Portland—that have adopted and implemented them. Thus, if not always in word, there is nonetheless substantial bi-partisan consensus for sanctioned encampments. As some have observed, the "wicked problem" of homelessness does not neatly track partisan divides.[254]

* * *

At the beginning of this Part, we posited that *Martin* was significantly responsible for the social and political developments—homeless encampments, a policy coalescence around designated encampments, and social welfare infrastructure—that followed and characterized the New Homelessness. The timeline of this series of events, the words and actions of policymakers, and other studies of homeless population trends together represent strong evidence of such a phenomenon. A confluence of the groundbreaking *Martin* holding, risk-averse local officials (many of whom are sympathetic to the principles underlying *Martin*), and a general public that is intolerant of displays of poverty in their public spaces collectively gave rise to a new mode of being homeless in America—one which is unique in American history and perhaps among wealthy industrialized nations.

III.
THE FALL OF THE NEW HOMELESSNESS?

Now that the Supreme Court has overturned the line of cases that gave rise to the New Homelessness, one might wonder whether the sociological phenomenon of the homeless residing in encampments will also disappear. In this Part, we argue that this is not so obvious. Specifically, we argue that four forces will make it hard to undo the New Homelessness: (1) state and local law; (2) public officials' learning; (3) shifting norms; and (4) the emergence of an encampment infrastructure.

A. The Supreme Court Reverses the Ninth Circuit

In March 2024, the Supreme Court granted certiorari for *City of Grants Pass v. Johnson*, and in June 2024, a five-justice majority reversed the Ninth Circuit in an opinion by Justice Gorsuch.[255] First, Justice Gorsuch's opinion determined that *Robinson* did not apply in that case. *Robinson*, he said, was a narrow holding applying only to status: in that case, the status of merely being addicted to drugs.[256] The Court majority—and especially Justice Clarence Thomas in his concurrence—seemed skeptical of that narrow holding, doubting

254. *See* Horst W. J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 160–67 (1973).

255. City of Grants Pass v. Johnson, 603 U.S. 520 (2024).

256. *Id.* at 544–47.

that the Eighth Amendment should concern *what* can be criminalized (as opposed to what *punishments* are permitted).[257] Regardless, the Court left *Robinson*'s fate for another day.[258] Thus, if the Eighth Amendment were to apply here, it must be extended from prohibiting only status crimes, such as the status of homelessness, to prohibiting crimes involving involuntary conduct that flows from status, such as sleeping outdoors.

The Court declined to do so. It noted that it had "already rejected that view" in *Powell*, when a four-justice plurality declined to extend *Robinson* to invalidate a public-intoxication conviction.[259] And the *Grants Pass* Court said that nothing in the Eighth Amendment authorizes such an extension in 2024. (The Court noted that other constitutional and legal protections—such as due process or a state-law necessity defense—may be better suited to protect people from prosecution for acts they cannot avoid.)[260] But as to the Eighth Amendment, Justice Gorsuch noted that Justice Marshall himself warned in *Powell* against extending *Robinson*, seeing no limiting principle to prevent the Court becoming "the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country."[261] Instead, Justice Gorsuch wrote, "[Q]uestions about whether an individual who has committed a proscribed act with the requisite mental state should be 'reliev[ed of] responsibility,' due to a lack of 'moral culpability,' are generally best resolved by the people and their elected representatives."[262]

The Court majority reasoned that the Ninth Circuit ignored these principles in deciding *Jones*, *Martin*, and *Grants Pass*. Doing so had predictably bad results, it said: "*Martin* exemplifies much of what can go wrong when courts try to resolve matters like those unmoored from any secure guidance in the Constitution."[263]

Those bad effects took several forms, Justice Gorsuch wrote, creating a poorly defined standard that was unworkable in practice in at least three ways, creating uncertainty for courts and local officials implementing the rules.[264] First, how is involuntarily homeless defined, and how can law enforcement personnel be expected to apply it?[265] The "more homeless than shelter beds" standard is not workable, as cities cannot know how many homeless individuals there are on any night. Second, courts struggled to define "adequate" and "available" shelter. For example, is a Christian-themed shelter (for non-Christians) or a no-

257. *Id.* at 561–63 (Thomas, J., concurring).
258. *See id.* at 563.
259. *Id.* at 548.
260. *See id.* at 549–50.
261. *Id.* at 550 (quoting Powell v. Texas, 392 U. S. 514, 533 (1968)).
262. *Id.* at 552 (citations omitted) (quoting Kahler v. Kansas, 140 S. Ct. 1021, 1030, 1031 (2020)).
263. *See id.*
264. *See id.* at 550–56; *supra* note 100.
265. *See Grants Pass*, 603 U.S. at 550–54.

smoking shelter (for smokers) disqualifying?[266] Finally, what are "'life-sustaining act[s]' that flow necessarily from homelessness"?[267] Fires? Tents? Gorsuch posed these questions.[268]

Justice Sonia Sotomayor dissented, joined by Justice Elena Kagan and Justice Ketanji Brown Jackson. Justice Sotomayor challenged the majority's contention that affirming the decision below would require extending *Robinson*. This is so, she argued, because "Grants Pass's Ordinances criminalize," not just behavior concomitant to homelessness, but "being homeless" itself.[269] "The status of being homeless (lacking available shelter)," she said, "*is defined by* the very behavior singled out for punishment (sleeping outside)."[270] Indeed, "as enforced," the ordinances "are intended to criminalize being homeless,"[271] Justice Sotomayor argued. The Grants Pass ordinances "define [a] 'campsite' as 'any place where bedding, sleeping bag, or other material used for bedding purposes' is placed '*for the purposes of maintaining a temporary place to live*.'"[272] By definition, only people without a regular place to live, that is, homeless people, Justice Sotomayor reasoned, would set up a campsite "for the purpose of maintaining a temporary place to live."[273] Thus, she argued, both the intent and the plain language of the law target the status of homelessness, making the law unconstitutional under *Robinson*.[274]

B. Why the New Homelessness Will Persist Despite the Supreme Court's Decision

Shortly after the Supreme Court's decision in the summer of 2024, California Governor Gavin Newsom called on California government officials to start dismantling homeless encampments. He told local officials that "[t]here are simply no more excuses" for allowing the encampments to remain.[275] To give these words force, he issued an executive order requiring certain state agencies to start clearing encampments[276] and threatened to withhold state funds from

266. *See id.*

267. *Id.* at 555 (alteration in original) (quoting Johnson v. City of Grants Pass, 72 F.4th 868, 921 (2023) (joint statement of Silver and Gould, JJ., regarding denial of rehearing)).

268. *Id.*

269. *Id.* at 578 (Sotomayor, J., dissenting).

270. *Id.* at 575 (emphasis added).

271. *Id.*

272. *Id.* at 570 (emphasis added) (quoting GRANTS PASS, OR., MUNICIPAL CODE § 5.61.010(B) (2023) (amended 2024)).

273. *Id.* (quoting GRANTS PASS, OR., MUNICIPAL CODE § 5.61.010(B) (2023) (amended 2024)).

274. *See id.* at 574–75, 579–81.

275. Shawn Hubler, *Newsom Orders California Officials to Remove Homeless Encampments*, N.Y. TIMES (Jul. 25, 2024), https://www.nytimes.com/2024/07/25/us/newsom-homeless-california.html [https://perma.cc/W4JJ-QGTQ].

276. Cal. Exec. Order No. N-1-24 (July 25, 2024), https://www.gov.ca.gov/wp-content/uploads/2024/07/2024-Encampments-EO-7-24.pdf [https://perma.cc/K957-VNZA].

local governments that failed to make progress toward clearing encampments.[277] In so doing, Governor Newsom, a potential 2028 presidential candidate, signaled that he heard the public disaffection over encampments in California cities. In response, San Francisco Mayor London Breed ordered a "very aggressive" cleanup of the city's encampments, with potential "criminal penalties for [those] refusing to disperse."[278] At first blush, these developments might portend the New Homelessness's death knell: a return to the 2018 status quo ante. We argue that they do not.

The reason is that local responses to the Court's recent decision vary widely, with many cities continuing to allow encampments despite state-level pushback. Despite Governor Newsom's strong language, he does not have the power to force local officials to clear encampments, and indeed, many cities decided not to. Following the Supreme Court's June 2024 decision, Los Angeles Mayor Karen Bass, an advocate for transitional housing initiatives,[279] stated that the ruling "must not be used as an excuse . . . to arrest [our] way out of this problem or hide the homelessness crisis in neighboring cities or in jail."[280] Similarly, the Los Angeles County Board of Supervisors unanimously opposed Governor Newsom's order, reaffirming their "care first, jails last" approach.[281]

Indeed, San Francisco's acquiescence may be an outlier. The city was in a unique position among Ninth Circuit cities: It had been enjoined from enforcing any of its anti-camping ordinances, meaning residents had completely unrestricted rights to urban camping.[282] In the weeks following the *Grants Pass* decision, the Ninth Circuit vacated the most important portion of this injunction.[283] San Francisco then became free to do what other cities had already been doing: regulate urban camping.

277. Taryn Luna, *Newsom Threatens to Take Money from Counties That Don't Reduce Homelessness*, L.A. TIMES (Aug. 8, 2024), https://www.latimes.com/california/story/2024-08-08/gavin-newsom-homelessness-fight-california-counties [https://perma.cc/WFH9-RW37].

278. Hannah Wiley, *Taking Cue from Supreme Court, Breed to Launch Aggressive Homeless Sweeps in San Francisco*, L.A. TIMES (July 27, 2024), https://www.latimes.com/california/story/2024-07-27/london-breed-to-launch-aggressive-homeless-sweeps-in-san-francisco [https://perma.cc/3KGG-KALW].

279. *Inside Safe*, MAYOR KAREN BASS, https://mayor.lacity.gov/InsideSafe [https://perma.cc/2M92-UTHB] (last visited Jan. 18, 2025); Piper French, *Gavin Newsom Is Creating a Disaster for Unhoused People*, THE NATION (Aug. 1, 2024), https://www.thenation.com/article/archive/gavin-newsom-is-creating-a-disaster-for-unhoused-people [https://perma.cc/M5JA-9XU9].

280. *Mayor Bass Slams Supreme Court's Ruling to Allow Failed Homeless Policies Across the Nation*, MAYOR KAREN BASS (June 28, 2024), https://mayor.lacity.gov/news/mayor-bass-slams-supreme-courts-ruling-allow-failed-homeless-policies-across-nation [https://perma.cc/6SF3-WP36].

281. Leah Sarnoff, *Los Angeles County Says 'Care First, Jails Last' to Newsom's Homeless Encampment Order*, ABC NEWS (Aug. 3, 2024), https://abcnews.go.com/US/los-angeles-county-care-jails-newsoms-homeless-encampment/story?id=112448132 [https://perma.cc/56TZ-TTU5].

282. *See* Coal. on Homelessness v. City and Cnty. of San Francisco, 90 F.4th 975, 977 (9th Cir. 2024).

283. Coal. on Homelessness v. City and Cnty. of San Francisco, 106 F.4th 931, 932 (9th Cir. 2024) (mem.); *Ninth Circuit Vacates Part of Injunction in Homeless Encampment Lawsuit*, CITY ATT'Y

San Francisco's and Los Angeles's contrasting responses show that local responses to the shift in federal law will not be uniform. This is true both in California and across the country. And we expect that many, if not most, cities will continue to permit and regulate homelessness encampments to some extent. Even though federal law has changed, four forces will make it hard to undo the New Homelessness: (1) state and local law, (2) public officials' learning, (3) shifting norms, and (4) the emergence of an encampment infrastructure.

1. State and Local Law

First, state and local laws limit the reach of the Supreme Court's *Grants Pass* decision, making the New Homelessness' persistence likelier. To illustrate, after the Supreme Court announced its decision, Portland, Oregon Mayor Ted Wheeler declared that the decision would "have little effect on Oregon's largest city," since it was now Oregon rather than federal law that "continues to control and limit what Oregon cities can and can't do."[284] Indeed, Justice Gorsuch singles out the Oregon legislation as an example of legislation that will remain.[285] As mentioned, several states with conservative electorates and Republican-dominated legislatures have enacted laws promoting sanctioned encampments at the local level. But progressive states and cities have also enacted legislation codifying sanctioned encampments. In 2021, the Oregon Legislative Assembly enacted House Bill 3115, the sole purpose of which was to codify *Martin*'s central holding and to decriminalize homelessness.[286] As the bill's sponsor, Oregon House Speaker Tina Kotek, put it, "[i]f you can't justify moving folks along because there's not enough shelter, then you have to have a different standard for how you treat them, and from my perspective, that is more humanely."[287] The bill, however, does not codify an unrestricted urban camping right. Instead, it allows local jurisdictions to impose geographic and temporal

OF S.F. (July 8, 2024), https://www.sfcityattorney.org/2024/07/08/ninth-circuit-vacates-part-of-injunction-in-homeless-encampment-lawsuit/ [https://perma.cc/6CS2-N8RB].

284. Conrad Wilson, Alex Zielinski & Dirk VanderHart, *Homelessness Rules in Oregon May Not Change Much Despite Supreme Court Decision*, OR. PUB. BROAD. (June 28, 2024), https://www.opb.org/article/2024/06/28/supreme-court-grants-pass-homeless-case-impacts-oregon/ [https://perma.cc/8W2P-SNSW].

285. City of Grants Pass v. Johnson, 603 U.S. 520, 556 (2024).

286. *See* LEAGUE OF OR. CITIES, GUIDE TO PERSONS EXPERIENCING HOMELESSNESS IN PUBLIC SPACES 5 (2024), https://www.orcities.org/application/files/3217/2047/9381/GuidetoPersonsExperiencingHomelessnessinPublicSpaces.pdf [https://perma.cc/CNA3-5UJ7] ("From a strictly legal perspective, HB 3115 intended to capture and codify the key principles of *Martin v. City of Boise* and *Blake v. City of Grants Pass*."); *see also* Nicole Hayden, *Oregon Will Allow Homeless Individuals to Sleep on Public Land in All Communities*, OREGONLIVE (June 10, 2021), https://www.oregonlive.com/politics/2021/06/oregon-will-allow-homeless-individuals-to-pitch-tents-on-public-land-in-all-communities.html [https://perma.cc/9W4X-M8LH].

287. Maggie Vespa, *Oregon Bill Aims to Largely Ban 'Sit-Lie' Laws*, KGW8 (Feb. 8, 2021), https://www.kgw.com/article/news/local/homeless/oregon-bill-aims-mostly-ban-sit-lie-laws/283-7f6933c9-5f50-4b35-b9fb-b6067991ff7f [https://perma.cc/QMJ3-SG9M].

restrictions on camping that are "objectively reasonable."[288] While the "objectively reasonable" standard is not one created by the Ninth Circuit and still needs to be fleshed out, it appears that the progressive legislation envisions sanctioned encampments, much like the conservative state-level legislation.[289]

Just as *Dobbs* spurred mass state legislative action to bolster abortion rights, we can expect a similar reaction from states in dealing with homelessness in the wake of *Grants Pass*.[290] Indeed, as of late 2024, state-level legislation had been debated in Washington[291] and Michigan.[292] Other states, including Colorado[293] and Oregon,[294] may reintroduce previously lapsed legislation that protected some homelessness rights (the so-called right-to-rest laws). In other states, including New Jersey,[295] we may see comprehensive laws like the Homeless Bill of Rights enacted last year in New York.[296] Shortly after the Supreme Court's *Grants Pass* decision, Democratic lawmakers in Pennsylvania announced a plan to enact

288. 2021 Or. Laws ch. 370, § 1(2) ("(2) Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness."). In the same legislative session, the Oregon Legislative Assembly also passed House Bill 3124, which offers procedural protections relating to closures of sanctioned encampments. *See* 2021 Or. Laws ch. 371.

289. *See* OR. REV. STAT. ANN. § 195.505 (West 2022). Mayor Wheeler has also recently indicated that he would instruct Oregon lawmakers to define what constitutes a 'reasonable' restriction on public camping under the law, after a Multnomah County judge held that Portland's "ban on [public] camping between the hours of 8 a.m. and 8 p.m." violated the law. *See* Ashley Koch, Pat Dooris & Jamie Parfitt, *What Happens to Homelessness in Oregon After Supreme Court's Grants Pass Decision?*, KGW8 (June 28, 2024), https://www.kgw.com/article/news/local/the-story/homeless-camp-case-grants-pass-oregon-supreme-court-ruling/283-2044f141-5a87-42c8-9c69-bdaedd0d01e8 [https://perma.cc/X8TE-P9NL].

290. *See* Mila Versteeg & Emily Zackin, *De-judicialization Strategies*, 133 YALE L.J. F. 228, 240–43 (2023) (analyzing how political campaigns were launched to respond to *Dobbs* that adopted strategies to shift authority over abortion rights away from courts and entrenching their preferred policies through state constitutional amendments).

291. S. 5016, 68th Leg., 2023 Reg. Sess. (Wash. 2023).

292. H.R. 4919, 102nd Leg., 2023 Reg. Sess. (Mich. 2023).

293. H.R. 18-1067, 71st Gen. Assemb., 2d Reg. Sess. (Colo. 2018).

294. H.R. 3501, 82d Legis. Assemb., 2023 Reg. Sess. (Or. 2023); *see also* Blair Best, *Controversial Oregon Bill Would Have Made Homeless Camp 'Sweeps' Illegal, Allowed Swept Campers to Sue for $1,000*, KGW (May 1, 2023), https://www.kgw.com/article/news/local/homeless/oregon-bill-homeless-camp-sweeps-illegal/283-637ab1aa-e152-4b8a-a678-e2faba73e425 [https://perma.cc/P8Y8-M3LS] (detailing provisions of the lapsed Oregon legislation that would have introduced extensive procedural and substantive safeguards against violations of homeless people's rights).

295. Bobby Brier, *New Legal Protections for Homeless People on Hold in NJ*, NJ SPOTLIGHT NEWS (July 29, 2024), https://www.njspotlightnews.org/2024/07/nj-homeless-protections-stalled-us-supreme-court-enables-public-places-sleeping-ban/ [https://perma.cc/UX73-9DKG].

296. 2023 N.Y.C. Local Law No. 62; *see also NYC Enacts 'Homeless Bill of Rights,' but Doubts Arise over Key Provisions*, PBS (May 30, 2023), https://www.pbs.org/newshour/politics/nyc-enacts-homeless-bill-of-rights-but-doubts-arise-over-key-provisions [https://perma.cc/2XVR-6NT5] (reporting that New York City's new "Homeless Bill of Rights" grants unhoused individuals rights to sleep in designated public spaces, protections for gender identity in shelters, and complaint rights regarding shelter conditions).

legislation barring the criminalization of homelessness.[297] Such legislation would of course remain in force despite the Supreme Court's decision. Moreover, as of 2024, nine Republican-led states had considered or enacted the Cicero model bill.

We expect that any future legislative efforts will broadly reflect three aforementioned insights: (1) Sanctioned encampments are a valuable policy response; (2) criminalization of homelessness when people have nowhere to go is an undesirable response; and (3) many now expect urban camping to be an option for those without a residence.

2. Public Officials' Learning

In the years following *Martin*, local officials discovered that creating sanctioned encampments may be among the most viable of the many imperfect strategies for addressing homelessness. What was once unthinkable—facilitating public homeless encampments—became practically and politically plausible. Although progressive local officials often cite Housing First as the best solution to homelessness,[298] such strategies have proven challenging to implement, especially in urban areas with high real estate prices and limited space.[299] Many used to think that the second-best alternative was homeless shelters.[300] Shelters began to emerge as a policy response to the growing homeless population in the late nineteenth and early twentieth centuries, particularly during periods of economic hardship like the Great Depression, and they continue to be a central strategy in some cities, including New York City.[301] But in the wake of *Martin*, city officials saw firsthand how many homeless people preferred self-organized encampments to shelters.[302] Indeed, sanctioned encampments respond to two of the most pressing concerns that homeless respondents express in surveys: the lack of safety in traditional shelters and the bureaucracy associated with

297. *Senators Saval, Hughes, Cappelletti, and Kearney Announce Intention to Introduce Bill Preventing Criminalization of Homelessness*, PA. SENATE DEMOCRATS (July 2, 2024), https://pasenate.com/senators-announce-intention-to-introduce-bill-preventing-criminalization-of-homelessness/ [https://perma.cc/67HS-QMZU].

298. There is preliminary evidence of the program's success. For example, Houston is said to have reduced homelessness in the greater Houston area by 63 percent since its introduction of Housing First in 2012. Martha Teichner, *Inside Houston's Successful Strategy to Reduce Homelessness*, CBS NEWS (Apr. 14, 2024), https://www.cbsnews.com/news/how-houston-successfully-reduced-homelessness/ [https://perma.cc/4V5R-VGFP].

299. *See* U.S. DEP'T OF HOUS. & URB. DEV., *Housing First: A Review of the Evidence*, EVIDENCE MATTERS, Spring/Summer 2023, at 11.

300. *See, e.g.*, Alex Farrington, *Racial Capitalism and Self-Organized Houseless Encampments: (En)countering Banishment in Portland and Miami*, ENV'T & PLAN. C: POL. & SPACE 6 (2023) (drawing on ethnographic data to show how attitudes toward self-organized encampments have evolved over time).

301. *See* Ellen Bassuk & Deborah Franklin, *Homelessness Past and Present: The Case of the United States, 1890-1925*, 8 NEW ENG. J. PUB. POL'Y 67, 70 (1992) (examining the historical emergence of homelessness and policy responses, including shelters, in the United States between 1890 and 1925).

302. *See supra* Part II.C.

accessing them.[303] Local officials further learned that, while the general population has little patience for unrestricted urban camping, it is more willing to accept sanctioned, regulated encampments.[304] Sanctioned encampments, therefore, might be among the best available options. *Martin* thus spurred a learning process, providing important information on the value of different policy responses to homelessness.

This court-induced learning was not limited to progressive circles. The Cicero Institute continues to recommend that states invest in "sanctioned, policed encampments."[305] In contrast with progressive homelessness advocates, Cicero recommends sanctioned encampments over Housing First, which it deems "expensive and ineffective."[306] Conservatives have instead lobbied for a model of civil commitment, making it easier to force care on people with mental health issues.[307]

But even if progressive and conservative visions differ, sanctioned encampments appear to be an acceptable compromise to both. Neither entirely minimalist nor maximalist, sanctioned encampments provide some immediate benefits to homeless individuals without requiring political leaders to acquiesce in a complex, ongoing positive social policy initiative. Sanctioned encampments also accommodate many of the preferences of a diverse set of stakeholders, while mitigating the predicament facing the country's involuntarily homeless population. Sanctioned encampments are nobody's idea of an ideal solution, but they seem to be the Condorcet winner among all other options.[308]

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303. *See What Do People Experiencing Homelessness Really Want?*, A-MARK FOUND. (Sept. 13, 2022), https://amarkfoundation.org/reports/what-do-people-experiencing-homelessness-really-want/ [https://perma.cc/2QAZ-3QU7] (reporting survey findings that emphasize homeless individuals' concerns about safety and barriers in accessing traditional shelters); JASON M. WARD, RICK GARVEY & SARAH B. HUNTER, RAND CORP., RECENT TRENDS AMONG THE UNSHELTERED IN THREE LOS ANGELES NEIGHBORHOODS: AN INTERIM REPORT ON THE LOS ANGELES LONGITUDINAL ENUMERATION AND DEMOGRAPHIC SURVEY (LA LEADS) PROJECT 9, 22–23 (2022), https://www.rand.org/pubs/research_reports/RRA1890-1.html [https://perma.cc/4AE2-5DTK] (analyzing demographic and safety concerns among unsheltered homeless populations, highlighting the need for secure and accessible shelter options).

304. *See* Jade N. Orr, Jeremy Németh, Alessandro Rigolon, Laura Santos Granja & Dani Slabaugh, *NIMBY Attitudes, Homelessness, and Sanctioned Encampments: A Longitudinal Study in Denver*, J. PLAN. EDUC. & RSCH. 1 (2024) (surveying local resident support for sanctioned encampments in Denver).

305. *Homelessness*, CICERO INST., https://ciceroinstitute.org/issues/homelessness/?_types=research [https://perma.cc/S4DE-VY3F].

306. *Id.*

307. *See* DEVON KURTZ & CHRISTOPHER JONES, CICERO INST., INVOLUNTARY CIVIL COMMITMENT 2 (2024), https://ciceroinstitute.org/wp-content/uploads/2024/01/Involuntary-Civil-Commitment-brief_1-19-2024.pdf [https://perma.cc/TP7G-KH2P] (arguing that "[i]nvoluntary civil commitment is an essential tool to help people who are experiencing homelessness and severe mental illness receive the treatment they need to survive").

308. The Condorcet winner is an option that would win a head-to-head comparison against each of the other alternatives. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2d ed. 1963).

3. Shifting Norms

The discourse surrounding homelessness has also shifted in the last decade under the influence of *Martin* and its progeny, such that few want a return to the pre-*Martin* practice of effectively criminalizing homelessness. Even as federal constitutional law has changed, *Martin*'s basic insight, that it is unjust to punish people for being in a place when they have no lawful alternative, will continue to resonate broadly as a moral matter.[309] To illustrate, even though Los Angeles Mayor Karen Bass enforced encampment sweeps all over the city, she also noted that "[s]trategies that just move people along from one neighborhood to the next or give citations instead of housing do not work."[310] Mayor Bass's statement offers a striking contrast with cities' expressed positions a decade before, which often demanded the power to do just that.[311] The conservative Cicero Institute agrees that people should be neither imprisoned nor abandoned; rather, they should receive mental health care or treatment for substance addiction—by civil commitment, if necessary.[312] Again, while there is much disagreement on the optimal solution to the homelessness crisis, there is a general consensus that it is unjust or ineffective to criminally punish people who have no lawful alternative but to occupy public spaces.

Sanctioned encampments represent a pragmatic consensus that allows cities to avoid being seen as criminalizing homelessness: While homeless people may not reside in any public space they choose, they have at least one place to be. And in most localities, sanctioned encampments are available in addition to indoor shelter, which, as discussed, many homeless people do not prefer.[313] Sanctioned encampments thus not only offer a feasible solution, but they also align with the shifting discourse around homelessness.[314] The Supreme Court

309. Longitudinal surveys indicate growing public support for compassionate approaches to tackling homelessness. *See* Jack Tsai, Crystal Yun See Lee, Thomas Byrne, Robert H. Pietrzak & Steven M. Southwick, *Changes in Public Attitudes and Perceptions About Homelessness Between 1990 and 2016*, 60 AM. J. CMTY. PSYCH. 599, 604 (2017); *see also* Clifford & Piston, *supra* note 38 (exploring the role of "disgust" in the public's support for "counter-productive" homelessness policies like criminalization).

310. Marisa Kendall, *Gavin Newsom Orders State Agencies to Move Homeless People Out of Camps — But to Where?*, CALMATTERS (July 25, 2024), https://calmatters.org/housing/homelessness/2024/07/newsom-homeless-encampments-order [https://perma.cc/6G7V-27YD]; CALMATTERS, *City Mayor Swore Not to Criminalize Homelessness, But Report Says She Did*, SANTA MONICA DAILY PRESS (Aug.16, 2024), https://smdp.com/news/this-big-city-mayor-swore-not-to-criminalize-homelessness-a-new-report-says-she-did-anyway/ [https://perma.cc/Q5DZ-UQZY].

311. Foscarinis, *supra* note 40, at 114–16 (tracking the use and proliferation of criminal laws and attendant law enforcement practices against homeless people in American cities in the 1980s and 1990s).

312. *See* CICERO INST., Integrating Treatment for Vulnerable Populations, https://ciceroinstitute.org/issues/homelessness/integrating-treatment-for-vulnerable-populations/ [https://perma.cc/E9ZR-2F5P].

313. *See supra* note 177.

314. One of the most striking fault lines in the discourse around homelessness policy has been the reemergence of "revanchist" policies seeking to "take back" public spaces from impoverished people, including homeless populations. *See* Jade N. Orr, Jeremy Németh, Alessandro Rigolon, Laura

changed federal constitutional law, but it will not so easily reverse a decade of shifting norms.

Perhaps the most striking example of evolving law and norms occurred in the city at the heart of *Grants Pass v. Johnson*. In August 2024, the Grants Pass City Council voted unanimously to designate four areas within the city for camping, banning camping in the rest of the city's public areas.[315] Campers are limited to just a few consecutive nights at each site, but they are permitted to "cycle through" the four sites indefinitely. Such a policy would have passed muster under a plain reading of the Ninth Circuit's *Grants Pass* opinion, but the city had been mired in an injunction for the duration of the litigation, which prevented it from creating dedicated campsites. Additionally, under the 2021 Oregon state law, the city was probably not permitted to reinstate its pre-lawsuit, city-wide ban on camping. Whether due to changing norms or strong-arming from the legislature, the city took a different path, opting for sanctioned encampments.

4. Infrastructure

Fourth and finally, in the late 2010s and early 2020s, substantial new local resources were devoted to sanctioned encampments,[316] including sanitation, medical services, mental health services, outreach programs, and substance-abuse treatment.[317] In 2022, the city of Portland alone allocated $27 million to

Santos Granja & Dani Slabaugh, *Beyond Revanchism? Learning from Sanctioned Homeless Encampments in the U.S.*, 45 URB. GEOGRAPHY 433 (2024) (analyzing the role of sanctioned encampments in countering punitive "revanchist" policies against homelessness by providing supportive alternatives); Antonin Margier, *The Compassionate Invisibilization of Homelessness: Where Revanchist and Supportive City Policies Meet*, 44 URB. GEOGRAPHY 178 (2023) (discussing the intersection of punitive and supportive policies and how "compassionate invisibilization" shapes public perceptions of homelessness).

315. Claire Rush, *Grants Pass Bans Homeless Camping Except in Some Areas*, ROGUE VALLEY TIMES (Aug. 12, 2024), https://www.rv-times.com/localstate/grants-pass-bans-homeless-camping-except-in-some-areas/article_58f64697-741f-5b39-816c-9bb30e01d040.html#:~:text=The%20new%20laws%20create%20four,adults%2C%20the%20Gospel%20Rescue%20Mission [https://perma.cc/CG5S-33CC].

316. *See* JUNEJO, *supra* note 134, at 4; Tony Sparks, *Citizens Without Property: Informality and Political Agency in a Seattle, Washington Homeless Encampment*, 49 ENV'T AND PLAN. A: ECON. & SPACE 86, 87–88 (2017).

317. DUNTON ET AL., *supra* note 16, at 22–23 (describing the development and incidence of mental health, sanitation, and other facilities in a number of surveyed cities, including Chicago and Houston, between 2016 and 2019); Stephen Przybylinski, *From Rejection to Legitimation: Governing the Emergence of Organized Homeless Encampments*, 60 URB. AFFS. REV. 118, 129 (2024) (describing the setting up of supportive infrastructure around encampments in Portland, Oregon, around 2016); Ippolytos Kalofonos, Matthew McCoy, Lisa Altman, Lillian Gelberg, Alison B. Hamilton & Sonya Gabrielian, *A Sanctioned Encampment as a Strategy for Increasing Homeless Veterans' Access to Housing and Healthcare During the COVID-19 Pandemic*, 38 J. GEN. INT'L MED. 857, 858 (2023) (describing the setting up of supportive infrastructure in a sanctioned encampment in Los Angeles starting in late 2019 and continuing into the COVID-19 pandemic in 2020).

create six designated encampment areas.[318] This infrastructure has led both homeless communities and service providers to expect encampments to be a legitimate residence option for homeless people for the foreseeable future. Upsetting these expectations would be politically difficult.

Studies on the stickiness of law and policy support this insight. Political scientist Paul Pierson has argued that legal changes often endure over time because they create policy feedback loops.[319] For example, the New Deal Era's Social Security expansion helped to create a powerful, multi-partisan constituency of beneficiaries, which has consistently rebuffed reduction efforts.[320] Similarly, the 2010 Affordable Care Act (ACA) extended healthcare coverage to millions of Americans. Despite multiple attempts to repeal it, the ACA has become embedded in the American healthcare system, sustained in part by the fact that millions of voters rely on it.[321]

In a similar vein, the initial investments in sanctioned encampments generate administrative and logistical structures, which then create inertia that makes policy reversal more challenging. Additionally, these investments give community organizations—including local nonprofits, service providers, and advocacy groups—vested interests in maintaining the funding and resources allocated to these sites. Over time, these stakeholders may lobby for the encampments' preservation (and even expansion), further embedding the policy in local governance structures despite potential opposition. While expenditures on encampments are tiny compared with those dedicated to health insurance or Social Security, and the homeless community is not nearly as powerful an electoral constituency as the beneficiaries of those larger social programs, sanctioned encampments will nonetheless be politically sticky for the reasons stated above.

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Taken together, four forces—state and local law, public officials' learning, shifting norms, and infrastructure—make it likely that the New Homelessness will remain even though the law has changed. If so, tent cities will remain a

318. Claire Rush, *Portland, Oregon, Approves $27M for New Homeless Camps*, ASSOCIATED PRESS (Nov. 30, 2022), https://apnews.com/article/health-oregon-portland-mental-social-services-7e2c55be4910618062d6768d2eac61d3#:~:text=November%2030%2C%202022-,PORTLAND%2C%20Ore.,to%20address%20its%20homelessness%20crisis [https://perma.cc/Z2GK-36UX].

319. PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS 31–36 (2004).

320. *See generally* ANDREA LOUISE CAMPBELL, HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE (2003) (discussing how welfare policies create vested interests and mobilize beneficiaries into political activism); Paul Pierson, *When Effect Becomes Cause: Policy Feedback and Political Change*, 45 WORLD POL. 595, 609 (1993) (exploring how policies can generate self-reinforcing effects that shape future political behavior and institutional resilience).

321. *See* Daniel J. Hopkins & Kalind Parish, *The Medicaid Expansion and Attitudes Toward the Affordable Care Act: Testing for a Policy Feedback on Mass Opinion*, 83 PUB. OP. Q. 123, 131–32 (2019).

fixture of American urban landscapes, and sanctioned encampments will be an enduring legacy of the Ninth Circuit's jurisprudence. Notably, in the wake of *Martin*, a *Harvard Law Review* note observed that "[t]he case's most significant impact . . . was to limit cities' ability to push homeless people out[] by allowing them to stay *somewhere* within [city] boundaries."[322] The author did not foresee that the decision's impact would come to be more profound. But after all the dust has settled and the case itself has been overturned, this does appear to be an accurate description of its legacy.

CONCLUSION

We have documented how a line of Ninth Circuit case law changed the face of American homelessness, catalyzing a movement toward mass urban camping and, eventually, government-sanctioned encampments. We predict that this court-induced learning process will continue to shape the response to homelessness, despite the Supreme Court's 2024 *Grants Pass* decision. Sanctioned encampments, we argue, are here to stay.

We end by raising an important question for further study: What are the implications of removing the federal right that spawned the urban encampment phenomenon? On one hand, if encampments continue to be a fixture of urban landscapes, many homeless residents' day-to-day realities might not change meaningfully. But on the other hand, the fact that these encampments are no longer an entitlement might have consequences.

We suspect that these potential consequences may be twofold. First, without an underlying federal constitutional right, homeless individuals may find it harder to advocate for themselves if they are denied access to encampments and related services. Literature in the law-and-society tradition has shown that the existence of rights can create a "rights consciousness," which empowers people to advocate for their needs and wants, both legally and politically.[323] Such empowerment can create a virtuous cycle, in which newly empowered groups pursue new strategies for obtaining additional rights. The fact that some people who were told to move off sidewalks reportedly responded by citing *Martin*

322. Recent Cases, *Eighth Amendment — Criminalization of Homelessness — Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public* — Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019)*, 133 HARV. L. REV. 699, 705 (2019).

323. *See generally* Michael McCann, *Litigation and Legal Mobilization*, *in* THE OXFORD HANDBOOK OF LAW AND POLITICS 522, 529–30 (Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira eds., 2008) (detailing the judicial and political constraints that operate on individual and collective strategies of legal mobilization); STUART A. SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND SOCIAL CHANGE 131 (1974) (showing how rights and rights consciousness infused emerging legal strategies among activists and politicians that undergirded a range of progressive causes). Studies have pointed out the importance of rights-consciousness in the pay equity movement, the mental health patient movement, and the women's rights movement, to name just a few. *See* MCCANN, *supra* note 164, at 5; Sally Engle Merry, *Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence*, 25 HUM. RTS. Q. 343, 345–46 (2003).

suggests that a rights consciousness has indeed emerged in homeless communities. The Supreme Court's *Grants Pass* decision removed this federal right, possibly disempowering homeless communities from further self-advocacy.

Second, *Grants Pass* may have the add-on effect of restricting access to camps and camp-related services. When homeless communities are stripped of ways to advocate for themselves, it will likely become easier to deny them that to which they were previously entitled.

It is too early to fully explore these implications. But an important question for future research and advocacy is whether it is either possible or desirable to bring back urban camping, not just as a matter of local discretionary policy but as a matter of legal right. Considering the coalition of homelessness advocates that were instrumental in *Martin*, we suspect that those groups will persist in their efforts to restore the legal right to urban camping. Advocacy groups have lobbied state legislatures against enacting additional criminal laws targeting homeless people. For instance, the National Homelessness Law Center developed the Gloria Johnson Act,[324] a model bill that prohibits civil and criminal penalties against homeless individuals without alternative shelter who camp in public spaces; such a rule comports with Oregon's reasonableness standard for assessing cities' anti-homelessness ordinances.[325] Advocates might also push for state constitutional amendments codifying rights, especially in states where amendment via public referendum is available. California, for example, has considered a constitutional amendment to recognize a right to housing, with a bill initially proposed in 2023.[326] In the 2024 presidential elections, several states had ballot initiatives addressing affordable housing and homelessness. For example, Rhode Island passed a $120 million bond for housing,[327] while North Carolina cities allocated $135 million collectively.[328] Maryland, New Mexico, and California cities, including San Francisco, also approved bonds for affordable housing and shelters.[329] Missouri voters

324. *Gloria Johnson Template Legislation*, NAT'L HOMELESSNESS L. CTR., https://housingnothandcuffs.org/gloria-johnson-template-legislation/ [https://perma.cc/DZX6-Q9DH].

325. OR. REV. STAT. ANN. § 195.530(4) (West 2024) (creating a cause of action for homeless persons to "bring suit for injunctive or declaratory relief to challenge the objective reasonableness" of a local anti-camping or sit-lie law).

326. State Assemb. Const. Amend. 10, 2023-2024 Leg., Reg. Sess. (Cal. 2023).

327. Alexander Castro, *Rhode Island Voters Approve All Four Bond Questions Totaling over $343 Million*, R.I. CURRENT (Nov. 6, 2024), https://rhodeislandcurrent.com/2024/11/06/rhode-island-voters-approve-all-four-bond-questions-totaling-over-343-million/ [https://perma.cc/A4F6-M39J].

328. Greg Childress, *Cary Says 'No' to Affordable Housing Bond. Asheville, Charlotte and Chapel Hill Say 'Yes,'* AOL (Nov. 7, 2024), https://www.aol.com/cary-says-no-affordable-housing-104741027.html [https://perma.cc/P63T-2S9G].

329. *Voters Approve Housing and Homelessness Ballot Measures Across the Country on Election Day*, NAT'L LOW INCOME HOUS. COAL. (Nov. 12, 2024), https://nlihc.org/resource/voters-approve-housing-and-homelessness-ballot-measures-across-country-election-day [https://perma.cc/37CD-U8J2].

established a hotel tax for affordable housing,[330] and Michigan's Ingham County increased property taxes for its Housing Trust Fund.[331]

Courts could also be sympathetic partners in pursuing additional rights for their homeless residents. Many state constitutions contain obligations to care for indigent communities.[332] Take New York, where the constitution requires providing for "[t]he aid, care and support of the needy."[333] In 1979, in response to a class action lawsuit filed by Robert Callahan and other homeless men, the New York County Supreme Court held that the New York state constitution requires the city to provide some type of shelter to homeless residents.[334] The Callahan decree initiated several decades of New York courts micro-managing New York City's shelter policies. Notably, the New York constitution does not explicitly mention shelter, but merely an obligation to care for the needy. We imagine the same provision might be read to grant a right to urban camping and that some state courts might be persuaded to find an urban camping right in the social rights component of state constitutions.

The fight for the right of homeless people to reside in public spaces, then, is far from over.

330. *St. Louis, Missouri, Proposition S, Hotel Tax Measure (November 2024)*, BALLOTPEDIA, https://ballotpedia.org/St._Louis,_Missouri,_Proposition_S,_Hotel_Tax_Measure_(2024) [https://perma.cc/Z2BT-4XQH] (last visited Jan. 19, 2025).

331. *Ingham County, Michigan, Housing and Homeless Millage Proposal, 2024*, ENHANCED VOTING, https://app.enhancedvoting.com/results/public/ingham-county-mi/elections/general11052024?st=Ingham%20County%20Housing%20and%20Homeless%20Millage%20Proposal&sv=01000000-1b0d-f605-3d9a-08dced127000&sm=id [https://perma.cc/6F73-AG8B] (last visited Jan. 19, 2025).

332. *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS (2013) (showing how constitutional history helps us understand why the constitutions of several U.S. states have progressive positive obligations).

333. N.Y. CONST. art. XVII, § 1 (establishing a state duty to provide for the aid, care, and support of the needy); *see also* N.Y. SOC. SERV. LAW § 49 (defining homelessness and outlining intervention services), § 131-v (providing emergency shelter allowances for homeless households); N.Y.C., N.Y., ADMIN. CODE § 21-328 (establishing the CityFHEPS housing subsidy program for homeless individuals and families), § 21-324 (mandating notification processes for establishing homeless shelters).

334. Callahan v. Carey, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979); *see generally* 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) (tracing the judicial enforceability of the right to shelter under the NY Constitution); Christine Robitscher Ladd, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272 (1986) (identifying the textual foundations of the right to shelter to Article XVII of the New York State Constitution); McJunkin, *supra* note 12, at 147–51 (discussing the social movement activism that led to the NY State Supreme Court to recognize a right to shelter).