



Council Meeting

Thursday, June 15th, 2023

Location: Council Chambers | In-person

AGENDA

Special Regular Session

7:00 p.m.

- 1) CALL TO ORDER
- 2) ROLL CALL
- 3) PLEDGE OF ALLEGIANCE
- 4) ADDITIONS OR DELETIONS TO AGENDA
- 5) PUBLIC HEARINGS OR PRESENTATIONS:
 - A. HB 3115 | *Overview*
 - B. Public Comment

★ Council asks that comments be limited to three minutes per audience member. Please state your name and address prior to commenting for the public record.
- 6) LEGISLATIVE:
 - A. **Ordinance 799:** HB 3115 | Martin v. Boise (*First Reading*)
- 7) ACTION ITEMS:
 - A. Park Camping Policy
- 8) COUNCIL QUESTIONS & COMMENTS
- 9) ADJOURN

Please visit www.ci.brownsville.or.us for the meeting agenda, agenda packet and other City information.



City Administrator Memorandum

June 15th, 2023

From: S. Scott McDowell
To: Mayor & Council
Re: Special Meeting | *June 15th, 2023*

Summary: Every city and county in Oregon have been struggling with the 9th Circuit Courts decision in *Martin v. Boise* for a number of years. In 2021, the State Legislative Assembly decided to codify the basic premise of the case into State Law with the passage of HB 3115. Several bills were introduced and were all rolled into the referenced House Bill. The State of Oregon struck down cities ability to have time, place and manner restrictions on public property in advance of HB 3115. Cities and counties were no longer allowed to keep anyone from using public property for camping and living purposes. The outcome of this policy approach was an explosion of homeless people sleeping in public spaces in cities such as Salem, Eugene, and Portland during the Pandemic and continuing to this day. The 9th Circuit ruled on a case known as *Blake v. Grants Pass* in September 2022 holding that the city's "anti-camping" ordinance prohibited individuals from using bedding supplies violated the Cruel and Unusual Punishment Clause of the 8th Amendment.

Meanwhile, many cities throughout Oregon have endeavored to find solutions to the "homelessness crisis." Local governments have tried to open housing, use hotels & motels, built shelters along with a myriad of other solutions to address this issue.

House Bill 3115 comes into law July 1st, 2023.

Implications: City attorneys all over the mid-valley, and beyond, have concluded that cities and counties have until July to put time, place and manner restrictions back in municipal codes provided that they allow a designated space for individuals experiencing homelessness. Cities have been advised that if time, place, and manner restrictions are not codified by July 1st, 2023, they will not be allowed to pass legislation after July 1st. Attorneys have agreed that cities can slightly modify the language after July 1st, as long as it complies with the State Law being imposed by HB 3115.

The League of Oregon Cities worked with legislators to get this carve out for cities. The carve out being allowing cities to close public spaces with certain conditions known as time, place, and manner restrictions.

The Oregon Mayor's Association in cooperation with the League of Oregon Cities took a funding proposal to the State legislature to assist cities and counties in an effort to gain funding for this unfunded mandate. Their proposal was denied by the State legislature.

What does Ordinance 799 do for Brownsville?

The ordinance aims to set time, place, and manner restrictions that meet the intent of the State law. The ordinance as written does the following:

1. Does not allow any person to camp on sidewalks either in front of private residences or businesses. Sidewalks are the responsibility of the property owner and are covered through private insurance. Public sidewalks are also prohibited.
2. Does not allow "free camping" in Pioneer Park. Pioneer Park becomes a fee park.



City Administrator Memorandum

3. Designates the South Wastewater Treatment Plant as a place for free camping between the hours of 10:00 p.m. and 7:00 a.m.
4. Creates a 200' buffer around the riparian area of the Calapooia River.

Staff Recommendation: The City does not have specialized personnel trained to deal with the associated issues that accompany the impact of individuals being singled out by this legislation. Several area communities have experienced large expenditures cleaning up camping sites and have had to contract clean-up services with special third-party contractors.

The State is also considering a law change to the requirements for disposing of abandoned recreational vehicles. The rate cities pay to dispose of an abandoned recreational vehicle is \$5,000 per vehicle. The State continues to create and implement unfunded mandates that cities simply cannot afford.

The City really has no other option than to pass Ordinance 799 and work toward developing a designated space as advised by the City Attorney.

Brownsville's Pioneer Park is a special place used for many events during the course of the summer and early fall. Without rules in place to protect public spaces from abuse, the City will have absolutely no defense to deal with the associated negative impacts of this State law.

Respectfully Submitted,

A handwritten signature in blue ink, appearing to be "SM", is written over the typed name.

S. Scott McDowell
City Administrator

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Real-Time Risk



TIMELY NEWS AND TIPS TO HELP REDUCE RISK

October 2021

HOW HB 3115 IMPACTS OREGON CITIES AND COUNTIES

By CIS Deputy Property/Casualty Trust Director Dave Nelson

It is time to review your city and county ordinances on sleeping, camping, or similarly related ordinances. On June 23, 2021, Governor Brown signed HB 3115 into law. HB 3115 requires cities and counties to review and update their ordinances primarily focusing on camping, sitting, sleeping, and staying warm and dry on public properties. Please pay close attention to the time, place, and manner language in the ordinance, which must be "objectively reasonable". Local governments will have until July 1, 2023, to comply with the new law.

So, what do you need to do to comply with HB 3115? You need to focus on "reasonableness". Review the policies of your organization as they relate to "sitting, lying, sleeping or keeping warm and dry while being outdoors which are objectively reasonable to time, place and manner with regards to someone facing homelessness". Furthermore, your policies cannot conflict with ORS 203.077 and 203.079. The actions of government agencies will be viewed on the totality of the circumstances, including, but not limited to, the impact of the law on persons experiencing homelessness.

House Bill 3115 is the regulation of public property with respect to persons experiencing homelessness; and declaring an emergency.

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Real-Time Risk

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There are four actions several cities and counties are taking to address homelessness in their communities, which also help address HB 3115. These four actions are summarized below with a summary of CIS' liability and property coverage for each category.

1. Purchasing or using government owned land to provide those experiencing homelessness a place to set up their camp.

- CIS requires a policy addressing each of the exposures (each camp/facility).
- Preferably, a non-profit or faith-based organization will operate the facility.
- CIS will require additional contributions for this unique risk. (Please contact your agent or CIS Underwriting.)

Liability: CIS' liability coverage would apply as usual for the members' exposures. There is limited coverage for third-party pollution which include viruses. Claims related to zoning and land use are excluded from the CIS coverage.

Property: CIS property coverage covers member-owned buildings or equipment as scheduled. Pollution is excluded unless caused by a covered loss, and then limited to \$25,000.

2. Purchasing or using existing land and installing small shelters to allow individuals or in some cases, couples to move from a tent to a small shelter.

- CIS requires a policy addressing each of the exposures (each location).
- Preferably a non-profit or faith-based organization will operate the facility.

When preparing space for those experiencing homelessness, we encourage having policies to address:

- Non-profit contract and insurance
- Leases for private land
- Abuse protection
- Physical distancing
- Shelter residency eligibility
- Sanitation
- Rodent control
- Cooking/food handling
- Food storage
- Electric, gas, propane heating
- Drugs and alcohol
- Crime/victimization
- Environmental clean-up plan
- Spill response plan
- Individual camp/room clean-up plan
- Damage/theft of personal property plan
- Security plan
- Safety plan
- Medical response plan
- Communication plan
- Natural disaster and adverse weather response plan
- Safety audits/inspections plan
- Incident reporting plan
- Accident investigations
- Zoning and neighborhood conflicts

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Real-Time Risk

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- CIS will require additional contributions for this unique risk. (Contact your agent or CIS Underwriting for your unique risk.)

Liability: CIS' liability coverage would apply as usual for the members' exposures. There is limited coverage for third-party pollution which include viruses. Claims related to zoning and land use are excluded from the CIS coverage.

Property: CIS will not offer property coverage for the shelters. Pollution is excluded unless caused by a covered loss, and then limited to \$25,000.

3. Using government owned facilities such as community centers or senior centers as temporary housing.

- Members may be asked by order or a civil authority to use member-owned facilities for temporary sheltering.

Liability: The CIS Liability Coverage Agreement provides coverage for claims under the Oregon Tort Claims Act and several federal statutes. Coverage is for the named member, employees, elected officials, and volunteers. Claims are covered in accordance with the terms and conditions of the CIS Liability Coverage Agreement.

It is important to note that communicable disease is excluded, but \$100,000 defense coverage is provided. Pollution is also excluded except for \$100,000 limited third-party pollution coverage which may apply.

Property: The CIS Property Coverage Agreement covers most perils associated with members owning and operating a building. CIS does not cover the personal property of facility users.

4. Purchasing buildings, such as old motels/hotels to turn into temporary housing.

- CIS recommends a community or faith-based non-profit lease and operate the facility.

ADDITIONAL RESOURCES

- [Required Homelessness Policy Checklist](#)
- [Homeless Shelter/Operational Checklist](#)
- [House Bill 3115](#)

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Real-Time Risk

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Liability: CIS will provide coverage for long-term shelters for the homeless in facilities owned by the member. If operated by the member, CIS charges an extra contribution for the additional and unique risks associated with providing a homeless shelter. If the member-owned facility is operated by a non-profit or faith-based organization that agrees to provide insurance and indemnification to the member, CIS may reduce the additional contribution.

Property: CIS covers the member-owned scheduled property and equipment. If operated by a non-profit, the contract shall include the clauses found in the insurance section of this document.

Each of these solutions help those that are facing homelessness but can create risk for our members. We strongly encourage these homelessness shelters are ran by a third-party, and not by our member. The third-party will need to have insurance up to at least two-million dollars per occurrence and name the government entity, who is providing the land or building, as an additional insured and agrees to hold the entity harmless and promises indemnification.

Risk Management Considerations

There are several risk management concerns that need to be considered when developing one of the four options above. Many of these risk management tools will be conducted by the third-party operator, however, our member should review the process to ensure practice is meeting policy. Some of these risk management tools are listed below. Please see the CIS Risk Management Resource Library for checklists relating to homelessness.

- Screening of new residents:
 - Who is and is not allowed in the shelter?
 - Does screening include a criminal history check?

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Real-Time Risk

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- Is there a screening for mental health concerns?
- Are mental health services provided to residents of the shelter?
- Does the location allow women, men, families, or pets?
- What is the process for removal of non-compliment residents?
- Medical care:
 - Is there a medical screening process?
 - Is there a vaccine mandate?
 - Is onsite medical provided to residents?
 - Is transportation provided for residents to treatment providers?
- Essentials:
 - Water (three to five gallons per person per day)
 - Food and food preparation sites
 - Heating and cooling
- Onsite sanitation:
 - Toilet facilities. A minimum of one toilet for every 20 persons
 - Handwashing stations
 - Trash collection
 - Rodent control
- Other concerns:
 - Personal Protective Equipment (PPE) for staff serving these new residents
 - Weather concerns for campers
 - Evacuation plans for these new residents in the event of an emergency
 - Security of these locations

If you have questions, please contact your Risk Management Consultant or Underwriting for your unique risk.

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CIS recognizes there is not a one-size-fits all recommendation for how best to handle homelessness in your communities. The topic is both a difficult and complex matter to navigate, often fueling strong opinions. We strive to continue providing up-to-date information on the topic, so that you can make the decisions which matter most to your communities. Our commitment is to stand as a partner providing the resources needed to support your efforts.





Guide to Persons Experiencing Homelessness in Public Spaces

JUNE 2022

Guide to Persons Experiencing Homelessness in Public Spaces

Cities possess a significant amount of property – from parks, greenways, sidewalks, and public buildings to both the developed and undeveloped rights of way – sizable portions of a city belong to the city itself, and are held in trust for particular public purposes or use by residents. Historically cities have regulated their various property holdings in a way that prohibits persons from camping, sleeping, sitting or lying on the property. The historic regulation and management of a city’s public spaces must be reimagined in light of recent federal court decisions and the Oregon Legislature’s enactment of HB 3115, both of which direct cities to consider their local regulations within the context of available local shelter services for those persons experiencing homelessness.

As the homelessness crisis intensifies, and the legal parameters around how a city manages its public property contract, cities need guidance on how they can regulate their property in a way that respects each of its community members, complies with all legal principles, and protects its public investments. A collective of municipal attorneys from across the state of Oregon convened a work group to create this guide, which is intended to do two things: (1) explain the legal principles involved in regulating public property in light of recent court decisions and statutory enactments; and (2) provide a checklist of issues/questions cities should review before enacting or amending any ordinances that may impact how their public property is managed.

Legal Principles Involved in Regulating Public Property

Two key federal court opinions, *Martin v. Boise* and *Blake v. Grants Pass*, have significantly impacted the traditional manner in which cities regulate their public property. In addition to these two pivotal cases, the Oregon Legislature enacted HB 3115 during the 2021 legislative session as an attempt to clarify, expand, and codify some of the key holdings within the court decisions. An additional piece of legislation, HB 3124, also impacts the manner in which cities regulate public property in relation to its use by persons experiencing homelessness. And, as the homelessness crisis intensifies, more legal decisions that directly impact how a city regulates its public property when it is being used by persons experiencing homelessness are expected. Some of these pending cases will seek to expand, limit, or clarify the decisions reached in *Martin* and *Blake*; other pending cases seek to explain how the well-established legal principle known as State Created Danger applies to actions taken, or not taken, by cities as they relate to persons experiencing homelessness.

A. *The Eighth Amendment to the U.S. Constitution*

The Eighth Amendment to the U.S. Constitution states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. In 1962, the U.S. Supreme Court, in *Robinson v. California*, established the principle that “the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.” 370 U.S. 660 (1962).

B. *Martin v. Boise*

In 2018, the U.S. 9th Circuit Court of Appeals, in *Martin v. Boise*, interpreted the Supreme Court’s decision in *Robinson* to mean that the Eighth Amendment to the U.S. Constitution “prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter ... because sitting, lying, and sleeping are ... universal and unavoidable consequences of being human.” The court declared that a governmental entity cannot “criminalize conduct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping.” 902 F3d 1031, 1048 (2018).

The 9th Circuit clearly stated in its *Martin* opinion that its decision was intentionally narrow, and that some restrictions on sitting, lying, or sleeping outside at particular times or in particular locations, or prohibitions on obstructing the rights of way or erecting certain structures, might be permissible. But despite the narrowness of the decision, the opinion only truly answered some of the many questions cities are rightly asking. After *Martin*, municipal attorneys could advise their clients in limited ways: some things were clear, and others were pretty murky.

One of the most commonly misunderstood aspects of the *Martin* decision is the belief that a city can never prohibit a person experiencing homelessness from sitting, sleeping or lying in public places. The *Martin* decision, as noted, was deliberately limited. Cities are allowed to impose city-wide prohibitions against persons sitting, sleeping, or lying in public, provided the city has a shelter that is accessible to the person experiencing homelessness against whom the prohibition is being enforced. Even if a city lacks enough shelter space to accommodate the specific person experiencing homelessness against whom the prohibition is being enforced, it is still allowed to limit sitting, sleeping, and lying in public places through reasonable restrictions on the time, place and manner of these acts (“where, when, and how”) – although what constitutes a reasonable time, place and manner restriction is often difficult to define.

A key to understanding *Martin* is recognizing that an analysis of how a city’s ordinance, and its enforcement of that ordinance, can be individualized. Pretend a city has an ordinance which prohibits persons from sleeping in city parks if a person has nowhere else to sleep. A person who violates that ordinance can be cited and arrested. A law enforcement officer finds 11 persons sleeping in the park, and is able to locate and confirm that 10 of said persons have access to a shelter bed or a different location in which they can sleep. If any of those 10 persons refuses to avail themselves of the available shelter beds, the law enforcement officer is within their rights, under *Martin*, to cite and arrest the persons who refuse to leave the park. The practicality of such an individualized assessment is not to be ignored, and cities are encouraged to consider the ability to make such an assessment as they review their ordinances, policies, and procedures.

What is clear from the *Martin* decision is the following:

1. Cities cannot punish a person who is experiencing homelessness for sitting, sleeping, or lying on public property when that person has no place else to go;
2. Cities are not required to build or provide shelters for persons experiencing homelessness;

3. Cities can continue to impose the traditional sit, sleep, and lie prohibitions and regulations on persons who do have access to shelter; and
4. Cities are allowed to build or provide shelters for persons experiencing homelessness.

After *Martin*, what remains murky, and unknown is the following:

1. What other involuntary acts or human conditions, aside from sleeping, lying and sitting, are considered to be an unavoidable consequence of one's status or being?
2. Which specific time, place and manner restrictions can cities impose to regulate when, where, and how a person can sleep, lie or sit on a public property?
3. What specific prohibitions can cities impose that will bar a person who is experiencing homelessness from obstructing the right of way?
4. What specific prohibitions can cities impose that will prevent a person who is experiencing homelessness from erecting a structure, be it temporary or permanent, on public property?

The city of Boise asked the United States Supreme Court to review the 9th Circuit's decision in *Martin*. The Supreme Court declined to review the case, which means the opinion remains the law in the 9th Circuit. However, as other federal circuit courts begin considering a city's ability to enforce sitting, sleeping and camping ordinances against persons experiencing homelessness, there is a chance that the Supreme Court may review a separate but related opinion to clarify the *Martin* decision and provide clarity to the outstanding issues raised in this guide.

C. *Blake v. Grants Pass*

Before many of the unanswered questions in *Martin* could be clarified by the 9th Circuit or the U.S. Supreme Court, an Oregon federal district court issued an opinion, *Blake v. Grants Pass*, which provided some clarity, but also provided an additional layer of murkiness.

From the *Blake* case we also know the following:

1. Whether a city's prohibition is a civil or criminal violation is irrelevant. If the prohibition punishes an unavoidable consequence of one's status as a person experiencing homelessness, then the prohibition, regardless of its form, is unconstitutional.
2. Persons experiencing homelessness who must sleep outside are entitled to take necessary minimal measures to keep themselves warm and dry while they are sleeping.
3. A person does not have access to shelter if:

- They cannot access the shelter because of their gender, age, disability or familial status;
- Accessing the shelter requires a person to submit themselves to religious teaching or doctrine for which they themselves do not believe;
- They cannot access the shelter because the shelter has a durational limitation that has been met or exceeded; or
- Accessing the shelter is prohibited because the person seeking access is under the influence of some substance (for example alcohol or drugs) or because of their past or criminal behavior.

But much like *Martin*, the *Blake* decision left some unanswered questions. The key unknown after *Blake*, is: What constitutes a minimal measure for a person to keep themselves warm and dry – is it access to a blanket, a tent, a fire, etc.?

And while defining the aforementioned unknown question after *Blake* is most certainly difficult for cities, what cities must also keep ever present in their mind is the fact that the 9th Circuit Court of Appeals is presently reviewing the *Blake* decision. When the 9th Circuit finishes its review and issues an opinion, cities should reasonably expect the rules and parameters established by the Oregon district court in *Blake* to change. What types of changes should be expected, the severity of the changes, and when those changes will occur are questions municipal attorneys cannot answer at this time for their clients. Given the very real fluidity surrounding the legal issues discussed in this guide, before adopting any new policy, or revising an existing policy, that touches on the subject matter described herein, cities are strongly encouraged to speak with their legal advisor to ensure the policy is constitutional.

D. House Bill 3115

HB 3115 was enacted by the Oregon Legislature during its 2021 session. It is the product of a workgroup involving the LOC and the Oregon Law Center as well as individual cities and counties.

The bill requires that any city or county law regulating the acts of sitting, lying, sleeping or keeping warm and dry outside on public property must be “objectively reasonable” based on the totality of the circumstances as applied to all stakeholders, including persons experiencing homelessness. What is objectively reasonable may look different in different communities. The bill retains cities’ ability to enact reasonable time, place and manner regulations, aiming to preserve the ability of cities to manage public spaces effectively for the benefit of an entire community.

HB 3115 includes a delayed implementation date of July 1, 2023, to allow local governments time to review and update ordinances and support intentional community conversations.

From a strictly legal perspective, HB 3115 did nothing more than restate the judicial decisions found in *Martin* and *Blake*, albeit a hard deadline to comply with those judicial decisions was imposed. The bill provided no further clarity to the judicial decisions, but it also imposed no new requirements or restrictions.

E. House Bill 3124

Also enacted during the 2021 legislative session, HB 3124 does two things. First, it changes and adds to existing guidance and rules for how a city is to provide notice to homeless persons that an established campsite on public property is being closed, previously codified at ORS 203.077 *et seq.*, now found at ORS 195.500, *et seq.* Second, it gives instructions on how a city is to oversee and manage property it removes from an established campsite located on public property. It is important to remember that HB 3124 applies to public property; it is not applicable to private property. This means that the rules and restrictions imposed by HB 3124 are not applicable city-wide, rather they are only applicable to property classified as public.

HB 3124 does not specify, with any true certainty, what constitutes public property. There has been significant discussion within the municipal legal field as to whether rights of way constitute public property for the purpose of interpreting and implementing HB 3124. The general consensus of the attorneys involved in producing this guide is that rights of way should be considered public property for purposes of HB 3124. If an established homeless camp is located on rights of way, it should generally be treated in the same manner as an established camp located in a city park. However, as discussed below, depending on the dangers involved with a specific location, exceptions to this general rule exist.

When a city seeks to remove an established camp site located on public property, it must do so within certain parameters. Specifically, a city is required to provide 72-hour notice of its intent to remove the established camp site. Notices of the intention to remove the established camp site must be posted at each entrance to the site. In the event of an exceptional emergency, or the presence of illegal activity other than camping at the established campsite, a city may act to remove an established camp site from public property with less than 72-hour notice. Examples of an exceptional emergency include: possible site contamination by hazardous materials, a public health emergency, or immediate danger to human life or safety.

While HB 3124 specifies that the requirements contained therein apply to established camping sites, it fails to define what constitutes an established camping site. With no clear definition of what the word established means, guidance on when the 72-hour notice provisions of HB 3124 apply is difficult to provide. The working group which developed this guide believes a cautious approach to defining the word established at the local level is prudent. To that end, the LOC recommends that if, for example, a city were to enact an ordinance which permits a person to pitch a tent between the hours of 7 p.m. and 7 a.m., that the city also then consistently and equitably enforce the removal of that tent by 7 a.m. each day, or as close as possible to 7 a.m. Failing to require the tent's removal during restricted camping hours each day, *may*, given that the word established is undefined, provide an argument that the tent is now an established camp site that triggers the requirement of HB 3124.

In the process of removing an established camp site, oftentimes city officials will also remove property owned by persons who are experiencing homelessness. When removing items from established camp sites, city officials should be aware of the following statutory requirements:

- Items with no apparent value or utility may be discarded immediately;
- Items in an unsanitary condition may be discarded immediately;
- Law enforcement officials may retain weapons, drugs, and stolen property;
- Items reasonably identified as belonging to an individual and that have apparent value or utility must be preserved for at least 30 days so that the owner can reclaim them; and
- Items removed from established camping sites in counties other than Multnomah County must be stored in a facility located in the same community as the camping site from which it was removed. Items removed from established camping sites located in Multnomah County must be stored in a facility located within six blocks of a public transit station.

Cities are encouraged to discuss with legal counsel the extent to which these or similar requirements may apply to any camp site, “established” or not, because of due process protections.

F. Motor Vehicles and Recreational Vehicles

Cities need to be both thoughtful and intentional in how they define and regulate sitting, sleeping, lying, and camping on public property. Is sleeping in a motor vehicle or a recreational vehicle (RV) that is located on public property considered sitting, lying, sleeping, or camping on public property under the city’s ordinances and policies? This guide will not delve into the manner in which cities can or should regulate what is commonly referred to as car or RV camping; however, cities do need to be aware that they should consider how their ordinances and policies relate to car and RV camping, and any legal consequences that might arise if such regulations are combined with ordinances regulating sitting, lying, sleeping, or camping on public property. Motor and recreational vehicles, their location on public property, their maintenance on public property, and how they are used on or removed from public property are heavily regulated by various state and local laws, and how those laws interact with a city’s ordinance regulating sitting, lying, sleeping, or camping on public property is an important consideration of this process.

G. State Created Danger

In 1989, the U.S. Supreme Court, in *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, interpreted the Fourteenth Amendment to the U.S. Constitution to impose a duty upon the government to act when the government itself has created dangerous conditions – this interpretation created the legal principle known as State Created Danger. 489 U.S. 189 (1989). The 9th Circuit has interpreted the State Created Danger doctrine to mean that a governmental

entity has a duty to act when the government actor “affirmatively places the plaintiff in danger by acting with ‘deliberate indifference’ to a ‘known or obvious danger.’” *LA Alliance for Human Rights v. City of Los Angeles*, 2021 WL 1546235.

The State Created Danger principle has three elements. First, the government’s own actions must have created or exposed a person to an actual, particularized danger that the person would not have otherwise faced. Second, the danger must have been one that is known or obvious. Third, the government must act with deliberate indifference to the danger. *Id.* Deliberate indifference requires proof of three elements:

“(1) there was an objectively substantial risk of harm; (2) the [state] was subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed; and (3) the [state] either actually drew that inference or a reasonable official would have been compelled to draw that inference.” *Id.*

Municipal attorneys are closely reviewing the State Created Danger principle as it relates to the use of public spaces by persons experiencing homelessness for three reasons. First, many cities are choosing to respond to the homeless crisis, the legal decisions of *Martin and Blake*, and HB 3115, by creating managed homeless camps where unhoused persons can find shelter and services that may open the door to many State Created Danger based claims of wrongdoing (*e.g.* failure to protect from violence, overdoses, etc. within the government sanctioned camp). Second, in California, at least one federal district court has recently ruled that cities have a duty to act to protect homeless persons from the dangers they face by living on the streets, with the court’s opinion resting squarely on the State Created Danger principle. Third, when imposing reasonable time, place, and manner restrictions to regulate the sitting, sleeping or lying of persons on public rights of way, cities should consider whether their restrictions, and the enforcement of those restrictions, trigger issues under the State Created Danger principle. Fourth, when removing persons and their belongings from public rights of way, cities should be mindful of whether the removal will implicate the State Created Danger principle.

In creating managed camps for persons experiencing homelessness, cities should strive to create camps that would not reasonably expose a person living in the camp to a known or obvious danger they would not have otherwise faced. And if there is a danger to living in the camp, a city should not act with deliberate indifference to any known danger in allowing persons to live in the camp.

And while the California opinion referenced above has subsequently been overturned by the 9th Circuit Court of Appeals, at least one federal district court in California has held that a city “acted with deliberate indifference to individuals experiencing homelessness” when the city allowed homeless persons to “reside near overpasses, underpasses, and ramps despite the inherent dangers – such as pollutants and contaminant.” *LA Alliance for Human Rights v. City of Los Angeles*, 2022 WL 2615741. The court essentially found a State Create Danger situation when a city allowed persons experiencing homelessness to live near interstates – a living situation it “knew” to be dangerous.

Before a city official enforces a reasonable time, place, and manner restriction which regulates the sitting, sleeping and lying of persons on public property, the official should review the enforcement action they are about to take in light of the State Created Danger principle. For example, if a city has a restriction that allows persons to pitch a tent on public property between the hours of 7 p.m. and 7 a.m., a city official requiring the person who pitched the tent to remove it at 7:01 a.m. should be mindful of all environmental conditions present at the time their enforcement order is made. The same thoughtful analysis should be undertaken when a city removes a person and their belongings from the public rights of way.

How Cities Proceed

The law surrounding the use of public spaces by persons experiencing homelessness is newly emerging, complex, and ripe for additional change. In an effort to simplify, as much as possible, the complexity of this legal conundrum, below is an explanation of what municipal attorneys know cities must do, must not do, and may potentially do.

A. What Cities Must Do

In light of the court decisions discussed herein, and the recent House bills enacted by the Oregon Legislature, cities must do the following:

1. Review all ordinances and policies with your legal advisor to determine which ordinances and policies, if any, are impacted by the court decisions or recently enacted statutes.
2. Review your city's response to the homelessness crisis with your legal advisor to ensure the chosen response is consistent with all court decisions and statutory enactments.

If your city chooses to exclude persons experiencing homelessness from certain areas of the city for violating a local or state law, the person must be provided the right to appeal that expulsion order, and the order must be stayed while the appeal is pending.

3. If your city chooses to remove a homeless person's established camp site, the city must provide at least 72-hour notice of its intent to remove the site, with notices being posted at entry point into the camp site.
4. If a city obtains possession of items reasonably identified as belonging to an individual and that item has apparent value or utility, the city must preserve that item for at least 30 days so that the owner can reclaim the property, and store that property in a location that complies with state law.

B. What Cities Must Not Do

When the decisions rendered by the federal district court of Oregon and the 9th Circuit Court of Appeals are read together, particularly in conjunction with Oregon statutes, cities must not do the following:

1. Cities cannot punish a person who is experiencing homelessness for sitting, sleeping, or lying on public property when that person has no place else to go.
2. Cities cannot prohibit persons experiencing homelessness from taking necessary minimal measures to keep themselves warm and dry when they must sleep outside.
3. Cities cannot presume that a person experiencing homelessness has access to shelter if the available shelter options are:
 - Not accessible because of their gender, age, or familial status;
 - Ones which requires a person to submit themselves to religious teaching or doctrine for which they themselves do not believe;
 - Not accessible because the shelter has a durational limitation that has been met or exceeded; or
 - Ones which prohibit the person from entering the shelter because the person is under the influence of some substance (for example alcohol or drugs) or because of their past or criminal behavior.

C. What Cities May Potentially Do

As previously noted, the recent court decisions, and those which are presently pending before the various federal district courts and in the 9th Circuit Court of Appeals, lack clarity in many key respects. This lack of clarity, while frustrating, also provides cities some leeway to address the homelessness crisis, specifically with how the crisis impacts the management of public property.

1. Cities may impose reasonable time, place and manner restrictions on where persons, including those persons experiencing homelessness, may sit, sleep, or lie. Any such regulation imposed by a city should be carefully vetted with the city's legal advisor.
2. Cities may prohibit persons, including those persons experiencing homelessness, from blocking rights of way. Any such regulation should be carefully reviewed by the city's legal advisor to ensure the regulation is reasonable and narrowly tailored.
3. Cities may prohibit persons, including those persons experiencing homelessness, from erecting either temporary or permanent structures on public property. Given that cities are required, by *Blake*, to allow persons experiencing homelessness to take reasonable precautions to remain warm and dry when sleeping outside, any such provisions regulating the erection of structures, particularly temporary structures, should be carefully reviewed by a legal advisor to ensure the regulation complies with all relevant court decisions and Oregon statutes.
4. If a city chooses to remove a camp site, when the camp site is removed, cities may discard items with no apparent value or utility, may discard items that are in an

unsanitary condition, and may allow law enforcement officials to retain weapons, drugs, and stolen property.

5. Cities may create managed camps where person experiencing homelessness can find safe shelter and access to needed resources. In creating a managed camp, cities should work closely with their legal advisor to ensure that in creating the camp they are not inadvertently positioning themselves for a State Created Danger allegation.

D. What Cities Should Practically Consider

While this guide has focused exclusively on what the law permits and prohibits, cities are also encouraged to consider the practicality of some of the actions they may wish to take. Prior to imposing restrictions, cities should work with all impacted staff and community members to identify if the suggested restrictions are practical to implement. Before requiring any tent pitched in the public right of way to be removed by 8 a.m., cities should ask themselves if they have the ability to practically enforce such a restriction – does the city have resources to ensure all tents are removed from public property every morning 365 days a year? If a city intends to remove property from a camp site, cities should practically ask themselves if they can store said property in accordance with the requirements of HB 3124. Both questions are one of only dozens of practical questions cities need to be discussing when reviewing and adopting policies that touch on topics covered by this guide.

Conclusion

Regulating public property, as it relates to persons experiencing homelessness, in light of recent court decisions, legislative actions, and forthcoming judicial opinions is nuanced and complicated. It is difficult for cities to know which regulations are permissible and which are problematic. This guide is an attempt to answer some of the most common legal issues raised by *Martin, Blake*, HB 3115, HB 3124, and the State Created Danger doctrine – it does not contain every answer to every question a city may have, nor does it provide guidance on what is in each community’s best interest. Ultimately, how a city chooses to regulate its public property, particularly in relation to persons experiencing homelessness, is a decision each city must make on its own. A city’s decision should be made not just on the legal principles at play, but on its own community’s needs, and be done in coordination with all relevant partners. As with any major decision, cities are advised to consult with experts on this topic, as well as best practice models, while considering the potential range of public and private resources available for local communities. Cities will have greater success in crafting ordinances which are not only legally acceptable, but are accepted by their communities, if the process for creating such ordinances is an inclusive process that involves advocates and people experiencing homelessness.

Additional Resources

The League of Oregon Cities (LOC), in preparing this guide, has obtained copies of ordinances and policies that may be useful to cities as they consider their own next steps. Additionally, several municipal advisors who participated in the development of this guide have expressed a willingness to share their own experiences in regulating public rights of way, particularly as it

relates to persons experiencing homelessness, with Oregon local government officials. If you believe these additional resources may be of use to you or your city, please feel free to contact a member of the LOC's [Legal Research Department](#).

Recognition and Appreciation

The LOC wishes to extend its sincerest thanks to the municipal attorneys who assisted in the development of this guide. Attorneys from across Oregon came together over several months to vet legal theories, share best practices, and create this guide. These attorneys donated their time, experience, and resources – seeking nothing in return. And while a core team of attorneys was gathered to build this guide, the LOC recognizes that the team's work stands on the shoulders of every city and county attorney in Oregon who has been working, and who will continue to work, to assist their community in addressing the homelessness crisis. For those attorneys not specifically named below, please know your contributions are equally recognized and respected:

- Aaron Hisel, Montoya, Hisel & Associates;
- Chad Jacobs, Beery Elsner & Hammond;
- Eric Mitton, City of Medford;
- Kirk Mylander, Citycounty Insurance Services;
- Elizabeth Oshel, City of Bend;
- Mary Winters, City of Bend; and
- Grace Wong, City of Beaverton.



League of Oregon Cities

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LOC NEWS

Legislature Passes Two Bills Regulating Homeless Camping

Two bills related to homelessness and local governments received bipartisan votes and final passage in the Legislature this week and are headed to the governor's desk. On Wednesday, the Senate passed HB 3115, which requires cities and counties to review their ordinances and if necessary, make updates in light of the recent *Martin v. City of Boise* federal court decision. The bill is the product of a workgroup effort between the LOC, the Oregon Law Center (OLC), the Association of Oregon Counties (AOC), as well as individual cities and counties. The workgroup spent many hours last fall crafting a concept to recognize key principles from the *Martin* decision in state law.

HB 3115 requires that any city or county law regulating the acts of sitting, lying, sleeping, or keeping warm and dry outside on public property must be "objectively reasonable" based on the totality of the circumstances as applied to all stakeholders, including persons experiencing homelessness. The bill preserves the ability of cities to manage public spaces effectively for the benefit of an entire community, and recognizes that what is objectively reasonable will look different in different communities.

Importantly, HB 3115 includes a **delayed implementation date of July 1, 2023**, to allow local governments time to review and, if necessary, update ordinances and support intentional community conversations. **The LOC, AOC and OLC will partner to provide guidance to cities and counties over the coming year.**

Also on Wednesday, the House gave final approval to pass HB 3124, which increases the time that local governments must post notice before removing campsites from 24 to 48 hours. The bill also requires jurisdictions to store unclaimed personal property in a facility located in the same community as the campsite from which it was removed. HB 3124 preserves existing exceptions to the notice requirement when:

- There are grounds for law enforcement officials to believe that illegal activities other than camping are occurring at an established camping site; and
- In the event of an exceptional emergency at an established camping site, including, but not limited to, possible site contamination by hazardous materials, a public health emergency or other immediate danger to human life or safety.

Contact: Ariel Nelson, Lobbyist – anelson@orcities.org (<mailto:anelson@orcities.org>)

Last Updated 6/11/21

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Enrolled House Bill 3115

Sponsored by Representative KOTEK; Representatives DEXTER, MARSH, MCLAIN, POWER,
REYNOLDS, WILDE, Senators DEMBROW, MANNING JR, RILEY

CHAPTER

AN ACT

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) At least 90 days before the action was filed, provided written notice to the governing body of the city or county that enacted the law being challenged of an intent to bring the action and the notice provided the governing body with actual notice of the basis upon which the plaintiff intends to challenge the law.

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

SECTION 2. Section 1 of this 2021 Act becomes operative on July 1, 2023.

SECTION 3. This 2021 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect on its passage.

Passed by House April 15, 2021

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Timothy G. Sekerak, Chief Clerk of House

.....
Tina Kotek, Speaker of House

Passed by Senate June 9, 2021

.....
Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2021

Approved:

.....M,....., 2021

.....
Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2021

.....
Shemia Fagan, Secretary of State

cluding flood plains or mapped environmental health hazards, unless the development complies with regulations directly related to the hazard;

(e) Has adequate transportation access to commercial and medical services; and

(f) Will not pose any unreasonable risk to public health or safety.

(2) An emergency shelter allowed under this section must be operated by:

(a) A local government as defined in ORS 174.116;

(b) An organization with at least two years' experience operating an emergency shelter using best practices that is:

(A) A local housing authority as defined in ORS 456.375;

(B) A religious corporation as defined in ORS 65.001; or

(C) A public benefit corporation, as defined in ORS 65.001, whose charitable purpose includes the support of homeless individuals, that has been recognized as exempt from income tax under section 501(a) of the Internal Revenue Code on or before January 1, 2018; or

(c) A nonprofit corporation partnering with any other entity described in this subsection.

(3) An emergency shelter approved under this section:

(a) May provide on-site for its clients and at no cost to the clients:

(A) Showering or bathing;

(B) Storage for personal property;

(C) Laundry facilities;

(D) Service of food prepared on-site or off-site;

(E) Recreation areas for children and pets;

(F) Case management services for housing, financial, vocational, educational or physical or behavioral health care services; or

(G) Any other services incidental to shelter.

(b) May include youth shelters, winter or warming shelters, day shelters and family violence shelter homes as defined in ORS 409.290.

(4) An emergency shelter approved under this section may also provide additional services not described in subsection (3) of this section to individuals who are transitioning from unsheltered homeless status. An organization providing services under this subsection may charge a fee of no more than \$300 per month per client and only to clients who are financially able to pay the fee and who request the services.

(5) The approval of an emergency shelter under this section is not a land use decision and is subject to review only under ORS 34.010 to 34.100.

SECTION 4. (1) Section 3 of this 2021 Act is repealed on July 1, 2022.

(2) The repeal of section 3 of this 2021 Act by subsection (1) of this section does not affect an application for the development of land for an emergency shelter that was completed and submitted before the date of the repeal.

SECTION 5. ORS 446.265 is amended to read:

446.265. (1) Inside an urban growth boundary, a local government may authorize the establishment of transitional housing accommodations used as individual living units by one or more individuals. Use of transitional housing accommodations is limited to [persons] individuals who lack permanent or safe shelter and who cannot be placed in other low income housing. A local government may limit the maximum amount of time that an individual or a family may use the accommodations.

(2) Transitional housing accommodations are intended to be used by individuals or families on a limited basis for seasonal, emergency or transitional housing purposes and may include yurts, huts, cabins, fabric structures, tents and similar accommodations, as well as areas in parking lots or facilities for individuals or families to reside overnight in a motor vehicle, without regard to whether the motor vehicle was designed for use as temporary living quarters. The transitional housing accommodations may provide parking facilities, walkways and access to water, toilet, shower, laundry, cooking, telephone or other services either through separate or shared facilities.

**Enrolled
House Bill 2006**

Sponsored by Representative KOTEK; Representatives CAMPOS, DEXTER, EVANS, FAHEY, GRAYBER, HOLVEY, KROFF, LEIF, MARSH, MCLAIN, MEEK, MORGAN, NATHANSON, NERON, NOBLE, REARDON, SOLLMAN, WILDE, WILLIAMS, ZIKA, Senator PATTERSON

CHAPTER

AN ACT

Relating to housing; creating new provisions; amending ORS 203.082, 446.265 and 458.650; and declaring an emergency.

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

SECTION 1. Sections 2 and 3 of this 2021 Act are added to and made a part of ORS chapter 197.

SECTION 2. (1) As used in this section, “emergency shelter” means a building or cluster of buildings that provides shelter on a temporary basis for individuals and families who lack permanent housing.

(2) A building or cluster of buildings used as an emergency shelter under an approval granted under section 3 of this 2021 Act or section 11, chapter 12, Oregon Laws 2020 (first special session):

(a) May resume its use as an emergency shelter after an interruption or abandonment of that use for two years or less, notwithstanding ORS 215.130 (7).

(b) May not be used for any purpose other than as an emergency shelter except upon application for a permit demonstrating that the construction of the building and its use could be approved under current land use laws and local land use regulations.

(3) An approval of an emergency shelter under section 3 of this 2021 Act or section 11, chapter 12, Oregon Laws 2020 (first special session) is void unless the shelter is operating within two years following the approval.

SECTION 3. (1) A local government shall approve an application for the development or use of land for an emergency shelter, as defined in section 2 of this 2021 Act, on any property, notwithstanding ORS chapter 195, 197, 197A, 215 or 227 or any statewide plan, rule of the Land Conservation and Development Commission or local land use regulation, zoning ordinance, regional framework plan, functional plan or comprehensive plan, if the emergency shelter:

(a) Includes sleeping and restroom facilities for clients;

(b) Will comply with applicable building codes;

(c) Is located inside an urban growth boundary or in an area zoned for rural residential use as defined in ORS 215.501;

(d) Will not result in the development of a new building that is sited within an area designated under a statewide planning goal relating to natural disasters and hazards, in-

(4) The department may expend funds from the account for:

(a) The administration of the account as provided for in the legislatively approved budget, as that term is defined in ORS 291.002, for the department.

(b) The development of technical assistance and training resources for organizations developing and operating emergency shelters as defined in section 2 of this 2021 Act and transitional housing accommodations as described in ORS 446.265.

SECTION 8. Section 9 of this 2021 Act is added to and made a part of ORS 458.600 to 458.665.

SECTION 9. (1) As used in this section, “low-barrier emergency shelter” means an emergency shelter, as defined in section 2 of this 2021 Act, that follows established best practices to deliver shelter services that minimize barriers and increase access to individuals and families experiencing homelessness.

(2) The Housing and Community Services Department shall award grants and provide technical assistance to organizations to fund:

(a) The construction, purchase or lease of facilities to be used as low-barrier emergency shelters;

(b) The operation, use or staffing of low-barrier emergency shelters, including the costs to provide clients with access to the shelters;

(c) The development or use of amenities or facilities that provide no-cost services to individuals and families who are homeless, including restroom and hygiene facilities, laundry facilities, dining facilities, storage for personal property, meeting or gathering spaces and facilities providing case management services; or

(d) Rapid rehousing services and supports for individuals and families.

(3) In awarding grants and providing technical assistance under this section, the department shall:

(a) Ensure that funds are distributed among different regions of the state; and

(b) Prioritize funding areas of highest need as identified in the August 2019 Oregon Statewide Shelter Study.

(4) Grants under this section must be awarded:

(a) Through a competitive process that emphasizes collaborative proposals; or

(b) To one or more community action agencies.

SECTION 10. (1) As used in this section, “navigation center” means a low-barrier emergency shelter, as defined in section 9 of this 2021 Act, that is open seven days per week and connects individuals and families with health services, permanent housing and public benefits.

(2) The Oregon Department of Administrative Services may award grants to local governments to:

(a) Plan the location, development or operations of a navigation center;

(b) Construct, purchase or lease a building for use as a navigation center;

(c) Operate a navigation center that has been constructed, purchased or leased under paragraph (b) of this subsection; or

(d) Contract for the performance of activities in this subsection.

(3) The department shall require that each local government receiving a grant under this section agree to return all moneys granted unless the local government has developed a navigation center that is operating on or before July 1, 2022.

SECTION 11. Notwithstanding ORS 458.650 (2) and (3), the Housing and Community Services Department may expend funds from the Emergency Housing Account to award grants and provide technical assistance under section 9 of this 2021 Act.

SECTION 12. Sections 9, 10 and 11 of this 2021 Act are repealed on January 2, 2024.

SECTION 13. This 2021 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2021 Act takes effect on its passage.

The Oregon Health Authority may develop public health best practices for shared health and sanitation facilities for transitional housing accommodations.

(3) Transitional housing accommodations are not subject to ORS chapter 90.

(4) As used in this section, "yurt" means a round, domed tent of canvas or other weather resistant material, having a rigid framework, wooden floor, one or more windows or skylights and that may have plumbing, electrical service or heat.

SECTION 6. ORS 203.082 is amended to read:

203.082. [(1) Any political subdivision in this state may allow churches, synagogues and similar religious institutions to offer overnight camping space on institution property to homeless persons living in vehicles.]

[(2) In addition to any conditions or limitations imposed by a political subdivision, a religious institution located within the political subdivision and offering camping space described under subsection (1) of this section must:]

[(a) Limit camping space at the institution site to three or fewer vehicles at the same time; and]

[(b) Provide campers with access to sanitary facilities, including but not limited to toilet, hand washing and trash disposal facilities.]

(1) Any political subdivision may allow any public or private entity to allow overnight camping by homeless individuals living in vehicles on the property of the entity.

(2) A political subdivision may impose reasonable conditions upon offering camping space under this section, including establishing a maximum number of vehicles allowed.

(3) Entities providing camping spaces under this section must also provide access to sanitary facilities, including toilet, handwashing and trash disposal facilities.

SECTION 7. ORS 458.650 is amended to read:

458.650. (1) The Emergency Housing Account *[shall be]* is administered by the Housing and Community Services Department to assist homeless *[persons]* individuals and those *[persons]* individuals who are at risk of becoming homeless. An amount equal to 25 percent of moneys deposited in the account pursuant to ORS 294.187 is dedicated for expenditure for assistance to veterans who are homeless or at risk of becoming homeless. For purposes of this section, "account" means the Emergency Housing Account.

(2) The Oregon Housing Stability Council, with the advice of the Community Action Partnership of Oregon, shall develop policy for awarding grants to organizations that shall use the funds:

(a) To provide to low and very low income *[persons]* individuals, including but not limited to, *[persons]* individuals more than 65 years of age, persons with disabilities, farmworkers and Native Americans:

(A) Emergency shelters and attendant services;

(B) Transitional housing services designed to assist *[persons]* individuals to make the transition from homelessness to permanent housing and economic independence;

(C) Supportive housing services to enable *[persons]* individuals to continue living in their own homes or to provide in-home services for such *[persons]* individuals for whom suitable programs do not exist in their geographic area;

(D) Programs that provide emergency payment of home payments, rents or utilities; or

(E) Some or all of the needs described in subparagraphs (A) to (D) of this paragraph.

(b) To align with federal strategies and resources that are available to prevent and end homelessness.

(3)(a) The council shall require as a condition of awarding a grant that the organization demonstrate to the satisfaction of the council that the organization has the capacity to deliver any service proposed by the organization.

(b) Any funds granted under this section *[shall]* may not be used to replace existing funds. Funds granted under this section may be used to supplement existing funds. An organization may use funds to support existing programs or to establish new programs.

(c) The council, by policy, shall give preference in granting funds to those organizations that receive grants from the Housing Development Grant Program established under ORS 458.625.

Passed by House April 5, 2021

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate May 3, 2021

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Peter Courtney, President of Senate

Received by Governor:

.....M,....., 2021

Approved:

.....M,....., 2021

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M,....., 2021

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Shemia Fagan, Secretary of State



HOMELESS LEGISLATION:

2021 LEGISLATIVE SESSION

Kevin Campbell, OACP/OSSA Lobbyist
6-29-2021

The following identifies the legislation passed during the 2021 Legislative Session addressing homelessness and provides details regarding the key provisions for each measure:

HB 2006 – Emergency Shelters/Transitional Housing Accommodations/Low-barrier Emergency Shelters and Navigation Centers

Emergency Shelters

- Defines “emergency shelter” as a building or cluster of buildings that provides shelter on a temporary basis for individuals and families who lack permanent housing.
- Provides that a building or cluster of buildings used as an emergency shelter under an approval granted under section 3 of this 2021 Act or section 11, chapter 12, Oregon Laws 2020 (first special session):
 - May resume its use as an emergency shelter after an interruption or abandonment of that use for two years or less, notwithstanding ORS 215.130 (7).
 - May not be used for any purpose other than as an emergency shelter except upon application for a permit demonstrating that the construction of the building and its use could be approved under current land use laws and local land use regulations.
- Provides that an approval of an emergency shelter under this measure or section 11, chapter 12, Oregon Laws 2020 (first special session) is void unless the shelter is operating within two years following the approval.
- Requires a local government to approve an application for the development or use of land for an emergency shelter, if the emergency shelter:
 - Includes sleeping and restroom facilities for clients
 - Will comply with applicable building codes
 - Is located inside and urban growth boundary or in an area zoned for rural residential use
 - Will not result in the development of a new building that is sited within an area designated under a statewide planning goal relating to natural disasters and hazards (flood plains or mapped environmental health hazards) unless the development complies with regulations directly related to the hazard;
 - Has adequate transportation access to commercial and medical services; and
 - Will not pose any unreasonable risk to public health or safety.

- Requires an emergency shelter, as defined by the measure, to be operated by:
 - A local government (ORS 174.116)
 - An organization with at least two years of experience operating and emergency shelter using best practices that is:
 - A local housing authority (ORS 456.375)
 - A religious corporation (ORS 65.001); or
 - A public benefit corporation (ORS 65.001), whose charitable purpose includes the support of homeless individuals, that has been recognized as exempt from income tax under section 501(a) of the Internal Revenue Code on or before January 1, 2018; or
 - A nonprofit corporation partnering with any other entity identified as an approved operator by the measure.
- Provides that an emergency shelter approved under the provisions of the measure:
 - May provide the following on-site for its clients and at no cost to the clients:
 - Showering or bathing;
 - Storage for personal property;
 - Laundry facilities;
 - Service of food prepared on-site or off-site;
 - Recreation areas for children and pets;
 - Case management services for housing, financial, vocational, educational or physical or behavioral health care services; or
 - Any other services incidental to shelter.
 - May include youth shelters, winter or warming shelters, day shelters and family violence shelter homes (ORS 409.290).
- Provides that an emergency shelter approved based on the provisions of this measure are authorized to provide additional services to individuals who are transitioning from unsheltered homeless status and allows the organization providing services to charge a fee of no more than \$300 per month per client and only to clients who are financially able to pay the fee and who request the services.
- Clarifies that the approval of an emergency shelter as defined by the measure is not a land use decision and is subject to review only under ORS 34.010 to 34.100.
- Provides that the emergency shelter approval requirement/process is repealed on July 1, 2022 for applications not completed and submitted before the date of the repeal.

Enhanced Transitional Housing Accommodations Definition

- Amends the definition of “transitional housing accommodations” to include areas in parking lots or facilities for individuals or families to reside overnight in a motor vehicle, without regard to whether the motor vehicle was designed for use as temporary living quarters.
- Provides that any political subdivision may:

- Allow any public or private entity to allow overnight camping by homeless individuals living in vehicles on the property of the entity.
- may impose reasonable conditions upon offering camping space, including establishing a maximum number of vehicles allowed.
- Requires entities approved by a political subdivision to provide camping spaces must also provide access to sanitary facilities, including toilet, handwashing and trash disposal facilities.
- Authorizes the Oregon Housing and Community Services Department to use resources from the Emergency Housing Account for development of technical assistance and training resources for organizations developing and operating emergency shelters and transitional housing accommodations based on the measure.

Low-barrier emergency shelters:

- Defines “low-barrier emergency shelter” as an emergency shelter that follows established best practices to deliver shelter services that minimize barriers and increase access to individuals and families experiencing homelessness.
- Requires the Oregon Housing and Community Services Department to award grants and provide technical assistance to organizations to fund:
 - The construction, purchase or lease of facilities to be used as low-barrier emergency shelters;
 - The operation, use or staffing of low-barrier emergency shelters, including the costs to provide clients with access to the shelters;
 - The development or use of amenities or facilities that provide no-cost services to individuals and families who are homeless, including restroom and hygiene facilities, laundry facilities, dining facilities, storage for personal property, meeting or gathering spaces and facilities providing case management services; or
 - Rapid rehousing services and supports for individuals and families.
- Requires the Oregon Housing and Community Services Department to:
 - Ensure that funds are distributed among different region of the state; and
 - Prioritize funding areas of highest need as identified in the August 2019 Oregon Statewide Shelter Study.
 - Ensure that grants are awarded through a competitive process that emphasizes collaborative proposals; or to one or more community action agencies.

Navigation Centers

- Defines “navigation center” as a low-barrier emergency shelter that is open seven days per week and connects individuals and families with health services, permanent housing and public benefits.
- Authorizes the Oregon Department of Administrative Services to award grants to local governments to:
 - Plan the location, development or operations of a navigation center;
 - Construct, purchase or lease a building for use as a navigation center;

- Operate a navigation center that has been constructed, purchased or leased; or
- Contract for the performance of activities related to a navigation center.
- Requires local governments receiving a grant to return all moneys granted if the navigation center subject to the grant is not operating on or before July 1, 2022.
- The following grants were awarded to specified nonprofit organizations and local governments through HB 5042 to establish and/or operate navigation centers to assist individuals and families with access to health services, permanent housing, and public benefits. The grants were awarded as follows:
 - \$1,500,000 to the City of McMinnville for a navigation center;
 - \$1,500,000 to the City of Roseburg for a navigation center;
 - \$2,000,000 to Bybee Lakes Hope Center for a navigation center;
 - 2,500,000 to the City of Bend for a navigation center;
 - \$2,500,000 to the City of Medford for a navigation center;
 - \$5,000,000 to the City of Salem for a navigation center; and
 - \$5,000,000 to Lane County for a navigation center within the City of Eugene

HB 3115 – Homelessness: Codification of Martin v. Boise

HB 3115 seeks to codify the 2019 9th Circuit Court of Appeals decision in *Martin v. Boise* relating to local laws regulating the acts of sitting, lying, sleeping, or keeping warm and dry in

outdoor public spaces with regards to persons experiencing homelessness. The measure includes the following key provisions:

- Defines “keeping warm and dry” to mean using measures necessary for an individual to survive outdoors given the environmental conditions but does not include using any measure that involves fire or flame.
- Defines “public property” to mean the term as it is defined in ORS 131.705.
- Provides that “city or county law” does not include policies developed pursuant to ORS 203.077 or 203.079.
- Provides that 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.
- Creates an affirmative defense to a charge of violating a city or county law regulating the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public that the law is not objectively reasonable.
- Authorizes a person experiencing homelessness to bring suit for injunctive or declaratory relief to challenge the objective reasonableness of these city or county laws and requires that the action be brought in the circuit court of the county that enacted the law or of the county in which the city that enacted the law is located.

- Requires “reasonableness” to be determined based on the totality of the circumstances, including, but not limited to, the impact of the law on persons experiencing homelessness.
- Allows the court, in its discretion, to award reasonable attorney fees to a prevailing plaintiff if the plaintiff:
 - Was not seeking to vindicate an interest unique to the plaintiff; and
 - At least 90 days before the action was filed, provided written notice to the governing body of the city or county that enacted the law being challenged of an intent to bring the action and the notice provided the governing body with actual notice of the bases the plaintiff intends to challenge the law.
- Clarifies that the measure does not create a private right of action for monetary damages.
- Provides that the requirements of the measure become operative on July 1, 2023

HB 3124 – Removal of Homeless from Established Camping Sites – Notice and Personal Property Requirements

- Defines “personal Property as any item that can reasonably be identified as belonging to an individual and that has apparent value or utility.
- Requires law enforcement officials, at least 72 hours before removing homeless individuals from an established camping site to post a written notice in English and Spanish at all entrances to the camping site to the extent that the entrances can reasonably be identified.
- Requires law enforcement officials, when a 72-hour notice is posted, to inform the local agency that delivers social services to homeless individuals as to where the notice has been posted.
- Requires all personal property at the camping site that remains unclaimed after removal to be given to a:
 - law enforcement official,
 - local agency that delivers social services to homeless individuals,
 - outreach worker,
 - local agency official or a person authorized to issue a citation for unlawful camping under state law, administrative rule or city or county ordinance, whether the 72-notice is required or not.
- Requires unclaimed personal property to be stored:
 - For property removed from camping sites in counties other than Multnomah County, in a facility located in the same community as the camping site from which it was removed.
 - For property removed from camping sites in Multnomah County, in a facility located within six blocks of a public transit station.
 - Items that have no apparent value or utility or are in an insanitary condition may be immediately discarded upon removal of the homeless individuals from the camping site.

- Weapons, controlled substances other than prescription medication and items that appear to be either stolen or evidence of a crime shall be given to or retained by law enforcement officials.
- Requires the written notice, at a minimum, to include:
 - Where unclaimed personal property will be stored;
 - A phone number that individuals may call to find out where the property will be stored; or
 - If a permanent storage location has not yet been determined, the address and phone number of an agency that will have the information when available.
- Requires unclaimed property to be stored in an orderly fashion, keeping items that belong to an individual together to the extent that ownership can reasonably be determined.
- Requires personal property to be stored for a minimum of 30 days during which time it shall be reasonably available to any individual claiming ownership.
- Personal property unclaimed after 30 day may be disposed of or donated to a 501(c)(3) corporation (Internal Revenue Code as amended and in effect on Dec. 31, 2020).
- Provides that the 72-hour notice requirement does not apply:
 - When there are grounds for law enforcement officials to believe that illegal activities other than camping are occurring at an established camping site.
 - In the event of an exceptional emergency at an established camping site, including, but not limited to, possible site contamination by hazardous materials, a public health emergency or other immediate danger to human life or safety.
- Allows a notice to be posted at least 24 hours before removing individuals from a camping site if a funeral service is scheduled with less than 72 hours' notice at a cemetery at which there is a camping site, or a camping site is established at the cemetery less than 72 hours before the scheduled service.
- Prohibits a person authorized to issue a citation for unlawful camping (under state law, administrative rule or city or county ordinance) from issuing a citation within 200 feet of a notice required by the measure and within two hours before or after the notice was posted.
- Provides that any law or policy of a city or county that is more specific or offers greater protections to homeless individuals subject to removal from an established camping site preempts contrary provisions of this measure.
- Effective Date: Took effect on the date the Governor signed the measure into law on June 23, 2021.

HB 3261 – Project Turnkey: Zoning for Hotel/Motel Conversion to Emergency Shelter/Affordable Housing

- Requires a local government to unconditionally allow the conversion of the lawful use of a property, notwithstanding any statewide land use planning goals or land use regulations:
 - From use as a hotel or motel, to use as an emergency shelter.
 - From use as a hotel or motel, or a hotel or motel that was converted to an emergency shelter, to use as affordable housing.
- Provides that the conversion requirement only applies to areas:
 - Within an urban growth boundary;
 - Not designated by the local government as specifically for heavy industrial uses;
 - With adequate transportation access to commercial and medical services; and
 - Not within an area designated for a statewide land use planning goal relating to natural disasters or hazards, including flood plains or mapped environmental health hazards, unless the converted use complies with regulations directly related to the disasters or hazards.
- Authorizes a local government to require a converted use to comply with:
 - Applicable building codes;
 - Occupancy limits; or
 - For affordable housing uses, reasonable standards relating to siting or design, if the standards do not, individually or cumulatively, prohibit the conversion through unreasonable costs or delay.
- Provides that conversions identified by the measure does not constitute a land use decision as defined in ORS 197.015.
- Provides that a local government is not required to consider whether the conversion significantly affects an existing or planned transportation facility for the purposes of implementing a statewide land use planning goal relating to transportation.
- Defines the following terms for purposes of the measure:
 - “Affordable housing” means housing in which all units are affordable to households with incomes equal to or less than 60 percent of the area median income as defined in ORS 458.610 and whose affordability is enforceable by an affordable housing covenant, as described in ORS 456.270 to 456.295, for a duration of no less than 30 years.
 - “Conversion” includes an alteration to a building that changes the number of units but does not expand the building footprint.
 - “Emergency shelter” means a building that provides shelter on a temporary basis for individuals and families who lack permanent housing.
 - “Lawful use” includes a nonconforming use as described in ORS 215.130 (6) or any other local land use regulation allowing for the continuation of a use that was lawful when first enacted.
- Applies to conversions or applications for conversions on or after January 1, 2021.

- **Effective Date:** Took effect on the date the Governor signed the measure into law on May 6, 2021.

NOTE: In 2020, the Oregon Legislature allocated a total of \$65 million of CARES Act funding through the Oregon Joint Legislative Emergency Board for Project Turnkey for the purpose of acquiring motels/hotels for use as non-congregate shelter for people experiencing homelessness or at-risk of homelessness. The two funds included:

- \$30 million designated for shelter opportunities in counties or tribal communities impacted by the 2020 wildfires has been fully allocated, resulting in the funding of seven projects for a total of 388 units in six counties (appropriated on 10/23/2020).
- \$35 million designated for shelter opportunities in the remaining areas of the state. Of this amount, \$31.2 million has been allocated to date (appropriated on 11/9/2020).

During the 2021 Legislative Session, an additional 9.7 million was appropriated in HB 2004 to the Oregon Community Foundation to complete Project Turnkey projects in Deschutes, Multnomah, Malheur and Yamhill counties. In addition, \$800,000 was appropriated for a Turnkey project in Salem and \$5,107,713 was appropriated for a Turnkey project in Corvallis in HB 5006.

S. Scott McDowell

From: Ross Williamson <ross@localgovtlaw.com>
Sent: Tuesday, May 31, 2022 11:50 AM
To: S. Scott McDowell
Subject: RE: Brownsville, OR | ORS Sections

Hi, Scott.

They have assembled many of these statutes and laws in ORS Chapter 195. The provision you reference is found at ORS 195.530.

195.530 Noncamping use of public property by homeless individuals; attorney fees. (1) As used in this section:

- (a) “City or county law” does not include policies developed pursuant to ORS 195.500 or 195.505.
- (b)(A) “Keeping warm and dry” means using measures necessary for an individual to survive outdoors given the environmental conditions.
- (B) “Keeping warm and dry” does not include using any measure that involves fire or flame.
- (c) “Public property” has the meaning given that term in ORS 131.705.
- (2) Any city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness.
- (3) It is an affirmative defense to a charge of violating a city or county law described in subsection (2) of this section that the law is not objectively reasonable.
- (4) A person experiencing homelessness may bring suit for injunctive or declaratory relief to challenge the objective reasonableness of a city or county law described in subsection (2) of this section. The action must be brought in the circuit court of the county that enacted the law or of the county in which the city that enacted the law is located.
- (5) For purposes of subsections (2) and (3) of this section, reasonableness shall be determined based on the totality of the circumstances, including, but not limited to, the impact of the law on persons experiencing homelessness.
- (6) In any suit brought pursuant to subsection (4) of this section, the court, in its discretion, may award reasonable attorney fees to a prevailing plaintiff if the plaintiff:
 - (a) Was not seeking to vindicate an interest unique to the plaintiff; and
 - (b) At least 90 days before the action was filed, provided written notice to the governing body of the city or county that enacted the law being challenged of an intent to bring the action and the notice provided the governing body with actual notice of the basis upon which the plaintiff intends to challenge the law.
- (7) Nothing in this section creates a private right of action for monetary damages for any person.



ORDINANCE NO. 799

AN ORDINANCE CREATING AND ADOPTING CHAPTER 8.65, HB 3115 | *Martin v. Boise* IMPLEMENTATION TO THE MUNICIPAL CODE OF THE CITY OF BROWNSVILLE, OREGON;

WHEREAS, Title 8 of the Brownsville Municipal Code (BMC) defines Health and Safety, and;

WHEREAS, the Council desires to create a response to HB 3115 | *Martin v. Boise* as defined herein, and;

WHEREAS, Council desires to pass this ordinance as an emergency, and;

NOW THEREFORE, the City of Brownsville ordains as follows:

**Chapter 8.65
HB 3115 | *Martin v. Boise***

Sections:

8.65.010 Purpose and scope.

8.65.020 Definitions.

8.65.030 Powers and duties.

8.65.040 City Administrator.

8.65.050 Vehicles.

8.65.060 Designated space and rules.

8.65.070 Method of financing and operating.

8.65.010 Purpose and scope.

The State of Oregon has codified the United States Ninth Circuit Court's ruling on the *Martin v. Boise* case. The State's decision to codify this case into law unduly burdens municipalities by delegating requirements for a specific class of people that places significant financial obligations and other responsibilities onto municipalities. By the State adopting code and mandating implementation for this purpose, the State is violating the Oregon Constitution, Article 1, Section 20. The State has allowed municipalities to pass time, place and manner ordinances to comply with this unfunded mandate that comes into full effect of law starting July 1st, 2023.

8.65.020 Definitions.

All definitions shall come from the State of Oregon for this Chapter. The City does not discriminate against individuals based on the Civil Rights Act of 1964 which prohibits discrimination on the basis of race, color, religion, sex or national origin.



“Camping” means staying overnight in any temporary or make-shift structure including a vehicle.

“Designated Space” means City owned public property.

“Riparian areas” means a boundary of two hundred feet from the Calapooia river or any other water tributary of the Calapooia river.

“Unlawful Campsite” means a location where a person unlawfully places onto private or public property any bedding, sleeping bag, or other sleeping matter; any stove or fire; and/or any structure such as a hut, lean-to-tent, or other temporary structure for the purpose of camping.

“Vehicles” means any car, truck, recreational vehicle or other mode of transportation that’s primary purpose is to transport persons.

8.65.030 Powers and duties.

- A. The powers, duties and responsibilities of the City shall not be further limited or defined that would cause the City to incur any financial, expertise, or liability burden as follows:
 - 1) By the State of Oregon,
 - 2) By City/County Insurance Services (CIS) or other insurance or agent used by the City of Brownsville,
 - 3) By any non-profit or other special interest group.
- B. It shall be the duty of the State of Oregon to provide grant funding for this undue burden caused by this unfunded mandate. The City of Brownsville does not have the financial wherewithal or personnel to address this matter as mandated.

8.65.030 City Administrator.

- A. The City Administrator shall have all authority to address both routine and unforeseen issues as they arise concerning these matters.
- B. The City Administrator shall maintain a record of all issues and file a report to Council on each matter.

8.65.050 Vehicles.

- A. Persons are only allowed to sleep in vehicles including cars, trucks, recreational vehicles on private property as allowed by local law.
- B. Persons are allowed to sleep in vehicles including cars, trucks, recreational vehicles from 9:00 p.m. to 7:00 a.m. on City owned public property in designated space(s). The City shall have designated space clearly marked with rules signage and any designated space(s) will have use location and information available on the City website.
- C. Abandoned recreational vehicles shall become the property of the State of Oregon, and any associated costs to abate, remove or dispose of an abandoned recreational vehicle shall be billed to the State of Oregon.



8.65.060 Designated space and rules.

- A. City owned public property that has been designated space for overnight camping will adhere to the guidelines and conditions as follows:
- 1) Camping is allowed on a daily basis from the hours 9:00 p.m. to 7:00 a.m.
 - 2) No camping, loitering, or use of the property is allowed between the hours of 7:00 a.m. to 9:00 p.m. Violators will be trespassed from the property.
 - 3) The City is not responsible for any loss of property, injury, or any other claim resulting from the use of any designated space.
 - 4) The City does not have the financial wherewithal to provide background checks, medical services, utilities or any other amenities to anyone using the designated space for sleeping purposes, and will not be held liable or responsible for any such services.
 - 5) The City will not provide social services to any person using the designated space including the distribution of drug paraphernalia.
 - 6) Any refuse left behind that has to be removed by the City will be billed to the State of Oregon.
 - 7) Any injury suffered by City personnel or damage to equipment in the cleanup of any designated space identified through this ordinance will be billed to the State of Oregon.
- B. Any person in need of social services should contact Linn County for programs and services offered through Linn County & the State of Oregon.
- C. Camping in riparian areas is strictly prohibited.
- D. The City designated space shall be the South Lagoon located at 34371 OR 228.
- E. Regulations governing use of designated spaces or unlawful camping include but are not limited to the following rules:
- 1) Persons using any property in the City whether or not a permit fee has been paid shall be subject to the rules herein and if ordered to leave a property due to violating a rule or regulation within this Chapter, is subject to fee and/or privilege forfeiture by the City.
 - 2) No person shall camp overnight, except in areas specifically designated by the City.
 - 3) No person shall park a pickup-mounted or truck-mounted camper, camp trailer, motor home, or other camp unit in places other than those provided and designated for such purposes unless the person has obtained a permit or permission from the City authorizing such use.
 - 4) No person shall engage in unlawful camping within the City.
 - 5) No person shall operate a concession, either fixed or mobile, solicit, sell or offer for sale, peddle, hawk, or vend any goods, wares, merchandise, foods, liquids, or services without written permission from the City.
 - 6) No person shall allow any animal in the person's custody to annoy or molest any person or other pet.
 - 7) No person shall in any manner, pursue, hunt, trap, or molest any bird or animal.



- 8) All persons shall pick up and properly dispose of their domestic animal's waste while visiting any property within the City.
- 9) No person shall build, light, or maintain any fire except in a stove, pit or fireplace especially designated for such purpose; provided, however, that a person may use a portable gas, gasoline, charcoal, or oil camp stove if the portable gas, gasoline, charcoal, or oil camp stove is in a safe operating condition and used in a manner so as to not start a fire.
- 10) No person shall leave unattended any fire built, lighted, or maintained.
- 11) No person shall pick, mutilate, dig or remove any plant whether living or dead, or in any way deface, mutilate, burn, destroy or defile any tree or plant within the limits of such areas.
- 12) No person shall alter, deface, mutilate or destroy any trail, road, parking lot, bridge, fence, building, sign, barrier, or other facility or structure.
- 13) No person shall dig up or remove any soil, stones, rocks, or other substances whatsoever, make any excavation, or lay or set off any blast or cause or assist therein.
- 14) No person shall discharge, set off, explode, or burn any fireworks, firearm, air, CO₂, or spring-actuated rifle or pistol, slingshot, arrow, or other similar devices designed or used to propel a projectile, in or over any property in the City. Such activities are strictly reserved to City authorized personnel.
- 15) No person shall fly or allow to be flown a self propelled aircraft, including but not limited to remote controlled model aircraft and drones, except in areas designated and identified for such purpose.
- 16) No person shall throw rocks, sticks, or other objects, which may endanger the safety of any other person.
- 17) No person shall dive, swim or engage in any water activity in an unsafe manner.
- 18) No person shall use abusive, threatening, obscene, or indecent language or gestures in a manner which causes a public nuisance.
- 19) No person shall fight, promote, instigate, or encourage fighting or similar violent conduct which would threaten the physical well-being of any person.
- 20) No person shall commit the act of public indecency as defined in ORS 163.465.
- 21) No person shall operate radios, television, musical instruments, and other noise producing devices, or otherwise cause unnecessary sound in such a manner and at such times so as to disturb other persons.
- 22) No person shall cause, attempt to cause, or bring about any public demonstrations or disturbances, or in any way create a public nuisance.
- 23) No person may make any noise that would reasonably disrupt normal sleeping activities during quiet hours; 10:00 p.m. to 7:00 a.m.
- 24) No person shall, within the City, refuse to disclose that person's identity to City personnel or law enforcement officer who requests such information.
- 25) No person shall obstruct, harass, or interfere with the official duties of City personnel or a law enforcement officer.



- 26) No person shall deposit any rubbish, garbage, glass or other litter except in receptacles designated for that purpose.
- 27) No person shall remove items from containers designated for recyclables, garbage, sewage, or waste.
- 28) No person shall dump household or commercial garbage.
- 29) No person shall depart from the campsite before removing all camping equipment and cleaning up the campsite.
- 30) No person shall maintain a campsite in an unsightly, unsafe, unclean, or unsanitary condition.

8.65.060 Private property.

- A. No person shall be permitted at any time to camp on sidewalks abutting private property, including businesses, due to the property liability implications associated with such a practice. The City shall not create an undue burden for private residences and private business owners.
- B. Persons loitering near private residences and private business are subject to trespass and removal from the property.
- C. Any personal property or rubbish shall not be allowed to be placed on or along sidewalks and/or pathways. The City retains the right to dispose of any such materials as deemed necessary by the City Administrator.

8.65.070 Method of financing and operating.

The City of Brownsville does not have the financial ability to operate the requirements of this unfunded mandate imposed by the State of Oregon. The City has made time, place and manner guidelines as allowed by law.

PASSED BY THE COUNCIL AND APPROVED BY THE MAYOR
this th day of June, 2023.

Mayor Adam Craven

City Administrator Scott McDowell

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT MARTIN; LAWRENCE LEE
SMITH; ROBERT ANDERSON; JANET
F. BELL; PAMELA S. HAWKES; and
BASIL E. HUMPHREY,
Plaintiffs-Appellants,

v.

CITY OF BOISE,
Defendant-Appellee.

No. 15-35845

D.C. No.
1:09-cv-00540-
REB

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the District of Idaho
Ronald E. Bush, Chief Magistrate Judge, Presiding

Argued and Submitted July 13, 2017
Portland, Oregon

Filed April 1, 2019

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

Order;
Concurrence in Order by Judge Berzon;
Dissent to Order by Judge Milan D. Smith, Jr.;
Dissent to Order by Judge Bennett;
Opinion by Judge Berzon;
Partial Concurrence and Partial Dissent by Judge Owens

SUMMARY*

Civil Rights

The panel amended its opinion filed September 4, 2018, and reported at 902 F.3d 1031, denied a petition for panel rehearing, denied a petition for rehearing en banc on behalf of the court, and ordered that no further petitions shall be entertained.

In the amended opinion, the panel affirmed in part and reversed in part the district court's summary judgment in favor of the City of Boise in an action brought by six current or formerly homeless City of Boise residents who alleged that their citations under the City's Camping and Disorderly Conduct Ordinances violated the Eighth Amendment's prohibition on cruel and unusual punishment.

Plaintiffs sought damages for the alleged violations under 42 U.S.C. § 1983. Two plaintiffs also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances. In 2014, after this litigation began, the ordinances were amended to prohibit their enforcement against any homeless person on public property on any night when no shelter had an available overnight space.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel first held that two plaintiffs had standing to pursue prospective relief because they demonstrated a genuine issue of material fact as to whether they faced a credible risk of prosecution on a night when they had been denied access to the City's shelters. The panel noted that although the 2014 amendment precluded the City from enforcing the ordinances when shelters were full, individuals could still be turned away for reasons other than shelter capacity, such as for exceeding the shelter's stay limits, or for failing to take part in a shelter's mandatory religious programs.

The panel held that although the doctrine set forth in *Heck v. Humphrey*, 512 U.S. 477 (1994), and its progeny precluded most — but not all — of the plaintiffs' requests for retrospective relief, the doctrine had no application to plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

Turning to the merits, the panel held that the Cruel and Unusual Punishments Clause of the Eighth Amendment precluded the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter. The panel held that, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

Concurring in part and dissenting in part, Judge Owens disagreed with the majority's opinion that *Heck v. Humphrey* did not bar plaintiffs' claim for declaratory and injunctive relief. Judge Owens stated that a declaration that the city ordinances are unconstitutional and an injunction against their future enforcement would necessarily demonstrate the

invalidity of plaintiffs' prior convictions. Judge Owens otherwise joined the majority in full.

Concurring in the denial of rehearing en banc, Judge Berzon stated that on the merits, the panel's opinion was limited and held only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. Judge Berzon further stated that a photograph featured in Judge M. Smith's dissent from the denial of rehearing en banc, depicting tents on a Los Angeles public sidewalk, was not part of the record, was unrelated, predated the panel's decision and did not serve to illustrate a concrete effect of the panel's holding. Judge Berzon stated that what the pre-*Martin* photograph did demonstrate was that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem.

Dissenting from the denial of rehearing en banc, Judge M. Smith, joined by Judges Callahan, Bea, Ikuta, Bennett and R. Nelson, stated that the panel severely misconstrued three areas of binding Supreme Court precedent, and that the panel's opinion created several splits with other appellate courts. Judge M. Smith further stated that the panel's holding has already begun wreaking havoc on local governments, residents, and businesses throughout the circuit. Judge M. Smith stated that the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination, and that the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.

Dissenting from the denial of rehearing en banc, Judge Bennett, joined by Judges Bea, Ikuta, R. Nelson, and joined by Judge M. Smith as to Part II, stated that the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment.

COUNSEL

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

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

ORDER

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

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

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

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

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a “distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court . . . perceived no error.” *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of

rehearing en banc); *see also* Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

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

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

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

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

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

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.¹

¹ Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative*, L.A. County, <http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/> [https://

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

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

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults* 5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf.

web.archive.org/web/20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), <https://twitter.com/CountyofLA/status/936012841533894657>.

The crisis continued to burgeon while ordinances forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere* in public if one has nowhere else to do so.

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

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

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

¹ With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev.,

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

I.

The most harmful aspect of the panel's opinion is its misreading of Eighth Amendment precedent. My colleagues cobble together disparate portions of a fragmented Supreme Court opinion to hold that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018). That holding is legally and practically ill-conceived, and conflicts with the reasoning of every other appellate court² that has considered the issue.

A.

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660 (1962). There, the Court addressed a statute that made it a "criminal

Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018), <https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>.

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

offense for a person to ‘be addicted to the use of narcotics.’” *Robinson*, 370 U.S. at 660 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts, regardless of whether they actually used or possessed drugs. *Id.* at 665. The Court struck down the statute under the Eighth Amendment, reasoning that because “narcotic addiction is an illness . . . which may be contracted innocently or involuntarily . . . a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug” violates the Eighth Amendment. *Id.* at 667.

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

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

Justice White concurred in the judgment. He upheld the defendant’s conviction because *Powell* had not made a

showing that he was unable to stay off the streets on the night he was arrested. *Id.* at 552–53 (White, J., concurring in the result). He wrote that it was “unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place.” *Id.* at 553.

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

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

This is hardly a radical proposition. I am not alone in recognizing that “there is definitely no Supreme Court holding” prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly

compelled or involuntary. *See, e.g., United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he “was not punished for his status as an alcoholic but for his conduct”); *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) (“Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his ‘status’ as a schizophrenic.”); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) (“The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person’s actions.”).³

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it “unnecessary to consider . . . the proper application of *Marks*”). *Hughes v. United States*, 138 S. Ct. 1765, 1772 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.⁴

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

⁴ Transcript of Oral Argument at 14, *Hughes v. United States*, 138 S. Ct. 1765 (2018) (No. 17-155).

The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.⁵

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

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

But the Court has repeatedly discouraged us from making such predictions when construing precedent. See *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). And, for good reason. Predictions about how

⁵ *Id.* at 49.

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

Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell*—that have arisen since the Court’s fragmented opinion. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) (noting “the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals”).

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

B.

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

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

previously upheld by the California Supreme Court. Both courts cannot be correct.

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

Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

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

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

I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem . . . [I]t seems to me that the

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

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

present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

Powell, 392 U.S. at 539–40 (Black, J., concurring).

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

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

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

C.

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

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

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

* * *

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

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

even then “not everybody really gets counted.”⁹ Lest one think Los Angeles is unique, our circuit is home to many of the largest homeless populations nationwide.¹⁰

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

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

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

And what if local governments (understandably) lack the resources necessary for such a monumental task?¹¹ They have no choice but to stop enforcing laws that prohibit public sleeping and camping.¹² Accordingly, our panel’s decision

¹¹ Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend \$403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), <https://assets.documentcloud.org/documents/4550980/LAHSAs-Sheltering-Report.pdf>. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between \$10 million and \$20 million, and would require \$20 million to \$30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?*, S.F. Chronicle (June 29, 2016), <https://projects.sfchronicle.com/sf-homeless/shelters>. Perhaps these staggering sums are why the panel went out of its way to state that it “in no way dictate[s] to the City that it must provide sufficient shelter for the homeless.” *Martin*, 902 F.3d at 1048.

¹² Indeed, in the few short months since the panel’s decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, Sacramento Bee (Sept. 18, 2019, 4:27 PM), <https://www.sacbee.com/news/local/homeless/article218605025.html> (“Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month.”); Michael Ellis Langley, *Policing Homelessness*, Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, “[a]s far as camping ordinances and things like that, we’re probably holding off on [issuing citations] for a while” in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision*, KXLY (Oct. 2, 2018, 12:50 PM), <https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activity-following-9th-circuit-court-decision/801772571> (“Because the City of Moses Lake does not currently have a homeless shelter, city officials can

effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.¹³

As if the panel's actual holding wasn't concerning enough, the logic of the panel's opinion reaches even further in scope. The opinion reasons that because "resisting the need to . . . engage in [] life-sustaining activities is impossible," punishing the homeless for engaging in those actions in public violates the Eighth Amendment. *Martin*, 902 F.3d at 1048. What else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the

no longer penalize people for sleeping in public areas."); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter*, Voice of OC (Feb. 14, 2019), <https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/> (stating that Judge David Carter of the U.S. District Court for the Central District of California has "warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances"); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate*, Santa Barbara Indep. (Oct. 31, 2018), <http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm> ("In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.").

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

striking down of laws that prohibit public defecation and urination.¹⁴ The panel’s reasoning also casts doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.

It is a timeless adage that states have a “universally acknowledged power and duty to enact and enforce all such laws . . . as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people.” *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901) (internal quotations omitted). I fear that the panel’s decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.¹⁵ As we have already begun to witness, our neighborhoods will soon feature “[t]ents . . .

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

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

equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic” and “human waste appearing on sidewalks and at local playgrounds.”¹⁶



A Los Angeles Public Sidewalk

II.

The panel’s fanciful merits-determination is accompanied by a no-less-inventive series of procedural rulings. The panel’s opinion also misconstrues two other areas of Supreme Court precedent concerning limits on the parties who can

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

bring § 1983 challenges for violations of the Eighth Amendment.

A.

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

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would “necessarily demonstrate the invalidity of [the plaintiff’s] confinement or its duration.” *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005); *see also Edwards v. Balisok*, 520 U.S. 641, 648 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson’s prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs’ requested relief, but *Edwards* cannot bear the weight the panel puts on it. In *Edwards*, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was

not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.* at 648.

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

B.

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

The panel relied on *Ingraham v. Wright*, 430 U.S. 651 (1977), to find that a plaintiff "need demonstrate only the

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

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

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. *Johnson*, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise an Eighth Amendment challenge to the ordinance because although “numerous tickets ha[d] been issued . . . [there was] no indication that any Appellees ha[d] been convicted” of

violating the sleeping in public ordinance. *Id.* at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.* at 444–45 (citing *Robinson*, 370 U.S. at 663; *Ingraham*, 430 U.S. at 667).

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

III.

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

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

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

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

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

I.

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of

Rights of 1689,¹ and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286 (1983) (observing that one of the themes of the founding era “was that Americans had all the rights of English subjects” and the Framers’ “use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection”); *Timbs v. Indiana*, 586 U.S. ____ (2019) (Thomas, J., concurring) (“[T]he text of the Eighth Amendment was ‘based directly on . . . the Virginia Declaration of Rights,’ which ‘adopted verbatim the language of the English Bill of Rights.’” (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989))). Thus, “not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular ‘rights of English subjects’ it was designed to vindicate.” *Harmelin v. Michigan*, 501 U.S. 957, 967 (1991) (Scalia, J., concurring).

Justice Scalia’s concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id.* at 966–85 (Scalia, J., concurring). Rather than reciting Justice Scalia’s *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the

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

Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.* at 976, his opinion’s historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

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

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed “vicious punishments for treason,” including “drawing and quartering, burning of women felons, beheading, [and] disemboweling.” *Harmelin*, 501 U.S. at 968. In the view of some historians, “the story of The Bloody Assizes . . . helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments.” *Furman v. Georgia*, 408 U.S. 238, 254 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys’s treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and life imprisonment, Jeffreys sentenced Oates to be “stript of [his] Canonical Habits.” *Harmelin*, 501 U.S. at 970 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St.

Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was "'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.'" *Id.* at 973 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

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

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.* at 975. "Wrenched out of its common-law context, and applied to the actions of a

legislature . . . the Clause disables the Legislature from authorizing particular forms or ‘modes’ of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.” *Id.* at 976.

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

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

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

II.

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

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

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

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

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

(internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6 (1989)).⁴

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

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

to crimes lacking an actus reus). The panel's holding here throws that caution to the wind.

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

* * *

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

OPINION

BERZON, Circuit Judge:

“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”

— Anatole France, *The Red Lily*

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

The plaintiffs-appellants are six current or former residents of the City of Boise (“the City”), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police

for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the “Camping Ordinance”), makes it a misdemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time.” The Camping Ordinance defines “camping” as “the use of public property as a temporary or permanent place of dwelling, lodging, or residence.” *Id.* The second, Boise City Code § 6-01-05 (the “Disorderly Conduct Ordinance”), bans “[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof.”

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

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

to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count (“PIT Count”) conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were “unsheltered,” or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.¹ The PIT Count likely underestimates the number of homeless individuals in Ada County. It is “widely recognized that a one-night point in

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

time count will undercount the homeless population,” as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

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

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

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

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

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

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

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive

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

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

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

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

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

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

A. The Plaintiffs

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

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

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was

cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

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

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

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any

person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

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

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

Bell further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id.* at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended

or reversed at any time by the Boise Chief of Police. *Id.* at 899–900.

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

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

prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions.”

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order’s mandate that “[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter.” Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no “credible threat” of future prosecution. “If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs” The court emphasized that the record “suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity” and that “there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families.”

This appeal followed.

II. Discussion

A. Standing

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

“To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1147 (2013) (citation omitted). “Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes — that the injury is *certainly* impending.” *Id.* (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. “When the plaintiff has alleged an

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

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

intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.” *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs “ need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements.” *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

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

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

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

The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's . . . a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious atmosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v.*

Kemna, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

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

So, even if we credit the City’s evidence that BRM’s facilities have never been “full,” and that the City has never cited any person under the ordinances who could not obtain shelter “due to a lack of shelter capacity,” there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is

available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

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

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

B. *Heck v. Humphrey*

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the

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

1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez*, 411 U.S. 475 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful

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

confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id.* at 487, 500. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974) (emphasis added).

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

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

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

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck*'s favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a

petition for habeas corpus. *See Muhammad v. Close*, 540 U.S. 749, 752 & n.2 (2004). But in *Spencer*, five Justices suggested that *Heck* may not apply in such circumstances. *Spencer*, 523 U.S. at 3.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck*, yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id.* at 18–19 (Souter, J., concurring). Justice Souter stated that in his view “*Heck* has no such effect,” and that “a former prisoner, no longer ‘in custody,’ may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy.” *Id.* at 21. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that “[g]iven the Court’s holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear . . . that he may bring an action under 42 U.S.C. § 1983.” *Id.* at 25 n.8 (Stevens, J., dissenting).

Relying on the concurring and dissenting opinions in *Spencer*, we have held that the “unavailability of a remedy in habeas corpus because of mootness” permitted a plaintiff released from custody to maintain a § 1983 action for damages, “even though success in that action would imply the

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

2. Retrospective Relief

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

Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued

inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[] . . . the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[] . . . any criminal fines paid . . . [or] costs of incarceration billed."

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

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

Ingraham concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual

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

3. Prospective Relief

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

that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

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

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

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

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

C. The Eighth Amendment

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

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

“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.” *Robinson v. California*, 370 U.S. 660, 667 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause’s third limitation is “one to be applied sparingly.” *Ingraham*, 430 U.S. at 667.

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

the challenged statute a violation of the Eighth Amendment. *Id.* at 666–67.

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

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

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

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

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

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones*

reasoned, “[w]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human.” *Jones*, 444 F.3d at 1136. Moreover, any “conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.” *Id.* As a result, just as the state may not criminalize the state of being “homeless in public places,” the state may not “criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.” *Id.* at 1137.

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

⁸ Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection

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

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a

of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the “universal and unavoidable consequences of being human” in the way the ordinance prescribes. *Id.* at 1136.

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

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

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

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

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed

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

III. Conclusion

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

¹⁰ Costs shall be awarded to the plaintiffs.

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

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

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

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

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

would necessarily demonstrate the invalidity of confinement or its duration.

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

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs’ prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck*'s application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok*, 520 U.S. 641 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards*, the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner’s confinement “as a substantive matter,” it improperly distinguished as not *Heck*-barred *all* claims alleging only procedural violations. 520 U.S. at 645. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction “as a substantive matter” are barred by *Heck*.

Id.; see also *Wilkinson*, 544 U.S. at 82 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures*" and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]'" (emphasis added) (quoting *Heck*, 512 U.S. at 487)).

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

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

Blake v. City of Grants Pass

Decided Jul 22, 2020

Case No. 1:18-cv-01823-CL

07-22-2020

DEBRA BLAKE, GLORIA JOHNSON, JOHN LOGAN, individuals, on behalf of themselves and all others similarly situated, Plaintiffs, v. CITY OF GRANTS PASS, Defendant.

CLARKE, Magistrate Judge.

OPINION AND ORDER

This case involves a certified class of homeless individuals residing in and around Grants Pass, Oregon. The class members allege that the City of Grants Pass has a web of ordinances, customs, and practices that, in combination, punish people based on their status of being involuntarily homeless. This case comes before the Court on cross-motions for summary judgment. The Court has also considered amicus briefs submitted by League of Oregon Cities and the National Law Center on Homelessness and Poverty. For the reasons below, Plaintiffs' *2 Motion for Summary Judgment (Dkt. No. 62) is GRANTED in part and DENIED in part, and Defendant's Motion for Summary Judgment (Dkt. No. 80) is DENIED.¹

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

STANDARD OF REVIEW

Summary judgment shall be granted when the record shows that there is no genuine dispute as to any material facts and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 247 (1986). The moving party has the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Devereaux v. Abbey*, 263 F.3d 1070, 1076 (9th Cir. 2001) (en banc). The court cannot weigh the evidence or determine the truth but may only determine whether there is a genuine issue of fact. *Playboy Enters., Inc. v. Welles*, 279 F.3d 796, 800 (9th Cir. 2002). An issue of fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

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

BACKGROUND

This case is about respecting the dignity of homeless individuals and the City of Grants Pass' ability to protect the safety and welfare of its citizens. Unsheltered homelessness is an ever-growing crisis nationwide, and the overwhelming majority of homeless individuals are not living

that way by choice. According to the United States Department of Housing and Urban Development ("HUD"), there were an estimated 533,000 homeless individuals in the United States in 2018; more than a third of whom were "unsheltered homeless," meaning, individuals "whose primary nighttime location [wa]s a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, . . . or camping ground."²

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

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

³ *Id.* at 28.

⁴ *Id.*

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

*4 920 F.3d 584, 604 (9th Cir.), *cert. denied sub nom. City of Boise, Idaho v. Martin*, 140 S. Ct. 674, (2019).

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

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

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

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

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

The City of Grants Pass, Oregon, the city involved in this case, had a population of 23,000 people according to the 2000 census, and it is now estimated to have more than 38,000 people.⁹ The development of affordable housing in Grants Pass has not kept up with the population growth. City Manager Aaron Cubic confirmed in his deposition that Grants Pass has a vacancy rate of 1% and that "essentially means that there's no vacancy." Edward Johnson Decl., Ex. 1, Cubic Depo. at p. 49, lines 1-10 (Dkt. #63-1). Kelly Wessels, the Chief Operating Officer of the Community Action Agency that serves Grants Pass testified that

5 "Grants Pass" *5 stock of affordable housing has dwindled to almost zero. Landlords routinely require an applicant to have an income that is three times the monthly rent. Rental units that cost less than \$1,000/month are virtually unheard of in Grants Pass." Kelly Wessels Decl. ¶ 7 (Dkt. #42).

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

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

In March 2013, the Grants Pass City Council hosted a Community Roundtable, hereinafter referred to as the "2013 Roundtable Meeting," to "identify solutions to current vagrancy problems."

Wessels Decl. ¶ 8, Ex. 1 (minutes of public roundtable) (Dkt #65). Minutes from this meeting show that the City Council President stated, "the point is to make it uncomfortable enough for them in our city so they [referring to homeless individuals] will want to move on down the road." Wessels Decl., Ex. 1 at 2 (Dkt. #65-1). At the end of the meeting, a list of "actions to move forward on" was created. These action items included (i) ways to increase police presence downtown; (ii) create an exclusion zone and possibly have a blanket trespassing regulation; (iii) specific amount of misdemeanors leading to prosecution; (iv) not feeding in parks or other specific areas in the city; (v) posting "zero tolerance" signs stating certain ordinances will be strictly enforced; (vi) look into the possibility of creating a "do not serve" or "most unwanted" list; (vii) pass out the trespassing letters and get word out to have them signed; and (viii) provide assistance in constructing safe areas at agencies to protect volunteers from aggressive behavior. *Id.* at 13. City Manager Aaron Cubic confirmed that the action items from the 2013 Roundtable Meeting were copied into the City's strategic plans in the *6 form of an objective to "address the vagrancy issue" starting with the 2013-14 Grants Pass Strategic Plan up to the current 2019 Grants Pass Strategic Plan. Edward Johnson Decl., Ex. 1, Cubic Depo. at p. 29 lines 11-16; p. 46 line 20 to p. 48 line 10. (Dkt. #63-1). The City Manager also confirmed that one of the action items related to this objective was the "targeted enforcement of illegal camping." *Id.* at p. 36 line 16 to p. 37 line 5.

There are no homeless shelters in Grants Pass that qualify as "shelters" under the criteria provided by HUD. The housing option cited by the City that most resembles a shelter is the Gospel Rescue Mission ("GRM"), which operates transitional housing programs in Grants Pass. GRM Director of Resident Services, Brian Bouteller, testified that GRM offers 30-day transitional housing in two facilities: one facility is for women and children

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

7 Mission property are strictly *7 forbidden. Edward Johnson Decl., Ex 3 (Dkt. #63-3). GRM has avoided seeking government funding so that it can maintain these restrictive rules. Johnson Decl., Ex 2, Bouteller Depo. p. 15 lines 15-23 (Dkt. #63-2).

The class of involuntarily homeless people living in and around Grants Pass, Oregon was certified by this Court on August 7, 2019. (Dkt. #47). The class is defined as all involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant City of Grants Pass as addressed in this lawsuit. The class representatives allege that each of their situations fall under the definition of homelessness adopted by HUD. 24 C.F.R. § 582.5 (2012). HUD's definition encompasses a variety of living situations, including youth homelessness, *id.* § 582.5(3);

individuals fleeing domestic violence, *id.* § 582.5(4); individuals "living in a supervised publicly or privately operated shelter designed to provide temporary living arrangements," *id.* § 582.5(1)(ii); and individuals whose primary nighttime residence "is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, or camping ground, *id.* § 582.5(1)(i).

Class representatives allege that their situations are just three representations of modern homelessness in the United States. Class representative, Debra Blake, lost her job and housing approximately ten years ago and has been involuntarily homeless in Grants Pass ever since. Blake Decl. ¶ 3 (Dkt. #90). At the time of class certification, Ms. Blake was living in temporary transitional housing, but her ninety-day stay expired and she has returned to sleeping outside. As recently as September 11, 2019, Ms. Blake was cited for illegal camping and "prohibited conduct" in Riverside Park in Grants Pass because she was laying in the park in a sleeping bag at 7:30 a.m. *Id.* ¶ 7. Ms. Blake was convicted and fined \$590.

8 Later that same morning, the same *8 officer wrote Ms. Blake a citation for "criminal trespass on City property" with an associated fine of \$295. *Id.* Ms. Blake was also issued a park exclusion on September 11, 2019. *Id.* ¶ 8. Ms. Blake filed an appeal and the exclusion was lifted without explanation after she had already been excluded from all Grants Pass parks for two weeks. *Id.* Currently, Ms. Blake owes the City over \$5,000 in unpaid fines related to enforcement of the ordinances at issue while living outside in Grants Pass. Class representative, John Logan, has been intermittently homeless in Grants Pass for the last ten years. Mr. Logan currently sleeps in his truck at a rest stop north of Grants Pass because he fears being awakened and ticketed if he sleeps in his truck within the City. Logan Decl. ¶ 2 (Dkt. #67), Mr. Logan is a licensed home care provider and his clients have allowed him to sleep on a mattress

in a room they use for storage approximately four to five nights a week. *Id.* ¶ 3. However, that job ended in October or November 2019. *Id.* Class representative, Gloria Johnson, has been living out of her van since at least before this litigation began. Johnson Decl. ¶ 2 (Dkt. #91). Ms. Johnson has parked her van to sleep outside of town on both BLM land and county roads. She claims that she has been asked to move along several times. *Id.* ¶¶ 3-5. While their exact circumstances and stories may vary, the three class representatives all share the need to conduct the life sustaining activities of resting, sleeping, and seeking shelter from the elements while living in Grants Pass without a permanent home.

Through their appointed class representatives, Plaintiffs move for summary judgment on each of their claims. Plaintiffs allege that the City of Grants Pass, through a combination of ordinances, customs, and policies, has unconstitutionally punished them for conducting life-sustaining activities and criminalized their existence as homeless individuals. Plaintiffs seek an order from this Court declaring that the City's enforcement of Grants Pass Municipal Codes ("GPMC") 5.61.020 (the "anti-sleeping ordinance"); GPMC 5.61.030 and GPMC 6.46.090 (the "anti-camping ordinances"), GPMC 6.46.350 (the "park exclusion ordinance") and criminal trespass laws stemming from violations of those ordinances are unconstitutional as applied to the ⁹ plaintiff class. Plaintiffs also seek an injunction prohibiting the City from enforcing those ordinances and related criminal trespass laws against the plaintiff class unless and until members of the class have the opportunity to obtain shelter within the City. The exact language of the ordinances at issue are as follows:

5.61.010 Definitions

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

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

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

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

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

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

5.61.030 Camping Prohibited

No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct, unless (i) otherwise specifically authorized by this Code, (ii) by a formal declaration of the City Manager in emergency circumstances, or (iii) upon Council resolution, the Council may exempt a special event from the prohibitions of this section, if the Council finds such exemption to be in the public interest and consistent with Council goals and notices and in accordance with conditions imposed by the Parks and Community Services Director. Any conditions imposed will include a condition requiring that the applicant

provide evidence of adequate insurance coverage and agree to indemnify the City for any liability, damage or expense incurred by the City as a result of activities of the applicant. Any findings by the Counsel shall specify the exact dates and location covered by the exemption.

10 *10

6.46.090 Camping in Parks

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

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

6.46.350 Temporary Exclusion from City Park Properties

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

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

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

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

6.46.355 Appeal and Hearing

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

The two camping ordinances carry a mandatory fine of \$295. The fine for illegal sleeping is \$75. GPMC 1.36.010. When unpaid, the fines increase to \$537.60 and \$160 respectively due to "collection fees." Johnson Decl., Ex. 9 at 5-6 (Dkt. #63-9). Plaintiffs were provided 615 citations and 541 incident reports issued pursuant to three of these ordinances: *11 GPMC 5.61.020 (the anti-sleeping ordinance), GPMC 5.61.030 (the anti-camping ordinance), GPMC 6.46.090 (the anti-camping in parks ordinance). Inessa Wurscher Decl. ¶¶ 4-5 (Dkt. #64). Of the 615 tickets, 313 were for illegal sleeping, 129 were for illegal camping in the parks and 182 were for illegal camping. *Id.* ¶ 5 (some citations were for more than one offense). The number of citations rose from 24 tickets in 2012 to 228 tickets in 2014, a significant increase following the 2013 Roundtable Meeting. *Id.*

DISCUSSION

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

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

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

Martin is binding precedent on this Court. In *Martin*, six plaintiffs who were or had recently been homeless residents of Boise, Idaho challenged two city ordinances that punished homeless people for sleeping or camping in public spaces. The Boise "camping ordinance" prohibited and punished the "use of 'any streets, sidewalks, parks, or public places as a camping *12 place at any time.'" *Id.* at 603. Camping was defined as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." *Id.* at 603-604. The Boise "disorderly conduct ordinance" prohibited "occupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." *Id.* at 604.

In this case, Grants Pass' two anti-camping ordinances prohibit "occupying a campsite" on "any publicly-owned property" in the City of Grants Pass. GPMC 5.61.030; GPMC 6.46.090. "Campsite" is defined as "any place where bedding, sleeping bag, or other material used for

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

Grants Pass takes the position that *Martin* simply confirms that a city cannot criminalize the unavoidable act of sleeping outside when there are not enough shelter beds available. Grants Pass argues that the City amended its anti-camping ordinances to remove the word "sleeping" after *Martin*. On January 2, 2019, the City amended GPMC 6.46.090 by removing the word "sleeping" so that the act of "sleeping" was to be distinguished from the prohibited conduct of *13 "camping" under the City's Camping in the Parks Ordinance. Aaron Hisel Decl. ¶¶ 12, 13, Exs. 11, 12 (Dkt. #81) . The City's intent for making this change "was to make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks but would still be prohibited from the voluntary conduct of maintaining a 'campsite' in the parks as a 'place to live.'" Defendant's Motion at 35 (Dkt. #80) (emphasis in original). The Court appreciates the City's attempt to comply with *Martin*. However, Grants Pass ignores the basic life sustaining need to keep warm and dry while sleeping in order to survive the elements. Under the Grants Pass ordinances, if a homeless person sleeps on public

property with so much as a flattened cardboard box to separate himself from the wet cold ground, he risks being punished under the anti-camping ordinance. Grants Pass cannot credibly argue that its ordinances allow sleeping in public without punishment when, in reality, the only way for homeless people to legally sleep on public property within the City is if they lay on the ground with only the clothing on their backs and without their items near them. That cannot be what *Martin* had in mind. Maintaining a practice where the City allows a person to "sleep" on public property, but punishes him as a "camper" if he so much as uses a bundled up item of clothing as a pillow, is cruel and unusual punishment. Therefore, this Court finds that it is not enough under the Eight Amendment to simply allow sleeping in public spaces; the Eight Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.

As was the case in *Martin*, Grants Pass has far more homeless people than "practically available" shelter beds. In *Martin*, the Ninth Circuit's math reflected 867 homeless individuals in Ada County Idaho (an unknown number in Boise) while Boise had 354 emergency shelter beds and 92 overflow mats. *Martin* 920 F.3d at 604, 606. On January 30, 2019, the Point in *14 Time Count¹⁰ in Grants Pass counted 1,673 unduplicated individuals, 602 of whom were "homeless" and the rest of whom were "precariously housed or doubled up." Wessels Decl. ¶¶ 5-6 (Dkt. #42). The mathematical ratio in the record as it currently stands is 602 homeless people (with another 1,071 on the verge of homelessness) in Grants Pass and, on the other side of the ledger, zero emergency shelter beds. The numbers here are clear, overwhelming, and decisive.

¹⁰ The Ninth Circuit in *Martin* also used PIT Counts to determine the number of homeless people in the area and

commented that PIT Counts typically undercount the homeless population in a community because of difficulty in locating people, weather and volunteer issues. *Martin* at 604.

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

Grants Pass argues that Plaintiffs have alternative "realistically available" shelter outside the City on federal BLM land, Josephine County land, or state rest stops. This remarkable *15 argument not only fails under *Martin*, but it also sheds light on the City's attitude towards its homeless citizens. Essentially, Grants Pass argues that it should be permitted to continue to punish its homeless population because Plaintiffs have the option to just leave the City. The City's suggestion that because it is geographically smaller than Boise or other cities, it should be allowed to drive its homeless population onto "nearby" federal, state,

or Josephine County land, is not supported by *Martin*. Additionally, the record does not support the suggestion that homeless people are welcome to live without interruption by law enforcement at these locations. BLM land is available for recreational camping, not as a space for emergency shelter. Fed. Reg. Vol. 70, No. 159 (Aug. 18, 2005). The campsites cost money. Aaron Hisel Decl., Ex. 1 at 52 (Dkt. #81-1). Living, establishing occupancy, or using this land for "residential purposes" is specifically prohibited, and there are limits on how long a person can stay. Fed. Reg. Vol. 70, No. 159; *See also* Gloria Johnson Decl. ¶¶ 3-5; Blake Decl. ¶ 15. Homeless people who attempt to live on BLM land are subject to trespass prosecution under [43 C.F.R. 2808.10](#), fined \$330, and summoned to this Court. Likewise, Josephine County does not welcome non-recreational camping in its parks. The County issued a letter from its Parks Director on November 12, 2019, stating that "County Parks are not a good alternative for nonrecreational campers - individuals or families who need a place to sleep, due to not having a permanent [sic] residents [sic]." Wessels Decl., Ex. 1 (Dkt. #89-1). This letter urges homeless services providers not to pay for campsites for homeless individuals in County Parks. Wessels Decl. ¶ 8 (Dkt. #89). Similarly, camping, setting up a tent, or remaining in a rest stop for more than 12 hours in a 24-hour period are explicitly prohibited. [OAR 734-030-0010\(18\)](#).

16 Finally, the City lists three services offered within Grants Pass that similarly do not change the equation under *Martin*. In February 2020, the Umpqua Community Action Network *16 (UCAN) opened a warming center that may hold up to 40 individuals on nights when the temperature is either below 30 degrees or below 32 degrees with snow. Wessels Decl. ¶ 9 (Dkt. #89). From the record, it appears 131 different people have stayed at the warming center since it opened. *Id.* ¶¶ 9-11. As of the filing of Plaintiffs' Reply Brief, the center had been open sixteen

nights and reached capacity on every night except the first night it opened, when it had 32 occupants. *Id.* ¶ 11. While the opening of a warming shelter is positive for the City, this emergency warming facility is not a shelter for the purposes of the *Martin* analysis because the facility does not have beds and is not available consistently throughout the year. *Id.* ¶ 9. Even if the warming center did count as a shelter under HUD, the capacity of the warming center is not large enough to accommodate the amount of homeless people in Grants Pass.

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

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

warm and dry constitutes cruel and unusual punishment in violation of the Eighth Amendment.

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

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

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

Austin v. United States, 509 U.S. 602, 609-610 (1993).

Unlike the Fifth Amendment's Self-incrimination Clause, the Eighth Amendment's prohibition on punishing an involuntary act or condition applies

to punishment beyond "criminal" cases. Again, the Supreme Court made clear, *18

[The United States] further suggests that the Eighth Amendment cannot apply to a civil proceeding unless that proceeding is so punitive that it must be considered criminal [citations omitted]. We disagree. Some provisions of the Bill of Rights are expressly limited to criminal cases. The Fifth Amendment's Self-incrimination Clause, for example, provides: "No person...shall be compelled in any criminal case to be a witness against himself." The protections provided by the Sixth Amendment are explicitly confined to "criminal prosecutions." [Citation omitted]. The text of the Eighth Amendment includes no similar limitation. Nor does the history of the Eighth Amendment require such a limitation...

Austin, 509 U.S. at 608.

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

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

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

Additionally, as the Supreme Court noted, "whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction." *United States v. Ward*, 448 U.S. 242, 248 (1980). In Oregon, violations are defined as criminal actions and are prosecuted in criminal proceedings. ORS 131.005(6)-(7). The Grants Pass Municipal Code uses the language and procedures of criminal law, discussing those "guilty" of code violations. GPMC 1.36.010(A). The violations are prosecuted in the Josephine

County Circuit Court by the Josephine County District Attorney's office. ORS 153.076(6). As in a criminal trial, a defendant may not be compelled to testify and the same pretrial discovery that applies in misdemeanor and felony cases applies, ORS 153.076(3)-(4). The judgment from a camping violation in Grants Pass reads, "[t]he court finds the defendant GUILTY of the charges designated CONVICTED in the section below." Edward Johnson Decl., Ex. 9 at 3-4 (Dkt. #63-9).

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

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

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

Grants Pass' enforcement of the ordinances at issue also violates the Excessive Fines Clause of the Eighth Amendment. The Supreme Court has

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

21 *Bajakajian*, 524 U.S. at 334. *21

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

In this case, the Court finds that the fines imposed for violating the ordinances at issue are punitive. According to the record, the two camping ordinances carry a mandatory fine of \$295. The fine for illegal sleeping is \$75. When unpaid, the

fines increase to \$537.60 and \$160 respectively because of additional "collection fees." Johnson Decl., Ex. 9 at 5-6 (Dkt. #63-9). Officers have the discretion to issue warnings prior to issuing a citation, but once a citation is issued, officers have no discretion over the amount of the fine, which is "autofilled" into all camping citations. Johnson Decl., Ex. 6, Burge Depo. at 20, lines 15-21 (Dkt. #63-6); Ex. 4, Hamilton Depo at p. 84 line 23 to p. 85 line 5 (Dkt. #63-4). Based on the record and

22 minutes *22 from the 2013 Roundtable Meeting, these statutory fines serve no remedial purpose and were intended to deter homeless individuals from residing in Grants Pass. Moreover, the ordinances themselves describe these fines as punishment. Compare GPMC 1.36.010(c) ("MAXIMUM FINE: except in cases where a different punishment is prescribed by any provision of this Code...") with GPMC 1.36.010(e) (allowing for restitution to any person, or business, including the city, who has been damaged by the defendant's conduct).

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

¹¹ The Supreme Court has left open the question of whether the ability to pay the fine would be relevant to the excessiveness

inquiry. *Bajakajian* at 340, n.15; see also *Timbs* at 688 quoting 4 W. Blackstone, Commentaries on the Laws of England 372 (1769) "[N]o man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear"

Here, the decisive consideration is that Plaintiffs are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry. Plaintiffs do not have enough money to obtain shelter, so they likely cannot pay these fines. When the fines remain unpaid, the additional collection fees are applied and the fines still remain unpaid, subjecting plaintiffs to collection efforts, the threat of driver license 23 suspensions (Johnson Decl., Ex. 9 at 3-4 (Dkt. #63-9)), and damaged credit that makes it even more difficult for them to find housing, exacerbating the homeless problem in Grants Pass (Wessels Dec. ¶11 (Dkt #65)). As the Supreme Court recognized in the cruel and unusual punishment context, "even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667 (1962). So too here. Fining a homeless person in Grants Pass who must sleep outside beneath a blanket because they cannot find shelter \$295 (\$537.60 after collection fees are inevitably assessed) is grossly disproportionate to the "gravity of the offense." Any fine is excessive if it is imposed on the basis of status and not conduct. For Plaintiffs, the conduct for which they face punishment is inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish. The fines associated with violating the ordinances at issue, as applied to Plaintiffs, are unconstitutionally excessive.

Having found that the ordinances violate the Cruel and Unusual Punishment Clause as well as the Excessive Fines Clause of the Eight Amendment,

the Court declines to decide whether the ordinances are also unconstitutionally vague.

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

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

Grants Pass does not challenge the merits of plaintiffs' procedural due process claim regarding the City's park exclusion ordinance in its response to Plaintiffs' motion for summary judgment. Instead, Grants Pass argues that this claim was not properly pled in the operative complaint. The Court disagrees. This claim seems to be the sole reason for the Third Amended Complaint filed on November 13, 2019. (Dkt. #50). The only changes from the Second Amended Complaint were to add the allegation at paragraph 87 that, "Plaintiffs have 24 been *24 excluded from Grants Pass parks without due process of law" and to specifically add "GPMC 6.46.350 (the park exclusion ordinance)" to the injunctive and declaratory relief sought in this case. Third Amended Complaint ¶ 87, Prayer ¶¶ 3-4 (Dkt. #50). Although the City correctly points out that GPMC 6.46.355 (the ordinance that explains the appeal procedure) is missing from the operative complaint, Plaintiffs made clear that they were challenging park exclusions under the Procedural Due Process Clause. The City did not object to the amendment or ask that it be clarified or made more specific. Therefore, the claim was pled, and the City was on notice.

Second, Grants Pass argues that if the claim was pled, it should be dismissed because Plaintiffs have not alleged or sufficiently established standing. The City argues, "plaintiffs do not even attempt to produce a plaintiff or rely upon any individual's standing." Response at 51 (Dkt. #80). The Court disagrees. The record shows that of the 59 park exclusions produced to Plaintiffs by the City, all were issued to homeless individuals and 42 were issued for illegal camping. Pltf.s' Motion

at 22 (Dkt. #62); Inessa Wurscher Decl. ¶ 7 (Dkt. #64). Class representative Debra Blake was issued an exclusion on September 11, 2019, after she was found sleeping in a City Park, and a copy of that exclusion order has been provided in the record. Johnson Decl., Ex. 9 at 7 (Dkt. #63-9). Debra Blake filed a written objection to her September 11, 2019 banishment from all parks. The ban was "lifted" without explanation on September 25, 2019, after half of the exclusion period had expired. Blake Decl. ¶ 8 (Dkt. #90). Additionally, class member Dolores Nevin was excluded from all parks after being found sleeping in Riverside Park on December 31, 2019. Wurscher Decl., Ex. 1 at 33-35 (Dkt. #64-1). Moreover, Plaintiffs provided evidence that a park exclusion goes into effect immediately and is not stayed when appealed. Johnson Decl., Ex. 5, McGinnis Depo p. 28 line 23 to p. 29 line 5 (Dkt. #63-5); Ex. 4, *25 Hamilton Depo. at p.117 lines 11-14 (Dkt. #63-4). Therefore, Plaintiffs have standing to seek prospective declaratory and injunctive relief regarding the park exclusion appeal process.

Finally, Grants Pass argues in a footnote that if the claim was pled and plaintiffs do have standing, the claim is "moot" because the current practice of the Grants Pass Department of Public Safety is to not issue park exclusions until City Council "has made appropriate revisions." Response at 51, n.8 (Dkt. #80). Evidence presented by Grants Pass to show this policy change consists of a sworn declaration from Jim Hamilton, the Deputy Chief for the City of Grants Pass Department of Public Safety, in which he declares, "The current practice is that there are no park exclusions being issued by anyone in the Grants Pass Department of Public Safety by way of written Order from me. Unless and until a revised version of the park exclusion ordinance is adopted by the City council and the related forms revised, they will not be issued," Hamilton Decl. ¶ 3 (Dkt. #83). The written order issued to the department was not attached as an exhibit. However, even if it was, policy changes not reflected in a change to statutes or ordinances

does not render a claim moot. *Rosebrock*, 745 F.3d at 971-72. The doctrine of voluntary cessation has been interpreted to apply generally in cases in which an injunction is sought. "Such cases do not become moot 'merely because the [defendant's] conduct immediately complained of has terminated, if there is a possibility of a recurrence which would be within the terms of a proper decree.'" *Armster v. U.S. District Court for the Central District of California*, 806 F.2d 1347, 1357 (9th Cir. 1986) (quoting P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 110 (2d ed. 1973)). This is particularly true, whereas here, the "new policy. . . could be easily abandoned or altered in the future." *Bell*, 709 F.3d at 901. If a municipal defendant could moot out claims simply by announcing in its cross-motion for summary judgment that it has decided not to enforce the offending ordinance, *26 the doctrine of voluntary cessation would be rendered meaningless. Plaintiffs pled this claim, have standing to assert it, and Grants Pass cannot moot this claim by asserting that it has temporarily stopped issuing park exclusions.

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

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

City Manager, at which point the objection will be placed on the City Council's agenda. GPMC 6.46.355.

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

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

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

27 protections of the due process clause. *27

The *Yeakle* court applied the three-part balancing test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) to Portland's functionally identical park exclusion appeal process. The court found that excluded individuals have a strong liberty interest in avoiding unjust exclusion because of the importance of public parks as a "treasured and unmatched resource" for members of the public. 322 F. Supp 2d at 1129. In this case, that interest is even greater for Plaintiffs because several parks in Grants Pass contain benches, tables and restrooms that homeless individuals may use for basic activities of daily life when they have no alternative place to dwell. The court also found that "the risk of erroneous deprivation under the present procedure is considerable" given the lack

of pre-deprivation process and the lack of "any evidentiary standard." *Id.* at 1130. The same is true here. There is no requirement in the ordinance that the Grants Pass police officer have enough evidence or reasonable suspicion of the excludable conduct to issue an exclusion or make an arrest. The officer need not witness the violation or have any other reliable information that a violation occurred under the language of the ordinance. Further, just like in *Yeakle*, "a person is subject to arrest for reentry as soon as she receives the exclusion notice" and "even if the exclusion is ultimately found to be invalid, the individual has been kept from the public parks for at least a significant portion of the thirty days." *Id.* The *Yeakle* Court concluded that "a pre-deprivation hearing or other procedural safeguard would not unduly burden the government" and "there would be no additional burden on the City if the park exclusions were simply stayed in the event that an individual filed an appeal." *Id.* at 1131. For the same reasons, the procedures for appealing park exclusions in Grants Pass violate Plaintiffs' procedural due process rights. *28

IV. Plaintiffs are denied summary judgment on their Equal Protection Claim.

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

Plaintiffs did not carry their burden of demonstrating that the City's ordinances were selectively enforced and that enforcement was motivated by a discriminatory purpose under the summary judgment standard. The evidence relied on by Plaintiffs to prove this claim are the minutes from the 2013 Roundtable Meeting and deposition testimony from two Grants Pass police officers. The City disputes this evidence as proof of selective enforcement. The City argues that deposition testimony from two knowledgeable police officers that they "could not remember" enforcing these ordinances against a non-homeless individual is not enough for the Court to conclude that these ordinances were selectively enforced as a matter of law. The Court agrees. Moreover, the City provided its Department of Public Safety Policy Manual, which specifically includes instructions to officers to not discriminate against homeless individuals. *See* Hamilton Decl., Ex. 1 (Dkt. #83-1). Therefore, facts surrounding the issues of whether the City's enforcement scheme had a discriminatory effect and whether the police were motivated by a discriminatory purpose are in dispute. As a result, Plaintiffs are denied summary judgment on their equal protection claim. *29

V. Plaintiffs are denied summary judgment on their Substantive Due Process Claim.

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

reckless disregard for the plaintiff's rights in situations where the official had the opportunity to deliberate. *Tennison*, 570 F.3d at 1089; *Porter*, 546 F.3d at 1137-39.

Plaintiffs argue they have a protected liberty interest in being present in public spaces in Grants Pass. Plaintiffs cite *Morales*, which found "it is apparent that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is 'a part of our heritage,' or the right to move 'to whatsoever place one's own inclination may direct' identified in Blackstone's Commentaries." 27 U.S. at 53-54 (citing *Williams v. Fears*, 179 U.S. 270, 274 (1900); *Papachristou v. Jacksonville*, 405 U.S. 156, 164 (1972); *Kent v. Dulles*, 357 U.S. 116, 126 (1958); 1 W. Blackstone, Commentaries on the Laws of England 130 (1765)). At least three Courts of Appeals have followed *Morales* and acknowledged a liberty interest to remain in a place open to the public. See *Vincent v. City of Sulphur*, 805 F.3d 543, 548 (5th Cir. 2015) ("Supreme Court decisions amply support the proposition that there is a general right to go to or remain on public property for lawful purposes"); *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) ("Plaintiffs have a *30 constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally."); *Kennedy v. City of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) ("[I]t is clear that Kennedy had a liberty interest 'to remain in a public place of his choice' and that defendants interfered with this interest.").

However, even if this Court were to find that Plaintiffs have a liberty interest to remain in City parks or other City lands that are open to the public generally, Plaintiffs have not provided this Court with controlling authority to convince the Court that Plaintiffs have a liberty interest to sleep or camp in a public place. Moreover, Plaintiffs have not carried their burden of showing that the City engaged in "conscience shocking behavior"

under the summary judgment standard. This Court's holding that the enforcement of Grants Pass' ordinances violate the Eight Amendment does not automatically translate to a finding that Grants Pass officials acted with deliberate indifference or reckless disregard for Plaintiffs' fundamental rights. Whether Grants Pass' conduct shocks the conscience is a question of material fact. Therefore, Plaintiffs are denied summary judgment on their substantive due process claim.

VI. Conclusion

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

31 *31 specific than the one in place now. For example, the City may ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep. The City may also consider limiting the amount of bedding type materials allowed per individual in public places. Moreover, this holding does not limit Grants Pass' ability to enforce laws that actually further public health and safety, such as laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence. Grants Pass would retain a large toolbox for regulating public space without violating the Eight Amendment.

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

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

The Court encourages Grants Pass to work with local homeless services experts and mental health professionals to develop training programs that

32 cover techniques and tools for *32 interacting with homeless individuals and for deescalating mental health crises. For example, the City of Eugene, Oregon has used the services from an organization called CAHOOTS ("Crisis Assistance Helping Out on the Streets") to provide free "immediate stabilization in cases of urgent medical need or psychological crisis, assessment, information referral, advocacy [and] (in some cases) transportation to the next step in treatment" to the people of Eugene, Oregon.¹³ As *The Wall Street Journal* noted, Gary Marshall, a 64-year-old who previously lived on the streets of Eugene, said the police approach was "name, serial number and up against the van." In contrast, when he was having

one of his frequent panic attacks, CAHOOTS counselors would bring the him inside and talk him down, he said.¹⁴

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

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

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

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

¹⁶ *Id.*

The City of Medford, Oregon, has also developed new strategies for addressing the homeless crisis in its community. The City of Medford worked with Rogue Retreat, a nonprofit group, to open Hope Village in November 2017.¹⁷ Hope Village is the first tiny homes ³³ community in Southern Oregon that provides short term transitional shelter and case management for individuals and families to help move from homelessness into long term housing.¹⁸ The idea of Hope Village was created in 2013, when Rogue Retreat, St. Vincent DePaul, and the Jackson County Homeless

Taskforce began researching and visiting other villages in Oregon to find creative ways to serve the homeless in Jackson County.¹⁹ Hope Village started with 14 units, each 8 feet by 10 feet, plus a communal kitchen, laundry and shower facilities. Hope Village began operating under a one-year agreement with the city, and in less than a year, the Medford City Council approved doubling the size of the village and signed a new, two-year agreement with Rogue Retreat.²⁰ Medford city officials didn't create the project, didn't build the units, and doesn't operate the village. However, city leaders supported the concept from the beginning, offering a city-owned property for the village.²¹ When neighboring businesses and other property owners objected to that location, the City of Medford continued to offer support and encouragement, culminating in a new location.²²

Hope Village now sits on property owned by the City of Medford and another property leased by Rogue Retreat.²³ Residents of Hope Village are required to attend case management meetings, counseling sessions, and work on permanent ways to stay off of the streets. Rogue Retreat says the average ³⁴ stay at Hope Village is around four months, and the program has a 62 percent success rate. According to Rogue Retreat, this means 6 out of 10 people in the program successfully move away from homelessness.²⁴

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

¹⁸ *Id.*

¹⁹ *Id.*

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

²¹ *Id.*

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

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

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

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

Quality of life laws erode the little trust that remains between homeless individuals and law enforcement officials. This erosion of trust not only increases the risk of confrontations between law enforcement and homeless individuals, but it also makes it less likely that homeless individuals will cooperate with law enforcement.²⁵ Moreover, quality of life laws, even civil citations, contribute to a cycle of incarceration and recidivism. Indeed, civil citations requiring appearance in court can lead to warrants for failure to appear when homeless people, who lack a physical address or phone number, do not receive notice of relevant hearings and wind up incarcerated as a result.²⁶ Moreover, unpaid civil citations can impact a person's credit history and be a direct bar to housing access in competitive rental markets where credit history is a factor^{*35} in tenant selection. In this way, civil penalties can prevent homeless people from accessing the very housing that they need to move from outdoor public spaces to indoor private ones.

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

²⁶ *Id.* at 52. -----

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

ORDER

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

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

/s/ Mark D. Clarke

MARK D. CLARKE

United States Magistrate Judge

