

No. _____

In The
Supreme Court of the United States

MICHAEL GANNON,

Petitioner,

v.

CITY OF EUGENE,

Respondent.

On Petition For A Writ Of Certiorari To
The Court of Appeals for the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

Brian Michaels, Attorney at Law
Counsel of Record
259 East 5th Avenue, Ste 300D
Eugene, Oregon 97401
(541) 687-0578
fax 541-686-2137
brian@brianmichaelslaw.com

QUESTIONS PRESENTED

1) Do the First Amendment's protections to public streets as the archetype of a traditional public forum extend to city and state public streets and public buildings owned by a public university?

2) If indeed the First Amendment's protections do extend to the public streets and public buildings of a public university, is the public university required to provide Fifth Amendment Due Process for deprivation of that liberty?

3) Does the Eighth Amendment's provision for proportionality apply to an 18-month ban from large swaths of public land, streets and sidewalks across the state of Oregon, owned by the public university, for merely falling asleep once after hours in a library, without any mention of threat to property or person?

LIST OF PARTIES

The name of the Petitioner is:

Michael Gannon

The name of the respondent is:

City of Eugene

CORPORATE DISCLOSURE STATEMENT

No party is a corporation, other than the City of Eugene, which is a municipal corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Michael Gannon petitions for a writ of certiorari to review the opinion issued by the Oregon Court of Appeals (entered November 18, 2018), and the Order of the Oregon Supreme Court declining review.

OPINIONS BELOW

Four cases were consolidated for trial in Lane County Circuit Court, Honorable R. Curtis Conover presiding. The order denying judgment of acquittal and finding defendant/petitioner guilty is set forth in the Appendix at App. 9a. The four judgments of conviction are set forth in the Appendix at App. 10a through 17a. The Opinion of the Oregon Court of Appeals is published as *City of Eugene v. Gannon*, 294 Or. App. 819 (2018), and is set forth in the Appendix at App. 1a through App. 8a. The Order of the Oregon Supreme Court declining review of the Court of Appeals decision is set forth in the Appendix at App 18a.

STATEMENT OF JURISDICTION

The Order of the Oregon Supreme Court Declining review of the Court of Appeals decision was entered March 7, 2019. Jurisdiction is further invoked by Petitioner's presentation of his First Amendment rights to the streets, walkways and campuses of a public University (University of Oregon) and the Fifth Amendment rights to due process required before taking away those rights.

Petitioner also invokes the Eighth Amendment right against cruel and unusual punishment, under the premise of proportionality.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant portion of the First Amendment to the Constitution (*U.S. Const. Amend. I*) provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The relevant portion of the Fifth Amendment to the Constitution (*U.S. Const. Amend. V*) provides:

No person shall be deprived of life, liberty, or property, without due process of law.

The Eighth Amendment to the Constitution (*U.S. Const. Amend. VIII*) provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments

inflicted.

The statute and ordinance under which Petitioner was prosecuted for violating the University's trespass order are:

Eugene Criminal Code (ECC) 4.807: "[a] person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully * * * upon premises."

Oregon Revised Statutes chapter 164 contains Oregon's criminal trespass statute, Or. Rev. Stat. 164.245, which has the same language as ECC 4.807.

STATEMENT OF THE CASE

An elderly homeless man who frequents libraries was found asleep in a University building after the library and the building were closed and locked. He had no history of ever violating any University rule. Instead of citing him for trespass, the University police officer gave a trespass order which excludes him from all University owned property across the state for 18 months, including public lands, streets and sidewalks. *See App. 23a et seq.* His only "due process" was to file an appeal within 10 days to the University chief of police. A former University police officer testified the chief assured all officers there would be no reversal on appeal. That same officer testified the University singled out homeless-looking people for trespass orders.

The questions here are:

1) Do the First Amendment's protections to public streets and sidewalks as the archetype of a traditional public forum, which for time out of mind have been used for public assembly and debate,¹ extend to the public streets and public buildings of a public university?

2) If indeed the First Amendment's protections do extend to the public streets and public buildings of a public university, is the public university required to provide Fifth Amendment Due Process for deprivation of that liberty?

3) Does the Eighth Amendment's provision for proportionality apply to an 18-month ban from large swaths of public lands, streets and sidewalks across the state of Oregon, owned by the public university, for merely falling asleep once after hours in a library, without any mention of threat to property or person?

REASONS FOR GRANTING THE WRIT

Supreme Court review is appropriate because this case involves questions of exceptional importance. The outcome of this case impacts the First Amendment rights of all members of the public to use streets, parks, sidewalks, and other public land, and to have available to us Fifth Amendment due process whenever the government chooses to deprive us of these liberties.

¹ *Snyder v. Phelps*, 131 S. Ct. 1207, 1217-18 (2011).

Separately, in accordance with this court's February 2019 ruling in *Timbs v. Indiana*, 586 U.S. ____ (2019), the proportionality of such a wide deprivation of liberty for so long a period can indeed offend the Eighth Amendment, despite not being "an excessive fine." As this court said, "Excessive fines can be used, for example, to retaliate against or chill the speech of political enemies, as the Stuarts' critics learned several centuries ago." *Timbs* (citing *Browning-Ferris*). The question here is: Does such a broad and long deprivation of such fundamental rights invoke the Eighth Amendment's prohibition against "cruel and unusual punishment"?

ARGUMENT

I. THE DECISION OF THE OREGON COURT OF APPEALS DECLINED TO RECOGNIZE THE FIRST AMENDMENT RIGHTS OF PETITIONER TO THE PUBLIC STREETS, LANDS, AND SIDEWALKS OF OREGON

The Oregon Supreme Court erred by failing to take review of the Court of Appeals decision which declined to recognize the First Amendment rights of Petitioner.

Petitioner's First Assignment Of Error was:
Judgment Of Acquittal Was Wrongly Denied, As There Was No Lawful Order Given, as "Notice Of Exclusion," To Defendant, Meaning The City's Trespass Ordinance Was Unconstitutional "As-Applied" To The Enforcement of The University's Exclusion Order.

The memorandum went to identify the First Amendment rights being deprived, and due process required.

Petitioner's Third Assignment Of Error was: Second Judgment Of Acquittal, at Close of Defendant's Case, Was Wrongly Denied, As There Was No Lawful Order Given, as "Notice Of Exclusion," To Defendant, Meaning The City's Trespass Ordinance Was Unconstitutional "As-Applied" To The Enforcement Of The University's Exclusion Order.

The memorandum went to identify the First Amendment rights being deprived, and due process required, both before and *after* Petitioner put on his witnesses, including the University police officer, Mr. Cleavenger, as discussed *infra*.

History of Procedure and Facts Relevant to Review

Petitioner was and remains an elderly homeless man who, after lawfully using the University's architecture library in one of the halls, was found sleeping in the area outside the library after the library and building were closed. He was not charged with trespassing, but rather was given an 18-month exclusion order, which he appealed, through his attorney, in the manner and timing expressed in the exclusion order itself.

Believing the exclusion order to be unconstitutional, Petitioner then entered the campus four times in an otherwise legal fashion. But for the exclusion order, his presence violated no law nor University rule. He was

then charged with four counts of trespass solely for violating the exclusion order. These charges were first tried in Eugene Municipal Court, where his constitutional presentments were denied. There were no further violations of the exclusion order after this ruling. An appeal to Lane County Circuit Court was affected, where a bench trial on the record was held, consolidating all four counts. Again, his constitutional presentments were denied. In neither court was there a written order explaining the court's decision. The circuit court judgment was signed December 9, 2015 by the Honorable R Curtis Conover.

The Oregon Court of Appeals erred by "conclud[ing] that [Petitioner] has not identified a constitutionally protected interest that the notice impinged on[.] [W]e [therefore] cannot determine that any process was due in depriving him of that interest." 294 Or. App. at 822. The Court so concluded after commenting, at 821, "[Petitioner] contends that UO is a public forum and that he, like any member of the public, has a right to be there; the unavailability of process to challenge the constitutionality or legitimacy of the notice – that is, 'no opportunity for an actual hearing or judicial review' – deprived him of his due process rights."

At Page 15 of his opening Brief, [Petitioner] addressed the issue of being deprived of his First Amendment rights to access public lands, streets, sidewalks and the like: "*Souders v. Lucero*, 196 F.3d 1040, 1043-44 (9th Cir. 1999), discusses universities as public fora, and how that applies to exclusion orders such as the one issued in this case. Oregon State

University's exclusion of Mr. Souders was for him having two court ordered stalking orders against him for two separate students- undeniably issued to protect students." This portion of Page 15 was directly, specifically, in answer to [Respondent's] argument, "that the University is not a public forum, therefore [Petitioner] may be excluded from its property without violating Defendant's constitutional rights. At Tr Pg 140, Ln 8-14" (Id.) Once these rights are expressed the question of due process arises.

"[W]e have repeatedly referred to public streets as the archetype of a traditional public forum, noting that **"[t]ime out of mind' public streets and sidewalks have been used for public assembly and debate."** *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S. Ct. 2495 (1988).

Snyder v. Phelps, 131 S. Ct. 1207, 1217-18 (2011) (emph. added).

Petitioner's proposed rule of law is to follow the holding in *Souders v. Lucero*, 196 F.3d 1040 (9th Cir. 1999). Therein the Ninth Circuit announced that, unlike a typical public forum, a University has a distinct obligation to protect its students. Exclusion orders must abide by a "student safety" standard before depriving individuals of their right to enter a university campus. "[T]he exclusion order was issued by the University for the valid purpose of protecting its students, and not for conduct protected by the Constitution." 196 F.3d at 1046.

The Colorado Supreme Court arrived at a similar conclusion in *Watson v. Board of Regents of Univ. of Colorado*, 182 Colo. 307, 313-14, 512 P.2d 1162, 1164 (Colo. 1973) (cited by this Court in *Souders*): **"The same protections must be afforded non-students who may be permanently denied access to University functions and facilities."** (Emphasis added.)

Similarly, as noted in *Orin v. Barclay*, 272 F.3d 1207, 1215 (9th Cir. 2001), *Souders* stands for the proposition, "a public university may exclude from its campus a non-student whose conduct endangers a student."

II. THE OREGON COURT OF APPEALS ERRED BY REFUSING TO RECOGNIZE THE LIBERTY INTEREST PETITIONER WAS SUMMARILY DENIED, AND CONSEQUENTLY DETERMINED PETITIONER WAS NOT ENTITLED TO ANY DUE PROCESS FOR BEING DENIED THAT LIBERTY INTEREST

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, (1976), "underscored the truism that 'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593 2600, (1972)." (Internal quotations and citations omitted.)

Mathews went on to find that resolution of whether

the due process provided is constitutionally sufficient "requires analysis of the governmental and private interests that are affected. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of **three distinct factors**: **First**, the private interest that will be affected by the official action; **second**, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and **finally**, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." (Emphasis added)

Recognition of Petitioner's First Amendment rights being summarily denied, leads to the conclusion that petitioner fits into each of these three distinct factors:

FIRST, his First Amendment private interests;

SECOND, it is undeniably obvious that there is a great risk, if not outright design, to effect erroneous deprivation. *See* University police officer Cleavenger's testimony: "I was told that the appeal process, they would have ten days to appeal, and they were appealing it to the chief as well, so we were told, you know, basically the chief would have our back on those." Tr. at 158, ln 14-17 (page 29 of Opening Brief).

FINALLY, given University police officer Cleavenger's testimony, this issue would appear to be premature, irrelevant, and moot.

III. THE OREGON COURT OF APPEALS ERRED BY REFUSING TO RECOGNIZE THE PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT IN THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In Section B of his Appellant Opening Brief, Petitioner stated:

The Trespass Order Violates the Constitutional Protections Against Disproportionality of Sentence (Article 1, Section 16) and the Prohibition Against Cruel and Unusual Punishment (Eight Amendment to the United States Constitution), Creating an Unconstitutional "As-Applied" Use of the City's Trespass Ordinance.

Solem v. Helm, 463 U.S. 277, 292, 103 S. Ct. 3001, 77 L.Ed.2d 637 (1983) held the "Eighth Amendment proportionality includes consideration of"(I) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other Jurisdictions."

What few comparisons there may be, we can look toward two cases examining the exclusion orders from public property, issued by the city of Portland. For example, in *State v. Crowe*, 143 Or. App. 512, 514, 923 P.2d 1338 (1996), Defendant was found to be given a lawful 30-day exclusion from the single park after being ordered by a park officer to "leave a public restroom

stall that was designated for handicapped persons. Defendant was not handicapped and was not using the stall for its intended purpose, but rather was occupying the stall to fill out application forms for a reduced public transit fare because he is on partial social security disability. The park officer repeatedly asked defendant to leave, because a handicapped person needed to use the stall. Defendant refused to comply with the officer's requests. Eventually, the park officer forcefully entered the stall, whereupon defendant pulled down his pants and sat on the toilet."

In *State v. Johnson*, 163 Or App 74, 75, 988 P2d 913 (1999), defendant was given a 90-day exclusion order (which he did not appeal) on the "ground that he had unlawfully entered a drug free zone within the City of Portland after being issued an exclusion order based on his possession of a controlled substance." "* * * [D]efendant [had previously been] arrested within a drug free zone after a police officer found a crack pipe in his possession."

Addressing the first prong of *Solem v. Helm*, by comparison, petitioner's actions were far less severe, if problematic at all, while the exclusion was far more extensive in terms of length of time and breadth of territory.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Petition for Writ of Certiorari be

granted.

Respectfully submitted,

BRIAN MICHAELS, Attorney at Law
Counsel of Record
259 East 5th Avenue, Suite 300-D
Eugene, OR 97401
(541) 687-0578
fax 541-686-2137
brian@brianmichaelslaw.com