APPENDIX

APPENDIX A

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;
Concurence 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

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]

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

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

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

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

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PM), https://twitter.com/CountyofLA/status/936012841533894657.

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]

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[1] With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev., Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018),

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

I.

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

A.

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

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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).

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 con-

stitutional 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] The Court also acknowledged that lower courts have

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[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).

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 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

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[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_i d=3090620.

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]

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

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

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

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*.

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

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

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.

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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

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[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_v olunteer.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.

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

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

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws

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

[11] Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. See Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-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

that prohibit public sleeping and camping.[12] Accordingly, our panel's decision effectively allows homeless

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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/ne ws/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.goldenstatenews papers.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 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 Bar-

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

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

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bara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm ("In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.").

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

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

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

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[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").

[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.

A Los Angeles Public Sidewalk

II.

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

A.

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477 (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

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[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

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 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

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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.

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

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[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.").

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 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 unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.* at 967 (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 'pro-

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[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.

tections do not attach until after conviction and sentence.'"[3] 444 F.3d at 1147 (Rymer, J., dissenting) (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

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

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

ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

* * *

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

OPINION

BERZON, Circuit Judge:

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

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

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or permanent 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

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[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

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

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

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number of homeless individuals in a particular region, and that she "cannot give . . . any other number with any kind of confidence."

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.

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[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?"

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

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[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 al-

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[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.

leged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (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

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[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.

an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id*. at 487, 500. 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 convic-

tion. 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]

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[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 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]

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

[9] In *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id.* Those unrefuted facts were critical to the court's holding. *Id.* As discussed below, the plaintiffs here have demonstrated a genuine issue of material fact concerning whether they have been denied access to shelter in the past or

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly 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).

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expect to be so denied in the future. *Joel* therefore does not provide persuasive guidance for this case.

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]

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[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 con-

clusion 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.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

ROBERT MARTIN AND ROBERT ANDERSON, *Plaintiffs*, vs. CITY OF BOISE, *Defendant*.	Civil Action No. 1:09-CV-00540-REB MEMORANDUM DECISION AND ORDER

I. Background and Summary of Decision

This case, filed in 2009, has a long procedural history that includes multiple dispositive motions, multiple amendments of the Plaintiffs' Complaint, the withdrawal and addition of numerous attorneys representing the various parties, dismissal of several parties, and an appeal of a substantive ruling against the plaintiffs followed by a remand from the Ninth Circuit Court of Appeals. The facts and legal issues are well known to the parties and set forth in more detail in the Court's prior Orders. *See* Dkts. 152, 170, 286.

Pending are Plaintiffs' Motion for Summary Judgment (Dkt. 243) and Defendant's Motion for Dispositive Relief[1] (Dkt. 229), with associated motions to strike particular evidence filed by both parties (Dkts.

[1] The City's Motion is made under Federal Rules of Civil Procedure 12(b)(1) and 56.

253, 264, 268).[2] The case now includes two remaining Plaintiffs: Robert Martin ("Martin") and Robert Anderson ("Anderson"). The only remaining Defendant is the City of Boise (the "City"). *See* Order (Dkt. 286). The remaining claims seeks prospective relief in (1) a declaration under 28 U.S.C. § 2201 that Boise City Code § 9-10-02 and §6-01-05(A) (collectively the "Ordinances") violate the Eighth Amendment's prohibition against cruel and unusual punishment, and (2) a permanent injunction enjoining the City of Boise from enforcing the Ordinances.[3] *See* Amd. Compl., pp. 22-23 (Dkt. 171).

The City argues that a threshold matter precludes the case from going any further at this point – specifically, that the case should be dismissed because the Plaintiffs lack standing. The City also argues that even if the Plaintiffs have standing to pursue the remaining claim, it has nonetheless been mooted and, regardless, Plaintiffs' claims fails on the merits. (Dkt. 229). Plaintiffs argue they have standing, the case is not moot, and they should be granted summary judg-

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[2] After the hearing on these motions, several additional motions were submitted (Dkts. 283, 287, 288, 289), some of which will be resolved here, and others by separate order.

[3] Plaintiffs seek a declaration that the "Ordinances are unconstitutional under the Eighth Amendment to the extent they apply to and are enforced against individuals for whom shelter beds are unavailable whether because (1) there are fewer emergency shelter beds than there are homeless individuals or (2) mental illness or physical disability." Pls.' Mem. Mot. Summ. Jdgmt., p. 3 (Dkt. 243-2). In making this argument, Plaintiffs primarily rely on cases involving "as applied" challenges to the constitutionality of statutes. *See*, *e.g.*, *id.*, p. 7. Only nighttime enforcement of the Ordinances is at issue. See *Bell v. City of Boise*, 709 F.3d 890, 896 (9th Cir. 2013).

ment as a matter of law based upon "undisputed" material facts. *See* Pls.' Resp. (Dkt. 258); Pls.' Mem. Mot. Summ. Jdgmt., p. 17 (Dkt. 243-2).

Martin and Anderson allege that they face a threat of being cited for violating the Boise City Ordinances prohibiting camping and sleeping at night in public places. *See* Boise City Code §§ 6-01-05(A); 9-10-02. Under applicable law, they have a right to bring such a claim only if they have suffered an injury-in-fact sufficient to provide the Plaintiffs legal standing under Article III of the federal Constitution. Any such claim made upon an alleged threatened injury (as argued by Martin and Anderson) must be "certainly impending" or there must be a "substantial risk that the harm will occur." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, n.5 (2013). The injury-in-fact must also be concrete and particularized, and actual or imminent. *Bennett v. Spear*, 520 U.S. 154, 167 (1997).

The Court concludes for the reasons described to follow that neither Martin nor Anderson is facing such a concrete, particularized or imminent injury, and therefore neither Martin nor Anderson has standing to bring a constitutional challenge to the Ordinances. Of central importance to that ruling is the fact that the Ordinances, by their very terms, are not to be enforced when a homeless individual "is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05(A); 9-10-02. Thus, the Ordinances are not to be enforced when the shelters are full. Additionally, neither Plaintiff has shown that he cannot or will not stay in one or more of the available shelters, if there is space available, or that he has a disability that prevents him from accessing shelter space. Thus, there is no actual or imminent threat

that either Plaintiff will be cited for violating the Ordinances. In the absence of such a threat, Plaintiffs cannot allege a sufficient injury-in-fact to establish legal standing to bring their claims. Therefore, the Court lacks jurisdiction to consider the merits of the claim that the Ordinances violate certain constitutional protections, and the case must be dismissed.

II. Standing

A. Introduction

The City argues that neither Mr. Martin, nor Mr. Anderson is at risk of any "certainly impending" injury and therefore each lacks the requisite Article III standing to seek prospective relief.

B. Standards of Law

Federal Rule 12(b) permits dismissal of a complaint where the federal court has no jurisdiction to consider the claims raised in the complaint. Under our Constitution federal courts may only consider and decide "[c]ases" and "[c]ontroversies." U.S. Const., Art. III, § 2. *See also Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). Martin and Anderson have the burden of proving the existence of a case or controversy sufficient to confer Article III standing, at all stages of the litigation. *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). To do so, there must be: (1) the existence of an injury-in-fact that is concrete and particularized, and actual or imminent; and (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision. *Bennett v. Spear*, 520 U.S. 154, 167 (1997); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). If Plaintiffs lack standing at this particular stage of the

lawsuit, notwithstanding the motion practice and discovery efforts that have transpired along the way, then the Court lacks jurisdiction to consider the merits of their remaining claims.[4]

C. Defining the Alleged Injury

The injury-in-fact requirement ensures a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (internal quotation marks omitted). "An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent, not conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (citation and internal quotation marks omitted).

The injury Plaintiffs allege is a threat of being cited for violating the Boise City Ordinances prohibiting camping and sleeping at night in public places. Their claims are, therefore, based upon an allegation of a future injury, which can amount to an injury-in-fact but only if the threatened injury is "certainly impending" or there is a "substantial risk that the harm

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[4] There have been a number of additional plaintiffs, in addition to Martin and Anderson, at various times in the pendency of this case. They have been dismissed for various reasons, including reasons related to the very fact of their homeless status – i.e., that they live in a nomadic manner and transient status, and that either by choice or circumstance they have fallen out of contact with their counsel. As a result, such persons were unavailable to participate in the proceedings of the case, such as, by way of example, being available for the taking of their deposition. Whatever have been the circumstances leading to this point, the Court's focus in the context of the City's challenge to the standing of the two remaining Plaintiffs must be only upon those two Plaintiffs.

will occur."[5] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, n.5 (2013) (citations and internal quotation marks 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.* at 1147. An injury-in-fact is sufficiently alleged where there is "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979).

Both Martin and Anderson were cited under prior versions of the Ordinances, which have since been revised.[6] The current ordinances prohibit enforcement when "the individual is on public property and there is no available overnight shelter."[7] Boise City Code §§

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[5] The Supreme Court has explained that its prior holdings "do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1150, n.5 (2013). Rather, in some instances, the Court has "found standing based on a substantial risk that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* (citations and internal quotation marks omitted).

[6] Plaintiff Anderson was cited in 2007 under the camping ordinance. Jones Declr., Ex. 7 (Dkt. 244–6). Plaintiff Martin was cited in 2009 under the disorderly conduct and camping ordinances. Jones Declr., Ex. 8 (Dkt. 244–7). Mr. Martin also received a camping citation in the fall of 2012. Jones Declr., Ex. 2, p. 143 (Dkt. 259–1). The Ordinances were revised in 2014.

[7] Both ordinances define the term "available overnight shelter" as "a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness at no charge." Boise City Code §§ 6-01-05(A); 9-10-02.

6-01-05(A); 9-10-02. Neither Martin nor Anderson has been cited under the revised Ordinances.[8] Although "past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury", *Fortyune v. Am. Multi-Cinema, Inc*., 364 F.3d 1075, 1081 (9th Cir. 2004) (citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974)), here the Ordinances have materially changed since Plaintiffs were issued citations.

D. Robert Martin Does Not Have Standing

Martin resided in Boise when Plaintiffs filed this case in 2009, but he has been living in Post Falls or Hayden, Idaho, since November 2013. Jones Declr., Ex. 2, p. 107 (Dkt. 259-1); Martin Aff., ¶ 8 (Dkt. 258–5). His having moved from Boise does not preclude the possibility of standing to pursue the lawsuit's remaining claims, because he made several trips to Boise in 2014 to visit his minor son and he plans to return to Boise in the future for the same purpose. Jones Declr., Ex. 2, pp. 111, 114, 181 ("I come down [to Boise] regularly to be able to see my son and everything, so I know I'll be coming back" to visit Boise).[9]

But, they go on to state that "[i]f the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available." Id.

[8] Other individuals have received citations since the Ordinances were revised in 2014. See, e.g., Jones Declr., Ex. 71 (Dkt. 246-20). However, as discussed earlier, the Court here is considering the standing of the two remaining Plaintiffs and not other parties who may have claims similar to Plaintiffs' claims.

[9] Martin says that if his employment and financial situation does not improve he will consider moving back to Boise. Martin Aff., ¶ 9 (Dkt. 258–5). However, this is too tenuous a statement

See also Martin Aff., ¶¶ 3–7 (Dkt. 258–5). During his prior return trips to Boise, Martin has stayed at the Budget Inn (with help from his attorneys), Jones Declr., Ex. 2, p. 113 (Dkt. 259-1), has also stayed with friends, *id.*, p. 119, and, on the last four or five trips to Boise, stayed in his car[10], *id.* p. 120, 142. At no time, however, during the four or five trips he has made to Boise in the last year, has he "camped outside," *id.*, p. 143, and he has no stated plans to do so on future trips to Boise.

Martin says he is concerned that if he comes to Boise and is unable to find shelter at a friend's home or an emergency shelter, then he may receive a citation for violating the Ordinances. Martin Aff., ¶ 10 (Dkt. 258–5). His concern, however, is entirely speculative because he is willing (and has in the past) stayed at the homeless shelters. Martin testified that he would stay at the Sanctuary and would consider staying at the River of Life,[11] if they would let him stay there.[12] Hall Declr., pp.160–61 (Dkt. 230-1) (if

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to manifest an intention to move to Boise, nor is there any suggestion beyond supposition that he would move to Boise and camp outside even when there is shelter space available.

[10] Martin no longer has a vehicle.

[11] There are three emergency shelters in Boise - Interfaith Sanctuary (or the "Sanctuary"),which houses both men and women, and the two shelters operated by the Boise Rescue Mission – the River of Life shelter for men and the City Lights shelter for women and children. Pls.' St. Mat'l Facts, ¶ 10.

[12] Martin also testified that whether he would stay at the Sanctuary would depend on if his ex-wife and her new husband were staying there as well, but there is no indication in the record about how often that circumstance might occur. Additionally, it would only impact Martin if the other shelter, River of Life, was full. Hall Declr., pp.160–61 (Dkt. 230-1). Plaintiffs have argued that the River of Life never reports as full because it does not

River of Life allowed Martin to stay at that shelter, he would "for a day or two, if need be"); *but see id.* at p. 164 (later stating, without explanation as to why, that he might stay at the River of Life and "it's possible [he might] not"). The directors of both the River of Life and Interfaith Sanctuary shelters have said that Martin can stay at their respective shelters in the future, if necessary. Roscoe Aff., ¶ 7 (Dkt. 239) (testimony of the Boise Rescue Mission's CEO); Sorrels Aff., ¶ 6 (Dkt. 240) (testimony of the Sanctuary's Executive Director that Martin is not barred from staying there).[13] And, Martin confirmed that, in the last four years, he has not been barred from the Sanctuary because of a rule violation. Jones Declr., p. 139 (Dkt 259-1). Thus, Martin can stay at the emergency shelters.

As previously described, the Ordinances are not to be enforced against a particular individual when "the

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turn people away. *See* Jones Declr., Ex. 69 (Boise Rescue Mission Wepage dated 4/17/15) ("Even in our busiest months, it's our policy to never turn down anyone for food or shelter due to lack of space.") (Dkt. 246-18). However, Martin's decision to not utilize available shelter space due to his personal concerns about being near his ex-wife do not implicate constitutional concerns. The Court has considered the fact that Martin described that when going through his divorce, he was the subject of a no-contact order requiring that he stay away from his wife. There is nothing in the record, however, to suggest that there is any current no-contact order, even though Martin may choose on his own to keep his distance from his ex-wife.

[13] Martin was not certain that he was placed on a "ban list" at River of Light, but he thought he had been told sometime prior to 2010 that he should not come back to that facility because he "had a problem getting up in the morning". Hall Declr., Ex. 1, pp. 129-30 (Dkt. 230-1). However, Martin currently is not barred from staying at either shelter. Dkts. 239, 240 (Sorrels and Roscoe Affidavits).

individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05(A); 9-10-02. Hence, Martin's concern that he will be cited under the Ordinances if he is unable to stay with a friend or in a shelter is not reasonable given that the Ordinances specifically provide that they shall not be enforced when there is no available overnight shelter. Moreover, evidence in 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. Allen Aff., ¶ 8 (Dkt. 242); *see also* Bailly Aff., ¶ 7 (Dkt. 232); Hall Declr., Ex. 7, pp. 74-75; *id.*, Ex. 5, p. 65. The record also indicates 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. *Id.*; *see also* Allen Supp. Aff., ¶ 4 (Dkt. 257-5).

Martin's counsel argues though that, even if there is room at a shelter, shelter may be nonetheless unavailable to Martin because the Boise Rescue Mission is a religious organization and Martin has religious objections to staying there. Both Ordinances state that "[i]f the individual cannot utilize the overnight shelter space due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules, the overnight shelter space shall still be considered available." Boise City Code §§ 6-01-05(A); 9-10-02. They do not address whether the Ordinances will be enforced if individuals have other reasons for

not seeking shelter, such as an objection to the religious basis of the Boise Rescue Mission or a mental illness or disability that might cause issues.[14]

Regardless, Martin testified that he finds nothing "objectionable" about the rules at River of Life because the rules are "pretty fair for the most part and everything." Hall Declr., Ex. 1, pp. 130-31 (Dkt. 230-1). Instead, his primary complaint with River of Life is the rule that during "chapel" (a religious service which lasts an hour) he is not able to go outside and have a cigarette. *Id.* That rule does not, however, require that Martin attend chapel at the River of Life (which he acknowledges) and he did not attend chapel at the River of Life when he stayed there previously, even though he had the impression that "people"[15] wanted him to attend. Jones Declr., Ex. 5, p. 124 (Dkt. 250-1). *See also* Hall Declr., Ex. 1, p. 129 (Dkt. 230-1) (Martin acknowledged that nobody has ever said he had to go to chapel at River of Life). Additionally, even though Martin has been diagnosed with certain

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[14] The Boise Police Department's Special Order also prohibits officers from enforcing the Ordinances when a person is on public property and there is no available overnight shelter. The Special Order states that, "to qualify as 'available', the space must take into account sex, marital and familial status, and disabilities." *Bell v. City of Boise*, 709 F.3d 890, 894–95 (9th Cir. 2013). "The Special Order further provides that, if an individual cannot use available space because of a disability or a shelter's length-of-stay restrictions, the space should not be considered available." *Id.* But, the space will be considered available if the individual cannot use the space "due to voluntary actions such as intoxication, drug use or unruly behavior." *Id.*

[15] Mr. Martin did not specify whether these "people" were other individuals seeking shelter or directors or volunteers at the shelter.

mental health disorders, nothing in the record suggests that mental health issues have prevented him from accessing the shelters. *See* Pls.' St. Facts,[16] ¶ 3 (Dkt. 248).

In short, Martin's alleged future injury is too speculative for Article III purposes. He has not alleged that a mental disorder or other disability interferes with his ability to obtain shelter at the Sanctuary or River of Life, or that he will not stay at any of the shelters even if space is available, or that any "objection" he many have to the religious mission of the River of Life will certainly cause him not to seek shelter there if needed. Additionally, although Martin does allege that he may again be homeless on his visits to Boise, there is no allegation that moves beyond supposition built on speculation that he will then remain outdoors on public property, in violation of one or more of the Ordinances, when the shelters are not full.[17]

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[16] The part of this document referring to Plaintiffs' medical records has been redacted from the public record and, at this time, is filed under seal. Accordingly, the Court has not stated more specifically what the record reflects.

[17] "[F]or purposes of assessing the likelihood that state authorities will reinflict a given injury, [the Supreme Court] generally ha[s] been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig v. Doe*, 484 U.S. 305, 320 (1988) (alterations added) (citing *Los Angeles v. Lyons*, 461 U.S. 95, 105, 106 (1983) (no threat that party seeking injunction barring police use of chokeholds would be stopped again for traffic violation or other offense, or would resist arrest if stopped); *Murphy v. Hunt*, 455 U.S. at 484 (no reason to believe that party challenging denial of pre-trial bail "will once again be in a position to demand bail"); *O'Shea v. Littleton*, 414 U.S. 488, 497 (1974) (unlikely that parties challenging discriminatory bond-setting, sentencing, and jury-fee practices would again violate valid criminal laws)).

To carry standing, Martin must demonstrate "an intention to engage in a course of conduct arguably affected *with a constitutional interest*," but proscribed by a statute. *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (emphasis added). Here, camping or sleeping at night in a public place is permitted, *not* proscribed, by the Ordinance *if* there is no shelter space available. Accordingly, the conduct Martin alleges he might have to engage in if he cannot stay at a friend's house or the shelters are full — *i.e.*, camping or sleeping in a public place — is not proscribed by the Ordinance, and there cannot be a credible threat of prosecution under these circumstances. *See Babbitt*, 442 U.S. at 298. *See also Pennell v. City of San Jose*, 485 U.S. 1, 8 (1988) (quoting *Babbitt*, 442 U.S. at 298) (internal quotation marks omitted) ("[A] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement.")).

Finally, the declaratory relief requested—that the "Ordinances are unconstitutional under the Eighth Amendment to the extent they apply to and are enforced against individuals for whom shelter beds are unavailable whether because (1) there are fewer emergency shelter beds than there are homeless individuals or (2) mental illness or physical disability"—does not align with the inchoate alleged injury. *See* Pls.' Mem. Mot. Summ. Jdgmt., p. 3 (Dkt. 243-2); but compare declaratory relief requested in Rev. 2d Amd. Compl, pp. 22-23 (Dkt. 172). First, there is no evidence that shelter beds are unavailable to Martin because of a mental illness or physical disability, so the declaratory relief in that regard would not redress his particular alleged injury. Second, when there are not enough emergency shelter beds available, regardless of the reason, the Ordinances by their plain terms

may not be enforced. The City's evidence is that the Ordinances are not enforced under these circumstances. Thus, it does not matter (but also does not condone nor condemn the sad commentary that flows from the difficulties faced by Boise City, or any community, in sheltering the homeless population) whether there are fewer beds in shelters than there are homeless individuals for purposes of standing.[18] 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 who are homeless and do not have a disability or other issue of Constitutional interest that the evidence shows prevents them from accessing the shelters.

E. Robert Anderson Does Not Have Standing

Anderson has not been warned by law enforcement officials regarding conduct that might violate the Ordinances in the four years preceding his most recent deposition. Hall Declr., Ex. 2, p. 101 (Dkt. 230–

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[18] This *is* a permissible consideration in assessing the merits of Plaintiffs' claims. Part of what the Court may consider if it applies the framework from *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) *vacated by* 505 F.3d 1006 (9th Cir. 2007), is whether the homeless Plaintiffs have no choice but to be present in the City's public spaces. *See* Order, p. 8 (Dkt. 115). Plaintiffs also discuss overcrowding at the shelters and the use of overflow mats, but that evidence and arguments relate to the merits of Plaintiffs' claims and not Plaintiffs' ability to demonstrate that they are threatened with injury from the alleged unconstitutional enforcement of the Ordinances at issue that is fairly traceable to the City's conduct. To satisfy the causation requirement, plaintiffs "must show that the injury is causally linked or 'fairly traceable'" to the City's Ordinances, "and not the result of independent choices by a party not before the Court." *Nw. Requirements Utilities v. F.E.R.C.*, No. 13-70391, 2015 WL 4716753, at *5 (9th Cir. Aug. 10, 2015).

2). At the time of his most recent deposition, Anderson had housing because he lived with his girlfriend.[19] Hall Declr., Ex. 2, pp. 81, 84–87 (Dkt. 230–2). His most recent Declaration describes that his girlfriend moved in February of 2015, which led to Anderson living with a friend for several months before obtaining shelter at the River of Life for a night and then at the Sanctuary.[20] (Dkt. 296–1). Unfortunately, Anderson is again homeless and relies on the shelters to provide him a place to sleep.[21]

However, as is the case with Martin, Anderson also will seek a place at a shelter instead of sleeping outside, and he has successfully done so.[22] Hall Declr.,

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[19] Mr. Anderson did not pay rent to his girlfriend and his only "income" was food stamps. He is not eligible for government housing assistance and has been denied a request for social security benefits. Hall Declr., Ex. 2, pp. 81, 84-87 (Dkt. 230-2).

[20] This Declaration provides relevant information for the Court to assess Anderson's standing, and standing must exist throughout every stage of litigation, which means the Court must reassess the facts relevant to standing as they change. Accordingly, the Court has considered the information provided. Plaintiffs' Motion seeking permission to file the Declaration is granted.

[21] The City's mootness argument rests on its assertion that Plaintiffs' claims for prospective relief is moot because Plaintiffs are no longer living unsheltered in Boise. *See* Def.'s Mem., p. 6 (Dkt. 229-2). Because those circumstances have changed with regard to Anderson, the Court has not considered whether this case is now moot based on Plaintiffs' living situations.

[22] Anderson reported that he slept on the streets in 2014 for three nights even though he could have accessed a shelter on those nights, because he was ashamed to return to the shelters. Hall Declr., Ex. 2, p. 70 (Dkt. 230-2). The reason for his reluctance to seek shelter for three nights does not evince an unwillingness to stay at shelters in the future (even if one assumed that such an emotion, understandable as it may be, is a cognizable

Ex. 2, p. 103 (Dkt. 230–2). There is nothing to prevent Anderson from seeking shelter at the River of Life or the Sanctuary, see Dkt. 239, ¶ 7; Dkt. 240, ¶ 6, although he does not like the rules at the River of Life that constrain his ability to smoke before he goes to bed, nor does he like the River of Life's "religious policies". Hall Declr., Ex. 2, p. 73 (Dkt. 230–2).

Anderson was not forced to engage in prayer at the River of Life during his March 2014 stay, but says he was forced to attend chapel services. Hall Declr., Ex. 2, p. 76 (Dkt. 230–2). But his statement in that regard was clarified in that he said that to join a particular treatment program that would allow him to stay for an extended period on the upper floors of the River of Life, he was required to attend chapel and other religious services. However, he decided not to participate in that particular program. He was, nonetheless, still permitted to stay overnight on the first floor without joining the program, subject, of course, to the other rules of the shelter. *Id.*, pp. 72–79, 111.[23] In other words, he objected to the requirements placed on those who stay longer than 17 days and then choose to enter the program allowing access to treatment program housing in the upstairs portion of the facility. Regardless, Anderson has stayed at the River of Life recently and has stated he will do so in the future. *Id.*

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basis for avoiding shelter when shelter was available, under a standing analysis), nor has Anderson made any such assertion. Indeed, Anderson has been residing at the Sanctuary shelter since May of 2015. Anderson Declr. (Dkt. 296-1).

[23] Anderson explained that he was required to attend chapel services at a stay in 2007, before the Boise Rescue Mission was "changed . . . over" to River of Life, and before this litigation commenced. Hall Declr., Ex. 2, p. 74 (Dkt. 230-2). He has stayed at the facility since that time.

at p. 110. Additionally, although he has been diagnosed with certain mental health disorders, nothing suggests that mental health issues have prevented Anderson from utilizing the shelters. *See* Pls.' St. Facts, 3 (Dkt. 248).

As with Martin, Anderson is worried he will receive a camping citation if there is no shelter space available and he has to camp or sleep in a public place. But also as with Martin, the revised Ordinances do not allow Boise City Police Officers to cite Anderson when no shelter space is available. Anderson is willing to stay at either available shelter, even if he prefers the Sanctuary and dislikes some of the policies at the River of Life. In such circumstances, Anderson's worry that he might be cited under the Ordinances does not amount to a substantial risk of imminent harm sufficient to demonstrate the injury-in-fact required for Article III standing.

F. Conclusion on Standing Issues

That these particular Plaintiffs lack standing does not mean, for all purposes, that other putative plaintiffs also would lack standing to pursue similar claims. There may, for instance, be an individual with a mental or physical condition that has interfered with her or her ability to seek access to or stay at shelters, with such difficulties likely to continue in the future.[24] Or, perhaps a homeless individual will refuse

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[24] *See, e.g.*, Jones Declr., Ex. 80 (Dkt. 247-4) (police report describing contact with an apparently homeless individual who advised that he has PTSD and cannot stay at a shelter); *id.*, Ex. 77 (Dkt. 247-1) (list of individuals who are barred from the Interfaith Sanctuary and, if coupled with an objection to the religious practices at River of Life, may be able to demonstrate threatened injury); *id.*, Ex. 78 (Police report noting probable cause for camping violation for homeless person who apparently suffers from a

to stay at the River of Life and can support a claim that the facility requires participation in religious practices for homeless individuals to stay in temporary housing there. However, this Court cannot entertain and decide controversies on possibilities, and it is similarly inappropriate for the Court to surmise conclusively whether such circumstances would be sufficient for other persons to establish standing. The Court will not substitute the possibility that another person might have standing to make the claims raised here as a substitute for the shortcomings of the standing claimed for Martin and Anderson. Instead, the Court must do exactly what has been done in this decision – consider the evidence and the allegations of future threatened harm to determine whether such a record rises to the level required for these particular plaintiffs to establish standing in the circumstances of this case. That answer, on this record, is "no." Because the Plaintiffs lack standing to pursue their claims, the Court lacks jurisdiction to consider the merits of those claims and this case will be DISMISSED.

G. Miscellaneous Motions

Before the hearing, Plaintiffs filed a Motion for Leave to File Supplemental Authority related to the standing issue (Dkt. 283). The City acknowledges that the Court has discretion to consider the three cases Plaintiffs brought to the Court's attention, but asks that the Court decline to do so. (Dkt. 293). The Court concludes that it is appropriate to consider the

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mental illness because he "said he had not tried to get into any shelters because they try to get him onto illegal drugs and steal his medicine"); *id.*, Ex. 72 (Dkt. 246-21) (homeless individual cited when the Sanctuary was full because River of Light had capacity, but individual was "barred" from the facility).

additional case authority, and has done so. The City is not prejudiced in any substantive manner by the presentation of the supplemental authority, and has had the opportunity to try and distinguish these cases from the facts of the present case. *See* Dkt. 293.

After the hearing, Plaintiffs filed a Motion for Leave to Identify Record Citations made at the hearing (Dkt. 289), for the stated purpose of assisting the Court in efficiently reviewing the record. Plaintiffs filed an appendix identifying the pages of the record that support their arguments. The appendix is a useful tool to compile evidence already in the record, it does not add to the record. Accordingly, Court will grant the Motion and has considered the appendix.

Plaintiffs also asked that the Court strike the affidavits of Jayne Sorrels and Jacob Lang, filed in support of the City's opposition to Plaintiffs' Motion for Summary Judgment. *See* Dkts. 257-3; 257-4. Plaintiffs argue that these affidavits contain (1) expert opinion testimony they are unqualified to provide and (2) statements for which they lack personal knowledge and foundation or constitute hearsay. (Dkt. 268-1). However, the Court did not rely on any of this evidence to find that Plaintiffs lack standing in this case, and the challenged affidavits relate primarily to issues going to the merits of this case.[25] Accordingly, Plaintiffs' Motion to Strike (Dkt. 268) is moot.

Additionally, having considered the evidence relevant to the standing issue and having ruled in the City's favor, the Court further finds that the City's Motions to Strike also are moot.

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[25] Although the Court has cited to Sorrels's Affidavit, the citation was not to any evidence objected to as unqualified expert testimony.

III. Order

For the reasons set forth above, IT IS HEREBY ORDERED:

(1) Defendant's Motion for Dispositive Relief (Dkt. 229) is GRANTED;

(2) Plaintiffs' Motion for Summary Judgment (Dkt. 243) is DENIED.

(3) Defendant's Motions to Strike (Dkts. 254 & 263) are DENIED as MOOT.

(4) Plaintiffs' Motion to Strike (Dkt. 268) is DENIED as MOOT.

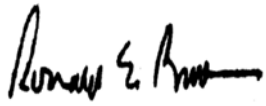
(5) Plaintiffs Motion for Leave to File Supplemental Authority (Dkt. 283) is GRANTED.

(6) Plaintiffs' Motion for Leave to Identify Record Citations (Dkt. 289) is GRANTED.

(7) Plaintiffs' Motion seeking permission to file the Robert Anderson Declaration (Dkt. 296) is GRANTED.

A separate judgment will be filed contemporaneously with this Order.

DATED: September 28, 2015



Honorable Ronald E. Bush
U. S. Magistrate Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF IDAHO

JANET F. BELL, BRIAN S. CARSON, ROBERT MARTIN, LAWRENCE LEE SMITH, ROBERT ANDERSON, PAMELA S. HAWKES, JAMES M. GODFREY, AND BASIL E. HUMPHERY, *Plaintiffs*, vs. CITY OF BOISE; BOISE POLICE DEPARTMENT; AND MICHAEL MASTERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE, *Defendants*.	Civil Action No. 1:09-CV-00540-REB MEMORANDUM DECISION AND ORDER ON DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Currently pending before the Court is Defendants' Second Motion for Summary Judgment (Dkt. 141). The Court has carefully reviewed the record, considered oral arguments, and now enters the following Order granting, in part, and denying, in part, Defendants' Motion.

SUMMARY OF THE DECISION

The Plaintiffs are individuals who either are or were homeless in Boise and they allege that Defendants (Boise City and its Police Department) have criminalized the status of being homeless by the man-

ner in which Defendants enforce Boise City ordinances[1] prohibiting (as a practical matter) camping and sleeping in public. Defendants now seek summary judgment on Plaintiffs' claim that Defendants' enforcement actions violate the Eighth Amendment's prohibition on cruel and unusual punishment.

In ruling on Defendants' previous summary judgment motion, the Court dismissed Plaintiffs' claims on jurisdictional and mootness grounds. Order (Dkt. 115). On Plaintiffs' appeal from that decision, the United States Court of Appeals for the Ninth Circuit reversed this Court's decision as to whether this federal court has jurisdiction to consider the claims, but did "not reach the merits of Plaintiffs' Eighth Amendment challenges" on appeal. *Bell v. City of Boise*, 709 F.3d 890, 892-96 (9th Cir. 2013).

This Court on remand also does not reach the underlying merits of Plaintiffs' Eighth Amendment claims. Those claims are largely barred by the so-called "favorable-termination" requirement of *Heck v. Humphrey*, 512 U.S. 477 (1994). In *Heck*, the United States Supreme Court held that, "in order to recover damages for [an] allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a . . . plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a

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[1] The ordinances are Boise City Code Section 9-10-02 02 (the "Camping Ordinance") and Boise City Code Section 6-01-05(A) (which prohibits disorderly conduct and is referred to throughout this order as the "Sleeping Ordinance").

state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.* at 486-87.

Plaintiffs could have raised their argument of Eighth Amendment unconstitutionality as a defense to their criminal prosecutions and on direct appeal. A decision in their favor on such claims in this case would necessarily imply the invalidity of their prior convictions or sentences. As a consequence, such claims cannot be prosecuted in this case under the holding in *Heck*. Accordingly, the Court will dismiss all claims for relief that seek expungement from Plaintiffs' records of any camping and sleeping ordinance violations, reimbursement for any fines or incarceration costs, recovery of damages for the alleged civil rights violations, and any other claim or recovery that seeks relief for events that have already occurred and necessarily would imply the invalidity of Plaintiffs' convictions.

The dismissal does not, however, extend to Plaintiffs' request for a declaratory judgment under 28 U.S.C. §§ 2201 and 2202. That claim seeks prospective relief – *i.e.*, a declaration stating that Defendants' present and threatened future actions in enforcing the Ordinances violate Plaintiffs' rights to be free from cruel and unusual punishment under the Eighth Amendment and the Idaho Constitution (Article I, § 6).[2] Further, this claim is not precluded by the doctrine of res judicata, and it remains to be determined on the merits. The Court will require, however, that

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[2] Because Plaintiffs have not argued that the Idaho Constitution provides more extensive protection than does the Eighth Amendment to the U.S. Constitution, this decision refers to both the state and federal constitutional challenges as an Eighth Amendment challenge throughout.

Plaintiffs file an Amended Complaint stating this claim more particularly and omitting any dismissed claims for relief.[3]

BACKGROUND[4]

In this lawsuit, Plaintiffs claim that Defendants enforce Boise City ordinances[5] (the "Ordinances") regarding camping and sleeping in public against the

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[3] For instance, regarding the Sleeping Ordinance, only nighttime enforcement remains at issue. *See Bell*, 709 F.3d at 896 ("Plaintiffs do not appeal the court's decision that their Eighth Amendment claims concerning daytime enforcement of the Sleeping Ordinance failed as a matter of law."). Additionally, the state constitutional claims are at issue only to the extent that their federal counterparts survive. *See Bell v. City of Boise*, 834 F.Supp.2d 1103, 1116 (D.Idaho 2011) (finding that "the state constitutional challenges fail for the same reasons the federal constitutional claims fail"); *Bell*, 709 F.3d at 896 n.8 (finding that, by not raising the issue in their opening brief, Plaintiffs had waived appeal of the district court's dismissal of their Idaho constitutional claims for the same reasons as their federal counterparts).

[4] The facts are set forth more fully in the Court's prior Memorandum Decision and Order (Dkt. 115) and the opinion of the United States Court of Appeals for the Ninth Circuit in *Bell v. City of Boise*, 709 F.3d 890 (9th Cir. 2013). For that reason, and because the parties are familiar with the factual background of this case, the full facts will not be recited here, but are incorporated by reference to the Court's Order at Docket Number 115 and the Ninth Circuit's opinion in *Bell*.

[5] The ordinances at issue are Boise City Code ("B.C.C.") Sections 9-10-02 and 6-0105(A). Boise City Code § 9-10-02 (the "Camping Ordinance") makes it a crime for any person "to use any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 6-01-05(A) (the "Sleeping Ordinance") criminalizes disorderly conduct, defined to include "[o]ccupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle without

homeless in Boise in a manner that violates the Eighth Amendment's prohibition against status crimes. Plaintiffs are individuals who either are or were homeless in Boise. Each has been cited and convicted under Boise City's Camping Ordinance, or its Sleeping Ordinance, or both.[6] Defendants are the City of Boise, the Boise City Police Department, and Boise City Police Chief Michael Masterson.

Plaintiffs contend that the Defendants' policy, custom, and practice of issuing citations, arresting, and "harassing" homeless individuals, including Plaintiffs, under the Ordinances has the effect of criminalizing homelessness. *Id.* at ¶ 35. They seek declaratory, injunctive, and monetary damages relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201-02. More specifically, Plaintiffs ask for: (1) an order enjoining Defendants from enforcing the Ordinances against people sleeping or lying down in public; (2) an order compelling the City of Boise to expunge the criminal records of any homeless individuals cited or arrested and charged under the Ordinances; (3) an order requiring reimbursement of any fines paid or incarceration costs imposed upon homeless individuals for violation of the

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the permission of the owner or person entitled to possession or in control thereof." B.C.C. § 6-01-05(A). These are considered misdemeanor crimes, punishable by a fine not exceeding one thousand dollars ($1,000) and imprisonment in the county jail not to exceed six (6) months. *See* B.C.C. §§ 6-01-21; 9-10-19. *See also* Idaho Code § 18-111 (explaining the difference between felonies, misdemeanors, and infractions).

[6] Defendants' Statement of Undisputed Facts (Dkt. 141-1) details the sentences imposed and attaches the state court docket sheets for each case. Plaintiffs report that they have paid fines ranging from $25 to $75 and/or have been sentenced to jail terms ranging from one to 90 days. (Dkt. 143, p. 1).

Ordinances; (4) and declaratory relief. *See* Amd. Compl., p. 25 (Dkt. 53).

Defendants previously moved for summary judgment on all claims raised by Plaintiffs in their Amended Complaint (Dkt. 53). The Court entered a Memorandum Decision and Order which held that the *Rooker–Feldman* doctrine[7] precluded subject matter jurisdiction over Plaintiffs' claims for retrospective relief and that Plaintiffs' claims for prospective injunctive and declaratory relief were largely moot because of changes in the Ordinances and the City's enforcement of the same stemming from an amendment made to one of the Ordinances, and an internal policy issued by the Chief of Police regarding the enforcement of both Ordinances. Order (Dkt. 115).

On Plaintiffs' appeal, the Ninth Circuit reversed the dismissal of Plaintiffs' claims for retrospective relief "because those claims are not barred by the *Rooker–Feldman* doctrine" and reversed the dismissal of Plaintiffs' claims for prospective relief "because those claims have not been mooted by Defendants' voluntary conduct." *Bell v. City of Boise*, 709 F.3d 890, 892 (9th Cir. 2013). The Ninth Circuit did "not reach the merits of Plaintiffs' Eighth Amendment challenges" on appeal, but did rule that jurisdiction exists as to those claims.[8] *Id.* at 896. In a footnote, however,

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[7] *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

[8] The Eighth Amendment is the only remaining basis for Plaintiffs' challenge to the ordinances because Plaintiffs waived appeal of all other issues "by failing to challenge these rulings in their opening brief." *Bell*, 709 F.3d at 896 n.8 (explaining that although this Court "held that Plaintiffs' right to travel claims failed as a matter of law, the Camping Ordinance was not uncon-

the Ninth Circuit made specific reference to *Heck v. Humphrey's* "favorable-termination" requirement and raised the question as to whether the holding in *Heck* bars Plaintiffs' Eighth Amendment claims. *Bell*, 709 F.3d at 897 n.11 (quoting *Heck*, 512 U.S. 477, 486–87 (1994) ("We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus") (footnote omitted)). Following the remand, Defendants filed their second motion for summary judgment, at issue now, arguing two-fold that the holding in *Heck* and claim preclusion principles bar Plaintiffs' Eighth Amendment claims.

DISCUSSION

A. Plaintiffs' remaining claim is an Eighth Amendment challenge to Defendants' alleged conduct of criminalizing homelessness as a status offense.

Plaintiffs allege that "Defendants are punishing Plaintiffs and other homeless individuals based on their status as homeless person[s]" and that doing so

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stitutionally vague, the overbreadth doctrine did not apply outside the First Amendment context, and the Idaho constitutional claims failed for the same reasons as their federal counterparts[,] Plaintiffs have waived appeal of these issues by failing to challenge these rulings in their opening brief."). Additionally, Plaintiffs did not appeal the ruling that the daytime enforcement of the Sleeping Ordinance failed as a matter of law, so only nighttime enforcement is at issue.

"constitute[s] cruel and unusual punishment in violation of Plaintiffs' well established rights under the Eighth Amendment." Amd. Compl., ¶¶ 57-58 (Dkt. 53). In response to Defendants' first summary judgment motion, Plaintiffs similarly argued that "it is unconstitutional to criminalize involuntary acts that are an unavoidable consequence of being homeless, *i.e.*, acts that [a homeless person] is powerless [to] avoid." Pls.' Resp., p. 1 (Dkt 85) (citation and internal quotation marks omitted). In making such arguments, Plaintiffs largely rely on the case of *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated by* 505 F.3d 1006 (9th Cir. 2007).[9]

In *Jones*, a panel decision of the Ninth Circuit Court of Appeals focused upon a discrete Eighth Amendment claim, *i.e.*, whether the Cruel and Unusual Punishment clause limits not just the ways in which a state can punish criminal behavior, but also "what" behavior or conduct a state can criminalize. *Jones*, 444 F.3d at 1128–29. The Cruel and Unusual Punishment clause "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes . . .; second, it proscribes punishment grossly disproportionate to the severity of the crime . . .; and third, it imposes substantive limits on what can be made criminal and punished as such. . . ." *Ingraham v. Wright*, 430 U.S. 651, 667–68 (1977). The third limitation, however—and the one at issue in *Jones* and in

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[9] As described in the Court's earlier Memorandum Decision and Order, "[t]he *Jones* decision was later vacated as a result of a settlement agreement; therefore the opinion is not binding." (Dkt. 115, p. 6, n. 1). Even so, this Court considered *Jones* because it "does shed light on the issue and how the Ninth Circuit might approach such challenges in the future." *Id.*

this case—should "be applied sparingly."[10] *Id.* at 668 (internal citations omitted).

According to the panel in *Jones*, when a state engages in this type of Eighth Amendment violation, "a person suffers constitutionally cognizable harm as soon as he is subjected to the criminal process." *Jones*, 444 F.3d at 1129. Indeed, many Eighth Amendment cases involve challenges to the terms of a criminal punishment which arise in a manner that could not be raised as a direct defense or in a subsequent appeal of a conviction. However, this is not such a case. Here, the Eighth Amendment claims could have been raised as a defense in a criminal proceeding and on direct appeal.

An analogous case, involving an appeal of a criminal conviction under a state statute which allegedly criminalized the status of addiction to narcotics, is *Robinson v. California*, 370 U.S. 660, 661, 666–67 (1962).[11] In *Robinson*, the Supreme Court considered the case on direct review, in deciding Robinson's argument that "a law which made a criminal offense of . . .

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[10] *See also Powell v. Texas*, 392 U.S. 514, 531–32 (1968) ("The primary purpose of [the Cruel and Unusual Punishment clause] has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed."). The United States Supreme Court in *Powell* described *Robinson's* proscription as one against statutes or laws that seek "to punish a mere status". *Powell*, 392 U.S. at 532.

[11] Although the "appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court," *Robinson*, 370 U.S. 660, 664, n.6, his appeal was "from the Appellate Department of the Superior Court of California, County of Los Angeles." *Robinson v. California*, 368 U.S. 918 (1961).

a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* Similarly, a constitutional challenge to a Texas statute criminalizing public intoxication also went to the Supreme Court on direct appeal from a state conviction.[12] *Powell v. Texas*, 392 U.S. 514, 517 (1968).

Moreover, whether this cases presents a "facial" or "as-applied" challenge to a statute or ordinance is immaterial. An as-applied challenge can be raised in a criminal prosecution, and then on direct appeal from any conviction. *See, e.g.*, *United States v. Jinian*, 725 F.3d 954, 958 (9th Cir. 2013) (appellant argued a wire fraud statute was unconstitutional as applied to him); *United States v. Shetler*, 665 F.3d 1150, 1156 (9th Cir. 2011) (appellant argued at the trial level and on appeal that a statute, as applied to him, was void for vagueness).

In sum, Plaintiffs could have raised both facial and as-applied Eighth Amendment defenses to their criminal charges, even though they did not do so.[13]

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[12] There are some cases in which the *Heck* bar has not been applied to Eighth Amendment claims, but those cases involved challenges to the type of punishment imposed or conditions of incarceration and not to what conduct a state may criminalize. *See, e.g.*, *Hanner v. City of Dearborn Heights*, No. 07-15251, 2009 WL 540699, *4-6 (E.D.Mich. Mar. 4, 2009) (finding *Heck* did not bar plaintiff's claim that he was deprived of a crutch in jail in violation of the Eighth Amendment's proscription against cruel and unusual punishment).

[13] Although not mentioned in the briefing in connection with the *Heck* issue, Plaintiffs argued in the preclusion doctrine section of their brief that they "could not have conveniently raised their Eighth Amendment claim[s] in prior criminal misdemeanor proceedings." Pls.' Resp., p. 14 (Dkt. 143). A homeless person, presumably indigent and perhaps dealing with other difficulties

B. *Heck v. Humphrey* bars Plaintiffs' Eighth Amendment claims brought under § 1983.

Plaintiffs did not raise Eighth Amendment claims in their state criminal cases, nor did any appeal their convictions. Hence, Eighth Amendment arguments were never considered in the criminal cases. That fact is significant here, although not under any sort of exhaustion requirement. *See Heck*, 512 U.S. at 489–90 (explaining that "[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus") (citations and internal quotation marks omitted)). "[W]hen a state prisoner seeks damages in a § 1983 suit, *the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence*; if it would,

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such as mental illness, may have challenges in navigating through the criminal justice system. However, those challenges, even if daunting, are not unique and the issue presented here is not a *Gideon v. Wainwright* question. Others who are also indigent, or have limited understanding of the legal system, or are mentally ill, or cannot speak English, and so forth, also face challenges. Such circumstances, lamentable as they are, may make the individual's encounter with the criminal justice system difficult, but such difficulty is a practical, not legal, barrier to raising a constitutional defense to a criminal charge. Moreover, court-appointed counsel assisted most of the Plaintiffs who appeared for the proceedings in their misdemeanor cases, so those individuals were not navigating the criminal justice system alone. (Dkt. 141-1; 141-3, pp.4-5). It is difficult to envision a sensible line to be drawn upon the particular details of an individual defendant's personal circumstances (leaving aside an indigent's right to counsel, which is not part of the analysis), by which this or any other court could decide that the rule in *Heck* ought not to apply solely because of those circumstances.

the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." *Heck*, 512 U.S. at 487 (emphasis added). Further:

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983.

512 U.S. at 486–87 (emphases added).

A judgment finding the Ordinances unconstitutional in this case necessarily would imply the invalidity of Plaintiffs' convictions under those Ordinances. The fulcrum of Plaintiffs' § 1983 claims is the allegation of unconstitutional convictions. None of those convictions, however, was reversed on direct appeal or otherwise called into question, and none of the Plaintiffs raised a constitutional challenge in his or her criminal case, including on appeal. The holding of

Heck is a close fit to such circumstances.[14] Accordingly, the *Heck* bar applies to Plaintiffs' claims that would necessarily imply the invalidity of the convictions or sentences. Here, that includes the relief requesting expungement of the records of any camping and sleeping ordinance violations, reimbursement for any fines or incarceration costs, recovery of damages for the alleged civil rights violations, and any other claim or recovery tied to events that have already occurred.

C. *Heck v. Humphrey* does not bar Plaintiffs' request for prospective declaratory relief.

Plaintiffs' have requested a declaratory judgment under 28 U.S.C. §§ 2201 and 2202, stating that Defendants' present and threatened future actions in enforcing the Ordinances violate the Eighth Amendment's prohibition against cruel and unusual punishment.[15] *See* Amd. Compl., p. 25 (Dkt. 53).

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[14] Although not issued on or after January 1, 2007, *see* Fed R. App. P. 32.1, one unpublished disposition from the Ninth Circuit addresses similar issues. In *Masters v. City of Bellflower*, No. 95-55921, 1996 WL 583625 (9th Cir. Oct. 7, 1996), the plaintiff raised a constitutional challenge to the validity of a city animal control statute which formed the basis of his criminal conviction. *Id.* at *1. The panel ruled that a judgment in the plaintiff's favor would necessarily imply that the statute and, therefore, the plaintiff's conviction, were invalid. *Id.* The criminal conviction had not been invalidated or reversed *on direct appeal*, and, accordingly, the Ninth Circuit affirmed the district court's ruling that the plaintiff's § 1983 claim against the city for damages was barred. *Id., cert. denied* 522 U.S. 871 (2007).

[15] Plaintiffs cited to the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, in the Jurisdiction and Venue section of their Amended Complaint (Dkt. 53), and asked for declaratory relief in their Prayer for Relief, but did not include this claim as a sep-

In most instances, the holding in *Heck* will bar § 1983 claims for injunctive or declaratory relief. *See Wilkinson v. Dotson*, 544 U.S. 74, 81–82 (2005) (explaining that certain "cases, taken together, indicate that 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*") (emphasis added).[16] However, *Heck* does not necessarily preclude *all* claims under the Declaratory Judgment Act.

Moreover, Plaintiffs seek a declaration that the Ordinances violate both the United States Constitution and the Idaho Constitution. *See Los Angeles County, Cal. v. Humphries*, 131 S.Ct. 447, 451 (2010) (Section 1983 protects against "deprivation of any rights ... secured by the Constitution and laws [*of the United States*]".) (quoting 42 U.S.C. § 1983) (internal quotation marks omitted, emphasis added, alterations in original)); *Skinner v. Switzer*, 131 S.Ct. 1289, 1301–02 (2011) (Thomas, J., dissenting) (explaining that the boundaries of § 1983 were first circumscribed in *Preiser v. Rodriguez*, 411 U.S. at 489, where "the

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arate "claim for relief", *see id.* pp. 22-24. However, they incorporated "all preceding paragraphs" in the section of the Amended Complaint stating their claims for relief. *Id.* at p. 22, ¶ 55.

[16] *But see Wolff v. McDonnell*, 418 U.S. 539, 554-55 (1974) (permitting prisoners to use § 1983 "as a predicate to a damages award" to obtain a declaratory judgment, explaining that "because under [*Preiser v. Rodriguez*, 411 U.S. 475 (1973)] only an injunction restoring good time improperly taken is foreclosed, [it would 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").

Court began with the undisputed proposition that a state prisoner may not use § 1983 to challeng[e] his underlying conviction and sentence *on federal constitutional grounds*") (alteration in original, emphasis added, internal quotation marks omitted)). Accordingly, summary judgment is not warranted at this time on Plaintiffs' request for declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.[17]

D. *Heck's* bar applies to Plaintiffs' Eighth Amendment claims brought under § 1983, even if federal habeas relief was unavailable on the facts of this case.

Even if federal habeas relief was unavailable to any of the Plaintiffs because he or she was never in custody (or if in custody, not for any significant length of time), *Heck* is still a bar to the § 1983 claims based on the Eighth Amendment. Plaintiffs ask that the Court rule otherwise, relying on a concurring opinion written by Justice Souter in *Spencer v. Kemna*, 523 U.S. 1 (1998), a case decided after *Heck*. Pls.' Resp., p. 4 (Dkt. 143). In his *Spencer* concurrence, Justice Souter opined 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 (Souter, J. concurring) (emphasis added). That circumstance,

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[17] As detailed further on in this Decision, the Court will require Plaintiffs to file an Amended Complaint and, if Plaintiffs believe they have a right to bring a declaratory judgment claim under § 1983 as one for prospective declaratory and injunctive relief despite the Court's ruling that *Heck* bars all other relief requested under §1983, they should support their amended claim with appropriate authority.

however, does not apply to Plaintiffs here, as it was not "impossible as a matter of law" for Plaintiffs to obtain the "favorable termination" required to bring a §1983 action. Any of the Plaintiffs could have raised a constitutional challenge to the ordinances in their criminal case, based on the same facts underlying Plaintiffs' Eighth Amendment claims in this case, and, if successful, paved the way for a §1983 case.

Most court rulings that have found an exception to the *Heck* doctrine have done so in reliance on Justice Souter's concurrence in *Spencer.*[18] That concurrence, however, must be considered in conjunction with a close reading of the majority opinion issued in *Spencer*, in which the Court affirmed the dismissal of a habeas claim brought by a petitioner who was no longer in custody. Such a claim, the Supreme Court ruled, was moot because after being released from custody the petitioner no longer suffered any continuing collateral consequences from his earlier parole revocation. *Id.* at 14–16. Justice Souter and the other justices joining in his concurrence sought to limit the reach of the majority's ruling, (and that of *Heck)*, by asserting 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," and thus "the answer to [petitioner] Spencer's argument that his habeas claim cannot be moot because *Heck* bars him from relief under § 1983

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[18] *Spencer*, 523 U.S. 1, 18–19 (Justice Souter, in his concurrence, joined in the "Court's opinion as well as the judgment, though [he did] so for an added reason that the Court [did] not reach.").

is that *Heck* has no such effect." *Id.* at 21 (Souter, J., concurring).[19]

The petitioner in *Spencer* argued that the ruling in *Heck* "would foreclose him from pursuing a damages action" under § 1983, "unless he can establish the invalidity of his parole revocation," and, therefore, "his action to establish that invalidity cannot be moot." *Id.* at 17. The majority of the Justices were not persuaded, and described this argument as "a great non sequitur, *unless one believes (as we do not) that a § 1983 action for damages must always and everywhere be available*." *Id.* (emphasis added). The majority opinion then went on to explain that a § 1983 damages claim is *not* foreclosed by *Heck* "[i]f, for example, petitioner were to seek damages for using the wrong procedures, not for reaching the wrong result," and if that procedural defect did not "necessarily imply the invalidity of the revocation." *Id.* (citing *Heck*, 512 U.S. at 482–83) (citations and internal quotation marks omitted).

Significantly, Justice Souter agreed that "the majority opinion in *Heck* can be read to suggest that [the] favorable-termination requirement is an element of any § 1983 action alleging unconstitutional conviction, whether or not leading to confinement and whether or not any confinement continued when the § 1983 action was filed." *Id.* at 19 (citing *Heck*, 512 U.S. at 483–84). He further agreed that the majority in *Heck* "acknowledged the possibility that even a released prisoner might not be permitted to bring a

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[19] Justice Stevens, who dissented from the majority opinion, agreed with those Justices joining in the Souter concurrence that a petitioner without a remedy under the habeas statute may bring an action under § 1983. *Id.* at 25 n. 8 (Stevens, J., dissenting).

§ 1983 action implying the invalidity of a conviction or confinement without first satisfying the favorable-termination requirement." *Id.* at 19–20 (Souter J., concurring). Justice Souter then explained that he joined the majority decision in *Heck*, "not because the favorable-termination requirement was necessarily an element of the § 1983 cause of action for unconstitutional conviction or custody, but because it was a 'simple way to avoid collisions at the intersection of habeas and § 1983.'" *Id.* at 21 (citation omitted).

Justice Souter's concurrence assumes that the federal habeas statute may provide the *only* means of satisfying *Heck's* favorable-termination requirement and, in many cases, that may well be true. However, in other cases, plaintiffs (such as those who brought this lawsuit) convicted of state crimes may raise § 1983 claims based upon underlying circumstances in which those same plaintiffs could have secured favorable terminations by raising the defense of unconstitutionality before the trial court, or by direct appeal, or by post-conviction litigation. *See, e.g., Molina-Aviles v. District of Columbia*, 797 F.Supp.2d 1, 6 (D.D.C. June 23, 2011) (pointing to the availability of state court habeas and habeas-type remedies to challenge plaintiffs' alleged unconstitutional driving while intoxicated convictions and concluding that "*Heck* precludes any § 1983 suit challenging a criminal conviction that has not already been favorably terminated, regardless of the availability of habeas-type relief"). *See also Harrison v. Michigan*, 722 F.3d 768, 772–75 (6th Cir. 2013) (discussing *Heck*, 512 U.S. at 487).

Moreover, the *Heck* favorable-termination requirement is described in the disjunctive, *i.e.*, "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." 512 U.S. 486–87 (emphasis added).

After *Spencer*, some federal circuit courts have drawn upon Justice Souter's concurrence to support decisions which do not apply *Heck's* favorable termination requirement, in a variety of circumstances.[20] *See, e.g.*, *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) (holding that *Heck* did not bar a plaintiff who was convicted and fined, but not imprisoned, from alleging selective prosecution under § 1983 because he was never in custody and thus could not seek habeas relief)[21]; *Wilson v. Johnson*, 535 F.3d 262, 266–68 (4th

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[20] The Second Circuit has issued the most recent decision upon the issue. *See Poventud v. City of New York*, No. 12–1011–cv, 2014 WL 182313, *13 (2nd Cir. Jan. 16, 2014) (explaining that "many violations of constitutional rights, even during the criminal process, may be remedied without impugning the validity of a conviction" and finding that Poventud's conviction had been "declared invalid by a state tribunal"). *See also id.,* 2014 WL 182313 at *37 (Jacobs, J., dissenting) (arguing "[t]here is no need to choose a side in this split because the narrow exception articulated by Justice Souter would be inapplicable here in any event" as "[t]he motivating concern in the *Spencer* dicta was that circumstances beyond the control of a criminal defendant might deprive him of the opportunity to challenge a federal constitutional violation in federal court" and the defendant in the *Poventud* case "is not such a person").

[21] Leather was assessed a $300 fine as well as a $25 surcharge, and his driver's license was suspended for 90 days, but he did not appeal this conviction. Leather, 180 F.3d at 424. The Second Circuit relied on a prior decision, *Jenkins v. Haubert*, 179 F.3d 19 (2d Cir. 1999), to decide "whether a plaintiff, convicted of a criminal offense, could proceed with a § 1983 claim where no remedy of habeas corpus existed." Id. However, the facts of Jenkins are distinguishable from Leather and the case at hand. Jenkins'

Cir. 2008)[22]; *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 603 (6th Cir. 2007)[23] (concluding that *Heck* is inapplicable because Powers' one day

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§ 1983 claim did not challenge his state court conviction, but was based on his allegations that a state department of corrections employee "violated his constitutional right to procedural due process in the course of presiding over two separate disciplinary hearings." 179 F.3d at 20. In concluding that *Heck*'s favorable-termination requirement did not bar Jenkins' claim, the Second Circuit observed that, "[i]n *Heck*, the Court did not address administrative or disciplinary segregation at all because the plaintiff challenged only the legality of his underlying criminal conviction and not any subsequent disciplinary action" and then "h[e]ld that a § 1983 suit by a prisoner, such as Jenkins, challenging the validity of a disciplinary or administrative sanction that does not affect the overall length of the prisoner's confinement is not barred by *Heck* and *Edwards*." 179 F.3d at 27. Thus, considering that the *Leather* decision relied on the factually distinct case of Jenkins, this Court concludes that any persuasive value *Leather* may have does not override the other considerations that led this Court to conclude that *Heck* applies to bar the Plaintiffs' claims in this case.

[22] The Fourth Circuit in *Wilson* explained that the purpose of § 1983 is to "provid[e] litigants with a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," and that "[b]arring [the plaintiff's] claim would leave him without access to any judicial forum in which to seek relief for his alleged wrongful imprisonment." *Wilson*, 535 F.3d at 268. Plaintiffs here are not claiming they lacked access to a judicial forum in which to raise their Eighth Amendment challenges.

[23] The plaintiff in *Powers* filed a § 1983 action under circumstances similar to the Plaintiffs here, *i.e.*, upon a misdemeanor conviction for which only a short jail term was imposed. Powers alleged that he was deprived of an indigency hearing "because the Public Defender has a policy or custom of failing to request such hearings when its clients face jail time for nonpayment of court-ordered fines his incarceration," and that "the absence of any inquiry into his ability to pay the court-imposed fine, vio-

term of incarceration for his reckless-driving misdemeanor "was too short to enable him to seek habeas relief"); *DeWalt v. Carter*, 224 F.3d 607, 617–18 (7th Cir. 2000)[24] (relying on *Spencer* to overrule *Anderson v. County of Montgomery*, 111 F.3d 494, 499 (7th Cir. 1997), which held that *Heck* barred a former prisoner from challenging his conviction in a § 1983 suit even if he could not seek habeas relief); *Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010) ("adopt[ing] the reasoning of these circuits and hold[ing] that a petitioner who has no available remedy in habeas, through no lack of diligence on his part, is not barred by *Heck* from pursuing a § 1983 claim"); *Harden v. Pataki*, 320 F.3d 1289, 1298–99 (11th Cir. 2003) (concluding "that *Heck* does not bar most § 1983 damages claims based on improper extradition").

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lated his Fifth, Sixth, and Fourteenth Amendment rights." *Powers*, 501 F.3d at 597. However, in a later decision discussing *Powers*, the Sixth Circuit commented:

> Because Justice Souter joined both the Court's opinion that Spencer's habeas claim was moot and the judgment affirming the district court's decision to that effect, the question he raised about whether Spencer could nevertheless maintain a § 1983 action for damages was not only unnecessary to the holding of the case but could also be described as purely hypothetical. At this point, however, we are bound by *Powers* . . . in which the panel chose to treat the Souter concurrence as establishing a rule of law, rather than dictum.

Harrison v. Michigan, 722 F.3d 768, 774 n.1 (6th Cir. 2013).

[24] The Seventh Circuit explained that "[u]nlike the plaintiffs in *Preiser*, *Heck*, and *Edwards*," Mr. DeWalt's case does not "lie at the intersection of sections 2254 and 1983" because "DeWalt does not challenge the fact or duration of his confinement, but only a condition of his confinement-the loss of his prison job." 224 F.3d at 617. Thus, DeWalt's circumstances also are unlike those of the Plaintiffs in this case, who have challenged the fact of their conviction and the resulting fines and, for some, confinement.

Plaintiffs argue that this Court should reach a similar result, where they argue that Plaintiffs "never had, and never would have on mootness grounds, an opportunity to petition for a writ of habeas corpus." Pls.' Resp., p. 1 (Dkt. 143). However, other circuits have imposed *Heck's* bar even when federal habeas relief is not available, notwithstanding the Souter concurrence in *Spencer*. As described by the Third Circuit:

> As we recently held in *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005), a § 1983 remedy is not available to a litigant to whom habeas relief is no longer available. In *Gilles*, we concluded that *Heck's* favorable-termination requirement had not been undermined, and, to the extent that its validity was called into question by *Spencer*, we observed that the Justices who believed § 1983 claims should be allowed to proceed where habeas relief is not available so stated in concurring and dissenting opinions in *Spencer*, not in a cohesive majority opinion.

Williams v. Consovoy, 453 F.3d 173, 177–78 (3d Cir. 2006). *See also, Randell v. Johnson*, 227 F.3d 300, 300–01 (5th Cir. 2000) (per curiam) (holding that *Heck* barred a former prisoner from alleging under § 1983 that he was improperly made to serve two sentences for the same offense because he was not given credit for his initial prison stay); *Entzi v. Redmann*, 485 F.3d 998, 1003–04 (8th Cir. 2007) (stating that "[a]bsent a decision of the [Supreme] Court that explicitly overrules what we understand to be the holding of *Heck*, . . . we decline to depart from that rule" and holding that the plaintiff's claim may be pursued only in an

action for habeas corpus relief even though plaintiff had argued that habeas corpus was no longer available to him on a claim challenging the length of his imprisonment). Indeed, the Supreme Court has said in a case decided after *Spencer* that the issue remains undecided of whether *Heck* applies when habeas review is unavailable. *See Muhammad v. Close*, 540 U.S. 749, 752 (2004) (per curiam) (noting that "[m]embers of the Court have expressed the view that unavailability of habeas for other reasons may also dispense with the *Heck* requirement" but "[t]his case is no occasion to settle the issue").

The Court agrees with this second line of cases. The majority opinion in *Heck* described Justice Souter's concurring opinion in that case as "adopt[ing] the common-law principle that one cannot use the device of a civil tort action to challenge the validity of an outstanding criminal conviction, but [thinking] it necessary to abandon that principle in those cases (of which no real-life example comes to mind) involving former state prisoners who, because they are no longer in custody, cannot bring postconviction challenges." *Heck*, 512 U.S. at 490 n. 10. In response, the majority opinion firmly stated that "the principle barring collateral attacks – a longstanding and deeply rooted feature of both the common law and our own jurisprudence – is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated" and, therefore, could not bring a federal habeas claim. 512 U.S. at 490 n. 10. Thus, the Supreme Court in *Heck* considered more than the intersection of § 1983 actions with habeas relief. The majority opinion emphasized "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments" and

stated the Court's concern for "finality and consistency" in such cases, where the Court "has generally declined to expand opportunities for collateral attack." 512 U.S. at 485–86.

This Court is also attuned to the touchstone of caution that must attend any case such as this, which arguably invites a remodeling of constitutional law precedent from our Supreme Court. The Court agrees with the First Circuit, in a similar proceeding:

> We are mindful that dicta from concurring and dissenting opinions in a recently decided case, *Spencer v. Kemna*, 523 U.S. 1 . . ., may cast doubt upon the universality of *Heck's* "favorable termination" requirement. *See id.* at 19-21, 118 S.Ct. at 989 (Souter, J., concurring); *id.* at 21-23, 118 S.Ct. at 990 (Ginsburg, J., concurring); *id.* at 25 n. 8, 118 S.Ct. at 992 n. 8 (Stevens, J., dissenting). The Court, however, has admonished the lower federal courts to follow its directly applicable precedent, even if that precedent appears weakened by pronouncements in its subsequent decisions, and to leave to the Court "the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 2017, 138 L.Ed.2d 391 (1997); *see also Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). We obey this admonition.

Figueroa v. Rivera, 147 F.3d 77, 81 n. 3 (1st Cir. 1998).

Accordingly, this Court concludes that the particular nuances of Justice Souter's concurrence in *Spencer* are not directly implicated in this case, and the Court finds no exception to the *Heck* rule drawn from that decision which would require the result sought by Plaintiffs here.

E. The Ninth Circuit's holding in *Nonnette* is limited to the particular circumstances of that case, which are not found here.

Some of the circuit courts finding exceptions to the ruling in *Heck* have cited in support the case of *Nonnette v. Small*, 316 F.3d 872 (9th Cir. 2002). Plaintiffs also rely upon *Nonnette*, arguing that they were either not incarcerated or not incarcerated long enough to bring a federal habeas action and, thus, *Heck* does not apply. *See* Pls.' Resp., pp. 5-6 (Dkt. 143). The facts of *Nonnette*, however, are far different than the matter before the Court here.

In *Nonnette*, the plaintiff claimed that he had been deprived of "good time" credits which should have reduced the amount of time he spent in state custody. 316 F.3d at 874–75. Nonnette first exhausted his prison administrative remedies, as required, before seeking alternative forms of relief. *Id.* at 874, n. 1. The remedy for such "good time" deprivation is ordinarily found in a petition for writ of habeas corpus, but Nonnette could not file a habeas petition because he already had been released from custody. *Id.* at 875–76. Under those circumstances, the Ninth Circuit held that *Heck* did not bar Nonnette from maintaining a § 1983 claim.[25] *Id.* at 876.

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[25] The issue on appeal was framed as: "Does the unavailability of a remedy in habeas corpus because of mootness permit Nonnette to maintain a § 1983 action for damages, even though

However, the *Nonnette* court "emphasize[d]" that its holding "affects only former prisoners challenging loss of good-time credits, revocation of parole or similar matters." 316 F.3d at 877 n. 7. In contrast to the Plaintiffs' claims in this case, Nonnette's constitutional claim was not ripe at the time that the issue was being considered by the prison's administrative process. It was the decision that resulted in what Nonnette contended was a short-changing of his good time credits that gave rise to his § 1983 claim, not the underlying conviction that led him to prison in the first place.

A careful reading of the more recent decision in *Guerrero v. Gates*, 442 F.3d 697 (9th Cir. 2003) also limits the holding in *Nonnette* to other similar circumstances, such as former prisoners challenging loss of good-time credits, revocation of parole, or similar matters. *Guerrero* involved a former prisoner who, after his release from prison, filed a § 1983 challenge to the validity of his conviction. The Ninth Circuit ruled that *Heck* barred his § 1983 claims: "Guerrero never challenged his convictions by any means prior to filing" his § 1983 lawsuit and that "[h]is failure timely to achieve habeas relief is self-imposed." *Guerrero*, 442 F.3d at 705. "[T]hough habeas relief for Guerrero may be 'impossible as a matter of law,' we decline to extend the relaxation of *Heck's* requirements." 442 F.3d at 704–05 (comparing *Nonnette*, where the plaintiff diligently challenged administrative revocation of good-time credits, with *Cunningham v. Gates*, 312 F.3d 1148 (9th Cir. 2002), where the plaintiff failed diligently to challenge an underlying criminal

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success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits?" *Id.* at 876.

conviction).[26] The *Guerrero* court narrowly construed the holding in *Nonnette*, emphasizing that "*Nonnette* was founded on the unfairness of barring a plaintiff's potentially legitimate constitutional claims *when the individual immediately pursued relief* after the incident giving rise to those claims *and* could not seek habeas relief only because of the shortness of his prison sentence." *Guerrero*, 442 F.3d at 705 (emphases added). The court emphasized that although "Guerrero is no longer in custody and thus cannot overturn his prior convictions by means of habeas corpus does not lift *Heck's* bar" and even though exceptions to *Heck's* bar may exist for plaintiffs no longer in custody, "any such exceptions would not apply" in Guerrero's case. *Id.* at 704.

Plaintiffs' claims here are most similar to those of the plaintiff in *Guerrero*, in that they seek to challenge (and thereby invalidate) convictions and sentences that have never been invalidated, or favorably-terminated, as required by *Heck*. Their claims are not similar to those described in *Nonnette*, which are those brought by "former prisoners challenging loss of good-time credits, revocation of parole or similar matters" who have timely pursued other available relief. 316 F.3d at 877 n. 7. Unlike the plaintiff in *Nonnette*, the plaintiffs here not only made no timely prior chal-

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[26] *See also Smith v. Ulbricht*, No. CV12-00199-M-DLC, 2013 WL 589628, *1-3 (D.Mont. Feb. 14, 2013) (finding the plaintiff's request to "expunge and effectively purge any evidence an arrest ever took place or conviction entered" to be more like *Guerrero* than *Nonnette* and explaining that the plaintiff "has not timely and diligently sought appropriate relief from his prior convictions" and though habeas relief may be "impossible as a matter of law," the plaintiff was not entitled to the relaxation of *Heck's* bar).

lenge, they did not make *any* challenge to the constitutionality of the government conduct of which they now complain.

When considered under the *Guerrero* decision, decisions from other circuit courts that have applied *Heck* despite the unavailability of habeas relief, and against the majority opinion in *Heck*, this Court views the holding in *Nonnette* as limited to the particular circumstances and distinct facts of that case. Other district courts in the Ninth Circuit are of the same mind, in analogous circumstances. *See Robertson v. Qadri*, No. C 06-4624 JF, 2009 WL 150952, *3 (N.D.Cal. Jan. 21, 2009) (explaining that Robertson's circumstances are entirely different from *Nonnette* because "[t]he remedy for [Robertson's] allegedly unlawful arrest and conviction is an appropriate motion or appeal with respect to his criminal conviction" and, thus, the *Heck* doctrine barred Robertson's later § 1983 claim). *See also Ra El v. Crain*, No. ED CV 05–00174 DDP, 2008 WL 2323524, *12-13 (C.D.Cal. June 4, 2008) (describing *Nonnette* as a "narrow exception limited to plaintiffs (1) who are former prisoners challenging loss of good-time credits, revocation of parole or similar matters, . . . not collaterally challenging underlying criminal convictions, and (2) who diligently pursued 'expeditious litigation' to challenge those punishments to the extent possible" (citations and internal quotation marks omitted).[27]

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[27] This part of the district court's decision was affirmed on appeal to the Ninth Circuit, where the panel explained that: "[t]o the extent that [plaintiff] claims a denial of the Fourteenth Amendment right to production of exculpatory evidence, summary judgment was proper because a favorable decision on this claim 'would necessarily imply the invalidity of his conviction.'" *Ra El v. Crain*, No. 08–56122, 399 Fed.Appx. 180, 182, 2010 WL

F. Plaintiffs' claims for prospective declaratory relief are not claim-precluded.

Alternatively, Defendants argue that Plaintiffs' constitutional challenge to the Ordinances is claim-precluded because Plaintiffs were convicted and judgments imposed for violations of the Ordinances. *See* Defs.' Mem., p. 7 (Dkt. 141-3). The Court need not reach this issue as to the non-prospective relief sought by Plaintiffs. However, because *Heck's* bar does not apply to Plaintiffs' requests for prospective declaratory relief under the Declaratory Judgment Act, the Court will now consider whether they are barred by the doctrine of res judicata.

Res judicata (or claim preclusion) prevents parties from re-litigating causes of action which were finally decided in a previous suit. Res judicata is an affirmative defense which, this setting, operates to give preclusive effect to prior state court judgments. *See* 28 U.S.C. § 1738 (federal courts must afford full faith and credit to state judicial proceedings); *Allen v. McCurry*, 449 U.S. 90 (1980) (federal courts considering § 1983 actions must give collateral estoppel preclusive effect to state court judgments); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75 (1984). Whether a state judgment has preclusive effect in a federal action is determined by state law governing claim preclusion. *See Migra*, 465 U.S. at 83–85.

The doctrine of claim preclusion is recognized as an affirmative defense under Idaho law. Put simply, "under the principle of res judicata or claim preclusion, judgment on the merits in a prior proceeding generally bars relitigation between the same parties

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3937982, *1 (9th Cir. Oct. 5, 2010) (quoting *Heck*, 512 U.S. at 487)).

or their privies on the same cause of action." *D.A.R., Inc., v. Sheffer*, 997 P.2d 602, 605 (Idaho 2000) (citing *Yoakum v. Hartford Fire Ins.*, 923 P.2d 416 (Idaho 1996)). Claim preclusion generally bars adjudication not only on the matters offered and received to defeat the claim, but also as to matters relating to the claim *which might have been litigated in the first suit*. *Ticor Title Co. v. Stanion*, 157 P.3d 613, 620 (Idaho 2007). In asserting the affirmative defense, the Defendants have the burden of establishing all of the essential elements by a preponderance of the evidence. *Foster v. City of St. Anthony*, 841 P.2d 413, 420 (Idaho 1992).

Defendants argue that Plaintiffs' § 1983 claim is "factually premised upon the same conduct that led to Plaintiffs' misdemeanor convictions." Defs.' Mem., p. 9 (Dkt. 141-3). Defendants do not explain how Plaintiffs could have requested prospective declaratory or injunctive relief in their criminal cases. The Court recognizes that, as described in *Preiser v. Rodriguez*, 411 U.S. 475 (1975), res judicata principles apply to civil rights suits brought under § 1983. *Id.* at 497. *See also Huffman v. Pursue, Ltd.*, 420 U.S. 592, 606, n. 18; *Wolff v. McDonnell*, 418 U.S. 539, 554, n. 12. Additionally, as outlined in *Preiser,* the doctrine of res judicata has been applied to issues previously decided both in state civil proceedings, *e. g., Coogan v. Cincinnati Bar Assn*., 431 F.2d 1209, 1211 (6th Cir. 1970), and in state criminal proceedings, *e. g., Goss v. Illinois*, 312 F.2d 257, 259 (7th Cir. 1963). *See also Allen v. McCurry*, 449 U.S. 90, 103-04 (1980) ("[N]othing in the legislative history of § 1983 reveals any purpose to afford less deference to judgments in state criminal proceedings than to those in state civil proceedings."); *Webber v. Giffin*, Civil No. 07–1675–KI, 2008 WL 5122702 (D.Or. Dec. 3, 2008) (finding plaintiff barred

from pursuing claims, including constitutional violations under § 1983, where those claims could have been raised in administrative proceeding addressing plaintiff's violation of Oregon water laws).

However, even though the "[t]he transactional concept of a claim is broad," *Ticor*, 157 P.3d 613, 620 (internal quotation marks omitted), the res judicata doctrine does not stretch so far as to preclude the claim for prospective declaratory judgment relief that remains in this case. "What constitutes the same transaction must be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, *whether they form a convenient trial unit*, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Sadid v. Vailas*, 936 F.Supp.2d 1207, 1218 (D.Idaho 2013) (internal quotation marks omitted and emphasis added) (citing *Andrus*, 186 P.3d at 633 (quoting the Restatement (Second) of Judgments § 24 (1982)). Here, Plaintiffs could have raised a constitutional claim as a defense to their criminal charges. However, claims for prospective injunctive and declaratory relief – traditionally tried in a civil court -- were likely unavailable for them, and would not have formed a convenient trial or conformed to the parties' expectations about the issues involved in a criminal case.

The Court finds persuasive the decision in *Cutler v. Guyer*, No. 3:08–CV–371– BLW, 2010 WL 3735689 (D.Idaho Sept. 14, 2010), in which District Judge B. Lynn Winmill ruled that claim preclusion principles did not bar a § 1983 claim. Although brought under different circumstances, the defendants in *Cutler* sought to use both claim and issue preclusion to dis-

miss a federal civil rights action based on the plaintiff's prior state habeas corpus action. "An Idaho habeas corpus action is a unique state law cause of action based upon the Idaho Constitution and Idaho statute," Judge Winmill wrote, and while that action "may involve federal constitutional issues, there is ordinarily no right to discovery, no availability of jury trial, and no availability of a remedy other than injunctive relief." *Id.* at *10.

Plaintiffs did have a right to a jury trial in their criminal cases.[28] However, the criminal rules and procedures do not permit the extent of discovery allowed in civil cases, nor provide an avenue to join a civil counterclaim in a criminal proceeding.

In summary, res judicata and claim preclusion principles do not bridge this proceeding and the plaintiffs' individual criminal prosecutions. There is simply not a sufficient common ground between the facts and the nature of the proceedings to permit such a defense in this case. Additionally, because claim preclusion does not apply, the Court need not consider Plaintiffs' argument that Defendants waived this defense by excluding it from their Answer to the Amended Complaint.

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[28] *See* Idaho Code § 19-1902 ("Issues of fact must be tried by jury, unless a trial by jury be waived in criminal cases by the consent of both parties expressed in open court and entered in the minutes. In case of misdemeanor the jury may consist of six (6) or any number less than six (6) upon which the parties may agree in open court. There shall be no right to trial by jury for an infraction punishable only by a penalty not to exceed one hundred dollars ($100) and no imprisonment.").

G. Conclusion

On the facts of this case, the favorable termination requirement of *Heck* is a bar to Plaintiffs' § 1983 claims. However, Plaintiffs' claim for prospective injunctive and declaratory relief, to the extent that such claim seeks declaratory relief under the Declaratory Judgment Act, is not barred by *Heck*. Finally, the criminal cases and the instant case are not sufficiently identical under a claim preclusion analysis to justify application of the bar of res judicata to Plaintiffs' claims for prospective declaratory and injunctive relief.

A portion of this case remains, but most of the claims have been dismissed. In the exercise of its discretion, the Court finds that it is appropriate for case management purposes to require Plaintiffs to file a second amended complaint stating only the claim that remains. After the Amended Complaint is filed, and Defendants respond in the ordinary course, the parties shall meet and confer and submit a new stipulated litigation plan. The stipulated litigation plan is due no later than twenty days after Defendants respond to the Amended Complaint. At that time, the Court will set a telephonic case management conference.

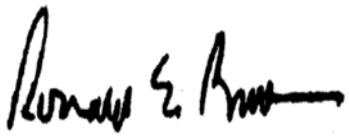
ORDER

ACCORDINGLY, IS HEREBY ORDERED that Defendants' Second Motion for Summary Judgment (Dkt. 141) is GRANTED, in part, and DENIED, in part, as set forth in more detail above.

On or before **February 25, 2014**, Plaintiffs shall file and Amended Complaint. After the Amended Complaint is filed, and Defendants respond, the par-

ties shall meet and confer and submit a new stipulated litigation scheduling plan. The stipulated litigation plan is due no later than 20 days after Defendants respond to the Amended Complaint.

DATED: January 27, 2014



Honorable Ronald E. Bush
U. S. Magistrate Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Boise, Idaho City Code, § 5-2-3: Disorderly Conduct

A. Violations: Any person who violates the provisions below is guilty of a misdemeanor:

1. Occupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle, without the permission of the owner or person entitled to possession or in control thereof; or

2. Loitering, prowling or wandering upon the private property of another, without lawful business, permission or invitation by the owner or the lawful occupants thereof; or

3. Loitering or remaining in or about school grounds or buildings, without having any reason or relationship involving custody of or responsibility for a pupil or student, school authorized functions, activities or use. (1952 Code § 6-01-05)

B. Availability Of Overnight Shelter:

1. Law enforcement officers shall not enforce subsection A of this section (disorderly conduct) when the individual is on public property and there is no available overnight shelter. The term "available overnight shelter" is a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness, at no charge. If the individual cannot utilize the overnight shelter space due to voluntary actions, such as intoxication, drug use, unruly behavior or violation of shelter rules, the

overnight shelter space shall still be considered available.

2. This section does not affect subsection 7-7A-5E or 7-7A-10A of this Code, which do not prohibit sleeping in a public park during hours of operation. (Ord. 38-14, 9-23-2014)

Boise, Idaho City Code, § 7-3A-2: Camping In Public Places

A. Prohibitions: It shall be unlawful for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time, or to cause or permit any vehicle to remain in any of said places to the detriment of public travel or convenience; or to cause or permit any livestock of any description to be herded into any of said places during any hours of the day or night; provided, that this section shall not prohibit the operation of a sidewalk cafe pursuant to a permit issued by the City Clerk. 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 any time 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).

B. Enforcement: Law enforcement officers shall not enforce this camping section when the individual

is on public property and there is no available overnight shelter. The term "available overnight shelter" is a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness, at no charge. If the individual cannot utilize the overnight shelter space due to voluntary actions, such as intoxication, drug use, unruly behavior or violation of shelter rules, the overnight shelter space shall still be considered available.

C. Exception: This section does not affect subsection 7-7A-5E or 7-7A-10A of this title, which do not prohibit sleeping in a public park during hours of operation. (Ord. 38-14, 9-23-2014)

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JANET F. BELL, BRIAN S. CARSON, CRAIG FOX, ROBERT MARTIN, LARENCE LEE SMITH, ROBERT ANDERSON, PAMELA S. HAWKES, JONATHAN LEIGH MILLER, JAMES M. GODFREY, BASIL E. HUMPHERY, AND KIRK ROSS, *Plaintiffs*, v. CITY OF BOISE; BOISE POLICE DEPARTMENT; AND MICHAEL MASTERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE, *Defendants*.	Civil Action No. 1:09-CV-00540-REB **AFFIDAVIT OF JAMES R. HALL**

James R. Hall, first duly sworn upon oath, states as follows:

1. I am employed by the City of Boise, Idaho, as Director of the Boise Parks and Recreation Department. I make this affidavit of my own personal knowledge on behalf of the named Defendants named herein.

2. I have been employed as Director of the Boise City Department of Parks and Recreation since 1991 and have knowledge of the Boise City Code and the

department's policies and procedures under which my department and its employees operate.

3. Boise City Code, Title 13, Chapter 3, Public Parks, regulates activities of the public in Boise City public parks. Acts not specifically prohibited by Title 13, Chapter 3 are presumed to be permissible activities in Boise City public parks.

4. Sleeping in a Boise City public parks during the "hours of operation," described in Section 8A of Title 13, Chapter 3, Boise City Code, is an activity not specifically prohibited by Title 13, Chapter 3. As not specifically prohibited by Title 13, Chapter 3, sleeping in a Boise City public park during the hours of operation is an activity that is an allowed use for persons within a Boise City public park. In fact, people do sleep in Boise City public parks legally – on blankets, on benches, in their cars, *et cetera* – during the hours of operation, and they cannot be prohibited from or criminally cited for doing so. This has been the case for as long as I've been the Director of the Department of Parks and Recreation.

5. The Department of Parks and Recreation maintains a number of policies and procedures, none of which prohibit sleeping in a Boise City public park during the hours of operation.

6. The following Boise City public parks are all located one mile or less from Interfaith Sanctuary, River of Life, and Corpus Christi House:

a. Julia Davis Park at 700 S. Capitol Boulevard, Boise, is 89.4 acres in size and is located .8 mile from Interfaith Sanctuary, .6 mile from River of Life, and .8 mile from Corpus Christi House.

b. Ann Morrison Park at 1000 Americana Boulevard, Boise, is 153 acres in size and is located .5 mile from Interfaith Sanctuary, .4 mile from River of Life, and .5 mile from Corpus Christi House.

c. Kathryn Albertson Park at 1001 Americana Boulevard, Boise, is 41 acres in size and is located .5 mile from Interfaith Sanctuary, .7 mile from River of Life, and .5 mile from Corpus Christi House.

d. Fairview Park at 2300 W. Idaho Street, Boise, is 2 acres in size and is located .6 mile from Interfaith Sanctuary, .8 mile from River of Life, and .6 mile from Corpus Christi House.

e. Capitol Park at 601 W. Jefferson Street, Boise, is 2 acres in size and is located one mile from Interfaith Sanctuary, .9 mile from River of Life, and one mile from Corpus Christi House.

f. McAuley Park at 1650 W. Resseguie, Boise, is .25 acres in size and is located .8 mile from Interfaith Sanctuary, one mile from River of Life, and .8 mile from Corpus Christi House.

7. Outside park hours of operation, no one is allowed to enter or remain in the Boise City public parks except for transit through the park, or as authorized by permit, or for specific department programs and activities with lighting for nighttime recreational activities. Vehicles are towed from the Boise City public parks if they remain in the park outside the hours of operation.

8. Erection of a tent for the purpose of camping is not allowed in Boise City public parks unless special permission to do so has been received from the Director. Erection of a tent for other purposes, such as shading while watching a sporting event during park hours, is allowed and requires no special permission.

9. Because of people sleeping in and committing vandalism to the Boise City public park toilet facilities, my department began installing automatic locks back in approximately 2003 to lock the public park toilet facilities at night. Doing so has significantly reduced the incidents of sleeping and vandalism occurring in those facilities. The department hopes to complete installation of automatic locks on all restrooms by 2011.

10. The Boise City public parks are not equipped with the physical features and facilities necessary to accommodate camping such as staff-monitored camp sites, dedicated trash collection systems, bathing facilities, and 24-hour toilets. Without such amenities available, people would need to urinate and defecate in areas where other park visitors were walking, playing, or resting or where wildlife, open spaces, and the Boise River would be negatively impacted by disposal of human waste. Without the physical features and facilities necessary to accommodate camping, camping in Boise City public parks and public open space areas such as the foothills and next to the Boise River poses a direct risk to health and safety of Boise City's residents and visitors who could happen upon or inadvertently discover the trash and human waste and would adversely affect wildlife, water quality, riparian areas and the natural environment.

11. The Boise Police Department's bicycle patrol officers are quick to respond to any safety needs in the

Boise City public parks. They immediately respond to reduce problems in and around the Boise City public parks. BPD takes a proactive role to deter crime and injury in the Boise City public parks, along the Greenbelt, the Boise River, and the public open space in the foothills to ensure these areas are available to the public for their intended uses.

DATED this 28th day of September, 2010.

JAMES R. HALL
Director the Boise Parks &
Recreation Department

SUBSCRIBED AND SWORN to before me this 28th day of September, 2010.

NOTARY PUBLIC for Idaho
My Commission Expires:
4-3-12

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JANET F. BELL, BRIAN S. CARSON, CRAIG FOX, ROBERT MARTIN, LARENCE LEE SMITH, ROBERT ANDERSON, PAMELA S. HAWKES, JONATHAN LEIGH MILLER, JAMES M. GODFREY, BASIL E. HUMPHERY, AND KIRK ROSS,

Plaintiffs,

v.

CITY OF BOISE; BOISE POLICE DEPARTMENT; AND MICHAEL MASTERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE,

Defendants.

Civil Action No. 1:09-CV-00540-REB

AFFIDAVIT OF SERGEANT CLAIR WALKER

SERGEANT CLAIR WALKER, first duly sworn upon oath, states as follows:

1. I make this affidavit of my own personal knowledge on behalf of the Defendants named herein.

2. I have been employed by the Boise Police Department for over 20 years. In 2000 I was promoted to sergeant. I supervised patrol teams from 2000 until March of 2009. I also was the coordinator for the field training officer (F.T.O.) program from 2000 to 2004. I was in charge of purchasing, logistics, and deployment of all marked police vehicles in the BPD fleet. I am

currently on the committee that developed and implemented the 700 MHZ radio system in Ada County. I have been the sergeant of the Bike Patrol Unit since March of 2009.

3. With respect to the Bike Unit, I supervise the unit members, and oversee law enforcement of special events in the City of Boise.

4. The Bike Unit's primary mission is the Greenbelt and the Boise City Parks. Our secondary mission is the downtown core. In those areas, our mission is prevention of violations of law, public education of what the law is, and enforcement when necessary. I task the bike unit members to do all three of these elements of service on any given day.

5. I am familiar with Boise Police Department policies, practices and customs. There has never been a policy, practice or custom of the Boise City Police Department to cite homeless persons for violations of sleeping in public when shelter was not available.

6. A true and correct copy of Boise Police Department Special Order concerning enforcement of camping and sleeping ordinances is attached as Exhibit #26. It was adopted on January 1, 2010, in order to clarify the BPD's policy in relation to shelter availability protocol.

7. The three largest homeless shelters in Boise serve various homeless populations. Interfaith Sanctuary provides shelter for single women, single men, and families. The Boise Rescue Mission (BRM) has two shelters. BRM's River of Life provides shelter to single men. BRM's City Lights provides shelter to single women and women with children.

8. It is my understanding that the homeless shelters in Boise have not concurrently reached capacity

for any one population. In other words, Sanctuary may be full for women on one night, but City Lights is not.

9. In an effort to work more closely with the shelters and to better gather information about shelter availability, in December 2009 I worked with both Jayne Sorrels, of the Interfaith Sanctuary, and Stuart Sampson, of the Boise Rescue Mission, to devise a way in which the shelter staff would communicate with BPD about the availability of shelter.

10. As part of that effort I took several steps. First, I worked to ensure that there was a manner in which the shelters could communicate to BPD when they were full. The shelters' staff voluntarily agreed to call BPD staff around 11 p.m. on each evening they were full in relation to the populations they serve.

11. The next step was to find an appropriate entity to contact in order for them to relay the information. By appropriate, the information needed to be distributed quickly and efficiently to all BPD patrol officers. We first attempted to use Ada County dispatch. Information on shelter availability was not viewed to be an emergency within Ada County dispatch's core mission and they declined. We next approached Boise State University Dispatch which has a contract with BPD for law enforcement services. They accepted the responsibility of receiving the shelter phone calls, and distributing the information via e-mail Department-wide.

12. I next worked to devise a sheet wherein BSU Dispatch could record the information as it came in from the homeless shelters. A true and correct copy of the form I devised, "Overnight Shelter Capacity Advisory", is attached as Exhibit #27.

13. Once the information is received from a shelter on any given night, that information is transferred immediately by dispatch via department e-mail so each patrol officer can see the status of shelter availability for that evening. Because the vast majority of sleeping and camping citations are written in the early morning, any officer who receives and opens this e-mail after 11 p.m. will know the availability of shelters for the following morning and day.

14. The City of Boise does not dictate to the shelters a definition of "full." The shelters' staff is able, at their discretion, to make that determination.

15. BSU dispatch periodically receives phone calls from Interfaith Sanctuary informing they are full for men, women or families. For instance, on February 3, 2010, the Sanctuary called BSU dispatch to inform of their status as full for men. BSU dispatch filled out the Advisory form, and sent an e-mail to all officers Department-wide. A true and correct copy of the February 3, 2010, Advisory form is attached as Exhibit #28. A true and correct copy of the February 3, 2010, Department-wide e-mail is attached as Exhibit #29.

16. To my knowledge, we have never received notification from the largest homeless shelter provider, Boise Rescue Mission, that they are full for men, women or women with children.

17. I am familiar with the Boise City Code and police practices as they related to arresting individuals for criminal acts.

18. As a general rule, misdemeanors cited under Boise City Code §§ 6-01-05(A) and (B), 6-17-06(G), 9-10-02, and 9-14-04(E) are not ones in which we routinely arrest.

DATED this 20 day of September, 2010.

CLAIR WALKER
Sergeant

SUBSCRIBED AND SWORN to before me this 28th day of September, 2010.

NOTARY PUBLIC for Idaho
My Commission Expires:
4-5-12

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

JANET F. BELL, BRIAN S. CARSON, CRAIG FOX, ROBERT MARTIN, LARENCE LEE SMITH, ROBERT ANDERSON, PAMELA S. HAWKES, JONATHAN LEIGH MILLER, JAMES M. GODFREY, BASIL E. HUMPHERY, AND KIRK ROSS,

Plaintiffs,

v.

CITY OF BOISE; BOISE POLICE DEPARTMENT; AND MICHAEL MASTERSON, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE,

Defendants.

Civil Action No. 1:09-CV-00540-REB

AFFIDAVIT OF SERGEANT ANDREW S. JOHNSON

OFFICER ANDREW S. JOHNSON, first duly sworn upon oath, states as follows:

1. I make this affidavit of my own personal knowledge on behalf of the Defendants named herein.

2. In July 2000 I began working for the BPD as a patrol officer. I have an Associates Degree in English from San Jose State. I hold an advanced certificate from the Idaho Peace Officers Standards and Training Academy (POST). I have over 1,500 hours of police

training and 10 years of police experience. Approximately 3 1/2 years ago I transferred to the bike unit as a patrol officer.

3. I am personally familiar with the nature of this lawsuit and am personally familiar with the events and persons about which I testify below. I am personally familiar with the Boise City Code including §§ 6-01-05(A) and (B), 6-17-06(G), 9-10-02, and 9-14-04(E), as well as other sections. The facts relating to the citations described below occurred within the city limits of Boise, Idaho.

4. The mission of the Bicycle Patrol Unit is to provide Service (Education, Prevention, Enforcement) in the areas of the Parks, Greenbelt, foothills and other areas difficult to patrol by vehicle in Boise, Idaho. The Bike Patrol Unit, together with Parks and Recreation and Greenbelt Volunteers, strives to maintain a safe, and sanitary, environment for all.

5. The bike unit patrols the parks, the greenbelt, and the foothills to keep them safe. We enforce camping ordinances in the parks, foothills and other public places, not just to keep them safe and sanitary, but also to allow users to utilize these public places as they were intended to be used.

6. I am familiar with the City of Boise's policy on camping and sleeping in public as it relates to persons who are without shelter. A person who is homeless may not be able to obtain shelter if the shelters who serve that person are full on a given night. On that night, that person would have no where to sleep but in public. When a person is in that situation, the City of Boise's policy is that the person is not in violation of the law for sleeping in public.

7. I was trained on this policy and, because as a bike officer I am very familiar with the camping and disorderly conduct ordinances, I provided training for various officers in the department.

8. Neither I, nor other officers within the police department, make the determination as to whether a particular shelter is full. I am notified by e-mail if a shelter(s) is full for a particular group(s). I do not have discretion to override that notification.

9. I have had training in mental illness, drug and alcohol abuse issues, and medical issues.

10. As for the City's parks, they are open to anyone during the day. Any person may partake in any activity which is not prohibited by parks policy during park hours. This includes sleeping during the day. This has been the park policy for as long as I have been a bike officer. It is my practice to inform individuals who I believe to be homeless that it is legal for them to sleep in a park during park hours. I also inform them that they cannot camp in public, whether in a park or elsewhere.

11. There have been occasions when I have come across a person who is lawfully sleeping in a park during the day and I have checked on them to ensure their welfare. This is commonly called a "welfare check." When it appears to me that I need to check on someone's welfare, I do wake them to ensure they do not need a medical or police assistance. My first approach is to attempt to wake the person with verbal inquiries. If I do not get a response to my verbal inquiries, I will tap the bottom of a person's foot, which usually has a shoe on, with my foot. This is the safest method of waking an individual. Once they are awake, I speak with them to see if, in my judgment,

they need help. If I determine they are not in any need of police or medical assistance, I go along my way.

12. The bike unit often gets direction or requests for assistance from the Parks and Recreation Department as it relates to use and maintenance of the parks, the Greenbelt and the foothills. The Parks Department has often communicated concerns to the bike unit about people camping in the parks overnight, sleeping in public restrooms when the parks are closed, finding a tremendous amount of garbage, and encampments (people staying in an area with sleeping bags, blankets, feces, tents, garbage, etc.). When Parks asks for assistance, it is our directive to assist them in alleviating the problems in order to keep the parks, restrooms, Greenbelt and foothills safe, sanitary and available for their intended use by the public.

JANET F. BELL AND LAWRENCE LEE SMITH

13. The City had been receiving phone call complaints about a camp and citizens concerned about the possibility that someone had been injured and in need of a welfare check at the south end of the trestle bridge east of the inbound connector. To the best of my knowledge this is Boise Parks Department property. On April 28, 2007, at approximately 3:30 p.m., I checked for the camp and to see if someone was injured. In this spot, under the bridge, I found two individuals, who identified themselves as Janet F. Bell and Lawrence Lee Smith, with a tent which was set up.

JANET F. BELL

14. In relation to Bell at the trestle bridge camp, she admitted to being there overnight. I confirmed with her that she did not need medical assistance.

She said she had been in Boise for about week from Newport, Oregon. I cited her for camping. A true and correct copy of the citation is attached as Exhibit #21.

LAWRENCE LEE SMITH

15. On April 28, 2007, the man who identified himself as Lawrence Lee Smith admitted to camping under the trestle bridge for one day. He admitted he built "a camp." When I asked him about shelters and resources, he told me, "I have job. I have money... I just don't like to pay rent." I confirmed that he did not need medical assistance. I cited him for camping. A true and correct copy of the citation is attached as Exhibit #22.

16. Smith had a $1,000 warrant out of Ada County. Normally, I would not cut someone loose on a warrant such as this, but in this case, because patrol had many calls for service that afternoon, I cut him loose on his warrant. He promised to take care of his tent, and other belongings.

17. On May 12, 2007, at approximately noon I went to check on a camp due to a citizen complaint to the police department about a person camping in the area of the Dredge Ponds just west of 31st Street and Pleasanton Street. To the best of my knowledge this is Boise Parks Department property. At this location I came across Lawrence Lee Smith who admitted he had been camping there for a week. Smith indicated he was "packing up today." At this location he had a tent set up, and a chair. He said he had been informed in the past that camping was not legal. Regarding shelters he said that the "shelters suck," and "I ain't doin' no shelters." Smith informed me he had a job. Smith promised to clean up the camping spot which had beer cans scattered about. I explained to him that

the park closes at sunset. I cited Smith for camping. A true correct copy of which is attached as Exhibit #23.

DATED this 21st day of September, 2010.

ANDREW S. JOHNSON

SUBSCRIBED AND SWORN to before me this 21st day of September, 2010.

NOTARY PUBLIC for Idaho
My Commission Expires: 4-3-12

APPENDIX H

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ROBERT MARTIN AND ROBERT ANDERSON, *Plaintiffs*, vs. CITY OF BOISE, *Defendant*.	Civil Action No. 1:09-CV-00540-REB **AFFIDAVIT OF MICHAEL CULTON**

I, MICHAEL CULTON, being first duly sworn upon oath, depose and state as follows:

1. I have personal knowledge of the testimony set forth herein and I *am* competent to testify as follows.

2. I am currently employed as a Supervisor and Analyst in the Crime Analysis Unit of the City of Boise Police Department. I have been employed with the Crime Analysis Unit since 2012 and have a total of nine years experience working in intelligence and analysis at both the federal and state level. Through my employment, I have received training and experience in crime and statistical analysis.

3. In my current position with the City of Boise's Crime Analysis Unit, I have access to and am familiar with the City of Boise's records of the citations and reports completed by Boise's police officers in the ordinary course of the City's law enforcement responsibilities. I also have access to and am familiar with the City's records regarding the publically-initiated calls for service, which are phone calls made from members

of the public to the Boise Police Department reporting a possible crime, emergency situation, or other health or safety concern. Each publically-initiated call for service requires at least one police officer with the City to respond and investigate the subject of the call. Furthermore, I am familiar the different geographical areas in Boise and the historical numbers of publically-initiated calls for service that arise from the different areas in Boise.

4. One area of the City of Boise that I have been analyzing in my position is the area in and around Rhodes Park located under the connector at 1555 W. Front Street. Rhodes Park is a public skateboard park owned and maintained by the City of Boise Department of Parks & Recreation. In 2013 and 2014, the Rhodes Park area experienced an increase in the presence of homeless individuals camping overnight in violation of Boise City Code 9-10-02. The number of homeless staying overnight at the encampment steadily grew and more and more tents, mattresses, and make-shift structures began to appear. The individuals camping at Rhodes Park began referring to the encampment as "Hobo Hangout." Homeless individuals repeatedly camped overnight in the Rhodes Park area despite their being capacity at the homeless shelters in Boise (River of Life, City Light and Interfaith Sanctuary) to provide emergency overnight shelter.

5. My review of the publically-initiated calls for service in and around the Rhodes Park area over the last five years reveals that there were significant increases in 2013 and 2014 of members of the public calling Boise Police Department to report possible crimes, emergency situations, and other health and safety concerns. There is a direct correlation between the increase in publically-initiated calls for service

and the presence of the homeless encampment at Rhodes Park. In addition to an increase in calls reporting illegal camping, drug activity, and alcohol violations, there was an alarming increase in 2013 and 2014 in the number of calls reporting homeless individuals being intoxicated in public, creating a public disturbance and in need of officer assistance (i.e. a welfare check).

6. Most alarming is that 2013 and 2014 saw a significant increase in calls reporting 'severe physical altercations, such as assaults, aggravated batteries and fights between the homeless individuals camping and congregating in the Rhodes Park area. Sadly, on October 28, 2014, a homicide occurred only several yards from the epicenter of the homeless encampment at Rhodes Park. The victim was a homeless man who had reportedly been frequenting the encampment at Rhodes Park. The suspect, Scotty Turnbull, was also homeless at the time of the homicide and Mr. Turnbull has since been charged with murder.

7. Additionally, the increase and overt centralization of the homeless encampment at Rhodes Park has also correlated in an increase in victimization of the homeless in non-violent crimes, specifically fraud. In 2014 and 2015, criminal groups like "Operation Homeless," surreptitiously recruited homeless individuals in or near the Rhodes Park encampment in order to have them engage in fraudulent transactions and contracts on behalf of the criminal group (i.e. counterfeit check cashing, cellular phone accounts). The perpetrators target vulnerable homeless individuals who they can locate more easily at centralized encampments and elicit their involvement in criminal activity that could potentially lead to felony criminal charges against the homeless person.

DATED this 28 day of April, 2015.

Michael Culton

SUBSCRIBED AND SWORN TO before me this 28th day of April, 2015.

Notary Public for the State of Idaho Residing at Ada County
My Commission Expires
01/10/19

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ROBERT MARTIN AND ROBERT ANDERSON, *Plaintiffs*, vs. CITY OF BOISE, *Defendant*.	Civil Action No. 1:09-CV-00540-REB **AFFIDAVIT OF ALLISON RAE DUMAN**

I, Allison Rae Duman, being first duly sworn upon oath, depose and state as follows:

1. I have personal knowledge of the testimony set forth herein and I am competent to testify as follows.

2. I am the Office Manager of Glancey, Rockwell, & Associates (GRA) located at 595 S. Americana Blvd, Boise, ID 83702. I have been employed at GRA for over 10 years and GRA has been at this location for more than 14 years.

3. GRA has had a significant increase in issues with homeless individuals, since the homeless encampment at Rhodes Park started forming in 2014, which have negatively affected this business and caused concern for the safety and security of our employees and customers.

4. I have called the Boise City Police approximately twenty times in the past couple of years for numerous issues relating to the homeless encampment and signed an Authorization by Owner to Eject and

Enforce Trespass Law in order to allow the Boise Police Officers to enter GRA property during non-business hours. I have witnessed drug use by homeless individuals on the perimeter of GRA property and have called the paramedics out of concern for homeless individuals that appeared to have passed out on the sidewalk in front of our business from drug or alcohol use.

5. GRA has incurred property damage and has installed a fence around a portion of the property to discourage loitering and trespass. We have found homeless individuals sleeping on our property on numerous occasions. These individuals have left debris, clothing, empty alcohol containers and drug paraphernalia on our property. Unfortunately, on numerous occasions we have also found feces, urine, and vomit on our property.

6. GRA employees no longer feel safe and will not walk anywhere in proximity to GRA property by themselves. We have also had numerous complaints from customers indicating they will no longer come to our location due to safety concerns.

7. As part of my employment I sit at the desk which is located immediately behind the front door to the business and have a view out the front into an open parking lot immediately next to Americana Blvd. There has been a significant increase in the number of homeless individuals loitering and walking along Americana Blvd. since the formation of the homeless encampment by Rhodes Park.

8. On several occasions in the past year I have witnessed numerous altercations between homeless individuals which lead to either shouting matches or

even fistfights. We have had homeless individuals enter GRA and become very belligerent and refused when asked to leave the premises. I now have to watch the activity outside our front door and, on occasion, have had to lock the front door during business hours to keep homeless individuals out of our business. We are currently looking into installing a front security door which we can lock remotely and quickly when we see questionable individuals or repeat offenders approach the building. Installation of this system will be at considerable expense to our company.

DATED this 29th day of April, 2015.

Allison Rae Duman

SUBSCRIBED AND SWORN TO before me this 29th day of April, 2015.

Notary Public or the State of Idaho Residing at Ada County
My Commission Expires 2-6-22