

No. 23-175

In the
Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,

v.

GLORIA JOHNSON, ET AL., ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

**On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit**

**BRIEF OF *AMICUS CURIAE* THE SAFETY NET
PROJECT OF THE URBAN JUSTICE CENTER
IN SUPPORT OF RESPONDENTS**

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April 3, 2024

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The Safety Net Project of the Urban Justice Center submits this brief in support of Respondents, Gloria Johnson and John Logan, on behalf of themselves and all others similarly situated.

INTEREST OF AMICUS CURIAE¹

Amicus curiae, the Safety Net Project of the Urban Justice Center (“UJC-SNP”), is one of twelve distinct projects at the Urban Justice Center, a 501(c)(3) organization. UJC-SNP has provided free legal services to thousands of low and no-income New Yorkers citywide. UJC-SNP’s services include helping tenants avoid eviction, address repairs and landlord harassment; facilitating access to crucial public benefits; and enforcing the rights of homeless New Yorkers. UJC-SNP’s homeless advocacy practice provides legal representation and social work support to homeless New Yorkers in the shelter system and on the streets.

Each year, UJC-SNP provides direct services to hundreds of homeless New Yorkers. UJC-SNP’s advocates, social workers, outreach workers, organizers and attorneys work directly with many street homeless New Yorkers to secure placements in low-barrier shelters like “safe haven” and “stabilization” beds, to address the consequences of police and other government interactions with homeless people, such as property seizure and

¹ Pursuant to SUP. CT. R. 37.6, *Amicus* certify that no counsel for any party authored this brief in whole or in part, no party or party’s counsel made a monetary contribution to fund its preparation or submission, and no person other than *Amicus* or its’ counsel made such a monetary contribution.

citations, and to access a range of public benefits and other social services. UJC-SNP also conducts impact litigation relating to homelessness, works with elected officials on draft legislation affecting homeless New Yorkers, and supports organizing in response to government actions that impact the homeless community. UJC-SNP encompasses an organized member base with lived experience of poverty and homelessness, the Safety Net Activists, who organize advocacy campaigns to address homelessness and welfare issues.

As a result, *Amicus* has a pronounced interest in the outcome of this case given the impact it will have on *Amicus*' organizational mission, work, clients, and member base.

SUMMARY OF ARGUMENT

Amicus submits this brief in support of Respondents on behalf of itself and the homeless New Yorkers that it represents.

New York State has one of the largest homeless populations in the United States. According to the U.S. Department of Housing and Urban Development ("HUD"), approximately 103,200 people were reported to be homeless in New York State as of January 2023.² This is 16% of the homeless population in the country as a whole³ and represents a 39.1% increase from the

² U.S. DEP'T OF HOUS. & URBAN DEV., *The 2023 Annual Homelessness Assessment Report (AHAR) to Congress, Part 1: Point-In-Time Estimates of Homelessness* 16 (Dec. 2023), <https://perma.cc/25X9-3U4V>.

³ *Id.*

year prior, one of the largest increases of any State.⁴ In October 2023, there were 115,516 homeless people residing in New York City’s shelter system, an additional 31,248 residents staying at migrant shelters⁵ and over 4,000 homeless New Yorkers residing in public unsheltered as of January 2023.⁶ Despite New York State’s constitutional right to shelter, shelter is unavailable to significant portions of the homeless population, which means that they have no choice but to live and survive in public space.

New York City’s regulation of street homelessness includes penalizing particular activities in public space, involuntary hospitalizations, clearing homeless encampments, and property confiscation. Not all those measures fall strictly within the purview of the Eighth Amendment; indeed, the holdings in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), cert. denied, 140 S. Ct. 674 (2019), and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), permit municipalities to enact numerous measures that regulate the use of public space by unhoused people. However, *Martin* and *Johnson* stand for the important proposition that homeless individuals should not be punished for sleeping in public with the most basic protection from the elements—when sleep is

⁴ *Id.*, 17.

⁵ Patrick Sprauser et al., *Tracking NYC’s Record-High Homeless Shelter Population*, CITY LIMITS (Dec. 7, 2023), <https://citylimits.org/2023/12/07/tracking-nycs-record-high-homeless-shelter-population/>.

⁶ N.Y.C. DEPT OF SOC. SERV., *Homeless Outreach Population Estimate: 2023 Results*, <https://perma.cc/LWB9-QEF6>.

biologically unavoidable, and they have nowhere else to go. Punishing that biologically necessary, life-sustaining conduct in public criminalizes the status of being homeless, which is prohibited by *Robinson v. California*, 370 U.S. 660 (1962), as a form of cruel and unusual punishment in violation of the Eighth Amendment.

Overturing the Ninth's Circuit's decision and upholding the ordinances at issue in this case would give municipalities nationwide *carte blanche* to adopt laws, policies, and practices that cruelly penalize homeless people for merely sleeping in public space. That would make it more difficult for unhoused individuals to overcome homelessness. And it would likely lead to domino effects of antisocial chaos extending far beyond the boundaries of Grants Pass generated by mass displacement and dispersal of entire communities from one municipality after the other. The impacts of that in New York City, with a homeless population of over 100,000 and rising, would literally be many orders of magnitude greater than in Grants Pass.

The Eighth Amendment is the primary safeguard against the criminalization of homeless people's fundamental right to survive in public space. Accordingly, it is of paramount importance that this Court upholds *Martin's* central holding and thus affirms the judgment of the Ninth Circuit in this case.

ARGUMENT

I. NEW YORK CITY HAS ONE OF THE LARGEST HOMELESS POPULATIONS IN THE UNITED STATES, INCLUDING DISTINCT GROUPS OF HOMELESS PEOPLE WHO DO NOT HAVE GUARANTEED ACCESS TO SHELTER

New York City is experiencing a catastrophic housing affordability crisis. Astoundingly, one in three New Yorkers spend more than *half* their income on rent,⁷ and evictions tripled in 2023 from the year prior.⁸ A shortage of affordable housing coupled with the rising cost of living, increased evictions, and migration of homeless individuals to the City has increased New York City's homeless population to Great Depression-era levels.⁹

In October 2023, there were a reported 115,516 homeless people residing in New York City's shelter

⁷ Oksana Mironova and Samuel Stein, *Our Fast Analysis of the 2021 New York City Housing and Vacancy Survey*, (Oct. 12, 2023), COMMUNITY SERVICE SOCIETY, <https://www.cssny.org/news/entry/our-fast-analysis-of-the-2021-new-york-city-housing-and-vacancy-survey>.

⁸ David Brand, *NYC Evictions Surged in 2023, With Legal Lockouts Nearing Pre-COVID Levels*, GOTHAMIST (Jan. 11, 2024), <https://gothamist.com/news/nyc-evictions-surged-in-2023-with-legal-lockouts-nearing-pre-covid-levels>.

⁹ COALITION FOR THE HOMELESS, *Basic Facts About Homelessness: New York City*, (Feb. 2023), <https://perma.cc/6J4E-3C6B>.

system.¹⁰ The unsheltered homeless population as of January 24, 2023, was an estimated 4,042 in New York City, according to the Homeless Outreach Population Estimate Count (“HOPE count”),¹¹ and 5,007 statewide, according to the HUD Point-in-Time Count.¹² These are likely significant undercounts given the methodological errors inherent in point-in-time counts.¹³

Jurisdictions that offer shelter, like New York City, still must contend with challenges pertaining to street homelessness and decide on an appropriate policy response. But that does not justify the implementation of cruel punitive measures. And given the reality that certain populations simply cannot access shelter in New York City, it certainly doesn’t

¹⁰ Patrick Sprauser et al., *supra* n 5, <https://citylimits.org/2023/12/07/tracking-nycs-record-high-homeless-shelter-population/>.

¹¹ N.Y.C. DEP’T OF SOC. SERV., *supra* n 6, <https://perma.cc/LWB9-QEF6>.

¹² U.S. DEP’T OF HOUS. & URBAN DEV., *supra* n 2, 17, <https://perma.cc/25X9-3U4V>.

¹³ See *Martin v. City of Boise*, 920 F.3d 584, 604 (2019). “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.” See, also, NAT’L LAW CTR ON HOMELESSNESS & POVERTY, *Don’t Count On It: How the HUD Point-in-Time Count Underestimates the Homelessness Crisis in America* (2017), <https://perma.cc/6CBS-FR3U>.

permit measures that violate individuals' constitutional rights.

A. Shelter Is Unavailable For Certain Homeless Populations In New York City

New York City operates under a series of consent decrees¹⁴ and judgments requiring it to provide shelter to anyone who asks for it.¹⁵ Notwithstanding the fact that New York City has a guaranteed right to shelter under the New York State constitution, certain populations of homeless people are systematically denied access to shelter and forced to sleep in public spaces.

i. There are Insufficient Shelter Beds for LGBTQ+ Adults, Runaway Youth and Domestic Violence Survivors so a Portion of Those Populations are Street Homeless

New York City offers shelter through a vast network of municipal shelter systems. General population shelters for single adults and adult families mostly take the form of congregate (dorm-like) settings. But New York also offers specialized shelter systems for certain homeless populations, including the LGBTQ+ community, runaway youth

¹⁴ *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. County, Cot. 18, 1979) (“*Callahan* Consent Decree”).

¹⁵ COALITION FOR THE HOMELESS, *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, <https://perma.cc/PXA8-W6DA>.

and domestic violence survivors, for whom there are a limited supply of beds.

Bed shortages in dedicated shelters for LGTBQ+ adults over the age of 24,¹⁶ homeless teens and young adults aged 16 to 24¹⁷ and domestic violence survivors¹⁸ mean that those groups consistently lack access to shelter in New York City. They cannot reside in the regular shelter system, overseen by the City's Department of Homeless Services ("DHS") due to the well-documented dangers posed by shelters designed for the general population,¹⁹ including hate crimes, abuse of minors,

¹⁶ There is only one dedicated shelter for LGBTQ+ adults over the age of 24, Marsha's House, which is located in the Bronx, has a maximum capacity of 81 beds and serves LGBTQ+ young adults up to the age of 30. See Daniel Parra, *For LGBTQIA+ Asylum Seekers, Life in NYC Brings New Freedom, and Challenges*, CITY LIMITS (Jul. 10, 2023), <https://citylimits.org/2023/07/10/for-lgbtqia-asylum-seekers-life-in-nyc-brings-new-freedom-and-challenges/>.

¹⁷ See David Brand & Daniel Parra, *NYC's Youth Shelter System Is Running Out of Space*, CITY LIMITS (Sep. 29, 2022), <https://citylimits.org/2022/09/29/nycs-youth-shelter-system-is-running-out-of-space/>.

¹⁸ See David Brand, *Hundreds of Families Forced from Domestic Violence Shelters into Strained DHS System Each Year*, CITY LIMITS (Sep. 7, 2022), <https://citylimits.org/2022/09/07/hundreds-of-families-forced-from-domestic-violence-shelters-into-strained-dhs-system-each-year/>. There is a statutory 180-day cap on stays in domestic violence shelters under State law.

¹⁹ See, e.g., Andy Newman, *Suing New York, Over and Over, for Transgender Rights*, N.Y. TIMES (Jul. 3, 2022), <https://www.nytimes.com/2022/07/03/nyregion/transgender-rights-homeless-new-york-lawsuit.html>.

and the risk for domestic violence survivors that their abusers will track them down. With no viable alternatives, they are relegated to sleeping in the street.

ii. Migrants Who Arrived in the United States Within the Last Two Years Do Not Have a Right to Shelter in New York City Which Results in Many Being Street Homeless

Pursuant to official municipal policy, thousands of newly arrived migrants to New York City are being denied access to shelter and are street homeless as a result.²⁰ Over 178,600 migrants arrived in New York City since the spring of 2022,²¹ and 126,000 were reported to have moved through the shelter system

²⁰ See Luis Ferre-Sadurni, *New York City to Impose Stricter Limits on Migrant Adults in Shelters*, N.Y. TIMES (Mar. 15, 2024), <https://www.nytimes.com/2024/03/15/nyregion/nyc-right-to-shelter-homeless-migrants.html>; Luis Ferre-Sadurni, *As Winter Approaches, Fears Grow For Homeless Migrants*, N.Y. TIMES (Dec. 4, 2023), <https://www.nytimes.com/2023/12/04/nyregion/nyc-migrant-crisis-cold.html>; Gwynne Hogan, *New York's 'Right to Shelter' No Longer Exists for Thousands of Migrants*, THE CITY (Dec. 18, 2023), <https://www.thecity.nyc/2023/12/18/nyc-right-to-shelter-no-longer-exists/>.

²¹ Jay Bulger & Paula Aceves, *In Line at St. Brigid. The City's Campaign to Push Migrants Out Has Turned Their Lives into an Interminable Loop*, CURBED (Feb. 26, 2024), <https://www.curbed.com/article/nyc-migrants-shelter-stories-st-brigid-church-reticketing.html>.

between the spring of 2022 and October 2023.²² The City therefore directed migrants away from the DHS shelter system to temporary emergency shelters called Humanitarian Emergency Response and Relief Centers (“HERRCs”)²³ and self-reported that it did not have the resources to shelter the migrant population. The City sought to be relieved of its shelter obligations in Court in the ongoing case of *Callahan v. Carey*, No. 79-42582 (Sup. Ct. N.Y. County, Oct. 18, 1979),²⁴ resulting in a settlement on March 15, 2024, that guarantees shelter to single adult asylum seekers for only thirty days (or sixty days in the case of individuals under the age of 23).²⁵ People with disabilities or those who can show “extenuating circumstances” may be able to extend their stay, but the remainder will be evicted into street homelessness

²² Armando Garcia, *NYC to Limit Shelter Stay for Asylum-Seekers With Children*, ABC NEWS (Oct. 17, 2023, 2:20 PM), <https://abcnews.go.com/US/nyc-limit-shelter-stay-asylum-seekers-children/story?id=104037716>.

²³ See Teddy Grant, *NYC Opening Humanitarian Relief Centers For Asylum-Seekers, Mayor Announces*, ABC NEWS (Sep. 22, 2023, 5:43 PM), <https://abcnews.go.com/US/nyc-opening-humanitarian-relief-centers-asylum-seekers-mayor/story?id=90339087>.

²⁴ See Emma G. Fitzsimmons, *New York City Moves to Suspend Right-to-Shelter Mandate*, N.Y. TIMES (Oct. 4, 2023), <https://www.nytimes.com/2023/10/04/nyregion/eric-adams-right-to-shelter-migrant-crisis.html>.

²⁵ See Anthony Izaguirre & Cedar Attanasio, *New York City Won't Offer 'Right to Shelter' to Some Immigrants After 30 Days in Deal with Advocates*, ASSOC. PRESS (Mar. 15, 2024), <https://apnews.com/article/nyc-immigrants-homeless-shelter-143790a69f6d81be262f8ecdffe28910>; Luis Ferre-Sadurni, *supra* n 20, <https://www.nytimes.com/2024/03/15/nyregion/nyc-right-to-shelter-homeless-migrants.html>.

after their thirty- or sixty-day stays expire.²⁶ Even prior to that, thousands of migrants were street homeless for days or even weeks while awaiting shelter placements.²⁷ New York City therefore has, and will have for the foreseeable future, a population of thousands of street homeless migrants.

II. NEW YORK CITY CURRENTLY REGULATES STREET HOMELESSNESS WITHOUT MAKING IT STRICTLY UNLAWFUL FOR THE HOMELESS TO MERELY SLEEP OUTDOORS WITH WINTER CLOTHING AND BEDDING

New York City currently uses various legal tools to regulate homeless people in public space. While many of the measures deployed by New York City do not necessarily implicate the specific constitutional issues raised by *Martin* and the instant case, they illustrate how municipalities regulate street homelessness in a way that, regardless of its public policy merits and without commenting on its compliance with the Bill of Rights more broadly, is arguably constitutionally consistent with the narrow holding at stake in this case.²⁸

²⁶ *Id.*

²⁷ See Jay Bulger & Paula Aceves, *supra* n 21, <https://www.curbed.com/article/nyc-migrants-shelter-stories-st-brigid-church-reticketing.html>. See, also, Gwynne Hogan, *supra* n 20, <https://www.thecity.nyc/2023/12/18/nyc-right-to-shelter-no-longer-exists/>.

²⁸ While there are many parallels with respect to the way that street homelessness is regulated across different jurisdictions,

The ordinances and regulations that impose restrictions on the use of public space by homeless people include:

1. Ordinances that make it an offense to camp in a park or erect a tent without a permit,²⁹ prohibit lying down on a park bench or other sitting area in a way that interferes with its use by other persons,³⁰ and prohibitions on being in a park between the hours of 1am and 6am.³¹
2. Obstructing traffic and creating a “hazardous or physically offensive condition” can both be punished as disorderly conduct;³²
3. Enforcement of criminal trespass laws that apply to fenced or enclosed areas;³³
4. A provision of the Sanitation Code that makes it unlawful to leave any “box, barrel, bale of merchandise or other movable property” in a public place or erect “any shed, building or other obstruction,”³⁴ which has been enforced against

Amicus notes that, to date, the Second Circuit has not yet scrutinized the constitutionality of each and every regulatory measure adopted in New York City, and the specific enforcement and impact of such measures.

²⁹ Rules of the City of New York, tit. 56, ch. 1 (“56 R.C.N.Y.”), § 1-04(p).

³⁰ 56 R.C.N.Y. § 1-04(o).

³¹ 56 R.C.N.Y. § 1-03(a).

³² N.Y. PENAL LAW § 240.20.

³³ N.Y. PENAL LAW § 140.10.

³⁴ N.Y.C. ADMIN. CODE, tit. 16, ch. 1, § 16-122.

street homeless people for sleeping with items that afford protection against the elements, including a cardboard box, and for obstructing the sidewalk;³⁵

5. On public transportation, it is a rule of conduct violation to stretch out or lie down,³⁶ and to “sleep or doze”³⁷ or use more than one seat if doing so interferes with the operation of the transit system or comfort of other passengers;³⁸
6. It is also a rule of conduct violation to take wheeled carts of over thirty inches long and wide into the subway system³⁹ and engage in “nontransit uses” of the subway system,⁴⁰ including by remaining in the fare zone for more than an hour.⁴¹

³⁵ See, e.g., *Betancourt v. Bloomberg*, 448 F.3d 547 (2d Cir. 2006).

³⁶ N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.7(j).

³⁷ N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.7(c).

³⁸ N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.7(j). In February 2022, Mayor Eric Adams announced the launch of the Subway Safety Plan (“SSP”), an initiative designed to intensify interactions between law enforcement and homeless individuals in the subway. A major component of the SSP is the aggressive enforcement of rule of conduct violations against homeless people in subway cars and on platforms.

³⁹ N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.9(g).

⁴⁰ N.Y. COMP. CODES R. & REGS., tit. 21, § 1050.6(c).

⁴¹ In April 2020, the Metropolitan Transportation Authority, New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority adopted these rules on emergency basis (and subsequently made permanent in September 2020.) In

In addition to the imposition of civil and criminal penalties, the City regulates the use of public space by homeless people through other measures, such as homeless “sweeps,” which are an inter-agency initiative to dismantle and dispose of homeless encampments,⁴² involuntary removals and hospitalizations of homeless people under Article 9 of the Mental Hygiene Law,⁴³ and “move along” orders issued by New York City Police Department (“NYPD”)

the lead up to adopting these rules, an MTA taskforce released a report detailing recommendations for addressing homelessness in the subway, which included publicizing rules of conduct and proposed changes to the rules. MTA officials also made numerous public statements about the steps it was taking to curb homelessness in the subway prior to adopting the rules.

⁴² See, e.g., Emma Whitford, ‘Policy Failure’: Audit Finds 3 Housing Placements From Months of Street Homeless Sweeps, CITY LIMITS (Jun. 28, 2023), <https://citylimits.org/2023/06/28/policy-failure-audit-finds-3-housing-placements-from-months-of-street-homeless-sweeps/>; Chau Lam, Mayor Adams’ Homeless Encampment Sweeps Result in Just 115 People Entering NYC Shelters, GOTHAMIST (Nov. 30, 2022), <https://gothamist.com/news/mayor-adams-homeless-encampment-sweeps-result-in-just-115-people-entering-nyc-shelters>.

⁴³ N.Y. MENTAL HYGIENE LAW, ch. 27, tit. B, art. 9, §§ 9.41, 9.58. In November 2022, the City adopted a policy of utilizing this law to involuntarily hospitalize homeless people who cannot meet their “basic human needs.” See OFFICE OF THE MAYOR, *Mental Health Involuntary Removals* (Nov. 2022), <https://perma.cc/A8BK-TP2E>.

officers to street homeless New Yorkers in public space.⁴⁴

This complex matrix of laws, policies, and practices result in a system whereby street homeless New Yorkers' use of public space is regulated by the government and those regulations are predominantly implemented by law enforcement officers. The interpretation of the Eighth Amendment adopted by the Ninth Circuit in *Martin* and the instant case, offers a crucial bulwark against the most pernicious forms of homelessness regulation – prohibiting laws and regulations that would punish sleeping in public with the bare minimum to survive. But it affords municipalities a great deal of latitude in determining their legislative and regulatory responses to homelessness. To the extent that other municipalities do not regulate street homelessness, this is because they have made a policy choice not to do so and not because the *Martin* line of cases precludes government action.

Consistent with *Martin* and the Ninth Circuit's holding in this case, New York City recognizes that

⁴⁴ In 2016, Picture the Homeless, a homeless-led organizing and advocacy group, filed a complaint with the New York City Human Rights Commission regarding the use of “move along” orders by the NYPD to disperse homeless people present in public spaces who weren't breaking any laws. See Dan Rosenblum, *Civil Liberties and Homeless Advocates Challenge NYPD Over “Move Along” Orders*, CITY & STATE N.Y. (Jul. 21, 2016), <https://www.cityandstateny.com/politics/2016/07/civil-liberties-and-homeless-advocates-challenge-nypd-over-move-along-orders/180369/>.

there is a basic right to sleep outside.⁴⁵ In fact, it is required under city law that homeless residents in DHS shelters be provided with a Bill of Rights. This Bill of Rights document has statutorily prescribed content, which includes informing the person that they have the right to sleep outdoors in public space.⁴⁶ Despite all the ways in which New York City regulates homeless people in public space, it has not passed laws that offend modern, and founding, standards of decency by criminalizing sleeping in public.

The Second Circuit has not squarely addressed the arguments advanced in *Martin* and subsequent cases, including the case at issue. But if this Court rules in favor of Petitioner here, two nationwide consequences will likely follow. On the one hand, it will push localities onto a slippery slope of ordinances making it a crime for homeless people to survive in public space, including in New York City, Los Angeles, and San Francisco where the street homeless population is tremendously greater than in Grants Pass, Oregon. That could result in massive displacement of homeless populations from those large cities and ensuing social chaos outside of them. On the other hand, reversing *Johnson* could push homeless populations out of small municipalities like Grants Pass and into large urban centers and small towns where sleeping or resting in public spaces

⁴⁵ This is subject to different laws and regulations, including those set out above.

⁴⁶ See *NYC Enacts 'Homeless Bill of Rights' But Doubts Arise Over Key Provisions Such As Right to Shelter*, ASSOC. PRESS (May 30, 2023, 5:36 PM), <https://apnews.com/article/homeless-bill-of-rights-shelter-nyc-edb0e8bbaa59497d3b1538f44e163767>.

remains lawful, imposing unmanageable resource burdens on the cities and towns to which homeless people are forced to relocate. The Court should consider the potential nationwide consequences of overturning *Martin* and *Johnson*.

III. PUNISHING HOMELESS PEOPLE FOR SLEEPING IN PUBLIC WHEN THEY HAVE NOWHERE ELSE TO GO PUNISHES HOMELESSNESS AS A STATUS, WHICH IS CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE EIGHTH AMENDMENT

To impose a civil or criminal penalty on a homeless person who has no access to shelter for conduct that is a life-sustaining biological aspect of being human criminalizes the status of homelessness.

In *Robinson*, the Court struck down a statute criminalizing the status of narcotic addiction as form of cruel and unusual punishment under the Eighth Amendment. Six years later, every justice in *Powell v. Texas*, 392 U.S. 514 (1968), endorsed *Robinson*'s central holding that the punishment of an involuntary status amounted to cruel and unusual punishment. The majority ultimately rejected the application of the *Robinson* principle to the enforcement of a statute criminalizing public intoxication to convict a defendant who suffered from alcoholism. *Powell*, 392 U.S. 514, 532-37. Unlike in *Powell*, however, the Grants Pass ordinances do not implicate potentially harmful compulsive conduct arising from a status. Here, the conduct in question – sleeping – is both innocuous and a basic biological necessity. Sleeping or

resting in public is so intertwined with being homeless that it falls squarely within the prohibition on status offenses arising from *Robinson*. To criminalize homelessness would fall afoul of the principle in *Robinson*; to do so indirectly by making it unlawful for homeless people to sleep outside with sufficient bedding to prevent hypothermia and resulting death, would permit a workaround that the *Robinson* court could not possibly have intended.

Prohibiting basic, biologically necessary survival activities carried out in public, i.e., sleeping with sufficient bedding to prevent hypothermia and death, has the effect of prohibiting homeless people who cannot practically access shelter from residing in the jurisdiction. Municipalities tolerate many different uses of public space, such as parked vehicles along the side of the street, public performances, and outdoor dining sheds. Housed residents are not typically approached by law enforcement and directed to disperse because they are picnicking, or even napping, in the park. Ordinances like the one at issue in this case, although generally applicable on their face, are concerned only with the use of public space by homeless residents. The goal in this case (as explicitly stated by Petitioner's officers) and the only logical result of such laws is to banish homeless people from the town or city limits, which is not a legitimate penological purpose.

New York City takes many steps to regulate public street homelessness, however, it has not banned outright the mere act of sleeping outside with minimal protections from the weather and thus has not inflicted this level of cruel and unusual

punishment on its homeless residents. If the Court were to overturn *Martin* and the Ninth Circuit's decision in this case, it would allow municipalities around the country, including New York City, to sanction homeless individuals for engaging in a biologically necessary, life-sustaining activity that is inseparable from their status as homeless people. Where shelter is not practicably available, *Amicus'* homeless clients report having no choice but to sleep on the sidewalk or in parks with the most rudimentary protections against the elements.

Nigel Jagmohan, who became homeless after his wife died and he lost his housing subsidy, sleeps on the sidewalk using sleeping bags or blankets gifted to him by his housed neighbors when he cannot access shelter. Another homeless New Yorker, VF,⁴⁷ sleeps on flat sheets of cardboard on a New York City streetcorner using blankets and other bedding to avoid freezing to death. While street homeless, James Doukas and his partner slept in a well-lit New York City park with little foot traffic, where they felt safe and out of the way. They too relied initially on flat sheets of cardboard in lieu of a mattress and blankets to protect themselves from the elements. Darren Laverpool, who was street homeless for roughly eighteen months, “survived by keeping myself warm in the wintertime. I’d stay in the train stations or outside just covered up and kept warm” using “covers and blankets” because “this is what I had to do to

⁴⁷ VF declined to use his full name in this brief for fear of retaliation.

survive. I needed to survive.” As Stevie,⁴⁸ a street homeless New Yorker, explained, sleep is a “human need,” and homeless people with no access to shelter have no choice but to sleep in public spaces.

To inflict punishment of any kind on homeless people who have no access to shelter, for sleeping outside using the bare minimum to survive is cruel and unusual and abhorrent by both founding-era and modern standards of decency. It is akin to punishing someone for the “crime’ of having a common cold.” *Robinson*, 370 U.S., at 667, 82 S.Ct., at 1421. Fining homeless people “because they can’t pay their bills, they have nowhere else to go” is “inhumane”, explained Mr. Doukas. “If you’re not capable of renting a room and you have to live on the street, then you’re not capable of paying a fine either,” Mr. Doukas stated. Stevie also held the view that fines and “going to court for not having a place is another form of inhumane treatment.”

Mr. Laverpool stated that laws prohibiting the mere act of sleeping in public spaces:

[W]ould really hurt me, mentally and physically because one, I wouldn’t have anywhere to go, right? And two, what would I do? I would be in prison because I’m homeless with no money.... What can I do? It’s nothing I could do unless they have a residence for me. I couldn’t do

⁴⁸ Stevie declined to use his full name in this brief for fear of retaliation.

anything but deal with what they're doing.

Not only are the Grants Pass ordinances cruel and unusual because they punish a totally innocuous biological function, and therefore criminalize homelessness as a status, but they make homelessness increasingly difficult to transcend—a particularly perverse outcome. “It’s hard enough dealing with everyday life on the street... to be persecuted for it as well is really psychologically damaging,” Mr. Doukas stated. He explained that chronic street homelessness causes him to feel “less than. I was a product of bad circumstances, but it seems like I can’t get out of the situation.”

The Eighth Amendment supports a very basic right of homeless individuals to exist in public space without fear of criminal punishment. Municipalities already have a robust toolbox they can draw from to address homelessness and that would not be diminished by a ruling against Petitioner in this case. The extent to which cities like New York City can enact an array of measures regulating public conduct engaged in by homeless people, militates very strongly against allowing laws that punish homeless people for simply existing in public space, which necessarily entails engaging in innocuous biological functions like sleeping.

The Court should reject the claims of Petitioner and its *Amici* that the Ninth Circuit has supplanted the role of the legislature in privileging a particular policy response to homelessness i.e., the provision of shelter and Housing First policies. The crux of the

Ninth Circuit’s ruling is that laws making it unlawful for homeless people to sleep in public where there is no viable alternative violate the Eighth Amendment. It is Petitioner and its supporters that are asking the Court to prioritize a different political response to homelessness, i.e., criminalization.

The problem with Petitioner’s argument is that its preferred policy response to street homelessness cannot be implemented without violating homeless people’s constitutional rights. While municipalities have the right to take steps to protect public health and safety, it is the Court’s duty to “judge the constitutionality of police behavior, *not* its effectiveness as a law enforcement tool.” *Floyd v. City of New York*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013). We cannot live in a society that privileges municipal efficiency over constitutional rights. Ultimately, if municipalities cannot implement laws and policies to address public health and safety concerns in a way that doesn’t violate the Bill of Rights, they must seek out an alternative.

IV. THE IMPOSITION OF CIVIL AND CRIMINAL PENALTIES MAKES CHRONIC HOMELESSNESS MORE INTRACTABLE

If the Court allows Grants Pass to enforce the ordinances at issue, it will necessarily result in (a) the imposition of fines and potential jail time on homeless individuals; (b) an increase in interactions between homeless people and law enforcement; and (c) the dispersal and displacement of homeless populations. Those all have grave consequences for homeless people, including adversely impacting their ability to

advance out of homelessness, which highlights both the cruelty inflicted by such laws and their deficiencies as a policy response to homelessness.

Homeless New Yorkers' experiences with regulatory measures used by the City of New York, whether consistent with the Eighth Amendment or not, offer important insights into how the shared consequences of criminalization exacerbate chronic homelessness as a matter of public policy.

A. Fines And Jail Time Cause Homeless People To Move Away From Housing As An End Goal

No reliable research shows that punitive laws help people escape the cycle of homelessness, but ample evidence suggests they exacerbate and entrench chronic homelessness.⁴⁹ Because homeless people cannot afford fines for routine so-called “quality of life offenses,” they often end up in jail. That affects their eligibility for housing, which in turn makes it difficult to obtain employment, and impacts receipt of critical public assistance benefits. Having a criminal record can impede access to federally subsidized housing and inhibit job searches where employers run criminal background checks.⁵⁰ Homeless people with disabilities may have their social security benefits,

⁴⁹ Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Oct. 26, 2022), <https://perma.cc/5CES-M62Q>.

⁵⁰ NAT'L LAW CTR ON HOMELESSNESS & POVERTY, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* 36-37 (2018), <https://perma.cc/A397-XLLF>.

often their sole income, suspended or even terminated while they are incarcerated.⁵¹ Inability to pay fines impairs homeless people's credit, creating more deleterious financial effects.

According to the U.S. Interagency Council on Homelessness, laws that deploy “out of sight, out mind” policies can lead to:

[L]ost belongings and identification which can set people back in their pathway to housing; breakdowns in connection with outreach teams, health care facilities, and housing providers; increased interactions with the criminal justice system; and significant traumatization – all of which can set people back in their pathway to housing and disrupt the work of ending homelessness.⁵²

In New York City—where there is already an overburdened shelter system, a homeless population of over 100,000, and over 4,000 street homeless individuals—the consequences of fining and subsequently jailing homeless people for sleeping outside would be catastrophic.

The more governments target homeless populations using criminal penalties like fines and jail time, the more unachievable exiting homelessness

⁵¹ *Id.*, 37.

⁵² U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *All In: The Federal Strategic Plan to Prevent and End Homelessness* 20 (Dec. 2022), <https://perma.cc/XR88-27QS>.

becomes. Eduardo Ventura, aged 36, has been homeless for most of his life. He currently resides in a low-barrier shelter placement known as a “safe haven” bed, which he secured through the help of UJC-SNP advocates but was previously street homeless. The City has never assisted him in applying for an apartment of his own. Mr. Ventura stated, “I’m not getting the help I need to get ID, voucher or Section 8, nothing.” Instead, the City has repeatedly swept, fined, and arrested Mr. Ventura for sleeping on the street, in parks and in the subway system. The City disposed of Mr. Ventura’s green card and New York State identification card during one such sweep and he has been unable to obtain replacement forms of identification ever since, which affects his ability to apply for permanent housing and seek out employment. When asked about the impact that fines and penalties had on him as a street homeless person, Mr. Ventura responded “it’s not helping the problem. It’s just taking the little bit of money I get from the government. I get arrested and fined then I’m back on the street again and again.”

Civil and criminal penalties do not bridge the gap between people living unsheltered on the street and permanent housing. The experience of many homeless New Yorkers who are *Amicus*’ clients and members is that they only widen that gap. David Ludemann, who became street homeless after relocating to New York, has received multiple fines for activities stemming from being a homeless person in public space. When Mr. Ludemann first became street homeless, he was arrested and charged with criminal trespass for sleeping in a fenced area under a highway

to be closer to his place of employment. He spent three months in prison awaiting trial, during which time he lost his job and fell out of communication with his family. He was also forced to abandon a permanent housing application that he had been trying to progress.

Grants Pass' political "solution" to homelessness that only makes the issue *more* intractable is not only unconstitutional, it is a counter-intuitive approach that is bad policy. Allowing jurisdictions to explicitly criminalize sleeping in public spaces with basic survival belongings, unregulated by the Eighth Amendment, would exacerbate the disconnect between homeless people and the resources they need to exit street homelessness. For Mr. Jagmohan, who has been street homeless for the better part of seven years, the risk that his inability to pay regular fines could result in jail times means that he would miss important appointments, like substance-use counseling and mental health treatment, which are critical to his well-being and services that he requires to stabilize his life.

Discussing the impacts that issuing fines to homeless people for sleeping outside would have on the homeless population, Stevie stated that it would be "financially devastating. Money that you don't have would be taken from you and you going to court for not having a place [to live] is another form of inhumane treatment." It would not only have direct financial consequences but would impede his "pursuit of getting a job and housing." Stevie also stated:

It's not going to benefit nobody. You're taking food out of their mouths. It's endless the amount of damage it could cause. I think that's the idea of it. A form of punishment for the situation. Some people believe you have to motivate people to get out of this situation, to motivate people out of the situation by being arrested.

Due to the sheer volume of interactions that street homeless New Yorkers like VF have with authorities, the enforcement of Grants Pass-like ordinances would result in the accumulation of fines that they cannot pay. "I would remain in jail because I can't afford the fines... that's not fair," VF stated. Despite doing everything he can to keep his sleeping site clean and be respectful to his housed neighbors, VF experiences a high level of police scrutiny for his presence in the neighborhood. He does not know what he would do if his mere presence there were to become a punishable offense.

Neil Amitabh, who is 39 and has been homeless on and off for twenty-eight years, has been "ticketed, arrested and locked up so many times just for [activities related to] trying to find a warm place to sleep." He stated, "I don't know what I would do," if law enforcement could punish him for simply sleeping with minimal bedding in public. "You might as well just lock me up now."

B. Increasing Police Interaction With Homeless Individuals Further Impedes Their Quest For Permanent Housing

Many municipalities frequently rely on law enforcement action in lieu of conducting actual homeless outreach. Treating homeless outreach as a police function leads to a breakdown in trust between homeless individuals and government services providers. It makes homeless people more likely to reject services, engenders hostility toward City representatives and often disrupts whatever progress homeless people have made toward securing permanent housing.

Police officers are poorly equipped to interact with people experiencing homelessness as they lack the requisite training and skillset to respond to the complex issues that homeless people may be experiencing, and the necessary responses are just not part of their role. Stevie explained that “most cops are very aggressive – too aggressive” in situations involving homeless people sleeping on public sidewalks. Stevie is “endlessly” and “continuously harassed” by police officers whenever he has to sleep outside, despite carefully selecting locations that are out of the way and do not disrupt passersby. “It just causes a great deal of aggravation because [sleep is] a human need,” Stevie explained.

James Doukas has been homeless for over two years. He became street homeless after he was evicted from an apartment that he and his partner were subletting. Unbeknownst to Mr. Doukas, the lessee was not paying their portion of their rent. As a result,

the landlord started eviction proceedings and Mr. Doukas and his partner were ousted from the apartment and onto the street. Mr. Doukas spent roughly seven months on the street, during which time he was repeatedly threatened by police officers with arrest for residing in a public park. He explained that the police would “get mad because I would go right back to the same place and I would tell them ‘where do you want me to go?... you woke me up and threatened to arrest me because I had nowhere else to go.’” Mr. Doukas wanted a shelter placement where he could reside with his partner but the City refused to offer them a placement together. Instead, police officers would wake them up early in the morning and “get really aggravated” about the fact that they were residing in public.

The tools that police officers have to respond to street homelessness are limited to law enforcement, i.e., arrest and summons, or forced hospitalization. The involvement of police officers, who are not trained mental health professionals, in involuntarily hospitalizing street homeless people raises serious civil rights concerns. Police officers are instructed to take into account indicia of poverty and homelessness i.e., a lack of warm clothing, as an indication that someone is unable to meet their “basic human needs” and requires involuntary hospitalization.⁵³

⁵³ NYPD training material regarding the November 2022 involuntary removals directive obtained by *Amicus* through a Freedom of Information Law (“FOIL”) request list “no shoes”, “malnourishment” and “exposed skin during cold weather alert” as “examples of signs an individual cannot care for self” and should be involuntarily hospitalized.

Perversely, compliance with a Grants Pass-type ordinance in New York City and sleeping outside without protective covering, would lead to involuntary hospitalization.

Using law enforcement to impose civil and criminal penalties instead of providing services to homeless people leads to fraught consequences, including the enforcement of generally applicable laws and regulations to engage in bias-based profiling against homeless people. New York City has focused its efforts on policing homelessness in the subway system, where homeless individuals are forced to seek shelter during the colder months. Homeless New Yorkers have received fines from police officers for stretching out or occupying more than one seat with their belongings despite not actually being in violation of the rules of conduct.⁵⁴ VF was recently arrested by the police after seeking shelter in the subway system as part of a broader effort to arrest and eject homeless people from trains and platforms.⁵⁵ The arresting

⁵⁴ *Amicus* represented a disabled street homeless client in a hearing before the Transit Adjudication Bureau after receiving a notice of violation and being fined \$50 for occupying more than one seat with their bag in a practically empty subway car. The notice of violation was dismissed after body camera footage revealed that there were plenty of open seats on the train and the client was therefore not interfering with the comfort of other passengers by placing their bag on the seat.

⁵⁵ Data collected by the NYPD Transit Bureau and obtained by *Amicus* through a FOIL request shows that teams deployed pursuant to the SSP routinely eject thousands of New Yorkers, many of whom are likely homeless, from the subway each year, ostensibly for rule of conduct violations. Through September

officer informed him that the basis for his arrest was that he was obstructing a passageway, despite the fact that he had situated himself in a way that did not block pedestrian traffic.

Darren Laverpool, who has been actively seeking permanent housing, described the impact his interactions with law enforcement had on his housing search:

They would come, start extracting my stuff and tell me to ‘move, leave, go somewhere else.’ Next time they see me here they’re going to arrest me. They extracted a lot of my paperwork. Now I have to go back around the wheel and get all that stuff again. [They took] several CityFHEPS shopping letters,⁵⁶ my social security card, a whole bunch of stuff. Without that, I can’t do nothing. By them taking all that information, I have to go get that same information all over again. That hinders me from getting in [to housing] immediately.

The enforcement of Grants Pass-like ordinances by police officers in a City like New York would invariably counteract any benefits that homeless outreach could potentially offer, including causing

2023, End of Line teams, who perform homeless outreach at end of line stations, reported 24,417 contacts with homeless riders and 12,655 ejections. UJC-SNP homeless clients have reported being repeatedly ejected from the subway system.

⁵⁶ CityFHEPS is the primary housing subsidy available to homeless New Yorkers to obtain permanent housing.

serious setbacks for homeless individuals in their search for permanent housing. “A lot of people don’t have the psychological capability of maintaining a positive mindset and being motivated to continue something [like I did],” Mr. Doukas explained.

Intensifying homeless people’s interactions with the police also has significant consequences for homeless individuals’ emotional, psychological, and physical well-being. Of being woken up by law enforcement early in the morning, Mr. Laverpool stated “it’s hard because now I have to sleep with one eye open and one eye closed worrying about law enforcement coming to bother me. Can’t sleep when you worry.” Mr. Doukas described his repeated interactions with law enforcement as “really psychologically damaging.” Mr. Ludemann, who was jailed for criminal trespass, shared this sentiment, stating, “when I first came to New York, I thought I was a good person. When they threw me in jail, I started to think I was a bad person.”

C. The Enforcement Of Punitive Laws To Address Homelessness Doesn’t Deter People From Being Street Homeless, It Simply Pushes Homeless People From One Place To Another

An inevitable outcome of punishing street homeless people for sleeping outside through fines and arrest is mass dispersal. After being threatened with arrest by the police, Mr. Laverpool would “get on the train and take a ride a few stops... there would be nowhere else to go and they would force me to get on the train.” To avoid being sanctioned, Mr. Ventura,

stated that he would have to “keep moving from one [street] corner to another.” Mr. Jagmohan stated that he would have to “stay away from people, places and things” altogether to not be penalized, something that would be incredibly challenging when he has nowhere else to sleep but the streets.

Shuffling people from one place to another makes it even harder to connect street homeless individuals with the services they need. It impedes service providers’ abilities to maintain relationships and stands in the way of homeless people building the support networks they need to stabilize their lives. VF explained how being consistently displaced from his site through the threat of fines or arrest has impacted his ability to access a shelter placement. Establishing long-term street homelessness is part of the eligibility criteria for entering a low-barrier shelter, which requires that outreach workers contracted by the City visit him several times in the same location. Because he is perpetually moving from place to place, outreach workers cannot find him, and they must start the entire process from scratch.

Ordinances that prohibit sleeping and resting in public not only make it more challenging for homeless individuals to access permanent housing and other services, but they do not actually deter people from living unsheltered in public places. Simply put, people must reside *somewhere*. When they have no other option but to remain in public, they will find another street corner, park, or other public place to reside.

Allowing municipalities to implement ordinances that criminalize the existence of homeless people in public spaces, unfettered and unchecked, will inevitably lead to mass displacement of homeless communities. Driving people out of towns and cities would have a series of highly undesirable consequences, including alienating people from their communities, support networks, and service providers, causing them to lose work, and rendering them unable to maintain financial supports. If homeless people without access to shelter are forced to leave jurisdictions where they reside, they will, by necessity, relocate elsewhere. The visibility of homelessness is typically what drives efforts to criminalize the physical presence of homeless people in public space. Accordingly, an increase in visible street homelessness in places where people are forced to relocate will inevitably lead to further criminalization and more displacement. Upholding the Grants Pass ordinances would mean that one municipality after the other can choose to make street homelessness “someone else’s problem,” meanwhile the circumstances that keep people homeless will only worsen as homeless people are displaced from one town to the next.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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April 3, 2024