

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CITY OF GRANTS PASS, OREGON, )  
Petitioner, )  
v. ) No. 23-175  
GLORIA JOHNSON, ET AL., ON BEHALF )  
OF THEMSELVES AND ALL OTHERS )  
SIMILARLY SITUATED, )  
Respondents. )  
- - - - -

Pages: 1 through 169  
Place: Washington, D.C.  
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3   CITY OF GRANTS PASS, OREGON,           )  
4                                    Petitioner,           )  
5                                    v.                            ) No. 23-175  
6   GLORIA JOHNSON, ET AL., ON BEHALF    )  
7   OF THEMSELVES AND ALL OTHERS         )  
8   SIMILARLY SITUATED,                    )  
9                                    Respondents.         )  
10  - - - - -

11  
12                                    Washington, D.C.  
13                                    Monday, April 22, 2024

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15           The above-entitled matter came on for  
16   oral argument before the Supreme Court of the  
17   United States at 10:04 a.m.

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7 neither party.  
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9 of the Respondents.  
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 23-175, City of Grants Pass versus Johnson.

Ms. Evangelis.

ORAL ARGUMENT OF THEANE D. EVANGELIS

ON BEHALF OF THE PETITIONER

MS. EVANGELIS: Mr. Chief Justice, and may it please the Court:

Like cities nationwide, Grants Pass relies on camping laws to protect its public spaces. These generally applicable laws prohibit specific conduct and are essential to public health and safety.

The Ninth Circuit tied cities' hands by constitutionalizing the policy debate over how to address growing encampments. Its holding that the Eighth Amendment bars Grants Pass from enforcing its camping laws is wrong for three reasons.

First, the Cruel and Unusual Punishments Clause governs which punishments are permitted, not what conduct can be prohibited.

Second, no precedent supports the

1 Ninth Circuit's rule. Respondents and the  
2 United States abandoned its reliance on Powell.  
3 Instead, they misread Robinson to bar any  
4 punishment for involuntary conduct that's linked  
5 to a status. But Robinson held only that states  
6 cannot outlaw the status of drug addiction. It  
7 made clear that they can prohibit conduct like  
8 drug use. This Court should not rewrite  
9 Robinson six decades later.

10 Third, the Ninth Circuit's approach  
11 has proven unworkable. The Eighth Amendment  
12 does not tell courts who is involuntarily  
13 homeless, what shelter is adequate, or what  
14 time, place, and manner regulations are allowed.  
15 But, in 35 suits and counting, federal courts  
16 are now deciding everything from the exact size  
17 of campsites in San Rafael to the adequacy of  
18 empty beds at specific shelters, like the Gospel  
19 Rescue Mission in Grants Pass, and cities are  
20 struggling to apply arbitrary, shifting  
21 standards in the field.

22 This Court should reverse and end the  
23 Ninth Circuit's failed experiment, which has  
24 fueled the spread of encampments while harming  
25 those it purports to protect.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Do you consider these  
3 civil or criminal penalties?

4 MS. EVANGELIS: They are both, Justice  
5 Thomas. There is criminal trespass and civil --

6 JUSTICE THOMAS: Is that involved in  
7 this case?

8 MS. EVANGELIS: Yes, it is.

9 JUSTICE THOMAS: To what extent? I  
10 mean, has any of the Petitioner's -- any of the  
11 parties here been subject to criminal trespass?

12 MS. EVANGELIS: Well, they are at  
13 issue in the case. The district court enjoined  
14 them. And, yes, they -- they do apply here.  
15 They are for recidivist offenses.

16 JUSTICE THOMAS: But which party has  
17 been held accountable for criminal trespass?

18 MS. EVANGELIS: Yes. So, here, none  
19 of the individuals who are currently in the  
20 case.

21 JUSTICE THOMAS: So what's involved in  
22 this case?

23 MS. EVANGELIS: For Logan and Johnson,  
24 civil, the civil penalties.

25 JUSTICE THOMAS: And so what -- is it

1 the anti-camping, or what is it?

2 MS. EVANGELIS: Yes, it is.

3 JUSTICE THOMAS: Okay. So that's  
4 civil, or is it criminal?

5 MS. EVANGELIS: The camping ordinance  
6 is civil. And then, for repeat offenders, it's  
7 punishable --

8 JUSTICE THOMAS: Okay. So --

9 MS. EVANGELIS: -- by criminal  
10 trespass.

11 JUSTICE THOMAS: But we're not talking  
12 about repeat offenders right now, right?

13 MS. EVANGELIS: That's correct.

14 JUSTICE THOMAS: So -- and then -- so  
15 then have we ever applied the Eighth Amendment  
16 to civil penalties?

17 MS. EVANGELIS: Not the Cruel and  
18 Unusual Punishments Clause, no.

19 CHIEF JUSTICE ROBERTS: Counsel, what  
20 will the City do if you don't prevail here?

21 MS. EVANGELIS: The City's hands will  
22 be tied. It will be forced to surrender its  
23 public spaces, as it has been. Unfortunately,  
24 beds are going unused at the Gospel Rescue  
25 Mission. People are not getting the help that



1 they need.

2           The City is under an injunction here,  
3 and it's unable to rely on these basic  
4 ordinances. And the Ninth Circuit's decisions  
5 give cities like Grants Pass no guidance about  
6 how they can navigate this very challenging  
7 area. The Ninth Circuit has effectively imposed  
8 a municipal code under the Ninth Circuit's  
9 Martin rule to regulate what the City can do in  
10 its public spaces.

11           JUSTICE SOTOMAYOR: Counsel, can I  
12 just stop you a moment? The Gospel unused beds,  
13 they're less than a hundred, right?

14           MS. EVANGELIS: That's correct.

15           JUSTICE SOTOMAYOR: And there's  
16 thousands of homeless?

17           MS. EVANGELIS: There are, I believe,  
18 as many as 600 in Grants Pass according to the  
19 district court's --

20           JUSTICE SOTOMAYOR: But there's still  
21 only less than a hundred beds?

22           MS. EVANGELIS: That is right.

23           JUSTICE SOTOMAYOR: Now can I stop you  
24 a moment? You are not asking us to overturn  
25 Robinson, correct?

1 MS. EVANGELIS: We think Robinson was  
2 wrongly decided and should not be extended, but  
3 we don't think that the Court needs to overrule  
4 it here --

5 JUSTICE SOTOMAYOR: All right.  
6 Assuming it's there --

7 MS. EVANGELIS: -- because it's still  
8 saying --

9 JUSTICE SOTOMAYOR: -- it prohibits  
10 you criminalizing homelessness, right? So what  
11 you do is say only homeless people who sleep  
12 outdoors will be arrested? That's the testimony  
13 of your chief of police, two -- and two or three  
14 officers, which is, if you read the crime, it's  
15 only stopping you from sleeping in public if you  
16 -- for the purpose of maintaining a temporary  
17 place to live.

18 And the police officers testified that  
19 that means that if a stargazer wants to take a  
20 blanket or a sleeping bag out at night to watch  
21 the stars and falls asleep, you don't arrest  
22 them. You don't arrest babies who have blankets  
23 over them. You don't arrest people who are  
24 sleeping on the beach, as I tend to do if I've  
25 been there a while.

1                   You only arrest people who don't have  
2 a second home. Is that correct?

3                   MS. EVANGELIS: Well --

4                   JUSTICE SOTOMAYOR: Who don't have a  
5 home?

6                   MS. EVANGELIS: So, no. These laws  
7 are generally applicable. They apply to  
8 everyone.

9                   JUSTICE SOTOMAYOR: Yeah, that's what  
10 you want to say. Give me one example, because  
11 your police officers couldn't, and they  
12 explicitly said, if someone has another home --  
13 has a home, and is out there and happens to fall  
14 asleep, they won't be arrested -- fall asleep  
15 with something on them.

16                   MS. EVANGELIS: Well, Joint Appendix,  
17 page 98, is one example of a citation issued to  
18 a person with a home address. But, more  
19 importantly, I think what we're getting at here  
20 is that these laws regulate conduct of everyone.  
21 There's nothing in the law that criminalizes  
22 homelessness. I really want to --

23                   JUSTICE SOTOMAYOR: That's what --  
24 that's what you say, but if I look at the record  
25 and see differently, it's a different argument,

1 isn't it?

2 MS. EVANGELIS: Grants Pass policy  
3 actually very clearly says that being homeless  
4 is not a crime. And that's in --

5 JUSTICE SOTOMAYOR: Well, I know  
6 that's what you say, but if you're enforcing it  
7 only against the homeless, I will suggest that  
8 you look -- there's one brief -- let me see if I  
9 can find it -- that talks about this. At any  
10 rate, I'll find it later and just mention it.

11 The second thing I want to ask you is  
12 you seemed to start by saying that the Eighth  
13 Amendment is limited to forms of punishment and  
14 not to the nature of punishment, the  
15 proportionality issue.

16 There also is a number of amicus brief  
17 that lays out for us that from the Magna Carta  
18 through the founding, through state laws,  
19 through Weems, which was in 1910, through Trop  
20 later in the century, that throughout all of  
21 that, both the English, American colonies, this  
22 Court has had some form of proportionality in  
23 their Eighth Amendment jurisprudence.

24 You're asking us to ignore all of that  
25 history.

1 MS. EVANGELIS: No, we're not, Justice  
2 Sotomayor. What we are saying is that this case  
3 doesn't implicate proportionality. We're not  
4 asking the Court to take a position on whether  
5 it's a proper inquiry under the Eighth  
6 Amendment.

7 For example --

8 JUSTICE SOTOMAYOR: Oh, yes. Yes, you  
9 are, because you're saying that the only thing  
10 that's prohibited by the Eighth Amendment is the  
11 form of punishment. But, in those cases and in  
12 our history, we have said that certain  
13 punishments, Trop, for example, can't be done.

14 MS. EVANGELIS: That's right. And the  
15 Court has always looked at, if a particular  
16 punishment is considered too extreme or  
17 categorically so, as in the death penalty in  
18 some cases, the Court looks at whether a lesser  
19 punishment would be acceptable.

20 Again, it's looking at punishment, and  
21 that's where the inquiry focuses. Here, only --  
22 what -- what the Respondents are asking this  
23 Court to do is to extend Robinson beyond --

24 JUSTICE SOTOMAYOR: Do you have hotels  
25 that are valued at 200, \$250 in your city?

1 MS. EVANGELIS: I -- I --

2 JUSTICE SOTOMAYOR: Just answer yes or  
3 no.

4 MS. EVANGELIS: I don't -- I don't  
5 know.

6 JUSTICE SOTOMAYOR: Well, let's assume  
7 because, even in New York City, which may be the  
8 most expensive city in the nation or close to  
9 it, there are hotels that are less than that or  
10 at that price.

11 If a homeless person had that kind of  
12 money, do you -- don't you think they'd stay in  
13 a hotel?

14 MS. EVANGELIS: So, Justice Sotomayor,  
15 the -- the difficulty here is that this rule  
16 that the Respondents are proposing rests on  
17 whether someone's conduct is involuntary. Most  
18 importantly here, we're talking about conduct,  
19 so I want to talk about how this is completely  
20 distinguishable from Robinson. The point --

21 JUSTICE KAGAN: So can I talk about  
22 that, Ms. Kapur? So taking Robinson as a given,  
23 could you criminalize the status of  
24 homelessness?

25 MS. EVANGELIS: Well, I have a couple

1 points to that.

2 JUSTICE KAGAN: It's just a simple  
3 question.

4 MS. EVANGELIS: So Robinson doesn't  
5 address that and I think it's completely  
6 distinguishable. So Robinson was a --

7 JUSTICE KAGAN: Could you criminalize  
8 the status of homelessness?

9 MS. EVANGELIS: Well, I don't think  
10 that homelessness is a status like drug  
11 addiction, and Robinson only stands for that.

12 JUSTICE KAGAN: Well, homelessness is  
13 a status. It's the status of not having a home.

14 MS. EVANGELIS: I actually -- I  
15 disagree with that, Justice Kagan, because it is  
16 so fluid, it's so different. People  
17 experiencing homelessness might be one day  
18 without shelter, the next day with. The federal  
19 definition contemplates various forms.

20 JUSTICE KAGAN: At the period with  
21 which -- in the period where -- where you don't  
22 have a home and you are homeless, is that a  
23 status?

24 MS. EVANGELIS: No.

25 JUSTICE KAGAN: Could you criminalize

1 that?

2 MS. EVANGELIS: No, it's not. So  
3 Robinson talked about --

4 JUSTICE KAGAN: So you couldn't just  
5 --

6 MS. EVANGELIS: -- addiction like a  
7 disease.

8 JUSTICE KAGAN: -- you -- you -- you  
9 could criminalize just homelessness?

10 MS. EVANGELIS: So I want to say first  
11 a couple of things. So I think that for the --  
12 the --

13 JUSTICE KAGAN: I mean, that's quite  
14 striking to --

15 MS. EVANGELIS: No, I don't. We --

16 JUSTICE KAGAN: -- that you think that  
17 you can criminalize just homelessness.

18 MS. EVANGELIS: No, we're not saying  
19 that homelessness is a status, but, most  
20 importantly, I think the Eighth Amendment --

21 JUSTICE KAGAN: Well, you're not  
22 saying --

23 MS. EVANGELIS: -- is the wrong way to  
24 focus on this question.

25 JUSTICE KAGAN: It's really a simple



1 question. Can you criminalize homelessness?

2 And you're suggesting, yes, you could.

3 MS. EVANGELIS: No, we do not  
4 criminalize homelessness. I'm not saying --

5 JUSTICE KAGAN: Could you criminalize  
6 homelessness? Not tell me what you do do, what  
7 you don't do. Could you?

8 MS. EVANGELIS: So I think there would  
9 be due process problems and vagueness problems.  
10 I don't think there's an Eighth Amendment  
11 problem in the sense of Robinson because that  
12 was a limited decision where the holding was  
13 solely about a disease of addiction. The Court  
14 was very clear about distinguishing between  
15 addiction and possession or use.

16 JUSTICE JACKSON: But, counsel --

17 MS. EVANGELIS: And so --

18 JUSTICE KAGAN: You're right that it's  
19 a different status that was involved in  
20 Robinson. But Robinson made clear that there  
21 was a category of cases which were status  
22 offenses, which were different from conduct  
23 offenses.

24 And when you started off here today,  
25 you said we're just criminalizing conduct. So,

1 to tell you the truth, I thought that this was  
2 going to be a question where you would say, no,  
3 of course, we can't criminalize a status, but  
4 there's conduct here. And then I was going to  
5 say: What is the conduct here?

6 But you didn't say that. You said you  
7 could criminalize even the status of  
8 homelessness, and that suggests to me that --  
9 that you're off on the wrong track in thinking  
10 about this issue.

11 MS. EVANGELIS: So, Justice Kagan, I  
12 think the -- the point where we are disagreeing  
13 here is really about whether the Eighth  
14 Amendment is the right framework for this  
15 discussion.

16 JUSTICE KAGAN: Well, the Eighth  
17 Amendment was the framework in Robinson.

18 MS. EVANGELIS: And I --

19 JUSTICE KAGAN: So taking Robinson as  
20 a given, where Robinson said the Eighth  
21 Amendment protects you against status-based  
22 crimes --

23 MS. EVANGELIS: I don't --

24 JUSTICE KAGAN: -- that's what the  
25 question is.

1 MS. EVANGELIS: -- I don't think  
2 Robinson extends that far. I think Robinson  
3 itself was cabined -- and I think the Marshall  
4 plural -- Justice Marshall's plurality in Powell  
5 goes into a discussion about this and how that  
6 was the right line.

7 JUSTICE KAGAN: Okay. What is the  
8 conduct here?

9 MS. EVANGELIS: The conduct is  
10 camping, establishing a campsite. And it's the  
11 same as in the federal regulations that the  
12 National Park Service relies on.

13 JUSTICE KAGAN: So I didn't think that  
14 that was the -- the conduct. I thought that the  
15 only conduct here was sleeping outside with a  
16 blanket.

17 MS. EVANGELIS: No, it is the conduct  
18 of establishing a campsite, which includes  
19 making a bed with bedding or other materials --

20 JUSTICE KAGAN: Well --

21 MS. EVANGELIS: -- and the federal law  
22 is --

23 JUSTICE KAGAN: -- a campsite suggests  
24 something different to people. It suggests a  
25 tent. It suggests a conglomeration of people.

1 You know, tent camps, if you will.

2 But your ordinance does not just  
3 prohibit that. Your ordinance prohibits a  
4 single person who is homeless, so does not have  
5 another place to sleep, that's a status, I don't  
6 have another place to sleep, a single person  
7 sleeping instead in public with a blanket.  
8 That's what I understand your statute to do.

9 Is that not what your statute does?

10 MS. EVANGELIS: The statute does not  
11 say anything about homelessness. It's a  
12 generally applicable law. One more -- it --  
13 it's very important that it applies to everyone,  
14 even --

15 JUSTICE KAGAN: Yeah, I -- I got that.

16 MS. EVANGELIS: -- people who are  
17 camping.

18 JUSTICE KAGAN: But it's a single  
19 person with a blanket.

20 MS. EVANGELIS: And --

21 JUSTICE KAGAN: You don't have to have  
22 a tent. You don't have to have a camp. It's a  
23 single person with a blanket.

24 MS. EVANGELIS: And sleeping in  
25 conduct is considered -- excuse me, sleeping in

1 public is considered conduct. And this Court --  
2 this Court in Clark discussed that, that that is  
3 conduct.

4 Also, the federal regulations --  
5 JUSTICE KAGAN: Well, sleeping is --  
6 MS. EVANGELIS: -- are very --  
7 JUSTICE KAGAN: -- a biological  
8 necessity. It's sort of like breathing. I  
9 mean, you could say breathing is conduct too,  
10 but, presumably, you would not think that it's  
11 okay to criminalize breathing in public.

12 MS. EVANGELIS: I would like to point  
13 to the federal regulations which I brought up.

14 JUSTICE KAGAN: And for a homeless  
15 person who has no place to go, sleeping in  
16 public is kind of like breathing in public.

17 MS. EVANGELIS: Well, two points.

18 So, first, even the federal  
19 regulations prohibit even sleeping. They don't  
20 even require any materials, including but -- but  
21 not necessary under the federal regulation. So  
22 this is conduct that is understood by  
23 jurisdictions nationwide and even the federal  
24 government to be conduct that is prohibited, and  
25 so I want to make that point.

1 JUSTICE KAGAN: See, I'll --

2 MS. EVANGELIS: The second point --

3 JUSTICE KAGAN: -- I'll tell you the  
4 truth, Ms. Kapur. I think that this is -- this  
5 is a super-hard policy problem for all  
6 municipalities. And if you were to come in here  
7 and you were to say, you know, we need certain  
8 protections to keep our streets safe and we  
9 can't have, you know, people sleeping anyplace  
10 that they want and we can't have, you know, tent  
11 cities cropping up, I mean, that would create  
12 one set of issues.

13 But your ordinance goes way beyond  
14 that. Your ordinance says as to a person -- and  
15 I understand that you think it's generally  
16 applicable, but we only come up with this  
17 problem for a person who is homeless, who has  
18 the status of homelessness, who has no other  
19 place to sleep, and your statute says that  
20 person cannot take himself and himself only and,  
21 you know, can't take a blanket and sleep  
22 someplace without it being a crime. And --  
23 and -- and that's, you know -- well, it just  
24 seems like Robinson. It seems like you're  
25 criminalizing a status.

1 MS. EVANGELIS: Well, it is not. And  
2 we agree with you that this is a very difficult  
3 policy question, and that's exactly --

4 JUSTICE KAGAN: But that --

5 CHIEF JUSTICE ROBERTS: Counsel --

6 JUSTICE KAGAN: -- it isn't.

7 MS. EVANGELIS: -- why the Eighth  
8 Amendment --

9 JUSTICE JACKSON: Can you answer why?

10 CHIEF JUSTICE ROBERTS: Can I --

11 JUSTICE JACKSON: Why is it not?

12 Just -- I mean, Justice Kagan has put  
13 -- laid out one of the essential problems here,  
14 which is that you're making a distinction  
15 between status and conduct. Okay. We see that.

16 And you keep saying this is conduct.  
17 Can you explain why?

18 MS. EVANGELIS: The actus reus  
19 element, that's exactly what was missing in  
20 Robinson and that's what we have here. And  
21 that's why that law was so unique. It's a very  
22 peculiar --

23 JUSTICE JACKSON: So it seems to me  
24 that Robinson actually hurts you and not helps  
25 you in the following sense. You know, it seems

1 both cruel and unusual to punish people for acts  
2 that constitute basic human needs.

3           So, here, unlike in Robinson, where,  
4 you know, you had at least the sort of disease  
5 state, drugs and -- and -- and the like, and  
6 potentially culpable acts that relate to that  
7 disease state, here, we're talking about  
8 sleeping that is universal, that is a basic  
9 function. And so I guess what I don't  
10 understand is, in this circumstance, why that  
11 particular state is being considered conduct for  
12 the purpose of -- of -- of punishment.

13           MS. EVANGELIS: Well, I think that  
14 just illustrates the line-drawing problems  
15 because, if you look at biological necessities  
16 and what a person needs to do, you know, the  
17 Ninth Circuit's decisions in this area would  
18 allow --

19           JUSTICE JACKSON: Can I give you a  
20 hypothetical?

21           MS. EVANGELIS: -- all sorts of  
22 behavior.

23           JUSTICE JACKSON: Can I give you a  
24 hypothetical?

25           MS. EVANGELIS: Yes. Thank you.



1 JUSTICE JACKSON: Okay. So suppose  
2 the relevant ordinance prohibited eating on  
3 public property rather than sleeping or camping.  
4 We're talking about eating. And the city, for  
5 very, you know, rational reasons, has determined  
6 that when people eat outdoors, it creates  
7 problems with trash and rodents and the like,  
8 and so it bans eating in public places and it  
9 punishes violators.

10 Now, just as here, that seems  
11 generally fine because most people have  
12 restaurants that they can go to, most people  
13 have houses that they can eat in. But some  
14 people don't have that option. They have to eat  
15 in public because they're unhoused and they  
16 can't afford to go to a restaurant.

17 So is -- is your argument the same  
18 result, no Eighth Amendment problem, no problem  
19 with the city banning eating in public, even  
20 though that's a public function -- I mean,  
21 excuse me, even though that's a human necessity  
22 that everyone engages in, and, really, what's  
23 happening is you're only punishing certain  
24 people who can't afford to do it privately?

25 MS. EVANGELIS: Well, it sounds like

1 -- I -- I take for a moment that you're not  
2 saying the law -- that the law draws lines on  
3 any sort of irrational basis or any equal  
4 protection issue --

5 JUSTICE JACKSON: No. The city has a  
6 rational basis.

7 MS. EVANGELIS: -- and --

8 JUSTICE JACKSON: When people eat in  
9 public --

10 MS. EVANGELIS: Yes.

11 JUSTICE JACKSON: -- there is trash,  
12 there are rodents, there are problems. So the  
13 city says what we're going to do is we're going  
14 to say no eating in public.

15 What I'm concerned about from your  
16 argument is the suggestion -- you know, you call  
17 it conduct, I appreciate that, but what we have  
18 happening in operation is that people who are  
19 able to afford doing this thing that's a basic  
20 human need privately are okay. They're not  
21 punished for it. But people who don't have any  
22 other option or opportunity except for to do it  
23 in public are the ones who are being targeted by  
24 this statute.

25 MS. EVANGELIS: So two responses.

1                   First, I think the Eighth Amendment is  
2                   the wrong way to look at it. Someone might have  
3                   a due process challenge to a law like that if  
4                   there is a deeply entrenched liberty interest.

5                   JUSTICE JACKSON: But punishment is  
6                   happening. In my hypothetical, people are going  
7                   to jail because they're eating in public.

8                   MS. EVANGELIS: So, in that case --

9                   JUSTICE JACKSON: Why is the Eighth  
10                  Amendment not implicated?

11                  MS. EVANGELIS: -- in that case, you  
12                  would have a defense under Oregon law, for  
13                  example, a necessity defense.

14                  JUSTICE GORSUCH: Counsel, on -- on --  
15                  on --

16                  MS. EVANGELIS: And I want to get to  
17                  that on the camping.

18                  JUSTICE GORSUCH: I'm sorry to  
19                  interrupt.

20                  MS. EVANGELIS: Yes.

21                  JUSTICE GORSUCH: But, on that point,  
22                  I think we're having some debate about where to  
23                  lodge the defense, whether it's under the Eighth  
24                  Amendment or under the Fourteenth Amendment.

25                  But do you concede that there are

1 instances in which a necessity defense, long  
2 recognized at common law, would apply to eating  
3 in public, sleeping in public, or other things  
4 like that?

5 MS. EVANGELIS: Yes, I agree. And,  
6 actually, here, in the case of camping, Oregon  
7 law recognizes a necessity defense, so as a  
8 matter of state law and policy -- and, again,  
9 that goes to the difficult policy questions --  
10 that's why states are able to address the needs  
11 of what this issue raises.

12 And so, for something under Oregon's  
13 state law, a person could raise that defense  
14 under the necessity defense, and then, if that's  
15 not enough, if they believe that that's not  
16 broad enough somehow --

17 JUSTICE GORSUCH: And you're saying --

18 MS. EVANGELIS: -- they can argue due  
19 process.

20 JUSTICE GORSUCH: -- Oregon law has  
21 that defense --

22 MS. EVANGELIS: Yes.

23 JUSTICE GORSUCH: -- already built  
24 into it?

25 MS. EVANGELIS: That's correct.

1 JUSTICE GORSUCH: All right. Thank  
2 you.

3 JUSTICE JACKSON: Let me ask you about  
4 Oregon law, because one sort of threshold  
5 concern that I have about this case is I  
6 understand that Oregon has enacted a statute, a  
7 new statute, that seems to address this very  
8 issue, so I'm trying to understand why this is  
9 -- is still a live case.

10 As I read the new law, it essentially  
11 codifies Martin's rule, that it says something  
12 about all regulations of this nature have to be  
13 objectively reasonable as to time, place, and  
14 manner with regard to -- with regards to people  
15 experiencing homelessness.

16 So it seems like the state has already  
17 precluded Grants Pass from doing the sort of  
18 thing it's doing here, so why do we need to  
19 weigh in on that?

20 MS. EVANGELIS: Well, no, it hasn't.  
21 So, first, both sides agree that this case is  
22 not moot. There is no state law challenge in  
23 this case. But, more importantly, that standard  
24 is very different from Martin, and there's never  
25 been a challenge to our laws.

1 JUSTICE JACKSON: What about  
2 constitutional avoidance? So, fine, it's not  
3 moot, but wouldn't our principle be that we  
4 don't need to reach the constitutionality of  
5 this issue if there's another possible way of  
6 resolving it because the state has addressed it?

7 MS. EVANGELIS: Well, not at all. So  
8 the state's law is very different. And we  
9 believe our law is satisfied.

10 But, more importantly, the fact that  
11 the state is acting here is a good thing. We  
12 agree that states should be able to make policy  
13 and to weigh all of the competing concerns.

14 And, here, the need to reverse Martin  
15 is so critical because laws like ours, they  
16 really do serve an essential purpose. They  
17 protect the health and safety of everyone. It  
18 is not safe to live in encampments. It's  
19 unsanitary. We see what's happening. And there  
20 are the -- the harms at the encampments  
21 themselves on those in them and outside. We  
22 know this. The federal government has cleared  
23 encampments here in the capital in McPherson  
24 Square. So this is an urgent problem.

25 And also, there are downstream effects

1 of all the other things that flow from it, but  
2 it is very important here to understand that the  
3 state laws and the --

4 JUSTICE JACKSON: So is it your  
5 argument that the Eighth Amendment has nothing  
6 to say about how the City responds to such  
7 problems? I mean, suppose the City decided that  
8 it was going to execute homeless people. I  
9 mean, very extreme, I know, but it would solve  
10 the problems that you're talking about.

11 MS. EVANGELIS: Well, that -- that  
12 would be --

13 JUSTICE JACKSON: Do we have an Eighth  
14 Amendment issue in that circumstance?

15 MS. EVANGELIS: Yes. I -- I think --

16 JUSTICE JACKSON: Why?

17 MS. EVANGELIS: -- there, you look at  
18 the punishment. That -- again, here, we're  
19 looking at the punishment, which is low-level  
20 fine --

21 JUSTICE GORSUCH: That -- that would  
22 be both cruel and unusual, wouldn't it?

23 MS. EVANGELIS: I -- I think it would  
24 -- it would be. Yes, I think it absolutely  
25 would.

1 JUSTICE GORSUCH: Why not just yes to  
2 that?

3 (Laughter.)

4 MS. EVANGELIS: Yes. Thank you.  
5 Thank you, Justice Gorsuch.

6 JUSTICE BARRETT: Counsel, can I ask  
7 you a question about the scope of your  
8 ordinance? So, as Justice Kagan was pointing  
9 out, this -- this criminalizes sleeping with a  
10 blanket at a minimum, right?

11 MS. EVANGELIS: Yeah.

12 JUSTICE BARRETT: Correct? But, as I  
13 understand it, after this decision and -- and  
14 maybe after Martin before that, there was some  
15 question about whether it also criminalized  
16 having fires, campfires, tents.

17 Can you talk a little bit about that  
18 and what the scope of it is? Does the  
19 Constitution then make it impossible for a city  
20 to limit the use of fires and encampments,  
21 tents, those kinds of temporary shelters?

22 MS. EVANGELIS: It really does because  
23 the rationale of Martin, the -- the argument  
24 that it's a biological necessity to sleep  
25 outside, the Respondents argue a blanket is



1 necessary in Oregon. Some might argue a tent  
2 and a fire is necessary in North Dakota. The  
3 Eighth Amendment really doesn't give us any  
4 answers to what cities can and can't prohibit.  
5 It's really administratively impossible for  
6 cities on the ground, as well as for courts, to  
7 administer. So we're seeing --

8 JUSTICE SOTOMAYOR: I'm sorry. This  
9 -- we have nothing to do with fires or tents.  
10 That was exempted under the district court's  
11 injunction, and the circuit court didn't require  
12 that. We're talking only about sleeping with a  
13 blanket.

14 MS. EVANGELIS: Well, I -- I --

15 JUSTICE SOTOMAYOR: So let's narrow it  
16 to what it is. I agree there might be other  
17 cases in the Ninth Circuit that are not  
18 rational, and I don't mean to throw aspersions  
19 at -- at those holdings, but some of them are  
20 not permitting time/place restrictions.

21 Let's go beyond that. Let's go here.  
22 Here, you're not precluded from prohibiting  
23 fires. You're not precluded from prohibiting  
24 tents. What's at issue is are you prohibited  
25 from keeping -- having someone wear a blanket

1 anywhere in the city.

2 Your intent was to remove -- stated by  
3 your mayor, intent is to remove every homeless  
4 person and give them no public space to sit down  
5 with a blanket or lay down with a blanket and  
6 fall asleep.

7 MS. EVANGELIS: That's not the intent  
8 of the law. And I would like to --

9 JUSTICE SOTOMAYOR: Well --

10 MS. EVANGELIS: -- address that point  
11 because the other side has --

12 JUSTICE SOTOMAYOR: -- why don't you  
13 answer the basic question.

14 MS. EVANGELIS: Yes. So --

15 JUSTICE SOTOMAYOR: It's not about  
16 fires. It's not about tents. It's about not  
17 being -- a time and place restriction about  
18 eliminating all choices.

19 MS. EVANGELIS: So we think that it is  
20 harmful for people to be living in public spaces  
21 on streets and in parks, whatever bedding  
22 materials. When humans are living in those  
23 conditions, we think that that's not  
24 compassionate and that --

25 JUSTICE SOTOMAYOR: Oh, it's not, but

1 --

2 MS. EVANGELIS: -- there's no dignity  
3 in that. We -- we don't.

4 JUSTICE SOTOMAYOR: -- neither is --  
5 neither is providing them with nothing --

6 MS. EVANGELIS: Well, we --

7 JUSTICE SOTOMAYOR: -- to alleviate  
8 that situation.

9 MS. EVANGELIS: This is a difficult  
10 policy question, Justice Sotomayor. It -- it  
11 is. And --

12 JUSTICE SOTOMAYOR: Where do we put  
13 them if every city, every village, every town  
14 lacks compassion --

15 MS. EVANGELIS: We --

16 JUSTICE SOTOMAYOR: -- and passes a  
17 law identical to this? Where are they supposed  
18 to sleep? Are they supposed to kill themselves,  
19 not sleeping?

20 MS. EVANGELIS: So this is -- a  
21 necessity defense, as I mentioned, under Oregon  
22 law is available. States are able to address  
23 these concerns. This is a complicated policy  
24 question. We believe that the Eighth Amendment  
25 analysis, to go back to it, focuses on the

1 low-level fines.

2 JUSTICE SOTOMAYOR: What's so  
3 complicated about letting someone somewhere  
4 sleep with a blanket in the outside if they have  
5 nowhere to sleep? The laws against defecation,  
6 the laws against keeping things unsanitary  
7 around yourself, those have all been upheld.

8 The only thing this injunction does is  
9 say you can't stop someone from sleeping in a  
10 public place without a blanket.

11 CHIEF JUSTICE ROBERTS: Why don't you  
12 answer and then we'll move on to the next round,  
13 and you can be thinking about an answer to  
14 Justice Sotomayor while they -- we move into a  
15 different --

16 MS. EVANGELIS: Thank you.

17 CHIEF JUSTICE ROBERTS: -- stage of  
18 the argument.

19 Is being a bank robber a status?

20 MS. EVANGELIS: No. I would say  
21 that -- well -- well, if -- if your question is  
22 asking would it be permissible to punish being a  
23 bank robber, I think that would have vagueness  
24 problems probably.

25 CHIEF JUSTICE ROBERTS: Well, it would

1 be someone who robbed a bank. That doesn't  
2 sound vague.

3 MS. EVANGELIS: Well, I don't -- I --  
4 I don't think that it is a status in the sense  
5 of Robinson, which, again, I -- I want to just  
6 focus on what we think Robinson stands for, and  
7 it's only its narrow holding about addiction.

8 And the -- there, it was the status of  
9 being an addict without any mens rea. So a law  
10 like that -- excuse me, without any actus reus.  
11 A law like that is problematic. Without an  
12 actus reus, I think it would probably have  
13 vagueness problems, due process problems.

14 However, the Eighth Amendment, this  
15 entire exercise under Robinson is the only time  
16 this Court has ever evaluated the substantive  
17 criminal law, and it raises all of these  
18 line-drawing problems. And the fact that -- I'm  
19 not here to defend Robinson. As a matter of  
20 first principles, we don't agree with it. We  
21 think it was wrongly decided. We're just saying  
22 that it is so far removed -- that our laws are  
23 so far removed from what was at issue in  
24 Robinson that it just isn't implicated here.

25 CHIEF JUSTICE ROBERTS: So, if someone

1 is homeless for a week and then finds available  
2 shelter, is that person homeless when he's in  
3 the shelter?

4 MS. EVANGELIS: Under federal law, the  
5 HUD regulations, he is actually considered  
6 homeless. That shows the fluidity and the  
7 different ways of --

8 CHIEF JUSTICE ROBERTS: Putting the  
9 HUD regulations to one side, can someone who is  
10 sleeping in a shelter be considered homeless?

11 MS. EVANGELIS: Some would say yes,  
12 that someone who --

13 CHIEF JUSTICE ROBERTS: What would you  
14 say?

15 MS. EVANGELIS: I -- I would say that  
16 at that point he is sheltered and homeless. I  
17 think he -- he -- that -- that is also --

18 CHIEF JUSTICE ROBERTS: All right.  
19 Let me make it easier. What if he buys a home  
20 or finds a home or is given a home? I mean, is  
21 he homeless --

22 MS. EVANGELIS: No, he is --

23 CHIEF JUSTICE ROBERTS: -- at that  
24 point?

25 MS. EVANGELIS: -- he is not. So for

1 -- what -- what's at issue in this case is --

2 CHIEF JUSTICE ROBERTS: So you think  
3 the status of homelessness can change from one  
4 time to another?

5 MS. EVANGELIS: Yes, I do. I think  
6 it's very fluid.

7 CHIEF JUSTICE ROBERTS: Is that  
8 consistent with the definition of "status" in  
9 Robinson?

10 MS. EVANGELIS: No. So Robinson  
11 treated addiction as a disease and as something  
12 that -- and -- and many believe that addiction  
13 is something that someone has with them forever  
14 and -- and it's a struggle. So that is a very  
15 different situation.

16 And, here, if someone has shelter --  
17 let's say they were offered shelter yesterday  
18 and they refused it, and then today, when  
19 someone comes around and tells them that they're  
20 not permitted to camp, are they involuntarily  
21 there if they refused shelter yesterday? That's  
22 the question the Eighth Amendment does not  
23 answer.

24 This is very complex. What if there  
25 is a bed available in the Gospel Rescue Mission,

1 but like Ms. Johnson, a person doesn't wish to  
2 leave their pet? Her Rottweiler's not permitted  
3 there. So that is a difficult question for a  
4 person and a difficult policy question, but --

5 CHIEF JUSTICE ROBERTS: Thank you.

6 MS. EVANGELIS: -- a person's  
7 status -- yes.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Justice Thomas?

11 JUSTICE THOMAS: Robinson actually  
12 included a crime of, as I read it, either to use  
13 narcotics or to be addicted to the use of  
14 narcotics, and the Court was concerned about  
15 being -- the status of being addicted to the  
16 use.

17 Is there a crime here for being  
18 homeless?

19 MS. EVANGELIS: No, there is not.

20 CHIEF JUSTICE ROBERTS: Justice Alito?

21 JUSTICE ALITO: Robinson presents a  
22 very difficult conceptual question. Do you  
23 think that someone who is a drug addict is  
24 absolutely incapable of -- that all people who  
25 are drug addicts are absolutely incapable of



1 refraining from using drugs?

2 MS. EVANGELIS: Well, I think that for  
3 some, that may be true, and for some, perhaps  
4 they can abstain. But that's a question of free  
5 will and agency that's true of every law and  
6 what conduct we choose to regulate. That's a --

7 JUSTICE ALITO: All right. Then  
8 compare that with a person who absolutely has no  
9 place to sleep in a particular jurisdiction.

10 Does that person have any alternative  
11 other than sleeping outside?

12 MS. EVANGELIS: So I think we'd have  
13 to ask all the questions I mentioned earlier  
14 about what alternatives they might have had  
15 yesterday --

16 JUSTICE ALITO: They have --

17 MS. EVANGELIS: -- and how they ended  
18 up there.

19 JUSTICE ALITO: -- they have none.  
20 They have absolutely none. There's not a single  
21 place where they can sleep.

22 MS. EVANGELIS: If that's true, then  
23 that may be the case, and in that case, at least  
24 in Oregon, they would have a defense of  
25 necessity.

1 JUSTICE ALITO: So the point is that  
2 the connection between drug addiction and drug  
3 usage is more tenuous than the connection  
4 between absolute homelessness and sleeping  
5 outside.

6 MS. EVANGELIS: Well, I -- I think,  
7 in -- in Robinson, again, the Court did draw  
8 that line, but, here, the Respondents are saying  
9 that the two are really the same, that camping  
10 outside, sleeping outside, and being homeless  
11 are two sides of the same coin.

12 We think that that's wrong. It's  
13 collapsing the status that they claim into the  
14 conduct. So we think the conduct here is very  
15 clear because it applies generally to everyone.  
16 The law does not say on its face it is a crime  
17 to be homeless. I just want to --

18 JUSTICE ALITO: All right.

19 MS. EVANGELIS: -- make that --

20 JUSTICE ALITO: Thank you.

21 MS. EVANGELIS: -- very clear. Thank  
22 you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Sotomayor?

25 JUSTICE SOTOMAYOR: It was the brief

1 of Criminal Law and Punishment Scholars that I  
2 was referencing earlier.

3 I want to go back to Justice Thomas's  
4 beginning question. As I understood it, the  
5 Ninth Circuit never reached the excessive fines  
6 question presented by this case, correct?

7 MS. EVANGELIS: That's correct.

8 JUSTICE SOTOMAYOR: So that's still  
9 open. And you didn't seek cert on that issue?

10 MS. EVANGELIS: That's correct.

11 JUSTICE SOTOMAYOR: All right.

12 Assuming that there is no standing, I understand  
13 one of the appellees died, the one who was  
14 camping outside died, during the pendency of  
15 this appeal. And there are two other named  
16 plaintiffs. I know they have fines on them.  
17 I'm not sure that either of them has any  
18 criminal -- crimes charged against them.

19 Where does that put this appeal?

20 Where does that put this case?

21 MS. EVANGELIS: Sure. Well, the  
22 case --

23 JUSTICE SOTOMAYOR: Should we be  
24 vacating and remanding to see if there is --

25 MS. EVANGELIS: No.

1 JUSTICE SOTOMAYOR: -- a live  
2 plaintiff -- a plaintiff, a named plaintiff who  
3 is still suffering injury?

4 MS. EVANGELIS: No. So, here, the --  
5 the sleeping ordinance, which is the one that  
6 Ms. Blake challenged, that is no longer in the  
7 case. That ordinance limited only sleeping in  
8 certain rights-of-way and sidewalks in the city,  
9 and it was a different law, and that's not at  
10 issue here.

11 So sleeping is not at issue. It's  
12 about the camping ordinance. And we very much  
13 have a live case because we are under the Ninth  
14 Circuit's injunction, and the named plaintiffs  
15 have --

16 JUSTICE SOTOMAYOR: No, the question  
17 is, could it give an injunction? Do -- are  
18 these people -- well, I guess, if they're not  
19 permitted to park --

20 MS. EVANGELIS: That's correct.

21 JUSTICE SOTOMAYOR: So it's not the  
22 camping, it's the parking, isn't it?

23 MS. EVANGELIS: Well, and the camping.  
24 So we -- we intend to -- and -- to rely on these  
25 laws. We want to be able to rely on these laws.

1 They are very important and --

2 JUSTICE SOTOMAYOR: You're not  
3 answering -- just focus on my question.

4 MS. EVANGELIS: Yes.

5 JUSTICE SOTOMAYOR: Both these people  
6 sleep in cars. Both of them sleep in cars  
7 outside of the town. So they're not seeking  
8 camping permission. Is your city not provide  
9 for overnight parking in any location at night  
10 except in private homes?

11 MS. EVANGELIS: Camping in a vehicle  
12 is included in the camping ordinance.

13 JUSTICE SOTOMAYOR: Well, that's going  
14 into a camp. How do you define "camp"?

15 MS. EVANGELIS: Again, it is a place  
16 where someone has laid down without any more,  
17 has --

18 JUSTICE SOTOMAYOR: So, if they go  
19 into -- if there's a line of cars and they want  
20 to -- and the cars can stay overnight --

21 MS. EVANGELIS: So --

22 JUSTICE SOTOMAYOR: -- and they want  
23 to park in one of those spaces, if they fall  
24 asleep in the car, they're guilty of violating  
25 the camping law?

1 MS. EVANGELIS: No. Justice  
2 Sotomayor, Ms. Johnson parks her car oftentimes  
3 at a friend's, so she is not violating the law  
4 at those times. So --

5 JUSTICE SOTOMAYOR: Just answer my  
6 question.

7 MS. EVANGELIS: -- parking everywhere  
8 is not prohibited. In certain areas, private  
9 areas, you can.

10 JUSTICE SOTOMAYOR: Is sleeping in  
11 your car prohibited?

12 MS. EVANGELIS: If you are sleeping in  
13 your car in a park, where you're not allowed to  
14 park overnight --

15 JUSTICE SOTOMAYOR: Have any of  
16 them --

17 MS. EVANGELIS: -- then yes.

18 JUSTICE SOTOMAYOR: -- indicated  
19 intent to sleep in a park, or have they just  
20 said they want to park somewhere in the city?  
21 And can they park somewhere in the city and  
22 sleep?

23 MS. EVANGELIS: Yes, they have said  
24 that they have the intent to continue their  
25 conduct and that they will be, therefore,

1 subject to the city's laws and subject to --

2 JUSTICE SOTOMAYOR: I don't understand  
3 that answer. Okay.

4 CHIEF JUSTICE ROBERTS: Justice Kagan?

5 JUSTICE KAGAN: You've referred a  
6 couple of times to the necessity defense, so  
7 could you tell me how that would work?

8 MS. EVANGELIS: Yes. So there --  
9 under Oregon law, if a person says that -- it's  
10 effectively the lesser of two evils if they say,  
11 I had no alternative to -- no legal alternative  
12 other than what I did here that broke the law,  
13 then I had no choice and I therefore had to  
14 break the law and it was in some sense  
15 involuntary, to use a term that -- that many  
16 have been discussing.

17 So, there, you -- it would be very  
18 narrow. It is a very narrow defense. So it  
19 would be in that moment of --

20 JUSTICE KAGAN: So -- so suppose that  
21 there is a person who is homeless and there are  
22 no shelter beds available and the person has no  
23 place to go, and the person, of course, has to  
24 sleep. And the person -- it's cold outside.  
25 The person has a blanket. So that's the minimum

1       conduct that the law prohibits. So the person  
2       sleeps outside with a blanket, and a police  
3       officer comes, and in the -- but the person  
4       says, well, I had no place else to go.

5                        Would the City continue to push for  
6       some kind of penalty?

7                        MS. EVANGELIS: Well, there, if a  
8       person received a citation, so if they did, then  
9       they would have a defense of necessity. It's  
10      asserted as a defense.

11                      So what the other side is trying --

12                      JUSTICE KAGAN: Well, it's asserted as  
13      a defense.

14                      MS. EVANGELIS: Yes.

15                      JUSTICE KAGAN: I mean -- but -- so  
16      you're not willing to say no, we're going to  
17      tell all our police officers that they shouldn't  
18      give a citation in that circumstance? You know,  
19      you -- you know, we're going to give a citation,  
20      and then we'll see how the courts deal with it,  
21      is all you're going to tell me?

22                      MS. EVANGELIS: Well, officers always  
23      have discretion, and we know that they exercise  
24      it. And -- and it's hard to know --

25                      JUSTICE KAGAN: Well, the question is



1 not an individual officer's --

2 MS. EVANGELIS: Yeah.

3 JUSTICE KAGAN: -- discretion.

4 Individual officers are in a tough situation  
5 here.

6 MS. EVANGELIS: They are.

7 JUSTICE KAGAN: The question is, what  
8 is the City going to tell individual officers?  
9 So what is the City going to tell individual  
10 officers about a case of the kind that I said?  
11 Are you going to tell individual officers issue  
12 the citation and we'll see if the person knows  
13 enough to make a necessity defense and we'll see  
14 what the court does about that? Or are you  
15 going to say, you know, there are some things  
16 that just ought not to be the subject of civil  
17 or criminal infractions?

18 MS. EVANGELIS: So the City, in its  
19 policy, at Joint Appendix, page 158, for  
20 example, talks about what officers are supposed  
21 to do. They're supposed to put people in touch  
22 with services first to contact if there is  
23 available help for them. These laws are  
24 absolutely a tool for getting people the  
25 services that they need. Many people need that

1 intervention.

2 JUSTICE KAGAN: Well, you're not  
3 giving me a real answer --

4 MS. EVANGELIS: Yes.

5 JUSTICE KAGAN: -- to the question of  
6 is the City telling officers that they should  
7 give citations --

8 MS. EVANGELIS: No.

9 JUSTICE KAGAN: -- in that  
10 circumstance.

11 MS. EVANGELIS: No. It is -- it is --  
12 if somebody -- again, it is a matter of  
13 discretion.

14 JUSTICE KAGAN: Is there anything you  
15 can point -- it's a matter of discretion?

16 MS. EVANGELIS: Yes.

17 JUSTICE KAGAN: There's nothing you  
18 can point to that the City says we have a  
19 necessity defense, what we're telling officers  
20 to do is to, you know, act consistently with  
21 that defense so that if it is truly a matter of  
22 need that you are sleeping on the street alone  
23 with a blanket, no, the officer should not cite  
24 the person?

25 MS. EVANGELIS: There's nothing in the

1 record here that shows officers were told about  
2 a necessity defense and that it -- what it would  
3 or would not preclude. That would be an  
4 individualized question after the fact if  
5 someone received a citation.

6 And if they thought that that wasn't  
7 enough, the proper framework would be this  
8 Court's framework in Kahler, where we would look  
9 at the asserted defense, there, insanity of some  
10 form, and, here, it would be necessity, and we  
11 would ask whether it is so deeply rooted in our  
12 history and -- and something that has to be  
13 imposed in this way on the states.

14 JUSTICE KAGAN: Thank you.

15 MS. EVANGELIS: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Gorsuch?

18 JUSTICE GORSUCH: I suppose someone  
19 could also initiate a class action of the sort  
20 that happened here if -- if you were not  
21 allowing the necessity defense to operate and  
22 seek to have it enforced, couldn't they?

23 MS. EVANGELIS: Potentially. I --

24 JUSTICE GORSUCH: Yeah. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 JUSTICE KAVANAUGH: You've said  
3 several times that it's a difficult policy  
4 question, a complicated policy question. I  
5 think everyone would agree with that.

6 How does this law help deal with the  
7 complicated policy issues?

8 MS. EVANGELIS: One of the most  
9 difficult challenges is getting people the help  
10 that they need. And laws like this allow cities  
11 to intervene, and they're an important tool in  
12 helping incentivize people to accept shelter.

13 So Ms. Johnson, for example, had said  
14 in her deposition -- it's in the Joint  
15 Appendix -- that she does not wish to stay at  
16 the Gospel Rescue Mission. One of the reasons  
17 is because of her dog. She also had other  
18 reasons. She doesn't like being around people  
19 and -- and so forth. People have all sorts of  
20 circumstances. It's very complex. And the  
21 individual decisions --

22 JUSTICE KAVANAUGH: How does it help  
23 if there are not -- how does it help -- the rule  
24 here, the law here, how does it help if there  
25 are not enough beds for the number of homeless

1 people in the jurisdiction?

2 MS. EVANGELIS: So, for Ms. Johnson,  
3 she sometimes stays with a friend. So there are  
4 other --

5 JUSTICE KAVANAUGH: How about more --  
6 more generally, though?

7 MS. EVANGELIS: Yes.

8 JUSTICE KAVANAUGH: I guess, if  
9 there's a mismatch between the number of beds  
10 available in shelters, even including Gospel  
11 Rescue, and the number of homeless people, there  
12 are going to be a certain number of people who  
13 there's nowhere to go?

14 MS. EVANGELIS: That -- that is a  
15 difficult policy question. And we --

16 JUSTICE KAVANAUGH: How does this law  
17 deal --

18 MS. EVANGELIS: Yes.

19 JUSTICE KAVANAUGH: -- help with that  
20 policy?

21 MS. EVANGELIS: So it encourages  
22 people to accept alternatives when they come up  
23 so that fewer people end up camping. It also --  
24 there is harm in simply camping. Whatever  
25 materials people are using when they are living

1 in public spaces without plumbing and  
2 infrastructure, there's harm to the whole city  
3 and to the whole community, as well as to them.

4 We know that -- that encampments and  
5 these conditions also breed crime and very  
6 dangerous conditions. So the City has an  
7 interest in protecting everyone, including --

8 JUSTICE KAVANAUGH: Do you think the  
9 constitutional rule should be different when the  
10 number of beds available in the jurisdiction  
11 exceeds the number of homeless people versus the  
12 number of homeless people exceeds the number of  
13 beds available in shelters?

14 MS. EVANGELIS: No. That's what we've  
15 seen in the Ninth Circuit. We've seen that that  
16 is unworkable. There is no way to count what  
17 beds are available and who is perhaps willing to  
18 take one and who would consider it adequate.

19 Then the question becomes, are those  
20 beds adequate? So, here, Gospel Rescue Mission  
21 again --

22 JUSTICE KAVANAUGH: That's a separate  
23 issue, I agree.

24 MS. EVANGELIS: It is.

25 JUSTICE KAVANAUGH: And it can be a

1 challenging issue, I suppose, I know, as well.

2 Let me ask one last question, which  
3 is, how does the necessity defense differ from  
4 the constitutional rule? You touched on this,  
5 but I just want to get a succinct answer to  
6 that, the state law necessity defense differ  
7 from the constitutional rule here.

8 MS. EVANGELIS: You would weigh the  
9 harm from the individual's conduct in violating  
10 the law. So, if someone were camping near a  
11 school or near -- or -- or doing some --  
12 something or engaged in some behavior that was  
13 particularly harmful and they had another place  
14 where they could camp, that would be maybe a  
15 factor that you would raise in the necessity  
16 situation.

17 It's -- it's narrower. So, in a case  
18 of a -- the Oregon cases include people who are  
19 growing marijuana for medical reasons but  
20 without a license, and so the necessity defense  
21 was not accepted in that case because they could  
22 have obtained a license. So, if a person had a  
23 friend to go to, had a bed available at the  
24 Gospel Rescue Mission, they would be expected to  
25 take it under the necessity defense.

1 I think that's how it would play out.

2 JUSTICE KAVANAUGH: I actually have  
3 one last question. When you get out of jail if  
4 you end up -- what's going to happen then?  
5 Aren't -- you still don't have a bed available.  
6 So how does this help?

7 MS. EVANGELIS: So the -- and -- and I  
8 want -- I do want to make a point about that --  
9 about the criminal aspect. The trespass law  
10 here is only triggered after several civil  
11 citations.

12 JUSTICE KAVANAUGH: Right. No.

13 MS. EVANGELIS: And at that point --

14 JUSTICE KAVANAUGH: If you run through  
15 that cycle --

16 MS. EVANGELIS: Yes.

17 JUSTICE KAVANAUGH: -- and you end up  
18 in jail for 30 days, then you get out, I mean,  
19 you're not going to be any better off than you  
20 were before in finding a bed if there aren't --  
21 going to my earlier question, if there aren't  
22 beds available in the jurisdiction, unless  
23 you're removed from the jurisdiction or you  
24 decide to -- to leave somehow.

25 MS. EVANGELIS: No. There are



1 services available, and the jurisdiction can put  
2 you in touch with services and programs to help  
3 you in those circumstances. And for many  
4 people, that is a point where they're able to  
5 get into treatment. So that intervention  
6 actually saves lives.

7 JUSTICE KAVANAUGH: Okay. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10 JUSTICE BARRETT: So let me follow up  
11 on that. So you're saying there are services  
12 available, there's treatment available, so  
13 people would ultimately move off the street? Is  
14 that -- is that what you're saying? Because I  
15 think part of the premise of all of this, right,  
16 is that there are not enough beds for homeless  
17 people to occupy, and so there will be a  
18 mismatch and there are going to be some people  
19 who can't be cared for.

20 Are you saying that if your law is  
21 enforced, there is a way for everyone to be  
22 cared for?

23 MS. EVANGELIS: No. I'm saying that's  
24 a policy question that is quite difficult, but  
25 these laws are an important part of the puzzle.

1 They're not the only solution. And we don't --  
2 we don't believe that they are, but we think  
3 they're an important tool. And without them,  
4 we've seen what's happened on our streets.  
5 We've seen that people are -- are dying in  
6 encampments. We've seen that cities are -- are  
7 being forced to cede all of their public spaces.

8 So that ultimate question is for the  
9 legislature and policymakers to figure out what  
10 the right solution, what the right mix of  
11 policies is. But the wrong answer is to do what  
12 the Ninth Circuit did here and to  
13 constitutionalize --

14 JUSTICE BARRETT: Okay. Let me -- let  
15 me just interrupt you there. You're right, it's  
16 a very, very difficult policy question. And I  
17 asked you before about whether this was just  
18 about blankets or whether it went into having  
19 fires or urinating and defecating outdoors and  
20 that sort of thing, and Justice Sotomayor  
21 pointed out that this particular injunction did  
22 carve out those things and was just talking  
23 about sleep.

24 But, you know, other cases have been  
25 litigated in the Ninth Circuit that have gone

1 beyond that, and because the line is things that  
2 are involuntary, that are human needs, it can --  
3 it can extend -- it's difficult to draw the  
4 line, and whatever we decide here about this  
5 case is about the line.

6 So can you describe for me some of the  
7 things that are difficult to figure out about  
8 the line? There's sleeping. There's sleeping  
9 with blankets. What else?

10 MS. EVANGELIS: Public urination and  
11 defecation, that is a serious problem. Those  
12 are parts of biological necessities of being  
13 human. A court in Sacramento addressed that,  
14 and the Ninth Circuit's opinions debated whether  
15 its rule would actually reach those things.

16 I think any rule that we are wondering  
17 about and debating whether it would go that far,  
18 I think that is a sign that it is not a workable  
19 rule. The slippery slope here is very real.  
20 It's not just for camping and conduct that might  
21 be a biological necessity. Putting aside tents  
22 and fires and cold climates, what other things  
23 would be allowed?

24 All of the things that a human needs  
25 to survive, for example, potentially come into

1 focus under the Ninth Circuit's rule but also in  
2 other areas. Someone could say that my drug use  
3 or possession is the other side of the coin  
4 because I'm an addict or because I -- a -- a  
5 person who violates other laws could say that I  
6 had a compulsion to do those things that I  
7 couldn't control.

8           And the plurality opinion in Powell  
9 addressed that very thing and why it's so  
10 important to draw the line there. And when  
11 conduct is involved and once the Court gets into  
12 deciding which conduct may be excused under the  
13 Eighth Amendment, it is so far afield of what  
14 the Eighth Amendment was ever understood to  
15 address.

16           JUSTICE BARRETT: Okay. Speaking of  
17 status and conduct, you've -- you've argued that  
18 Robinson was wrong and we don't need to overrule  
19 it. And I agree. I don't -- I don't think we  
20 should overrule Robinson.

21           You've also been kind of resisting the  
22 status -- you've been resisting characterizing  
23 anything other than the drug addiction that was  
24 at issue in Robinson as status.

25           So what if the law said it is unlawful

1 and punishable by 30 days in prison to have the  
2 status of homelessness? Just go with me. Just  
3 assume that the law defines homelessness as a  
4 status and it is a status.

5 Would Robinson say that that law is  
6 unconstitutional under the Eighth Amendment?  
7 Would you concede that?

8 MS. EVANGELIS: And you're saying that  
9 that is a status?

10 JUSTICE BARRETT: Yes.

11 MS. EVANGELIS: All of the --

12 JUSTICE BARRETT: The law defines it  
13 as a status, and it's a status.

14 MS. EVANGELIS: Well, yes, and I think  
15 it looks a lot like Robinson under that  
16 hypothetical, but, of course, we disagree that  
17 it is --

18 JUSTICE BARRETT: I understand you  
19 disagree --

20 MS. EVANGELIS: -- a status in that  
21 way.

22 JUSTICE BARRETT: -- but you are  
23 accepting that Robinson draws a distinction  
24 between status and conduct and you're just  
25 fighting about the definition of a status?

1 MS. EVANGELIS: It -- it draws the  
2 line where a law has no actus reus. So I think  
3 that's the easiest line. I -- I don't defend  
4 the line under the Eighth Amendment because I  
5 don't think actually that the Court -- I know  
6 the Court didn't rely on any Eighth Amendment  
7 principles or history of --

8 JUSTICE BARRETT: But the hypothetical  
9 I just gave you had no actus reus either. The  
10 status of homelessness, I mean, it could be, you  
11 know, 4:00 in the afternoon and the person is  
12 just standing outside the bus stop.

13 Do you agree that if the law  
14 prohibited that, made that a crime, that under  
15 Robinson, whether Robinson was right or wrong,  
16 that under Robinson, that would be a violation  
17 of the Eighth Amendment?

18 MS. EVANGELIS: Well, I -- I -- I  
19 think the better framework is due process.

20 JUSTICE BARRETT: I understand that.  
21 Under Robinson, do you agree that that would be  
22 wrong?

23 MS. EVANGELIS: Yes.

24 JUSTICE BARRETT: Okay. Thank you.

25 MS. EVANGELIS: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Jackson?

3 JUSTICE JACKSON: So picking up where  
4 Justice Barrett left off, you -- you -- you say  
5 that the ordinance here pertains to conduct and  
6 not to status, and I'm just trying to figure  
7 that out. I'm not so sure for this reason.  
8 It's because all humans engage in the act in  
9 question, sleeping. And yet the statute  
10 operates or the ordinance operates to penalize  
11 only certain individuals, those who have no  
12 choice but to do that act in public.

13 So it appears, I think, not to be the  
14 act that the state or the city in this case  
15 finds criminally culpable. It's instead the act  
16 as engaged in by certain people, by people who  
17 cannot afford housing and have nowhere else to  
18 go.

19 So why is that the wrong way to think  
20 about it? And if that is the right way to think  
21 about it, why isn't that a status crime in the  
22 way that Robinson contemplates?

23 MS. EVANGELIS: It's not because we  
24 can look at the law and it has a conduct  
25 element. The conduct is establishing a place --

1 a campsite, and that is something that a person  
2 who has a home or a shelter could do as well.

3 JUSTICE JACKSON: But you've just  
4 defined away the basic actus reus, right? The  
5 actus reus is sleeping out -- I guess outside to  
6 the extent you put outside in it, but that's the  
7 problem I'm talking about. The actus reus is  
8 the sleeping, right? Everybody -- that's not a  
9 criminally culpable kind of activity.

10 That's what I think might distinguish  
11 it from Robinson and -- and make it worse for  
12 you in a way because, in Robinson at least, to  
13 the extent someone had a disease and the  
14 question was, well, are they engaging in  
15 otherwise criminally culpable conduct, buying  
16 and selling drugs, taking drugs, you know, we --  
17 we look at that kind of category of things.

18 Here, the actus reus is sleeping,  
19 human, universal. The -- the -- the City adds,  
20 okay, but you can't sleep outside. And I guess  
21 what I'm trying to understand is, to the extent  
22 that that only happens with respect to a certain  
23 category of people who have no other place to  
24 go, why isn't that really just punishing the  
25 status of being someone who doesn't have any



1 place to go?

2 MS. EVANGELIS: It doesn't apply only  
3 to those people. The Respondents here are  
4 trying to exempt a whole category of people.  
5 What -- so what you look at there is the -- the  
6 conduct of camping under federal law and in this  
7 Court's decision in Clark, it was understood  
8 that that is conduct. It is just like trespass,  
9 where, if you are found in a place, if you enter  
10 with permission, but then you remain there  
11 without permission under Quarles --

12 JUSTICE JACKSON: But it's not just  
13 like trespass because, presumably, you have  
14 other places to go. So let me just -- let me  
15 just ask you this other question.

16 What -- what is your understanding of  
17 the Martin rule? Because I -- I thought it was  
18 premised on the circumstance in which someone  
19 had nowhere else to go and they needed to sleep  
20 and they needed to be there. But you seem to  
21 suggest that necessity is not sort of baked into  
22 what Martin was doing.

23 MS. EVANGELIS: Martin speaks in terms  
24 of someone who is involuntarily homeless, and  
25 that raises all of those policy questions that

1 we've been discussing about how do you determine  
2 that.

3 JUSTICE JACKSON: But assume they  
4 exist. Involuntarily homeless means the person  
5 has nowhere else to sleep.

6 MS. EVANGELIS: Yes, that is -- the  
7 necessity defense is available. And what  
8 Respondents are asking to do is to  
9 constitutionalize that very defense under the  
10 Eighth Amendment.

11 So, as I said earlier, it could be --  
12 the argument could be made -- it would be a very  
13 high bar under due process, but that is the sort  
14 of argument that we would expect one to make  
15 under a due process framework --

16 JUSTICE JACKSON: Thank you.

17 MS. EVANGELIS: -- under this Court's  
18 Kahler decision.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Mr. Kneedler.

22 ORAL ARGUMENT OF EDWIN S. KNEEDLER  
23 FOR THE UNITED STATES, AS AMICUS CURIAE,  
24 SUPPORTING NEITHER PARTY

25 MR. KNEEDLER: Mr. Chief Justice, and

1 may it please the Court:

2 In Robinson, this Court held that the  
3 government cannot criminalize status. And  
4 Respondent has conceded here today that the City  
5 cannot criminalize the status of being homeless.

6 Our narrow submission in this case is  
7 that government cannot circumvent the principle  
8 of Robinson by making it unlawful for a person  
9 to reside in the jurisdiction if he has that  
10 status.

11 That is what the ordinances here do.  
12 As applied to someone who has nowhere else to  
13 sleep, which is an essential human function, the  
14 ordinances are the equivalent of making it a  
15 crime to be homeless while living in Grants  
16 Pass.

17 Although we think the Ninth Circuit  
18 was right to recognize that the core principle  
19 of Robinson is implicated in this case, the  
20 Court was wrong to award broad injunctive relief  
21 in the circumstances and manner in which it did.

22 The Robinson principle requires an  
23 individualized determination, and the Ninth  
24 Circuit's failure to require such a  
25 determination and its issuance of much broader

1 injunctive relief has led to the problems at  
2 issue that the Petitioner and its amici have  
3 raised, not the core principle of Robinson.

4           And, therefore, we urge the Court to  
5 adhere to the core principle of Robinson but to  
6 emphasize that cities have flexibility to  
7 implement these, and, in particular, time,  
8 place, and manner restrictions on where someone  
9 can sleep are entirely valid if they are  
10 reasonable, and, indeed, the state law that  
11 Justice Jackson referred to establishes a state  
12 policy that time, manner, and place restrictions  
13 are the way to go if they are reasonable.

14           I welcome the Court's questions.

15           JUSTICE THOMAS: Mr. Kneedler,  
16 wouldn't you have a better argument if Robinson  
17 involved someone being arrested for using drugs,  
18 but then the Court said that you were in effect  
19 arresting him for the status of a drug user  
20 because he was -- he had no choice but to use  
21 drugs because he's an addict?

22           MR. KNEEDLER: No. Our -- our  
23 position is not that the conduct as in Robinson,  
24 the drug addict can't stop from using drugs.  
25 That is not our position. That's a question of

1 personal culpability on the basis of what the  
2 person's makeup --

3 JUSTICE THOMAS: So what's the  
4 difference between that and -- and -- and  
5 camping out? What you're saying here, it seems  
6 as though you're saying, well, they -- there's  
7 no other choice, so you have to camp out.  
8 Therefore, you're really arresting this person  
9 for the status of homelessness.

10 MR. KNEEDLER: Yes, but -- but not  
11 because of an -- of an involuntary compulsion  
12 sense. I think, as Justice Alito pointed out,  
13 the nexus here is actually closer than in the --  
14 than in the addiction situation because sleeping  
15 outside is essentially the mirror image or the  
16 other side of the coin or the definition --

17 JUSTICE GORSUCH: Well, Mr. --

18 MR. KNEEDLER: -- of the status of --  
19 of homelessness.

20 JUSTICE GORSUCH: -- Mr. Kneedler, I  
21 -- I agree that the distinction between status  
22 and conduct is a slippery one and that they're  
23 often closely related.

24 And in Robinson, though, the Court  
25 said you cannot make the status of being a drug

1     addict a crime, but you can criminalize the  
2     conduct, even if it is involuntary and  
3     compulsive. And Powell reaffirmed that line  
4     very strongly, at least the plurality opinion  
5     did, and said we're not going to go further.

6             And I wonder whether the government is  
7     asking us to take that step that Powell  
8     counseled against by saying that it is -- it is  
9     status -- effectively status, and this is  
10    throughout your brief. You use the word  
11    "effective" or "essentially" or "tantamount to,"  
12    those kinds of words. And -- and so I just  
13    wanted to get your response to that -- that  
14    concern.

15            MR. KNEEDLER: No, we are not asking  
16    the Court to take the step that it declined to  
17    take in Powell, which had to do with personal  
18    responsibility, the -- the sort of issues that  
19    were involved --

20            JUSTICE GORSUCH: Okay. If you're --

21            MR. KNEEDLER: -- in this Court's  
22    decision in Kahler.

23            JUSTICE GORSUCH: -- not asking us to  
24    do that, then -- then -- then I guess I just  
25    want to circle back to what Justice Thomas was

1 getting at, which is, surely, the government  
2 wants to continue to enforce the drug laws and  
3 all kinds of other laws that people could make  
4 an argument that I had involuntary need to do, a  
5 necessity defense to. You -- you don't want us  
6 to wipe out all those laws?

7 MR. KNEEDLER: Absolutely not, but --  
8 but what is different here is that the -- the  
9 conduct in -- in -- that was suggested in Powell  
10 would have been based on the person's own  
11 separate --

12 JUSTICE GORSUCH: Well --

13 MR. KNEEDLER: -- antisocial conduct.  
14 Here --

15 JUSTICE GORSUCH: Well, Justice White  
16 made clear that some people are going to be  
17 forced to drink in public because they don't  
18 have a home.

19 MR. KNEEDLER: Yeah. And what --

20 JUSTICE GORSUCH: He made this very  
21 point. And --

22 MR. KNEEDLER: No, we don't -- but --  
23 -- but -- but the point here, it is the  
24 government that is -- that is prohibiting the  
25 alternative. It's not the individual's

1 inability to control his own conduct.

2 The government, because the person --  
3 because of other circumstances, the lack of  
4 money, the lack of a friend to stay with, the  
5 lack of shelter space, there is no place -- we  
6 take as a given in our position that there is no  
7 other place for the person to sleep --

8 JUSTICE GORSUCH: And I think,  
9 wouldn't --

10 MR. KNEEDLER: -- and as the  
11 government --

12 JUSTICE GORSUCH: -- couldn't a drug  
13 addict, though, make the exact same argument? I  
14 had no other choice.

15 MR. KNEEDLER: But that is -- that is  
16 -- that -- the other choice would be a matter of  
17 -- of personal --

18 JUSTICE GORSUCH: No. Say the record  
19 says --

20 MR. KNEEDLER: -- understanding,  
21 personal culpability.

22 JUSTICE GORSUCH: But the record says  
23 that there is no other choice. I had to do it.

24 MR. KNEEDLER: Well, I -- I do think  
25 that engaging in conduct that is unrelated to --



1 let me take that back.

2 The -- the sleeping outside when you  
3 have no other place to go is the definition of  
4 homelessness.

5 JUSTICE JACKSON: Mr. Kneedler, isn't  
6 the response --

7 JUSTICE BARRETT: But -- but Judge --

8 JUSTICE JACKSON: -- also that those  
9 two things are different? I mean, you're sort  
10 of saying it's about individual culpability.  
11 But it's not as though everyone engages in drug  
12 use.

13 MR. KNEEDLER: Right.

14 JUSTICE JACKSON: Right? Certain  
15 people do, and maybe they have addiction, and  
16 maybe you can't punish them because of the  
17 addiction, but you can still punish them as  
18 criminally culpable for engaging in the act.

19 It seems to me we are in a totally  
20 different category --

21 MR. KNEEDLER: We are, yes.

22 JUSTICE JACKSON: -- when you're  
23 talking about acts that everybody participates  
24 in that no one thinks in and of themselves are  
25 criminally culpable. And yet somehow this

1 statute is reaching out to punish certain people  
2 who engage in that universal human basic need.  
3 That seems to me to be the distinction --

4 MR. KNEEDLER: Yes.

5 JUSTICE JACKSON: -- in these  
6 situations.

7 MR. KNEEDLER: That is a critical  
8 distinction, and not only is it something that  
9 everybody engages in, but it's something that  
10 everybody has to engage in to be alive.

11 So, if you -- so, if you can't sleep,  
12 you can't live, and, therefore, by prohibiting  
13 sleeping, the City is basically saying you  
14 cannot live in Grants Pass. It's the equivalent  
15 of banishment, which is -- which is something  
16 that is unknown to the way --

17 JUSTICE SOTOMAYOR: Mr. Kneedler --

18 JUSTICE GORSUCH: Mr. Kneedler --

19 JUSTICE SOTOMAYOR: -- wasn't Grant  
20 Pass's first attempt, policy choice, to put  
21 people -- homeless people on buses so they would  
22 leave the city? I understood that to be the  
23 history of Grant Pass. They put -- police  
24 officers would put -- buy them a bus ticket,  
25 send them out of the city, but that didn't work

1 because people came back because it had been  
2 their home, correct?

3 MR. KNEEDLER: They came back.

4 JUSTICE SOTOMAYOR: They came back.

5 MR. KNEEDLER: I think they might have  
6 been sent back by the --

7 JUSTICE SOTOMAYOR: So then they  
8 passed this law. And didn't the city council  
9 president say, our intent is to make it so  
10 uncomfortable here that they'll move down the  
11 road, meaning out of town, correct?

12 MR. KNEEDLER: That state -- that  
13 statement was made at a -- at a public meeting  
14 of the city council.

15 JUSTICE SOTOMAYOR: All right. So  
16 let's assume what you're saying or accepting,  
17 that -- do you -- do you happen to know, or  
18 maybe I hope one of you knows, how many beds  
19 there are in Grant Pass, shelter beds?

20 MR. KNEEDLER: I believe the only --  
21 the only shelter beds, at least at the -- at the  
22 time the record in this case was compiled, was  
23 at the Gospel Mission. There's a -- there's a  
24 -- has been at times a detox place. There has  
25 been a warming center that has been maintained.

1 But, in terms of -- excuse me -- shelter beds --

2 JUSTICE SOTOMAYOR: Well, we're  
3 talking about --

4 MR. KNEEDLER: Yes, and I think --

5 JUSTICE SOTOMAYOR: -- a  
6 disproportionate --

7 MR. KNEEDLER: -- I think it's  
8 approximately a hundred. There -- there are  
9 men's, women's.

10 JUSTICE SOTOMAYOR: Yeah. I thought  
11 it was much less than that.

12 MR. KNEEDLER: Yes.

13 JUSTICE SOTOMAYOR: All right. So we  
14 go back to you want the district court to make  
15 individualized findings. You've asked us to  
16 vacate and remand. Can we go back to that so I  
17 understand it? I quite didn't understand it in  
18 your brief because I thought individualized  
19 findings had to do with the class action, but  
20 that question hasn't been certified here.

21 MR. KNEEDLER: Right, but -- but I  
22 think the -- I think the merits -- our basic  
23 point is that a -- a person does not have an  
24 Eighth Amendment defense or an Eighth Amendment  
25 claim unless he truly does not have some other

1 place to reside. And so, by speaking of  
2 individualized, what we were --

3 JUSTICE SOTOMAYOR: So --

4 MR. KNEEDLER: -- saying is that it  
5 depends on whether that person has some other  
6 place, has a relative.

7 JUSTICE SOTOMAYOR: I -- I accept all  
8 of that.

9 MR. KNEEDLER: Yeah.

10 JUSTICE SOTOMAYOR: I guess what I'm  
11 asking you is -- and this is what I didn't  
12 understand from your brief -- are you saying  
13 that there can't be a class certification of  
14 homeless people ever?

15 MR. KNEEDLER: No.

16 JUSTICE SOTOMAYOR: That you have to  
17 have individuals? Or are you -- or are you  
18 saying that the injunction is too broad if it  
19 doesn't provide for remedies that are -- somehow  
20 that the person has to prove a certain --

21 MR. KNEEDLER: The --

22 JUSTICE SOTOMAYOR: -- number of  
23 things before --

24 MR. KNEEDLER: Yes. That it --

25 JUSTICE SOTOMAYOR: -- they're

1 entitled to the injunction?

2 MR. KNEEDLER: Yeah. Yes.

3 JUSTICE SOTOMAYOR: I wasn't sure.

4 MR. KNEEDLER: No, the -- the Eighth  
5 Amendment claim is a personal one and, in this  
6 context, depends on whether the person does have  
7 another place to sleep. So the -- the person  
8 cannot benefit from the Eighth Amendment claim  
9 without an individualized -- without that person  
10 showing, if it comes up in a -- in an  
11 affirmative injunctive action, without that  
12 person showing that he or she has no other place  
13 to stay.

14 CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16 If there is a -- the town next to  
17 Grants Pass, 10 minutes away, has just completed  
18 building a homeless shelter that has many vacant  
19 beds, does that change the analysis here? I  
20 mean, we talked about the town wanting to get --  
21 ship people out of the town.

22 Would it be -- would -- would it --  
23 would there still be a right to sleep, contrary  
24 to the ordinances in Grants Pass, because you  
25 don't want to be taken 10 minutes away where

1 there's a homeless shelter?

2 MR. KNEEDLER: I -- that goes to the  
3 question, I think, under the analysis of whether  
4 the beds are available. And I think, if they're  
5 right across the town line, it would be  
6 appropriate to take into account that there's a  
7 homeless shelter there, even though it's not one  
8 in the City of Grants Pass. But often, in a  
9 situation, the two towns might cooperate to have  
10 one homeless shelter.

11 CHIEF JUSTICE ROBERTS: Well, yeah,  
12 they might, but often --

13 MR. KNEEDLER: Right.

14 CHIEF JUSTICE ROBERTS: -- the next  
15 towns don't always cooperate. So what if it's  
16 30 miles away? Is a -- is the shelter available  
17 in that case --

18 MR. KNEEDLER: I --

19 CHIEF JUSTICE ROBERTS: -- for your  
20 purposes, or are you going to tell me it just  
21 depends on all the circumstances --

22 MR. KNEEDLER: Well, I think it  
23 depends on how --

24 CHIEF JUSTICE ROBERTS: -- so  
25 municipalities won't have that much guidance?

1           MR. KNEEDLER: I think it depends on  
2 the accessibility. I mean, one -- one of the  
3 fundamental points here --

4           CHIEF JUSTICE ROBERTS: The  
5 accessibility is that when an officer comes up  
6 in Grants Pass and finds a homeless person and  
7 says it violates our ordinance, but I will give  
8 you a ride down the road, 30 miles, whatever it  
9 is, because there's a new homeless shelter  
10 there, and the person says, no, I don't want to  
11 do that, can that person be given a citation?

12          MR. KNEEDLER: I -- I think probably  
13 not, but let me -- if I could explain why.

14          CHIEF JUSTICE ROBERTS: Sure.

15          MR. KNEEDLER: I mean, obviously,  
16 there are questions at the -- at the margin  
17 here. But I think one of the principal features  
18 here that shouldn't be overlooked is the City is  
19 seeking to banish or expel its own residents,  
20 its own citizens, people whose children can go  
21 to school in that location, who may pay taxes in  
22 that location.

23                 So, if the 30-mile-away shelter  
24 requires the person to leave his community and  
25 to live in another place, that -- that



1       implicates --

2                   CHIEF JUSTICE ROBERTS:  What is the --  
3       I mean, how far does that go?

4                   MR. KNEEDLER:  -- that aspect of the  
5       problem here.

6                   CHIEF JUSTICE ROBERTS:  Let's say  
7       there are five cities all around Grants Pass and  
8       they all have homeless shelters.  And yet the  
9       person wants to stay.  You know, I've been a  
10      Grants Pass resident for a long time.  I don't  
11      want to go to the one of those shelters.

12                   Can that person be given a citation?

13                   MR. KNEEDLER:  I -- I think under --  
14      because of the concern I've mentioned, I think  
15      that would -- would be a serious problem  
16      because --

17                   CHIEF JUSTICE ROBERTS:  You would say  
18      it would be a problem to give them a citation?

19                   MR. KNEEDLER:  Yes, I -- I think so,  
20      because you would be requiring -- or the City's  
21      ordinance requires them to leave the City of  
22      Grants Pass.  If it's just -- if the homeless  
23      shelter is right over the line, they can still  
24      be part of the community of Grants Pass but  
25      sleep in the --

1 CHIEF JUSTICE ROBERTS: No, but it's  
2 in another city. You keep fighting the  
3 hypothetical.

4 MR. KNEEDLER: No, no, and -- and  
5 that's why I think it's different. I -- I'm not  
6 prepared to say, you know, that absolutely not,  
7 but I do -- I do think it's different because  
8 the City is implementing its policy of banishing  
9 people, its own residents, from the --

10 CHIEF JUSTICE ROBERTS: Banishment is  
11 a -- is a strange word when you're talking about  
12 something 10 minutes away.

13 MR. KNEEDLER: Well -- well -- but,  
14 again, the question is whether you could still  
15 realistically be part of the community where you  
16 grew up. The figures show and, in fact, JA 114,  
17 115 here shows that most of the homeless people  
18 in Grants Pass are from Grants Pass.

19 CHIEF JUSTICE ROBERTS: Counsel,  
20 everyone's mentioned -- not everybody. Many  
21 people have mentioned this is a serious policy  
22 problem, and it's a policy problem because the  
23 solution, of course, is to build shelter to  
24 provide shelter for those who are otherwise  
25 harmless.

1                   But municipalities have competing  
2 priorities. I mean, what if there are lead  
3 pipes in -- in -- in the -- in the water? Do  
4 you build the homeless shelter or do you take  
5 care of the lead pipes? What if there aren't --  
6 isn't enough fire protection? Which one do you  
7 prioritize?

8                   Why would you think that these nine  
9 people are the best people to judge and weigh  
10 those policy judgments?

11                  MR. KNEEDLER: We're -- we're not  
12 suggesting that. We're not suggesting that the  
13 only solution is for -- especially in the  
14 current circumstances, the only solution would  
15 be to build homeless shelters.

16                  As I mentioned, time, place, and  
17 manner restrictions, I -- I think, are a very  
18 sensible way to go. And, in fact, as I  
19 mentioned, Oregon state law requires that. In  
20 other words, a -- a city adopts a provision that  
21 you -- you know, you can't -- you -- you can't  
22 sleep on the sidewalks anywhere because that  
23 obstructs people seeking to move.

24                  You can't camp near a school. You  
25 can't camp downtown. You can't sleep downtown.

1 You might be able to sleep in a -- in a park,  
2 and -- and so it -- and a park -- and that could  
3 be patrolled for -- for drug use and whatnot.

4 CHIEF JUSTICE ROBERTS: Counsel, this  
5 is --

6 MR. KNEEDLER: None of these other  
7 laws are inapplicable if there's a time, place,  
8 and manner restriction.

9 CHIEF JUSTICE ROBERTS: This is an old  
10 question, but, you know, eating is a basic human  
11 function as well that people have to do, just  
12 like sleeping. So, if someone is hungry and no  
13 one is giving him food, can you prosecute him if  
14 he breaks into a store to get something to eat?

15 MR. KNEEDLER: Absolutely, absolutely.  
16 Breaking into -- into a store is a common crime  
17 that not everybody engages in, unlike sleeping,  
18 which is what -- which is what we have here,  
19 which is really --

20 CHIEF JUSTICE ROBERTS: But it's a --  
21 it's a -- it's a -- a necessity for the person  
22 who needs food.

23 MR. KNEEDLER: It's not a necessity to  
24 break into -- into a -- into a store. And with  
25 respect to the --

1 CHIEF JUSTICE ROBERTS: Well, you're  
2 fighting the hypothetical. I'm saying this  
3 person needs food.

4 MR. KNEEDLER: And -- and it -- the --  
5 the Eighth Amendment does not require that that  
6 person be excused from doing it. I think  
7 there's -- there's a certain amount of common  
8 sense and practicality to this, and it's, I  
9 think, well understood that just like drug use  
10 is not something the Eighth Amendment excuses  
11 you from, either is eating.

12 And the -- the problem of eating is  
13 addressed at the local level as the, you know,  
14 history and the poor law shows, is that the  
15 community takes care of its own residents.

16 And it's common now as it was at the  
17 founding for churches and individuals and  
18 whatnot to offer their help, the charity in the  
19 community. And that's what happens in Grants  
20 Pass. Various organizations feed -- feed the --  
21 the homeless people, and there are social  
22 services to help the homeless people.

23 So this is -- this is consistent  
24 except for the absolute ban in sleeping in the  
25 City. Otherwise, the community's response is

1 what has been done down through history.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 MR. KNEEDLER: But it's the City's  
5 absolute ban --

6 CHIEF JUSTICE ROBERTS: Thank you.

7 MR. KNEEDLER: -- that interrupts that  
8 continuity.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Thomas?

11 Justice Alito?

12 JUSTICE ALITO: Could you explain how  
13 your rule would be carried out by police  
14 officers on a day-to-day basis?

15 Let's say that there are 500 beds in a  
16 particular town and let's say it's 3 -- 3:00 in  
17 the afternoon, 4:00 in the afternoon on a winter  
18 day.

19 What is an individual police officer  
20 supposed to do if individual police officer  
21 would go around and count the number of people  
22 who are getting ready to sleep outside? I  
23 guess, if it's 4:00, you wouldn't get that.  
24 Let's say it's 6:00.

25 Count the number of people who are

1 getting ready to sleep outside for the night and  
2 then ask each one of them whether you've tried  
3 to find a bed at -- at a shelter? Whether that  
4 person would be willing to go to a shelter if a  
5 bed is available without any conditions or  
6 whether the bed -- the bed would have to be  
7 available on the conditions that the individual  
8 wants, like I won't go to a shelter where they  
9 won't take my dog or something like that?

10 Just explain how it would work on a --  
11 a daily basis.

12 MR. KNEEDLER: Well, first of all,  
13 with respect to the individual encounter, I  
14 think the -- the way this would work in the real  
15 world -- and -- and I think it's important to  
16 understand what happens on the ground in these  
17 situations.

18 The -- I -- I think, in the  
19 circumstances you're talking about, I think what  
20 would happen is that the person -- the -- the  
21 person encountering the homeless person would  
22 know whether there is a -- a spot available.

23 The study -- I don't think the  
24 homeless person would be required to check each  
25 day with each shelter if there are multiple

1 shelters. And in larger cities, these initial  
2 encounters are -- are not handled by law  
3 enforcement. They're typically handled by  
4 social services agencies who are in contact with  
5 people who are camping and -- and -- and know  
6 what their circumstances are and they are able  
7 to say: We know that at such and such shelter  
8 there are beds available --

9 JUSTICE ALITO: What if there's a --

10 MR. KNEEDLER: -- would you be willing  
11 to go?

12 JUSTICE ALITO: What if there's a  
13 question whether there are, indeed, enough  
14 shelter beds available?

15 Your rule wouldn't apply if there are  
16 enough beds available, right? If there are 500  
17 shelter beds and -- and there are only 200  
18 people who are trying to sleep outside, then  
19 your rule wouldn't apply?

20 MR. KNEEDLER: Right, right.

21 JUSTICE ALITO: So you have to have a  
22 comparison of the number of beds available with  
23 the number of people who want to sleep outside?

24 MR. KNEEDLER: Right, yes. And I just  
25 --



1                   JUSTICE ALITO:  So that would be the  
2                   threshold question?

3                   MR. KNEEDLER:  Right.  And I just want  
4                   to clarify one -- one point about that.  It's  
5                   not simply a measure of the number of beds  
6                   against the number of homeless people such that  
7                   if there is a deficit, the City can't enforce  
8                   the law at all.

9                   If you have individualized questioning  
10                  and you know that there are vacant -- there are  
11                  vacancies available, even if not for everybody,  
12                  but there is a vacancy for the person being  
13                  interviewed, then, yes, that person -- if -- if  
14                  that person is offered and refuses, that -- that  
15                  person could be prosecuted and -- or -- or -- or  
16                  cited.  So --

17                  JUSTICE ALITO:  Well, what if the  
18                  person says I -- I -- yeah, I know there's a bed  
19                  available at the Gospel Rescue Mission, but they  
20                  won't take my dog?

21                  MR. KNEEDLER:  Yeah, I don't think --  
22                  I don't think the inability to take your dog to  
23                  the shelter is -- is a sufficient reason.  There  
24                  are shelters in some larger cities that may well  
25                  take pets, but --

1 JUSTICE ALITO: I could -- I could --  
2 I know I could sleep in the home of a family  
3 member, but they really hate me and they're  
4 really nasty to me.

5 MR. KNEEDLER: I -- you know, I --

6 JUSTICE ALITO: I'm not -- these are  
7 --

8 MR. KNEEDLER: No, no --

9 JUSTICE ALITO: I'm just wondering how  
10 the -- this is going to be administered on a  
11 daily basis.

12 MR. KNEEDLER: And -- and -- and I  
13 think, you know, with all respect, I think that  
14 example is -- if the -- if the family is going  
15 to accept him, but, I mean, that's the question,  
16 whether there is a -- a place to sleep. But  
17 I -- I don't know that it would very often come  
18 down to that -- that family hates me.

19 On the other hand, if it's a woman who  
20 left domestic abuse, she couldn't be expected --

21 JUSTICE ALITO: Right.

22 MR. KNEEDLER: -- to go back to the --  
23 to the -- to her home or maybe her relative's  
24 home or his relative's home or something. So  
25 there's a lot of common sense.

1                   And, again -- again, the law enforce  
2                   -- the -- the first encounter that a police  
3                   officer or somebody else has with a homeless  
4                   person is very unlikely to be a situation in  
5                   which the person would be issued a citation.

6                   JUSTICE ALITO: Okay. You -- you  
7                   mentioned just a couple of things that I wanted  
8                   to follow up on. Does it matter whether the  
9                   person grew up in the town or not? Suppose --

10                  MR. KNEEDLER: No. No.

11                  JUSTICE ALITO: -- that they -- okay,  
12                  that's irrelevant?

13                  MR. KNEEDLER: And -- and -- and I  
14                  think --

15                  JUSTICE ALITO: So they go up to --  
16                  they go up to some police officer or social  
17                  services in San Diego goes up to somebody and  
18                  says, you know, where are you from? Oh, I'm  
19                  from Fargo, but if I have to sleep outside, I  
20                  sure would rather do it here than in Fargo.  
21                  That doesn't matter?

22                  MR. KNEEDLER: No, and -- and I  
23                  think -- not because of -- of any Eighth  
24                  Amendment rule we're talking about, but under  
25                  this Court's decisions in -- in Edwards and --

1 and Saenz, the Privileges and Immunities Clause  
2 or the Commerce Clause or the various right to  
3 travel provisions would -- would prohibit  
4 attaching that sort of -- of limitation to a --  
5 to a newcomer.

6 But I -- but I would -- as I  
7 mentioned, regarding people --

8 JUSTICE ALITO: Okay. Where I used  
9 to -- where I used to live in New Jersey, there  
10 are a lot of really small municipalities, I  
11 think over 500 municipalities in the state. I  
12 could go for a 20-minute walk in the evening and  
13 be in three or four different municipalities.

14 So, to get back to my -- to Justice --  
15 to the Chief Justice's question, if -- you know,  
16 if there aren't enough beds available in West  
17 Caldwell, does it matter -- is it -- West  
18 Caldwell is out of luck even though there are a  
19 lot of beds available in Caldwell, which is, you  
20 know, a couple -- less than a mile away?

21 MR. KNEEDLER: Yeah, I think the way  
22 you're describing it, it would -- it would be --  
23 it -- it might be fair to say that that -- that  
24 set of small and closely knit communities would  
25 be one community and -- and the person wouldn't

1 -- wouldn't basically be banished from where he  
2 lived or where he grew up by saying, you know,  
3 if there's a shelter in this other location,  
4 then -- then you could be expected to go there.

5 JUSTICE ALITO: There's some tiny  
6 municipalities. What if a municipality doesn't  
7 have a park, so if somebody is going to sleep  
8 outside, the only place where that person can  
9 sleep is going to have to be on the street?

10 MR. KNEEDLER: I --

11 JUSTICE ALITO: What -- does a time,  
12 place, or manner restriction work there?

13 MR. KNEEDLER: I mean, certainly not  
14 on the street and -- I mean, because of safety,  
15 traffic, et cetera. I mean, there are  
16 common-sense accommodations, and I think even in  
17 the smallest town, there are probably locations  
18 where a -- a -- a person could sleep. I -- you  
19 know.

20 JUSTICE ALITO: All right. Thank you.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Sotomayor?

23 JUSTICE SOTOMAYOR: I don't want to be  
24 repetitive, but what are we vacating and  
25 remanding for? You -- you -- individualized

1 finding of what?

2 MR. KNEEDLER: Well, the -- the way  
3 that -- the way -- first of all, the class was  
4 defined simply on the basis of the aggregate  
5 numbers without an individualized determination  
6 as -- as to whether, frankly, in our view, not a  
7 sufficient individualized determination as to  
8 the two named plaintiffs.

9 And you identified several factors  
10 here. They both slept in their -- in their  
11 cars. Several of them were able -- or both of  
12 them chose at some times to sleep at a Safeway  
13 parking lot or with a friend. The other slept  
14 at a truck stop out of -- out of town. It's not  
15 clear that -- neither of them ever actually  
16 camped in a park. And so -- and, in fact, the  
17 dissent below questioned whether one of those  
18 two people even had standing.

19 So that there -- even with respect to  
20 the named plaintiffs, there was not the sort of  
21 examination of their individual --

22 JUSTICE SOTOMAYOR: So you're talking  
23 --

24 MR. KNEEDLER: -- circumstances that  
25 they're --

1 JUSTICE SOTOMAYOR: -- about standing?

2 That we don't know if --

3 MR. KNEEDLER: Well, standing, yes,  
4 and then there -- there could be typicality or  
5 commonality problems there too if the -- if the  
6 -- the two named plaintiffs slept in vehicles,  
7 which may present different problems than --  
8 than in the -- in the camp.

9 JUSTICE SOTOMAYOR: Well, we were told  
10 that sleeping or camping is out of the case  
11 because -- and the court said that.

12 MR. KNEEDLER: Sleeping, yes, but --  
13 but sleeping in a vehicle counts as camping.

14 JUSTICE SOTOMAYOR: Right.

15 MR. KNEEDLER: But it's not the sort  
16 of camping that -- that we've been talking  
17 about, to some extent, about sleeping on the  
18 ground with a blanket or a tent or something  
19 like that.

20 And it's true, the question of tents  
21 are not in -- in the case. And if -- even if --  
22 you know, if the City wanted to allow tents, I  
23 suppose it could even require that they be --

24 JUSTICE SOTOMAYOR: All right.

25 MR. KNEEDLER: -- taken down --

1 JUSTICE SOTOMAYOR: Thank you,  
2 counsel.

3 MR. KNEEDLER: -- and put back up.  
4 There's a lot of flexibility that the City could  
5 have.

6 CHIEF JUSTICE ROBERTS: Justice Kagan?

7 JUSTICE KAGAN: Well, I did want to  
8 you just about that. I mean, let's say I'm with  
9 you, Mr. Kneedler, on the fact that you can't  
10 prohibit being homeless, and because you can't  
11 prohibit being homeless, you can't prohibit  
12 sleeping outside if you are a genuinely homeless  
13 person.

14 And let's say I'm with you that the  
15 fact that this ordinance says, well, but we're  
16 prohibiting using a blanket, that can't be  
17 right. You know, you're not, like, just, like,  
18 get hypothermia and the problem will -- the  
19 constitutional problem will go away.

20 But it does seem as though there are  
21 line-drawing issues as you go up, right? It's a  
22 very cold night and somebody wants to make a  
23 fire. It's raining and somebody wants to put up  
24 a tarp. The City has said you can sleep in  
25 particular areas, but it turns out that those



1 areas have a ton of crime.

2           You know, you could go on and on. And  
3 I'm not -- how do you deal with questions like  
4 that? These are not, like, gotcha questions.  
5 This is, like, how do you deal with questions  
6 like that? Where is the line where the City can  
7 say our legitimate municipal interests can come  
8 in and say, you know, as to that, as to that,  
9 you can't do that?

10           MR. KNEEDLER: Yeah, so what -- and  
11 there are several examples that you have there.  
12 With respect to tents and tarps, I guess, you --  
13 you were saying, I -- I -- I think there's a  
14 difference between what you might need to  
15 realistically sleep outside if it's raining,  
16 snowing, or something like that, and what you  
17 might prefer to have as a structure for  
18 long-term camping.

19           As I mentioned, the City might say you  
20 can put up a tent if it's very cold, but you've  
21 got to take it down in the morning. That's like  
22 being in -- some shelters say you can stay here  
23 overnight, but you have to leave during the day  
24 and you can come back.

25           I mean, that might seem gratuitous of

1 the City to do it. It might not want to do it.  
2 But -- but we're not saying that the Eighth  
3 Amendment would prevent it from doing it, and  
4 especially, as you say, if there's no  
5 alternative and it's, you know, 20 -- 20  
6 degrees.

7 And with respect to fires, there are  
8 really important issues on the other side of  
9 that question. In an urban area, if you're  
10 creating fires, there may be hazards in a -- in  
11 a park. There might be --

12 JUSTICE KAGAN: So how does --

13 MR. KNEEDLER: -- there might be  
14 fireplaces in a park.

15 JUSTICE KAGAN: -- how does a court  
16 make these judgments? Because these are tough  
17 judgments, and -- and usually they're the kind  
18 of judgments that we think of as municipal  
19 officials make them.

20 But you're saying, no, there's a  
21 certain level where it's out of their hands and  
22 it's in the court hands. And I guess I want to  
23 know what the principle is where those questions  
24 go to the courts and -- and why that principle  
25 is the right principle.

1                   MR. KNEEDLER: I think -- I mean, I  
2 think there are two principles. One is that it  
3 -- it's the municipality's determination  
4 certainly in the first instance with a great  
5 deal of flexibility how to address the question  
6 of homelessness and a time, place, and manner.  
7 And then municipalities should -- should be able  
8 to choose the place, should be able to choose  
9 the attributes of that place, should be able to  
10 say we're not going to allow more than, you  
11 know, 20 people or something, you know, to -- to  
12 regulate it in that manner.

13                   And I think the -- I think the  
14 principle, the Eighth Amendment principle, would  
15 be whether the -- the City has effectively  
16 prevented sleeping outside because the  
17 protections needed from the elements are not  
18 available. And, certainly, in Grants Pass, I  
19 would think even a blanket would not be enough  
20 under some -- but I think that's the -- I think  
21 that's the touchstone.

22                   Are you basically -- does it boil down  
23 to or is the core principle of Robinson that you  
24 can't criminalize homelessness, which includes  
25 not being able to criminalize sleeping outside?

1 If you can't sleep outside because of lack of  
2 protection from the elements, I think that's the  
3 principle a court would -- would apply.

4 But the Ninth Circuit, in a number of  
5 cases, has gone way beyond that, and we think  
6 that's really the source of the problems that  
7 have been identified in the briefs and not the  
8 core principle of -- of Robinson.

9 JUSTICE KAGAN: Thank you.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Gorsuch?

12 JUSTICE GORSUCH: Mr. Kneedler, I want  
13 to probe this a little bit further because it --  
14 it does seem to me the status/conduct  
15 distinction is very tricky. And I had thought  
16 that Robinson, after Powell, really was just  
17 limited to status.

18 And now you're saying, well, there's  
19 some conduct that's effectively equated to  
20 status and -- but you're saying involuntary drug  
21 use, you can regulate that conduct. That  
22 doesn't qualify as status. You're saying  
23 compulsive alcohol use, you can regulate that  
24 conduct in public. Public drunkenness, even if  
25 it's involuntary, that doesn't qualify as

1 status, right?

2 MR. KNEEDLER: Right.

3 JUSTICE GORSUCH: You're saying you  
4 can regulate somebody who is hungry and has no  
5 other choice but to steal. You can regulate  
6 that conduct even though it's a basic human  
7 necessity, and that doesn't come under the --  
8 under the status side of the line, right?

9 MR. KNEEDLER: Yes.

10 JUSTICE GORSUCH: Okay. But, when it  
11 comes to homelessness, which is a terribly  
12 difficult problem, you're saying that's  
13 different and -- because there are no beds  
14 available for them to go to in Grants Pass.

15 What -- what about someone who has a  
16 mental health problem that prohibits them --  
17 they cannot sleep in -- in a shelter. Are they  
18 allowed to sleep outside or not? Is that status  
19 or conduct that's regulable?

20 MR. KNEEDLER: I -- I think the -- the  
21 question would be whether that shelter is  
22 available.

23 JUSTICE GORSUCH: It's available.

24 MR. KNEEDLER: Well, no, available to  
25 the individual.

1 JUSTICE GORSUCH: It's available to  
2 the individual.

3 MR. KNEEDLER: But --

4 JUSTICE GORSUCH: It's just because of  
5 their mental health problem, they cannot do it.

6 MR. KNEEDLER: I -- I think there  
7 might be -- I mean, that's -- the mental health  
8 problem --

9 JUSTICE GORSUCH: Status or conduct?

10 MR. KNEEDLER: The mental health  
11 situation is itself a status.

12 JUSTICE GORSUCH: Right, I know that.

13 MR. KNEEDLER: Yes. But -- but if the  
14 --

15 JUSTICE GORSUCH: It has this further  
16 knock-on effect on conduct. Is that regulable  
17 --

18 MR. KNEEDLER: I -- I --

19 JUSTICE GORSUCH: -- by the state or  
20 not?

21 MR. KNEEDLER: -- I -- I think that --  
22 I think if the --

23 JUSTICE GORSUCH: All the -- you know,  
24 alcohol, drug use --

25 MR. KNEEDLER: Right, right.

1 JUSTICE GORSUCH: -- they have  
2 problems too and that that -- and -- and -- but  
3 you're saying that conduct is regulable. How  
4 about with respect to this pervasive problem of  
5 -- of persons with mental health problems?

6 MR. KNEEDLER: I -- I think, in a  
7 particular situation, if the -- if the -- if the  
8 person would engage in violent conduct as --

9 JUSTICE GORSUCH: No, no, no, don't  
10 mess with my hypothetical, counsel.

11 (Laughter.)

12 JUSTICE GORSUCH: I like my  
13 hypothetical. I know you don't. It's a hard  
14 one, and that's why I'm asking it. I'm just  
15 trying to understand --

16 MR. KNEEDLER: I -- I --

17 JUSTICE GORSUCH: -- the limits of  
18 your line.

19 MR. KNEEDLER: I think it would depend  
20 on how serious the offense was on the -- on the  
21 individual.

22 JUSTICE GORSUCH: It's -- it's -- it's  
23 a very serious effect. The mental health  
24 problem is serious, but there are beds  
25 available.

1           MR. KNEEDLER: Well, what I was trying  
2 to say, it would depend on how serious being  
3 required in -- to -- to go into that facility  
4 was on the person's mental -- if it would make  
5 his mental health situation a lot worse, then  
6 that may not be something that's --

7           JUSTICE GORSUCH: So that's status --  
8 that falls on the status side?

9           MR. KNEEDLER: Well, I -- I -- I -- I  
10 guess you could put it that way, but I -- I  
11 guess what I'm saying is that --

12           JUSTICE GORSUCH: I -- that's what I'm  
13 wondering. I don't -- I'm asking you.

14           MR. KNEEDLER: Well --

15           JUSTICE GORSUCH: I really am just  
16 trying to figure out --

17           MR. KNEEDLER: No. You could view  
18 that as status or --

19           JUSTICE GORSUCH: You're asking us to  
20 extend Robinson, and I'm asking how far?

21           MR. KNEEDLER: Well, what I was going  
22 to say, you could -- you could think of it as  
23 status, but I think another way to think about  
24 it, and this is our point about an  
25 individualized determination, is that place



1 realistically available to that person

2 because --

3 JUSTICE GORSUCH: It is in the sense  
4 that the bed is available --

5 MR. KNEEDLER: I know that it's --

6 JUSTICE GORSUCH: -- but not because  
7 of their personal circumstances.

8 MR. KNEEDLER: Right. Right. And  
9 that's -- and that's my point. It -- it's  
10 available in a physical sense. It may be  
11 available to somebody else, but requiring an  
12 individualized determination might include  
13 whether that person could cope in that setting.  
14 That's the only --

15 JUSTICE GORSUCH: So that -- so that  
16 might be an Eighth Amendment violation?

17 MR. KNEEDLER: Because it may not --  
18 yes, because it's not available.

19 JUSTICE GORSUCH: So that's an -- it's  
20 an Eighth Amendment violation to require people  
21 to access available beds in the jurisdiction in  
22 which they live because of their mental health  
23 problems?

24 MR. KNEEDLER: If -- if going there  
25 would -- would --

1 JUSTICE GORSUCH: How about if they  
2 have a substance abuse problem and they can't  
3 use those substances in the shelter? Is that an  
4 Eighth Amendment --

5 MR. KNEEDLER: That is -- that is not  
6 a -- that is not a sufficient --

7 JUSTICE GORSUCH: Why? Why? They're  
8 addicted to drugs, they cannot use them in the  
9 shelter. That's one of the rules.

10 MR. KNEEDLER: Well, if they -- if  
11 they -- if it's the shelter's rule, then they  
12 have no -- they -- they -- they can't go there  
13 if they're -- if they're addicted. That's not  
14 -- that's not --

15 JUSTICE GORSUCH: So that's an Eighth  
16 -- that's an Eighth Amendment violation?

17 MR. KNEEDLER: Well, no, the -- the --  
18 the Eighth Amendment violation is prohibiting  
19 sleeping outside because the only shelter that  
20 is available --

21 JUSTICE GORSUCH: Is not really  
22 available to that person?

23 MR. KNEEDLER: -- won't take them --  
24 won't take them, yes. And that's an  
25 individualized determination.

1 JUSTICE GORSUCH: Same thing with the  
2 alcoholic?

3 MR. KNEEDLER: Yes.

4 JUSTICE GORSUCH: Okay. So the  
5 alcoholic has an Eighth Amendment right to sleep  
6 outside even though there's a bed available?

7 MR. KNEEDLER: If -- if the only  
8 shelter in town won't take him, then I think  
9 he's in exactly -- he's in the same -- he's in  
10 the same condition. And there can be all sorts  
11 of reasons, and the City doesn't normally --

12 JUSTICE GORSUCH: And judges across  
13 the country are now going to superintend this  
14 under the Eighth Amendment?

15 MR. KNEEDLER: I -- I actually don't  
16 think that it -- it requires the -- again, I  
17 don't think we should let the Ninth Circuit  
18 decisions --

19 JUSTICE GORSUCH: No, you want to --

20 MR. KNEEDLER: -- characterize this.

21 JUSTICE GORSUCH: Okay. You -- you  
22 don't like the class certification, but that  
23 question's not before us, counsel.

24 MR. KNEEDLER: No, but all we're  
25 talking about is the core principle of Robinson,

1 which is you cannot punish someone for a status.  
2 And -- and I think communities guided by that  
3 principle, and it's the only principle a court  
4 should be enforcing --

5 JUSTICE GORSUCH: How about --

6 MR. KNEEDLER: -- would retain a lot  
7 of flexibility.

8 JUSTICE GORSUCH: How about if there  
9 are no public bathroom facilities? Can -- do  
10 people have an Eighth Amendment right to  
11 defecate and urinate outdoors?

12 MR. KNEEDLER: No, we -- we --

13 JUSTICE GORSUCH: Is that conduct or  
14 is that status?

15 MR. KNEEDLER: I -- it's, obviously,  
16 there -- there is conduct there and we are not  
17 suggesting that cities can't enforce their --

18 JUSTICE GORSUCH: Why not, if there  
19 are no public facilities available to homeless  
20 persons?

21 MR. KNEEDLER: The -- the -- that  
22 situation, you know, candidly, has never arisen.  
23 And whether or not there -- I mean, in the  
24 litigation as I've seen. But no one is  
25 suggesting and we're not suggesting that public

1 urination and defecation laws cannot be enforced  
2 because there are very substantial public health  
3 reasons for that.

4 JUSTICE GORSUCH: Well, there are  
5 substantial public health reasons with drug use,  
6 with alcohol, and with all these other things  
7 too.

8 MR. KNEEDLER: And they can all be --

9 JUSTICE GORSUCH: And you're saying  
10 the Eighth Amendment overrides those. Why not  
11 in this circumstance right now?

12 MR. KNEEDLER: No, I'm not -- I'm not  
13 saying the Eighth Amendment overrides the laws  
14 against drug use.

15 JUSTICE GORSUCH: Oh, I know that.

16 MR. KNEEDLER: Oh, I'm sorry.

17 JUSTICE GORSUCH: I know that.

18 MR. KNEEDLER: No, I misunderstood  
19 what you --

20 JUSTICE GORSUCH: That one -- that one  
21 the government wants to keep. I got that.

22 MR. KNEEDLER: No, I misunderstood  
23 your question. Sorry.

24 JUSTICE GORSUCH: Yeah. Last one.  
25 How about -- how about fires outdoors? I know

1 you say time, place, and manner, but is there an  
2 Eighth Amendment right to cook outdoors?

3 MR. KNEEDLER: No. I -- I -- I -- I  
4 think what -- what --

5 JUSTICE GORSUCH: That's -- that's an  
6 incident -- a human necessity every person has  
7 to do.

8 MR. KNEEDLER: But this -- but this is  
9 one -- this is one of those things that, you  
10 know, is taken care of on the ground as a  
11 practical matter. There are restaurants where  
12 someone can go. There are --

13 JUSTICE GORSUCH: Well, no, no, we're  
14 talking about homeless people.

15 MR. KNEEDLER: No.

16 JUSTICE GORSUCH: They're not going to  
17 go spend money at a restaurant necessarily.  
18 Let's --

19 MR. KNEEDLER: Well, there -- there  
20 may be inexpensive places. Some people get --

21 JUSTICE GORSUCH: Let's say there  
22 isn't, okay?

23 MR. KNEEDLER: And --

24 JUSTICE GORSUCH: Let's say that there  
25 is no reasonable --

1           MR. KNEEDLER:  And -- and the local  
2     community --

3           JUSTICE GORSUCH:  Do they have a right  
4     to cook?  They have a right to eat, don't they?

5           MR. KNEEDLER:  They have -- they have  
6     a right to eat, a right to cook if it entails  
7     having a fire, which I think it -- it -- it  
8     probably -- it probably would, but -- but, as I  
9     said, the -- the -- the eating, the feeding is  
10    taken care of in most communities by nonprofits  
11    and churches stepping forward --

12          JUSTICE GORSUCH:  But if there isn't  
13    --

14          MR. KNEEDLER:  -- as they have for 200  
15    years.

16          JUSTICE GORSUCH:  -- but, if there  
17    isn't, there's an Eighth Amendment right to have  
18    a fire?

19          MR. KNEEDLER:  No, no, we are not  
20    saying there's an Eighth Amendment --

21          JUSTICE GORSUCH:  Well, I thought you  
22    just said there was.

23          MR. KNEEDLER:  Well, there -- there's  
24    food that you can eat without cooking it.  I  
25    mean, they -- and they could could get a handout

1 from the -- from a -- from an individual that,  
2 you know, people can beg for money. I mean,  
3 there are -- there are ways that this works out  
4 in practice.

5 JUSTICE GORSUCH: Last -- last  
6 question. I -- I'm totally sympathetic to the  
7 idea that there might be a necessity defense in  
8 these cases, and there's a footnote in your  
9 brief that indicates that in a lot of cases you  
10 could -- you could maybe bring advance  
11 preliminary injunctive action at least as  
12 individuals. And I don't even see why you  
13 couldn't do it on a class-wide -- a class-wide  
14 basis.

15 MR. KNEEDLER: Yeah, we haven't ruled  
16 out classed, we haven't ruled out class -- class  
17 action.

18 JUSTICE GORSUCH: Well, I thought you  
19 did in that footnote. You said, you know,  
20 the -- the whole mistake here is that this was  
21 done on a class-wide basis. Why couldn't they  
22 --

23 MR. KNEEDLER: I think without --  
24 without -- without sufficient inquiry into the  
25 individual circumstances is what, particularly



1 with the two class representatives here.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice  
4 Kavanaugh?

5 JUSTICE KAVANAUGH: You just said a  
6 minute ago that a lot of this is taken care of  
7 on the ground as a practical matter. And I  
8 think one of the questions is, who takes care of  
9 it on the ground? Is it going to be federal  
10 judges, or is it the local jurisdictions with --  
11 working with the nonprofits and religious  
12 organizations?

13 So I guess following up on the  
14 necessity question, given the line-drawing  
15 problems that we've been going through, if a  
16 state has a traditional necessity defense, won't  
17 that take care of most of the concerns, if not  
18 all, and, therefore, avoid the need for having  
19 to constitutionalize an area and have a federal  
20 judge superintend this rather than the local  
21 community, which you've emphasized many times  
22 working with the nonprofits and charitable and  
23 religious organizations, which is how it works  
24 in most places?

25 MR. KNEEDLER: Well, I -- I think that

1 the necessity defense at least traditionally has  
2 required a much stronger sense of urgency and  
3 imminence than -- than this. If states had a  
4 necessity defense and we knew that it was  
5 available in all of these places, but even in --  
6 in Oregon, I think it's a case called Barrett,  
7 the Court said it's theoretically possible, but  
8 there was a remand for factual issues.

9           So we don't -- we don't know at this  
10 point in time whether -- whether there is such a  
11 defense. And that's really not in the -- in  
12 the -- in the case here. This comes up on an  
13 Eighth Amendment challenge without -- without  
14 reference to the necessity defense and, frankly,  
15 without reference to the new Oregon statute,  
16 which seems highly instructive in terms of time,  
17 manner, and place that jurisdictions -- Grants  
18 Pass should examine.

19           But I -- I don't think we can -- I  
20 don't think the Court should put this core point  
21 about Robinson to one side because, in -- of the  
22 possibility that in Oregon and maybe, you know,  
23 maybe no other place, I don't know about  
24 California law of necessity, maybe it would be  
25 taken care of. I think, at this point in time,

1 that is too speculative.

2 JUSTICE KAVANAUGH: Well, usually we  
3 think about before constitutionalizing an area  
4 or extending a constitutional precedent, you  
5 might disagree with that characterization, but  
6 before doing that, we usually think about  
7 whether state law, local law already -- already  
8 achieves those purposes so that the federal  
9 courts aren't micromanaging homeless policy.

10 And it's -- and it's on a daily basis  
11 when you work with the homeless. It's a daily  
12 issue, how many people are going to show up that  
13 day at the food bank, how many people are going  
14 to show up that day at the shelter. So it's not  
15 like this is a once-a-year thing.

16 MR. KNEEDLER: Yeah, no. For -- for  
17 the people actually dealing with it day to day,  
18 that is certainly true, the -- the City, the law  
19 enforcement, the City liaisons, the nonprofits.

20 But it's not true for the federal  
21 court. The federal court doesn't have to get  
22 into any of that. The only time the federal  
23 court would get into it is when -- is if the  
24 core principle of Robinson was being disregarded  
25 by not -- by criminalizing somebody for sleeping

1 outside when they have no place to sleep inside.  
2 That's the core principle. That's the only  
3 thing a court should be enforcing, not the --  
4 not whether people -- whether people show up.

5           And the thing I would -- another thing  
6 I would say about the necessity defense, it --  
7 it may be that if the Court issues an  
8 appropriate injunction in this case or another  
9 case limited to the core principle of Robinson,  
10 but it develops or the state law develops that  
11 there is a necessity defense, then I think that  
12 should be taken into account. I mean, that's in  
13 effect the time, manner, and place or -- or  
14 similar to that.

15           If state law comes -- comes along and  
16 establishes a -- a realistic defense or a  
17 realistic approach to how people can remain in  
18 the -- in the community, then the courts  
19 obviously should defer to that. But we don't  
20 have that established state law at this time.

21           And I don't think the Court should  
22 decline to address this question, which is  
23 important in the Ninth Circuit, both because the  
24 principle that those courts recognize should be  
25 sustained but the approach they've taken should

1 not.

2 JUSTICE KAVANAUGH: Last question I  
3 have on the food hypotheticals about stealing to  
4 feed yourself or cooking to feed yourself.

5 You kind of waved all those away by,  
6 oh, that's all taken care of by local  
7 communities, nonprofits, and religious  
8 organizations, and by and large, heroic efforts  
9 each day to make sure that happens, but it  
10 doesn't always happen by any stretch.

11 MR. KNEEDLER: No, it -- it doesn't  
12 always happen.

13 JUSTICE KAVANAUGH: And then what?

14 MR. KNEEDLER: But homeless people are  
15 resourceful. They have friends who are also  
16 homeless. They may -- they may know people in  
17 town. They may beg for money.

18 And the -- the towns are -- are coping  
19 in the same way, frankly, that individual  
20 homeless people do. They do the best they can  
21 under the circumstances. But that -- if those  
22 circumstances fail and the nonprofits, et  
23 cetera, can't -- you know, the truck doesn't  
24 show up one night, that doesn't become an Eighth  
25 Amendment problem.

1                   And -- and we're by no means  
2 suggesting that there should be a federal  
3 judiciary overlay on top of all that. The  
4 cities and the nonprofits should be left alone  
5 to do the work that they're doing, unless the  
6 core principle of Robinson is not respected.

7                   JUSTICE KAVANAUGH: Thank you.

8                   CHIEF JUSTICE ROBERTS: Justice  
9 Barrett?

10                  JUSTICE BARRETT: So one odd thing  
11 about the posture of this case, putting aside  
12 the class part, is its pre-enforcement nature,  
13 because, in Robinson and in Powell too, the  
14 punishment -- you know, the -- the adjudication  
15 of guilt had already occurred and it was time  
16 for the punishment to be to imposed, and then  
17 the Eighth Amendment challenge was raised.

18                  And Justice Alito was asking you about  
19 a lot of the very difficult on-the-ground  
20 factual determinations that law enforcement  
21 would need to make before deciding whether  
22 someone could be given a citation for camping  
23 outdoors. Why wouldn't it make more sense,  
24 assuming that we agree in substance with the  
25 line that Robinson would control here, why

1 wouldn't it make more sense for the Eighth  
2 Amendment claim to be raised as a defense, much  
3 like the necessity defense, once a court is in a  
4 position, unlike the law enforcement officer  
5 just trying to gather information on the ground,  
6 to determine whether there were available beds,  
7 whether the person had a place to go? Why is a  
8 pre-enforcement challenge the right way to think  
9 about this?

10 MR. KNEEDLER: Well, several things.  
11 It -- it obviously could be raised as a defense  
12 in a -- in a criminal prosecution or civil  
13 citation.

14 JUSTICE BARRETT: Sure. But does it  
15 --

16 MR. KNEEDLER: But -- but -- but I  
17 think --

18 JUSTICE BARRETT: -- make sense to  
19 think about it in this --

20 MR. KNEEDLER: -- for this particular  
21 Eighth Amendment claim, the claim is that the  
22 Eighth Amendment prohibits criminalizing the act  
23 to begin with. So the -- the -- it's not just  
24 the punishment that would be --

25 JUSTICE BARRETT: Well, I mean, I --

1                   MR. KNEEDLER:  -- meted out at the end  
2 of the day.

3                   JUSTICE BARRETT:  -- I understand  
4 that.  I mean -- let's see -- I do understand  
5 that, but it's not that it categorically  
6 prohibits punishing this act.  I mean, as -- as  
7 one might say if it, you know, prohibited  
8 sleeping altogether for everyone, right, this is  
9 because it -- the Eighth Amendment claim is that  
10 it punishes, criminalizes this act in a way that  
11 falls disproportionately and unconstitutionally  
12 on a particular class of people.

13                   And that requires adjudication at the  
14 front end to figure out whether someone is  
15 protected or unprotected.  If -- if I go and  
16 sleep in an encampment, I can be cited.  It's  
17 different.  There's a factual determination on  
18 the ground.

19                   And Robinson was a status-based  
20 challenge, and it came up in the context of the  
21 individualized criminal proceeding.  So why is a  
22 pre-enforcement challenge -- why does it make  
23 sense given the very, very fact-intensive nature  
24 of this?

25                   MR. KNEEDLER:  Well, and -- and in --



1 you know, in a -- in a -- an individual case, I  
2 think you're right, but imagine a situation  
3 where someone who genuinely had no other place  
4 to live and it's the third citation, the fourth  
5 citation, and -- and you -- you have a pattern  
6 as to that person or -- or other people where  
7 the city is -- is consistently not respecting  
8 the Robinson principle. Then I think you might  
9 have a pre-enforcement review, just as you might  
10 for an asserted violation of some other  
11 constitutional right because, here, again, it's  
12 -- it's not the Eighth Amendment regulating only  
13 the punishment for an otherwise valid  
14 conviction.

15 Here, the question is whether the --  
16 the City can criminalize that conduct at all.  
17 And so, if -- if you have a series of citations  
18 that don't rise to the level of probable cause  
19 or whatever would be necessary -- excuse me --  
20 necessary for the issuance of a citation where  
21 the -- the law enforcement officer on the ground  
22 is not respecting the -- the Robinson principle,  
23 then you might have an injunctive action.

24 JUSTICE BARRETT: But this would be  
25 the first case, right, because it didn't happen

1 in Robinson itself, where we had -- where we  
2 required -- where we had a pre-enforcement  
3 challenge on the basis of the Eighth Amendment  
4 to the criminalization of certain conduct,  
5 putting policemen in -- in this situation,  
6 right?

7 MR. KNEEDLER: But -- but I suppose,  
8 in -- in Robinson itself, if the person had been  
9 arrested once, been arrested a second time, and  
10 then he's arrested a third time, I would think  
11 he could bring a pre-enforcement challenge  
12 because the way the police were interacting with  
13 him was not respecting the Robinson principle  
14 with respect to Robinson himself.

15 JUSTICE BARRETT: How does the federal  
16 government do this? So, in the brief, you  
17 talked about clearing the encampment at  
18 McPherson Square. Can you just describe, I  
19 mean, briefly if you can, I mean, do police then  
20 make individualized inquiries? How does this  
21 work?

22 MR. KNEEDLER: Well, what happened  
23 there was the -- you know, was I -- I think the  
24 gold standard of -- of the way this should be  
25 done, and larger cities have this ability. The

1 -- the Park Service cooperated very closely with  
2 the District government. The Park Service does  
3 not have the sort of social services, et cetera,  
4 that a municipality has in D.C. And so that  
5 function is sort of split. These are special  
6 National Park properties. But the -- the  
7 National Park Service relies, as the federal  
8 government does, the Federal Protective Service  
9 for buildings elsewhere, cooperates with the  
10 local government.

11           But -- and the local government's  
12 social service people or the nonprofits went out  
13 and interviewed everybody who was in the -- who  
14 was in the encampment at McPherson Square and --  
15 and told them about what services are available.  
16 There was advance notice given that the  
17 encampment is going to be cleared within I think  
18 it was 30 days. And people were -- so people  
19 were warned 30 days in advance. They were  
20 warned the night before, the day before, so they  
21 could collect their things. Some just moved  
22 somewhere else. Some did take the -- the city  
23 up on the offer. Some went into shelters.

24           So that -- and that's the way that  
25 shelters are -- excuse me -- encampments are

1 typically cleared, is the -- and particularly in  
2 -- in cities where you've gotten a number of  
3 amicus briefs explaining the problem. That's  
4 what happens.

5 It isn't the -- it isn't the example  
6 we've been talking about where the law  
7 enforcement officer for the first time is  
8 encountering the person. Smaller cities don't  
9 have that capability, but Grants Pass does have  
10 these outreach workers and that's who -- that's  
11 who carries on the -- the dialogue.

12 And so that's the way it was cleared.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Jackson?

15 JUSTICE JACKSON: And so, given that  
16 experience and the fact that Martin has actually  
17 been the law since 2018, we don't really have to  
18 speculate as to how this works, right? I mean,  
19 this is happening -- this is the law right now  
20 in the Ninth Circuit.

21 MR. KNEEDLER: The -- the Robinson  
22 principle is the law.

23 JUSTICE JACKSON: The Robinson  
24 principle as adopted in Martin. My  
25 understanding is, for example, California says

1 that's the law, we comply with it, and there we  
2 are.

3 MR. KNEEDLER: Yeah. They -- they --  
4 they are not asking for Robinson to be  
5 overruled. What they're objecting to is the  
6 injunctions that go well beyond that by --

7 JUSTICE JACKSON: Yes, I understand.  
8 I'm just sort of responding to some of the  
9 questions that you've gotten as to sort of how  
10 does this rule work, can it work, that sort of  
11 suggest that it's not already happening on the  
12 ground in these places, that the shelters and  
13 the workers are aware of what is available, that  
14 people are being advised, that, you know, the  
15 principle of Martin at least in the Ninth  
16 Circuit is we hold that so long as there's a  
17 greater number of homeless individuals in a  
18 jurisdiction than the number of available beds,  
19 the jurisdiction cannot prosecute homeless  
20 individuals for sitting, lying, sleeping.

21 This is not a new rule. That's what  
22 the law is right now in that situation, right?

23 MR. KNEEDLER: Yeah, that -- that's  
24 what -- that's what Martin -- I don't want to  
25 say that the -- the clearance procedures work

1 perfectly in every case or that they're  
2 available in every case, but --

3 JUSTICE JACKSON: No, I just want to  
4 say we don't have to speculate about how the  
5 rule works.

6 MR. KNEEDLER: Or -- yeah, or how --

7 JUSTICE JACKSON: It's not a new thing  
8 that is being asked for today.

9 MR. KNEEDLER: How it's -- how it's  
10 supposed to work.

11 JUSTICE JACKSON: Yes.

12 MR. KNEEDLER: All I'm saying is that  
13 there -- there may be imperfections --

14 JUSTICE JACKSON: All right. Let me  
15 ask you about whether or not you are asking for  
16 an extension of Robinson. That's come up a  
17 couple times, and I don't -- I don't -- I don't  
18 see it as an extension or whether that's being  
19 asked for. So can you explain whether there's  
20 some sort of extension of Robinson --

21 MR. KNEEDLER: No.

22 JUSTICE JACKSON: -- happening today?

23 MR. KNEEDLER: No, I don't think so at  
24 all because, as I said, the -- the sleeping  
25 outside is -- is an essential human function,

1 and if you say someone can't sleep outside,  
2 that's -- that's sort of -- or has no place to  
3 sleep inside, that's the definition, really, of  
4 -- of homelessness.

5 JUSTICE JACKSON: So you're not  
6 suggesting that people should be excused from  
7 engaging in otherwise criminal conduct? So  
8 we've heard this example about people stealing  
9 in order to eat. I mean, that would be a  
10 situation in which someone is actively  
11 participating in what would be otherwise  
12 criminal behavior --

13 MR. KNEEDLER: Yes.

14 JUSTICE JACKSON: -- if anybody did  
15 it.

16 MR. KNEEDLER: Yes.

17 JUSTICE JACKSON: And -- and the idea,  
18 I guess, is that, well, maybe these people need  
19 to do it, and so that might be some sort of  
20 excuse. That's not what's happening in the  
21 facts here, correct?

22 MR. KNEEDLER: No. That's correct.  
23 And one -- one thing that I think is important  
24 to keep in mind in this is, if Grants Pass can  
25 do this, so could every other city. So could a

1 state do it state-wide. And, eventually, a  
2 homeless person would have no place to be,  
3 lawfully be.

4 JUSTICE JACKSON: So this is more like  
5 the sort of initial hypo of criminalizing eating  
6 outside, not that you'd be doing something that  
7 was otherwise criminally culpable?

8 MR. KNEEDLER: Yeah. Yes. I mean, I  
9 suppose there could be ordinances that the City  
10 would have about where you can -- you know, you  
11 can't eat at -- can't consume for the --

12 JUSTICE JACKSON: That's time, place,  
13 and manner.

14 MR. KNEEDLER: Yes.

15 JUSTICE JACKSON: Final question with  
16 respect to you mentioned states doing this. Why  
17 isn't the federal government arguing that this  
18 case is moot in light of 195.530? This is the  
19 Oregon recently passed statute that I mentioned  
20 earlier. Why -- why -- why doesn't the  
21 government read that law as I do to prevent  
22 Grants Pass from enforcing its ordinances to  
23 block sleeping outdoors at all places and all  
24 times?

25 MR. KNEEDLER: Yeah, no, I -- I -- I



1 certainly agree that there appears to be a -- a  
2 pretty stark inconsistency between that state  
3 law and the ordinance. It hasn't been applied.  
4 It has to be objectively reasonable, I think --

5 JUSTICE JACKSON: So would the federal  
6 government --

7 MR. KNEEDLER: -- but this isn't time,  
8 place, and manner at all.

9 JUSTICE JACKSON: Right. So what  
10 would the -- what would your position be if the  
11 Court decided that as a matter of constitutional  
12 avoidance or whatever else that we don't need to  
13 hear this or reach this decision in this case  
14 given this new state ordinance?

15 MR. KNEEDLER: That -- that would be  
16 one possibility. It wouldn't answer the core  
17 Robinson principle point and -- and the  
18 limitations on -- on that point that has -- that  
19 has triggered the amicus briefs.

20 JUSTICE JACKSON: Right. But our  
21 typical rule's --

22 MR. KNEEDLER: Yes.

23 JUSTICE JACKSON: -- that if there's  
24 some other way, we don't necessarily comment on  
25 constitutional issues, correct?

1 MR. KNEEDLER: Right. And -- and --  
2 yes. And -- and that would be -- that would be  
3 one course to see how -- what time, place, and  
4 manner meant under state law and how -- how the  
5 Eighth Amendment could accommodate that or take  
6 it into account.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel.

10 Ms. Corkran.

11 ORAL ARGUMENT OF KELSI B. CORKRAN

12 ON BEHALF OF THE RESPONDENTS

13 MS. CORKRAN: Mr. Chief Justice, and  
14 may it please the Court:

15 Robinson v. California holds that  
16 status-based punishment schemes are  
17 categorically cruel and unusual under the Eighth  
18 Amendment. The challenged ordinances inflict  
19 status-based punishment in both effect and  
20 purpose.

21 Although the City describes its  
22 ordinances as punishing camping on public  
23 property, it defines campsite as anyplace a  
24 homeless person is while covered with a blanket.  
25 The City interprets and applies the ordinances

1 to permit non-homeless people to rest on  
2 blankets in public parks while a homeless person  
3 who does the same thing breaks the law.

4           The ordinances by design make it  
5 physically impossible for homeless people to  
6 live in Grants Pass without facing endless fines  
7 and jail time. The only question under Robinson  
8 is whether there's any meaningful difference  
9 between a law that says being homeless is  
10 punishable and a law that says being homeless  
11 while breathing or sleeping or blinking is  
12 punishable.

13           In other words, does adding a  
14 universal human attribute to the definition of  
15 the offense make the punishment conduct-based  
16 instead of status-based? The answer is no. The  
17 purpose and effect of the second statute is  
18 exactly the same as the first, to make people  
19 with a status endlessly and unavoidably  
20 punishable if they don't leave Grants Pass.

21           Indeed, all the ordinances do is turn  
22 the City's homelessness problem into someone  
23 else's problem by forcing its homeless residents  
24 into other jurisdictions.

25           The injunction below leaves the City

1 with an abundance of tools to address  
2 homelessness. It can impose time, place, manner  
3 restrictions on when and where homeless people  
4 sleep.

5 It can ban tents and clear  
6 encampments. It can enforce a sleeping ban  
7 against homeless people who decline shelter.  
8 And it can fully enforce its laws prohibiting  
9 littering, public urination and defecation, drug  
10 use, and violent or harassing behavior.

11 The only tool the City wants that it  
12 doesn't have is authority to impose a 24/7  
13 City-wide sleeping ban that forces its homeless  
14 residents to either move to another jurisdiction  
15 or face endless punishment.

16 The state police power is broad, but  
17 it does not include the power to push the  
18 burdens of social problems like poverty on to  
19 other communities or the power to satisfy public  
20 demand by compromising individual constitutional  
21 rights.

22 I welcome the Court's questions.

23 JUSTICE THOMAS: In Robinson, there  
24 was a statute that outlawed -- that said that  
25 "to be addicted" is a crime. Is there an

1 ordinance here that says "to be homeless" is a  
2 crime?

3 MS. CORKRAN: So the language for the  
4 purposes of a temporary place to live bakes  
5 homelessness into the -- the definition of the  
6 offense. Justice Sotomayor was talking about  
7 that earlier.

8 So, when you combine that language  
9 with the -- the rest of the camping definition,  
10 what you have is an ordinance that says being  
11 homeless while sleeping with a blanket is  
12 punishable. And as I just said earlier, the  
13 question becomes when you attach the status to  
14 the universal attribute of -- of sleeping, does  
15 it then transform the offense into conduct-based  
16 punishment instead of status-based punishment,  
17 and I think the answer is no.

18 CHIEF JUSTICE ROBERTS: A number of  
19 us, I think, are having difficulty with the  
20 distinction between status and conduct. You'll  
21 acknowledge, won't you, that in those terms,  
22 there's a difference between being addicted to  
23 drugs and being homeless?

24 In other words, someone who's homeless  
25 can immediately become not homeless, right, if

1 they find shelter.

2           Someone who is addicted to drugs, it's  
3 not so -- so easy. It seems to me that in  
4 Robinson, it's much easier to understand the  
5 drug addiction as an ongoing status, while,  
6 here, I think it is different because you can  
7 move into and out of and into and out of the  
8 status, as you would put it, as being homeless.

9           MS. CORKRAN: Yeah. So it's  
10 interesting, we today understand addiction as an  
11 immutable status. In Robinson, the Court  
12 suggested that someone might be recovered and no  
13 longer have the status of addiction. So the  
14 Robinson Court wasn't thinking about addiction  
15 as something that couldn't change over time.

16           CHIEF JUSTICE ROBERTS: Well, that may  
17 limit the applicability of Robinson to a  
18 different situation, but what is the -- I mean,  
19 what is the analytic approach to deciding  
20 whether something's a status or a situation of  
21 conduct?

22           MS. CORKRAN: So the question is a  
23 status is something that a person is when  
24 they're not doing anything. So being addicted,  
25 having cancer, being poor, are all statuses that

1 you have apart from any conduct.

2 CHIEF JUSTICE ROBERTS: Having cancer  
3 is not the same as being homeless, right? I  
4 mean, maybe I'm just repeating myself because  
5 homelessness can -- you -- you can remove the  
6 homeless status in an instant if you move to a  
7 shelter or situations otherwise change. And, of  
8 course, it can be moved the other way as well if  
9 you're kicked out of the shelter or whatever.

10 So that is a distinction from all  
11 these other things that have been labeled  
12 status, isn't it?

13 MS. CORKRAN: I -- I don't think so  
14 because, you know, a cancer patient can go into  
15 remission, they no longer have that status. I  
16 don't think -- I mean, I don't think there's any  
17 question that being poor is a status. It's  
18 something you are apart from anything you do.  
19 It's a status that can change over time, and at  
20 that point, you wouldn't be a part of the class,  
21 but I don't think it changes the fact that it is  
22 a status.

23 And what Robinson found so offensive  
24 about status-based conduct --

25 CHIEF JUSTICE ROBERTS: Well, I guess

1 is -- is being a bank robber a status?

2 MS. CORKRAN: No, because being a bank  
3 robber means you rob banks. So -- So the  
4 definition and the conduct --

5 CHIEF JUSTICE ROBERTS: Violating this  
6 ordinance means upon being asked to leave you  
7 don't leave.

8 MS. CORKRAN: Violating this ordinance  
9 means you're homeless. So, again, homelessness  
10 is not something you can -- that you do. It's  
11 just something that you are.

12 And so the question becomes, when you  
13 attach the universal human attribute of sleeping  
14 or breathing to that status, does it make the  
15 punishment conduct-based instead of status-based  
16 and I think the answer is yes.

17 JUSTICE SOTOMAYOR: Counsel, Edwards  
18 v. California in 1941 struck down a law that  
19 made it a crime to transport an indigent person,  
20 correct?

21 MS. CORKRAN: Yes.

22 JUSTICE SOTOMAYOR: Indigency is  
23 not -- is a condition that can change over time,  
24 but the law was aimed at the transport of a  
25 person who wasn't morally reprehensible.



1 MS. CORKRAN: Yes. I think that's  
2 notable because our history and tradition as a  
3 country is to emphatically reject any sort of  
4 local legislative scheme that has the effect of  
5 pushing the burdens of poverty or indigency into  
6 other communities. It's woven throughout  
7 through our Constitution.

8 So Edwards located it in the Dormant  
9 Commerce Clause. We have Saenz v. Roe, which  
10 locates it in the Privileges or Immunities  
11 Clause; Papachristou addresses that status-based  
12 punishment in the context of procedural due  
13 process.

14 What Robinson held is that when that  
15 expulsion is effectuated through status-based  
16 punishment, it violates the Punishments Clause.

17 JUSTICE BARRETT: How do you define a  
18 community?

19 So Justice Alito was describing how  
20 New Jersey has so many tightly woven  
21 municipalities close together and, here, you  
22 know, the Chief Justice was asking about whether  
23 if Grants Pass, if there were -- was a new  
24 homeless shelter with lots of beds right across  
25 the border 10 minutes away, you know, could that

1 be taken into account.

2 And I think there was some back and  
3 forth and not necessarily agreement on that.  
4 What is your position? How do you define a --  
5 define a community? Take that example of a  
6 homeless shelter right outside the limits of  
7 Grants Pass.

8 MS. CORKRAN: Yes. So to -- so to  
9 answer that hypothetical first, I'm not  
10 concerned -- I don't have any problems with  
11 saying that a homeless person in Grants Pass has  
12 legal and physical access to a shelter that's  
13 just over the lines if that's, in fact, true.

14 Lots of jurisdictions limit their  
15 homeless shelters to people who are residents.  
16 So -- and just to be clear, there was no  
17 suggestion in the record here that there were  
18 any shelters available outside of Grants Pass.

19 JUSTICE BARRETT: Understood. But --  
20 so community doesn't need to be determined by  
21 jurisdictional lines is what you're telling  
22 me --

23 MS. CORKRAN: No.

24 JUSTICE BARRETT: -- as a matter of --  
25 because I -- I -- let's see, I'm asking all of

1 this because, in response to Justice Sotomayor,  
2 you were pointing out that our -- you know, our  
3 nation has a history and tradition of not saying  
4 you can shunt homeless people or the poor out of  
5 your jurisdiction and on to others.

6 So -- or out of your community and on  
7 to others is I think how you -- how you phrased  
8 it. So I'm asking, how do we know what those  
9 lines are? And you're saying it doesn't have to  
10 be jurisdiction-specific.

11 MS. CORKRAN: No. I think  
12 jurisdiction matters because that tells us kind  
13 of the lines in which the -- whatever ordinance  
14 or statute applies. So, when shelter is  
15 available, the ordinances are enforceable  
16 because they punish the conduct of not going to  
17 the shelter, as opposed to the status of  
18 homelessness.

19 So I think that a -- a municipality  
20 can punish the conduct of not going to a shelter  
21 that's just over the line if you have physical  
22 and legal access to it. Now, for the reasons  
23 you say -- and this dates back to our -- our  
24 settlement system at the Founding Era -- a lot  
25 of municipalities do not allow people from

1 outside of the jurisdiction to use their  
2 shelters, and so, under those circumstances, the  
3 shelter wouldn't be legally available.

4 CHIEF JUSTICE ROBERTS: Is that cruel  
5 and unusual punishment for them to turn away  
6 someone who wants to use their shelter?

7 MS. CORKRAN: No, that wouldn't be  
8 punishment. Punishment is the infliction of  
9 suffering for a crime.

10 JUSTICE JACKSON: Counsel, I --

11 CHIEF JUSTICE ROBERTS: Well, then --  
12 then why is the Eighth Amendment implicated in  
13 this case?

14 MS. CORKRAN: Because, here, we have  
15 fines and jail time. We have a status-based  
16 punishment scheme that is, in fact, inflicting  
17 punishing -- punishment within the meaning of  
18 the Eighth Amendment.

19 JUSTICE BARRETT: Counsel, do you want  
20 to -- oh, I'm sorry, Chief. Were you finished?

21 CHIEF JUSTICE ROBERTS: No, I'm done.  
22 That's fine.

23 JUSTICE BARRETT: Do you want to  
24 address some of the line-drawing problems that  
25 we've been going back and forth? I mean,

1 Justice Gorsuch pointed out, you know, eating is  
2 a basic human need, and it's not the case that  
3 soup kitchens or social services will always be  
4 able to meet it, and so he asked about whether  
5 the Eighth Amendment would prohibit punishment  
6 for stealing food.

7           You might ask the same questions about  
8 trespass and squatting in structures if there  
9 are -- you know, if that was the best  
10 alternative. So how do we -- how do we draw  
11 these difficult lines about, you know, public  
12 urination and those sorts of things?

13           MS. CORKRAN: So I'll start with  
14 stealing food. Stealing food is not part of the  
15 definition of homelessness, and it's also not a  
16 universal attribute. So -- so I put that  
17 outside the scope of any of the arguments we're  
18 making here.

19           With respect to public urination and  
20 defecation, if you had a -- I don't think this  
21 would ever exist, but if you had a law that said  
22 homeless people cannot urinate or defecate  
23 anywhere within city limits, I think then it  
24 starts to look like this case. But, if you're  
25 saying that people can't urinate or defecate on

1 public property, it is almost -- it's hard to  
2 imagine a situation where --

3 JUSTICE BARRETT: They have no place  
4 else to go. So a homeless person, there --  
5 there's no facilities available, and a homeless  
6 person has no place else to go. How could a --

7 MS. CORKRAN: You might have a -- I  
8 mean, there are commercial establishments. I  
9 don't know that anyone's pointed to a  
10 jurisdiction where you truly don't have access.  
11 But if we had to say --

12 JUSTICE BARRETT: Well, what's the  
13 constitutional principle?

14 MS. CORKRAN: Right.

15 JUSTICE BARRETT: Take my  
16 hypothetical. Say there -- there's not --  
17 commercial establishments don't want non-patrons  
18 coming in to use the facilities, there are no  
19 public facilities, and it's a generally  
20 applicable rule that says no public urination.

21 MS. CORKRAN: So I think, there, one  
22 distinction between urination and defecation and  
23 sleeping is that sleeping outside is part of the  
24 definition of homelessness, right? Homelessness  
25 is lacking a fixed, regular nighttime address.

1 So the -- the sleeping prohibition goes more  
2 directly to the status of homelessness than  
3 urination or defecation.

4 JUSTICE BARRETT: So it would not --  
5 so it would not violate the Eighth Amendment to  
6 punish public urination and defecation?

7 MS. CORKRAN: You might come up with  
8 some different theory, but it's not the theory  
9 that we're putting forward in this case.

10 JUSTICE BARRETT: Not the theory that  
11 you're -- okay.

12 MS. CORKRAN: Yes.

13 JUSTICE KAGAN: What do you think, Ms.  
14 Corkran, of this idea that Oregon's necessity  
15 defense essentially functions as an Eighth  
16 Amendment in this context, so we don't have to  
17 constitutionalize the kinds of limits that  
18 you're talking about?

19 MS. CORKRAN: Yeah, I would say it's  
20 not at all clear that that's true. As Mr.  
21 Kneedler pointed out, you know, there is a  
22 necessity defense in Oregon law, but, so far,  
23 the Oregon courts have not applied it to this  
24 circumstance. It also wouldn't necessarily be  
25 available for the fines, the citations, we have

1 here.

2 But I think that this question about  
3 the availability of the necessity defense really  
4 goes to the injunctive posture of the case.  
5 It's not going to come up if you're in the --  
6 you know, you're -- if you're presenting the  
7 Eighth Amendment as an affirmative defense at  
8 the same time as a necessity defense in a  
9 criminal prosecution, right, it kind of moots  
10 out the -- the Eighth Amendment claim.

11 But going to Justice Barrett's  
12 questions about injunctive relief, there, the  
13 question you're asking is, does the plaintiff  
14 have a credible threat of future punishment?  
15 I'd say first that the injunctive relief is not  
16 before the Court. The City has not challenged  
17 the propriety of the injunction here. So I  
18 think it's a question for another day.

19 The courts here did find that the  
20 plaintiffs had shown a credible threat of future  
21 punishment, and so I think that resolves the  
22 issue for -- for this case.

23 JUSTICE GORSUCH: Counsel, along those  
24 lines, we -- we haven't mentioned it yet, but in  
25 the briefing, there's a lot of discussion about



1 the fact that Robinson's Eighth Amendment  
2 holding with respect to status came without any  
3 adversarial testing, wasn't what was argued by  
4 the parties, it didn't have a whole lot of  
5 citation or support, it came kind of in a breezy  
6 paragraph.

7 MS. CORKRAN: Right.

8 JUSTICE GORSUCH: And some have  
9 suggested that that's really a mistake because  
10 the Eighth Amendment's about punishments. It  
11 doesn't prevent states -- limit states' capacity  
12 to engage in passing laws that make conduct or  
13 actions or anything a crime. It just goes to  
14 the nature of what punishments follow, putting  
15 aside the Excessive Fines Clause.

16 MS. CORKRAN: Yeah.

17 JUSTICE GORSUCH: So there's a lot of  
18 discussion in the brief about that and some --  
19 some suggestion that, really, it's the  
20 Fourteenth Amendment that should be doing work  
21 here, if there is work to be done, because some  
22 form of the necessity defense has been always  
23 understood as inhering in due process from the  
24 founding and whether that can be enforced  
25 through state laws, which might differ, Kansas

1 versus Kahler, but have to -- have to  
2 nonetheless cover the territory, and whether  
3 there might be injunctive relief on that basis,  
4 possible in advance, not limited to defenses,  
5 possible.

6 Just reactions to that. I -- we  
7 haven't yet touched on it.

8 MS. CORKRAN: So Robinson predates  
9 Graham v. Connor, but I think it espouses the  
10 same principle, which is, when you can identify  
11 an explicit textual source for a right, you  
12 locate the right in that amendment and not more  
13 generalized notions of due process. And so what  
14 the Robinson Court did was they --

15 JUSTICE GORSUCH: Well, but, here, the  
16 more -- the more -- the more limited -- I mean,  
17 let me just --

18 MS. CORKRAN: Yeah.

19 JUSTICE GORSUCH: -- play with that  
20 for a minute. The more natural home for a  
21 necessity-type argument is due process. That's  
22 where it's always historically been understood  
23 to lie, not the -- not an amendment having to do  
24 with punishments, right? One has to do with  
25 what you can criminalize. The other has to do

1 with the punishments that follow.

2 And you're not really attacking the  
3 punishments here. You're saying any punishment  
4 is impermissible.

5 MS. CORKRAN: Right.

6 JUSTICE GORSUCH: And -- and any  
7 punishment's impermissible. And that -- that is  
8 a necessity defense. That's a classic necessity  
9 defense.

10 MS. CORKRAN: So I think that it's --  
11 it's right that Robinson describes what it was  
12 doing as saying that the Eighth Amendment  
13 prohibited the criminalization. You see that  
14 language in I think Weems and Wilkerson v. Utah.  
15 I -- I agree it seems like a bit of a strange  
16 fit.

17 JUSTICE GORSUCH: So, if that's the  
18 case, if that's the case, let me just -- you  
19 know, wouldn't that get rid of this awful  
20 status/conduct distinction that we have -- that  
21 we're struggling with here today? Because, if  
22 it's a necessity, it doesn't matter why it's a  
23 necessity. It's -- every person can make their  
24 own argument about why it was necessary, and  
25 then the courts will decide. We don't get into

1 the status/conduct stuff that -- that Robinson  
2 seems to invite. Thoughts?

3 MS. CORKRAN: Well, but that's --  
4 here, we don't have necessarily a necessity  
5 defense, so that wouldn't be very satisfying --

6 JUSTICE GORSUCH: You don't think your  
7 clients have a good necessity defense?

8 MS. CORKRAN: The Oregon courts so far  
9 have not applied the Oregon --

10 JUSTICE GORSUCH: I didn't ask whether  
11 the courts --

12 MS. CORKRAN: Yeah.

13 JUSTICE GORSUCH: -- have applied it.  
14 You haven't asked them to apply it, and you're  
15 --

16 MS. CORKRAN: They've had a couple of  
17 cases like this.

18 JUSTICE GORSUCH: Have they?

19 MS. CORKRAN: Mr. Kneidler referred to  
20 the Bartlett case.

21 JUSTICE GORSUCH: And how are they  
22 going?

23 MS. CORKRAN: The -- so far, they have  
24 not applied the necessity defense. They left  
25 open the possibility that it might apply, but

1 they haven't applied it --

2 JUSTICE GORSUCH: Why not?

3 MS. CORKRAN: -- yet. They didn't  
4 find that it was necessary under those  
5 circumstances. And, again, we --

6 JUSTICE GORSUCH: Did they rule out  
7 that it might be necessary under some  
8 circumstances?

9 MS. CORKRAN: They left open that  
10 possibility, but I'd also say the -- the civil  
11 citation or the -- I don't want to say "civil."  
12 It's a little murky. But the -- the fines here  
13 are not subject, I don't think, or it's not  
14 clear, to the necessity defense. So it wouldn't  
15 take care of the entirety of the claim.

16 JUSTICE GORSUCH: You've got Excessive  
17 Fines Clause there, though, right?

18 MS. CORKRAN: Yes.

19 JUSTICE GORSUCH: And that's not  
20 before us either?

21 MS. CORKRAN: We have raised the fines  
22 before this Court because our challenge is to  
23 the -- the package of punishments, and,  
24 historically, that's how the Court has looked at  
25 applying the Excessive Fines Clause and the

1 Punishment Clause together. We're in a really  
2 unfortunate posture here that we have claims  
3 that involve both fines and punishment, and yet  
4 we're only here on the Punishments Clause piece  
5 of it. It was one of the reasons we suggested  
6 this isn't a great vehicle.

7 I think the Court can say that, you  
8 know, it's not going to reach the fines because  
9 we won on that below, and so you can just focus  
10 on the -- on the -- the jail time for -- for  
11 criminal trespass.

12 JUSTICE ALITO: What is your  
13 definition of the status of homelessness? Is it  
14 the lack of a place to stay indoors on a  
15 particular night, or is it something broader  
16 than that?

17 MS. CORKRAN: So -- so homelessness --

18 JUSTICE ALITO: Does it require more  
19 than that?

20 MS. CORKRAN: Right. Homelessness is  
21 defined as lacking a fixed, regular, adequate  
22 nighttime address. So, if you have a home, you  
23 have a home -- I'm not homeless when I go to  
24 Grants Pass because I have a home in D.C.

25 The second part of our class

1 definition focuses on whether the homeless  
2 person has access to shelter. That's not  
3 because that's part of the status. It's  
4 because, when someone has access to shelter,  
5 then the ordinances aren't punishing them for  
6 the status. It's punishing them for the conduct  
7 of not going --

8 JUSTICE ALITO: Well, I -- I asked the  
9 question because, if homelessness is defined as  
10 simply lacking a place to stay indoors on a  
11 particular night, then there is an ironclad  
12 connection between the conduct, which is  
13 sleeping outside, and the status of  
14 homelessness.

15 But if homelessness is defined to  
16 require more than that, then my question would  
17 be whether someone who is lacking a place to  
18 stay on a particular night or for a particular  
19 period of time is homeless if the reason why the  
20 person finds himself or herself in that status  
21 is, for example, the person refuses to take  
22 antipsychotic medicine that's been prescribed or  
23 refuses to go to drug rehab or rehabilitation  
24 for alcoholism or the person has chosen to move  
25 from one place where the person might have a

1 shelter or a home where the person could live to  
2 another place.

3 What about all of that?

4 MS. CORKRAN: So the status of  
5 homelessness is something that only changes once  
6 the person has a home. You lose your home,  
7 you're homeless. If you have a home again, then  
8 you're not in the status anymore.

9 I think what your question gets at is  
10 that second piece, which is whether a person has  
11 access to shelter. That can change from day to  
12 day. And so --

13 JUSTICE ALITO: No, that's not really  
14 what my question gets at. The question is you  
15 can draw a distinction -- status is different  
16 from conduct, but there are some instances of  
17 conduct that are closely tied to status or, if  
18 homelessness is defined as simply lacking a  
19 place to stay on a particular night, they amount  
20 to the same thing. The definition of  
21 homelessness encompasses the conduct of sleeping  
22 outside.

23 So my question is whether this is --  
24 what if the person finds that person in a  
25 homeless state because of prior life choices or



1 the refusal to make future life choices? That's  
2 the question.

3 MS. CORKRAN: Yeah, yeah. So -- so  
4 our definition of lacking access to shelter is  
5 lacking physical or legal access to shelter.  
6 And you're looking at the person's situation on  
7 that particular night.

8 I think, generally, we're not doing an  
9 inquiry into all of a person's life choices that  
10 might have led them to the point where they're  
11 homeless and can't find a place to sleep.

12 Robinson certainly didn't do that sort  
13 of analysis with respect to addiction, but there  
14 could be situations where there is such a -- a  
15 tight causal nexus between a choice a person has  
16 made and their lack of shelter access that you  
17 would say this person has chosen not to take the  
18 shelter and to be very clear, if you decline  
19 shelter that is physically and legally available  
20 to you, you're not in a class -- you're in --

21 JUSTICE ALITO: Well, see, the problem  
22 is that once you move away from the definition  
23 that makes the inquiry basically tautological,  
24 then you get into the question of assessing the  
25 closeness of the connection between the status

1 and the conduct.

2 And you do run into problems with the  
3 person who's a kleptomania -- a kleptomaniac or  
4 a person who suffers from pedophilia. So how do  
5 you distinguish that? How does the Court assess  
6 how close the connection has to be?

7 MS. CORKRAN: So -- so, for both of  
8 those categories, the -- the -- the status is  
9 defined -- I don't know if status is the right  
10 word there -- being a pedophilia or having  
11 pedophilia is defined by the urge that you have,  
12 not by your conduct, and acting on that urge.

13 So, if someone were to act on that  
14 urge, that tight causal nexus on why they didn't  
15 have access to shelter, then they would be  
16 outside of our claim.

17 JUSTICE JACKSON: I thought you made a  
18 very interesting remark in response to Justice  
19 Alito, and I'm just trying to clarify.

20 You seem to say that homelessness, as  
21 you've defined, is not lacking access to shelter  
22 on a particular night.

23 Is that -- am I right about that?

24 MS. CORKRAN: That's right. We're  
25 use -- I use the HUD definition, which is that

1 homeless means you lack a fixed, regular,  
2 adequate nighttime address.

3 JUSTICE JACKSON: So that kind of  
4 thing might -- going back to the Chief Justice's  
5 original question, that's not changing night to  
6 night --

7 MS. CORKRAN: No, I mean --

8 JUSTICE JACKSON: -- in the same way.

9 MS. CORKRAN: -- it can change over  
10 time in the same way that a cancer diagnosis  
11 could change over time, but --

12 JUSTICE JACKSON: And then the other  
13 part that was interesting to me is that assuming  
14 that's your definition, homelessness lacking a  
15 fixed regular address, when someone does have  
16 access to a shelter even though they lack a  
17 fixed regular address, the ordinance in that  
18 situation, I thought you said, is operating to  
19 punish the act of not going to the shelter --

20 MS. CORKRAN: Yes.

21 JUSTICE JACKSON: -- as opposed to  
22 punishing the status of being homeless.

23 MS. CORKRAN: Yes, that's -- that's  
24 the exact reason that reasonable time, place,  
25 manner restrictions aren't a problem because, if

1 you have time, manner -- time, place, and manner  
2 restrictions, what you're doing is punishing the  
3 conduct of not going to sleep where you're  
4 allowed to go. That rationale doesn't work when  
5 someone has nowhere to go.

6 JUSTICE JACKSON: And can you speak to  
7 whether or not we should really be even getting  
8 into this in light of the new Oregon law?

9 MS. CORKRAN: So we didn't argue  
10 mootness. We made this point in our brief in  
11 opposition. We didn't say mootness just because  
12 we don't have an injunction under the Oregon law  
13 yet and it's not self-executing.

14 I don't think there is any question  
15 that the ordinances fall under the Oregon law.  
16 I mean, it was intended to codify Martin. It  
17 requires that any sort of restrictions on  
18 sleeping or resting outside are reasonable with  
19 respect to homeless individuals.

20 Clearly, the ordinances here don't  
21 meet that standard. So I -- I -- I certainly  
22 wouldn't have any concerns with the Court  
23 saying, as a matter of constitutional avoidance,  
24 it appears this Oregon law resolves this whole  
25 issue, so we're, you know, dismissing as

1       improvidently granted or however the Court  
2       wanted to -- to resolve the case.

3                   JUSTICE JACKSON: Thank you.

4                   JUSTICE SOTOMAYOR: So the plaintiff  
5       -- I'm sorry. The plaintiff who died here had  
6       used up her provisional stay credits at the time  
7       of class certification, so she no -- no longer  
8       had a shelter who was willing to take her.

9                   I think the hard hypothetical that  
10       Justice Alito was positing and in part Justice  
11       Gorsuch is the person who owns a dog.

12                   MS. CORKRAN: Yeah.

13                   JUSTICE SOTOMAYOR: Or let's say a  
14       mentally ill person. Do you have the same  
15       response as the government?

16                   MS. CORKRAN: So I -- I would like to  
17       live in a world where separating someone from  
18       their pet is cruel. But it's outside the scope  
19       of our claim because we are just talking about  
20       physical and legal access to shelter.

21                   So, if someone turns down a shelter  
22       offer that's physically and legally available  
23       because of their dog, they would not be within  
24       the scope of our claim.

25                   To get to the mental health

1 hypothetical, if a person -- if the person's  
2 mental health issues made the shelter either  
3 physically unavailable to them because, if they  
4 went there, they would be at substantial risk of  
5 bodily harm or death, then I would say the  
6 shelter isn't physically available.

7           You could also have a shelter that  
8 won't take people with mental health problems,  
9 in which case it wouldn't be legally available  
10 to them.

11           I would say that if the shelter is  
12 physically and legally available, then they're  
13 outside the scope of their -- our claim, but  
14 they might have ADA claims or some other law  
15 that applies that would restrict the City's  
16 ability to punish them for not going to that  
17 place, but it's outside our case.

18           JUSTICE SOTOMAYOR: Thank you.

19           CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel. Can you go from having a fixed regular  
21 address to not having one?

22           MS. CORKRAN: Yes.

23           CHIEF JUSTICE ROBERTS: Can you go  
24 from not having one to having one?

25           MS. CORKRAN: Yes. People --

1 CHIEF JUSTICE ROBERTS: Thank you.  
2 Justice Thomas?

3 JUSTICE THOMAS: In Robinson, a  
4 narcotics officer testified that based on his  
5 experience, the marks on the defendant's arm  
6 suggested that he was an addict.

7 MS. CORKRAN: Yes.

8 JUSTICE THOMAS: Do we have anything  
9 like that where an expert testifies that these  
10 people -- that the individuals here are  
11 homeless?

12 MS. CORKRAN: So, here, the legal  
13 burden was on the plaintiffs to show that they  
14 were homeless. The lower courts found that  
15 their declarations and depositions satisfied  
16 that.

17 JUSTICE THOMAS: Well, what I'm  
18 interested in is the status. You say that this  
19 is the equivalent of Robinson, and I'm trying to  
20 determine where the status of homelessness was  
21 determined and how it plays a role in this case.

22 MS. CORKRAN: So it was determined  
23 based on the declarations and depositions of  
24 the -- the putative class members and named  
25 plaintiffs. It also, you know, we talked a

1 little about the ratio between beds to  
2 population.

3 The Ninth Circuit ended up rejecting  
4 that as a hard-and-fast rule, but the lack of  
5 shelter beds in Grants Pass provides credibility  
6 to the putative class members' declarations when  
7 they say they have nowhere to go.

8 I'd also say I don't understand the  
9 City to have ever contested that the named  
10 plaintiffs are homeless. What they contested is  
11 whether they had access --

12 JUSTICE THOMAS: I think what's  
13 confusing me is that when I read the ordinance,  
14 the ordinance is an anti-camping ordinance.  
15 Would this -- would a -- would a backpacker who  
16 happens to be in the area for a few days be  
17 allowed to camp on -- on public property?

18 MS. CORKRAN: I don't -- I think  
19 theoretically no, but I would say that the City  
20 has never -- it was not able to identify any  
21 circumstance in which it had applied --

22 JUSTICE THOMAS: I understand that.  
23 But it -- but it would apply to a backpacker?

24 MS. CORKRAN: So I -- I -- it would  
25 depend on the circumstances. The line that the



1 police officers drew in their depositions was,  
2 if they saw a non-homeless person lying on a  
3 blanket, they wouldn't enforce the ordinance.

4 JUSTICE THOMAS: No, I'm saying some  
5 -- he's back --

6 MS. CORKRAN: Yeah. So --

7 JUSTICE THOMAS: -- someone with a  
8 backpack who's been wandering around for a  
9 couple of years in the continental divide or  
10 something.

11 MS. CORKRAN: So I can imagine -- I'm  
12 putting myself in the place of the officers who  
13 were deposed. If you gave them that  
14 hypothetical --

15 JUSTICE THOMAS: Yeah.

16 MS. CORKRAN: -- they might say no,  
17 that person isn't setting up a temporary place  
18 to live; they're just traveling through town.  
19 That -- that particular hypothetical didn't come  
20 up, but we do --

21 JUSTICE THOMAS: So that would not  
22 violate the anti-camping ordinance?

23 MS. CORKRAN: I don't know. I mean,  
24 maybe this gets to the vagueness of the --

25 JUSTICE THOMAS: Yeah.

1 MS. CORKRAN: -- of the provisions,  
2 but --

3 CHIEF JUSTICE ROBERTS: Justice Alito?  
4 Justice Sotomayor?  
5 Justice Kagan?  
6 Justice Kavanaugh?

7 JUSTICE KAVANAUGH: I think one of the  
8 premises of your argument is that this is not  
9 good policy for the homeless, and good policy  
10 would -- would help homeless individuals  
11 transition, get mental health treatment, get  
12 substance abuse treatment, job -- job  
13 assistance, and that this doesn't -- doesn't  
14 fulfill those objectives.

15 And maybe you -- maybe you're not  
16 saying that, but I'm curious whether you think  
17 this is good policy in terms of incentivizing or  
18 bad? You -- you must think it's bad, and I'm  
19 curious why.

20 MS. CORKRAN: Yeah, I don't think  
21 we've made that argument. It certainly a theme  
22 across the amici briefs. I would -- just on the  
23 incentivizing, I think, is a non sequitur  
24 because the only question here is whether it  
25 violates the Eighth Amendment to enforce the

1 ordinances when someone has no access to  
2 shelter, when they're turning down the services.  
3 So that's a circumstance we're looking at.

4           Maybe -- I think what Your Honor's  
5 question gets at is our discussion of no  
6 penological purpose. This Court has recognized  
7 that when a punishment scheme has no penological  
8 purpose, it inflicts gratuitous suffering, and  
9 that is cruel and unusual punishment.

10           And I will say, at this point, the  
11 City has not ever identified any penological  
12 purpose for punishing homeless people who do not  
13 have access to shelter. If you ask that  
14 question, every time they pivot to encampments  
15 and fires and sanitation problems, which are all  
16 non-sequiturs. As I've said a number of times,  
17 this case is only about sleeping outside when  
18 there's no shelter available. And so I think  
19 that lack of penological purpose is significant.

20           JUSTICE KAVANAUGH: Well, we've heard  
21 a lot about how it's more difficult to have an  
22 effective homeless policy given the rule that's  
23 been in effect in the Ninth Circuit over the  
24 last several years.

25           MS. CORKRAN: I think that's --

1 JUSTICE KAVANAUGH: How are we  
2 supposed to --

3 MS. CORKRAN: -- that's flatly wrong.  
4 I mean, I -- I'll go back to my opening. I gave  
5 the whole list of the things that the City is  
6 allowed to do under the ordinance and under our  
7 claim. The only thing that they cannot do is  
8 impose a 24/7 sleeping ban that makes it  
9 impossible for homeless people to stay in the  
10 jurisdiction.

11 I'd also note, you know, they have a  
12 lot of amicus briefs on their side from local  
13 governments. Almost the entirety of what those  
14 amicus briefs are complaining about isn't at  
15 issue in this case. So, when you have  
16 injunctions against encampments, that's under  
17 the Fourth Amendment. We don't have a Fourth  
18 Amendment claim. A lot of the injunctions are  
19 under the Fourteenth Amendment, including the  
20 San Rafael one that the City identifies in its  
21 reply brief.

22 I think it's remarkable that when the  
23 City was trying to identify the best example it  
24 could come up with for its reply brief, it chose  
25 one involving a different constitutional claim.

1 JUSTICE KAVANAUGH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 JUSTICE BARRETT: No.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Jackson?

7 JUSTICE JACKSON: Can a person go from  
8 being addicted to drugs to not being addicted to  
9 drugs?

10 MS. CORKRAN: So I think under  
11 common -- as we think about it in terms of  
12 modern medicine, the answer is no. But the  
13 Robinson Court certainly thought that was the  
14 case, right? Sixty years ago, we didn't have  
15 the same understanding of addiction as we do  
16 now.

17 JUSTICE JACKSON: So your view of  
18 Robinson is that it doesn't really matter, the  
19 permanency of the condition; it's still a  
20 status?

21 MS. CORKRAN: Right. The Robinson  
22 Court did not think that the permanency mattered  
23 because it thought that addiction was a status  
24 that could change.

25 JUSTICE JACKSON: Thank you.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Rebuttal?

4 REBUTTAL ARGUMENT OF THEANE D. EVANGELIS  
5 ON BEHALF OF THE PETITIONER

6 MS. EVANGELIS: Thank you.

7 This case is worlds away from  
8 Robinson. The Eighth Amendment does not answer  
9 any of the questions that we've been discussing  
10 today, and that is reason not to extend  
11 Robinson. All of these questions are  
12 unanswerable.

13 First, I'd like to start with the  
14 United States' position. That would also bring  
15 chaos. It would be a disaster if Martin were to  
16 remain on the books in any form. It does not  
17 make a difference if the inquiry is  
18 pre-enforcement or post-enforcement. All the  
19 same questions come up about whether the  
20 person's conduct is involuntary, what their  
21 choices are, how they are there, whether the  
22 shelter that's available is adequate, where it  
23 is, what rules it has, all of that.

24 And I'd like to clarify how all of  
25 this works in practice because it would be

1 impossible for people on the ground to  
2 understand and predict what a court would say  
3 about the shelters that are available and the  
4 alternatives that are available and the choices  
5 that were made and the difficulty of all that.

6           So, here, how it works is, under the  
7 Grants Pass policy -- I'll direct the Court to  
8 page 155 of the Joint Appendix. There, it says,  
9 officers are required to give a 24-hour notice  
10 before issuing a citation.

11           So I -- I want to just focus on that  
12 for a moment. How will the officer know when --  
13 when she or he comes back whether the individual  
14 has another place to go? There's no way to know  
15 the answer to that. So they would have to take  
16 their word for it perhaps. So it would lead to  
17 all of those same problems.

18           And it is hyperbole -- the other side  
19 talks about banishment and all of that. The  
20 Respondents have remained in Grants Pass for  
21 years. There's nothing like that going on here.  
22 They talk about an isolated statement from a  
23 community meeting that was a three-hour meeting.  
24 There are 20 pages of minutes. It's one  
25 sentence. What that full context shows is a

1 wide-ranging discussion about all of these  
2 difficult policy problems and how the City was  
3 trying to incentivize people to accept shelter  
4 and dealing with a small group that was causing  
5 serious problems and crime in the City, and  
6 they're trying to balance those who wouldn't  
7 take the help with the City's needs to keep  
8 their public spaces open.

9           When the Ninth Circuit  
10 constitutionalized this area, it left cities  
11 with really no choice: Either keep building  
12 enough shelter that may or may not be adequate  
13 or suitable to someone's preferences, or be  
14 forced to give up all of your public spaces.  
15 That is what's happened. We've seen a -- a  
16 suspension of enforcement of these basic laws  
17 that are so important.

18           The line-drawing problems are  
19 never-ending. That is exactly why Powell,  
20 Justice Gorsuch, to your point about Powell and  
21 the plurality there said that if we embark on  
22 this journey and we start constitutionalizing  
23 laws that address conduct, the line-drawing  
24 problems will be endless. And so that is a  
25 reason not to extend Robinson here.



1           So I just want to make, again, our  
2 basic Eighth Amendment point here, which is that  
3 these are low-level fines and very short jail  
4 terms for repeat offenders that are in effect in  
5 many other jurisdictions. This is not unusual  
6 in any way. It is certainly not cruel. And we  
7 can just point to our appendix in our reply that  
8 goes through jurisdictions from West Hollywood,  
9 California, to Watertown, Massachusetts, that  
10 have the same type of policies. So the policy  
11 questions in this case are very difficult, and I  
12 think that's what has come across today.

13           The Eighth Amendment question, though,  
14 is not. Here, the punishments are the sorts of  
15 punishments that have been held to be  
16 permissible for -- since the founding and really  
17 are in use today. They're not in any way  
18 unusual.

19           So we -- we heard a lot of things  
20 about guessing how this would work in practice,  
21 but it sounds to me like courts would need to  
22 have some sort of rules so that they could tell  
23 a jurisdiction like Chico that the place it set  
24 aside for camping was adequate when the federal  
25 court said no, it wasn't, because it's outdoors,

1 or a San Clemente that was threatened with  
2 lawsuits because it didn't provide cell phone  
3 chargers in the area that it designated for  
4 camping, or San Rafael, where the court said  
5 that 200 feet between encampments -- between  
6 tents was too much and that 100 feet was the  
7 maximum under the Eighth Amendment.

8 So, for all of those reasons, the  
9 Court should reverse.

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 The case is submitted.

13 (Whereupon, at 12:30 p.m., the case  
14 was submitted.)

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## Official - Subject to Final Review

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