

SUPREME COURT OF THE UNITED STATES

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.)
- - - - -

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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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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 abandon 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 -- so then have we ever applied the Eighth
16 Amendment 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 --

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

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

25 You only arrest people who don't have

1 a second home. Is that correct?

2 MS. EVANGELIS: Well --

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

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

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

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

22 JUSTICE SOTOMAYOR: That's what --
23 that's what you say, but if I look at the record
24 and see differently, it's a different argument,
25 isn't it?

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

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

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

15 MS. EVANGELIS: No, I don't. We -- I
16 --

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

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

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

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

1 JUSTICE KAGAN: I -- I -- it's really
2 a simple question. Can you criminalize
3 homelessness? And you're suggesting, yes, you
4 could.

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

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

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

18 JUSTICE JACKSON: But, count -- count
19 --

20 MS. EVANGELIS: And so --

21 JUSTICE KAGAN: I -- I -- you're right
22 that it's a different status that was involved
23 in Robinson. But Robinson made clear that there
24 was a category of cases which were status
25 offenses, which were different from conduct

1 offenses.

2 And when you started off here today,
3 you said we're just criminalizing conduct. So,
4 to tell you the truth, I thought that this was
5 going to be a question where you would say, no,
6 of course, we can't criminalize a status, but
7 there's conduct here. And then I was going to
8 say: What is the conduct here?

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

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

19 JUSTICE KAGAN: Well, the Eighth
20 Amendment was the framework in Robinson.

21 MS. EVANGELIS: And I --

22 JUSTICE KAGAN: So taking Robinson as
23 a given, where Robinson said the Eighth
24 Amendment protects you against status-based
25 crimes --

1 MS. EVANGELIS: I don't --

2 JUSTICE KAGAN: -- that's what the
3 question is.

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

10 JUSTICE KAGAN: Okay. What is the
11 conduct here?

12 MS. EVANGELIS: That was -- the
13 conduct is camping, establishing a campsite.
14 And it's the same as in the federal regulations
15 that the National Park Service relies on.

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

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

23 JUSTICE KAGAN: Well --

24 MS. EVANGELIS: -- and the federal law
25 is --

1 JUSTICE KAGAN: -- a campsite suggests
2 something different to people. It suggests a
3 tent. It suggests a conglomeration of people.
4 You know, tent camps, if you will.

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

12 Is that not what your statute does?

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

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

19 MS. EVANGELIS: -- people who are
20 camping.

21 JUSTICE KAGAN: But it's a single
22 person with a blanket.

23 MS. EVANGELIS: And --

24 JUSTICE KAGAN: You don't have to have
25 a tent. You don't have to have a camp. It's a

1 single person with a blanket.

2 MS. EVANGELIS: And sleeping in
3 conduct is considered -- excuse me, sleeping in
4 public is considered conduct. And this Court --
5 this Court in Clark discussed that, that that is
6 conduct.

7 Also, the federal regulations --

8 JUSTICE KAGAN: Well, sleeping is --

9 MS. EVANGELIS: -- are very --

10 JUSTICE KAGAN: -- a biological
11 necessity. It's sort of like breathing. I
12 mean, you could say breathing is conduct too,
13 but, presumably, you would not think that it's
14 okay to criminalize breathing in public.

15 MS. EVANGELIS: I would like to point
16 to the federal regulations which I brought up.

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

20 MS. EVANGELIS: Well, two points.

21 So, first, even the federal
22 regulations prohibit even sleeping. They don't
23 even require any materials, it -- including
24 but -- but not necessary under the federal
25 regulation. So this is conduct that is

1 understood by jurisdictions nationwide and even
2 the federal government to be conduct that is
3 prohibited, and so I want to make that point.

4 JUSTICE KAGAN: See, I'll --

5 MS. EVANGELIS: The second point --

6 JUSTICE KAGAN: -- I'll tell you the
7 truth, Ms. Kapur. I think that this is -- this
8 is a super-hard policy problem --

9 MS. EVANGELIS: It is.

10 JUSTICE KAGAN: -- for all
11 municipalities. And if you were to come in here
12 and you were to say, you know, we need certain
13 protections to keep our streets safe and we
14 can't have, you know, people sleeping anyplace
15 that they want and we can't have, you know, tent
16 cities cropping up, I mean, that would create
17 one set of issues.

18 But your ordinance goes way beyond
19 that. Your ordinance says as to a person -- and
20 I understand that you think it's generally
21 applicable, but we only come up with this
22 problem for a person who is homeless, who has
23 the status of homelessness, who has no other
24 place to sleep, and your statute says that
25 person cannot take himself and himself only and,

1 you know, can't take a blanket and sleep
2 someplace without it being a crime. And --
3 and -- and that's, you know -- well, it just
4 seems like Robinson. It seems like you're
5 criminalizing a status.

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

9 JUSTICE KAGAN: But that --

10 CHIEF JUSTICE ROBERTS: Counsel --

11 JUSTICE KAGAN: -- it isn't.

12 MS. EVANGELIS: -- why the Eighth
13 Amendment --

14 JUSTICE JACKSON: But can -- can you
15 answer why?

16 CHIEF JUSTICE ROBERTS: Can --

17 JUSTICE JACKSON: Why is it not?

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

22 And you keep saying this is conduct.
23 Can you explain why?

24 MS. EVANGELIS: The actus reus
25 element, that's exactly what was missing in

1 Robinson and that's what we have here. And
2 that's why that law was so unique. It's a very
3 peculiar --

4 JUSTICE JACKSON: So it seems to me
5 that Robinson actually hurts you and not helps
6 you in the following sense. You know, it seems
7 both cruel and unusual to punish people for acts
8 that constitute basic human needs.

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

19 MS. EVANGELIS: Well, I think that
20 just illustrates the line-drawing problems
21 because, if you look at biological necessities
22 and what a person needs to do, you know, the --
23 the Ninth Circuit's decisions in this area would
24 allow --

25 JUSTICE JACKSON: Can I give you a

1 hypothetical?

2 MS. EVANGELIS: -- all sorts of
3 behavior.

4 JUSTICE JACKSON: Can I give you a
5 hypothetical?

6 MS. EVANGELIS: Yes. Thank you.

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

16 Now, just as here, that seems
17 generally fine because most people have
18 restaurants that they can go to, most people
19 have houses that they can eat in. But some
20 people don't have that option. They have to eat
21 in public because they're unhoused and they
22 can't afford to go to a restaurant.

23 So is -- is your argument, same
24 result, no Eighth Amendment problem, no problem
25 with the city banning eating in public, even

1 though that's a public function -- I mean,
2 excuse me, even though that's a human necessity
3 that everyone engages in, and, really, what's
4 happening is you're only punishing certain
5 people who can't afford to do it privately?

6 MS. EVANGELIS: Well, it sounds like
7 -- I -- I take for a moment that you're not
8 saying the law -- that the law draws lines on
9 any sort of irrational basis or any equal
10 protection issue --

11 JUSTICE JACKSON: No. The city has a
12 perfectly rational basis.

13 MS. EVANGELIS: -- and --

14 JUSTICE JACKSON: When people eat in
15 public --

16 MS. EVANGELIS: Yes.

17 JUSTICE JACKSON: -- there is trash,
18 there are rodents, there are problems. So the
19 city says what we're going to do is we're going
20 to say no eating in public.

21 What I'm concerned about from your
22 argument is the suggestion -- you know, you call
23 it conduct, I appreciate that, but what we have
24 happening in operation is that people who are
25 able to afford doing this thing that's a basic

1 human need privately are okay. They're not
2 punished for it. But people who don't have any
3 other option or opportunity except for to do it
4 in public are the ones who are being targeted by
5 this statute.

6 MS. EVANGELIS: So two responses.

7 First, I think the Eighth Amendment is
8 the wrong way to look at it. Someone might have
9 a due process challenge to a law like that if
10 there is a deeply entrenched liberty interest.

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

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

15 JUSTICE JACKSON: Why is the Eighth
16 Amendment not implicated?

17 MS. EVANGELIS: -- in that case, you
18 would have a defense under Oregon law, for
19 example, a necessity defense.

20 JUSTICE GORSUCH: Counsel, on -- on --
21 on -- on --

22 MS. EVANGELIS: And I want to get to
23 that on the camping --

24 JUSTICE GORSUCH: I'm sorry to
25 interrupt.

1 MS. EVANGELIS: Yes.

2 JUSTICE GORSUCH: But -- but, on that
3 point, I think we're having some debate about
4 where to lodge the defense, whether it's under
5 the Eighth Amendment or under the Fourteenth
6 Amendment.

7 But do you concede that there are
8 instances in which a necessity defense, long
9 recognized at common law, would apply to eating
10 in public, sleeping in public, or other things
11 like that?

12 MS. EVANGELIS: Yes, I agree. And,
13 actually, here, in the case of camping, Oregon
14 law recognizes a necessity defense, so as a
15 matter of state law and policy -- and, again,
16 that goes to the difficult policy questions --
17 that's why states are able to address the needs
18 of what this issue raises.

19 And so, for something under Oregon's
20 state law, a person could raise that defense
21 under the necessity defense, and then, if that's
22 not enough, if they believe that that's not
23 broad enough somehow --

24 JUSTICE GORSUCH: And you're saying --

25 MS. EVANGELIS: -- they can argue due

1 process.

2 JUSTICE GORSUCH: -- Oregon law has
3 that defense --

4 MS. EVANGELIS: Yes.

5 JUSTICE GORSUCH: -- already built
6 into it?

7 MS. EVANGELIS: That's correct.

8 JUSTICE GORSUCH: All right. Thank
9 you.

10 JUSTICE JACKSON: Let me ask you about
11 Oregon law, because one sort of threshold
12 concern that I have about this case is I
13 understand that Oregon has enacted a statute, a
14 new statute, that seems to address this very
15 issue, so I'm trying to understand why this is
16 -- is still a live case.

17 As I read the new law, it essentially
18 codifies Martin's rule, that it says something
19 about all regulations of this nature have to be
20 objectively reasonable as to time, place, and
21 manner with regard to -- with regards to people
22 experiencing homelessness.

23 So it seems like the state has already
24 precluded Grants Pass from doing the sort of
25 thing it's doing here, so why do we need to

1 weigh in on that?

2 MS. EVANGELIS: Well, no, it hasn't.
3 So, first, both sides agree that it -- this case
4 is not moot. There is no state law challenge in
5 this case. But, more importantly, that standard
6 is very different from Martin, and there's never
7 been a challenge to our laws.

8 JUSTICE JACKSON: What about
9 constitutional avoidance? So, fine, it's not
10 moot, but wouldn't our principle be that we
11 don't need to reach the constitutionality of
12 this issue if there's another possible way of
13 resolving it because the state has addressed it?

14 MS. EVANGELIS: Well, not at all. So
15 the state's law is very different. And we
16 believe our law is satisfied.

17 But, more importantly, the fact that
18 the state is acting here is a good thing. We
19 agree that states should be able to make policy
20 and to weigh all of the competing concerns.

21 And, here, the -- the need to reverse
22 Martin is so critical because laws like ours,
23 they really do serve an essential purpose. They
24 protect the health and safety of everyone. It
25 is not safe to live in encampments. It's

1 unsanitary. We see what's happening. And there
2 are the -- the harms at the encampments
3 themselves on those in them and outside. We
4 know this. The federal government has cleared
5 encampments here in the capital in McPherson
6 Square. So this is an urgent problem.

7 And also, there are downstream effects
8 of all the other things that flow from it, but
9 it is very important here to understand that the
10 state laws and the --

11 JUSTICE JACKSON: So is it your
12 argument that the Eighth Amendment has nothing
13 to say about how the City responds to such
14 problems? I mean, suppose the City decided that
15 it was going to execute homeless people. I
16 mean, very extreme, I know, but it would solve
17 the problems that you're talking about.

18 MS. EVANGELIS: Well, that -- that
19 would be --

20 JUSTICE JACKSON: Do we have an Eighth
21 Amendment issue in that circumstance?

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

23 JUSTICE JACKSON: Why?

24 MS. EVANGELIS: -- there, you look at
25 the punishment. That -- again, here, we're

1 looking at the punishment, which is low-level
2 fine --

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

5 MS. EVANGELIS: I -- I think it would
6 -- it would be. Yes, I think it -- it
7 absolutely would.

8 JUSTICE GORSUCH: Why -- why not just
9 yes to that?

10 (Laughter.)

11 MS. EVANGELIS: Yes. Thank you.
12 Thank you, Justice Gorsuch.

13 JUSTICE BARRETT: Counsel, can I ask
14 you a question about the scope of your
15 ordinance? So, as Justice Kagan was pointing
16 out, this -- this criminalizes sleeping with a
17 blanket at a minimum, right?

18 MS. EVANGELIS: Yeah.

19 JUSTICE BARRETT: Correct? But, I --
20 as I understand it, after this decision and --
21 and maybe after Martin before that, there was
22 some question about whether it also criminalized
23 having fires, campfires, tents.

24 Can you talk a little bit about that
25 and what the scope of it is? Does the

1 Constitution then make it impossible for a city
2 to limit the use of fires and encampments,
3 tents, those kinds of temporary shelters?

4 MS. EVANGELIS: It really does because
5 the rationale of Martin, the -- the argument
6 that it's a biological necessity to sleep
7 outside, the Respondents argue a blanket is
8 necessary in Oregon. Some might argue a tent
9 and a fire is necessary in North Dakota. The
10 Eighth Amendment really doesn't give us any
11 answers to what cities can and can't prohibit.
12 It's really administratively impossible for
13 cities on the ground, as well as for courts, to
14 administer. So we're seeing --

15 JUSTICE SOTOMAYOR: I'm sorry. This
16 -- we have nothing to do with fires or tents.
17 That was exempted under the district court's
18 injunction, and the circuit court didn't require
19 that. We're talking only about sleeping with a
20 blanket.

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

22 JUSTICE SOTOMAYOR: So let's narrow it
23 to what it is. I agree there might be other
24 cases in the Ninth Circuit that are not
25 rational, and I don't mean to throw aspersions

1 at -- at those holdings, but some of them are
2 not permitting time/place restrictions.

3 Let's go beyond that. Let's go here.
4 Here, you're not precluded from prohibiting
5 fires. You're not precluded from prohibiting
6 tents. What's at issue is are you prohibited
7 from keeping -- having someone wear a blanket
8 anywhere in the city.

9 Your intent was to remove -- stated by
10 your mayor, intent is to remove every homeless
11 person and give them no public space to sit down
12 with a blanket or lay down with a blanket and
13 fall asleep.

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

16 JUSTICE SOTOMAYOR: Well --

17 MS. EVANGELIS: -- address that point
18 because the other side has --

19 JUSTICE SOTOMAYOR: -- why don't you
20 answer the basic question.

21 MS. EVANGELIS: Yes. So --

22 JUSTICE SOTOMAYOR: It's not about
23 fires. It's not about tents. It's about not
24 being -- a time and place restriction about
25 eliminating all choices.

1 MS. EVANGELIS: So we think that it is
2 harmful for people to be living in public spaces
3 on streets and in parks, whatever bedding
4 materials. When humans are living in those
5 conditions, we think that that's not
6 compassionate and that --

7 JUSTICE SOTOMAYOR: Oh, it's not, but
8 --

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

11 JUSTICE SOTOMAYOR: -- neither is --
12 neither is providing them with nothing --

13 MS. EVANGELIS: Well, we --

14 JUSTICE SOTOMAYOR: -- to alleviate
15 that situation.

16 MS. EVANGELIS: This is a difficult
17 policy question, Justice Sotomayor. It -- it
18 is. And --

19 JUSTICE SOTOMAYOR: Where do we put
20 them if every city, every village, every town
21 lacks compassion --

22 MS. EVANGELIS: We --

23 JUSTICE SOTOMAYOR: -- and passes a
24 law identical to this? Where are they supposed
25 to sleep? Are they supposed to kill themselves,

1 not sleeping?

2 MS. EVANGELIS: So this is -- a
3 necessity defense, as I mentioned, under Oregon
4 law is available. States are able to address
5 these concerns. This is a complicated policy
6 question. We believe that the Eighth Amendment
7 analysis, to go back to it, focuses on the
8 low-level fines.

9 JUSTICE SOTOMAYOR: What's so
10 complicated about letting someone somewhere
11 sleep with a blanket in the outside if they have
12 nowhere to sleep? The laws against defecation,
13 the laws against keeping things unsanitary
14 around yourself, those have all been upheld.

15 The only thing this injunction does is
16 say you can't stop someone from sleeping in a
17 public place without a blanket.

18 CHIEF JUSTICE ROBERTS: Why don't you
19 answer and then we'll move on to the next round,
20 and you can be thinking about an answer to
21 Justice Sotomayor while they -- we move into a
22 different --

23 MS. EVANGELIS: Thank you.

24 CHIEF JUSTICE ROBERTS: -- stage of
25 the argument.

1 Is being a bank robber a status?

2 MS. EVANGELIS: No. I would say
3 that -- well -- well, if -- if your question is
4 asking would it be permissible to punish being a
5 bank robber, I think that would have vagueness
6 problems probably.

7 CHIEF JUSTICE ROBERTS: Well, it would
8 be someone who robbed a bank. That doesn't
9 sound vague.

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

15 And the -- there, it was the status of
16 being an addict without any mens rea. So a law
17 like that -- excuse me, without any actus reus.
18 A law like that is problematic. Without an
19 actus reus, I think it would probably have
20 vagueness problems, due process problems.

21 However, the Eighth Amendment, this
22 entire exercise under Robinson is the only time
23 this Court has ever evaluated the substantive
24 criminal law, and it raises all of these
25 line-drawing problems. And the fact that -- I'm

1 not here to defend Robinson. As a matter of
2 first principles, we don't agree with it. We
3 think it was wrongly decided. We're just saying
4 that it is so far removed -- that our laws are
5 so far removed from what was at issue in
6 Robinson that it just isn't implicated here.

7 CHIEF JUSTICE ROBERTS: So, if someone
8 is homeless for a week and then finds available
9 shelter, is that person homeless when he's in
10 the shelter?

11 MS. EVANGELIS: Under federal law, the
12 HUD regulations, he is actually considered
13 homeless. That shows the fluidity and the
14 different ways of --

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

18 MS. EVANGELIS: Some would say yes,
19 that someone who --

20 CHIEF JUSTICE ROBERTS: What would you
21 say?

22 MS. EVANGELIS: I -- I would say that
23 at that point he is sheltered and homeless. I
24 think he -- he -- that -- that is also --

25 CHIEF JUSTICE ROBERTS: All right.

1 Let me make it easier. What if he buys a home
2 or finds a home or is given a home? I mean, is
3 he homeless --

4 MS. EVANGELIS: No, he is --

5 CHIEF JUSTICE ROBERTS: -- at that
6 point?

7 MS. EVANGELIS: -- he is not. So for
8 -- what -- what's at issue in this case is --

9 CHIEF JUSTICE ROBERTS: So you think
10 the status of homelessness can change from one
11 time to another?

12 MS. EVANGELIS: Yes, I do. I think
13 it's very fluid.

14 CHIEF JUSTICE ROBERTS: Is that
15 consistent with the definition of "status" in
16 Robinson?

17 MS. EVANGELIS: No. So Robinson
18 treated addiction as a disease and as something
19 that -- and -- and many believe that addiction
20 is something that someone has with them forever
21 and -- and it's a struggle. So that is a very
22 different situation.

23 And, here, if someone has shelter --
24 let's say they were offered shelter yesterday
25 and they refused it, and then today, when

1 someone comes around and tells them that they're
2 not permitted to camp, are they involuntarily
3 there if they refused shelter yesterday? That's
4 the question the Eighth Amendment does not
5 answer.

6 This is very complex. What if there
7 is a bed available in the Gospel Rescue Mission,
8 but like Ms. Johnson, a person doesn't wish to
9 leave their pet? Her Rottweiler's not permitted
10 there. So that is a difficult question for a
11 person and a difficult policy question, but --

12 CHIEF JUSTICE ROBERTS: Thank you.

13 MS. EVANGELIS: -- a person's
14 status -- yes.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 JUSTICE THOMAS: Robinson actually
19 included a crime of, as I read it, "either to
20 use narcotics or to be addicted to the use of
21 narcotics," and the Court was concerned about
22 being -- the status of being addicted to the
23 use.

24 Is there a crime here for being
25 homeless?

1 MS. EVANGELIS: No, there is not.

2 CHIEF JUSTICE ROBERTS: Justice Alito?

3 JUSTICE ALITO: Robinson presents a
4 very difficult conceptual question. Do you
5 think that someone who is a drug addict is
6 absolutely incapable of -- that all people who
7 are drug addicts are absolutely incapable of
8 refraining from using drugs?

9 MS. EVANGELIS: Well, I think that for
10 some, that may be true, and for some, perhaps
11 they can abstain. But that's a question of free
12 will and agency that's true of all -- every law
13 and what conduct we choose to regulate. That's
14 a --

15 JUSTICE ALITO: All right. Then
16 compare that with a person who absolutely has no
17 place to sleep in a particular jurisdiction.

18 Does that person have any alternative
19 other than sleeping outside?

20 MS. EVANGELIS: So I think we'd have
21 to ask all the questions I mentioned earlier
22 about what alternatives they might have had
23 yesterday --

24 JUSTICE ALITO: They have --

25 MS. EVANGELIS: -- and how they ended

1 up there.

2 JUSTICE ALITO: -- they have none.
3 They have absolutely none. There's not a single
4 place where they can sleep.

5 MS. EVANGELIS: If that's true, then
6 that may be the case, and in that case, at least
7 in Oregon, they would have a defense of
8 necessity.

9 JUSTICE ALITO: So the point is that
10 the connection between drug addiction and drug
11 usage is more tenuous than the connection
12 between absolute homelessness and sleeping
13 outside.

14 MS. EVANGELIS: Well, I -- I think,
15 in -- in Robinson, again, the Court did draw
16 that line, but, here, the Respondents are saying
17 that the two are really the same, that camping
18 outside, sleeping outside, and being homeless
19 are two sides of the same coin.

20 We think that that's wrong. It's
21 collapsing the status that they claim into the
22 conduct. So we think the conduct here is very
23 clear because it applies generally to everyone.
24 The law does not say on its face it is a crime
25 to be homeless. I just want to --

1 JUSTICE ALITO: All right.

2 MS. EVANGELIS: -- make that --

3 JUSTICE ALITO: Thank you.

4 MS. EVANGELIS: -- very clear. Thank
5 you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: It was the brief
9 of Criminal Law and Punishment Scholars that I
10 was referencing earlier.

11 I want to go back to Justice Thomas's
12 beginning question. As I understood it, the
13 Ninth Circuit never reached the excessive fines
14 question presented by this case, correct?

15 MS. EVANGELIS: That's correct.

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

18 MS. EVANGELIS: That's correct.

19 JUSTICE SOTOMAYOR: All right.
20 Assuming that there is no standing, I understand
21 one of the appellees died, the one who was
22 camping outside died, during the pendency of
23 this appeal. And there are two other named
24 plaintiffs. I -- I know they have fines on
25 them. I'm not sure that either of them has any

1 criminal -- crimes charged against them.

2 Where does that -- put this appeal?

3 Where does that put this case?

4 MS. EVANGELIS: Sure. Well, the
5 case --

6 JUSTICE SOTOMAYOR: Should we be
7 vacating and remanding to see if there is --

8 MS. EVANGELIS: No.

9 JUSTICE SOTOMAYOR: -- a live
10 plaintiff -- a -- a plaintiff, a named plaintiff
11 who is still suffering injury?

12 MS. EVANGELIS: No. So, here, the --
13 the sleeping ordinance, which is the one that
14 Ms. Blake challenged, that is no longer in the
15 case. That ordinance limited only sleeping in
16 certain rights-of-way and sidewalks in the city,
17 and it was a different law, and that's not at
18 issue here.

19 So sleeping is not at issue. It's
20 about the camping ordinance. And we very much
21 have a live case because we are under the Ninth
22 Circuit's injunction, and the named plaintiffs
23 have --

24 JUSTICE SOTOMAYOR: No, the question
25 is, could it give an injunction? Do -- are

1 these people -- well, I guess, if they're not
2 permitted to park --

3 MS. EVANGELIS: That's correct.

4 JUSTICE SOTOMAYOR: So it's not the
5 camping, it's the parking, isn't it?

6 MS. EVANGELIS: Well, and the camping.
7 So we -- we intend to -- and -- to rely on these
8 laws. We want to be able to rely on these laws.
9 They are very important and --

10 JUSTICE SOTOMAYOR: You're not
11 answering -- just focus on my question.

12 MS. EVANGELIS: Yes.

13 JUSTICE SOTOMAYOR: Both these people
14 sleep in cars. Both of them sleep in cars
15 outside of the town. So they're not seeking
16 camping permission. Is -- is your city not
17 provide for overnight parking in any location at
18 night except in private homes?

19 MS. EVANGELIS: Camping in a vehicle
20 is included in the camping ordinance.

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

23 MS. EVANGELIS: Again, it is a place
24 where someone has laid down bedding or has --

25 JUSTICE SOTOMAYOR: So, if they go

1 into -- if there's a line of cars and they want
2 to -- and the cars can stay overnight --

3 MS. EVANGELIS: So --

4 JUSTICE SOTOMAYOR: -- and they want
5 to park in one of those spaces, if they fall
6 asleep in the car, they're guilty of violating
7 the camping law?

8 MS. EVANGELIS: No. Justice --
9 Justice Sotomayor, Ms. Johnson parks her car
10 oftentimes at a friend's, so she is not
11 violating the law at those times. So --

12 JUSTICE SOTOMAYOR: Just answer my
13 question.

14 MS. EVANGELIS: -- parking everywhere
15 is not prohibited. In certain areas, private
16 areas, you can.

17 JUSTICE SOTOMAYOR: Is sleeping in
18 your car prohibited?

19 MS. EVANGELIS: If you are sleeping in
20 your car in a park, where you're not allowed to
21 park overnight --

22 JUSTICE SOTOMAYOR: Have any of
23 them --

24 MS. EVANGELIS: -- then yes.

25 JUSTICE SOTOMAYOR: -- indicated

1 intent to sleep in a park, or have they just
2 said they want to park somewhere in the city?
3 And can they park somewhere in the city and
4 sleep?

5 MS. EVANGELIS: Yes, they have said
6 that they have the intent to continue their
7 conduct and that they will be, therefore,
8 subject to the city's laws and subject to --

9 JUSTICE SOTOMAYOR: I don't understand
10 that answer. Okay.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

24 So, there, you -- it would be very
25 narrow. It is a very narrow defense. So it

1 would be in that moment of --

2 JUSTICE KAGAN: So -- so suppose that
3 there is a person who is homeless and there are
4 no shelter beds available and the person has no
5 place to go, and the person, of course, has to
6 sleep. And the person -- it's cold outside.
7 The person has a blanket. So that's the minimum
8 conduct that the law prohibits. So the person
9 sleeps outside with a blanket, and the police
10 officer comes, and in the -- in -- in -- but the
11 person says, well, I had no place else to go.

12 Would the City continue to push for
13 some kind of penalty?

14 MS. EVANGELIS: Well, there, if a
15 person received a citation, so if -- if they
16 did, then they would have a defense of
17 necessity. It's asserted as a defense.

18 So what the other side is trying --

19 JUSTICE KAGAN: Well, it's asserted as
20 a defense.

21 MS. EVANGELIS: Yes.

22 JUSTICE KAGAN: I mean -- but -- so
23 you're not willing to say no, we're going to
24 tell all our police officers that they shouldn't
25 give a citation in that circumstance? You know,

1 you -- you know, we're going to give a citation,
2 and then we'll see how the courts deal with it,
3 is all you're going to tell me?

4 MS. EVANGELIS: Well, officers always
5 have discretion, and we know that they exercise
6 it. And -- and it's hard to know --

7 JUSTICE KAGAN: Well, the question is
8 not an individual officer's --

9 MS. EVANGELIS: Yeah.

10 JUSTICE KAGAN: -- discretion.
11 Individual officers are in a tough situation
12 here.

13 MS. EVANGELIS: They are.

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

25 MS. EVANGELIS: So the City, in its

1 policy, at Joint Appendix, page 158, for
2 example, talks about what officers are supposed
3 to do. They're supposed to put people in touch
4 with services first to contact if there is
5 available help for them. These laws are
6 absolutely a tool for getting people the
7 services that they need. Many people need that
8 intervention.

9 JUSTICE KAGAN: Well, you're not
10 giving me a -- a real answer --

11 MS. EVANGELIS: Yes.

12 JUSTICE KAGAN: -- to the question of
13 is the City telling officers that they should
14 give citations --

15 MS. EVANGELIS: No.

16 JUSTICE KAGAN: -- in that
17 circumstance.

18 MS. EVANGELIS: No. It is -- it is --
19 if somebody -- again, it is a matter of
20 discretion.

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

23 MS. EVANGELIS: Yes.

24 JUSTICE KAGAN: There's nothing you
25 can point to that the City says we have a

1 necessity defense, what we're telling officers
2 to do is to, you know, act consistently with
3 that defense so that if it is truly a matter of
4 need that you are sleeping on the street alone
5 with a blanket, no, the officer should not cite
6 the person?

7 MS. EVANGELIS: There's nothing in the
8 record here that shows officers were told about
9 a necessity defense and that it -- what it would
10 or would not preclude. That would be an
11 individualized question after the fact if
12 someone received a citation.

13 And if they thought that that wasn't
14 enough, the proper framework would be this
15 Court's framework in Kahler, where we would look
16 at the asserted defense, there, insanity of some
17 form, and, here, it would be necessity, and we
18 would ask whether it is so deeply rooted in our
19 history and -- and something that has to be
20 imposed in this way on the states.

21 JUSTICE KAGAN: Thank you.

22 MS. EVANGELIS: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Gorsuch?

25 JUSTICE GORSUCH: I suppose someone

1 could also initiate a class action of the sort
2 that happened here if -- if you were not
3 allowing the necessity defense to operate and
4 seek to have it enforced, couldn't they?

5 MS. EVANGELIS: Potentially. I -- I
6 --

7 JUSTICE GORSUCH: Yeah. Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: You've said
11 several times that it's a difficult policy
12 question, a complicated policy question. I
13 think everyone would agree with that.

14 How does this law help deal with the
15 complicated policy issues?

16 MS. EVANGELIS: One of the most
17 difficult challenges is getting people the help
18 that they need. And laws like this allow cities
19 to intervene, and they're an important tool in
20 helping incentivize people to accept shelter.

21 So Ms. Johnson, for example, has said
22 in her deposition -- it's in the Joint
23 Appendix -- that she does not wish to stay at
24 the Gospel Rescue Mission. One of the reasons
25 is because of her dog. She also had other

1 reasons. She doesn't like being around people
2 and -- and so forth. People have all sorts of
3 circumstances. It's very complex. And the
4 individual decisions --

5 JUSTICE KAVANAUGH: How does it help
6 if there are not -- how does it help -- the rule
7 here, the law here, how does it help if there
8 are not enough beds for the number of homeless
9 people in the jurisdiction?

10 MS. EVANGELIS: So, for Ms. Johnson,
11 she sometimes stays with a friend. So there are
12 other --

13 JUSTICE KAVANAUGH: How about more --
14 more generally, though?

15 MS. EVANGELIS: Yes.

16 JUSTICE KAVANAUGH: I -- I guess, if
17 there's a mismatch between the number of beds
18 available in shelters, even including Gospel
19 Rescue, and the number of homeless people, there
20 are going to be a certain number of people who
21 there's nowhere to go?

22 MS. EVANGELIS: That -- that is a
23 difficult policy question. And we --

24 JUSTICE KAVANAUGH: How does this law
25 deal --

1 MS. EVANGELIS: Yes.

2 JUSTICE KAVANAUGH: -- help with that
3 policy?

4 MS. EVANGELIS: So it encourages
5 people to accept alternatives when they come up
6 so that fewer people end up camping. It also --
7 there is harm in simply camping. Whatever
8 materials people are using when they are living
9 in public spaces without plumbing and
10 infrastructure, there's harm to the whole city
11 and to the whole community, as well as to them.

12 We know that -- that encampments and
13 these conditions also breed crime and very
14 dangerous conditions. So the City has an
15 interest in protecting everyone, including --

16 JUSTICE KAVANAUGH: Do you think the
17 constitutional rule should be different when the
18 number of beds available in the jurisdiction
19 exceeds the number of homeless people versus the
20 number of homeless people exceeds the number of
21 beds available in shelters?

22 MS. EVANGELIS: No. That's what we've
23 seen in the Ninth Circuit. We've seen that that
24 is unworkable. There is no way to count what
25 beds are available and who is perhaps willing to

1 take one and who would consider it adequate.

2 Then the question becomes, are those
3 beds adequate? So, here, Gospel Rescue Mission
4 again --

5 JUSTICE KAVANAUGH: That's a separate
6 issue, I agree.

7 MS. EVANGELIS: It is.

8 JUSTICE KAVANAUGH: And -- and it can
9 be a challenging issue, I suppose, I know, as
10 well.

11 Let me ask one last question, which
12 is, how does the necessity defense differ from
13 the constitutional rule? You touched on this,
14 but I just want to get a succinct answer to
15 that, the state law necessity defense differ
16 from the constitutional rule here.

17 MS. EVANGELIS: You would weigh the
18 harm from the individual's conduct in violating
19 the law. So, if someone were camping near a
20 school or near -- or -- or -- or doing some --
21 something or engaged in some behavior that was
22 particularly harmful and they had another place
23 where they could camp, that would be maybe a
24 factor that you would raise in the necessity
25 situation.

1 It's -- it's narrower. So, in a case
2 of a -- the Oregon cases include people who are
3 growing marijuana for medical reasons but
4 without a license, and so the necessity defense
5 was not accepted in that case because they could
6 have obtained a license. So, if a person had a
7 friend to go to, had a bed available at the
8 Gospel Rescue Mission, they would be expected to
9 take it under the necessity defense.

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

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

16 MS. EVANGELIS: So the -- and -- and I
17 want -- I do want to make a point about that --
18 about the criminal aspect. The trespass law
19 here is only triggered after several civil
20 citations.

21 JUSTICE KAVANAUGH: Right. No.

22 MS. EVANGELIS: And at that point --

23 JUSTICE KAVANAUGH: If you run through
24 that cycle --

25 MS. EVANGELIS: Yes.

1 JUSTICE KAVANAUGH: -- and you end up
2 in jail for 30 days, then you get out, I mean,
3 you're not going to be any better off than you
4 were before in finding a bed if there aren't --
5 going to my earlier question, if there aren't
6 beds available in the jurisdiction, unless
7 you're removed from the jurisdiction or you
8 decide to -- to leave somehow.

9 MS. EVANGELIS: No. There are
10 services available, and the jurisdiction can put
11 you in touch with services and programs to help
12 you in those circumstances. And for many
13 people, that is a point where they're able to
14 get into treatment. So that intervention
15 actually saves lives.

16 JUSTICE KAVANAUGH: Okay. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Barrett?

19 JUSTICE BARRETT: So let me follow up
20 on that. So you're saying there are services
21 available, there's treatment available, so
22 people would ultimately move off the street? Is
23 that -- is that what you're saying? Because I
24 think part of the premise of all of this, right,
25 is that there are not enough beds for homeless

1 people to occupy, and so there will be a
2 mismatch and there are going to be some people
3 who can't be cared for.

4 Are you saying that if your law is
5 enforced, there is a way for everyone to be
6 cared for?

7 MS. EVANGELIS: No. I'm saying that's
8 a policy question that is quite difficult, but
9 these laws are an important part of the puzzle.
10 They're not the only solution. And we don't --
11 we don't believe that they are, but we think
12 they're an important tool. And without them,
13 we've seen what's happened on our streets.
14 We've seen that people are -- are dying in
15 encampments. We've seen that cities are -- are
16 being forced to cede all of their public spaces.

17 So that ultimate question is for the
18 legislature and policymakers to figure out what
19 the right solution, what the right mix of
20 policies is. But the wrong answer is to do what
21 the Ninth Circuit did here and to
22 constitutionalize --

23 JUSTICE BARRETT: Okay. Let me -- let
24 me just interrupt you there. You're right, it's
25 a very, very difficult policy question. And I

1 asked you before about whether this was just
2 about blankets or whether it went into having
3 fires or urinating and defecating outdoors and
4 that sort of thing, and Justice Sotomayor
5 pointed out that this particular injunction did
6 carve out those things and was just talking
7 about sleep.

8 But, you know, other cases have been
9 litigated in the Ninth Circuit that have gone
10 beyond that, and because the line is things that
11 are involuntary, that are human needs, it can --
12 it can extend -- it's difficult to draw the
13 line, and whatever we decide here about this
14 case is about the line.

15 So can you describe for me some of the
16 things that are difficult to figure out about
17 the line? There's sleeping. There's sleeping
18 with blankets. What else?

19 MS. EVANGELIS: Public urination and
20 defecation, that is a serious problem. Those
21 are parts of biological necessities of being
22 human. A court in Sacramento addressed that,
23 and the Ninth Circuit's opinions debated whether
24 its rule would actually reach those things.

25 I think any rule that we are wondering

1 about and debating whether it would go that far,
2 I think that is a sign that it is not a workable
3 rule. The slippery slope here is very real.
4 It's not just for camping and conduct that might
5 be a biological necessity. Putting aside tents
6 and fires and cold climates, what other things
7 would be allowed?

8 All of the things that a human needs
9 to survive, for example, potentially come into
10 focus under the Ninth Circuit's rule but also in
11 other areas. Someone could say that my drug use
12 or possession is the other side of the coin
13 because I'm an addict or because I -- a -- a
14 person who violates other laws could say that I
15 had a compulsion to do those things that I
16 couldn't control.

17 And the plurality opinion in Powell
18 addressed that very thing and why it's so
19 important to draw the line there. And when
20 conduct is involved and once the Court gets into
21 deciding which conduct may be excused under the
22 Eighth Amendment, it is so far afield of what
23 the Eighth Amendment was ever understood to
24 address.

25 JUSTICE BARRETT: Okay. Speaking of

1 status and conduct, you've -- you've argued that
2 Robinson was wrong and we don't need to overrule
3 it. And I agree. I don't -- I don't think we
4 should overrule Robinson.

5 You've also been kind of resisting the
6 status -- you -- you've been resisting
7 characterizing anything other than the drug
8 addiction that was at issue in Robinson as
9 status.

10 So what if the law said it is unlawful
11 and punishable by 30 days in prison to have the
12 status of homelessness? Just go with me. Just
13 assume that the law defines homelessness as a
14 status and it is a status.

15 Would Robinson say that that law is
16 unconstitutional under the Eighth Amendment?
17 Would you concede that?

18 MS. EVANGELIS: And -- and you're
19 saying that that is a status?

20 JUSTICE BARRETT: Yes.

21 MS. EVANGELIS: All of the --

22 JUSTICE BARRETT: The law defines it
23 as a status, and it's a status.

24 MS. EVANGELIS: Well, yes, and I think
25 it looks a lot like Robinson under that

1 hypothetical, but, of course, we disagree that
2 it is --

3 JUSTICE BARRETT: I understand you
4 disagree --

5 MS. EVANGELIS: -- a status in that
6 way.

7 JUSTICE BARRETT: -- but you are
8 accepting that -- that Robinson draws a
9 distinction between status and conduct and
10 you're just fighting about the definition of a
11 status?

12 MS. EVANGELIS: It -- it draws the
13 line where a law has no actus reus. So I think
14 that's the easiest line. I -- I don't defend
15 the line under the Eighth Amendment because I
16 don't think actually that the Court -- I know
17 the Court didn't rely on any Eighth Amendment
18 principles or history of --

19 JUSTICE BARRETT: But the hypothetical
20 I just gave you had no actus reus either. The
21 status of homelessness, I mean, it could be, you
22 know, 4:00 in the afternoon and the person is
23 just standing outside the bus stop.

24 Do you agree that if the law
25 prohibited that, made that a crime, that under

1 Robinson, whether Robinson was right or wrong,
2 that under Robinson, that would be a violation
3 of the Eighth Amendment?

4 MS. EVANGELIS: Well, I -- I -- I
5 think the better framework is due process.

6 JUSTICE BARRETT: I understand that.
7 Under Robinson, do you agree that that would be
8 wrong?

9 MS. EVANGELIS: Yes.

10 JUSTICE BARRETT: Okay. Thank you.

11 MS. EVANGELIS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Jackson?

14 JUSTICE JACKSON: So picking up where
15 Justice Barrett left off, you -- you -- you say
16 that the ordinance here pertains to conduct and
17 not to status, and I'm just trying to figure
18 that out. I'm not so sure for this reason.
19 It's because all humans engage in the act in
20 question, sleeping. And yet the statute
21 operates or the ordinance operates to penalize
22 only certain individuals, those who have no
23 choice but to do that act in public.

24 So it appears, I think, not to be the
25 act that the state or the city in this case

1 finds criminally culpable. It's instead the act
2 as engaged in by certain people, by people who
3 cannot afford housing and have nowhere else to
4 go.

5 So why is that the wrong way to think
6 about it? And if that is the right way to think
7 about it, why isn't that a status crime in the
8 way that Robinson contemplates?

9 MS. EVANGELIS: It's not because we
10 can look at the law and it has a conduct
11 element. The conduct is establishing a place --
12 a campsite, and that is something that a person
13 who has a home or a shelter could do as well.

14 JUSTICE JACKSON: But -- but you've
15 just defined away the -- the basic actus reus,
16 right? The actus reus is sleeping out -- I
17 guess outside to the extent you put outside in
18 it, but that's the problem I'm talking about.
19 The actus reus is the sleeping, right?
20 Everybody -- that's not a criminally culpable
21 kind of activity.

22 That's what I think might distinguish
23 it from Robinson and -- and make it worse for
24 you in a way because, in Robinson at least, to
25 the extent someone had a disease and the

1 question was, well, are they engaging in
2 otherwise criminally culpable conduct, buying
3 and selling drugs, taking drugs, you know, we --
4 we look at that kind of category of things.

5 Here, the actus reus is sleeping,
6 human, universal. The -- the -- the -- the City
7 adds, okay, but you can't sleep outside. And I
8 guess what I'm trying to understand is, to the
9 extent that that only happens with respect to a
10 certain category of people who have no other
11 place to go, why isn't that really just
12 punishing the status of being someone who
13 doesn't have any place to go?

14 MS. EVANGELIS: It doesn't apply only
15 to that -- those people. The Respondents here
16 are trying to exempt a whole category of people.
17 What -- so what you look at there is the -- the
18 conduct of camping under federal law and in this
19 Court's decision in Clark, it was understood
20 that that is conduct. It is just like trespass,
21 where, if you are found in a place, if you enter
22 with permission, but then you remain there
23 without permission under Quarles --

24 JUSTICE JACKSON: But it's not just
25 like trespass because, presumably, you have

1 other places to go. So let me just -- let me
2 just ask you this other question.

3 What -- what is your understanding of
4 the Martin rule? Because I -- I thought it was
5 premised on the circumstance in which someone
6 had nowhere else to go and they needed to sleep
7 and they needed to be there. But you seem to
8 suggest that necessity is not sort of baked into
9 what Martin was doing.

10 MS. EVANGELIS: Martin speaks in terms
11 of someone who is involuntarily homeless, and
12 that raises all of those policy questions that
13 we've been discussing about how do you determine
14 that.

15 JUSTICE JACKSON: But assume they
16 exist. Involuntarily homeless means the person
17 has nowhere else to sleep.

18 MS. EVANGELIS: Yes, that is -- the
19 necessity defense is available. And what
20 Respondents are asking to do is to
21 constitutionalize that very defense under the
22 Eighth Amendment.

23 So, as I said earlier, it could be --
24 the argument could be made -- it would be a very
25 high bar under due process, but that is the sort

1 of argument that we would expect one to make
2 under a due process framework --

3 JUSTICE JACKSON: Thank you.

4 MS. EVANGELIS: -- under this Court's
5 Kahler decision.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Mr. Kneedler.

9 ORAL ARGUMENT OF EDWIN S. KNEEDLER
10 FOR THE UNITED STATES, AS AMICUS CURIAE,
11 SUPPORTING NEITHER PARTY

12 MR. KNEEDLER: Mr. Chief Justice, and
13 may it please the Court:

14 In Robinson, this Court held that the
15 government cannot criminalize status. And
16 Respondent has conceded here today that the City
17 cannot criminalize the status of being homeless.

18 Our narrow submission in this case is
19 that government cannot circumvent the principle
20 of Robinson by making it unlawful for a person
21 to reside in the jurisdiction if he has that
22 status.

23 That is what the ordinances here do.
24 As applied to someone who has nowhere else to
25 sleep, which is an essential human function, the

1 ordinances are the equivalent of making it a
2 crime to be homeless while living in Grants
3 Pass.

4 Although we think the Ninth Circuit
5 was right to recognize that the core principle
6 of Robinson is implicated in this case, the
7 Court was wrong to award broad injunctive relief
8 in the circumstances and manner in which it did.

9 The Robinson principle requires an
10 individualized determination, and the Ninth
11 Circuit's failure to require such a
12 determination and its issuance of much broader
13 injunctive relief has led to the problems at
14 issue that the Petitioner and its amici have
15 raised, not the core principle of Robinson.

16 And, therefore, we urge the Court to
17 adhere to the core principle of Robinson but to
18 emphasize that cities have flexibility to
19 implement these, and, in particular, time,
20 place, and manner restrictions on where someone
21 can sleep are entirely valid if they are
22 reasonable, and, indeed, the state law that
23 Justice Jackson referred to establishes a state
24 policy that time, manner, and place restrictions
25 are the way to go if they are reasonable.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Kneedler,
3 wouldn't you have a better argument if Robinson
4 involved the -- someone being arrested for using
5 drugs, but then the Court said that you were in
6 effect arresting him for the -- the status of a
7 drug user because he was -- he had no choice but
8 to use drugs because he's an addict?

9 MR. KNEEDLER: No. Our -- our
10 position is not that the conduct as in Robinson,
11 the drug addict can't stop from using drugs.
12 That is not our position. That's a question of
13 personal culpability on the basis of what the
14 person's makeup --

15 JUSTICE THOMAS: So what's the
16 difference between that and -- and -- and
17 camping out? What you're saying here, it seems
18 as though you're saying, well, they -- there's
19 no other choice, so you have to camp out.
20 Therefore, you're really arresting this person
21 for the status of homelessness.

22 MR. KNEEDLER: Yes, but -- but not
23 because of an -- of an involuntary compulsion
24 sense. I think, as Justice Alito pointed out,
25 the nexus here is actually closer than in the --

1 than in the addiction situation because sleeping
2 outside is essentially the mirror image or the
3 other side of the coin or the definition --

4 JUSTICE GORSUCH: Well, Mr. --

5 MR. KNEEDLER: -- of the status of --
6 of homelessness.

7 JUSTICE GORSUCH: -- Mr. Kneedler, I
8 -- I agree that -- that the distinction between
9 status and conduct is a slippery one and that
10 they're often closely related.

11 And in Robinson, though, the Court
12 said you cannot make the status of being a drug
13 addict a crime, but you can criminalize the
14 conduct, even if it is involuntary and
15 compulsive. And Powell reaffirmed that line
16 very strongly, at least the plurality opinion
17 did, and said we're not going to go further.

18 And I wonder whether the government is
19 asking us to take that step that Powell
20 counseled against by saying that it is -- it is
21 -- it is status because -- effectively status,
22 and this is throughout your brief. You use the
23 word "effective" or "essentially" or "tantamount
24 to," those kinds of words. And -- and so I just
25 wanted to get your response to that -- that

1 concern.

2 MR. KNEEDLER: No, we are not asking
3 the Court to take the step that it declined to
4 take in Powell, which had to do with personal
5 responsibility, the -- the sort of issues that
6 were involved --

7 JUSTICE GORSUCH: And -- and okay. If
8 you're --

9 MR. KNEEDLER: -- in this Court's
10 decision in Kahler.

11 JUSTICE GORSUCH: -- not asking us to
12 do that, then -- then -- then I guess I just
13 want to circle back to what Justice Thomas was
14 getting at, which is, surely, the government
15 wants to continue to enforce the drug laws and
16 all kinds of other laws that -- that people
17 could make an argument that I had involuntary
18 need to do, a necessity defense to. You -- you
19 don't want us to wipe out all those laws?

20 MR. KNEEDLER: Certain -- absolutely
21 not, but -- but what is different here is that
22 -- that the -- the conduct in -- in -- that was
23 suggested in Powell would have been based on the
24 person's own separate --

25 JUSTICE GORSUCH: Well --

1 MR. KNEEDLER: -- antisocial conduct.

2 Here --

3 JUSTICE GORSUCH: Well, Justice White
4 made clear that some people are going to be
5 forced to drink in public because they don't
6 have a home.

7 MR. KNEEDLER: Yeah. And what -- and
8 --

9 JUSTICE GORSUCH: He made this very
10 point. And --

11 MR. KNEEDLER: No, we don't -- but --
12 -- but -- but the -- the point here, it is the
13 government that is -- that is prohibiting the
14 alternative. It's not the individual's
15 inability to control his own conduct.

16 The government, because the person --
17 because of other circumstances, the lack of
18 money, the lack of a friend to stay with, the
19 lack of shelter space, there is no place -- we
20 -- we take as a given in our position that there
21 is no other place for the person to sleep --

22 JUSTICE GORSUCH: And I think,
23 wouldn't --

24 MR. KNEEDLER: -- and it's the
25 government --

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

4 MR. KNEEDLER: But that is -- that is
5 -- that -- the other choice would be a matter of
6 -- of personal --

7 JUSTICE GORSUCH: No. Say the record
8 says --

9 MR. KNEEDLER: -- undertaking,
10 personal culpability.

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

13 MR. KNEEDLER: Well, I -- I -- I do
14 think that engaging in conduct that is unrelated
15 to -- let me take that back.

16 The -- the -- the sleeping outside
17 when you have no other place to go is the
18 definition of homelessness.

19 JUSTICE JACKSON: Mr. Kneedler, isn't
20 the response --

21 JUSTICE BARRETT: But -- but Judge --

22 JUSTICE JACKSON: -- also that those
23 two things are different? I mean, you're sort
24 of saying it's about individual culpability.
25 But it's not as though everyone engages in drug

1 use.

2 MR. KNEEDLER: Right.

3 JUSTICE JACKSON: Right? Certain
4 people do, and maybe they have addiction, and
5 maybe you can't punish them because of the
6 addiction, but you can still punish them as
7 criminally culpable for engaging in the act.

8 It seems to me we are in a totally
9 different category --

10 MR. KNEEDLER: We are, yes.

11 JUSTICE JACKSON: -- when you're
12 talking about acts that everybody participates
13 in that no one thinks in and of themselves are
14 criminally culpable. And yet somehow this
15 statute is reaching out to punish certain people
16 who engage in that universal human basic need.
17 That seems to me to be the distinction --

18 MR. KNEEDLER: Yes.

19 JUSTICE JACKSON: -- in these
20 situations.

21 MR. KNEEDLER: That is a critical
22 distinction, and -- and not only is it something
23 that everybody engages in, but it's something
24 that everybody has to engage in to be alive.

25 So, if you -- so, if you can't sleep,

1 you can't live, and, therefore, by prohibiting
2 sleeping, the City is basically saying you
3 cannot live in Grants Pass. It's the equivalent
4 of banishment, which is -- which is something
5 that is unknown to the way --

6 JUSTICE SOTOMAYOR: Mr. Kneedler --

7 CHIEF JUSTICE ROBERTS: Mr. Kneedler

8 --

9 JUSTICE SOTOMAYOR: -- wasn't Grant
10 Pass's first attempt, policy choice, to put
11 people -- homeless people on buses so they would
12 leave the city? I understood that to be the
13 history of Grant Pass. They put -- police
14 officers would put -- buy them a bus ticket,
15 send them out of the city, but that didn't work
16 because people kept -- came back because it had
17 been their home, correct?

18 MR. KNEEDLER: They came back.

19 JUSTICE SOTOMAYOR: They came back.

20 MR. KNEEDLER: I -- I -- I think they
21 might have been sent back by the other --

22 JUSTICE SOTOMAYOR: So then they
23 passed this law. And didn't the city council
24 president say, our intent is to make it so
25 uncomfortable here that they'll move down the

1 road, meaning out of town, correct?

2 MR. KNEEDLER: That state -- that
3 statement was made at a -- at a public meeting
4 of the city council.

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

10 MR. KNEEDLER: I believe the only --
11 the only shelter beds, at least at the -- at the
12 time the record in this case was compiled, was
13 at the Gospel Mission. There's a -- there's a
14 -- has been at times a detox place. There has
15 been a warming center that has been maintained.
16 But, in terms of -- excuse me -- shelter beds --

17 JUSTICE SOTOMAYOR: Well, we're
18 talking about --

19 MR. KNEEDLER: Yes, and I -- I think
20 --

21 JUSTICE SOTOMAYOR: -- a
22 disproportionate --

23 MR. KNEEDLER: -- I think it's
24 approximately a hundred. There -- there are
25 men's, women's.

1 JUSTICE SOTOMAYOR: Yeah. I thought
2 it was much less than that.

3 MR. KNEEDLER: Yes.

4 JUSTICE SOTOMAYOR: Yeah. All right.
5 So we go back to you want the district court to
6 make individualized findings. You've asked us
7 to vacate and remand. Can we go back to that so
8 I understand it? I quite didn't understand it
9 in your brief because I thought individualized
10 findings had to do with the class action, but
11 that question hasn't been certified here.

12 MR. KNEEDLER: Right, but -- but I --
13 I think the -- I think the merits -- our basic
14 point is that a -- a person does not have an
15 Eighth Amendment defense or an Eighth Amendment
16 claim unless he truly does not have some other
17 place to reside. And so, by speaking of
18 individualized, what we were --

19 JUSTICE SOTOMAYOR: So are --

20 MR. KNEEDLER: -- saying is that it
21 depends on whether that person has some other
22 place, has a relative.

23 JUSTICE SOTOMAYOR: I -- I accept all
24 of that.

25 MR. KNEEDLER: Yeah.

1 JUSTICE SOTOMAYOR: I guess what I'm
2 asking you is -- and this is what I didn't
3 understand from your brief -- are you saying
4 that there can't be a class certification of
5 homeless people ever?

6 MR. KNEEDLER: No.

7 JUSTICE SOTOMAYOR: That you have to
8 have individuals? Or are you -- or are you
9 saying that the injunction is too broad if it
10 doesn't provide for remedies that are -- somehow
11 that the person has to prove a certain --

12 MR. KNEEDLER: The -- the --

13 JUSTICE SOTOMAYOR: -- number of
14 things before --

15 MR. KNEEDLER: Yes. That it -- it --

16 JUSTICE SOTOMAYOR: -- they're
17 entitled to the injunction?

18 MR. KNEEDLER: Yeah. Yes.

19 JUSTICE SOTOMAYOR: I wasn't sure.

20 MR. KNEEDLER: No, but the -- the
21 Eighth Amendment claim is a personal one and --
22 and, in this context, depends on whether the
23 person does have another place to sleep. So the
24 -- the person cannot benefit from the Eighth
25 Amendment claim without an individualized --

1 without that person showing, if it comes up in a
2 -- in an affirmative injunctive action, without
3 that person showing that he or she has no other
4 place to stay.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 If there is a -- the town next to
8 Grants Pass, 10 minutes away, has just completed
9 building a homeless shelter that has many vacant
10 beds, does that change the analysis here? I
11 mean, we've talked about the town wanting to get
12 -- ship people out of the town.

13 Would it be -- would -- would it --
14 would there still be a right to sleep, contrary
15 to the ordinances in Grants Pass, because you
16 don't want to be taken 10 minutes away where
17 there's a homeless shelter?

18 MR. KNEEDLER: I -- that goes to the
19 question, I think, under the analysis of whether
20 the beds are available. And I think, if they're
21 right across the town line, it would be
22 appropriate to take into account that there's a
23 homeless shelter there, even though it's not one
24 in the City of Grants Pass.

25 CHIEF JUSTICE ROBERTS: Well --

1 MR. KNEEDLER: But often, in a
2 situation, the two towns might cooperate to have
3 one homeless shelter.

4 CHIEF JUSTICE ROBERTS: Well, yeah,
5 they might, but often --

6 MR. KNEEDLER: Right.

7 CHIEF JUSTICE ROBERTS: -- next towns
8 don't always cooperate. So what if it's 30
9 miles away? Is a -- is the shelter available in
10 that case --

11 MR. KNEEDLER: I --

12 CHIEF JUSTICE ROBERTS: -- for your
13 purposes, or are you going to tell me it just
14 depends on all the circumstances --

15 MR. KNEEDLER: Well, I think it
16 depends on how --

17 CHIEF JUSTICE ROBERTS: -- so
18 municipalities won't have that much guidance?

19 MR. KNEEDLER: I think it depends on
20 the accessibility. I mean, one -- one of the
21 fundamental points here --

22 CHIEF JUSTICE ROBERTS: The
23 accessibility is that when an officer comes up
24 in Grants Pass and finds a homeless person and
25 says it violates our ordinance, but I will give

1 you a ride down the road, 30 miles, whatever it
2 is, because there's a new homeless shelter
3 there, and the person says, no, I don't want to
4 do that, can that person be given a citation?

5 MR. KNEEDLER: I -- I think probably
6 not, but let me -- if -- if I could explain why.
7 There are --

8 CHIEF JUSTICE ROBERTS: Sure.

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

17 So, if the 30-mile-away shelter
18 requires the person to leave his community and
19 to live in another place, that -- that
20 implicates --

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

23 MR. KNEEDLER: -- that aspect of the
24 problem here.

25 CHIEF JUSTICE ROBERTS: Let's say

1 there are five cities all around Grants Pass and
2 they all have homeless shelters. And yet the
3 person wants to stay. You know, I've been a
4 Grants Pass -- Pass resident for a long time. I
5 don't want to go to the one of those shelters.

6 Can that person be given a citation?

7 MR. KNEEDLER: I -- I -- I think under
8 -- because of the concern I've mentioned, I
9 think that would -- would be a serious problem
10 because --

11 CHIEF JUSTICE ROBERTS: You would --
12 you would say it would be a problem to give them
13 a citation?

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

21 CHIEF JUSTICE ROBERTS: No, but it's
22 in another city. You keep fighting the
23 hypothetical.

24 MR. KNEEDLER: No, no, no, and -- and
25 that's why I think it's different. I -- I'm --

1 I'm not prepared to say it, you know, that
2 absolutely not, but I do -- I do think it's
3 different because the City is implementing its
4 policy of banishing people, its own residents,
5 from the --

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

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

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

22 But municipalities have competing
23 priorities. I mean, what if there are lead
24 pipes in -- in -- in the -- in the water? Do
25 you build the homeless shelter or do you take

1 care of the lead pipes? What is there aren't --
2 isn't enough fire protection? Which one do you
3 prioritize?

4 Why would you think that these nine
5 people are the best people to judge and weigh
6 those policy judgments?

7 MR. KNEEDLER: We're -- we're not
8 suggesting that. We're not suggesting that the
9 only solution is for in -- especially in the
10 current circumstances, the only solution would
11 be to build homeless shelters.

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

20 You can't camp near a school. You
21 can't camp downtown. You can't sleep downtown.
22 You might be able to sleep in a -- in a park,
23 and -- and so it -- and a park -- and that could
24 be patrolled for -- for drug use and whatnot.
25 We're --

1 CHIEF JUSTICE ROBERTS: Counsel, this
2 is --

3 MR. KNEEDLER: None of these other
4 laws are inapplicable if there's a time, place,
5 and manner restriction.

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

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

17 CHIEF JUSTICE ROBERTS: But it's a --
18 it's a -- it's a -- a necessity for the person
19 who needs food.

20 MR. KNEEDLER: It's not a necessity to
21 break into -- into a -- into a store. And with
22 respect to the --

23 CHIEF JUSTICE ROBERTS: Well, you're
24 fighting the hypothetical. I'm saying this
25 person needs food.

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

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

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

20 So this is -- this is consistent
21 except for the absolute ban in sleeping in the
22 City. This -- otherwise, the community's
23 response is what has been done down through
24 history.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 MR. KNEEDLER: But it's the City's
3 absolute ban --

4 CHIEF JUSTICE ROBERTS: Thank you.

5 MR. KNEEDLER: -- that interrupts that
6 continuity.

7 CHIEF JUSTICE ROBERTS: Justice
8 Thomas?

9 Justice Alito?

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

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

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

23 Count the number of people who are
24 getting ready to sleep outside for the night and
25 then ask each one of them whether you've tried

1 to find a bed at -- at a shelter? Whether that
2 person would be willing to go to a shelter if a
3 bed is available without any conditions or
4 whether the bed -- the bed would have to be
5 available on the conditions that the individual
6 wants, like I won't go to a shelter where they
7 won't take my dog or something like that?

8 Just explain how it would work on a --
9 a daily basis.

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

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

21 The study -- I don't think the
22 homeless person would be required to check each
23 day with each shelter if there are multiple
24 shelters. And in larger cities, these initial
25 encounters are -- are not handled by law

1 enforcement. They're typically handled by
2 social services agencies who are in contact with
3 people who are camping and -- and -- and know
4 what their circumstances are and they are able
5 to say: We know that at such and such shelter
6 there are beds available --

7 JUSTICE ALITO: What -- what if
8 there's a --

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

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

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

19 MR. KNEEDLER: Right, right.

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

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

25 JUSTICE ALITO: So that would be the

1 threshold question?

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

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

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

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

25 JUSTICE ALITO: I could -- I could --

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

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

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

7 MR. KNEEDLER: No, no --

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

11 MR. KNEEDLER: I -- and -- and -- and
12 I think, you know, with all respect, I think
13 that example is -- if the -- if the family is
14 going --

15 JUSTICE ALITO: Okay, maybe --

16 MR. KNEEDLER: -- to accept him, but,
17 I mean, that's the question, whether there is
18 a -- a place to sleep. But I -- I don't know
19 that it would very often come down to that --
20 that family hates me.

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

23 JUSTICE ALITO: Right.

24 MR. KNEEDLER: -- to go back to the --
25 to the -- to her home or maybe her relative's

1 home or his relative's home or something. So
2 there's a lot of common sense.

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

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

13 MR. KNEEDLER: No. No.

14 JUSTICE ALITO: -- that they -- okay,
15 that's irrelevant?

16 MR. KNEEDLER: And -- and -- and I
17 think --

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

25 MR. KNEEDLER: No, and -- and I

1 think -- not because of -- of any Eighth
2 Amendment rule we're talking about, but under
3 this Court's decisions in -- in Edwards and --
4 and Saenz, the Privileges and Immunities Clause
5 or the Commerce Clause or the various right to
6 travel provisions would -- would prohibit
7 attaching that sort of -- of limitation to a --
8 to a newcomer.

9 But I -- but I would say -- as I
10 mentioned, the majority of people are from their
11 home --

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

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

25 MR. KNEEDLER: Yeah, I think the way

1 you're describing it, it would -- it would be --
2 it -- it might be fair to say that that -- that
3 set of small and closely knit communities would
4 be one community and -- and -- and the person
5 wouldn't -- wouldn't basically be banished from
6 where he lived or where he grew up by saying,
7 you -- you know, if there's a shelter in this
8 other location, then -- then you could be
9 expected to go there.

10 JUSTICE ALITO: There's some tiny
11 municipalities. What if a municipality doesn't
12 have a park, so if somebody is going to sleep
13 outside, the only place where that person can
14 sleep is going to have to be on the street?

15 MR. KNEEDLER: I --

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

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

25 JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: I don't want to be
4 repetitive, but what are we vacating and
5 remanding for? You -- you -- individualized
6 finding of what?

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

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

24 So that there -- even with respect to
25 the named plaintiffs, there was not the sort of

1 examination of their individual --

2 JUSTICE SOTOMAYOR: So you're talking

3 --

4 MR. KNEEDLER: -- circumstances that
5 they're --

6 JUSTICE SOTOMAYOR: -- about standing?

7 That we don't know if --

8 MR. KNEEDLER: Well, standing, yes,
9 and then there -- there could be typicality or
10 commonality problems there too if the -- if the
11 -- the two named plaintiffs slept in vehicles,
12 which may present different problems than --
13 than in the -- in the camp.

14 JUSTICE SOTOMAYOR: Well, we were told
15 that sleeping or camping is out of the case
16 because -- and the court said that.

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

19 JUSTICE SOTOMAYOR: Right.

20 MR. KNEEDLER: But it's not the sort
21 of camping that -- that we've been talking
22 about, to some extent, about sleeping on the
23 ground with a blanket or a tent or something
24 like that.

25 And it's true, the question of tents

1 are not in -- in the case. And if -- even if --
2 you know, if the City wanted to allow tents, I
3 suppose it could even require that they be --

4 JUSTICE SOTOMAYOR: All right.

5 MR. KNEEDLER: -- taken down --

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 MR. KNEEDLER: -- and put back up.
9 There's a lot of flexibility that the City could
10 have.

11 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

25 But it does seem as though there are

1 line-drawing issues as you go up, right? It's a
2 very cold night and somebody wants to make a
3 fire. It's raining and somebody wants to put up
4 a -- a tarp. The City has said you can sleep in
5 particular areas, but it turns out that those
6 areas have a ton of crime.

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

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

24 As I mentioned, the -- the City might
25 say you can put up a tent if it's very cold, but

1 you've got to take it down in the morning.
2 That's like being in -- some shelters say you
3 can stay here overnight, but you have to leave
4 during the day and you can come back.

5 I mean, that might seem gratuitous of
6 the City to do it. It might not want to do it.
7 But -- but we're not saying that the Eighth
8 Amendment would prevent it from doing it, and
9 especially, as you say, if there's no
10 alternative and it's, you know, 20 -- 20
11 degrees.

12 And with respect to fires, there are
13 really important issues on the other side of --
14 of that question. And in an urban area, if
15 you're creating fires, there may be hazards in a
16 -- in a park. There might be --

17 JUSTICE KAGAN: So how does --

18 MR. KNEEDLER: -- there might be
19 fireplaces in a park.

20 JUSTICE KAGAN: -- how does a court
21 make these judgments? Because these are tough
22 judgments, and -- and usually they're the kind
23 of judgments that we think of as municipal
24 officials make them.

25 But you're saying, no, there's a

1 certain level where it's out of their hands and
2 it's in the court hands. And I guess I want to
3 know what the principle is where those questions
4 go to the courts and -- and why that principle
5 is the right principle.

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

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

1 think that's the touchstone.

2 Are you basically -- does it boil down
3 to or is the core principle of Robinson that you
4 can't criminalize homelessness, which includes
5 not being able to criminalize sleeping outside?
6 If you can't sleep outside because of lack of
7 protection from the elements, I think that's the
8 principle a court would -- would apply.

9 But the Ninth Circuit, in a number of
10 cases, has gone way beyond that, and we think
11 that's really the source of the problems that
12 have been identified in the briefs and not the
13 core principle of -- of Robinson.

14 JUSTICE KAGAN: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

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

23 And now you're saying, well, there's
24 some conduct that's effectively equated to
25 status and -- but you're saying involuntary drug

1 use, you can regulate that conduct. That
2 doesn't qualify as status. You're saying
3 compulsive alcohol use, you can regulate that
4 conduct in public. Public drunkenness, even if
5 it's involuntary, that doesn't qualify as
6 status, right?

7 MR. KNEEDLER: Right.

8 JUSTICE GORSUCH: You're saying you
9 can regulate somebody who is hungry and has no
10 other choice but to steal. You can regulate
11 that conduct even though it's a basic human
12 necessity, and that doesn't come on -- on --
13 under the -- under the status side of the line,
14 right?

15 MR. KNEEDLER: Yes.

16 JUSTICE GORSUCH: Okay. But, when it
17 comes to homelessness, which is a terribly
18 difficult problem, you're saying that's
19 different and -- because there are no beds
20 available for them to go to in Grants Pass.

21 What -- what about someone who has a
22 mental health problem that prohibits them --
23 they're -- they -- they cannot sleep in -- in a
24 shelter. Are they allowed to sleep outside or
25 not? Is that status or conduct that's

1 regulable?

2 MR. KNEEDLER: I -- I -- I think the
3 -- the question would be whether that shelter is
4 available.

5 JUSTICE GORSUCH: It's available.

6 MR. KNEEDLER: Well, no, available to
7 the individual.

8 JUSTICE GORSUCH: It's available to
9 the individual.

10 MR. KNEEDLER: But --

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

13 MR. KNEEDLER: I -- I think there
14 might be -- I mean, that's -- the mental health
15 problem --

16 JUSTICE GORSUCH: Status or conduct?

17 MR. KNEEDLER: The mental health
18 situation is itself a status.

19 JUSTICE GORSUCH: Right, I know that.

20 MR. KNEEDLER: Yes. But -- but if the
21 -- if --

22 JUSTICE GORSUCH: It has this further
23 knock-on effect on conduct. Is that regulable
24 --

25 MR. KNEEDLER: I -- I --

1 JUSTICE GORSUCH: -- by the state or
2 not?

3 MR. KNEEDLER: -- I -- I think that --
4 I think that if the --

5 JUSTICE GORSUCH: All the -- the --
6 you know, alcohol, drug use --

7 MR. KNEEDLER: Right, right, right.

8 JUSTICE GORSUCH: -- they have
9 problems too and that that -- and -- and -- but
10 you're saying that conduct is regulable. How
11 about with respect to this pervasive problem of
12 -- of persons with mental health problems?

13 MR. KNEEDLER: I -- I think, in a
14 particular situation, if the -- if the -- if the
15 person would engage in violent conduct as --

16 JUSTICE GORSUCH: No, no, no, don't
17 mess with my hypothetical, counsel.

18 (Laughter.)

19 JUSTICE GORSUCH: I like my
20 hypothetical. I know you don't. It's a hard
21 one, and that's why I'm asking it. I'm just
22 trying to understand --

23 MR. KNEEDLER: I -- I --

24 JUSTICE GORSUCH: -- the limits of
25 your line.

1 MR. KNEEDLER: I think it would depend
2 on how serious the offense was on the -- on the
3 individual.

4 JUSTICE GORSUCH: It's -- it's -- it's
5 a very serious effect. The mental health
6 problem is serious, but there are beds
7 available.

8 MR. KNEEDLER: Well, what -- what I
9 was trying to say, it would depend on how
10 serious being required in -- to -- to go into
11 that facility was on the person's mental -- if
12 it would make his mental health situation a lot
13 worse, then that may not be something that's --

14 JUSTICE GORSUCH: So that's status --
15 that falls on the status side?

16 MR. KNEEDLER: Well, I -- I -- I -- I
17 guess you could put it that way, but I -- I
18 guess what I'm saying is that --

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

21 MR. KNEEDLER: Well --

22 JUSTICE GORSUCH: I really am just
23 trying to figure out --

24 MR. KNEEDLER: No -- no. You could
25 view that as status or --

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

3 MR. KNEEDLER: Well, what I was going
4 to say, you could -- you could think of it as
5 status, but I think another way to think about
6 it, and this is our point about an
7 individualized determination, is that place
8 realistically available to that person
9 because --

10 JUSTICE GORSUCH: It is in the sense
11 that the bed is available --

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

13 JUSTICE GORSUCH: -- but not because
14 of their personal circumstances.

15 MR. KNEEDLER: Right. Right. And
16 that's -- and that's my point. It -- it's
17 available in a physical sense. It may be
18 available to somebody else, but requiring an
19 individualized determination might include
20 whether that person could cope in that setting.
21 That's the only --

22 JUSTICE GORSUCH: So that -- so that
23 might be an Eighth Amendment violation?

24 MR. KNEEDLER: Because it may not --
25 yes, it may -- because it's not available.

1 JUSTICE GORSUCH: So that's an -- it's
2 an Eighth Amendment violation to require people
3 to access available beds in the jurisdiction in
4 which they live because of their mental health
5 problems?

6 MR. KNEEDLER: If -- if going there
7 would -- would --

8 JUSTICE GORSUCH: How about if they
9 have a substance abuse problem and they can't
10 use those substances in the shelter? Is that an
11 Eighth Amendment --

12 MR. KNEEDLER: That is -- that is not
13 a -- that is not a sufficient --

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

17 MR. KNEEDLER: Well, if they -- if
18 they -- if it's the shelter's rule, then they
19 have no -- they -- they -- they can't go there
20 if they're -- if they're addicted. That's not
21 -- that's not --

22 JUSTICE GORSUCH: So that's an Eighth
23 Amendment -- that's an Eighth Amendment
24 violation?

25 MR. KNEEDLER: Well, no, the -- the --

1 the Eighth Amendment violation is prohibiting
2 sleeping outside because the only shelter that
3 is available won't --

4 JUSTICE GORSUCH: Is not really
5 available to -- to that person?

6 MR. KNEEDLER: -- won't -- won't
7 take them -- won't take them, yes. And that's
8 an individualized determination.

9 JUSTICE GORSUCH: Same thing with the
10 alcoholic?

11 MR. KNEEDLER: Yes.

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

15 MR. KNEEDLER: If -- if the only
16 shelter in town won't take him, then I think
17 he's in exactly -- he's in the same -- he's in
18 the same condition. And there can be all sorts
19 of reasons, and the City doesn't normally --

20 JUSTICE GORSUCH: And -- and judges
21 across the country are now going to superintend
22 this under the Eighth Amendment?

23 MR. KNEEDLER: I -- I actually don't
24 think that it -- it requires the -- again, I
25 don't think we should let the Ninth Circuit

1 decisions --

2 JUSTICE GORSUCH: No, you -- you --
3 you want to --

4 MR. KNEEDLER: -- characterize this.

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

8 MR. KNEEDLER: No, but all we're
9 talking about is the core principle of Robinson,
10 which is you cannot punish someone for a status.
11 And -- and if I think communities guided by that
12 principle, and it's the only principle a court
13 should be enforcing --

14 JUSTICE GORSUCH: How -- how about --

15 MR. KNEEDLER: -- would retain a lot
16 of flexibility.

17 JUSTICE GORSUCH: How about if there
18 are no public bathroom facilities? Can -- do
19 people have an Eighth Amendment right to
20 defecate and urinate outdoors?

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

22 JUSTICE GORSUCH: Is that conduct or
23 is that status?

24 MR. KNEEDLER: I -- I -- it's,
25 obviously, there -- there is conduct there and

1 we are not suggesting that cities can't enforce
2 their --

3 JUSTICE GORSUCH: Why -- why not, if
4 there are no public facilities available to
5 homeless persons?

6 MR. KNEEDLER: The -- the -- that
7 situation, you know, candidly, has never arisen.
8 And whether or not there -- I mean, in the
9 litigation as I've seen. But no one is
10 suggesting and we're not suggesting that public
11 urination and defecation laws cannot be enforced
12 because there are very substantial public health
13 reasons for that.

14 JUSTICE GORSUCH: Well, there -- there
15 are substantial public health reasons with drug
16 use, with alcohol, and with all these other
17 things too.

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

19 JUSTICE GORSUCH: And you're saying
20 the Eighth Amendment overrides those. What --
21 why not in this circumstance right now?

22 MR. KNEEDLER: No, I'm not -- I'm not
23 saying the Eighth Amendment overrides the laws
24 against drug use.

25 JUSTICE GORSUCH: Oh, I know that.

1 MR. KNEEDLER: Oh -- oh, I'm -- I'm
2 sorry. It's something --

3 JUSTICE GORSUCH: I know that.

4 MR. KNEEDLER: No, I misunderstood
5 what you --

6 JUSTICE GORSUCH: That one -- that one
7 the government wants to keep. I got that.

8 MR. KNEEDLER: No, I -- I
9 misunderstood your question. Sorry.

10 JUSTICE GORSUCH: Yeah. Last one.
11 How about -- how about fires outdoor --
12 outdoors? I know you say time, place, and
13 manner, but is there an Eighth Amendment right
14 to cook outdoors?

15 MR. KNEEDLER: No. I -- I -- I -- I
16 think what -- what --

17 JUSTICE GORSUCH: That's -- that's an
18 incident -- a human necessity every person has
19 to do.

20 MR. KNEEDLER: But this -- this -- but
21 this is one -- this is one of those things that,
22 you know, is taken care of on the ground as a
23 practical matter. There are restaurants where
24 someone can go. There are --

25 JUSTICE GORSUCH: Well, no, no, we're

1 talking about homeless people.

2 MR. KNEEDLER: No.

3 JUSTICE GORSUCH: They're not going to
4 go spend money at a restaurant necessarily.
5 Let's --

6 MR. KNEEDLER: Well, the -- there --
7 there may be inexpensive places. Some people
8 get --

9 JUSTICE GORSUCH: Let's say there
10 isn't, okay?

11 MR. KNEEDLER: And --

12 JUSTICE GORSUCH: Let's say that there
13 is no reasonable --

14 MR. KNEEDLER: And -- and the local
15 community --

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

18 MR. KNEEDLER: They have -- they have
19 a right to eat, a right to cook if it entails
20 having a fire, which I think it -- it -- it
21 probably -- it probably would, but -- but, as I
22 said, the -- the -- the eating, the feeding is
23 taken care of in most communities by nonprofits
24 and churches stepping forward --

25 JUSTICE GORSUCH: But if -- but if

1 there isn't --

2 MR. KNEEDLER: -- as they have for 200
3 years.

4 JUSTICE GORSUCH: -- but, if there
5 isn't, there's an Eighth Amendment right to have
6 a fire?

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

9 JUSTICE GORSUCH: Well, I thought you
10 just said there was.

11 MR. KNEEDLER: Well, there -- there --
12 there's food that you can eat without cooking
13 it. I mean, they -- and they could get a
14 handout from the -- from a -- from -- from an
15 individual that, you know, people can beg for
16 money. I mean, there are -- there are ways that
17 this works out in practice.

18 JUSTICE GORSUCH: Last -- last
19 question. I -- I -- I'm totally sympathetic to
20 the idea that there might be a necessity defense
21 in these cases, and there's a footnote in your
22 brief that indicates that in a lot of cases you
23 could -- you could maybe bring advance
24 preliminary injunctive action at least as
25 individuals. And I don't even see why you

1 couldn't do it on a class-wide -- a class-wide
2 basis.

3 MR. KNEEDLER: Yeah, we -- we haven't
4 ruled out class, we haven't ruled out class --
5 class action.

6 JUSTICE GORSUCH: Well, I thought you
7 did in that footnote. You said, you know,
8 the -- the whole mistake here is that this was
9 done on a class-wide basis. Why couldn't it --

10 MR. KNEEDLER: I think without --
11 without -- without sufficient inquiry into the
12 individual circumstances is what, particularly
13 with the two class representatives here.

14 JUSTICE GORSUCH: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Kavanaugh?

17 JUSTICE KAVANAUGH: You just said a
18 minute ago that a lot of this is taken care of
19 on the ground as a practical matter. And I
20 think one of the questions is, who takes care of
21 it on the ground? Is it going to be federal
22 judges, or is it the local jurisdictions with --
23 working with the nonprofits and religious
24 organizations?

25 So I guess following up on the

1 necessity question, given the line-drawing
2 problems that we've been going through, if a
3 state has a traditional necessity defense, won't
4 that take care of most of the concerns, if not
5 all, and, therefore, avoid the need for having
6 to constitutionalize an area and have a federal
7 judge superintend this rather than the local
8 community, which you've emphasized many times
9 working with the nonprofits and charitable and
10 religious organizations, which is how it works
11 in most places?

12 MR. KNEEDLER: Well, I -- I think that
13 the necessity defense at least traditionally has
14 required a much stronger sense of urgency and
15 imminence than -- than this. What -- if states
16 had a necessity defense and we knew that it was
17 available in all of these places, but even in --
18 in Oregon, I think it's a case called Barrett,
19 the Court said it's theoretically possible, but
20 there was a remand for factual issues.

21 So we don't -- we don't know at this
22 point in time whether -- whether there is such a
23 defense. And that's really not in the -- in
24 the -- in the case here. This comes up on an
25 Eighth Amendment challenge without -- without

1 reference to the necessity defense and, frankly,
2 without reference to the new Oregon statute,
3 which seems highly instructive in terms of time,
4 manner, and place that jurisdictions -- Grants
5 Pass should examine.

6 But I -- I don't think we can -- I --
7 I don't think the Court should put this core
8 point about Robinson to one side because, in --
9 of the possibility that in Oregon and maybe, you
10 know, maybe no other place, I don't know about
11 California law of necessity, maybe it would be
12 taken care of. I think, at this point in time,
13 that is too speculative.

14 JUSTICE KAVANAUGH: Well, usually we
15 think about before constitutionalizing an area
16 or extending a constitutional precedent, you
17 might disagree with that characterization, but
18 before doing that, we usually think about
19 whether state law, local law already -- already
20 achieves those purposes so that the federal
21 courts aren't micromanaging homeless policy.

22 And it's -- and it's on a daily basis
23 when you work with the homeless. It's a daily
24 issue, how many people are going to show up that
25 day at the food bank, how many people are going

1 to show up that day at the shelter. So it's not
2 like this is a once-a-year thing.

3 MR. KNEEDLER: Yeah, no. For -- for
4 the people actually dealing with it day to day,
5 that is certainly true, the -- the City, the law
6 enforcement, the City liaisons, the nonprofits.

7 But it's not true for the federal
8 court. The federal court doesn't have to get
9 into any of that. The only time the federal
10 court would get into it is when -- is if the
11 core principle of -- of Robinson was being
12 disregarded by not -- by criminalizing somebody
13 for sleeping outside when they have no place to
14 sleep inside. That's the core principle.
15 That's the only thing a court should be
16 enforcing, not the -- not whether people --
17 whether people show up.

18 And the -- the thing I would --
19 another thing I would say about the necessity
20 defense, it -- it may be that if -- if -- if the
21 Court issues an appropriate injunction in this
22 case or another case limited to the core
23 principle of Robinson, but it develops or the
24 state law develops that there is a necessity
25 defense, then I think that should be taken into

1 account. I mean, that's in effect the time,
2 manner, and place or -- or similar to that.

3 If state law comes -- comes along and
4 establishes a -- a realistic defense or a
5 realistic approach to how people can remain in
6 the -- in the community, then the courts
7 obviously should defer to that. But we don't
8 have that established state law at this time.

9 And I don't think the Court should
10 decline to address this question, which is
11 important in the Ninth Circuit, both because the
12 principle that those courts recognize should be
13 sustained but the approach they've taken should
14 not.

15 JUSTICE KAVANAUGH: Last question I
16 have on the food hypotheticals about stealing to
17 feed yourself or cooking to feed yourself.

18 You kind of waved all those away by,
19 oh, that's all taken care of by local
20 communities, nonprofits, and religious
21 organizations, and by and large, heroic efforts
22 each day to make sure that happens, but it
23 doesn't always happen by any stretch.

24 MR. KNEEDLER: No, it -- it -- it
25 doesn't always happen.

1 JUSTICE KAVANAUGH: And then what?

2 MR. KNEEDLER: But homeless people are
3 resourceful. They have friends who are also
4 homeless. They may -- they may know people in
5 town. They may beg for money.

6 And the -- the -- the towns are -- are
7 coping in the same way, frankly, that individual
8 homeless people do. They do the best they can
9 under the circumstances. But that -- if -- if
10 those circumstances fail and the nonprofits, et
11 cetera, can't -- you know, the truck doesn't
12 show up one night, that doesn't become an Eighth
13 Amendment problem.

14 And -- and -- and we're by no means
15 suggesting that there should be a federal
16 judiciary overlay on top of all that. The
17 cities and the nonprofits should be left alone
18 to do the work that they're doing, unless the
19 core principle of Robinson is not respected.

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: So one odd thing
24 about the posture of this case, putting aside
25 the class part, is its pre-enforcement nature,

1 because, in Robinson and in Powell too, the
2 punishment -- you know, the -- the adjudication
3 of guilt had already occurred and it was time
4 for the punishment to be to imposed, and then
5 the Eighth Amendment challenge was raised.

6 And Justice Alito was asking you about
7 a lot of the very difficult on-the-ground
8 factual determinations that law enforcement
9 would need to make before deciding whether
10 someone could be given a citation for camping
11 outdoors. Why wouldn't it make more sense,
12 assuming that we agree in substance with the
13 line that Robinson would control here, why
14 wouldn't it make more sense for the Eighth
15 Amendment claim to be a raised as a defense,
16 much like the necessity defense, once a court is
17 in a position, unlike the law enforcement
18 officer just trying to gather information on the
19 ground, to determine whether there were
20 available beds, whether the person had a place
21 to go? Why is a pre-enforcement challenge the
22 right way to think about this?

23 MR. KNEEDLER: Well, several things.
24 It -- it obviously could be raised as a defense
25 in a -- in a criminal prosecution or civil

1 citation.

2 JUSTICE BARRETT: Sure. But does it

3 --

4 MR. KNEEDLER: But -- but -- but I

5 think --

6 JUSTICE BARRETT: -- make sense to

7 think about it in this way --

8 MR. KNEEDLER: -- for this particular

9 Eighth Amendment claim, the -- the claim is that

10 the Eighth Amendment prohibits the criminalizing

11 the act to begin with. So the -- the -- the --

12 it's not just the punishment that would be --

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

14 MR. KNEEDLER: -- meted out at the end

15 of the day.

16 JUSTICE BARRETT: -- I understand

17 that. I mean -- let's see -- I do understand

18 that, but it's not that it categorically

19 prohibits punishing this act. I mean, as -- as

20 one might say if it, you know, prohibited

21 sleeping altogether for everyone, right, this is

22 because it -- the Eighth Amendment claim is that

23 it punishes, criminalizes this act in a way that

24 falls disproportionately and unconstitutionally

25 on a particular class of people.

1 And that requires adjudication at the
2 front end to figure out whether someone is
3 protected or unprotected. If -- if I go and
4 sleep in an encampment, I can be cited. It --
5 it -- it's different. There's a factual
6 determination on the ground.

7 And Robinson was a status-based
8 challenge, and it came up in the context of the
9 individualized criminal proceeding. So why is a
10 pre-enforcement challenge -- why does it make
11 sense given the very, very fact-intensive nature
12 of this?

13 MR. KNEEDLER: Well, and -- and -- and
14 in -- you know, in a -- in a -- in an individual
15 case, I think you're right, but imagine a
16 situation where someone who genuinely had no
17 other place to live and it's the third citation,
18 the fourth citation, and -- and the -- you --
19 you have a pattern as to that person or -- or
20 other people where the city is -- is
21 consistently not respecting the Robinson
22 principle. Then I think you might have a
23 pre-enforcement review, just as you might for an
24 asserted violation of some other constitutional
25 right because, here, again, it's -- it's not the

1 Eighth Amendment regulating only the punishment
2 for an otherwise valid conviction.

3 Here, the question is whether the --
4 the City can criminalize that conduct at all.
5 And so, if -- if you have a series of citations
6 that don't rise to the level of probable cause
7 or whatever would be -- necessary -- excuse
8 me -- necessary for the issuance of a citation
9 where the -- the law enforcement officer on the
10 ground is not respecting the -- the Robinson
11 principle, then you might have an injunctive
12 action.

13 JUSTICE BARRETT: But this would be
14 the first case, right, because it didn't happen
15 in Robinson itself, where we had -- where we
16 required -- where we had a pre-enforcement
17 challenge on the basis of the Eighth Amendment
18 to the criminalization of certain conduct,
19 putting policemen in -- in this situation,
20 right?

21 MR. KNEEDLER: But -- but I suppose,
22 in -- in -- in Robinson itself, if the person
23 had been arrested once, been arrested a second
24 time, and then he's arrested a third time, I
25 would think he could bring a pre-enforcement

1 challenge because the way the police were
2 interacting with him was not respecting the
3 Robinson principle with respect to Robinson
4 himself.

5 JUSTICE BARRETT: How does the federal
6 government do this? So, in the brief, you
7 talked about clearing the encampment at
8 McPherson Square. Can you just describe, I
9 mean, in -- briefly if you can, I mean, do
10 police then make individualized inquiries? How
11 does this work?

12 MR. KNEEDLER: Well, what happened
13 there was the -- you know, was I -- I -- I think
14 the gold standard of -- of the way this should
15 be done, and -- and larger cities have this
16 ability. This -- the Park Service cooperated
17 very closely with the District government. The
18 Park Service does not have the sort of social
19 services, et cetera, that a municipality has in
20 D.C. And so that function is sort of split.
21 These are special National Park properties. But
22 the -- the National Park Service relies, as the
23 federal government does, the Federal Protective
24 Service for buildings elsewhere, cooperates with
25 the local government.

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

15 So that -- and that's the way that
16 shelters are -- are -- excuse me -- encampments
17 are typically cleared, is the -- and
18 particularly in -- in cities where you've gotten
19 a number of amicus briefs explaining the
20 problem. That's what happens.

21 It isn't the -- it isn't the example
22 we've been talking about where the law
23 enforcement officer for the first time is
24 encountering the person. Smaller cities don't
25 have that capability, but Grants Pass does have

1 these outreach workers and that's who -- that's
2 who carries on the -- the dialogue.

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

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: And so, given that
7 experience and the fact that Martin has actually
8 been the law since 2018, we don't really have to
9 speculate as to how this works, right? I mean,
10 this is happening -- this is the law right now
11 in the Ninth Circuit.

12 MR. KNEEDLER: The -- the -- the
13 Robinson principle is the law.

14 JUSTICE JACKSON: The -- the Robinson
15 principle as adopted in Martin. My
16 understanding is, for example, California says
17 that's the law, we comply with it, and there we
18 are.

19 MR. KNEEDLER: Yeah. They -- they --
20 they are not asking for Robinson to be
21 overruled. What they're objecting to is the
22 injunctions that go well beyond that by --

23 JUSTICE JACKSON: Yes, I understand.
24 I'm just sort of responding to some of the
25 questions that you've gotten as to sort of how

1 does this rule work, can it work, that sort of
2 suggest that it's not already happening on the
3 ground in these places, that the shelters and
4 the workers are aware of what is available, that
5 people are being advised, that, you know, the
6 principle of Martin at least in the Ninth
7 Circuit is we hold that so long as there's a
8 greater number of homeless individuals in a
9 jurisdiction than the number of available beds,
10 the jurisdiction cannot prosecute homeless
11 individuals for sitting, lying, sleeping.

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

14 MR. KNEEDLER: Yeah, that -- that's
15 what -- that's what Martin -- I don't want to
16 say that the -- the clearance procedures work
17 perfectly in every case or that they're
18 available in every case, but --

19 JUSTICE JACKSON: No, I just want to
20 say we don't have to speculate about how the
21 rule works.

22 MR. KNEEDLER: Or -- yeah, or how it's
23 --

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

1 MR. KNEEDLER: How it's -- how it's
2 supposed to work.

3 JUSTICE JACKSON: Yes.

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

6 JUSTICE JACKSON: All right. Let me
7 ask you about whether or not you are asking for
8 an extension of Robinson. That's come up a
9 couple times, and I don't -- I don't -- I don't
10 see it as an extension or whether that's being
11 asked for. So can you explain whether there's
12 some sort of extension of Robinson --

13 MR. KNEEDLER: No.

14 JUSTICE JACKSON: -- happening today?

15 MR. KNEEDLER: No, I don't think so at
16 all because, as I said, the -- the sleeping
17 outside is -- is an essential human function,
18 and if you say someone can't sleep outside,
19 that's -- that's sort of -- or -- or has no
20 place to sleep inside, that's the definition,
21 really, of -- of homelessness.

22 JUSTICE JACKSON: So you're not
23 suggesting that people should be excused from
24 engaging in otherwise criminal conduct? So
25 we've heard this example about people stealing

1 in order to eat. I mean, that would be a
2 situation in which someone is actively
3 participating in what would be otherwise
4 criminal behavior --

5 MR. KNEEDLER: Yes.

6 JUSTICE JACKSON: -- if anybody did
7 it.

8 MR. KNEEDLER: Yes.

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

14 MR. KNEEDLER: No. That -- that's
15 correct. And one -- one thing that I think is
16 important to keep in mind in this is, if Grants
17 Pass can do this, so could every other city. So
18 could a state do it state-wide. And,
19 eventually, a homeless person would have no
20 place to be, lawfully be.

21 JUSTICE JACKSON: So this is more like
22 the sort of initial hypo of criminalizing eating
23 outside, not that you'd be doing something that
24 was otherwise criminally culpable?

25 MR. KNEEDLER: Yeah. Yes. I mean, I

1 suppose there could be ordinances that the City
2 would have about where you can -- you know, you
3 can't eat at -- can't consume for the --

4 JUSTICE JACKSON: That's time, place,
5 and manner.

6 MR. KNEEDLER: Yes.

7 JUSTICE JACKSON: Final question with
8 respect to you mentioned states doing this. Why
9 isn't the federal government arguing that this
10 case is moot in light of 195.530? This is the
11 Oregon recently passed statute that I mentioned
12 earlier. Why -- why -- why doesn't the
13 government read that law as I do to prevent
14 Grants Pass from -- enforcing its ordinances to
15 block sleeping outdoors at all places and all
16 times?

17 MR. KNEEDLER: Yeah, no, I -- I -- I
18 certainly agree that there appears to be a -- a
19 pretty stark inconsistency between that state
20 law and the ordinance. It hasn't been applied.
21 It has to be objectively reasonable, I think --

22 JUSTICE JACKSON: So would the federal
23 government --

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

1 JUSTICE JACKSON: Right.

2 MR. KNEEDLER: But -- but --

3 JUSTICE JACKSON: So what would the --
4 what would your position be if the Court decided
5 that as a matter of constitutional avoidance or
6 whatever else that we don't need to hear this or
7 reach this decision in this case given this new
8 state ordinance?

9 MR. KNEEDLER: That -- that would be
10 one possibility. It wouldn't answer the core
11 Robinson principle point and -- and the
12 limitations on -- on that point that has -- that
13 has triggered the amicus briefs.

14 JUSTICE JACKSON: Right. But our
15 typical rule is --

16 MR. KNEEDLER: Yes.

17 JUSTICE JACKSON: -- that if there's
18 some other way, we don't necessarily comment on
19 constitutional issues, correct?

20 MR. KNEEDLER: Right. And -- and --
21 yes. And -- and that would be -- that would be
22 one course to see how -- what time, place, and
23 manner meant under state law and how -- how the
24 Eighth Amendment could accommodate that or take
25 it into account.

1 JUSTICE JACKSON: Thank you.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Ms. Corkran.

5 ORAL ARGUMENT OF KELSI B. CORKRAN

6 ON BEHALF OF THE RESPONDENTS

7 MS. CORKRAN: Mr. Chief Justice, and
8 may it please the Court:

9 Robinson v. California holds that
10 status-based punishment schemes are
11 categorically cruel and unusual under the Eighth
12 Amendment. The challenged ordinances inflict
13 status-based punishment in both effect and
14 purpose.

15 Although the City describes its
16 ordinances as punishing camping on public
17 property, it defines campsite as anyplace a
18 homeless person is while covered with a blanket.
19 The City interprets and applies the ordinances
20 to permit non-homeless people to rest on
21 blankets in public parks while a homeless person
22 who does the same thing breaks the law.

23 The ordinances by design make it
24 physically impossible for homeless people to
25 live in Grants Pass without facing endless fines

1 and jail time. The only question under Robinson
2 is whether there's any meaningful difference
3 between a law that says being homeless is
4 punishable and a law that says being homeless
5 while breathing or sleeping or blinking is
6 punishable.

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

15 Indeed, all the ordinances do is turn
16 the City's homelessness problem into someone
17 else's problem by forcing its homeless residents
18 into other jurisdictions.

19 The injunction below leaves the City
20 with an abundance of tools to address
21 homelessness. It can impose time, place, manner
22 restrictions on when and where homeless people
23 sleep.

24 It can ban tents and clear
25 encampments. It can enforce a sleeping ban

1 against homeless people who decline shelter.
2 And it can fully enforce its laws prohibiting
3 littering, public urination and defecation, drug
4 use, and violent or harassing behavior.

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

10 The state police power is broad, but
11 it does not include the power to push the
12 burdens of social problems like poverty on to
13 other communities or the power to satisfy public
14 demand by compromising individual constitutional
15 rights.

16 I welcome the Court's questions.

17 JUSTICE THOMAS: In Robinson, there
18 was a statute that outlawed -- that said that
19 "to be addicted" is a crime. Is there an
20 ordinance here that says "to be homeless" is a
21 crime?

22 MS. CORKRAN: So the language for the
23 purposes of a temporary place to live bakes
24 homelessness into the -- the definition of the
25 offense. Justice Sotomayor was talking about

1 that earlier.

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

12 CHIEF JUSTICE ROBERTS: A number of
13 us, I think, are having difficulty with the
14 distinction between status and conduct. You'll
15 acknowledge, won't you, that in -- that those
16 terms, there's a difference between being
17 addicted to drugs and being homeless?

18 In other words, someone who's homeless
19 can immediately become not homeless, right, if
20 they find shelter.

21 Someone who is addicted to drugs, it's
22 not so -- so easy. It seems to me that in
23 Robinson, it's much easier to understand the
24 drug addiction as an ongoing status, while,
25 here, I think it is different because you can

1 move into and out of and into and out of the
2 status, as you would put it, as being homeless.

3 MS. CORKRAN: Yeah. So it's
4 interesting, we today understand addiction as an
5 immutable status. In Robinson, the Court
6 suggested that someone might be -- be recovered
7 and no longer have the status of addiction. So
8 the Robinson Court wasn't thinking about
9 addiction as something that couldn't change over
10 time.

11 CHIEF JUSTICE ROBERTS: Well, that may
12 limit the applicability of Robinson to a
13 different situation, but what is the -- I mean,
14 what is the analytic approach to deciding
15 whether something's a status or a situation of
16 conduct?

17 MS. CORKRAN: So the question is a
18 status is something that a person is when
19 they're not doing anything. So being addicted,
20 having cancer, being poor, are all statuses that
21 you have apart from any conduct.

22 CHIEF JUSTICE ROBERTS: Having cancer
23 is not the same as being homeless, right? I
24 mean, maybe I'm just repeating myself because
25 homelessness can -- you -- you can remove the

1 homeless status in an instant if you move to a
2 shelter or situations otherwise change. And, of
3 course, it can be moved the other way as well if
4 you're kicked out of the shelter or whatever.

5 So that is a distinction from all
6 these other things that have been labeled
7 status, isn't it?

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

18 And what Robinson found so offensive
19 about status-based conduct --

20 CHIEF JUSTICE ROBERTS: Well, I guess
21 is -- is being a bank robber a status?

22 MS. CORKRAN: No, because being a bank
23 robber means you rob banks. So -- so the
24 definition and the conduct --

25 CHIEF JUSTICE ROBERTS: Violating this

1 ordinance means upon being asked to leave you
2 don't leave.

3 MS. CORKRAN: Violating this ordinance
4 means you're homeless. So, again, homelessness
5 is not something you can -- that you do. It's
6 just something that you are.

7 And so the question becomes, when you
8 attach the universal human attribute of sleeping
9 or breathing to that status, does it make the
10 punishment conduct-based instead of -- of
11 status-based and I -- I think the answer is yes.

12 JUSTICE SOTOMAYOR: Counsel, Edwards
13 v. California in 1941 struck down a law that
14 made it a crime to transport an indigent person,
15 correct?

16 MS. CORKRAN: Yes.

17 JUSTICE SOTOMAYOR: Indigency is
18 not -- is a condition that can change over time,
19 but the law was aimed at the transport of a
20 person who wasn't morally reprehensible.

21 MS. CORKRAN: Yes. I think that's
22 notable because our history and tradition as a
23 country is to emphatically reject any sort of
24 local legislative scheme that has the effect of
25 pushing the burdens of poverty or indigency into

1 other communities. It's woven throughout
2 through our Constitution.

3 So Edwards located it in the Dormant
4 Commerce Clause. We have Saenz v. Roe, which
5 locates it in the Privileges or Immunities
6 Clause; Papachristou addresses that status-based
7 punishment in the context of procedural due
8 process.

9 What Robinson held is that when that
10 expulsion is effectuated through status-based
11 punishment, it violates the Punishments Clause.

12 JUSTICE BARRETT: How do you define a
13 community?

14 So Justice Alito was describing how
15 New Jersey has so many tightly woven
16 municipalities close together and, here, you
17 know, the Chief Justice was asking about whether
18 if Grants Pass, if there were -- was a new
19 homeless shelter with lots of beds right across
20 the border 10 minutes away, you know, could that
21 be taken into account.

22 And I think there was some back and
23 forth and not necessarily agreement on that.
24 What is your position? How do you define a --
25 define a community? Take that example of a

1 homeless shelter right outside the limits of
2 Grants Pass.

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

9 Lots of jurisdictions limit their
10 homeless shelters to people who are residents.
11 So -- and just to be clear, there was no
12 suggestion in the record here that there were
13 any shelters available outside of Grants Pass.

14 JUSTICE BARRETT: Understood. But --
15 so community doesn't need to be determined by
16 jurisdictional lines is what you're telling
17 me --

18 MS. CORKRAN: No.

19 JUSTICE BARRETT: -- as a matter of --
20 because I -- I -- let's see, I'm asking all of
21 this because, in response to Justice Sotomayor,
22 you were pointing out that our -- you know, our
23 nation has a history and tradition of not saying
24 you can shunt homeless people or the poor out of
25 your jurisdiction and on to others.

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

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

14 So I think that a -- a municipality
15 can punish the conduct of not going to a shelter
16 that's just over the line if you have physical
17 and legal access to it. Now, for the reasons
18 you say -- and this dates back to our -- our
19 settlement system at the Founding Era -- a lot
20 of municipalities do not allow people from
21 outside of the jurisdiction to use their
22 shelters, and so, under those circumstances, the
23 shelter wouldn't be legally available.

24 CHIEF JUSTICE ROBERTS: Is that cruel
25 and unusual punishment for them to turn away

1 someone who wants to use their shelter?

2 MS. CORKRAN: No, that wouldn't be
3 punishment. Punishment is the infliction of
4 suffering for a crime.

5 JUSTICE JACKSON: Counsel, I --

6 CHIEF JUSTICE ROBERTS: Well, then --
7 then why is the Eighth Amendment implicated in
8 this case?

9 MS. CORKRAN: Because, here, we have
10 fines and jail time. We have a status-based
11 punishment scheme that is, in fact, inflicting
12 punishing -- punishment within the meaning of
13 the Eighth Amendment.

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

16 CHIEF JUSTICE ROBERTS: No, I'm done.
17 That's fine.

18 JUSTICE BARRETT: Do you want to
19 address some of the line-drawing problems that
20 we've been going back and forth? I mean,
21 Justice Gorsuch pointed out, you know, eating is
22 a basic human need, and it's not the case that
23 soup kitchens or social services will always be
24 able to meet it, and so he asked about whether
25 the Eighth Amendment would prohibit punishment

1 for stealing food.

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

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

14 With respect to public urination and
15 defecation, if you had a -- I don't think this
16 would ever exist, but if you had a law that said
17 homeless people cannot urinate or defecate
18 anywhere within city limits, I -- I think then
19 it starts to look like this case. But, if
20 you're saying that people can't urinate or
21 defecate on public property, it is almost -- it
22 -- it's hard to imagine a situation where --

23 JUSTICE BARRETT: They have no place
24 else to go. So a homeless person, there --
25 there's no facilities available, and a homeless

1 person has no place else to go. How could a --

2 MS. CORKRAN: You might have a -- I
3 mean, there are commercial establishments. I --
4 I don't know that anyone's pointed to a
5 jurisdiction where you truly don't have access.
6 But if we hypothetically --

7 JUSTICE BARRETT: Well, what's the
8 constitutional principle?

9 MS. CORKRAN: Right.

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

16 MS. CORKRAN: So I think, there, one
17 distinction between urination and defecation and
18 sleeping is that sleeping outside is part of the
19 definition of homelessness, right? Homelessness
20 is lacking a fixed, regular nighttime address.
21 So the -- the sleeping prohibition goes more
22 directly to the status of homelessness than
23 urination or defecation.

24 JUSTICE BARRETT: So it would not --
25 so it would not violate the Eighth Amendment to

1 punish public urination and defecation?

2 MS. CORKRAN: You might come up with
3 some different theory, but it's not the theory
4 that we're -- we're putting forward in this
5 case.

6 JUSTICE BARRETT: Not the theory that
7 you're -- okay.

8 MS. CORKRAN: Yes.

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

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

23 But I think that this question about
24 the availability of the necessity defense really
25 goes to the injunctive posture of the case.

1 It's not going to come up if you're in the --
2 you know, you're -- if you're presenting the
3 Eighth Amendment as an affirmative defense at
4 the same time as a necessity defense in a
5 criminal prosecution, right, the -- the -- it
6 kind of moots out the -- the Eighth Amendment
7 claim.

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

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

21 JUSTICE GORSUCH: Counsel, along those
22 lines, we -- we haven't mentioned it yet, but in
23 the briefing, there's a lot of discussion about
24 the fact that Robinson's Eighth Amendment
25 holding with respect to status came without any

1 adversarial testing, wasn't what was argued by
2 the parties, it didn't have a whole lot of
3 citation or support, it came kind of in a breezy
4 paragraph.

5 MS. CORKRAN: Right.

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

14 MS. CORKRAN: Yeah.

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

1 there might be injunctive relief on that basis,
2 possible in advance, not limited to defenses,
3 possible.

4 What -- just reactions to that. I --
5 I -- we haven't yet touched on.

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

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

16 MS. CORKRAN: Yeah.

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

25 And you're not really attacking the

1 punishments here. You're saying any punishment
2 is impermissible.

3 MS. CORKRAN: Oh, right.

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

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

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

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

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

6 MS. CORKRAN: The Oregon courts so far
7 have not applied the Oregon --

8 JUSTICE GORSUCH: I -- I didn't ask
9 whether the courts --

10 MS. CORKRAN: Yeah.

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

14 MS. CORKRAN: They -- they've had a
15 couple of cases like this.

16 JUSTICE GORSUCH: Have they?

17 MS. CORKRAN: Mr. Kneedler referred to
18 the Bartlett case.

19 JUSTICE GORSUCH: And how are they
20 going?

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

25 JUSTICE GORSUCH: Why not?

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

4 JUSTICE GORSUCH: Did they rule out
5 that it might be necessary under some
6 circumstances?

7 MS. CORKRAN: They left open that
8 possibility, but I'd also say the -- the civil
9 citation or the -- I don't want to say "civil."
10 It's a little murky. But the -- the fines here
11 are -- are not subject, I don't think, or it's
12 not clear, to the necessity defense. So it
13 wouldn't take care of -- of the entirety of the
14 claim.

15 JUSTICE GORSUCH: You've got Excessive
16 Fines Clause there, though, right?

17 MS. CORKRAN: Yes.

18 JUSTICE GORSUCH: And that's not
19 before us either?

20 MS. CORKRAN: We have raised the fines
21 before this Court because our challenge is to
22 the -- the package of punishments, and,
23 historically, that's how the Court has looked at
24 applying the Excessive Fines Clause and the
25 Punishment Clause together. We're in a really

1 unfortunate posture here that we have claims
2 that involve both fines and punishment, and yet
3 we're only here on the Punishments Clause piece
4 of it. It was one of the reasons we suggested
5 this isn't a great vehicle.

6 I -- I think the Court can say that,
7 you know, it's not going to reach the fines
8 because we won on that below, and so you can
9 just focus on the -- on the -- the jail time for
10 -- for criminal trespass.

11 JUSTICE ALITO: What is your
12 definition of the status of homelessness? Is it
13 the lack of a place to stay indoors on a
14 particular night, or is it something broader
15 than that?

16 MS. CORKRAN: So -- so homelessness --

17 JUSTICE ALITO: Does it require more
18 than that?

19 MS. CORKRAN: Right. Homelessness is
20 defined as lacking a fixed, regular, adequate
21 nighttime address. So, if you have a home, you
22 have a home -- I -- I -- I'm not homeless when I
23 go to Grants Pass because I have a home in D.C.

24 The second part of our class
25 definition focuses on whether the homeless

1 person has access to shelter. That's not
2 because that's part of the status. It's
3 because, when someone has access to shelter,
4 then the ordinances aren't punishing them for
5 the status. It's punishing them for the conduct
6 of not going --

7 JUSTICE ALITO: Well, I -- I asked the
8 question --

9 MS. CORKRAN: Yeah.

10 JUSTICE ALITO: -- because, if
11 homelessness is defined as simply lacking a
12 place to stay indoors on a particular night,
13 then there is an ironclad connection between the
14 conduct, which is sleeping outside, and the
15 status of homelessness.

16 But if homelessness is defined to
17 require more than that, then my question would
18 be whether someone who is lacking a place to
19 stay on a particular night or for a particular
20 period of time is homeless if the reason why the
21 person finds himself or herself in that status
22 is, for example, the person refuses to take
23 antipsych -- antipsychotic medicine that's been
24 prescribed or refuses to go to drug rehab or
25 rehabilitation for alcoholism or the person has

1 chosen to move from one place where the person
2 might have a shelter or a home where the person
3 could live to another place.

4 MS. CORKRAN: Yeah.

5 JUSTICE ALITO: What about all of
6 that?

7 MS. CORKRAN: So the status of
8 homelessness is something that only changes once
9 the person has a home. You lose your home,
10 you're homeless. If you have a home again, then
11 you're not in the status anymore.

12 I think what your question gets at is
13 that second piece, which is whether a person has
14 access to shelter. That can change from day to
15 day. And so -- sorry, that's not --

16 JUSTICE ALITO: No, that's not really
17 what my question gets at. The question is you
18 can draw a distinction -- status is different
19 from conduct, but there are some instances of
20 conduct that are closely tied to status or, if
21 homelessness is defined as simply lacking a
22 place to stay on a particular night, they amount
23 to the same thing. The definition of
24 homelessness encompasses the conduct of sleeping
25 outside.

1 So my question is whether this is --
2 what if the person finds that person in a
3 homeless state because of prior life choices or
4 the refusal to make future life choices? That's
5 the question.

6 MS. CORKRAN: Yeah, yeah. So -- so
7 our definition of lacking access to shelter is
8 lacking physical or legal access to shelter.
9 And you're looking at the person's situation on
10 that particular night.

11 I think, generally, we're not doing an
12 inquiry into all of a person's life choices that
13 might have led them to the point where they're
14 homeless and can't find a place to sleep.

15 Robinson certainly didn't do that sort
16 of analysis with respect to addiction, but there
17 could be situations where there is such a -- a
18 tight causal nexus between a choice a person has
19 made and their lack of shelter access that you
20 would say this person has chosen not to take the
21 shelter and to be very clear, if you decline
22 shelter that is physically and legally available
23 to you, you're not in our class -- you're in --

24 JUSTICE ALITO: Well, see, the -- the
25 problem is that once you move away from the

1 definition that makes the inquiry basically
2 tautological, then you get into the question of
3 assessing the closeness of the connection
4 between the status and the conduct.

5 And you do run into problems with the
6 person who's a kleptomaniac -- a kleptomaniac or
7 a person who suffers from -- pedophilia. So how
8 do you distinguish that? How does the Court
9 assess how close the connection has to be?

10 MS. CORKRAN: So -- so, for both of
11 those categories, the -- the -- the status is
12 defined -- I don't know if status is the right
13 word there -- being a pedophilia or having
14 pedophilia is defined by the urge that you have,
15 not by your conduct, and acting on that urge.

16 So, if someone were to act on that
17 urge, in a -- that tight causal nexus on why
18 they didn't have access to shelter, then they
19 would be outside of our claim.

20 JUSTICE JACKSON: I thought you made a
21 very interesting remark in response to Justice
22 Alito, and I'm just trying to clarify.

23 You seem to say that homelessness, as
24 you've defined it, is not lacking access to
25 shelter on a particular night.

1 Is that -- am I right about that?

2 MS. CORKRAN: That's right. We're
3 use -- I use the HUD definition, which is that
4 homelessness means you lack a fixed, regular,
5 adequate nighttime address.

6 JUSTICE JACKSON: So that kind of
7 thing might -- going back to the Chief Justice's
8 original question, that's not changing night to
9 night --

10 MS. CORKRAN: No, I mean --

11 JUSTICE JACKSON: -- in the same way.

12 MS. CORKRAN: -- it can change over
13 time in the same way that a cancer diagnosis
14 could change over time, or -- but --

15 JUSTICE JACKSON: And then the other
16 part that was interesting to me is that assuming
17 that's your definition, homelessness lacking a
18 fixed regular address, it -- when someone does
19 have access to a shelter even though they lack a
20 fixed regular address, the ordinance in that
21 situation, I thought you said, is operating to
22 punish the act of not going to the shelter --

23 MS. CORKRAN: Yes.

24 JUSTICE JACKSON: -- as opposed to
25 punishing the status of being homeless.

1 MS. CORKRAN: Yes, that's -- that's
2 the exact reason that reasonable time, place,
3 manner restrictions aren't a problem because, if
4 you have time, manner -- time, place, and manner
5 restrictions, what you're doing is punishing the
6 conduct of not going to sleep where you're
7 allowed to go. That rationale doesn't work when
8 someone has nowhere to go.

9 JUSTICE JACKSON: And can you speak to
10 whether or not we should really be even getting
11 into this in light of the new Oregon law?

12 MS. CORKRAN: So we didn't argue
13 mootness. We made this point in our brief in
14 opposition. We didn't say mootness just because
15 we don't have an injunction under the Oregon law
16 yet and it's not self-executing.

17 I don't think there is any question
18 that the ordinances fall under the Oregon law.
19 I mean, it was intended to codify Martin. It
20 requires that any sort of restrictions on
21 sleeping or resting outside are reasonable with
22 respect to homeless individuals.

23 Clearly, the ordinances here don't
24 meet that standard. So I -- I -- I certainly
25 wouldn't have any concerns with the Court

1 saying, as a matter of constitutional avoidance,
2 it appears this Oregon law resolves this whole
3 issue, so we're, you know, dismissing as
4 improvidently granted or however the Court
5 wanted to -- to resolve the case.

6 JUSTICE JACKSON: Thank you.

7 JUSTICE SOTOMAYOR: So the plaintiff
8 -- I'm sorry. The plaintiff who died here had
9 used up her provisional stay credits at the time
10 of class certification, so she no -- no longer
11 had a shelter who was willing to take her.

12 I think the hard hypothetical that
13 Justice Alito was positing and in part Justice
14 Gorsuch is the person who owns a dog.

15 MS. CORKRAN: Yeah.

16 JUSTICE SOTOMAYOR: Or let's say a
17 mentally ill person -- person. Do you have the
18 same response as the government?

19 MS. CORKRAN: So I -- I would like to
20 live in a world where separating someone from
21 their pet is cruel. But it's outside the scope
22 of our claim because we are just talking about
23 physical and legal access to shelter.

24 So, if someone turns down a shelter
25 offer that's physically and legally available

1 because of their dog, they would not be within
2 the -- the scope of our claim.

3 To -- to get to the mental health
4 hypothetical, if a person -- if the person's
5 mental health issues made the shelter either
6 physically unavailable to them because, if they
7 went there, they would be at substantial risk of
8 bodily harm or death, then I would say the
9 shelter isn't physically available.

10 You could also have a shelter that
11 won't take people with mental health problems,
12 in which case it wouldn't be legally available
13 to them.

14 I would say that if the shelter is
15 physically and legally available, then they're
16 outside the scope of their -- our claim, but
17 they might have ADA claims or some other law
18 that applies that would restrict the City's
19 ability to punish them for not going to that
20 place, but it's outside our case.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel. Can you go from having a fixed regular
24 address to not having one?

25 MS. CORKRAN: Yes.

1 CHIEF JUSTICE ROBERTS: Can you go
2 from not having one to having one?

3 MS. CORKRAN: Yes. People --

4 CHIEF JUSTICE ROBERTS: Thank you.
5 Thank you.

6 Justice Thomas?

7 JUSTICE THOMAS: In Robinson, a
8 narcotics officer testified that based on his
9 experience, the marks on the defendant's arm
10 suggested that he was an addict.

11 MS. CORKRAN: Yes.

12 JUSTICE THOMAS: Do we have anything
13 like that where an expert testifies that these
14 people -- that the individuals here are
15 homeless?

16 MS. CORKRAN: So, here, the legal
17 burden was on the plaintiffs to show that they
18 were homeless. The lower courts found that
19 their declarations and depositions satisfied
20 that.

21 JUSTICE THOMAS: Well, what I'm
22 interested in is the status. You say that this
23 is the equivalent of Robinson, and I'm trying to
24 determine where the status of homelessness was
25 determined and how it plays a role in this case.

1 MS. CORKRAN: So it was determined
2 based on the declarations and depositions of
3 the -- the putative class members and named
4 plaintiffs. It also, you know, we've talked a
5 little about the ratio between beds to
6 population.

7 The Ninth Circuit ended up rejecting
8 that as a hard-and-fast rule, but the lack of
9 shelter beds in Grants Pass provides credibility
10 to the putative class members' declarations when
11 they say they have nowhere to go.

12 I'd also say I don't understand the
13 City to have ever contested that the named
14 plaintiffs are homeless. What they contested is
15 whether they had access to shelter --

16 JUSTICE THOMAS: I -- I think what's
17 confusing me is that when I read the ordinance,
18 the ordinance is an anti-camping ordinance.
19 Would this -- would a -- would a backpacker who
20 happens to be in the area for a few days be
21 allowed to camp on -- on public property?

22 MS. CORKRAN: I don't -- I think
23 theoretically no, but I would say that the City
24 has never -- it was not able to identify any
25 circumstance in which it had applied --

1 JUSTICE THOMAS: Well, I understand
2 that. But it -- but it -- it would apply to a
3 backpacker?

4 MS. CORKRAN: So I -- I -- it would
5 depend on the circumstances. The line that the
6 police officers drew in their depositions was,
7 if they saw a non-homeless person lying on a
8 blanket, they wouldn't enforce the ordinance.

9 JUSTICE THOMAS: No, I'm saying some
10 -- he's back -- I'm --

11 MS. CORKRAN: Yeah. So --

12 JUSTICE THOMAS: -- someone with a
13 backpack who's been wandering around for a
14 couple of years doing the continental divide or
15 something.

16 MS. CORKRAN: So I can imagine -- I'm
17 putting myself in the place of the officers who
18 were deposed. If you gave them that
19 hypothetical --

20 JUSTICE THOMAS: Yeah.

21 MS. CORKRAN: -- they might say no,
22 that person isn't setting up a temporary place
23 to live; they're just traveling through town.
24 That -- that particular hypothetical didn't come
25 up, but we do --

1 JUSTICE THOMAS: So that would not
2 violate the anti-camping ordinance?

3 MS. CORKRAN: I don't know. I mean,
4 maybe this gets to the vagueness of the --

5 JUSTICE THOMAS: Yeah.

6 MS. CORKRAN: -- of the provisions,
7 but --

8 CHIEF JUSTICE ROBERTS: Justice Alito?
9 Justice Sotomayor?
10 Justice Kagan?
11 Justice Kavanaugh?

12 JUSTICE KAVANAUGH: I think one of the
13 premises of your argument is that this is not
14 good policy for the homeless, and good policy
15 would -- would help homeless individuals
16 transition, get mental health treatment, get
17 substance abuse treatment, job -- job
18 assistance, and that this doesn't -- doesn't
19 fulfill those objectives.

20 And maybe you -- maybe you're not
21 saying that, but I'm curious whether you think
22 this is good policy in terms of incentivizing or
23 bad? You -- you must think it's bad, and I'm
24 curious why.

25 MS. CORKRAN: Yeah, I don't think

1 we've made that argument. It certainly a theme
2 across the amici briefs. I would -- just on the
3 incentivizing, I think, is a non sequitur
4 because the only question here is whether it
5 violates the Eighth Amendment to enforce the
6 ordinances when someone has no access to
7 shelter, when they're turning down the services.
8 So that's a circumstance we're looking at.

9 Maybe -- I think what Your Honor's
10 question gets at is our discussion of no
11 penological purpose. This Court has recognized
12 that when a punishment scheme has no penological
13 purpose, it inflicts gratuitous suffering, and
14 that is cruel and unusual punishment.

15 And I will say, at this point, the
16 City has not ever identified any penological
17 purpose for punishing homeless people who do not
18 have access to shelter. If you ask that
19 question, every time they pivot to encampments
20 and fires and sanitation problems, which are all
21 non-sequiturs. As I've said a number of times,
22 this case is only about sleeping outside when
23 there's no shelter available. And so I think
24 that lack of penological purpose is significant.

25 JUSTICE KAVANAUGH: Well, we've heard

1 a lot about how it's more difficult to have an
2 effective homeless policy given the rule that's
3 been in effect in the Ninth Circuit over the
4 last several years.

5 MS. CORKRAN: I think that's --

6 JUSTICE KAVANAUGH: How are we
7 supposed to --

8 MS. CORKRAN: -- that's flatly wrong.
9 I mean, I -- I'll go back to my opening. I gave
10 the whole list of the things that the City is
11 allowed to do under the ordinance and under our
12 claim. The only thing that they cannot do is
13 impose a 24/7 sleeping ban that makes it
14 impossible for homeless people to stay in the
15 jurisdiction.

16 I'd also note, you know, they have a
17 lot of amicus briefs on their side from local
18 governments. Almost the entirety of what those
19 amicus briefs are complaining about isn't at
20 issue in this case. So, when you have
21 injunctions against encampments, that's under
22 the Fourth Amendment. We don't have a Fourth
23 Amendment claim. A lot of the injunctions are
24 under the Fourteenth Amendment, including the
25 San Rafael one that the City identifies in its

1 reply brief.

2 I think it's remarkable that when the
3 City was trying to identify the best example it
4 could come up with for its reply brief, it chose
5 one involving a different constitutional claim.

6 JUSTICE KAVANAUGH: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: No.

10 CHIEF JUSTICE ROBERTS: Justice
11 Jackson?

12 JUSTICE JACKSON: Can a person go from
13 being addicted to drugs to not being addicted to
14 drugs?

15 MS. CORKRAN: So I think under
16 common -- as we think about it in terms of
17 modern medicine, the answer is no. But the
18 Robinson Court certainly thought that was the
19 case, right? Sixty years ago, we didn't have
20 the same understanding of addiction as we do
21 now.

22 JUSTICE JACKSON: So your view of
23 Robinson is that it doesn't really matter, the
24 permanency of the condition; it's still a
25 status?

1 MS. CORKRAN: Right. The Robinson
2 Court did not think that the permanency mattered
3 because it thought that addiction was a status
4 that could change.

5 JUSTICE JACKSON: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Rebuttal?

9 REBUTTAL ARGUMENT OF THEANE D. EVANGELIS
10 ON BEHALF OF THE PETITIONER

11 MS. EVANGELIS: Thank you.

12 This case is worlds away from
13 Robinson. The Eighth Amendment does not answer
14 any of the questions that we've been discussing
15 today, and that is reason not to extend
16 Robinson. All of these questions are
17 unanswerable.

18 First, I'd like to start with the
19 United States' position. That would also bring
20 chaos. It would be a disaster if Martin were to
21 remain on the books in any form. It does not
22 make a difference if the inquiry is
23 pre-enforcement or post-enforcement. All the
24 same questions come up about whether the
25 person's conduct is involuntary, what their

1 choices are, how they are there, whether the
2 shelter that's available is adequate, where it
3 is, what rules it has, all of that.

4 And I'd like to clarify how all of
5 this works in practice because it would be
6 impossible for people on the ground to
7 understand and predict what a court would say
8 about the shelters that are available and the
9 alternatives that are available and the choices
10 that were made and the difficulty of all that.

11 So, here, how it works is, under the
12 Grants Pass policy -- I'll direct the Court to
13 page 155 of the Joint Appendix. There, it says,
14 officers are required to give a 24-hour notice
15 before issuing a citation.

16 So I -- I want to just focus on that
17 for a moment. How will the officer know when --
18 when she or he comes back whether the individual
19 has another place to go? There's no way to know
20 the answer to that. So they would have to take
21 their word for it perhaps. So it would lead to
22 all of those same problems.

23 And it is hyperbole -- the other side
24 talks about banishment and all of that. The
25 Respondents have remained in Grants Pass for

1 years. There's nothing like that going on here.
2 They talk about an isolated statement from a
3 community meeting that was a three-hour meeting.
4 There are 20 pages of minutes. It's one
5 sentence. What that full context shows is a
6 wide-ranging discussion about all of these
7 difficult policy problems and how the City was
8 trying to incentivize people to accept shelter
9 and dealing with a small group that was causing
10 serious problems and crime in the City, and
11 they're trying to balance those who wouldn't
12 take the help with the City's needs to keep
13 their public spaces open.

14 When the Ninth Circuit
15 constitutionalized this area, it left cities
16 with really no choice: Either keep building
17 enough shelter that may or may not be adequate
18 or suitable to someone's preferences, or be
19 forced to give up all of your public spaces.
20 That is what's happened. We've seen a -- a
21 suspension of enforcement of these basic laws
22 that are so important.

23 The line-drawing problems are
24 never-ending. That is exactly why Powell,
25 Justice Gorsuch, to your point about Powell and

1 the plurality there said that if we embark on
2 this journey and we start constitutionalizing
3 laws that address conduct, the line-drawing
4 problems will be endless. And so that is a
5 reason not to extend Robinson here.

6 So I -- I just want to make, again,
7 our basic Eighth Amendment point here, which is
8 that these are low-level fines and very short
9 jail terms for repeat offenders that are in
10 effect in many other jurisdictions. This is not
11 unusual in any way. It is certainly not cruel.
12 And we can just point to our appendix in our
13 reply that goes through jurisdictions from West
14 Hollywood, California, to Watertown,
15 Massachusetts, that have the same type of
16 policies. So the policy questions in this case
17 are very difficult, and I think that's what has
18 come across today.

19 The Eighth Amendment question, though,
20 is not. Here, the punishments are the sorts of
21 punishments that have been held to be
22 permissible for -- since the founding and really
23 are in use today. They're not in any way
24 unusual.

25 So we -- we heard a lot of things

1 about guessing how this would work in practice,
2 but it sounds to me like courts would need to
3 have some sort of rules so that they could tell
4 a jurisdiction like Chico that the place it set
5 aside for camping was adequate when the federal
6 court said no, it wasn't, because it's outdoors,
7 or a San Clemente that was threatened with
8 lawsuits because it didn't provide cell phone
9 chargers in the area that it designated for
10 camping, or San Rafael, where the court said
11 that 200 feet between encampments -- between
12 tents was too much and that 100 feet was the
13 maximum under the Eighth Amendment.

14 So, for all of those reasons, the
15 Court should reverse.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 The case is submitted.

19 (Whereupon, at 12:30 p.m., the case
20 was submitted.)

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