

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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9 of the Respondents.

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P R O C E E D I N G S

(10:04 a.m.)

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

Ms. Evangelis.

ORAL ARGUMENT OF THEANE D. EVANGELIS

ON BEHALF OF THE PETITIONER

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

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

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

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

Second, no precedent supports the

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

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

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

1 I welcome the Court's questions.

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

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

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

8 MS. EVANGELIS: Yes, it is.

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

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

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

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

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

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

25 JUSTICE THOMAS: And so what -- is it

1 the anti-camping, or what is it?

2 MS. EVANGELIS: Yes, it is.

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

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

8 JUSTICE THOMAS: Okay. So --

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

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

13 MS. EVANGELIS: That's correct.

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

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

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

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

1 they need.

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

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

14 MS. EVANGELIS: That's correct.

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

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

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

22 MS. EVANGELIS: That is right.

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

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

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

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

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

25 MS. EVANGELIS: Well --

1 JUSTICE SOTOMAYOR: Who don't have a
2 home?

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

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

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

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

24 MS. EVANGELIS: Grants Pass policy
25 actually very clearly says that being homeless

1 is not a crime. And that's in --

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

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

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

21 You're asking us to ignore all of that
22 history.

23 MS. EVANGELIS: No, we're not, Justice
24 Sotomayor. What we are saying is that this case
25 doesn't implicate proportionality. We're not

1 asking the Court to take a position on whether
2 it's a proper inquiry under the Eighth
3 Amendment.

4 For example --

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

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

17 Again, it's looking at punishment.
18 And that's where the inquiry focuses. Here,
19 only what -- what the Respondents are asking
20 this Court to do is to extend Robinson beyond --

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

23 MS. EVANGELIS: I -- I --

24 JUSTICE SOTOMAYOR: Just answer yes or
25 no.

1 MS. EVANGELIS: I don't -- I don't
2 know.

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

8 If a homeless person had that kind of
9 money, don't you think they'd stay in a hotel?

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

17 JUSTICE KAGAN: So can I talk about
18 that, Ms. Capoor? So taking Robinson as a
19 given, could you criminalize the status of
20 homelessness?

21 MS. EVANGELIS: Well, I have a couple
22 points to that.

23 JUSTICE KAGAN: It's just a simple
24 question.

25 MS. EVANGELIS: So Robinson doesn't

1 address that and I think it's completely
2 distinguishable. So Robinson was a --

3 JUSTICE KAGAN: Could you criminalize
4 the status of homelessness?

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

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

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

16 JUSTICE KAGAN: At the period with
17 which -- in the period where -- where you don't
18 have a home and you are homeless, is that a
19 status?

20 MS. EVANGELIS: No.

21 JUSTICE KAGAN: Could you criminalize
22 that?

23 MS. EVANGELIS: No, it's not. So
24 Robinson talked about --

25 JUSTICE KAGAN: So you couldn't just

1 --

2 MS. EVANGELIS: -- addiction like a
3 disease.

4 JUSTICE KAGAN: -- you -- you -- you
5 could criminalize just homelessness?

6 MS. EVANGELIS: So I want to say,
7 first, a couple of things. So I think that
8 for the -- the --

9 JUSTICE KAGAN: I mean, that's quite
10 striking --

11 MS. EVANGELIS: No, I don't.

12 JUSTICE KAGAN: -- that you think that
13 you can criminalize just homelessness.

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

17 JUSTICE KAGAN: Well, you're not
18 saying --

19 MS. EVANGELIS: -- is the wrong way to
20 focus on this question.

21 JUSTICE KAGAN: It's really a simple
22 question. Can you criminalize homelessness?
23 And you're suggesting, yes, you could.

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

1 JUSTICE KAGAN: Could you criminalize
2 homelessness? Not tell me what you do do, what
3 you don't do. Could you?

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

12 JUSTICE JACKSON: But, counsel --

13 MS. EVANGELIS: And so --

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

20 And when you started off here today,
21 you said we're just criminalizing conduct. So,
22 to tell you the truth, I thought that this was
23 going to be a question where you would say no,
24 of course, we can't criminalize a status, but
25 there's conduct here. And then I was going to

1 say: What is the conduct here?

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

7 MS. EVANGELIS: So, Justice Kagan, I
8 think the -- the point where we are disagreeing
9 here is really about whether the Eighth
10 Amendment is the right framework for this
11 discussion.

12 JUSTICE KAGAN: Well, the Eighth
13 Amendment was the framework in Robinson. And
14 taking Robinson as a given, where Robinson said
15 the Eighth Amendment protects you against
16 status-based crimes --

17 MS. EVANGELIS: I don't --

18 JUSTICE KAGAN: -- that's what the
19 question is.

20 MS. EVANGELIS: -- I don't think
21 Robinson extends that far. I think Robinson
22 itself was cabined -- and I think the Marshall
23 plural -- Justice Marshall's plurality in Powell
24 goes into a discussion about this and how that
25 was the right line.

1 JUSTICE KAGAN: Okay. What is the
2 conduct here?

3 MS. EVANGELIS: The conduct is
4 camping, establishing a campsite. And it's the
5 same as in the federal regulations that the
6 National Park Service relies on.

7 JUSTICE KAGAN: So I didn't think that
8 that was the -- the conduct. I thought that the
9 only conduct here was sleeping outside with a
10 blanket.

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

14 JUSTICE KAGAN: Well --

15 MS. EVANGELIS: -- and the federal law
16 is --

17 JUSTICE KAGAN: -- a campsite suggests
18 something different to people. It suggests a
19 tent. It suggests a conglomeration of people.
20 You know, tent camps, if you will.

21 But your ordinance does not just
22 prohibit that. Your ordinance prohibits a
23 single person who is homeless, so does not have
24 another place to sleep, that's a status, I don't
25 have another place to sleep, a single person

1 sleeping instead in public with a blanket.

2 That's what I understand your statute to do.

3 Is that not what your statute does?

4 MS. EVANGELIS: The statute does not

5 say anything about homelessness. It's a

6 generally applicable law. One more -- it --

7 it's very important that it applies to everyone

8 --

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

10 MS. EVANGELIS: -- even people who are

11 camping.

12 JUSTICE KAGAN: But it's a single

13 person with a blanket.

14 MS. EVANGELIS: And --

15 JUSTICE KAGAN: You don't have to have

16 a tent. You don't have to have a camp. It's a

17 single person with a blanket.

18 MS. EVANGELIS: And sleeping in

19 conduct is considered -- excuse me, sleeping in

20 public is considered conduct. And this Court --

21 this Court in Clark discussed that, that that is

22 conduct.

23 Also, the federal regulations --

24 JUSTICE KAGAN: Well, sleeping is --

25 MS. EVANGELIS: -- are very --

1 JUSTICE KAGAN: -- a biological
2 necessity. It's sort of like breathing. I
3 mean, you could say breathing is conduct too,
4 but, presumably, you would not think that it's
5 okay to criminalize breathing in public.

6 MS. EVANGELIS: I would like to point
7 to the federal regulations which I brought up.

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

11 MS. EVANGELIS: Well, two points. So,
12 first, even the federal regulations prohibit
13 even sleeping. They don't even require any
14 materials, including but -- but not necessary
15 under the federal regulation. So this is
16 conduct that is understood by jurisdictions
17 nationwide and even the federal government to be
18 conduct that is prohibited, and so I want to
19 make that point.

20 JUSTICE KAGAN: See, I'll --

21 MS. EVANGELIS: The second point --

22 JUSTICE KAGAN: -- I'll tell you the
23 truth, Ms. Capoor. I think that this is -- this
24 is a super-hard policy problem for all
25 municipalities. And if you were to come in here

1 and you were to say, you know, we need certain
2 protections to keep our streets safe and we
3 can't have, you know, people sleeping anyplace
4 that they want and we can't have, you know, tent
5 cities cropping up, I mean, that would create
6 one set of issues.

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

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

23 JUSTICE KAGAN: But that -- it isn't.

24 MS. EVANGELIS: -- why the Eighth
25 Amendment --

1 JUSTICE JACKSON: Can you answer why?

2 CHIEF JUSTICE ROBERTS: Can I --

3 JUSTICE JACKSON: Why is it not?

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

8 And you keep saying this is conduct.
9 Can you explain why?

10 MS. EVANGELIS: The actus reus
11 element, that's exactly what was missing in
12 Robinson and that's what we have here. And
13 that's why that law was so unique. It's a very
14 peculiar --

15 JUSTICE JACKSON: So it seems to me
16 that Robinson actually hurts you and not helps
17 you in the following sense. You know, it seems
18 both cruel and unusual to punish people for acts
19 that constitute basic human needs.

20 So, here, unlike in Robinson, where,
21 you know, you had at least the sort of disease
22 state, drugs and -- and -- and the like, and
23 potentially culpable acts that relate to that
24 disease state, here, we're talking about
25 sleeping that is universal, that is a basic

1 function. And so I guess what I don't
2 understand is in this circumstance why that
3 particular state is being considered conduct for
4 the purpose of -- of -- of punishment.

5 MS. EVANGELIS: Well, I think that
6 just illustrates the line-drawing problems
7 because, if you look at biological necessities
8 and what a person needs to do, you know, the
9 Ninth Circuit's decisions in this area would
10 allow --

11 JUSTICE JACKSON: Can I give you a
12 hypothetical?

13 MS. EVANGELIS: -- all sorts of
14 behavior.

15 JUSTICE JACKSON: Can I give you a
16 hypothetical?

17 MS. EVANGELIS: Yes. Thank you.

18 JUSTICE JACKSON: Okay. So suppose
19 the relevant ordinance prohibited eating on
20 public property rather than sleeping or camping.
21 We're talking about eating. And the city, for
22 very, you know, rational reasons, has determined
23 that when people eat outdoors, it creates
24 problems with trash and rodents and the like,
25 and so it bans eating in public places and it

1 punishes violators.

2 Now, just as here, that seems
3 generally fine because most people have
4 restaurants that they can go to, most people
5 have houses that they can eat in. But some
6 people don't have that option. They have to eat
7 in public because they're unhoused and they
8 can't afford to go to a restaurant.

9 So is -- is your argument the same
10 result, no Eighth Amendment problem, no problem
11 with the city banning eating in public, even
12 though that's a public function -- I mean,
13 excuse me, even though that's a human necessity
14 that everyone engages in, and, really, what's
15 happening is you're only punishing certain
16 people who can't afford to do it privately?

17 MS. EVANGELIS: Well, it sounds like
18 -- I -- I take for a moment that you're not
19 saying the law -- that the law draws lines on
20 any sort of irrational basis or any equal
21 protection issue --

22 JUSTICE JACKSON: No. The city has a
23 rational basis.

24 MS. EVANGELIS: -- and --

25 JUSTICE JACKSON: When people eat in

1 public --

2 MS. EVANGELIS: Yes.

3 JUSTICE JACKSON: -- there is trash,
4 there are rodents, there are problems. So the
5 city says what we're going to do is we're going
6 to say no eating in public.

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

17 MS. EVANGELIS: So two responses.
18 First, I think the Eighth Amendment is the wrong
19 way to look at it. Someone might have a due
20 process challenge to a law like that if there is
21 a deeply entrenched liberty interest.

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

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

1 JUSTICE JACKSON: Why is the Eighth
2 Amendment not implicated?

3 MS. EVANGELIS: -- in that case, you
4 would have a defense under Oregon law, for
5 example, a necessity defense.

6 JUSTICE GORSUCH: Counsel, on -- on --
7 on --

8 MS. EVANGELIS: And I want to get to
9 that on the camping.

10 JUSTICE GORSUCH: Counsel, I'm sorry
11 to interrupt.

12 MS. EVANGELIS: Yes.

13 JUSTICE GORSUCH: But, on that point,
14 I think we're having some debate about where to
15 lodge the defense, whether it's under the Eighth
16 Amendment or under the Fourteenth Amendment.

17 But do you concede that there are
18 instances in which a necessity defense, long
19 recognized at common law, would apply to eating
20 in public, sleeping in public, or other things
21 like that?

22 MS. EVANGELIS: Yes, I agree. And,
23 actually, here, in the case of camping, Oregon
24 law recognizes a necessity defense, so as a
25 matter of state law and policy -- and, again,

1 that goes to the difficult policy questions --
2 that's why states are able to address the needs
3 of what this issue raises.

4 And so, for something under Oregon
5 State law, a person could raise that defense
6 under the necessity defense, and then, if that's
7 not enough, if they believe that that's not
8 broad enough somehow --

9 JUSTICE GORSUCH: And you're saying --

10 MS. EVANGELIS: -- they can argue due
11 process.

12 JUSTICE GORSUCH: -- Oregon law has
13 that defense --

14 MS. EVANGELIS: Yes.

15 JUSTICE GORSUCH: -- already built
16 into it?

17 MS. EVANGELIS: That's correct.

18 JUSTICE GORSUCH: All right. Thank
19 you.

20 JUSTICE JACKSON: Let me ask you about
21 Oregon law, because one sort of threshold
22 concern that I have about this case is I
23 understand that Oregon has enacted a statute, a
24 new statute, that seems to address this very
25 issue, so I'm trying to understand why this is

1 -- is still a live case.

2 As I read the new law, it essentially
3 codifies Martin's rule, that it says something
4 about all regulations of this nature have to be
5 objectively reasonable as to time, place, and
6 manner with regard to -- with regards to people
7 experiencing homelessness.

8 So it seems like the state has already
9 precluded Grants Pass from doing the sort of
10 thing it's doing here, so why do we need to
11 weigh in on that?

12 MS. EVANGELIS: Well, no, it hasn't.
13 So, first, both sides agree that this case is
14 not moot. There is no state law challenge in
15 this case. But, more importantly, that standard
16 is very different from Martin, and there's never
17 been a challenge to our laws.

18 JUSTICE JACKSON: What about
19 constitutional avoidance? So, fine, it's not
20 moot, but wouldn't our principle be that we
21 don't need to reach the constitutionality of
22 this issue if there's another possible way of
23 resolving it because the state has addressed it?

24 MS. EVANGELIS: Well, not at all. So
25 the state's law is very different. And we

1 believe our law is satisfied.

2 But, more importantly, the fact that
3 the state is acting here is a good thing. We
4 agree that states should be able to make policy
5 and to weigh all of the competing concerns.
6 And, here, the need to reverse Martin is so
7 critical because laws like ours, they really do
8 serve an essential purpose. They protect the
9 health and safety of everyone. It is not safe
10 to live in encampments. It's unsanitary. We
11 see what's happening. And there are the -- the
12 harms at the encampments themselves on those in
13 them and outside. We know this. The federal
14 government has cleared encampments here in the
15 capital in McPherson Square. So this is an
16 urgent problem.

17 And also, there are downstream effects
18 of all the other things that flow from it, but
19 it is very important here to understand that the
20 state laws and the --

21 JUSTICE JACKSON: So is it your
22 argument that the Eighth Amendment has nothing
23 to say about how the City responds to such
24 problems? I mean, suppose the City decided that
25 it was going to execute homeless people. I

1 mean, very extreme, I know, but it would solve
2 the problems that you're talking about.

3 MS. EVANGELIS: Well, that -- that
4 would be --

5 JUSTICE JACKSON: Do we have an Eighth
6 Amendment issue in that circumstance?

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

8 JUSTICE JACKSON: Why?

9 MS. EVANGELIS: -- there, you look at
10 the punishment. That -- again, here, we're
11 looking at the punishment, which is low-level
12 fine --

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

15 MS. EVANGELIS: I -- I think it would
16 -- it would be. Yes, I think it absolutely
17 would.

18 JUSTICE GORSUCH: Why not just yes to
19 that?

20 (Laughter.)

21 MS. EVANGELIS: Yes. Thank you.
22 Thank you, Justice Gorsuch.

23 JUSTICE BARRETT: Counsel, can I ask
24 you a question about the scope of your
25 ordinance? So, as Justice Kagan was pointing

1 out, this -- this criminalizes sleeping with a
2 blanket at a minimum, right?

3 MS. EVANGELIS: Yeah.

4 JUSTICE BARRETT: Correct? But, as I
5 understand it, after this decision and -- and
6 maybe after Martin before that, there was some
7 question about whether it also criminalized
8 having fires, campfires, tents.

9 Can you talk a little bit about that
10 and what the scope of it is? Does the
11 Constitution then make it impossible for a city
12 to limit the use of fires and encampments,
13 tents, those kinds of temporary shelters?

14 MS. EVANGELIS: It really does because
15 the rationale of Martin, the -- the argument
16 that it's a biological necessity to sleep
17 outside, the Respondents argue a blanket is
18 necessary in Oregon; some might argue a tent and
19 a fire is necessary in North Dakota. The Eighth
20 Amendment really doesn't give us any answers to
21 what cities can and can't prohibit. It's really
22 administratively impossible for cities on the
23 ground, as well as for courts, to administer.
24 So we're seeing --

25 JUSTICE SOTOMAYOR: I'm sorry. This

1 -- we have nothing to do with fires or tents.
2 That was exempted under the district court's
3 injunction, and the circuit court didn't require
4 that. We're talking only about sleeping with a
5 blanket.

6 MS. EVANGELIS: Well, I think --

7 JUSTICE SOTOMAYOR: Well, so let's
8 narrow it to what it is. I agree there might be
9 other cases in the Ninth Circuit that are not
10 rational, and I don't mean to throw aspersions
11 at -- at those holdings, but some of them are
12 not permitting time/place restrictions.

13 Let's go beyond that. Let's go here.
14 Here, you're not precluded from prohibiting
15 fires. You're not precluded from prohibiting
16 tents. What's at issue is are you prohibited
17 from keeping -- having someone wear a blanket
18 anywhere in the city.

19 Your intent was to remove -- stated by
20 your mayor, intent is to remove every homeless
21 person and give them no public space to sit down
22 with a blanket or lay down with a blanket and
23 fall asleep.

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

1 JUSTICE SOTOMAYOR: Well --

2 MS. EVANGELIS: -- address that point
3 because the other side has --

4 JUSTICE SOTOMAYOR: -- why don't you
5 answer the basic question.

6 MS. EVANGELIS: Yes. So --

7 JUSTICE SOTOMAYOR: It's not about
8 fires. It's not about tents. It's about not
9 being -- a time and place restriction about
10 eliminating all choices.

11 MS. EVANGELIS: So we think that it is
12 harmful for people to be living in public spaces
13 on streets and in parks, whatever bedding
14 materials. When humans are living in those
15 conditions, we think that that's not
16 compassionate and that there's no dignity in
17 that.

18 JUSTICE SOTOMAYOR: Oh, it's not, but
19 --

20 MS. EVANGELIS: No.

21 JUSTICE SOTOMAYOR: -- neither is --
22 neither is providing them with nothing --

23 MS. EVANGELIS: Well, we --

24 JUSTICE SOTOMAYOR: -- to alleviate
25 that situation.

1 MS. EVANGELIS: This is a difficult
2 policy question, Justice Sotomayor. It is. And
3 --

4 JUSTICE SOTOMAYOR: Where do we put
5 them if every city, every village, every town
6 lacks compassion --

7 MS. EVANGELIS: We --

8 JUSTICE SOTOMAYOR: -- and passes a
9 law identical to this? Where are they supposed
10 to sleep? Are they supposed to kill themselves,
11 not sleeping?

12 MS. EVANGELIS: So this is -- a
13 necessity defense, as I mentioned, under Oregon
14 law is available. States are able to address
15 these concerns. This is a complicated policy
16 question. We believe that the Eighth Amendment
17 analysis, to go back to it, focuses on the
18 low-level fines.

19 JUSTICE SOTOMAYOR: What's so
20 complicated about letting someone somewhere
21 sleep with a blanket in the outside if they have
22 nowhere to sleep? The laws against defecation,
23 the laws against keeping things unsanitary
24 around yourself, those have all been upheld.

25 The only thing this injunction does is

1 say you can't stop someone from sleeping in a
2 public place without a blanket.

3 CHIEF JUSTICE ROBERTS: Why don't you
4 answer and then we'll move on to the next round,
5 and you can be thinking about an answer to
6 Justice Sotomayor while they -- we move into a
7 different --

8 MS. EVANGELIS: Thank you.

9 CHIEF JUSTICE ROBERTS: -- stage of
10 the argument.

11 Is being a bank robber a status?

12 MS. EVANGELIS: No. I would say
13 that -- well -- well, if -- if your question is
14 asking would it be permissible to punish being a
15 bank robber, I think that would have vagueness
16 problems probably.

17 CHIEF JUSTICE ROBERTS: Well, it would
18 be someone who robbed a bank. That doesn't
19 sound vague.

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

25 And the -- there, it was the status of

1 being an addict without any mens rea. So a law
2 like that -- excuse me -- without any actus
3 reus. A law like that is problematic without an
4 actus reus. I think it would probably have
5 vagueness problems, due process problems.

6 However, the Eighth Amendment, this
7 entire exercise under Robinson is the only time
8 this Court has ever evaluated the substantive
9 criminal law, and it raises all of these
10 line-drawing problems. And the fact that -- I'm
11 not here to defend Robinson as a matter of first
12 principles. We don't agree with it. We think
13 it was wrongly decided. We're just saying that
14 it is so far removed -- that our laws are so far
15 removed from what was at issue in Robinson that
16 it just isn't implicated here.

17 CHIEF JUSTICE ROBERTS: So, if someone
18 is homeless for a week and then finds available
19 shelter, is that person homeless when he's in
20 the shelter?

21 MS. EVANGELIS: Under federal law, the
22 HUD regulations, he is actually considered
23 homeless. That shows the fluidity and the
24 different ways of --

25 CHIEF JUSTICE ROBERTS: Putting the

1 HUD regulations to one side, can someone who is
2 sleeping in a shelter be considered homeless?

3 MS. EVANGELIS: Some would say yes,
4 that someone who --

5 CHIEF JUSTICE ROBERTS: What would you
6 say?

7 MS. EVANGELIS: I -- I would say that
8 at that point he is sheltered and homeless. I
9 think he -- he -- that -- that is also --

10 CHIEF JUSTICE ROBERTS: All right.
11 Let me make it easier. What if he buys a home
12 or finds a home or is given a home? Is he
13 homeless --

14 MS. EVANGELIS: No, he is --

15 CHIEF JUSTICE ROBERTS: -- at that
16 point?

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

19 CHIEF JUSTICE ROBERTS: So you think
20 the status of homelessness can change from one
21 time to another?

22 MS. EVANGELIS: Yes, I do. I think
23 it's very fluid.

24 CHIEF JUSTICE ROBERTS: Is that
25 consistent with the definition of "status" in

1 Robinson?

2 MS. EVANGELIS: No. So Robinson
3 treated addiction as a disease and as something
4 that -- and -- and many believe that addiction
5 is something that someone has with them forever
6 and -- and it's a struggle. So that is a very
7 different situation.

8 And, here, if someone has shelter --
9 let's say they were offered shelter yesterday
10 and they refused it, and then today, when
11 someone comes around and tells them that they're
12 not permitted to camp, are they involuntarily
13 there if they refused shelter yesterday? That's
14 the question the Eighth Amendment does not
15 answer.

16 This is very complex. What if there
17 is a bed available in the Gospel Rescue Mission,
18 but like Ms. Johnson, a person doesn't wish to
19 leave their pet? Her Rottweiler's not permitted
20 there. So that is a difficult question for a
21 person and a difficult policy question, but --

22 CHIEF JUSTICE ROBERTS: Thank you.

23 MS. EVANGELIS: -- a person's
24 status -- yes.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas?

3 JUSTICE THOMAS: Robinson actually
4 included a crime of, as I read it, either to use
5 narcotics or to be addicted to the use of
6 narcotics, and the Court was concerned about
7 being -- the status of being addicted to the
8 use.

9 Is there a crime here for being
10 homeless?

11 MS. EVANGELIS: No, there is not.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

13 JUSTICE ALITO: Robinson presents a
14 very difficult conceptual question. Do you
15 think that someone who is a drug addict is
16 absolutely incapable of -- that all people who
17 are drug addicts are absolutely incapable of
18 refraining from using drugs?

19 MS. EVANGELIS: Well, I think that for
20 some, that may be true, and for some, perhaps
21 they can abstain. But that's a question of free
22 will and agency that's true of every law and
23 what conduct we choose to regulate. That's a --

24 JUSTICE ALITO: All right. Then
25 compare that with a person who absolutely has no

1 place to sleep in a particular jurisdiction.

2 Does that person have any alternative
3 other than sleeping outside?

4 MS. EVANGELIS: So I think we'd have
5 to ask all the questions I mentioned earlier
6 about what alternatives they might have had
7 yesterday --

8 JUSTICE ALITO: They have --

9 MS. EVANGELIS: -- and how they ended
10 up there.

11 JUSTICE ALITO: -- they have none.
12 They have absolutely none. There's not a single
13 place where they can sleep.

14 MS. EVANGELIS: If that's true, then
15 that may be the case. And in that case, at
16 least in Oregon, they would have a defense of
17 necessity.

18 JUSTICE ALITO: So the point is that
19 the connection between drug addiction and drug
20 usage is more tenuous than the connection
21 between absolute homelessness and sleeping
22 outside.

23 MS. EVANGELIS: Well, I -- I think,
24 in -- in Robinson, again, the Court did draw
25 that line, but, here, the Respondents are saying

1 that the two are really the same, that camping
2 outside, sleeping outside, and being homeless
3 are two sides of the same coin.

4 We think that that's wrong. It's
5 collapsing the status that they claim into the
6 conduct. So we think the conduct here is very
7 clear because it applies generally to everyone.
8 The law does not say on its face it is a crime
9 to be homeless. I just want to --

10 JUSTICE ALITO: All right.

11 MS. EVANGELIS: -- make that --

12 JUSTICE ALITO: Thank you.

13 MS. EVANGELIS: -- very clear. Thank
14 you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Sotomayor?

17 JUSTICE SOTOMAYOR: It was the brief
18 of Criminal Law and Punishment Scholars that I
19 was referencing earlier.

20 I want to go back to Justice Thomas's
21 beginning question. As I understood it, the
22 Ninth Circuit never reached the excessive fines
23 question presented by this case, correct?

24 MS. EVANGELIS: That's correct.

25 JUSTICE SOTOMAYOR: So that's still

1 open. And you didn't seek cert on that issue?

2 MS. EVANGELIS: That's correct.

3 JUSTICE SOTOMAYOR: All right.

4 Assuming that there is no standing, I understand
5 one of the appellees died, the one who was
6 camping outside died during the pendency of this
7 appeal. And there are two other named
8 plaintiffs. I know they have fines on them.
9 I'm not sure that either of them has any
10 criminal -- crimes charged against them.

11 Where does that put this appeal?

12 Where does that put this case?

13 MS. EVANGELIS: Sure. Well, the
14 case --

15 JUSTICE SOTOMAYOR: Should we be
16 vacating and remanding to see if there is --

17 MS. EVANGELIS: No.

18 JUSTICE SOTOMAYOR: -- a live
19 plaintiff -- a plaintiff, a named plaintiff who
20 is still suffering injury?

21 MS. EVANGELIS: No. So, here, the --
22 the sleeping ordinance, which is the one that
23 Ms. Blake challenged, that is no longer in the
24 case. That ordinance limited only sleeping in
25 certain rights-of-way and sidewalks in the city,

1 and it was a different law, and that's not at
2 issue here.

3 So sleeping is not at issue. It's
4 about the camping ordinance. And we very much
5 have a live case because we are under the Ninth
6 Circuit's injunction, and the named plaintiffs
7 have --

8 JUSTICE SOTOMAYOR: No, the question
9 is, could it give an injunction? Do -- are
10 these people -- well, I guess, if they are not
11 permitted to park --

12 MS. EVANGELIS: That's correct.

13 JUSTICE SOTOMAYOR: So it's not the
14 camping, it's the parking, isn't it?

15 MS. EVANGELIS: Well, and the camping.
16 So we -- we intend to -- and -- to rely on these
17 laws. We want to be able to rely on these laws.
18 They are very important and --

19 JUSTICE SOTOMAYOR: You're not
20 answering -- just focus on my question.

21 MS. EVANGELIS: Yes.

22 JUSTICE SOTOMAYOR: Both these people
23 sleep in cars. Both of them sleep in cars
24 outside of the town. So they're not seeking
25 camping permission. Is your city not provide

1 for overnight parking in any location at night
2 except in private homes?

3 MS. EVANGELIS: Camping in a vehicle
4 is included in the camping ordinance.

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

7 MS. EVANGELIS: Again, it is a place
8 where someone has laid down without any more,
9 has --

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

13 MS. EVANGELIS: So --

14 JUSTICE SOTOMAYOR: -- and they want
15 to park in one of those spaces, if they fall
16 asleep in the car, they're guilty of violating
17 the camping law?

18 MS. EVANGELIS: No. Justice
19 Sotomayor, Ms. Johnson parks her car oftentimes
20 at a friend's, so she is not violating the law
21 at those times. So --

22 JUSTICE SOTOMAYOR: Just answer my
23 question.

24 MS. EVANGELIS: -- parking everywhere
25 is not prohibited. In certain areas, private

1 areas, you can.

2 JUSTICE SOTOMAYOR: Is sleeping in
3 your car prohibited?

4 MS. EVANGELIS: If you are sleeping in
5 your car in a park, where you're not allowed to
6 park overnight --

7 JUSTICE SOTOMAYOR: Have any of
8 them --

9 MS. EVANGELIS: -- then yes.

10 JUSTICE SOTOMAYOR: -- indicated
11 intent to sleep in a park, or have they just
12 said they want to park somewhere in the city?
13 And can they park somewhere in the city and
14 sleep?

15 MS. EVANGELIS: Yes, they have said
16 that they have the intent to continue their
17 conduct and that they will be, therefore,
18 subject to the city's laws and subject to --

19 JUSTICE SOTOMAYOR: I don't understand
20 that answer. Okay.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

25 MS. EVANGELIS: Yes. So there --

1 under Oregon law, if a person says that -- it's
2 effectively the lesser of two evils. If they
3 say, I had no alternative to -- no legal
4 alternative other than what I did here that
5 broke the law, then I had no choice and I
6 therefore had to break the law and it was in
7 some sense involuntary, to use a term that --
8 that many have been discussing.

9 So, there, you -- it would be very
10 narrow. It is a very narrow defense. So it
11 would be in that moment of --

12 JUSTICE KAGAN: So -- so suppose that
13 there is a person who is homeless and there are
14 no shelter beds available and the person has no
15 place to go, and the person, of course, has to
16 sleep. And the person -- it's cold outside.
17 The person has a blanket. So that's the minimum
18 conduct that the law prohibits. So the person
19 sleeps outside with a blanket, and a police
20 officer comes, and in the -- but the person
21 says, well, I had no place else to go.

22 Would the city continue to push for
23 some kind of penalty?

24 MS. EVANGELIS: Well, there, if a
25 person received a citation, so if they did, then

1 they would have a defense of necessity. It's
2 asserted as a defense.

3 So what the other side is trying --

4 JUSTICE KAGAN: Well, it's asserted as
5 a defense.

6 MS. EVANGELIS: Yes.

7 JUSTICE KAGAN: I mean -- but -- so
8 you're not willing to say no, we're going to
9 tell all our police officers that they shouldn't
10 give a citation in that circumstance? You know,
11 you -- you know, we're going to give a citation,
12 and then we'll see how the courts deal with it,
13 is all you're going to tell me?

14 MS. EVANGELIS: Well, officers always
15 have discretion, and we know that they exercise
16 it. And -- and it's hard to know --

17 JUSTICE KAGAN: Well, the question is
18 not an individual officer's --

19 MS. EVANGELIS: Yeah.

20 JUSTICE KAGAN: -- discretion.
21 Individual officers are in a tough situation
22 here.

23 MS. EVANGELIS: They are.

24 JUSTICE KAGAN: The question is, what
25 is the city going to tell individual officers?

1 So what is the city going to tell individual
2 officers about a case of the kind that I said?
3 Are you going to tell individual officers issue
4 the citation and we'll see if the person knows
5 enough to make a necessity defense and we'll see
6 what the court does about that? Or are you
7 going to say, you know, there are some things
8 that just ought not to be the subject of civil
9 or criminal infractions?

10 MS. EVANGELIS: So the City, in its
11 policy, at Joint Appendix, page 158, for
12 example, talks about what officers are supposed
13 to do. They're supposed to put people in touch
14 with services first to contact if there is
15 available help for them. These laws are
16 absolutely a tool for getting people the
17 services that they need. Many people need that
18 intervention.

19 JUSTICE KAGAN: Well, you're not
20 giving me a real answer --

21 MS. EVANGELIS: Yes.

22 JUSTICE KAGAN: -- to the question of
23 is the city telling officers that they should
24 give citations --

25 MS. EVANGELIS: No.

1 JUSTICE KAGAN: -- in that
2 circumstance.

3 MS. EVANGELIS: No. It is -- it is --
4 if somebody -- again, it is a matter of
5 discretion.

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

8 MS. EVANGELIS: Yes.

9 JUSTICE KAGAN: There's nothing you
10 can point to that the city says we have a
11 necessity defense, what we're telling officers
12 to do is to, you know, act consistently with
13 that defense so that if it is truly a matter of
14 need that you are sleeping on the street alone
15 with a blanket, no, the officer should not cite
16 the person?

17 MS. EVANGELIS: There's nothing in the
18 record here that shows officers were told about
19 a necessity defense and that it -- what it would
20 or would not preclude. That would be an
21 individualized question after the fact if
22 someone received a citation.

23 And if they thought that that wasn't
24 enough, the proper framework would be this
25 Court's framework in Kahler, where we would look

1 at the asserted defense, there, insanity of some
2 form, and, here, it would be necessity, and we
3 would ask whether it is so deeply rooted in our
4 history and -- and something that has to be
5 imposed in this way on the states.

6 JUSTICE KAGAN: Thank you.

7 MS. EVANGELIS: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch?

10 JUSTICE GORSUCH: I suppose someone
11 could also initiate a class action of the sort
12 that happened here if -- if you were not
13 allowing the necessity defense to operate and
14 seek to have it enforced, couldn't they?

15 MS. EVANGELIS: Potentially. I --

16 JUSTICE GORSUCH: Yeah. Thank you.

17 CHIEF JUSTICE ROBERTS: Justice
18 Kavanaugh?

19 JUSTICE KAVANAUGH: You've said
20 several times that it's a difficult policy
21 question, a complicated policy question. I
22 think everyone would agree with that.

23 How does this law help deal with the
24 complicated policy issues?

25 MS. EVANGELIS: One of the most

1 difficult challenges is getting people the help
2 that they need. And laws like this allow cities
3 to intervene, and they're an important tool in
4 helping incentivize people to accept shelter.

5 So Ms. Johnson, for example, had said
6 in her deposition -- it's in the Joint
7 Appendix -- that she does not wish to stay at
8 the Gospel Rescue Mission. One of the reasons
9 is because of her dog. She also had other
10 reasons. She doesn't like being around people
11 and -- and so forth. People have all sorts of
12 circumstances. It's very complex. And the
13 individual decisions --

14 JUSTICE KAVANAUGH: How does it help
15 if there are not -- how does it help -- the rule
16 here, the law here, how does it help if there
17 are not enough beds for the number of homeless
18 people in the jurisdiction?

19 MS. EVANGELIS: So, for Ms. Johnson,
20 she sometimes stays with a friend. So there are
21 other --

22 JUSTICE KAVANAUGH: How about more --
23 more generally, though?

24 MS. EVANGELIS: Yes.

25 JUSTICE KAVANAUGH: I guess, if

1 there's a mismatch between the number of beds
2 available in shelters, even including Gospel
3 Rescue, and the number of homeless people, there
4 are going to be a certain number of people who
5 there's nowhere to go?

6 MS. EVANGELIS: That -- that is a
7 difficult policy question. And we --

8 JUSTICE KAVANAUGH: How does this law
9 deal --

10 MS. EVANGELIS: Yes.

11 JUSTICE KAVANAUGH: -- help with that
12 policy question?

13 MS. EVANGELIS: So it encourages
14 people to accept alternatives when they come up
15 so that fewer people end up camping. It also --
16 there is harm in simply camping. Whatever
17 materials people are using when they are living
18 in public spaces without plumbing and
19 infrastructure, there's harm to the whole city
20 and to the whole community, as well as to them.

21 We know that -- that encampments and
22 these conditions also breed crime and very
23 dangerous conditions. So the City has an
24 interest in protecting everyone, including --

25 JUSTICE KAVANAUGH: Do you think the

1 constitutional rule should be different when the
2 number of beds available in the jurisdiction
3 exceeds the number of homeless people versus the
4 number of homeless people exceeds the number of
5 beds available in shelters?

6 MS. EVANGELIS: No. That's what we've
7 seen in the Ninth Circuit. We've seen that that
8 is unworkable. There is no way to count what
9 beds are available and who is perhaps willing to
10 take one and who would consider it adequate.

11 Then the question becomes, are those
12 beds adequate? So, here, Gospel Rescue Mission
13 again --

14 JUSTICE KAVANAUGH: That's a separate
15 issue, I agree.

16 MS. EVANGELIS: It is.

17 JUSTICE KAVANAUGH: And it can be a
18 challenging issue, I suppose, I know, as well.

19 Let me ask one last question, which
20 is, how does the necessity defense differ from
21 the constitutional rule? You touched on this,
22 but I just want to get a succinct answer to
23 that, the state law necessity defense differ
24 from the constitutional rule here.

25 MS. EVANGELIS: You would weigh the

1 harm from the individual's conduct in violating
2 the law. So, if someone were camping near a
3 school or near -- or -- or doing some --
4 something or engaged in some behavior that was
5 particularly harmful and they had another place
6 where they could camp, that would be maybe a
7 factor that you would raise in the necessity
8 situation.

9 It's -- it's narrower. So, in a case
10 of a -- the Oregon cases include people who are
11 growing marijuana for medical reasons but
12 without a license, and so the necessity defense
13 was not accepted in that case because they could
14 have obtained a license. So, if a person had a
15 friend to go to, had a bed available at the
16 Gospel Rescue Mission, they would be expected to
17 take it under the necessity defense.

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

19 JUSTICE KAVANAUGH: I actually have
20 one last question. When you get out of jail if
21 you end up -- what's going to happen then? Are
22 -- you still don't have a bed available. So how
23 does this help?

24 MS. EVANGELIS: So the -- and -- and I
25 want -- I do want to make a point about that --

1 about the criminal aspect. The trespass law
2 here is only triggered after several civil
3 citations.

4 JUSTICE KAVANAUGH: Right. No.

5 MS. EVANGELIS: And at that point --

6 JUSTICE KAVANAUGH: If you run through
7 that cycle --

8 MS. EVANGELIS: Yes.

9 JUSTICE KAVANAUGH: -- and you end up
10 in jail for 30 days, then you get out, I mean,
11 you're not going to be any better off than you
12 were before in finding a bed if there aren't --
13 going to my earlier question, if there aren't
14 beds available in the jurisdiction, unless
15 you're removed from the jurisdiction or you
16 decide to -- to leave somehow.

17 MS. EVANGELIS: No. There are
18 services available, and the jurisdiction can put
19 you in touch with services and programs to help
20 you in those circumstances. And for many
21 people, that is a point where they're able to
22 get into treatment. So that intervention
23 actually saves lives.

24 JUSTICE KAVANAUGH: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

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

12 Are you saying that if your law is
13 enforced, there is a way for everyone to be
14 cared for?

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

25 So that ultimate question is for the

1 legislature and policymakers to figure out what
2 the right solution, what the right mix of
3 policies is. But the wrong answer is to do what
4 the Ninth Circuit did here and to
5 constitutionalize --

6 JUSTICE BARRETT: Okay. Let me -- let
7 me just interrupt you there. You're right, it's
8 a very, very difficult policy question. And I
9 asked you before about whether this was just
10 about blankets or whether it went into having
11 fires or urinating and defecating outdoors and
12 that sort of thing, and Justice Sotomayor
13 pointed out that this particular injunction did
14 carve out those things and was just talking
15 about sleep.

16 But, you know, other cases have been
17 litigated in the Ninth Circuit that have gone
18 beyond that, and because the line is things that
19 are involuntary, that are human needs, it can --
20 it can extend -- it's difficult to draw the
21 line, and whatever we decide here about this
22 case is about the line.

23 So can you describe for me some of the
24 things that are difficult to figure out about
25 the line? There's sleeping. There's sleeping

1 with blankets. What else?

2 MS. EVANGELIS: Public urination and
3 defecation, that is a serious problem. Those
4 are parts of biological necessities of being
5 human. A court in Sacramento addressed that,
6 and the Ninth Circuit's opinions debated whether
7 its rule would actually reach those things.

8 I think any rule that we are wondering
9 about and debating whether it would go that far,
10 I think that is a sign that it is not a workable
11 rule. The slippery slope here is very real.
12 It's not just for camping and conduct that might
13 be a biological necessity, putting aside tents
14 and fires and cold climates. What other things
15 would be allowed?

16 All of the things that a human needs
17 to survive, for example, potentially come into
18 focus under the Ninth Circuit's rule but also in
19 other areas. Someone could say that my drug use
20 or possession is the other side of the coin
21 because I'm an addict or because I -- a -- a
22 person who violates other laws could say that I
23 had a compulsion to do those things that I
24 couldn't control.

25 And the plurality opinion in Powell

1 addressed that very thing and why it's so
2 important to draw the line there. And when
3 conduct is involved and once the Court gets into
4 deciding which conduct may be excused under the
5 Eighth Amendment, it is so far afield of what
6 the Eighth Amendment was ever understood to
7 address.

8 JUSTICE BARRETT: Okay. Speaking of
9 status and conduct, you've -- you've argued that
10 Robinson was wrong and we don't need to overrule
11 it. And I agree. I don't -- I don't think we
12 should overrule Robinson.

13 You've also been kind of resisting the
14 status -- you've been resisting characterizing
15 anything other than the drug addiction that was
16 at issue in Robinson as status.

17 So what if the law said it is unlawful
18 and punishable by 30 days in prison to have the
19 status of homelessness? Just go with me. Just
20 assume that the law defines homelessness as a
21 status and it is a status.

22 Would Robinson say that that law is
23 unconstitutional under the Eighth Amendment?
24 Would you concede that?

25 MS. EVANGELIS: And you're saying that

1 that is a status?

2 JUSTICE BARRETT: Yes.

3 MS. EVANGELIS: All of the --

4 JUSTICE BARRETT: The law defines it
5 as a status, and it's a status.

6 MS. EVANGELIS: Well, yes, and I think
7 it looks a lot like Robinson under that
8 hypothetical, but, of course, we disagree that
9 it is --

10 JUSTICE BARRETT: I understand you
11 disagree --

12 MS. EVANGELIS: -- a status in that
13 way.

14 JUSTICE BARRETT: -- but you are
15 accepting that Robinson draws a distinction
16 between status and conduct and you're just
17 fighting about the definition of a status?

18 MS. EVANGELIS: It -- it draws the
19 line where a law has no actus reus. So I think
20 that's the easiest line. I -- I don't defend
21 the line under the Eighth Amendment because I
22 don't think actually that the Court -- I know
23 the Court didn't rely on any Eighth Amendment
24 principles or history of --

25 JUSTICE BARRETT: But the hypothetical

1 I just gave you had no actus reus either. The
2 status of homelessness, I mean, it could be, you
3 know, 4:00 in the afternoon and the person is
4 just standing outside the bus stop.

5 Do you agree that if the law
6 prohibited that, made that a crime, that under
7 Robinson, whether Robinson was right or wrong,
8 that under Robinson, that would be a violation
9 of the Eighth Amendment?

10 MS. EVANGELIS: Well, I -- I -- I
11 think the better framework is due process.

12 JUSTICE BARRETT: I understand that.
13 Under Robinson, do you agree that that would be
14 wrong?

15 MS. EVANGELIS: Yes.

16 JUSTICE BARRETT: Okay. Thank you.

17 MS. EVANGELIS: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: So picking up where
21 Justice Barrett left off, you -- you -- you say
22 that the ordinance here pertains to conduct and
23 not to status, and I'm just trying to figure
24 that out. I'm not so sure for this reason.
25 It's because all humans engage in the act in

1 question, sleeping. And yet the statute
2 operates or the ordinance operates to penalize
3 only certain individuals, those who have no
4 choice but to do that act in public.

5 So it appears, I think, not to be the
6 act that the state or the city in this case
7 finds criminally culpable. It's instead the act
8 as engaged in by certain people, by people who
9 cannot afford housing and have nowhere else to
10 go.

11 So why is that the wrong way to think
12 about it? And if that is the right way to think
13 about it, why isn't that a status crime in the
14 way that Robinson contemplates?

15 MS. EVANGELIS: It's not because we
16 can look at the law and it has a conduct
17 element. The conduct is establishing a place --
18 a campsite. And that is something that a person
19 who has a home or a shelter could do as well.

20 JUSTICE JACKSON: But you've just
21 defined away the basic actus reus, right? The
22 actus reus is sleeping out -- I guess outside to
23 the extent you put outside in it, but that's the
24 problem I'm talking about. The actus reus is
25 the sleeping, right? Everybody -- that's not a

1 criminally culpable kind of activity.

2 That's what I think might distinguish
3 it from Robinson and -- and make it worse for
4 you in a way because, in Robinson at least, to
5 the extent someone had a disease, and the
6 question was, well, are they engaging in
7 otherwise criminally culpable conduct, buying
8 and selling drugs, taking drugs, you know, we --
9 we look at that kind of category of things.

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

19 MS. EVANGELIS: It doesn't apply only
20 to those people. The Respondents here are
21 trying to exempt a whole category of people.
22 What -- so what you look at there is the -- the
23 conduct of camping under federal law and in this
24 Court's decision in Clark, it was understood
25 that that is conduct. It is just like trespass,

1 where, if you are found in a place, if you enter
2 with permission, but then you remain there
3 without permission under Quarles --

4 JUSTICE JACKSON: But it's not just
5 like trespass because, presumably, you have
6 other places to go. So let me just -- let me
7 just ask you this other question.

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

15 MS. EVANGELIS: Martin speaks in terms
16 of someone who is involuntarily homeless, and
17 that raises all of those policy questions that
18 we've been discussing about how do you determine
19 that.

20 JUSTICE JACKSON: But assume they
21 exist. Involuntarily homeless means the person
22 has nowhere else to sleep.

23 MS. EVANGELIS: Yes, that is -- the
24 necessity defense is available. And what
25 Respondents are asking to do is to

1 constitutionalize that very defense under the
2 Eighth Amendment.

3 So, as I said earlier, it could be --
4 the argument could be made -- it would be a very
5 high bar under due process, but that is the sort
6 of argument that we would expect one to make
7 under a due process framework --

8 JUSTICE JACKSON: Thank you.

9 MS. EVANGELIS: -- under this Court's
10 Kahler decision.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 Mr. Kneedler.

14 ORAL ARGUMENT OF EDWIN S. KNEEDLER
15 FOR THE UNITED STATES, AS AMICUS CURIAE,
16 SUPPORTING NEITHER PARTY

17 MR. KNEEDLER: Mr. Chief Justice, and
18 may it please the Court:

19 In Robinson, this Court held that the
20 government cannot criminalize status. And
21 Respondent has conceded here today that the City
22 cannot criminalize the status of being homeless.

23 Our narrow submission in this case is
24 that government cannot circumvent the principle
25 of Robinson by making it unlawful for a person

1 to reside in the jurisdiction if he has that
2 status.

3 That is what the ordinances here do.
4 As applied to someone who has nowhere else to
5 sleep, which is an essential human function, the
6 ordinances are the equivalent of making it a
7 crime to be homeless while living in Grants
8 Pass.

9 Although we think the Ninth Circuit
10 was right to recognize that the core principle
11 of Robinson is implicated in this case, the
12 Court was wrong to award broad injunctive relief
13 in the circumstances and manner in which it did.

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

21 And, therefore, we urge the Court to
22 adhere to the core principle of Robinson but to
23 emphasize that cities have flexibility to
24 implement these and, in particular, time, place,
25 and manner restrictions on where someone can

1 sleep are entirely valid if they are reasonable,
2 and, indeed, the state law that Justice Jackson
3 referred to establishes a state policy that
4 time, manner, and place restrictions are the way
5 to go if they are reasonable.

6 I welcome the Court's questions.

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

14 MR. KNEEDLER: No. Our -- our
15 position is not that the conduct as in Robinson,
16 the drug addict can't stop from using drugs.
17 That is not our position.

18 That's a question of personal
19 culpability on the basis of what the substances
20 make up --

21 JUSTICE THOMAS: So what's the
22 difference between that and -- and -- and
23 camping out? What you're saying here, it seems
24 as though you're saying, well, they -- there's
25 no other choice, so you have to camp out.

1 Therefore, you're really arresting this person
2 for the status of homelessness.

3 MR. KNEEDLER: Yes, but -- but not
4 because of an -- of an involuntary compulsion
5 sense. I think, as Justice Alito pointed out,
6 the nexus here is actually closer than in the --
7 than in the addiction situation because sleeping
8 outside is essentially the mirror image or the
9 other side of the coin or the definition --

10 JUSTICE GORSUCH: Well, Mr. --

11 MR. KNEEDLER: -- of the status of --
12 of homelessness.

13 JUSTICE GORSUCH: -- Mr. Kneedler, I
14 -- I agree that the distinction between status
15 and conduct is a slippery one and that they're
16 often closely related.

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

24 And I wonder whether the government is
25 asking us to take that step that Powell

1 counseled against by saying that it is -- it is
2 status -- effectively status, and this is
3 throughout your brief. You use the word
4 "effective" or "essentially" or "tantamount to,"
5 those kinds of words, and -- and so I just
6 wanted to get your response to that -- that
7 concern.

8 MR. KNEEDLER: No, we are not asking
9 the Court to take the step that it declined to
10 take in Powell, which had to do with personal
11 responsibility, the -- the sort of issues that
12 were involved --

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

14 MR. KNEEDLER: -- in this Court's
15 decision in Kahler.

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

25 MR. KNEEDLER: Absolutely not, but --

1 but what is different here is that the -- the
2 conduct in -- in -- that was suggested in Powell
3 would have been based on the person's own
4 separate --

5 JUSTICE GORSUCH: Well --

6 MR. KNEEDLER: -- antisocial conduct.

7 Here --

8 JUSTICE GORSUCH: Well, Justice White
9 made clear that some people are going to be
10 forced to drink in public because they don't
11 have a home.

12 MR. KNEEDLER: Yeah. And what --

13 JUSTICE GORSUCH: He made this very
14 point. And --

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

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

1 JUSTICE GORSUCH: And I think,
2 wouldn't --

3 MR. KNEEDLER: -- and as the
4 government --

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

8 MR. KNEEDLER: But that is -- that is
9 -- that -- the other choice would be a matter of
10 -- of personal --

11 JUSTICE GORSUCH: No. Say the record
12 says --

13 MR. KNEEDLER: -- understanding,
14 personal culpability.

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

17 MR. KNEEDLER: Well, I -- I do think
18 that engaging in conduct that is unrelated to --
19 let me take that back.

20 The -- the sleeping outside when you
21 have no other place to go is the definition of
22 homelessness.

23 JUSTICE JACKSON: Mr. Kneedler, isn't
24 the response --

25 JUSTICE BARRETT: But -- but Judge --

1 JUSTICE JACKSON: -- also that those
2 two things are different? I mean, you're sort
3 of saying it's about individual culpability.
4 But it's not as though everyone engages in drug
5 use.

6 MR. KNEEDLER: Right.

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

12 It seems to me we are in a totally
13 different category --

14 MR. KNEEDLER: We are, yes.

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

22 MR. KNEEDLER: Yes.

23 JUSTICE JACKSON: -- in these
24 situations.

25 MR. KNEEDLER: That is a critical

1 distinction, and not only is it something that
2 everybody engages in, but it's something that
3 everybody has to engage in to be alive.

4 So, if you -- so, if you can't sleep,
5 you can't live, and, therefore, by prohibiting
6 sleeping, the city is basically saying you
7 cannot live in Grants Pass. It's the equivalent
8 of banishment, which is -- which is something
9 that is unknown to the way --

10 JUSTICE SOTOMAYOR: Mr. Kneedler --

11 JUSTICE GORSUCH: Mr. Kneedler --

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

21 MR. KNEEDLER: They came back.

22 JUSTICE SOTOMAYOR: They came back.

23 MR. KNEEDLER: I think they might have
24 been sent back by the --

25 JUSTICE SOTOMAYOR: So then they

1 passed this law. And didn't the city council
2 president say, our intent is to make it so
3 uncomfortable here that they'll move down the
4 road, meaning out of town, correct?

5 MR. KNEEDLER: That state -- that
6 statement was made at a -- at a public meeting
7 of the city council.

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

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

20 JUSTICE SOTOMAYOR: Well, we're
21 talking about --

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

23 JUSTICE SOTOMAYOR: -- a
24 disproportionate --

25 MR. KNEEDLER: -- I think it's

1 approximately a hundred. There -- there are
2 men's, women's.

3 JUSTICE SOTOMAYOR: Yeah. I thought
4 it was much less than that.

5 MR. KNEEDLER: Yes.

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

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

21 JUSTICE SOTOMAYOR: So --

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

25 JUSTICE SOTOMAYOR: I -- I accept all

1 of that.

2 MR. KNEEDLER: Yeah.

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

8 MR. KNEEDLER: No.

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

14 MR. KNEEDLER: The --

15 JUSTICE SOTOMAYOR: -- number of
16 things before --

17 MR. KNEEDLER: Yes. That it --

18 JUSTICE SOTOMAYOR: -- they're
19 entitled to the injunction?

20 MR. KNEEDLER: Yeah. Yes.

21 JUSTICE SOTOMAYOR: I wasn't sure.

22 MR. KNEEDLER: No, the -- the Eighth
23 Amendment claim is a personal one and, in this
24 context, depends on whether the person does have
25 another place to sleep. So the -- the person

1 cannot benefit from the Eighth Amendment claim
2 without an individualized -- without that person
3 showing, if it comes up in a -- in an
4 affirmative injunctive action, without that
5 person showing that he or she has no other place
6 to stay.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

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

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

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

1 in the City of Grants Pass. 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: -- the next
8 towns don't always cooperate. So what if it's
9 30 miles away? Is it -- is the shelter
10 available in that case for your purposes, or are
11 you going to tell me it just depends on all the
12 circumstances --

13 MR. KNEEDLER: Well, I think it
14 depends on how --

15 CHIEF JUSTICE ROBERTS: -- so
16 municipalities won't have that much guidance?

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

20 CHIEF JUSTICE ROBERTS: The
21 accessibility is that when an officer comes up
22 in Grants Pass and finds a homeless person and
23 says it violates our ordinance, but I will give
24 you a ride down the road, 30 miles, whatever it
25 is, because there's a new homeless shelter

1 there, and the person says, no, I don't want to
2 do that, can that person be given a citation?

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

5 CHIEF JUSTICE ROBERTS: Sure.

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

14 So, if the 30-mile-away shelter
15 requires the person to leave his community and
16 to live in another place, that -- that
17 implicates --

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

20 MR. KNEEDLER: -- that aspect of the
21 problem here.

22 CHIEF JUSTICE ROBERTS: Let's say
23 there are five cities all around Grants Pass and
24 they all have homeless shelters. And yet the
25 person wants to stay. You know, I've been a

1 Grants Pass resident for a long time. I don't
2 want to go to the one of those shelters. Can
3 that person be given a citation?

4 MR. KNEEDLER: I -- I think under --
5 because of the concern I've mentioned, I think
6 that would -- would be a serious problem
7 because --

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

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

17 CHIEF JUSTICE ROBERTS: No, but it's
18 in another city. You keep fighting the
19 hypothetical.

20 MR. KNEEDLER: No, no, and -- and
21 that's why I think it's different. I -- I'm not
22 prepared to say it, you know, that absolutely
23 not, but I do -- I do think it's different
24 because the City is implementing its policy of
25 banishing people, its own residents from --

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

4 MR. KNEEDLER: Well -- well -- but,
5 again, the question is whether you could still
6 realistically be part of the community where you
7 grew up. The figures show and, in fact, JA 114,
8 115 here shows that most of the homeless people
9 in Grants Pass are from Grants Pass.

10 CHIEF JUSTICE ROBERTS: Counsel,
11 everyone's mentioned, not everybody, many people
12 have mentioned this is a serious policy problem.
13 And it's a policy problem because the solution,
14 of course, is to build shelter to provide
15 shelter for those who are otherwise harmless.

16 But, municipalities have competing
17 priorities. I mean, what if there are lead
18 pipes in -- in -- in the -- in the water? Do
19 you build the homeless shelter or do you take
20 care of the lead pipes? What if there aren't --
21 isn't enough fire protection? Which one do you
22 prioritize?

23 Why would you think this these nine
24 people are the best people to judge and weigh
25 those policy judgments?

1 MR. KNEEDLER: We're -- we're not
2 suggesting that. We're not suggesting that the
3 only solution is for -- especially in the
4 current circumstances, the only solution would
5 be to build homeless shelters.

6 As I mentioned, time, place, and
7 manner restrictions, I -- I think, are a very
8 sensible way to go. And, in fact, as I
9 mentioned, Oregon State law requires that. In
10 other words, a -- a city adopts a provision that
11 you -- you know -- you can't -- you -- you can't
12 sleep on the sidewalks anywhere because that
13 obstructs people seeking to move.

14 You can't camp near a school. You
15 can't camp downtown. You can't sleep downtown.
16 You might be able to sleep in a -- in a park,
17 and -- and so it -- and a park -- and that could
18 be patrolled for -- for drug use and whatnot.

19 CHIEF JUSTICE ROBERTS: Counsel, this
20 is --

21 MR. KNEEDLER: None of these other
22 laws are inapplicable if there's a time, place,
23 and manner restriction.

24 CHIEF JUSTICE ROBERTS: This is an old
25 question, but, you know, eating is a basic human

1 function as well, that people have to do, just
2 like sleeping. So if someone is hungry and no
3 one is giving him food, can you prosecute him if
4 he breaks into a store to get something to eat?

5 MR. KNEEDLER: Absolutely, absolutely.
6 Breaking into -- into a store is a common crime
7 that not everybody engages in, unlike sleeping,
8 which is what -- which is what we have here,
9 which is really --

10 CHIEF JUSTICE ROBERTS: But it's a --
11 it's a -- it's a necessity for the person who
12 needs food.

13 MR. KNEEDLER: It's not a necessity to
14 break into -- into a -- into a store. And with
15 respect to --

16 CHIEF JUSTICE ROBERTS: Well, you're
17 fighting the hypothetical. I'm saying this
18 person needs food.

19 MR. KNEEDLER: And -- and it -- the --
20 the Eighth Amendment does not require that that
21 person be excused from doing it. I think
22 there's -- there's a certain amount of common
23 sense and practicality to this, and it's, I
24 think, well understood that just like drug use
25 is not something the Eighth Amendment excuses

1 you from, either is eating.

2 And the -- the problem of eating is
3 addressed at the local level as the, you know,
4 history and the poor law shows is that the
5 community takes care of its own residents.

6 And it's common now as it was at the
7 founding for churches and individuals and
8 whatnot to offer their help, to charity in the
9 community. And that's what happens in Grants
10 Pass. Various organizations feed -- feed the --
11 the homeless people. And there are social
12 services to help the homeless people.

13 So this is -- this is consistent
14 except for the absolute ban in sleeping in the
15 City. Otherwise the community's response is
16 what has been done down through history.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 MR. KNEEDLER: It is the City's
20 absolute ban --

21 CHIEF JUSTICE ROBERTS: Thank you.

22 MR. KNEEDLER: -- that interrupts that
23 continuity.

24 CHIEF JUSTICE ROBERTS: Justice
25 Thomas?

1 Justice Alito?

2 JUSTICE ALITO: Could you explain how
3 your rule would be carried out by police
4 officers on a day-to-day basis?

5 Let's say that there are 500 beds in a
6 particular town and let's say it's 3 -- 3:00 in
7 the afternoon, 4:00 in the afternoon on a winter
8 day.

9 What is an individual police officer
10 supposed to do if individual police officer
11 would go around and count the number of people
12 who are getting ready to sleep outside? I guess
13 if that's 4:00, you wouldn't get that. Let's
14 say it's 6:00.

15 Count the number of people who are
16 getting ready to sleep outside for the night and
17 then ask each one of them whether you've tried
18 to find a bed at -- at a shelter? Whether that
19 person would be willing to go to a shelter if a
20 bed is available without any conditions or
21 whether the bed -- the bed would have to be
22 available on the conditions that the individual
23 wants, like I won't go to a shelter where they
24 won't take my dog or something like that?

25 Can you just explain how it would work

1 on a -- a daily basis.

2 MR. KNEEDLER: Well, first of all,
3 with respect to the individual encounter, I
4 think the -- the way this would work in the real
5 world, and -- and that -- I think it's important
6 to understand what happens on the ground in
7 these situations.

8 The -- I -- I think in the
9 circumstances you're talking about, I think what
10 would happen is that the person -- the -- the
11 person encountering the homeless person would
12 know whether there is a -- a spot available.

13 To -- I don't think the homeless
14 person would be required to check each day with
15 each shelter if there are multiple shelters.
16 And in larger cities, these initial encounters
17 are -- are not handled by law enforcement.
18 They're typically handled by social services
19 agencies who are in contact with people who are
20 camping and -- and -- and know what their
21 circumstances are and they are able to say: We
22 know that at such and such shelter, there are
23 beds available --

24 JUSTICE ALITO: What if there's --

25 MR. KNEEDLER: -- would you be willing

1 to go?

2 JUSTICE ALITO: What if there's a
3 question whether there are, indeed, enough
4 shelter beds available?

5 Your rule wouldn't apply if there are
6 enough beds available, right? If there are 500
7 shelter beds and -- and there are only 200
8 people who are trying to sleep outside, then
9 your rule wouldn't apply?

10 MR. KNEEDLER: Right, right.

11 JUSTICE ALITO: So you have to have a
12 comparison of the number of beds available with
13 the number of people who want to sleep outside.

14 MR. KNEEDLER: Right, yes. And --

15 JUSTICE ALITO: So that would be the
16 threshold question?

17 MR. KNEEDLER: Right. And I just want
18 to clarify one -- one point about that. It's
19 not simply a measure of the number of beds
20 against the number of homeless people, such that
21 if there is a deficit, the city can't enforce
22 the law at all.

23 If you have individualized questioning
24 and you know that there are -- there are
25 vacancies available, even if not for everybody

1 but there is a vacancy for the person being
2 interviewed, then, yes, that person -- if that
3 person is offered and refuses, that -- that
4 person could be prosecuted and or -- or -- or
5 cited. So --

6 JUSTICE ALITO: What if the person
7 says I -- I -- yeah, I know there's a bed
8 available at the Gospel Rescue Mission but they
9 won't take my dog.

10 MR. KNEEDLER: I don't think -- I
11 don't think the inability to take your dog to a
12 shelter is -- is a sufficient reason. There are
13 shelters in some larger cities that may well
14 take pets, but --

15 JUSTICE ALITO: I could -- I could --
16 I know I could sleep in the home of a family
17 member but they really hate me and they're
18 really nasty to me.

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

20 JUSTICE ALITO: I'm not -- these are
21 --

22 MR. KNEEDLER: No, no --

23 JUSTICE ALITO: I'm just wondering how
24 there -- this is going to be administered on a
25 daily basis.

1 MR. KNEEDLER: And -- and -- and I
2 think, you know, with all respect, I think that
3 that example is -- if the -- if the family is
4 going to accept him, but, I mean, that's the
5 question. Whether there is a -- a place to
6 sleep. But I -- I don't know that it would very
7 often come down to that -- that family hates me.

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

10 JUSTICE ALITO: Right.

11 MR. KNEEDLER: -- to go back to the --
12 to the -- to her home or maybe her relative's
13 home or his relative's home or something. So
14 there's a lot of common sense.

15 And again -- again, the law -- the
16 first encounter that a police officer or
17 somebody else has with a homeless person is very
18 unlikely to be a situation in which the person
19 would be issued a citation.

20 JUSTICE ALITO: Okay. You
21 mentioned -- you mentioned just a couple of
22 things that I wanted to follow up on. Does it
23 matter whether the person grew up in the town or
24 not? Suppose --

25 MR. KNEEDLER: No. No.

1 JUSTICE ALITO: -- that they -- okay,
2 that's irrelevant?

3 MR. KNEEDLER: And -- and -- and I
4 think --

5 JUSTICE ALITO: So they go up to --
6 they go up to some police officer or social
7 services in San Diego, goes up to somebody and
8 says, you know, where are you from? Oh, I'm
9 from Fargo, but if I have to sleep outside, I
10 sure would rather do it here than in Fargo.
11 That doesn't matter?

12 MR. KNEEDLER: No, and -- and I
13 think -- not because of -- of any Eighth
14 Amendment rule we're talking about, but under
15 this Court's decisions in -- in Edwards and --
16 and Saenz, the Privileges and Immunities Clause
17 or the Commerce Clause or the various right to
18 travel provisions would -- would prohibit
19 attaching that sort of -- of limitation to -- to
20 a newcomer.

21 But I -- but I would -- as I
22 mentioned, regarding people --

23 JUSTICE ALITO: Where I used to --
24 where I used to live in New Jersey, there are a
25 lot of really small municipalities, I think over

1 500 municipalities in the state. I could go for
2 a 20-minute walk in the evening and be in three
3 or four different municipalities.

4 So to get back to my -- to Justice --
5 to the Chief Justice's question, if -- you know,
6 if there aren't enough beds available in West
7 Caldwell does it matter -- is it -- West
8 Caldwell is out of luck even though there are a
9 lot of beds available in Caldwell, which is, you
10 know, a couple -- less than a mile away?

11 MR. KNEEDLER: Yeah, I think the way
12 you're describing it, it would -- it would be --
13 it -- it might be fair to say that that -- that
14 set of small and closely-knit communities would
15 be one community and -- and the person wouldn't
16 -- wouldn't basically be banished from where he
17 lived or where he grew up by saying, you know,
18 if there's a shelter in this other location,
19 then -- then you could be expected to go there.

20 JUSTICE ALITO: There's some tiny
21 municipalities. What if a municipality doesn't
22 have a park, so if somebody is going to sleep
23 outside, the only place where that person can
24 sleep is going to have to be on the street?

25 MR. KNEEDLER: I --

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

3 MR. KNEEDLER: I mean, certainly not
4 on the street. And, I mean, it would -- because
5 of safety, traffic, et cetera. I mean, there
6 are commonsense accommodations, and I think even
7 in the smallest town, there are probably
8 locations where a -- a -- a person could sleep.
9 I -- you know.

10 JUSTICE ALITO: All right. Thank you.

11 CHIEF JUSTICE ROBERTS: Justice
12 Sotomayor?

13 JUSTICE SOTOMAYOR: I don't want to be
14 repetitive, but what are we vacating and
15 remanding for? You -- you -- individualized
16 finding of what?

17 MR. KNEEDLER: Well, the -- the way
18 that -- the way -- first of all, the class was
19 defined simply on the basis of the aggregate
20 numbers without an individualized determination
21 as -- as to whether, frankly, in our view, not a
22 sufficient individualized determination as to
23 the two named plaintiffs.

24 And you identified several factors
25 here. They both slept in their -- in their

1 cars. Several of them were able -- or both of
2 them chose at some times to sleep at a Safeway
3 parking lot or with a friend. The other slept
4 in a truck stop out of -- out of town. It's not
5 clear that -- neither of them ever actually
6 camped in a park. And so -- and, in fact, the
7 dissent below questioned whether one of those
8 two people even had standing.

9 So that there -- even with respect to
10 the named plaintiffs, there was not the sort of
11 examination of their individual --

12 JUSTICE SOTOMAYOR: So you're talking
13 --

14 MR. KNEEDLER: -- circumstances that
15 they're --

16 JUSTICE SOTOMAYOR: -- about standing?
17 That we --

18 MR. KNEEDLER: Well, no -- standing,
19 yes, and then there -- there could be typicality
20 or commonality problems there too if the -- if
21 the -- the two named plaintiffs slept in
22 vehicles, which may present different problems
23 than -- than in the -- in the camp.

24 JUSTICE SOTOMAYOR: Well, we were told
25 that sleeping or camping is out of the case

1 because -- and the court said that.

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

4 JUSTICE SOTOMAYOR: Right.

5 MR. KNEEDLER: But it's not the sort
6 of camping that -- that we've been talking
7 about, to some extent, about sleeping on the
8 ground with a blanket or a tent or something
9 like that.

10 And it's true, the question of tents
11 are not in -- in the case. And if -- even if --
12 you know, if the City wanted to allow tents, I
13 suppose it could even require that they be --

14 JUSTICE SOTOMAYOR: All right.

15 MR. KNEEDLER: -- taken down --

16 JUSTICE SOTOMAYOR: Thank you,
17 counsel.

18 MR. KNEEDLER: -- and put back up.
19 There's a lot of flexibility that the City could
20 have.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

22 JUSTICE KAGAN: Well, I did want to
23 you just about that. I mean, let's say I'm with
24 you, Mr. Kneedler, on the fact that you can't
25 prohibit being homeless, and because you can't

1 prohibit being homeless, you can't prohibit
2 sleeping outside if you are a genuinely homeless
3 person.

4 And let's say I'm with you that the
5 fact that this ordinance says, well, but we're
6 prohibiting using a blanket, that can't be
7 right. You know, you're not, like, just, like,
8 get hypothermia and the problem -- the
9 constitutional problem will go away.

10 But it does seem as though there are
11 line-drawing issues, as you go up, right? It's
12 a very cold night and somebody wants to make a
13 fire. It's raining and somebody wants to put up
14 a tarp. The city has said you can sleep in
15 particular areas, but it turns out that those
16 areas have a ton of crime.

17 You know, you could go on and on. And
18 I'm not -- how do you deal with questions like
19 that? These are not, like, gotcha questions.
20 This is, like, how do you deal with questions
21 like that? Where is the line where the city can
22 say our legitimate municipal interests can come
23 in and say, you know, as to that, as to that,
24 you can't do that.

25 MR. KNEEDLER: Yeah, so what -- and

1 there are several examples that you have there.
2 With respect to tents and tarps, I guess, you --
3 you were saying, I -- I -- I'd think there's a
4 difference between what you might need to
5 realistically sleep outside if it's raining,
6 snowing, or something like that, and what you
7 might prefer to have as a structure for
8 long-term camping.

9 As I mentioned, the city might say you
10 can put up a tent if it's very cold, but you've
11 got to take it down in the morning. That's like
12 being in -- some shelters say you can stay here
13 overnight, but you have to leave during the day
14 and you can come back.

15 I mean, that might seem gratuitous of
16 the city to do it. It might not want to do it.
17 But -- but we're not saying that the Eighth
18 Amendment would prevent it from doing it, and
19 especially as you say, if there's no alternative
20 and it's, you know, 20 -- 20 degrees.

21 With respect to fires, there are
22 really important issues on the other side of
23 that question. In an urban area, if you're
24 creating fires, there may be hazards in a -- in
25 a park. There might be --

1 JUSTICE KAGAN: So how does --

2 MR. KNEEDLER: -- there might be
3 fireplaces in a park.

4 JUSTICE KAGAN: How does a court make
5 these judgments? Because these are tough
6 judgments, and -- and usually they're the kind
7 of judgments that we think of as municipal
8 officials make them.

9 But you're saying, no, there's a
10 certain level where it's out of their hands and
11 it's in the court hands. And I guess I want to
12 know what the principle is where those questions
13 go to the courts and -- and why that principle
14 is the right principle.

15 MR. KNEEDLER: I think -- I mean, I
16 think there are two principles. One is that it
17 -- it's the municipality's determination,
18 certainly in the first instance, with a great
19 deal of flexibility how to address the question
20 of homelessness and a time, place, and manner.
21 And then municipalities should -- should be able
22 to choose the place, should be able to choose
23 the attributes of that place, should be able to
24 say we're not going to allow more than, you
25 know, 20 people or something, you know, to -- to

1 regulate it in that manner.

2 And I think the -- I think the
3 principle, the Eighth Amendment principle, would
4 be whether the -- the city has effectively
5 prevented sleeping outside because the
6 protections needed from the elements are not
7 available. And, certainly in Grants Pass, I
8 would think even a blanket would not be enough
9 under some -- but I think that's the -- I think
10 that's the touchstone.

11 Are you basically -- does it boil down
12 to or is the core principle of Robinson that you
13 can't criminalize homelessness, which includes
14 not being able to criminalize sleeping outside?
15 If you can't sleep outside because of lack of
16 protection from the elements, I think that's the
17 principle a court would -- would apply.

18 But the Ninth Circuit, in a number of
19 cases, has gone way beyond that. And we think
20 that's really the source of the problems that
21 have been identified in the briefs, and not the
22 core principle of -- of Robinson.

23 JUSTICE KAGAN: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice
25 Gorsuch?

1 JUSTICE GORSUCH: Mr. Kneedler, I want
2 to probe this a little bit further because it
3 does seem to me this status/conduct distinction
4 is very tricky. And I had thought that
5 Robinson, after Powell, really was just limited
6 to status.

7 And now you're saying, well, there's
8 some conduct that's effectively equated to
9 status. And -- but you're saying involuntary
10 drug use, you can regulate that conduct. That
11 doesn't qualify as status. You're saying
12 compulsive alcohol use, you can regulate that
13 conduct in public, public drunkenness, even if
14 it's involuntary. That doesn't qualify as
15 status, right?

16 MR. KNEEDLER: Right.

17 JUSTICE GORSUCH: You're saying you
18 can regulate somebody who is hungry and has no
19 other choice but to steal. You can regulate
20 that conduct, even though it's a basic human
21 necessity. And that doesn't come under the --
22 under the status side of the line, right?

23 MR. KNEEDLER: Yes.

24 JUSTICE GORSUCH: Okay. But when it
25 comes to homelessness, which is a terribly

1 difficult problem, you're saying that's
2 different and -- because there are no beds
3 available for them to go to in Grants Pass.

4 What -- what about someone who has a
5 mental health problem that prohibits them --
6 they cannot sleep in -- in a shelter. Are they
7 allowed to sleep outside or not? Is that status
8 or conduct that's regulable?

9 MR. KNEEDLER: I -- I think the -- the
10 question would be whether that shelter is
11 available.

12 JUSTICE GORSUCH: It's available.

13 MR. KNEEDLER: Well, no, available to
14 the individual?

15 JUSTICE GORSUCH: It's available to
16 the individual.

17 MR. KNEEDLER: Well --

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

20 MR. KNEEDLER: I -- I think there
21 might be -- I mean, that's, the mental health
22 problem --

23 JUSTICE GORSUCH: Status or conduct?

24 MR. KNEEDLER: The mental health
25 situation itself is a status.

1 JUSTICE GORSUCH: Right, I know that.

2 MR. KNEEDLER: But -- but it --

3 JUSTICE GORSUCH: It has this further
4 knock-on effect on conduct. Is that regulable
5 --

6 MR. KNEEDLER: I --

7 JUSTICE GORSUCH: -- by the state or
8 not?

9 MR. KNEEDLER: I think that -- I think
10 if the --

11 JUSTICE GORSUCH: All the -- you know,
12 alcohol, drug use --

13 MR. KNEEDLER: Right, right.

14 JUSTICE GORSUCH: -- that they have
15 problems too that -- and -- and -- but you're
16 saying that conduct is regulable. How about
17 with respect to this pervasive problem of -- of
18 persons with mental health problems?

19 MR. KNEEDLER: I -- I think in a
20 particular situation, if the -- if the -- if the
21 person would engage in violent conduct as --

22 JUSTICE GORSUCH: No, no, no, don't
23 mess with my hypothetical, counsel.

24 (Laughter.)

25 JUSTICE GORSUCH: I like my

1 hypothetical. I know you don't. It's a hard
2 one, and that's why I'm asking it. I'm just
3 trying to understand --

4 MR. KNEEDLER: I -- I --

5 JUSTICE GORSUCH: -- the limits of
6 your line.

7 MR. KNEEDLER: I think it would depend
8 on how serious the offense was on the -- on the
9 -- individual.

10 JUSTICE GORSUCH: It's a very serious
11 effect. The mental health problem is serious,
12 but there are beds available.

13 MR. KNEEDLER: What I was trying to
14 say it would depend on how serious being
15 required in -- to go into that facility was on
16 the person's mental -- if it would make his
17 mental health situation a lot worse, then that
18 may not be something that's --

19 JUSTICE GORSUCH: So that's status --
20 that falls on the status side?

21 MR. KNEEDLER: Well, I -- I guess you
22 could put it that way, but I -- I guess what I'm
23 saying --

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

1 MR. KNEEDLER: Well --

2 JUSTICE GORSUCH: I really am just
3 trying to figure out --

4 MR. KNEEDLER: You could view that as
5 --

6 JUSTICE GORSUCH: You're asking us to
7 extend Robinson. I'm asking how far?

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

15 JUSTICE GORSUCH: It is in the sense
16 that the bed is available --

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

18 JUSTICE GORSUCH: -- but not because
19 of their personal circumstances.

20 MR. KNEEDLER: Right. Right. And
21 that's -- and that's my point. It -- it's
22 available in a physical sense. It may be
23 available to somebody else, but requiring an
24 individualized determination might include
25 whether that person could cope in that setting.

1 That's the only --

2 JUSTICE GORSUCH: So that -- so that
3 might be an Eighth Amendment violation?

4 MR. KNEEDLER: Because it may not --
5 yes, because it's not available.

6 JUSTICE GORSUCH: It's an Eighth
7 Amendment violation to require people to access
8 available beds in the jurisdiction in which they
9 live because of their mental health problems?

10 MR. KNEEDLER: If -- if going there
11 would -- would --

12 JUSTICE GORSUCH: How about if they
13 have a substance abuse problem and they can't
14 use those substances in the shelter? Is that an
15 Eighth Amendment --

16 MR. KNEEDLER: That is -- that is not
17 a -- that is not a sufficient --

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

21 MR. KNEEDLER: Well, if they -- if
22 they -- if it's the shelter's rule, then they
23 have no -- they -- they -- they can't go there
24 if they're -- if they're addicted. That's not
25 -- that's not --

1 JUSTICE GORSUCH: So that's an Eighth
2 -- that's an Eighth Amendment violation?

3 MR. KNEEDLER: Well, no, the -- the --
4 the Eighth Amendment violation is prohibiting
5 sleeping outside because the only shelter that
6 is available --

7 JUSTICE GORSUCH: Is not really
8 available to that person?

9 MR. KNEEDLER: -- won't take them --
10 won't take them, yes. And that's an
11 individualized determination.

12 JUSTICE GORSUCH: Same thing with the
13 alcoholic?

14 MR. KNEEDLER: Yes.

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

18 MR. KNEEDLER: If -- if the only
19 shelter in town won't take him, then I think
20 he's in exactly -- he's in the same -- he's in
21 the same condition. And there can be all sorts
22 of reasons, and the City doesn't want normally
23 --

24 JUSTICE GORSUCH: And judges across
25 the country are now going to superintend this

1 under the Eighth Amendment.

2 MR. KNEEDLER: I -- I actually don't
3 think that it -- it requires -- again, I don't
4 think we should let the Ninth Circuit decisions
5 characterize this.

6 JUSTICE GORSUCH: No, you want to --
7 okay. You -- you don't like the class
8 certification, but that question is not before
9 us, counsel.

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

16 JUSTICE GORSUCH: How about --

17 MR. KNEEDLER: -- would retain a lot
18 of flexibility.

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

23 MR. KNEEDLER: No, we --

24 JUSTICE GORSUCH: Is that conduct or
25 is that status?

1 MR. KNEEDLER: I -- it's obviously,
2 there -- there is -- conduct there and we are
3 not suggesting that cities can't enforce their
4 --

5 JUSTICE GORSUCH: Why not, if there
6 are no public facilities available to homeless
7 persons?

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

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

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

21 JUSTICE GORSUCH: But you're saying
22 the Eighth Amendment overrides those. Why not
23 in this circumstance right now?

24 MR. KNEEDLER: No, I'm not -- I'm not
25 saying the Eighth Amendment overrides the laws

1 against drug use.

2 JUSTICE GORSUCH: Oh, I know that.

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

4 JUSTICE GORSUCH: I know that.

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

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

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

11 JUSTICE GORSUCH: Yeah. Last one.
12 How about -- how about fires outdoors? I know
13 you say time, place, and manner, but is there an
14 Eighth Amendment right 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 -- but this is
21 one -- this is one of those things that, you
22 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, there may be
7 inexpensive places. Some people get --

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

10 MR. KNEEDLER: And --

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

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

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

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

24 JUSTICE GORSUCH: But if there isn't
25 --

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

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

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

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

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

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

1 basis.

2 MR. KNEEDLER: Yeah, we haven't ruled
3 out class, we haven't ruled out class.

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

9 MR. KNEEDLER: Well, I think
10 without -- without -- without sufficient inquiry
11 into the individual circumstances is what,
12 particularly with the two class representatives
13 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. If states had a
16 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 don't think the Court should put this core point
8 about Robinson to one side because, in -- the
9 possibility that in Oregon and maybe, you know,
10 maybe no other place, I don't know about
11 California law of necessity, maybe it would be
12 taken care of.

13 I think, at this point in time, that
14 is too speculative to --

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

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

1 day at the food bank, how many people are going
2 to show up that day at the shelter. So it's not
3 like this is a once-a-year thing.

4 MR. KNEEDLER: Yeah, no. For -- for
5 the people actually dealing with it day to day,
6 that is certainly true, the City, the law
7 enforcement, the City liaisons, the nonprofits,
8 but it's not true for the federal court.

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

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

1 effect the time, manner, and place or -- or
2 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 waived 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 doesn't
25 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 towns are -- are coping
7 in the same way, frankly, that individual
8 homeless people do. They do the best they can
9 under the circumstances, but that -- if those
10 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 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 raised as a defense, much
16 like the necessity defense, once a court is in
17 the position, unlike the law enforcement officer
18 just trying to gather information on the ground,
19 to determine whether there were available beds,
20 whether the person had a place to go. Why is a
21 pre-enforcement challenge the right way to think
22 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 I think --

5 JUSTICE BARRETT: -- make sense to

6 think about it in this --

7 MR. KNEEDLER: -- for this particular
8 Eighth Amendment claim, the claim is that the
9 Eighth Amendment prohibits criminalizing the act
10 to begin with. So the -- the -- it's not just
11 the punishment that would be --

12 JUSTICE BARRETT: Well, I mean --

13 MR. KNEEDLER: -- meted out at the end
14 of the day.

15 JUSTICE BARRETT: -- I understand
16 that. I mean -- let's see -- I do understand
17 that, but it's not that it categorically
18 prohibits punishing this act. I mean, as -- as
19 one might say if it, you know, prohibited
20 sleeping altogether for everyone, right, this is
21 because it -- the Eighth Amendment claim is that
22 it punishes, criminalizes this act in a way that
23 false disproportionately and unconstitutionally
24 on a particular class of people.

25 And that requires adjudication at the

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

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

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

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

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

18 MR. KNEEDLER: But -- but I suppose in
19 -- in Robinson itself, if the person had been
20 arrested once, been arrested a second time, and
21 then he's arrested a third time, I would think
22 he could bring a pre-enforcement challenge
23 because the way the police were interacting with
24 him was not respecting the Robinson principle
25 with respect to Robinson himself.

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

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

21 But -- and the local government's
22 social service people or the non-profits went
23 out and interviewed everybody who was in the --
24 who was in the encampment in McPherson square
25 and -- and told them about what services are

1 available. There was advance notice given that
2 the encampment is going to be cleared within --
3 I think it was 30 days. And people were -- so
4 people were warned 30 days in advance. They
5 were warned the night before, the day before, so
6 they could collect their things. Some just
7 moved somewhere else. Some did take the -- the
8 city up on the offer. Some went into shelters.

9 So that -- and that's the way that
10 shelters are -- excuse me -- encampments are
11 typically cleared, is the -- and particularly in
12 -- in cities where you've gotten a number of
13 amicus briefs explaining the problem. That's
14 what happens.

15 It isn't the -- it isn't the example
16 we've been talking about where the law
17 enforcement officer for the first time is
18 encountering the person. Smaller cities don't
19 have that capability, but Grants Pass does have
20 these outreach workers. And that's who --
21 that's who carries on the -- the dialogue.

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

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: And so, given that

1 experience and the fact that Martin has actually
2 been the law since 2018, we don't really have to
3 speculate as to how this works, right? I mean,
4 this is happening -- this is the law, right now,
5 in the Ninth Circuit.

6 MR. KNEEDLER: The -- the Robinson
7 principle is.

8 JUSTICE JACKSON: The Robinson
9 principle as adopted in Martin. My
10 understanding is, for example, California says
11 that's the law, we comply with it, and there we
12 are.

13 MR. KNEEDLER: Yeah. They -- they are
14 not asking for Robinson to be overruled. What
15 they're objecting to is the injunctions that go
16 well beyond that by --

17 JUSTICE JACKSON: Yes, I understand.
18 I'm just sort of responding to some of the
19 questions that you've gotten as to sort of how
20 does this rule work, can it work, that sort of
21 suggest that it's not already happening on the
22 ground in these places, that the shelters and
23 the workers are aware of what is available, that
24 people are being advised, that, you know, the
25 principle of Martin, at least in the Ninth

1 Circuit, is we hold that so long as there's a
2 greater number of homeless individuals in a
3 jurisdiction than the number of available beds,
4 the jurisdiction cannot prosecute homeless
5 individuals for sitting, lying, sleeping. This
6 is not a new rule.

7 That's what the law is right now in
8 that situation, right?

9 MR. KNEEDLER: Yeah, that -- that's
10 what -- that's what Martin -- I don't want to
11 say that the -- the clearance procedures work
12 perfectly in every case or that they're
13 available in every case, but --

14 JUSTICE JACKSON: No, I just want to
15 say we don't have to speculate about how the
16 rule works.

17 MR. KNEEDLER: Or -- yeah, how --

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

20 MR. KNEEDLER: How it's -- how it's
21 supposed to work.

22 JUSTICE JACKSON: Yes.

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

25 JUSTICE JACKSON: All right. Let me

1 ask you about whether or not you are asking for
2 an extension of Robinson. That's come up a
3 couple of times, and I don't -- I don't -- I
4 don't see it as an extension or whether that's
5 being asked for. So can you explain whether
6 there's some sort of extension of Robinson --

7 MR. KNEEDLER: No.

8 JUSTICE JACKSON: -- happening today?

9 MR. KNEEDLER: No, I don't think so at
10 all because, as I said, the sleeping outside is
11 -- is an essential human function, and if you
12 say someone can't sleep outside, that's --
13 that's sort of -- or has no place to sleep
14 inside, that's the definition, really, of -- of
15 homelessness.

16 JUSTICE JACKSON: So you're not
17 suggesting that people should be excused from
18 engaging in otherwise criminal conduct? So
19 we've heard this example about people stealing
20 in order to eat. I mean, that would be a
21 situation in which someone is actively
22 participating in what would be otherwise
23 criminal behavior --

24 MR. KNEEDLER: Yes.

25 JUSTICE JACKSON: -- if anybody did

1 it.

2 MR. KNEEDLER: Yes.

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

8 MR. KNEEDLER: No. That's correct.
9 And one -- one thing that I think is important
10 to keep in mind in this, is if Grants Pass can
11 do this, so could every other city. So could a
12 state do it state-wide. And, eventually, a
13 homeless person would have no place to be.

14 JUSTICE JACKSON: So this is more like
15 the sort of initial hypo of criminalizing eating
16 outside, not that you'd be doing something that
17 was otherwise criminally culpable?

18 MR. KNEEDLER: Yeah. Yes. I mean, I
19 suppose there could be ordinances that the city
20 would have about where you can -- you know, you
21 can't eat at -- can't consume --

22 JUSTICE JACKSON: That is time, place,
23 and manner.

24 MR. KNEEDLER: Yes.

25 JUSTICE JACKSON: Final question. You

1 mentioned with respect to states doing this.
2 Why isn't the federal government arguing this
3 case is moot in light of 195.530? This is the
4 Oregon recently passed statute that I mentioned
5 earlier.

6 Why -- why -- why doesn't the
7 government read that law as I do to prevent
8 Grants Pass from enforcing its ordinances to
9 block sleeping outdoors at all places and all
10 times?

11 MR. KNEEDLER: Yeah, no, I -- I -- I
12 certainly agree there appears to be a pretty
13 stark inconsistency between that state law and
14 the ordinance. It hasn't been applied. It has
15 to be objectively, reasonable, I think --

16 JUSTICE JACKSON: So would the federal
17 government --

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

20 JUSTICE JACKSON: Right. So what
21 would -- what would -- what would your position
22 be if the Court decided that as a matter of
23 constitutional avoidance or whatever else that
24 we don't need to hear this or reach this
25 decision in this case, given this new state

1 ordinance?

2 MR. KNEEDLER: That -- that would be
3 one possibility. It wouldn't answer the core
4 Robinson principle point and -- and the
5 limitations on -- on that point that has -- that
6 has triggered the amicus briefs.

7 JUSTICE JACKSON: Right. But our
8 typical rule is that if there's some other way,
9 we don't necessarily comment on constitutional
10 issues, correct?

11 MR. KNEEDLER: Right. And -- and --
12 yes. And -- and that would be -- that would be
13 one course to see how what time, place and
14 manner meant under state law and how -- how the
15 Eighth Amendment could accommodate that or take
16 it into account.

17 JUSTICE JACKSON: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Ms. Corkran.

21 ORAL ARGUMENT OF KELSI B. CORKRAN

22 ON BEHALF OF THE RESPONDENTS

23 MS. CORKRAN: Mr. Chief Justice and
24 may it please the Court:

25 Robinson v. California holds that

1 status-based punishment schemes are
2 categorically cruel and unusual under the Eighth
3 Amendment. The challenged ordinances inflict
4 status-based punishment in both effect and
5 purpose.

6 Although the City describes its
7 ordinances as punishing camping on public
8 property, it defines campsite as anyplace a
9 homeless person is while covered with a blanket.
10 The City interprets and applies the ordinances
11 to permit non-homeless people to rest on
12 blankets in public parks while a homeless person
13 who does the same thing breaks the law.

14 The ordinances by design make it
15 physically impossible for homeless people to
16 live in Grants Pass without facing endless fines
17 and jail time. The only question under Robinson
18 is whether there's any meaningful difference
19 between a law that says being homeless is
20 punishable and a law that says being homeless
21 while breathing or sleeping or blinking is
22 punishable.

23 In other words, does adding a
24 universal human attribute to the definition of
25 the offense make the punishment conduct-based

1 instead of status-based? The answer is no. The
2 purpose and effect of the second statute is
3 exactly the same as the first, to make people
4 with a status endlessly and unavoidably
5 punishable if they don't leave Grants Pass.

6 Indeed all the ordinances do is turn
7 the City's homelessness problem into someone
8 else's problem by forcing its homeless residents
9 into other jurisdictions.

10 The injunction below leaves the City
11 with an abundance of tools to address
12 homelessness. It can impose time, place, manner
13 restrictions on when and where homeless people
14 sleep.

15 It can ban tents and clear
16 encampments. It can enforce a sleeping ban
17 against homeless people who declines shelter and
18 it can fully enforce laws prohibiting littering,
19 public urination, defecation, drug use and
20 violent or harassing behavior.

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

1 The state police power is broad but it
2 does not include the power to push the burdens
3 of social problems like poverty on to other
4 communities or the power to satisfy public
5 demand by compromising individual constitutional
6 rights.

7 I welcome the Court's questions.

8 JUSTICE THOMAS: In Robinson, there
9 was a statute that outlawed -- that said that
10 "to be addicted" is a crime. Is there an
11 ordinance here that says "to be homeless" is a
12 crime?

13 MS. CORKRAN: So the language for the
14 purposes of a temporary place to live bakes
15 homelessness into the -- the definition of the
16 offense, Justice Sotomayor was talking about
17 that earlier.

18 So when you combine that language with
19 the -- the best of the camping definition, what
20 you have is an ordinance that says being
21 homeless, while sleeping with a blanket, is
22 punishable. And as I just said earlier, the
23 question becomes when you attach the status to
24 the universal attribute of -- of sleeping, does
25 it then transform the offense into conduct-based

1 punishment instead of status-based punishment
2 and I think the answer is no.

3 CHIEF JUSTICE ROBERTS: A number of
4 us, I think, are having difficulty with the
5 distinction between status and conduct. You'll
6 acknowledge, won't you, that in those terms,
7 there's a difference between being addicted to
8 drugs and being homeless?

9 In other words, someone who's homeless
10 can immediately become not homeless, right, if
11 they find shelter.

12 Someone who is addicted to drugs, it's
13 not so -- so easy. It seems to me that in
14 Robinson, it's much easier to understand the
15 drug addiction as an ongoing status, while here
16 I think it is different because you can move
17 into and out of and into and out of the status,
18 as you would put it, as being homeless.

19 MS. CORKRAN: So it's interesting, we
20 today understand addiction as an immutable
21 status. In Robinson, the Court suggested that
22 someone might be recovered and no longer have
23 the status of addiction. So the Robinson court
24 wasn't thinking about addiction as something
25 that couldn't change over time.

1 CHIEF JUSTICE ROBERTS: Well, that may
2 limit the applicability of Robinson to a
3 different situation, but what is the -- I mean,
4 what is the analytic approach to deciding
5 whether something's a status or a situation of
6 conduct?

7 MS. CORKRAN: So the question is a
8 status is something that a person is when
9 they're not doing anything. So being addicted,
10 having cancer, being poor, are all statuses that
11 you have apart from any conduct.

12 CHIEF JUSTICE ROBERTS: Having cancer
13 is not the same as being homeless, right? I
14 mean, maybe I'm just repeating myself because
15 homelessness can -- you -- you can remove the
16 homeless status in an instant if you move to a
17 shelter or situations otherwise change. And of
18 course it can be moved the other way as well if
19 you're kicked out of the shelter, whatever.

20 So that is a distinction from all
21 these other things that have been labeled
22 status, isn't it?

23 MS. CORKRAN: I -- I don't think so
24 because, you know, a cancer patient can go into
25 remission, they no longer have that status. I

1 don't think -- I mean, I don't think there's any
2 question that being poor is a status. It's
3 something that you are apart from anything you
4 do. It's a status that can change over time and
5 at that point you wouldn't be a part of the
6 class but I don't think it changes the fact that
7 it is a status.

8 And what Robinson found so offensive
9 about statuses is --

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

12 MS. CORKRAN: No, because being a bank
13 robber means you rob banks. So -- so the
14 definition and the conduct --

15 CHIEF JUSTICE ROBERTS: Violating this
16 ordinance means upon being asked to leave you
17 don't leave.

18 MS. CORKRAN: Violating this ordinance
19 means you're homeless. So again, homelessness
20 is not something that you do. It's just
21 something that you are.

22 And so the question becomes when you
23 attach the universal human attribute of sleeping
24 or breathing to that status, does it make the
25 punishment conduct-based instead of status-based

1 and I think the answer is --

2 JUSTICE SOTOMAYOR: Counsel, Edwards
3 v. California in 1941 struck down a law that
4 made it a crime to transport an indigent person,
5 correct?

6 MS. CORKRAN: Yes.

7 JUSTICE SOTOMAYOR: Indigency is a
8 not -- is a condition that can change over time,
9 but the law was aimed at the transport of a
10 person who wasn't morally reprehensible.

11 MS. CORKRAN: Yes. I think that's
12 notable because our history and tradition as a
13 country is to emphatically reject any sort of
14 local legislative scheme that has the effect of
15 pushing the burdens of poverty or indigency into
16 other communities. It's woven throughout
17 through our Constitution.

18 So Edwards located it in the Dormant
19 Commerce Clause. We have Saenz v. Roe which
20 locates it in the Privileges of Immunities
21 Clause; Papachristou addresses that status-based
22 punishment in the context of a procedural due
23 process.

24 What Robinson held is that when that
25 expulsion is effectuated through status-based

1 punishment, it violates the Punishments Clause.

2 JUSTICE BARRETT: How do you define a
3 community?

4 So when Justice Alito was describing
5 how New Jersey has so many tightly woven
6 municipalities close together and here, you
7 know, the Chief Justice was asking about whether
8 if Grants Pass, if there were -- was a new
9 homeless shelter with lots of beds right across
10 the border 10 minutes away, you know, could that
11 be taken into account?

12 And I think there was some back and
13 forth and not necessarily agreement on that.
14 What is your position? How do you define a
15 community? Take that example of a homeless
16 shelter right outside the limits of Grants Pass.

17 MS. CORKRAN: Yes. So to -- so to
18 answer that hypothetical first, I'm not
19 concerned -- I don't have any problems with
20 saying that a homeless person in Grants Pass has
21 legal and physical access to a shelter that's
22 just over the lines, if that's, in fact, true.

23 Lots of jurisdictions limit their
24 homeless shelters to people who are residents.
25 So -- and just to be clear, there was no

1 suggestion in the record here that there were
2 any shelters available outside of Grants Pass.

3 JUSTICE BARRETT: Understood. But so
4 community doesn't need to be determined by
5 jurisdictional lines is what you're telling
6 me --

7 MS. CORKRAN: No.

8 JUSTICE BARRETT: -- as a matter of --
9 because, let's see, I'm asking all of this
10 because, in response to Justice Sotomayor, you
11 were pointing out that our -- you know, our
12 nation has a history and tradition of not saying
13 you can shunt homeless people or the poor out of
14 your jurisdiction and on to others.

15 So -- or out of your community and on
16 to others is I think how you -- how you phrased
17 it. So I'm asking how do we know what those
18 lines are? And you're saying it doesn't have to
19 be jurisdiction-specific.

20 MS. CORKRAN: No. I think
21 jurisdiction matters because that tells us kind
22 of the lines in which the -- whatever ordinance
23 or statute applies. So, when shelter is
24 available, the ordinances are enforceable
25 because they punish the conduct of not going to

1 the shelter, as opposed to the status of
2 homelessness.

3 So I think that a -- a municipality
4 can punish the conduct of not going to a shelter
5 that's just over the line if you have physical
6 and legal access to it. Now, for the reasons
7 you say -- and this dates back to our -- our
8 settlement system at the Founding Era -- a lot
9 of municipalities do not allow people from
10 outside of the jurisdiction to use their
11 shelters, and so, under those circumstances, the
12 shelter wouldn't be legally available.

13 CHIEF JUSTICE ROBERTS: Is that cruel
14 and unusual punishment for them to turn away
15 someone who wants to use their shelter?

16 MS. CORKRAN: No, that wouldn't be
17 punishment. Punishment is the infliction of
18 suffering for a crime.

19 JUSTICE JACKSON: Counsel, I --

20 CHIEF JUSTICE ROBERTS: Well, then --
21 then why is the Eighth Amendment implicated in
22 this case?

23 MS. CORKRAN: Because, here, we have
24 fines and jail time. We have a status-based
25 punishment scheme that is, in fact, inflicting

1 punishing -- punishment within the meaning of
2 the Eighth Amendment.

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

5 CHIEF JUSTICE ROBERTS: No, I'm done.
6 That's fine.

7 JUSTICE BARRETT: Do you want to
8 address some of the line-drawing problems that
9 we've been going back and forth? I mean,
10 Justice Gorsuch pointed out, you know, eating is
11 a basic human need, and it's not the case that
12 soup kitchens or social services will always be
13 able to meet it, and so he asked about whether
14 the Eighth Amendment would prohibit punishment
15 for stealing food.

16 You might ask the same questions about
17 trespass and squatting in structures if there
18 are -- you know, if that was the best
19 alternative. So how do we -- how do we draw
20 these difficult lines about, you know, public
21 urination and those sorts of things?

22 MS. CORKRAN: So I'll start with
23 stealing food. Stealing food is not part of
24 definition of homelessness, and it's also not a
25 universal attribute. So -- so I put that

1 outside the scope of any of the arguments we're
2 making here.

3 With respect to public urination and
4 defecation, if you had a -- I don't think this
5 would ever exist, but if you had a law that said
6 homeless people cannot urinate or defecate
7 anywhere within city limits, I think then it
8 starts to look like this case. But, if you're
9 saying that people can't urinate or defecate on
10 public property, it is almost -- it's hard to
11 imagine a situation where --

12 JUSTICE BARRETT: They have no place
13 else to go. So a homeless person, there --
14 there's no facilities available, and a homeless
15 person has no place else to go. How could a --

16 MS. CORKRAN: You might have a -- I
17 mean, there are commercial establishments. I
18 don't know that anyone's pointed to a
19 jurisdiction where you truly don't have access.
20 But if we had to say --

21 JUSTICE BARRETT: Well, what's the
22 constitutional principle?

23 MS. CORKRAN: Right.

24 JUSTICE BARRETT: Take my
25 hypothetical. Say there -- there's not --

1 commercial establishments don't want non-patrons
2 coming in to use the facilities, there are no
3 public facilities, and it's a generally
4 applicable rule that says no public urination.

5 MS. CORKRAN: So I think, there, one
6 distinction between urination and defecation and
7 sleeping is that sleeping outside is part of the
8 definition of homelessness, right? Homelessness
9 is lacking a fixed, regular nighttime address.
10 So the -- the sleeping prohibition goes more
11 directly to the status of homelessness than
12 urination or defecation.

13 JUSTICE BARRETT: So it would not --
14 so it would not violate the Eighth Amendment to
15 punish public urination and defecation?

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

19 JUSTICE BARRETT: Not the theory that
20 you're -- okay.

21 MS. CORKRAN: Yes.

22 JUSTICE KAGAN: What do you think, Ms.
23 Corkran, of this idea that Oregon's necessity
24 defense essentially functions as an Eighth
25 Amendment in this context, so we don't have to

1 constitutionalize the kinds of limits that
2 you're talking about?

3 MS. CORKRAN: Yeah, I would say it's
4 not at all clear that that's true. As Mr.
5 Kneedler pointed out, you know, there is a
6 necessity defense in Oregon law, but, so far,
7 the Oregon courts have not applied it to this
8 circumstance. It also wouldn't necessarily be
9 available for the fines, the citations, we have
10 here.

11 But I think that this question about
12 the availability of the necessity defense really
13 goes to the injunctive posture of the case.
14 It's not going to come up if you're in the --
15 you know, you're -- if you're presenting the
16 Eighth Amendment as an affirmative defense at
17 the same time as a necessity defense in a
18 criminal prosecution, right, it kind of moots
19 out the -- the Eighth Amendment claim.

20 But going to Justice Barrett's
21 questions about injunctive relief, there, the
22 question you're asking is, does the plaintiff
23 have a credible threat of future punishment?
24 I'd say first that the injunctive relief is not
25 before the Court. The City has not challenged

1 the propriety of the injunction here. So I
2 think it's a question for another day.

3 The courts here did find that the
4 plaintiffs had shown a credible threat of future
5 punishment, and so I think that resolves the
6 issue for -- for this case.

7 JUSTICE GORSUCH: Counsel, along those
8 lines, we -- we haven't mentioned it yet, but in
9 the briefing, there's a lot of discussion about
10 the fact that Robinson's Eighth Amendment
11 holding with respect to status came without any
12 adversarial testing, wasn't what was argued by
13 the parties, it didn't have a whole lot of
14 citation or support, it came kind of in a breezy
15 paragraph.

16 MS. CORKRAN: Right.

17 JUSTICE GORSUCH: And some have
18 suggested that that's really a mistake because
19 the Eighth Amendment's about punishments. It
20 doesn't prevent states -- limit states' capacity
21 to engage in passing laws that make conduct or
22 actions or anything a crime. It just goes to
23 the nature of what punishments follow, putting
24 aside the Excessive Fines Clause.

25 MS. CORKRAN: Yeah.

1 JUSTICE GORSUCH: So there's a lot of
2 discussion in the brief about that and some --
3 some suggestion that, really, it's the
4 Fourteenth Amendment that should be doing work
5 here, if there is work to be done, because some
6 form of the necessity defense has been always
7 understood as inhering in due process from the
8 founding and whether that can be enforced
9 through state laws, which might differ, Kansas
10 versus Kahler, but have to -- have to
11 nonetheless cover the territory, and whether
12 there might be injunctive relief on that basis,
13 possible in advance, not limited to defenses,
14 possible.

15 Just reactions to that. I -- we
16 haven't yet touched on it.

17 MS. CORKRAN: So Robinson predates
18 Graham v. Connor, but I think it espouses the
19 same principle, which is, when you can identify
20 an explicit textual source for a right, you
21 locate the right in that amendment and not more
22 generalized notions of due process. And so what
23 the Robinson Court did was they --

24 JUSTICE GORSUCH: Well, but, here, the
25 more -- the more -- the more limited -- I mean,

1 let me just --

2 MS. CORKRAN: Yeah.

3 JUSTICE GORSUCH: -- play with that
4 for a minute. The more natural home for a
5 necessity-type argument is due process. That's
6 where it's always historically been understood
7 to lie, not the -- not an amendment having to do
8 with punishments, right? One has to do with
9 what you can criminalize. The other has to do
10 with the punishments that follow.

11 And you're not really attacking the
12 punishments here. You're saying any punishment
13 is impermissible.

14 MS. CORKRAN: Right.

15 JUSTICE GORSUCH: And -- and any
16 punishment is impermissible. And that is a
17 necessity defense. That's a classic necessity
18 defense.

19 MS. CORKRAN: So I think that it's --
20 it's right that Robinson describes what it was
21 doing as saying that the Eighth Amendment
22 prohibited the criminalization. You see that
23 language in I think Weems and Wilkerson v. Utah.
24 I -- I agree it seems like a bit of a strange
25 fit.

1 JUSTICE GORSUCH: So, if that's the
2 case, if that's the case, let me just -- you
3 know, wouldn't that get rid of this awful
4 status/conduct distinction that we have -- that
5 we're struggling with here today? Because, if
6 it's a necessity, it doesn't matter why it's a
7 necessity. It's -- every person can make their
8 own argument about why it was necessary, and
9 then the courts will decide. We don't get into
10 the status/conduct stuff that -- that Robinson
11 seems to invite. Thoughts?

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

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

17 MS. CORKRAN: The Oregon courts so far
18 have not applied the Oregon --

19 JUSTICE GORSUCH: I didn't ask whether
20 the courts --

21 MS. CORKRAN: Yeah.

22 JUSTICE GORSUCH: -- have applied it.
23 You haven't asked them to apply it, and you're
24 --

25 MS. CORKRAN: They've had a couple of

1 cases like this.

2 JUSTICE GORSUCH: Have they?

3 MS. CORKRAN: Mr. Kneedler referred to
4 the Bartlett case.

5 JUSTICE GORSUCH: And how are they
6 going?

7 MS. CORKRAN: The -- so far, they have
8 not applied the necessity defense. They left
9 open the possibility that it might apply, but
10 they haven't applied it --

11 JUSTICE GORSUCH: Why not?

12 MS. CORKRAN: -- yet. They didn't
13 find that it was necessary under those
14 circumstances. And, again, we --

15 JUSTICE GORSUCH: Did they rule out
16 that it might be necessary under some
17 circumstances?

18 MS. CORKRAN: They left open that
19 possibility, but I'd also say the -- the civil
20 citation or the -- I don't want to say "civil."
21 It's a little murky. But the -- the fines here
22 are not subject, I don't think, or it's not
23 clear, to the necessity defense. So it wouldn't
24 take care of the entirety of the claim.

25 JUSTICE GORSUCH: You've got Excessive

1 Fines Clause there, though, right?

2 MS. CORKRAN: Yes.

3 JUSTICE GORSUCH: And that's not
4 before us either?

5 MS. CORKRAN: We have raised the fines
6 before this Court because our challenge is to
7 the -- the package of punishments, and,
8 historically, that's how the Court has looked
9 applying the Excessive Fines Clause and the
10 Punishment Clause together. We're in a really
11 unfortunate posture here that we have claims
12 that involve both fines and punishment, and yet
13 we're only here on the Punishments Clause piece
14 of it. It was one of the reasons we suggested
15 this isn't a great vehicle.

16 I think the Court can say that, you
17 know, it's not going to reach the fines because
18 we won on that below, and so you can just focus
19 on the -- on the -- the jail time for -- for
20 criminal trespass.

21 JUSTICE ALITO: What is your
22 definition of the status of homelessness? Is it
23 the lack of a place to stay indoors on a
24 particular night, or is it something broader
25 than that?

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

2 JUSTICE ALITO: Does it require more
3 than that?

4 MS. CORKRAN: Right. Homelessness is
5 defined as lacking a fixed, regular, adequate
6 nighttime address. So, if you have a home, you
7 have a home -- I'm not homeless when I go to
8 Grants Pass because I have a home in D.C.

9 The second part of our class
10 definition focuses on whether the homeless
11 person has access to shelter. That's not
12 because that's part of the status. It's
13 because, when someone has access to shelter,
14 then the ordinances aren't punishing them for
15 the status. It's punishing them for the conduct
16 of not going --

17 JUSTICE ALITO: Well, I -- I asked the
18 question because if homelessness is defined as
19 simply lacking a place to stay indoors on a
20 particular night, then there is an ironclad
21 connection between the conduct, which is
22 sleeping outside, and the status of
23 homelessness.

24 But if homelessness is defined to
25 require more than that, then my question would

1 be whether someone who is lacking a place to
2 stay on a particular night or for a particular
3 period of time is homeless, if the reason why
4 the person finds himself or herself in that
5 status is, for example, the person refuses to
6 take antipsychotic medicine that's been
7 prescribed or refuses to go to drug rehab or
8 rehabilitation for alcoholism or the person has
9 chosen to move from one place where the person
10 might have a shelter or a home where the person
11 could live to another place.

12 What about all of that?

13 MS. CORKRAN: So the status of
14 homelessness is something that only changes once
15 the person has a home. You lose your home,
16 you're homeless. If you have a home again, then
17 you're not in the status anymore.

18 I think what your question gets at is
19 that second piece, which is whether a person has
20 access to shelter. That can change from day to
21 day. And so --

22 JUSTICE ALITO: No, that's not really
23 what my question gets at. The question is you
24 can draw a distinction -- status is different
25 from conduct, but there are some instances of

1 conduct that are closely tied to status or if
2 homelessness is defined as simply lacking a
3 place to stay in a particular night, they amount
4 to the same thing. The definition of
5 homelessness encompasses the conduct of sleeping
6 outside.

7 So my question is whether this is --
8 what if the person finds that person in a
9 homeless state because of prior life choices or
10 their refusal to make future life choices?
11 That's the question.

12 MS. CORKRAN: Yeah, yeah. So -- so
13 our definition of lacking access to shelter is
14 lacking physical or legal access to shelter.
15 And you're looking at the person situation on
16 that particular night.

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

21 Robinson certainly didn't do that sort
22 of analysis with respect to addiction but there
23 could be situations where there is such a -- a
24 tight causal nexus between a choice a person has
25 made and their lack of shelter access that you

1 would say this person has chosen not to take
2 this shelter and to be very clear, if you
3 decline shelter that is physically and legally
4 available to you, you're not in a class --
5 you're in --

6 JUSTICE ALITO: Well, see but the
7 problem is that once you move away from the
8 definition that makes the inquiry basically
9 tautological, then you get into the question of
10 assessing the closeness of the connection
11 between the status and the conduct.

12 And you do run into problems with the
13 person who's a kleptomania -- a kleptomaniac, or
14 a person who suffers from pedophilia. So how do
15 you distinguish that? How does the Court assess
16 how close the connection has to be?

17 MS. CORKRAN: So -- so for both of
18 those categories, the -- the -- the status is
19 defined -- I don't know if status is the right
20 word there -- being a pedophilia or having
21 pedophilia is defined by the urge that you have,
22 not by your conduct and acting on that urge.

23 So if someone were to act on that
24 urge, that tight causal nexus on why they didn't
25 have access to shelter, then they would be

1 outside of our claim.

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

5 You seem to say that homelessness, as
6 you've defined, is not lacking access to shelter
7 on a particular night.

8 Is that -- am I right about that?

9 MS. CORKRAN: That's right. We're
10 use -- I use the HUD definition which is
11 homelessness means you lack a fixed regular
12 adequate night-time address.

13 JUSTICE JACKSON: So that kind of
14 thing might -- going back to the Chief Justice's
15 original question, that's not changing night to
16 night --

17 MS. CORKRAN: No, I mean --

18 JUSTICE JACKSON: -- in the same way.

19 MS. CORKRAN: -- it can change over
20 time the same way that a cancer diagnosis could
21 change over time, but --

22 JUSTICE JACKSON: And then the other
23 part that was interesting to me is that assuming
24 that's your definition, homelessness lacking a
25 fixed regular address, when someone does have

1 access to a shelter even though they lack a
2 fixed, regular address, the ordinance in that
3 situation, I thought you said, is operating to
4 punish the act of not going to the shelter --

5 MS. CORKRAN: Yes.

6 JUSTICE JACKSON: -- as opposed to
7 punishing the status of being homeless.

8 MS. CORKRAN: Yes, that's -- that's
9 the exact reason that reasonable time, place,
10 manner restrictions aren't a problem because if
11 you have time, manner -- time, place, and manner
12 restrictions what you're doing is punishing the
13 conduct of not going to sleep where you're
14 allowed to go.

15 That rationale doesn't work when
16 someone has nowhere to go.

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

20 MS. CORKRAN: So we didn't argue
21 mootness. We made this point in our brief in
22 opposition. We didn't say mootness just because
23 we don't have an injunction under the Oregon law
24 yet and it's not self-executing.

25 I don't think there is any question

1 that the ordinances fall under the Oregon law.
2 I mean, it was intended to codify Martin. It
3 requires that any sort of restrictions on
4 sleeping or resting outside are reasonable with
5 respect to homeless individuals.

6 Clearly the ordinances here don't meet
7 that standard. So I -- I -- I certainly
8 wouldn't have any concerns with the Court saying
9 as a matter of constitutional avoidance, it
10 appears this Oregon law resolves this whole
11 issue so, you know, we're dismissing as
12 improvidently granted or however the Court
13 wanted to -- to resolve the case.

14 JUSTICE JACKSON: Thank you.

15 JUSTICE SOTOMAYOR: So the plaintiff
16 -- I'm sorry.

17 The plaintiff who died here had used
18 up her provisional stay credits at the time of
19 class certification, so she no longer had a
20 shelter that was willing to take her.

21 I think the hard hypothetical that
22 Justice Alito was positing and in part Justice
23 Gorsuch is the person who owns a dog.

24 MS. CORKRAN: Yeah.

25 JUSTICE SOTOMAYOR: Or let's say a

1 mentally ill person. Do you have the same
2 response as the government?

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

8 So if someone turns down a shelter
9 offer that's physically and legally available
10 because of their dog, they would not be within
11 the scope of our claim.

12 To get to the mental health
13 hypothetical, if a -- if the person's mental
14 health issues made the shelter either physically
15 unavailable to them because if they went there,
16 they would be at substantial risk of bodily harm
17 or death, then I would say the shelter isn't
18 physically available.

19 You could also have a shelter that
20 won't take people with mental health problems,
21 in which case it wouldn't be legally available
22 to them.

23 I would say that if the shelter is
24 physically and legally available, then they're
25 outside the scope of their -- our claim but they

1 might have ADA claims or some other law that
2 applies that would restrict the city's ability
3 to punish them for not going to that place but
4 that's outside our case.

5 JUSTICE SOTOMAYOR: Thank you.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel. Can you go from having a fixed regular
8 address to not having one?

9 MS. CORKRAN: Yes.

10 CHIEF JUSTICE ROBERTS: Can you go
11 from not having one to having one?

12 MS. CORKRAN: Yes. People --

13 CHIEF JUSTICE ROBERTS: Thank you.
14 Justice Thomas?

15 JUSTICE THOMAS: In Robinson, a
16 narcotics officer testified that based on his
17 experience, the marks on the defendant's arm
18 suggested that he was an addict.

19 MS. CORKRAN: Yes.

20 JUSTICE THOMAS: Do we have anything
21 like that where an expert testifies that these
22 people -- that the individuals here are
23 homeless?

24 MS. CORKRAN: So here the legal burden
25 was on the Plaintiffs to show that they were

1 homeless. The lower courts found that their
2 declarations and depositions satisfied that.

3 JUSTICE THOMAS: Well, what I'm
4 interested in is the status. You say that this
5 is the equivalent of Robinson. And I'm trying
6 to determine where the status of homelessness
7 was determined and how it plays a role in this
8 case.

9 MS. CORKRAN: So it was determined
10 based on the declarations and depositions of
11 the -- the punitive class members and named
12 plaintiffs. It also, you know, we talked a
13 little about the ratio between beds to
14 population.

15 The Ninth Circuit ended up rejecting
16 that as a hard and fast rule, but the lack of
17 shelter beds in Grants Pass provides credibility
18 to the putative class members' declarations when
19 they say they have nowhere to go.

20 I'd also say I don't understand the
21 City to have ever contested that the named
22 plaintiffs are homeless. What they contested is
23 whether they had access --

24 JUSTICE THOMAS: I think what's
25 confusing me is that when I read the ordinance,

1 the ordinance is an anti-camping ordinance.
2 Would this -- would a -- would a backpacker who
3 happens to be in the area for a few days be
4 allowed to camp on -- on public property?

5 MS. CORKRAN: I don't -- I think
6 theoretically no but I would say that the City
7 has never -- it was not able to identify any
8 circumstance in which it had applied --

9 JUSTICE THOMAS: I understand that.
10 But it -- but -- it would apply to a backpacker?

11 MS. CORKRAN: So I -- I -- it would
12 depend on the circumstances. The line that the
13 police officers drew in their depositions was
14 that if they saw a non-homeless person lying on
15 a blanket, they wouldn't enforce the ordinance.

16 JUSTICE THOMAS: No, I'm saying some
17 -- he's back --

18 MS. CORKRAN: Yep. So --

19 JUSTICE THOMAS: -- someone with a
20 backpack who's been wandering around for a
21 couple of years, in the continental divide or
22 something.

23 MS. CORKRAN: So I can imagine -- I'm
24 putting myself in the place of the officers who
25 were deposed. If you gave them that

1 hypothetical --

2 JUSTICE THOMAS: Yeah.

3 MS. CORKRAN: -- they might say no,
4 that person isn't setting up a temporary place
5 to live; they're just traveling through town.
6 That -- that particular hypothetical didn't come
7 up, but we do --

8 JUSTICE THOMAS: So that would not
9 violate the anti-camping ordinance?

10 MS. CORKRAN: I don't know. I mean,
11 maybe this gets to the vagueness of the --

12 JUSTICE THOMAS: Yeah.

13 MS. CORKRAN: -- of the provisions,
14 but --

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 Justice Sotomayor?

17 Justice Kagan?

18 Justice Kavanaugh?

19 JUSTICE KAVANAUGH: I think one of the
20 premises of your argument is that this is not
21 good policy for the homeless, and good policy
22 would -- would help homeless individuals
23 transition, get mental health treatment, get
24 substance abuse treatment, job -- job
25 assistance, and that this doesn't -- doesn't

1 fulfill those objectives.

2 And maybe you -- maybe you're not
3 saying that, but I'm curious whether you think
4 this is good policy in terms of incentivizing,
5 or bad? You -- you must think it's bad, and I'm
6 curious why.

7 MS. CORKRAN: Yeah, I don't think
8 we've made that argument. It certainly came
9 across the amici briefs. I would -- just on the
10 incentivizing, I think, is a non sequitur
11 because the only question here is whether it
12 violates the Eighth Amendment to enforce the
13 ordinances when someone has no access to
14 shelter, when they're turning down the services.
15 So that's a circumstance we're looking at.

16 Maybe -- I think what Your Honor's
17 question gets at is our discussion of no
18 penological purpose. This Court has recognized
19 that when a punishment scheme has no penological
20 purpose, it inflict gratuitous suffering, and
21 that is cruel and unusual punishment.

22 And I will say, at this point, the
23 City has not ever identified any penological
24 purpose for punishing homeless people who do not
25 have access to shelter. If you ask that

1 question, every time they pivot to encampments
2 and fires and sanitation problems, which are all
3 non-sequiturs. As I've said a number of times,
4 this case is only about sleeping outside when
5 there's no shelter available. And so I think
6 that lack of penological purpose is significant.

7 JUSTICE KAVANAUGH: Well, we've heard
8 about how it's more difficult to have an
9 effective homeless policy, given the rule that's
10 been in effect in the Ninth Circuit over the
11 last several years.

12 MS. CORKRAN: I think that's --

13 JUSTICE KAVANAUGH: How are we
14 supposed to --

15 MS. CORKRAN: -- that's flatly wrong.
16 And I -- I'll go back to my opening. I gave the
17 whole list of the things that the City is
18 allowed to do under the ordinance and under our
19 claim. The only thing that they cannot do is
20 impose a 24/7 sleeping ban that makes it
21 impossible for homeless people to stay in the
22 jurisdiction.

23 I'd also note, you know, they have a
24 lot of amicus briefs on their side from local
25 governments. Almost the entirety of what those

1 amicus briefs are complaining about isn't at
2 issue in this case. So when you have
3 injunctions against encampments, that's under
4 the Fourth Amendment. We don't have a Fourth
5 Amendment claim. A lot of the injunctions are
6 under the Fourteenth Amendment, including the
7 San Rafael one that the City identifies in its
8 reply brief.

9 I think it's remarkable that when the
10 City was trying to identify the best example it
11 could come up with for its reply brief, it chose
12 one involving a different constitutional claim.

13 JUSTICE KAVANAUGH: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Barrett?

16 JUSTICE BARRETT: No.

17 CHIEF JUSTICE ROBERTS: Justice
18 Jackson?

19 JUSTICE JACKSON: Can a person go from
20 being addicted to drugs to not being addicted to
21 drugs?

22 MS. CORKRAN: So I think under
23 common -- as we think about it in terms of
24 modern medicine, the answer is no. But the
25 Robinson Court certainly thought that was the

1 case, right? Sixty years ago, we didn't have
2 the same understanding of addiction.

3 JUSTICE JACKSON: So your view of
4 Robinson is that it doesn't really matter, the
5 permanency of the condition; it's still a
6 status?

7 MS. CORKRAN: Right. The Robinson
8 Court did not think that the permanency
9 mattered, because it thought that addiction was
10 a status that could change.

11 JUSTICE JACKSON: Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal?

15 REBUTTAL ARGUMENT OF THEANE D. EVANGELIS

16 ON BEHALF OF THE PETITIONER

17 MS. EVANGELIS: Thank you.

18 This case is worlds away from
19 Robinson. The Eighth Amendment does not answer
20 any of the questions that we've been discussing
21 today, and that is reason not to extend
22 Robinson. All of these questions are
23 unanswerable.

24 First, I'd like to start with the
25 United States' position. That would also bring

1 chaos. It would be a disaster if Martin were to
2 remain on the books in any form. It does not
3 make a difference if the inquiry is
4 pre-enforcement or post-enforcement. All the
5 same questions come up about whether the
6 person's conduct is involuntary, what their
7 choices are, how they are there, whether the
8 shelter that's available is adequate, where it
9 is, what rules it has, all of that.

10 And I'd like to clarify how all of
11 this works in practice because it would be
12 impossible for people on the ground to
13 understand and predict what a court would say
14 about the shelters that are available and the
15 alternatives that are available and the choices
16 that were made, and the difficulty of all that.

17 So here how it works is, under the
18 Grants Pass' policy -- I'll direct the Court to
19 page 155 of the Joint Appendix. There it says,
20 officers are required to give a 24-hour notice
21 before issuing a citation.

22 So I -- I want to just focus on that
23 for a moment. How will the officer know,
24 when -- when she or he comes back, whether the
25 individual has another place to go? There's no

1 way to know the answer to that. So they would
2 have to take their word for it, perhaps. So it
3 would lead to all of those same problems.

4 And it is hyperbole -- the other side
5 talks about banishment and all of that. The
6 Respondents have remained in Grants Pass for
7 years. There's nothing like that going on here.
8 They talk about an isolated statement from a
9 community meeting that was a three-hour meeting.
10 There are 20 pages of minutes. It's one
11 sentence. What that full context shows is a
12 wide-ranging discussion about all of these
13 difficult policy problems and how the city was
14 trying to incentivize people to accept shelter
15 and dealing with a small group that was causing
16 serious problems and crime in the City. And
17 they're trying to balance those who wouldn't
18 take the help with the City's needs to keep
19 their public spaces open.

20 When the Ninth Circuit
21 constitutionalized this area, it left cities
22 with really no choice, either keep building
23 enough shelter that may or may not be adequate
24 or suitable to someone's preferences, or be
25 forced to give up all of your public spaces.

1 That is what's happened. We've seen a
2 suspension of enforcement of these basic laws
3 that are so important.

4 The line-drawing problems are
5 never-ending. That is exactly why Powell,
6 Justice Gorsuch, to your point about Powell and
7 the plurality there said that if we embark on
8 this journey and we start constitutionalizing
9 laws that address conduct, the line-drawing
10 problems will be endless. And so that is a
11 reason not to extend Robinson here.

12 So I just want to make, again, our
13 basic Eighth Amendment point here, which is that
14 these are low-level fines and very short jail
15 terms for repeat offenders that are in effect in
16 many other jurisdictions. This is not unusual
17 in any way. It is certainly not cruel. And we
18 can just point to our appendix in our reply that
19 goes through jurisdictions from West Hollywood,
20 California to Watertown, Massachusetts, that
21 have the same type of policies. So the policy
22 questions in this case are very difficult. And
23 I think that's what has come across today.

24 The Eighth Amendment question, though,
25 is not. Here the punishments are the sorts of

1 punishments that have been held to be
2 permissible for -- since the founding and really
3 are in use today. They're not in any way
4 unusual.

5 So we -- we heard a lot of things
6 about guessing how this would work in practice,
7 but it sounds to me like courts would need to
8 have some sort of rules so that they could tell
9 a jurisdiction like Chico that the place it set
10 aside for camping was adequate, when the federal
11 court said no, it wasn't, because it's outdoors,
12 or a San Clemente that was threatened with
13 lawsuits because it didn't provide cell phone
14 chargers in the area that it designated for
15 camping, or San Rafael, where the court said
16 that 200 feet between encampments -- between
17 tents was too much and that 100 feet was the
18 maximum under the Eighth Amendment.

19 So for all of those reasons, the Court
20 should reverse.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 The case is submitted.

24 (Whereupon, at 12:30 p.m., the case
25 was submitted.)

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