City Council Meeting
01-11-21
Item 7.E.

Council Agenda Report

To: Mayor Pierson and the Honorable Members of the City Council

Date prepared: December 21, 2020 Meeting date: January 11, 2021

Subject: Proposal to Amend the Malibu Municipal Code to Reduce Overnight Parking on PCH and Otherwise Regulate the Time and Location of Camping, Lodging or Sleeping in Public (Councilmembers Silverstein and Uhring)

The attached document was drafted and provided by Councilmember Silverstein.

Council Agenda Report

City Council Meeting
11-23-20
Item
7. .

To: Mayor Pierson and the Honorable Members of the City Council

Prepared by: Bruce Lee Silverstein, Councilmember

Date submitted: December 20, 2020

Meeting date: January 11, 2021

Subject: **Proposal to Amend the Malibu Municipal Code to Reduce Overnight Parking on PCH and Otherwise Regulate the Time and Location of Camping, Lodging, or Sleeping in Public (Councilmember Silverstein)**

RECOMMENDED ACTION: At the request of Councilmember Silverstein, 1) After the City Attorney reads the title, introduce on first reading Ordinance No. ___ (Attachment 1) amending Section 9.08.090 of the Malibu Municipal Code to create a permit "exception" to the statute's current "unconditional" prohibition against camping, lodging, or sleeping in public (including in a vehicle parked on a public street) within the City limit of Malibu in order to ensure that the statute will be enforceable in the face of arguments arising under *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), and finding the action exempt from the California Environmental Quality Act; and 2) Direct staff to schedule second reading and adoption of Ordinance No. __ for the January 25, 2021 Regular City Council meeting

FISCAL IMPACT: Although the City Staff routinely asserts "[t]here is no fiscal impact associated with the recommended action," the fact is that there is no way to predict or forecast with any degree of certainty the fiscal impact of any proposed legislative action. If adopted, the recommended action would require the City to incur some level of cost to administer the permit program established by the proposed amended statute and for enforcement of the law. On the other hand, enforcement of the proposed amended statute would increase revenue to the City of Malibu from the payment of fines for violation of the amended statute that could be established in an amount calculated to off-set the permitting and enforcement costs, would free up parking for visitors to Malibu who likely will spend money in Malibu and thereby increase the City's tax base, and may result in the overall improvement of the City to the residents, which could result in increased property values, which also will increase the City's tax base.

WORK PLAN: This item was not included in the Adopted Work Plan for Fiscal year 2020- 2021 because the City has, essentially, given up on seeking to enforce to Section 9.08.090 of the Malibu

Municipal Code in dereliction of the City's overriding responsibility to protect the health, safety, and welfare of the residents.

PRIOR DISCUSSION: During and following the campaign for the 2020 General Municipal Election, the proposal was discussed on my website, in one or more interview by the local press, on social media and at one or more Candidate Forum. The proposal also has been discussed with (i) multiple residents, who have expressed support for the proposal during the campaign, and (ii) ranking officers of the Los Angeles County Sheriff's Department, who have expressed the view that the proposal has the potential to simplify their efforts to police vehicles being used for sleeping, lodging, or camping, because there would be no need for law enforcement to do anything beyond confirm the absence of a permit in order to enforce the law.

BACKGROUND

The residents of Malibu almost uniformly want to reduce or eliminate the armada of recreational vehicles and other vehicles that indefinitely reside on Pacific Coast Highway ("PCH") and other locations within the City of Malibu. While having empathy and compassion for "unhoused" individuals currently residing in Malibu, the health, safety, and welfare of Malibu and all of it residents is threatened and endangered by the living arrangements of some members of the unhoused segment of the population, and Malibu's residents almost uniformly desire to see that danger ameliorated. Although the ability of Malibu to regulate "parking" on PCH and other public streets without the cooperation of outside agencies, Malibu does have tools to materially reduce, if not eliminate, the vehicles that are a problem for the residents. Malibu also has tools to protect the health, safety, and welfare of Malibu and its residents from the dangers posed by the living arrangements of some members of the unhoused population.

The most significant of Malibu's tools for reducing the number of vehicles parked indefinitely on PCH and other public streets in Malibu, and for otherwise protecting the health, safety and welfare of Malibu and all of its residents with respect to the segment of the community that is unhoused, is Section 9.08.090 of the Malibu Municipal Code (the "No Camping Ordinance"), which expressly and unconditionally prohibits camping, lodging, or sleeping in public (including in a vehicle parked on a public street) within the City limit of Malibu. As explained herein, with some minor tweaks, the No Camping Ordinance can be used to reduce or eliminate the vehicles parked overnight on large stretches of PCH, and to generally protect the health, safety and welfare of the residents from the dangers posed by the living arrangements of some members of the unhoused population.

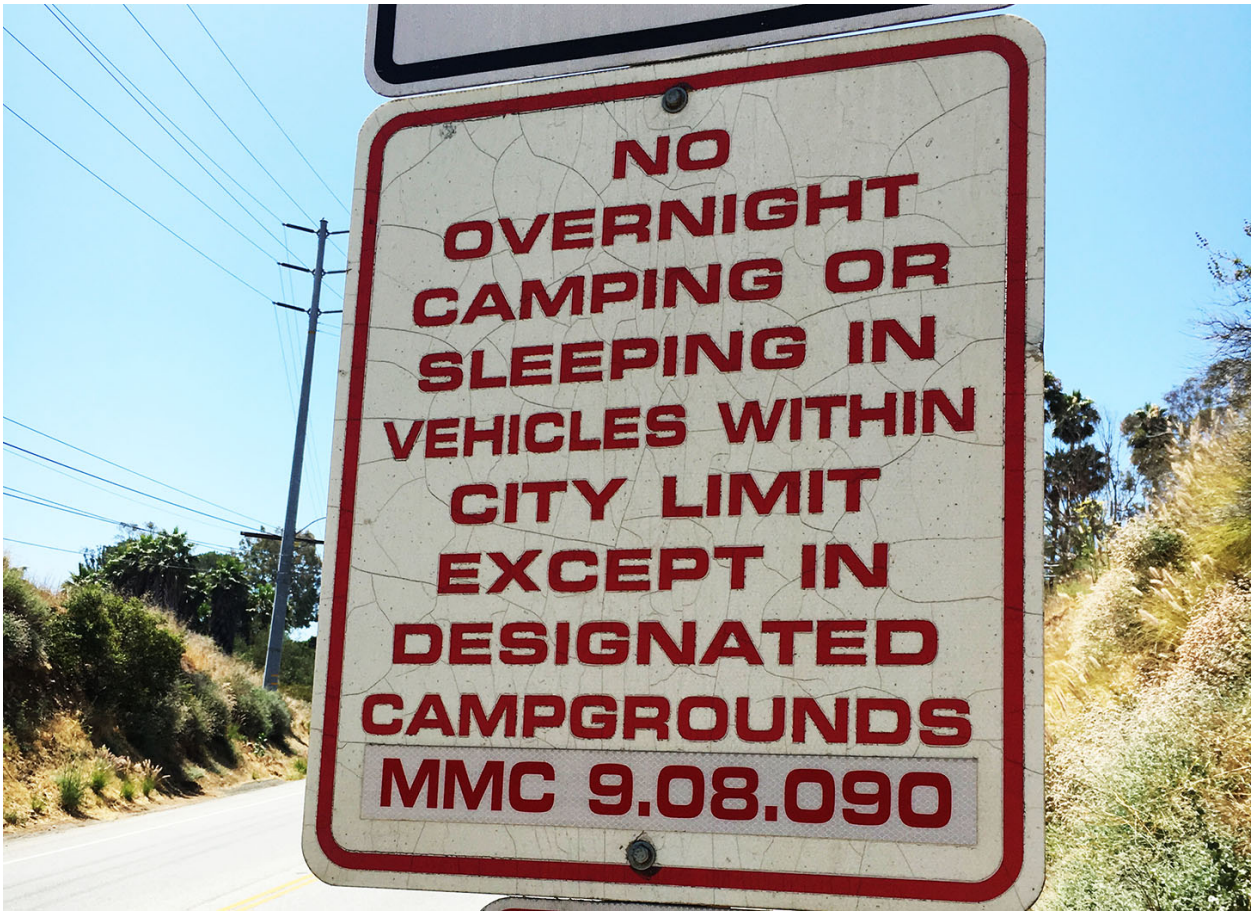
The No Camping Ordinance is contained in Title 9, which is titled "PUBLIC PEACE AND WELFARE. The ordinance provides as follows:

> **9.08.090 camping lodging, sleeping overnight on public property.**
>
> No person shall camp, lodge, or sleep overnight in any public park, public beach or public street (including in a vehicle parked on a public street) provided that nothing herein shall be construed to prohibit camping in public campgrounds under a permit authorized by other provisions of law or ordinance.

> "Camp" shall mean residing in or using any park, public street, or public beach for living accommodation purposes, as exemplified by remaining for prolonged or repetitious periods of time associated with ordinary recreational use of a park or public beach or ordinary use of public street, with one's personal possessions (including, but not limited to, clothing, sleeping bags, bed rolls, blankets, sheets, luggage, backpacks, kitchen utensils, cookware, and similar materials) sleeping or making preparations to sleep, storing personal belongings as above defined, regularly cooking or consuming meals or living in a parked vehicle. These activities constitute camping when it reasonably appears in light of all the circumstances that a person is using a park as a living accommodation regardless of his or her intent or the nature of any other activities in which he or she might also be engaged in. (Ord. 233 § 1, 2001; prior code § 4111.5)

Additionally, Section 12.08.120 of the Malibu Municipal Code permits camping and sleeping in a park that is designated for such activity. Section 12.08.120 also permits a youth group or special interest group to camp in a designated area with a permit issued by the city manager.

Consistent with the No Camping Ordinance, the following sign is posted in various locations in Malibu:



Notwithstanding the No Camping Ordinance, people regularly camp, lodge, and sleep in public (including in a vehicle parked on a public street) within the City limit of Malibu, and neither the City nor any law enforcement officers contracted to enforce the law in Malibu enforces the No Camping Ordinance.[1]

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[1] There is reason to believe that the failure of the City of Malibu and Los Angeles County to enforce the No Camping Ordinance is politically motivated and not legally mandated. At the County level, it is no secret that Supervisor Kuehl, whose constituency includes Malibu, is an active advocate for programs that she believes to benefit the unhoused – even at the potential expense and to the potential detriment to the residents who are not unhoused. Indeed, when the Los Angeles County Board of Supervisors voted to add its voice to efforts to overturn the *Martin* decision (discussed in the next section of this report), Supervisor Kuehl voted against the effort to stand up for the vast majority of the residents who favored that action, arguing that a reversal of the ruling would undermine the County's efforts to address the unhoused situation. *See* http://www.ladowntownnews.com/news/county-supervisors-vote-to-challenge-ninth-circuit-homeless-ruling/article_d36443ea-de57-11e9-86d1-2ff6bd11cb6a.html. Within the City of Malibu, it is no secret that the City Manager and some Members of the City Council are working with Supervisor Kuehl to press for a shelter and/or a "safe parking" facility in Malibu – even though the vast majority of the residents seem to be opposed to both options. Significantly, it is

Martin v. Boise

It has been argued by some people (including some former and current Members of the City Council) that the No Camping Ordinance is unlawful and/or unenforceable based on the decision of the Ninth Circuit Court of Appeals in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) (a copy of which is appended hereto as Attachment 2). As explained herein, there is nothing in the *Martin* decision (or any other court decision) that holds that a law prohibiting camping, lodging, or sleeping in public (including in a vehicle parked on a public street) is unenforceable. Moreover, the No Camping Ordinance can be amended to eliminate any argument that the law violates even the spirit of the *Martin* decision.

The *Martin* decision involved a challenge to two laws that created a sweeping prohibition against "[o]ccupying, lodging or sleeping in any . . . place . . . without . . . permission" and/or the "use [of] any . . . streets, sidewalks, parks or public places as a camping place at any time." The appellants in that case, including Mr. Martin, were "homeless" and was arrested, fined and/or imprisoned for violating the Boise ordinance by, among other things, sleeping outdoors on public property. At the trial court level, the District Court rejected the challenge to the two criminal laws. On appeal, a three-member panel of the Court of Appeals reversed the District Court and concluded that the laws at issue were unconstitutional. In an unusual turn of events, a motion for reconsideration *en banc* (i.e., by a panel of 11 members of the Court of Appeals) resulted in a lengthy and harshly worded dissent joined by six members of the Court of Appeals.

The *Martin* decision identifies the issue addressed in that case as follows:

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

Martin, 920 F.3d at 603.

After addressing numerous arcane issues of standing and retrospective and prospective relief, the *Martin* decision sets forth the following ruling:

> [T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. . . . "[W]hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human." . . . Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." . . . As a result, just as the state may not criminalize the

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helpful to the efforts of those who favor the creation of a local shelter or safe parking facility if they are able to argue that such initiatives are legally necessary to be able to reduce or eliminate the vehicles parked on PCH and other public streets.

> state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." . . .

Id. at 616-17 (citations omitted).

The *Martin* decision also includes the following analysis that is relevant for present purpsoes:

> Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in any building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." . . .
>
> The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02.
>
> > The ordinance defines "camping" broadly: The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).
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> . . . It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping" – the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property – are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against

> homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

Id. at 617-18 (citations omitted).

A scathing dissent from the denial of the City of Boise's motion for reconsideration *en banc*, which was written and/or by six members of the Court of Appeals, began with the following statement:

> In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit.

Id. at 590.

The dissenting opinion also notes that "[o]ur panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts" – which the dissent identified as including a decision of the California Supreme Court. As explained the dissenting opinion instructs:

> The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. . . . The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. . . . The court sensibly reasoned that because [the United States Supreme Court's decision in] *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" . . . Our panel – bound by the same Supreme Court precedent – invalidates identical California ordinances previously upheld by the California Supreme Court. Both courts cannot be correct.

Id. at 593 (citations omitted)

As suggested in the dissenting opinion in *Martin*, there are multiple reasons to believe *Martin* was wrongly decided and will be rejected by the United States Supreme Court if the issue decided in *Martin* is ever addressed by the United States Supreme Court.[2] Among other things,

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[2] The City of Boise did seek discretionary appellate review of the *Martin* decision by the United States Supreme Court, which the Supreme Court rejected. Contrary to popular belief, the mere fact that the United States Supreme Court declined to grant discretionary review of the *Martin* decision does not, in any way, suggest that the United States Supreme Court approves of the decision. It simply means that the United States Supreme Court does not view the issue to be sufficiently serious to be addressed at

respected constitutional scholarts have argued that the Eight Amendment does not apply to the substantive provisions of the law, but only to the provisions of the law that proscribe a penalty for the violation of law. There is much to be said for the strength of that argument.

There also is reason to believe that another panel of the Ninth Circuit may decide differently if the issue were presented anew – largely because of the powerful dissenting opinion from the denial of the rehearing motion and because the composition of the Court of Appeals continues to become more conservative as a consequence of judicial appointments made over the past four years by the Trump Administration.

Without regard to whether the *Martin* decision was rightly or wrongly decided, the fact is that the Martin *decision* is exceedingly limited in its scope and application and provides express exceptions and guidance for laws that can be passed and enforced. Stressing the narrow nature of its decision, the *Martin* decision includes the following disclaimer:

> Our holding is a narrow one. '[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.' . . . We hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' . . . That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.

Id. at 617 (citations omitted)

The *Martin* decision concludes the foregoing paragraph with the following footnote:

> Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. . . . So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as

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this time – when only one Court in the country (which has a reputation of being the most liberal of the Courts of Appeals) has addressed the issue.

Another possible explanation for the United States Supreme Court's lack of interest in the issue (at this time) may be that the *Martin* decision is fairly narrow in its reach and leaves substantial room for local governments to address the types of problems that were the subject of the particular ordinance that was struck down in that case.

> here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes. . . .

Id. at 617, n.8 (citations omitted)

The *Martin* decision's own narrow cabining of the import of the decision, along with the strength and content of the dissenting opinion from the denial of Boise's motion for rehearing *en banc*, provide reason to believe that courts will be hesitant to expand the *Martin* holding to circumstances that are distinguishable from those present in *Martin*. As a Case Note published in the Harvard Law Review observes, the *Martin* decision "left cities ample power to police and punish homeless people, as well as regulate and restrict their access to public space." *Martin v. City of Boise: Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 *Harv. L. Rev*. 699 (2019). As reported in the Harvard Law Review, multiple post-*Martin* decision in California already have held that cities can clear campsites of unhoused residents, arrest those who refuse to leave, and force those arrested to show that shelters are full. *See*, *e.g.*, *Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019); *Quintero v. City of Santa Cruz*, No. 19-CV-01898, 2019 WL 1924990, at *3 (N.D. Cal. Apr. 30, 2019); *Le Van Hung v. Schaaf*, No. 19-CV-01436, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019); *Miralle v. City of Oakland*, No. 18-CV-06823, 2018 WL 6199929 at *2 (N.D. Cal. Nov. 28, 2018); *Butcher v. City of Marysville*, No. 18-CV-02765, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019).[3]

Additionally, it is important to note that the *Martin* decision did not invalidate or void the Boise ordinances at issue therein. Rather the *Martin* decision simply held that the Eighth Amendment to the United States Constitution foreclosed criminal prosecution for violation of the ordinances at issue in that case and under the facts and circumstances of that case. The *Martin* decision says nothing about (i) civil penalties, (ii) criminal prosecution of a violation of a statute that is less encompassing than the ordinances at issue in *Martin*, or (iii) criminal prosecution for conduct beyond that which was at issue in *Martin*.

Options Available to Malibu in the Wake of *Martin*

As it pertains to Malibu, the maximum arguable import of the *Martin* decision is that Malibu cannot fine, criminalize, or prosecute unhoused individuals solely for sitting, lying, and sleeping in public so long as there is no option for such individuals to sleep indoors – and it is not even clear that the indoor sleeping option must exist within the City of Malibu. Malibu is materially smaller than the City of Boise, which is the only jurisdiction that was before the *Martin* Court. Additionally, a material portion of the unhoused population in Malibu are transient individuals who migrated to Malibu for the purpose of living without cost on public property (a dynamic that was not present in *Martin*). Another material difference between Malibu and Boise

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[3] For an further discussion of the many limitations of the *Martin* decision, *see*, *e.g.*, "MARTIN VS BOISE: NO, IT DOES NOT PROHIBIT CITIES FROM REMOVING ILLEGAL CAMPS" at https://homelessquandary.wordpress.com/2018/11/16/martin-vs-boise-no-it-does-not-prohibit-cities-from-removing-illegal-camps/?fbclid=IwAR2gN0DBWtHMFBLx2vLP9jteMFKsh_f--SCdTE8PwJvWvvDwzL9LezeAZt8.

may be the existence of State Park campgrounds nearby, where people can camp with accommodations that include restrooms, showers, and cooking facilities. Combined with the hospitable year-round weather of Southern California (as contrasted with the harsh weather in Idaho during parts of the year), this provides another reason why Malibu's No Camping Ordinance is not subject to same constraints as Boise's more general laws.

Moreover, the *Martin* decision does not even suggest, much less hold, that a ban on camping, lodging, or sleeping in public a vehicle on a public street is unconstitutional and/or unenforceable – and it is doubtful that a court would extend the decision that far if pressed to do so. Unlike a person who lacks a car and is on foot in a municipality that lacks adequate free shelter, a person who is living in a vehicle can move the vehicle to a place where free shelter is available. As such, people living in a vehicle "have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it."

Separate and apart from the foregoing, the *Martin* decision provides a roadmap for a municipality to adopt an ordinance that would pass constitutional muster pursuant to that ruling. Specifically, the *Martin* decision expressly states that (i) the ruling "does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it," (ii) "[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible," and (iii) "[s]o, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures."

Following the *Martin* roadmap, Malibu could amend the No Camping Ordinance to create an "exception" to the existing "unconditional" prohibition against camping, lodging, or sleeping in public (including in a vehicle on a public street). The exception would be that camping, lodging, or sleeping in public is prohibited "without a permit" – which would be subject to the following terms and conditions:

First, a permit would not be available to any individual who has access to adequate temporary shelter, whether because such person has the means to pay for it or because it is realistically available to such person for free, but who chooses not to use it.[4] By including this limitation, the revised ordinance will fit squarely into the explicit language of the *Martin* decision.

To ensure that a permit applicant does not "have access to adequate temporary shelter," the permit application could include a requirement of certification of that fact that is sworn under penalty of perjury and with a substantial financial penalty for providing a false certification. The

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[4] It should be noted that there is a strong argument that an individual who receives or has access to funds sufficient to pay for adequate temporary shelter, but uses such funds to purchase illegal drugs, alcohol, or other things that deprive such individual of the ability to obtain adequate temporary shelter is not protected by the *Martin* decision. It may also be argued that an person who suffers from a mental illness and qualifies for in-house treatment at a mental health facility funded by public insurance has access to temporary shelter that is available to such individual for free. There are many other programs that offer temporary shelter that are abjured by unhoused individuals for one reason or another.

application process also could include some form of simple mechanism for checking the applicant's assets (such as real property ownership) to ensure that the certification is accurate. The permitting process also could (i) require that a permit applicant must submit to a background check to ensure that there are no outstanding warrants, which would disqualify an applicant from receiving a permit, and (ii) prohibit the grant of a permit to camp, lodge, or sleep in a vehicle that is not registered or otherwise violates the motor vehicle code. Moreover, the process could be constructed in a manner that a permit to camp, lodge, or sleep in a vehicle can be obtained only by visiting a particular location (e.g., City Hall or other designated location) with the vehicle to obtain a permit. This latter requirement would preclude an applicant from keeping the applicant's vehicle parked in the same place indefinitely.

Second, the permit would proscribe the "particular times" and "particular locations" where such activity is permitted, including "public rights of way." Again, this limitation falls squarely within the language of the Martin decision. Additional reasonable location restrictions could include, for example, locations within 1,500 feet of (i) any area that the City Manager, Public Safety Manager or City Council may determine from time-to-time to constitute a fire danger, (ii) a residence, (iii) a school, (iv) a place of business, or (v) the holder of another Special Camping Permit (except that multiple individuals within a single vehicle shall be exempt from such restriction). It also seems that twenty-four (24) hours (or even eight or twelve hours) would provide a reasonable opportunity to sleep and rest in a public place before moving on to another location. After all, the *Martin* decision does not hold that individuals protected by the decision must be provided a place to "live" indefinitely – only a place to sleep, for which eight to twelve hours is ample time. The amended statute also could provide that a new permit is available after the passage of twelve hours following the expiration of a permit – which will ensure that the amended statute does not prevent individuals protected by the *Martin* decision from having a place they can lawfully sleep, while still precluding such individuals from settling into any particular place to live on public property.

Third, the law would be explicit that the grant of a permit shall not entitle the individual to whom the permit is issued to (i) start or build a fire for the purposes of cooking at a location or in a manner that is not expressly permitted by law (such as, for example, a public camping site with a fire pit), (ii) discharge wastewater onto public property, (iii) dispose of trash or garbage in any manner not expressly permitted by law (such as, for example, a public trash disposal container), or (iv) urinate or defecate in any location that is not expressly permitted by law (such a public restroom during the hours in which such restroom is open to the public).

Finally, to ensure that the permit process does not end up becoming an "attractive nuisance" that results in a material increase in the unhoused population in Malibu, the number of available permits may be capped at (i) the number of unhoused individuals who were identified as living in Malibu at the time of the last official count, or (ii) a number that represents a proportionate portion of Malibu's population that equates to the unhoused population in Los Angeles County. If necessary, exceptions might be made for unhoused individuals who have lived in a home in Malibu for more than a year and lose the financial capacity to pay for temporary shelter in Malibu or the surrounding area.

THE PROPOSED ORDINANCE

In order to ensure that Malibu retains the right to regulate and restrict camping, lodging, or sleeping overnight in public (including in a vehicle parked on a public street) within the City limit of Malibu, as provided in the No Camping Ordinance, it is proposed that the ordinance be amended to provide as follows:

9.08.090 camping lodging, sleeping overnight on public property.

No person shall camp, lodge, or sleep overnight on public property including in any public park, public beach or public street (including in a vehicle parked on a public street) without a "Special Camping Permit" issued by the City of Malibu; provided, however, that nothing herein shall be construed to prohibit camping in public campgrounds under a permit authorized by other provisions of law or ordinance.

"Camp" shall mean residing in or using any public property, including any pubic park, public street, or public beach for living accommodation purposes, as exemplified by remaining for prolonged or repetitious periods of time associated with ordinary recreational use of a park or public beach or ordinary use of public street, with one's personal possessions (including, but not limited to, clothing, sleeping bags, bed rolls, blankets, sheets, luggage, backpacks, kitchen utensils, cookware, and similar materials) sleeping or making preparations to sleep, storing personal belongings as above defined, regularly cooking or consuming meals or living in a parked vehicle. These activities constitute camping when it reasonably appears in light of all the circumstances that a person is using public property as a living accommodation regardless of such person's intent or the nature of any other activities in which such person might also be engaged.

For purposes of this Section 9.08.090 of the Malibu Municipal Code, the term "Special Camping Permit" shall mean a permit issued by the City of Malibu, which shall be titled "Special Camping Permit." A Special Camping Permit shall permit only the individual to whom it is issued the privilege of camping in the City limits of Malibu, subject to the terms and conditions specified on the Special Camping Permit and/or in this Section 9.08.090 of the Malibu Municipal Code (the terms of which shall be incorporated by reference in such Special Camping Permit).

The City of Malibu shall not issue a Special Camping Permit to any individual who has access to adequate temporary shelter, whether because such individual has the means to pay for it or because it is realistically available to such individual for free. When applying for a Special Camping Permit, an applicant must provide identification sufficient to enable the City of Malibu to determine (i) whether the applicant has any criminal warrants outstanding (which will disqualify the applicant from receiving a permit) or is otherwise subject to any laws that restrict the location where such

applicant is permitted to be and/or whether any mandated reporting obligations exist respecting the applicant's location, (ii) whether the applicant owns real property (which is a form of shelter), and (iii) whether the applicant is entitled to and/or receiving any government benefits that could be utilized to secure temporary shelter. Additionally, when determining whether an applicant has access to adequate temporary shelter, whether because such individual has the means to pay for it or because it is realistically available to such individual for free, the City of Malibu may consider the number of space available at free shelters within a distance to Malibu that are accessible to the applicant.

For a Special Camping Permit to be used to camp, lodge, or sleep in a vehicle, the applicant for such a permit must have a vehicle that is lawfully registered, the applicant must have valid drivers' license and liability insurance, and the vehicle must not have any defect that violates the motor vehicle code (such as lights that do not function properly). Each individual who camps, lodges, or sleeps overnight in a vehicle must have a separate Special Camping Permit, which must be prominently displayed on the dashboard of such vehicle.

Each Special Camping Permit shall proscribe the particular time and particular location within Malibu where the Special Camping Permit may be used, which may be different for each Special Camping Permit depending on the facts and circumstances of the applicant and the number of Special Camping Permits issued at any given time. With respect to the subject of time, no Special Camping Permit shall be issued for a time period exceeding twenty-four (24) hours; provided, however, that there shall be no limit on the number of times that an individual may apply for and obtain a Special Camping Permit. With respect to subject or location, in addition to any other reasonable limitation or restriction that the City of Malibu might proscribe, a Special Camping Permit shall preclude camping, lodging, or sleeping on a public right of way and/or within 1,500 feet of (i) any area that the City Manager, Public Safety Manager or City Council may determine from time-to-time to constitute a fire danger, (ii) a residence, (iii) a school, (iv) a place of business, or (v) the holder of another Special Camping Permit (except that multiple individuals within a single vehicle shall be exempt from such restriction).

Notwithstanding anything in this Section 9.08.090 of the Malibu Municipal Code to the contrary, a Special Camping Permit shall not entitle the individual to whom the permit is issued to (i) start, build or use a fire for the purposes of cooking at a location or in a manner that is not expressly permitted by law (such as, for example, a public camping site with a fire pit), (ii) discharge wastewater onto public property, (iii) dispose of trash or garbage in any manner not expressly permitted by law (such as, for example, a public trash disposal container), or (iv) urinate or defecate in any

location that is not expressly permitted by law (such a public restroom during the hours in which such restroom is open to the public).

The maximum number of Special Camping Permits available at any given time from the City of Malibu shall be limited to a number that is equal to the lesser of (i) such number of unhoused individuals who were identified as living in Malibu at the time of the last official count performed prior to the issuance of any given Special Camping Permit, and (ii) such number that equates to a percentage of the population of Malibu (as determined by the latest U.S. Census then in effect) that is equal to percentage of unhoused individuals known to exist within the Los Angeles County (as determined by the latest U.S. Census then in effect). For the purpose of clarity, if population of Los Angeles County were ten million (10,000,000) and the number of unhoused individuals were one hundred thousand (100,000) or one percent (1%), then the maximum number of Special Camping Permits issuable in Malibu would be limited to a number equal to three quarters of one percent of the population of Malibu – which would be one hundred (100) if the population of Malibu were ten thousand (10,000). Within the maximum number of Special Camping Permits that may be issued at any given time in Malibu, no more than twenty five percent (25%) of such number may be issued for the purpose of camping, lodging, or sleeping in a vehicle.

In addition to any penalty or consequence that is set forth in Title 1 ("General Provisions") of the Malibu Municipal Code (including, but not limited to Sections 1.04, 1.08, 1.10 and 1.12) for the violation of or failure to comply with the provisions of the Malibu Municipal Code, any vehicle used by a person who violates or fails to comply with the provisions of this Section 9.08.090 of the Malibu Municipal Code by camping, lodging, or sleeping in such vehicle on public property without a Special Camping Permit shall be subject to being towed at the expense of the owner of such vehicle, which expense shall include a storage fee pursuant to a Schedule to be determined and posted by the City of Malibu.

ADOPTION AND IMPLEMENTATION OF AMENDED ORDINANCE

The City Council should obtain public comment respecting the proposed amendments to the No Camping Ordinance, consider the proposal, and determine whether to adopt it (as is or as may be further amended). Following the City Council's approval of the amendment to the new Camping Ordinance, the City staff should place the amended ordinance on the agenda of the next Regular Meeting of the City Council for a second reading.

Because the Malibu Municipal Code already includes the No Camping Ordinance that creates an explicit and unconditional prohibition against camping, lodging, or sleeping overnight in public (including in a vehicle parked on a public street) within the City limit of Malibu, it should not be necessary to obtain the consent or approval of any outside body or agency to create a permitting regime that establishes an "exception" to that explicit and unconditional prohibition.

The fact that enforcement of the existing No Camping Ordinance is thought by some people to be unconstitutional based on the *Martin* decision does not alter the fact that No Parking Ordinance is, in fact, an existing part of the Malibu Municipal Code, and the *Martin* decision does not alter that fact. Indeed, as explained above, the *Martin* decision does not invalidate or void any statute (even in Boise). Rather the decision simply holds that criminal prosecution of a violation of the Boise statutes at issue in that case violated the Eighth Amendment to the United States Constitution.

ATTACHMENT 1

ORDINANCE NO. ____

A ORDINANCE OF THE CITY OF MALIBU ADOPTING AN AMENDMENT OF SECTION 9.08.090 OF THE MALIBU MUNICIPAL CODE TO ADD PROVISIONS THAT WILL CREATE A PERMIT "EXCEPTION" TO THE STATUTE'S CURRENT UNCONDITIONAL PROHIBITION AGAINST CAMPING, LODGING, OR SLEEPING IN PUBLIC (INCLUDING IN A VEHICLE PARKED ON A PUBLIC STREET) WITHIN THE CITY LIMIT OF MALIBU IN ORDER TO ENSURE THAT THE STATUTE WILL BE ENFORCEABLE IN THE FACE OF ARGUMENTS ARISING UNDER *MARTIN V. CITY OF BOISE*, 920 F.3D 584 (9TH CIR. 2019) AND FINDING THE SAME EXEMPT FROM THE CALIFORNIA ENVIRONMENTAL QUALITY ACT.

The City Council of the Malibu does ordain as follows:

SECTION 1. Findings

A. Title 9 of the Malibu Municipal Code governs "PUBLIC PEACE AND WELFARE."

B. Chapter 9.08 of the Malibu Municipal Code governs "OFFENSES AGAINST PROPERTY."

C. Section 9.08.090 of the Malibu Municipal Code (the "No Camping Ordinance") governs "camping lodging, sleeping overnight on public property."

D. The No Camping Ordinance exists for the purpose of protecting the health, safety and welfare of Malibu and the residents of Malibu.

E. Some people have expressed concerns that the decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) bars the criminal prosecution of certain individuals who might violate or fail to comply with certain provisions of No Camping Ordinance.

F. The City wishes to amend the No Camping Ordinance to eliminate any reasonable argument that the ruling in the *Martin* decision bars the criminal prosecution of certain individuals who might violate or fail to comply with certain provisions of No Camping Ordinance.

G. On January 11, 2020 the City Council conducted a duly noticed public hearing and received testimony from all interested parties regarding the proposed amendment to the No Camping Ordinance to eliminate any reasonable argument that the ruling in the *Martin* decision bars the criminal prosecution of certain individuals who might violate or fail to comply with certain provisions of No Camping Ordinance.

H. The residents of Malibu almost uniformly want to reduce or eliminate the armada of recreational vehicles and other vehicles that indefinitely reside on Pacific Coast Highway ("PCH") and other locations within the City of Malibu. While having empathy and compassion for "unhoused" individuals currently residing in Malibu, the health, safety and welfare or Malibu's larger population is threatened and endangered by the living arrangements of some members of the unhoused population, and Malibu's residents almost uniformly desire to see that danger ameliorated. Although the ability of Malibu to regulate "parking" on PCH and other public streets without the cooperation of outside agencies, Malibu does have tools to materially reduce, if not eliminate, the vehicles that are a problem for the residents. Malibu also has tools to protect the health, safety, and welfare of the residents from the dangers posed by the living arrangements of some members of the unhoused population.

I. The most significant of Malibu's tools for reducing the number of vehicles parked indefinitely on PCH and other public streets in Malibu, and for otherwise protecting the health, safety and welfare of the residents, is No Camping Ordinance, which expressly and unconditionally prohibits camping, lodging, or sleeping in public (including in a vehicle parked on a public street) within the City limit of Malibu. As explained herein, with some minor tweaks, the No Camping Ordinance can be used to reduce or eliminate the vehicles parked overnight on large stretches of PCH, and also to generally protect the health, safety and welfare of the residents from the dangers posed by the living arrangements of some members of the unhoused population.

J. Notwithstanding the No Camping Ordinance, people regularly camp, lodge, or sleep in public (including in a vehicle parked on a public street) within the City limit of Malibu, and neither the City nor any law enforcement officers contracted to enforce the law in Malibu enforces the No Camping Ordinance – claiming that enforcement of the No Camping Ordinance is, somehow, barred by the *Martin* decision.

K. The *Martin* decision does not that a law prohibiting camping, lodging, or sleeping in public (including in a vehicle parked on a public street) is unenforceable. Moreover, the No Camping Ordinance can be amended to eliminate any reasonable argument that the law violates even the spirit of the *Martin* decision, which has left cities ample power to regulate the unhoused population withing their jurisdictional borders, as well as regulate and restrict their access to public space. In that regard, it is significant that multiple post-*Martin* decision in California already have held that cities can clear campsites of unhoused residents, arrest those who refuse to leave, and force those arrested to show that shelters are full. *See*, *e.g.*, *Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019); *Quintero v. City of Santa Cruz*, No. 19-CV-01898, 2019 WL 1924990, at *3 (N.D. Cal. Apr. 30, 2019); *Le Van Hung v. Schaaf*, No. 19-CV-01436, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019); *Miralle v. City of Oakland*, No. 18-CV-06823, 2018 WL 6199929 at *2 (N.D. Cal. Nov. 28, 2018); *Butcher v. City of Marysville*, No. 18-CV-02765, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019).

L. In addition, it is important to note that the *Martin* decision did not invalidate or void the Boise ordinances at issue therein. Rather the decision simply held that the Eighth Amendment to the United States Constitution foreclosed criminal prosecution for violation of the particular ordinances at issue in that case and under the facts and circumstances of that case. The *Martin* decision says nothing about (i) civil penalties, (ii) criminal prosecution of a violation of a statute

that is less encompassing than the ordinances at issue in *Martin*, or (iii) criminal prosecution for conduct beyond that which was at issue in *Martin*.

M. As it pertains to Malibu, the maximum arguable import of the *Martin* decision is that Malibu cannot fine, criminalize, or prosecute unhoused individuals solely for sitting, lying, and sleeping in public so long as there is no option for unhoused individuals in Malibu to sleep indoors – and it is not even clear that the indoor sleeping option must exist within the City of Malibu, because Malibu is materially smaller than the City of Boise, which is the only jurisdiction that was before the *Martin* Court, and also because a material portion of the unhoused population in Malibu are transient individuals who migrated to Malibu for the purpose of living without cost on public property (a dynamic that was not present in *Martin*).

N. Another material difference between Malibu and Boise may be the existence of State Park campgrounds nearby, where people can camp with accommodations that include restrooms, showers, and cooking facilities. Combined with the hospitable year-round weather of Southern California (as contrasted with the harsh weather in Idaho during parts of the year), this provides another reason why Malibu's No Camping Ordinance is not subject to same constraints as Boise's more general laws.

O. Moreover, the *Martin* decision does not even suggest, much less hold, that a ban on camping, lodging, or sleeping in public a vehicle on a public street is unconstitutional and/or unenforceable – and it is doubtful that a court would extend the decision that far if pressed to do so. Unlike a person who lacks a car and is on foot in a municipality that lacks adequate free shelter, a person who is living in a vehicle can move the vehicle to a place where free shelter is available. As such, people living in a vehicle "have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it."

P. Separate and apart from the foregoing, the *Martin* decision provides a roadmap for a municipality to adopt an ordinance that would pass constitutional muster pursuant to that ruling. Specifically, the *Martin* decision expressly states that (i) the ruling "does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it," (ii) "[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible," and (iii) "[s]o, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures."

Q. Following the *Martin* roadmap, Malibu's the No Camping Ordinance can be amended to create an "exception" to the existing "unconditional" prohibition against camping, lodging, or sleeping in public (including in a vehicle on a public street) to create a "conditional" prohibition that applies "without a permit" – which would be subject to the following terms and conditions:

R. *First*, a permit should not be available to any individual who has access to adequate temporary shelter, whether because such person has the means to pay for it or because it is

realistically available to such person for free, but who chooses not to use it. By including this limitation, the revised ordinance will fit squarely into the explicit language of the *Martin* decision.

S. To ensure that a permit applicant does not "have access to adequate temporary shelter," the permit application could include a certification of that fact, with a substantial penalty for providing a false certification. The application process also could include some form of simple mechanism for checking the applicant's assets (such as real property ownership) to ensure that the certification is accurate. The permitting process also could require that a permit applicant must submit to a background check to ensure that there are no outstanding warrants and could prohibit the grant of a permit to camp, lodge, or sleep in a vehicle that is not registered or otherwise violates the motor vehicle code. Moreover, the process could be constructed in a manner that a permit to camp, lodge or sleep in a vehicle can be obtained only by visiting a particular location (e.g., City Hall or other designated location) with the vehicle to obtain a permit.

T. *Second*, the permit should proscribe the "particular times" and "particular locations" where such activity is permitted, including "public rights of way." Again, this limitation falls squarely within the language of the Martin decision.

Q. Additional reasonable location restrictions could include, for example, locations within 1,500 feet of (i) any area that the City Manager, Public Safety Manager or City Council may determine from time-to-time to constitute a fire danger, (ii) a residence, (iii) a school, (iv) a place of business, or (v) the holder of another Special Camping Permit (except that multiple individuals within a single vehicle shall be exempt from such restriction). It also seems that twenty-four (24) hours (or even eight or twelve hours) would provide a reasonable opportunity to sleep and rest in a public place before moving on to another location. After all, the *Martin* decision does not hold that individuals protected by the decision must be provided a place to "live" indefinitely – only a place to sleep, for which eight to twelve hours is ample time. The amended statute also could provide that a new permit is available after the passage of twelve hours following the expiration of a permit – which will ensure that the amended statute does not prevent individuals protected by the *Martin* decision from having a place they can lawfully sleep.

R. *Third*, the law should be explicit that the grant of a permit shall not entitle the individual to whom the permit is issued to (i) start or build a fire for the purposes of cooking at a location or in a manner that is not expressly permitted by law (such as, for example, a public camping site with a fire pit), (ii) discharge wastewater onto public property, (iii) dispose of trash or garbage in any manner not expressly permitted by law (such as, for example, a public trash disposal container), or (iv) urinate or defecate in any location that is not expressly permitted by law (such a public restroom during the hours in which such restroom is open to the public).

S. *Finally*, to ensure that the permit process does not end up becoming an "attractive nuisance" that results in a material increase in the unhoused population in Malibu, the number of available permits may be capped at (i) the number of unhoused individuals who were identified as living in Malibu at the time of the last official count, or (ii) a number that represents a proportionate portion of Malibu's population that equates to the unhoused population in Los Angeles County.

SECTION 2. The Amended No Camping Ordinance. In order to ensure that Malibu retains the right to protect the health, safety and welfare of Malibu and its residents by regulating and

restricting camping, lodging, or sleeping overnight in public (including in a vehicle parked on a public street) within the City limit of Malibu, Section 9.08.090 of the Malibu Municipal Code is hereby amended to provide, in its entirety, as follows (and with any prior language of the No Camping Ordinance superseded by this Amendment):

9.08.090 camping lodging, sleeping overnight on public property.

No person shall camp, lodge, or sleep overnight on public property including in any public park, public beach or public street (including in a vehicle parked on a public street) without a "Special Camping Permit" issued by the City of Malibu; provided, however, that nothing herein shall be construed to prohibit camping in public campgrounds under a permit authorized by other provisions of law or ordinance.

"Camp" shall mean residing in or using any public property, including any pubic park, public street, or public beach for living accommodation purposes, as exemplified by remaining for prolonged or repetitious periods of time associated with ordinary recreational use of a park or public beach or ordinary use of public street, with one's personal possessions (including, but not limited to, clothing, sleeping bags, bed rolls, blankets, sheets, luggage, backpacks, kitchen utensils, cookware, and similar materials) sleeping or making preparations to sleep, storing personal belongings as above defined, regularly cooking or consuming meals or living in a parked vehicle. These activities constitute camping when it reasonably appears in light of all the circumstances that a person is using public property as a living accommodation regardless of such person's intent or the nature of any other activities in which such person might also be engaged.

For purposes of this Section 9.08.090 of the Malibu Municipal Code, the term "Special Camping Permit" shall mean a permit issued by the City of Malibu, which shall be titled "Special Camping Permit." A Special Camping Permit shall permit only the individual to whom it is issued the privilege of camping in the City limits of Malibu, subject to the terms and conditions specified on the Special Camping Permit and/or in this Section 9.08.090 of the Malibu Municipal Code (the terms of which shall be incorporated by reference in such Special Camping Permit).

The City of Malibu shall not issue a Special Camping Permit to any individual who has access to adequate temporary shelter, whether because such individual has the means to pay for it or because it is realistically available to such individual for free. When applying for a Special Camping Permit, an applicant must provide identification sufficient to enable the City of Malibu to determine (i) whether the applicant has any criminal warrants outstanding (which will disqualify the applicant from receiving a permit) or is otherwise subject to any laws that restrict the location where such applicant is permitted to be and/or whether any mandated reporting obligations exist respecting the applicant's location, (ii) whether the

applicant owns real property (which is a form of shelter), and (iii) whether the applicant is entitled to and/or receiving any government benefits that could be utilized to secure temporary shelter. Additionally, when determining whether an applicant has access to adequate temporary shelter, whether because such individual has the means to pay for it or because it is realistically available to such individual for free, the City of Malibu may consider the number of space available at free shelters within a distance to Malibu that are accessible to the applicant.

For a Special Camping Permit to be used to camp, lodge, or sleep in a vehicle, the applicant for such a permit must have a vehicle that is lawfully registered, the applicant must have valid drivers' license and liability insurance, and the vehicle must not have any defect that violates the motor vehicle code (such as lights that do not function properly). Each individual who camps, lodges, or sleeps overnight in a vehicle must have a separate Special Camping Permit, which must be prominently displayed on the dashboard of such vehicle.

Each Special Camping Permit shall proscribe the particular time and particular location within Malibu where the Special Camping Permit may be used, which may be different for each Special Camping Permit depending on the facts and circumstances of the applicant and the number of Special Camping Permits issued at any given time. With respect to the subject of time, no Special Camping Permit shall be issued for a time period exceeding twenty-four (24) hours; provided, however, that there shall be no limit on the number of times that an individual may apply for and obtain a Special Camping Permit. With respect to subject or location, in addition to any other reasonable limitation or restriction that the City of Malibu might proscribe, a Special Camping Permit shall preclude camping, lodging, or sleeping on a public right of way and/or within 1,500 feet of (i) any area that the City Manager, Public Safety Manager or City Council may determine from time-to-time to constitute a fire danger, (ii) a residence, (iii) a school, (iv) a place of business, or (v) the holder of another Special Camping Permit (except that multiple individuals within a single vehicle shall be exempt from such restriction).

Notwithstanding anything in this Section 9.08.090 of the Malibu Municipal Code to the contrary, a Special Camping Permit shall not entitle the individual to whom the permit is issued to (i) start, build or use a fire for the purposes of cooking at a location or in a manner that is not expressly permitted by law (such as, for example, a public camping site with a fire pit), (ii) discharge wastewater onto public property, (iii) dispose of trash or garbage in any manner not expressly permitted by law (such as, for example, a public trash disposal container), or (iv) urinate or defecate in any location that is not expressly permitted by law (such a public restroom during the hours in which such restroom is open to the public).

The maximum number of Special Camping Permits available at any given time from the City of Malibu shall be limited to a number that is equal to the lesser of (i) such number of unhoused individuals who were identified as living in Malibu at the time of the last official count performed prior to the issuance of any given Special Camping Permit, and (ii) such number that equates to a percentage of the population of Malibu (as determined by the latest U.S. Census then in effect) that is equal to percentage of unhoused individuals known to exist within the Los Angeles County (as determined by the latest U.S. Census then in effect). For the purpose of clarity, if population of Los Angeles County were ten million (10,000,000) and the number of unhoused individuals were one hundred thousand (100,000) or one percent (1%), then the maximum number of Special Camping Permits issuable in Malibu would be limited to a number equal to three quarters of one percent of the population of Malibu – which would be one hundred (100) if the population of Malibu were ten thousand (10,000). Within the maximum number of Special Camping Permits that may be issued at any given time in Malibu, no more than twenty five percent (25%) of such number may be issued for the purpose of camping, lodging, or sleeping in a vehicle.

In addition to any penalty or consequence that is set forth in Title 1 ("General Provisions") of the Malibu Municipal Code (including, but not limited to Sections 1.04, 1.08, 1.10 and 1.12) for the violation of or failure to comply with the provisions of the Malibu Municipal Code, any vehicle used by a person who violates or fails to comply with the provisions of this Section 9.08.090 of the Malibu Municipal Code by camping, lodging, or sleeping in such vehicle on public property without a Special Camping Permit shall be subject to being towed at the expense of the owner of such vehicle, which expense shall include a storage fee pursuant to a Schedule to be determined and posted by the City of Malibu.

SECTION 3. Severability. Severability If any section, subsection, provision, sentence, clause, phrase or word of this Ordinance is, for any reason, held to be illegal or otherwise invalid by any court of competent jurisdiction, such invalidity shall be severable, and shall not affect or impair any remaining section, subsection, provision, sentence, clause, phrase or word included within this Ordinance, it being the intent of the City that the remainder of the Ordinance shall be and shall remain in full force and effect, valid, and enforceable.

SECTION 6. Effective Date. In accordance with California Government Code section 36937, this Ordinance shall become effective on the 30th day following its passage and adoption.

SECTION 7. Environmental Review. The City Council finds that adoption and implementation of this ordinance is categorically exempt the provisions of Section 15378 of the State of California Environmental Quality Act (CEQA) Guidelines, because it has no potential for resulting in physical change in the environment, directly or indirectly. The ordinance does not authorize any specific development or installation on any specific piece of property within the City's boundaries. Although the ordinance does authorize an amendment to the No Camping Ordinance that expressly

permits a limited amount and type of camping, lodging and sleeping on public property that was hereto-before prohibited, the prohibition has not been enforced on account of concerns respecting the constitutionality of doing so, and camping, lodging and sleeping on public property has been occurring virtually unabated. As such, the ordinance will facilitate the substantial enforcement of the existing No Camping Ordinance in a constitutionally valid manner.

SECTION 8. The City Clerk shall certify the adoption of this Ordinance and enter it into the book of original ordinances.

PASSED, APPROVED AND ADOPTED this ____ day of _____ 2020.

_____
MIKKE PIERSON, Mayor

ATTEST: _____
HEATHER GLASER, City Clerk

(seal)

ATTACHMENT 2

No. 15-35845
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Martin v. City of Boise

920 F.3d 584 (9th Cir. 2019)
Decided Apr 1, 2019

No. 15-35845

04-01-2019

Robert MARTIN; Lawrence Lee Smith; Robert Anderson; Janet F. Bell; Pamela S. Hawkes; and Basil E. Humphrey, Plaintiffs-Appellants, v. CITY OF BOISE, Defendant-Appellee.

Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants. Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B. Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

BERZON, Circuit Judge

587 *587

Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants.

Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B. Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

Before: Marsha S. Berzon, Paul J. Watford, and John B. Owens, Circuit Judges.

Concurrence in Order by Judge Berzon ;

Dissent to Order by Judge Milan D. Smith, Jr. ;

Dissent to Order by Judge Bennett ;

Partial Concurrence and Partial Dissent by Judge Owens

588 *588

ORDER

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

BERZON, Circuit Judge, concurring in the denial of rehearing en banc:

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a "distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority —often a decisive majority—of the active members of the court ... perceived no error." *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of rehearing en banc); *see also*Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

Despite my distaste for these separate writings, I have, on occasion, written concurrences in the denial of rehearing en banc. On those rare occasions, I have addressed arguments raised for the first time during the en banc process, corrected misrepresentations, or highlighted important facets of the case that had yet to be discussed.

This case serves as one of the few occasions in which I feel compelled to write a brief concurrence. I will not address the dissents' challenges to the *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and Eighth Amendment rulings of *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), as the opinion sufficiently rebuts those erroneous arguments. I write only to raise two points.

First, the City of Boise did not initially seek en banc reconsideration of the Eighth Amendment holding. When this court solicited the parties' positions as to whether the Eighth Amendment holding merits en banc review, the City's initial submission, before mildly supporting en banc reconsideration, was that the opinion is quite "narrow" and its "interpretation of the [C]onstitution raises little actual conflict with Boise's Ordinances or
589 [their] enforcement." And the City noted that it viewed *589 prosecution of homeless individuals for sleeping outside as a "last resort," not as a principal weapon in reducing homelessness and its impact on the City.

The City is quite right about the limited nature of the opinion. On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all*public spaces, when *no*alternative sleeping space is available, violate the Eighth Amendment. *Martin*, 902 F.3d at 1035. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter.

Second, Judge M. Smith's dissent features an unattributed color photograph of "a Los Angeles public sidewalk." The photograph depicts several tents lining a street and is presumably designed to demonstrate the purported negative impact of *Martin*. But the photograph fails to fulfill its intended purpose for several reasons.

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It

depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.[1]

[1] Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative* , L.A. County, http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/ [https://web.archive.org/web/?20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), https://twitter.com/CountyofLA/status/936012841533894657.

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

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

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults*5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf. The crisis continued to
590 burgeon while ordinances *590 forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere*in public if one has nowhere else to do so.

For the foregoing reasons, I concur in the denial of rehearing en banc.

M. SMITH, Circuit Judge, with whom CALLAHAN, BEA, IKUTA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit. Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.[1] [1] [1]

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

https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

[1] 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) (Section 10 of the English Declaration of Rights) ("excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted.").

[1] The United States Department of Housing and Urban Development ("HUD") requires local homeless assistance and prevention networks to conduct an annual count of homeless individuals on one night each January, known as the PIT Count, as a condition of receiving federal funds. State, local, and federal governmental entities, as well as private service providers, rely on the PIT Count as a "critical source of data" on homelessness in the United States. The parties acknowledge that the PIT Count is not always precise. The City's Director of Community Partnerships, Diana Lachiondo, testified that the PIT Count is "not always the ... best resource for numbers," but also stated that "the point-in-time count is our best snapshot" for counting the number of homeless individuals in a particular region, and that she "cannot give ... any other number with any kind of confidence."

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

I.

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

[2] Our court previously adopted the same Eighth Amendment holding as the panel in *Jones v. City of Los Angeles* , 444 F.3d 1118, 1138 (9th Cir. 2006), but that decision was later vacated. 505 F.3d 1006 (9th Cir. 2007).

A.

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). There, the Court addressed a statute that made it a "criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts,
591 regardless of whether they actually used or possessed drugs. *Id.*at 665, 82 S.Ct. 1417. The Court struck *591
down the statute under the Eighth Amendment, reasoning that because "narcotic addiction is an illness ... which may be contracted innocently or involuntarily ... a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id.*at 667, 82 S.Ct. 1417.

A few years later, in *Powell*, the Court addressed the scope of its holding in *Robinson*. *Powell* concerned the constitutionality of a Texas law that criminalized public drunkenness. *Powell*, 392 U.S. at 516, 88 S.Ct. 2145. As the panel's opinion acknowledges, there was no majority in *Powell*. The four Justices in the plurality interpreted the decision in *Robinson* as standing for the limited proposition that the government could not criminalize one's status. *Id.*at 534, 88 S.Ct. 2145. They held that because the Texas statute criminalized conduct rather than alcoholism, the law was constitutional. *Powell*, 392 U.S. at 532, 88 S.Ct. 2145.

The four dissenting Justices in *Powell* read *Robinson* more broadly: They believed that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.*at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Although the statute in *Powell* differed from that in *Robinson* by covering involuntary conduct, the dissent found the same constitutional defect present in both cases. *Id.*at 567–68, 88 S.Ct. 2145.

Justice White concurred in the judgment. He upheld the defendant's conviction because Powell had not made a showing that he was unable to stay off the streets on the night he was arrested. *Id.*at 552–53, 88 S.Ct. 2145 (White, J., concurring in the result). He wrote that it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.*at 553, 88 S.Ct. 2145.

The panel contends that because Justice White concurred in the judgment alone, the views of the dissenting Justices constitute the holding of *Powell*. *Martin*, 902 F.3d at 1048. That tenuous reasoning—which metamorphosizes the *Powell* dissent into the majority opinion—defies logic.

Because *Powell* was a 4–1–4 decision, the Supreme Court's decision in *Marks v. United States* guides our analysis. 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred*in the judgments on the narrowest grounds.' " *Id.*at 193, 97 S.Ct. 990 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)) (emphasis added). When *Marks* is applied to *Powell*, the holding is clear: The defendant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less.

This is hardly a radical proposition. I am not alone in recognizing that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly compelled or involuntary. *See, e.g.*, *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his
592 status as an alcoholic but for his conduct"); *592 *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) ("Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness .... This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his 'status' as a schizophrenic."); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions.").[3]

[3] That most of these opinions were unpublished only buttresses my point: It is uncontroversial that *Powell* does not prohibit the criminalization of involuntary conduct.

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it "unnecessary to consider ... the proper application of *Marks*"). *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 1772, 201 L.Ed.2d 72 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.[4] The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.[5]

4 Transcript of Oral Argument at 14, *Hughes v. United States* , —— U.S. ——, 138 S.Ct. 1765, 201 L.Ed.2d 72 (2018) (No. 17-155).

5 *Id.* at 49.

Those criticisms, however, were based on the assumption that *Marks* means what it says and says what it means: Only the views of the Justices concurring in the judgment may be considered in construing the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. 990. The Justices did not even think to consider that *Marks* allows dissenting Justices to create the Court's holding. As a *Marks* scholar has observed, such a method of vote counting "would paradoxically create a precedent that contradicted the judgment in that very case."[6] And yet the panel's opinion flouts that common sense rule to extract from *Powell* a holding that does not exist.

6 Richard M. Re, *Beyond the* Marks *Rule* , 132 Harv. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

What the panel really does is engage in a predictive model of precedent. The panel opinion implies that if a case like *Powell* were to arise again, a majority of the Court would hold that the criminalization of involuntary conduct violates the Eighth Amendment. Utilizing such reasoning, the panel borrows the Justices' robes and adopts that holding on their behalf.

But the Court has repeatedly discouraged us from making such predictions when construing precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). And, for good reason. Predictions about how Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell* —that have arisen since the Court's fragmented opinion. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (noting "the wisdom of allowing difficult issues to mature through *593 full consideration by the courts of appeals").

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In short, predictions about how the Justices will rule ought not to create precedent. The panel's Eighth Amendment holding lacks any support in *Robinson* or *Powell*.

B.

Our panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts.

The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. 892 P.2d 1145 (1995). The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. *Id.*at 1152. The court sensibly reasoned that because *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.*at 1166 (quoting *Powell*, 392 U.S. at 533, 88 S.Ct. 2145). Our panel—bound by the same Supreme Court precedent—invalidates identical California ordinances previously upheld by the California Supreme Court. Both courts cannot be correct.

The California Supreme Court acknowledged that homelessness is a serious societal problem. It explained, however, that:

> Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

*Id.*at 1157 n.12. By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.[7]

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

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

Powell , 392 U.S. at 539–40, 88 S.Ct. 2145 (Black, J., concurring).

The reasoning of our panel decision also conflicts with precedents of the Fourth and Eleventh Circuits. In *Manning v. Caldwell*, the Fourth Circuit held that a Virginia statute that criminalized the possession of alcohol did not violate the Eighth Amendment when it punished the involuntary actions of homeless alcoholics. 900 F.3d 139, 153 (4th Cir. 2018), *reh'g en banc granted*741 F. App'x 937 (4th Cir. 2018).[8] 594 *594 The court rejected the argument that Justice White's opinion in *Powell*"requires this court to hold that Virginia's statutory scheme imposes cruel and unusual punishment because it criminalizes [plaintiffs'] status as homeless alcoholics." *Id.*at 145. The court found that the statute passed constitutional muster because "it is the act of possessing alcohol—not the status of being an alcoholic—that gives rise to criminal sanctions." *Id.*at 147.

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

Boise's Ordinances at issue in this case are no different: They do not criminalize the status of homelessness, but only the act of camping on public land or occupying public places without permission. *Martin*, 902 F.3d at 1035. The Fourth Circuit correctly recognized that these kinds of laws do not run afoul of *Robinson* and *Powell*.

The Eleventh Circuit has agreed. In *Joel v. City of Orlando*, the court held that a city ordinance prohibiting sleeping on public property was constitutional. 232 F.3d 1353, 1362 (11th Cir. 2000). The court rejected the plaintiffs' Eighth Amendment challenge because the ordinance "targets conduct, and does not provide criminal punishment based on a person's status." *Id.* The court prudently concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs." *Id.*

We ought to have adopted the sound reasoning of these other courts. By holding that Boise's enforcement of its Ordinances violates the Eighth Amendment, our panel has needlessly created a split in authority on this straightforward issue.

C.

One would think our panel's legally incorrect decision would at least foster the common good. Nothing could be further from the truth. The panel's decision generates dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.

The panel opinion masquerades its decision as a narrow one by representing that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

That excerpt, however, glosses over the decision's actual holding: "We hold only that ... as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." *Id.* Such a holding leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

* * *

Under the panel's decision, local governments can enforce certain of their public health and safety laws only when homeless individuals have the choice to sleep indoors. That inevitably leads to the question of how local officials ought to know whether that option exists.

The number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time. Instead, volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway. Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day. Yet
595 in massive cities *595 such as Los Angeles, that is simply impossible. Even when thousands of volunteers devote dozens of hours to such "a herculean task," it takes three days to finish counting—and even then "not everybody really gets counted."[9] Lest one think Los Angeles is unique, our circuit is home to many of the largest homeless populations nationwide.[10]

9 Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible* , LAist (Jan. 22, 2019, 2:08 PM), https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php. The panel conceded the imprecision of such counts in its opinion. *See Martin* , 902 F.3d at 1036 n.1 (acknowledging that the count of homeless individuals "is not always precise"). But it went on to disregard that fact when tying a city's ability to enforce its laws to these counts.

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

If cities do manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under the false impression that the number of shelter beds exceeds the number of homeless people that night? According to the

panel's opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws that prohibit public sleeping and camping.[12] Accordingly, *596 our panel's decision effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.[13]

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11 Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-ShelteringReport.pdf. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?* , S.F. Chronicle (June 29, 2016), https://projects.sfchronicle.com/sfhomeless/shelters. Perhaps these staggering sums are why the panel went out of its way to state that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Martin* , 902 F.3d at 1048.

12 Indeed, in the few short months since the panel's decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.* , Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers* , Sacramento Bee (Sept. 18, 2019, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html ("Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month."); Michael Ellis Langley, *Policing Homelessness* , Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, "[a]s far as camping ordinances and things like that, we're probably holding off on [issuing citations] for a while" in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision* , KXLY (Oct. 2, 2018, 12:50 PM), https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activityfollowing-9th-circuit-court-decision/801772571 ("Because the City of Moses Lake does not currently have a homeless shelter, city officials can no longer penalize people for sleeping in public areas."); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter* , Voice of OC (Feb. 14, 2019), https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/ (stating that Judge David Carter of the U.S. District Court for the Central District of California has "warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances"); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate* , Santa Barbara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm ("In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.").

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

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

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

It is a timeless adage that states have a "universally acknowledged power and duty to enact and enforce all such laws ... as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people." *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20, 22 S.Ct. 1, 46 L.Ed. 55 (1901) (internal quotations omitted). I fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.[15] As we have already begun to witness, our neighborhoods will soon feature "[t]ents ... equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic" and "human waste
597 appearing on sidewalks and at local playgrounds." *597 [16]

[15] *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless* , The Atlantic (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosismedieval-diseases-spreading-homeless/584380/ (describing the recent outbreaks of typhus, Hepatitis A, and shigellosis as "disaster[s] and [a] public-health crisis" and noting that such "diseases spread quickly and widely among people living outside or in shelters").

[16] Scott Johnson and Peter Kiefer, *LA's Battle for Venice Beach: Homeless Surge Puts Hollywood's Progressive Ideals to the Test* , Hollywood Reporter (Jan. 11, 2019, 6:00 AM), https://www.hollywoodreporter.com/features/las-homeless-surge-puts-hollywoods-progressive-ideals-test-1174599.

II.

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

A.

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). As recognized by Judge Owens's dissent, that conclusion cuts against binding precedent on the issue.

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would "necessarily demonstrate the invalidity of [the plaintiff's] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005) ; *see also Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson's prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they

were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs' requested relief, but *Edwards* cannot bear the weight the panel puts on it. In *598 *Ed wards*, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643, 117 S.Ct. 1584. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.*at 648, 117 S.Ct. 1584.

Here, in contrast, a declaration that the Ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. According to data from the U.S. Department of Housing and Urban Development, the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited.[17] Under the panel's holding that "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property" "as long as there is no option of sleeping indoors," that data necessarily demonstrates the invalidity of the plaintiffs' prior convictions. *Martin*, 902 F.3d at 1048.

17 *See* U.S. Dep't of Hous. & Urban Dev., PIT Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-PITCounts-by-CoC.xlsx; U.S. Dep't of Hous. & Urban Dev., HIC Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018HIC-Counts-by-CoC.xlsx. Boise is within Ada County and listed under CoC code ID-500.

B.

The panel also erred in holding that Robert Martin and Pamela Hawkes, who were cited but not convicted of violating the Ordinances, had standing to sue under the Eighth Amendment. In so doing, the panel created a circuit split with the Fifth Circuit.

The panel relied on *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), to find that a plaintiff "need demonstrate only the initiation of the criminal process against him, not a conviction," to bring an Eighth Amendment challenge. *Martin*, 902 F.3d at 1045. The panel cites *Ingraham* 's observation that the Cruel and Unusual Punishments Clause circumscribes the criminal process in that "it imposes substantive limits on what can be made criminal and punished as such." *Id.*at 1046 (citing *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401). This reading of *Ingraham*, however, cherry picks isolated statements from the decision without considering them in their accurate context. The *Ingraham* Court plainly held that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40, 97 S.Ct. 1401. And, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after*it has secured a formal adjudication of guilt." *Id.* (emphasis added). As the *Ingraham* Court recognized, "[T]he decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted*of crimes." *Id.*at 664, 97 S.Ct. 1401 (emphasis added). Clearly, then, *Ingraham* stands for the proposition that to challenge a criminal statute as violative of the Eighth Amendment, the individual must be convicted of that relevant crime.

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. *599 *John son*, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise

an Eighth Amendment challenge to the ordinance because although "numerous tickets ha[d] been issued ... [there was] no indication that any Appellees ha[d] been convicted" of violating the sleeping in public ordinance. *Id.*at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.*at 444–45 (citing *Robinson*, 370 U.S. at 663, 82 S.Ct. 1417 ; *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401).

By permitting Martin and Hawkes to maintain their Eighth Amendment challenge, the panel's decision created a circuit split with the Fifth Circuit and took our circuit far afield from "[t]he primary purpose of (the Cruel and Unusual Punishments Clause) ... [which is] the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (quoting *Powell*, 392 U.S. at 531–32, 88 S.Ct. 2145).

III.

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

I am deeply concerned about the consequences of our panel's unfortunate opinion, and I regret that we did not vote to reconsider this case en banc. I respectfully dissent.

BENNETT, Circuit Judge, with whom BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

I fully join Judge M. Smith's opinion dissenting from the denial of rehearing en banc. I write separately to explain that except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize.

I recognize that we are, of course, bound by Supreme Court precedent holding that the Eighth Amendment encompasses a limitation "on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (citing *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)). However, the *Ingraham* Court specifically "recognized [this] limitation as one to be applied sparingly." *Id.* As Judge M. Smith's dissent ably points out, the panel ignored *Ingraham* 's clear direction that Eighth Amendment scrutiny attaches only after a criminal conviction. Because the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment, I respectfully dissent from our decision not to rehear this case en banc.

I.

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English
600 Declaration of *600 Rights of 1689,[1] and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (observing that one of the themes of the founding era "was that Americans had all the rights of English subjects" and the Framers' "use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection"); *Timbs v. Indiana*, 586 U.S. ——, 139 S.Ct. 682, —— L.Ed.2d —— (2019) (Thomas, J., concurring) ("[T]he text of the Eighth Amendment was 'based directly on ... the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of

Rights.' " (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989))). Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 967, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Scalia, J., concurring).

Justice Scalia's concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id*. at 966–85, 111 S.Ct. 2680 (Scalia, J., concurring). Rather than reciting Justice Scalia's *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.*at 976, 111 S.Ct. 2680, his opinion's historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

The English Declaration of Rights's prohibition on "cruell and unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.*at 967, 111 S.Ct. 2680 (Scalia, J., concurring). "Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year." *Ingraham*, 430 U.S. at 664, 97 S.Ct. 1401 (footnote omitted).

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed "vicious punishments for treason," including "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968, 111 S.Ct. 2680. In the view of some historians, "the story of The Bloody Assizes ... helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments." *Furman v. Georgia*, 408 U.S. 238, 254, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys's treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and
601 life imprisonment, Jeffreys sentenced Oates to be "stript of [his] Canonical Habits." *601 *Harmelin*, 501 U.S. at 970, 111 S.Ct. 2680 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972, 111 S.Ct. 2680 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was " 'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.' " *Id.*at 973, 111 S.Ct. 2680 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

Thus, Justice Scalia concluded that the prohibition on "cruell and unusuall punishments" as used in the English Declaration, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Harmelin*, 501 U.S. at 974, 111 S.Ct. 2680 (Scalia, J., concurring) (citing *Ingraham*, 430 U.S. at 665, 97 S.Ct. 1401 ; 1 J. Chitty, Criminal Law 710–12 (5th Am. ed. 1847); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969)).

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.*at 975, 111 S.Ct. 2680. "Wrenched out of its common-law context, and applied to the actions of a legislature ... the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.*at 976, 111 S.Ct. 2680.

As support for his conclusion that the Framers of the Bill of Rights intended for the Eighth Amendment to reach only certain punishment methods, Justice Scalia looked to "the state ratifying conventions that prompted the Bill of Rights." *Id.*at 979, 111 S.Ct. 2680. Patrick Henry, speaking at the Virginia Ratifying convention, "decried the absence of a bill of rights," arguing that "Congress will loose the restriction of not ... inflicting cruel and unusual punishments. ... What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." *Id.*at 980, 111 S.Ct. 2680 (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)). The Massachusetts Convention likewise heard the objection that, in the absence of a ban on cruel and unusual punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." *Id.*at 979, 111 S.Ct. 2680 (internal quotation marks omitted) (quoting 2 J. Debates on the Federal Constitution, at 111). These historical sources "confirm[ ] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods*of punishment." *Id.* (internal quotation marks omitted) (quoting Granucci, 57 Calif. L. Rev. at 842) (emphasis in *Harmelin*).

In addition, early state court decisions "interpreting state constitutional provisions with identical or more expansive wording (i.e., 'cruel or unusual') concluded that these provisions ... proscribe[d] ... only certain
602 modes of punishment." *Id.*at 983, 111 S.Ct. 2680 ; *see also* *602 *id.*at 982, 111 S.Ct. 2680 ("Many other Americans apparently agreed that the Clause only outlawed certain *modes*of punishment.").

In short, when the Framers drafted and the several states ratified the Eighth Amendment, the original public meaning of the Cruel and Unusual Punishments Clause was "to proscribe ... methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction. Incorporation, of course, extended the reach of the Clause to the States, but worked no change in its meaning.

II.

The panel here held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). In so holding, the panel allows challenges asserting this prohibition to be brought in advance of any conviction. That holding, however, has nothing to do with the punishment that the City of Boise imposes for those offenses, and thus nothing to do with the text and tradition of the Eighth Amendment.

The panel pays only the barest attention to the Supreme Court's admonition that the application of the Eighth Amendment to substantive criminal law be "sparing[ ]," *Martin*, 902 F.3d at 1047 (quoting *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401), and its holding here is dramatic in scope and completely unfaithful to the proper interpretation of the Cruel and Unusual Punishments Clause.

"The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 531–32, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)). It should, therefore, be the "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007).[2] [2] And permitting a pre-conviction challenge to a local ordinance, as the panel does here, is flatly inconsistent with the Cruel and Unusual Punishments Clause's core constitutional function: regulating the *methods* of punishment that may be inflicted upon one convicted of an offense. *Harmelin*, 501 U.S. at 977, 979, 111 S.Ct. 2680 (Scalia, J., concurring). As Judge Rymer, dissenting in *Jones*, observed, "the Eighth Amendment's 'protections do not
603 attach until after conviction and sentence.' "[3] [3] 444 F.3d at 1147 (Rymer, J., dissenting) *603 (internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).[4] [4]

[2] *Jones* , of course, was vacated and lacks precedential value. 505 F.3d 1006 (9th Cir. 2007). But the panel here resuscitated *Jones* 's errant holding, including, apparently, its application of the Cruel and Unusual Punishments Clause in the absence of a criminal conviction. We should have taken this case en banc to correct this misinterpretation of the Eighth Amendment.

[2] The record suggests that BRM provides some limited additional non-emergency shelter programming which, like the Discipleship Program, has overtly religious components.

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

[3] The intake form states in relevant part that "We are a Gospel Rescue Mission. Gospel means 'Good News,' and the Good News is that Jesus saves us from sin past, present, and future. We would like to share the Good News with you. Have you heard of Jesus? ... Would you like to know more about him?"

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

[4] The parties dispute the extent to which BRM actually enforces the 17- and 30-day limits.

The panel's holding thus permits plaintiffs who have never been convicted of any offense to avail themselves of a constitutional protection that, historically, has been concerned with prohibition of "only certain modes of punishment." *Harmelin*, 501 U.S. at 983, 111 S.Ct. 2680 ; *see also United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997) (citing *Harmelin* for the proposition that a "plurality of the Supreme Court ... has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed").

Extending the Cruel and Unusual Punishments Clause to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point. I doubt that the drafters of our Bill of Rights, the legislators of the states that ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or

ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

* * *

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

BERZON, Circuit Judge:

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

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

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a
604 temporary or permanent *604 place of dwelling, lodging, or residence." *Id* . The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof."

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

In *Jones v. City of Los Angeles* , 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated* , 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones* 's reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them. Two of the plaintiffs, we further hold, may be entitled to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton* , 572 U.S. 650, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.[1] The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of
605 the count.*605 There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — "Sanctuary" — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program.[2] The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.[3]

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days.[4] Participants in the Emergency Services Program

must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check
606 in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30 *606 days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

A. The Plaintiffs

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. *Cf. Jones* , 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 – 2202.

607 After this litigation began, the Boise Police Department promulgated a new *607 "Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available

overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise* , 834 F.Supp.2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise* , 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs' claims under the *Rooker-Feldman* doctrine. *Id* . at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey* , 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applied to the plaintiffs' claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell* , 709 F.3d at 897 n.11.

Bell further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id* . at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.* , 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police. *Id* . at 899–900.

Finally, *Bell* rejected the City's argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id* . at 901 & n.12. We noted that, on summary judgment, the plaintiffs "need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements." *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs' § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" to demonstrate that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87, 114 S.Ct. 2364. According to the district court, "a judgment finding the Ordinances unconstitutional *608 ... necessarily would imply the invalidity of Plaintiffs' [previous] convictions under those ordinances," and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs' claims for retrospective relief were barred by *Heck* . The district court also rejected as barred by *Heck* the plaintiffs' claim

for prospective injunctive relief under § 1983, reasoning that "a ruling in favor of Plaintiffs on even a prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions."

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no "credible threat" of future prosecution. "If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs ...." The court emphasized that the record "suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity" and that "there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families."

This appeal followed.

II. Discussion

A. Standing

We first consider whether any of the plaintiffs has standing to pursue prospective relief.[5] We conclude that there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether Martin and Anderson face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.[6]

"To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA* , 568 U.S. 398, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the
609 alleged injury *609 is not too speculative for Article III purposes — that the injury is *certainly* impending." *Id* . (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union* , 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs " need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States* , 306 F.3d 938, 947 (9th Cir. 2002).

In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space* , they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's ... a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the
610 overall religious atmosphere *610 of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v.Kemna* , 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason — perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel — cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite

the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

The City argues that Martin faces little risk of prosecution under either ordinance because he has not lived in Boise since 2013. Martin states, however, that he is still homeless and still visits Boise several times a year to visit his minor son, and that he has continued to seek shelter at Sanctuary and River of Life. Although Martin may no longer spend enough time in Boise to risk running afoul of BRM's 17-day limit, he testified that he has unsuccessfully sought shelter at River of Life after being placed on Sanctuary's waiting list, only to discover later in the evening that Sanctuary had no available beds. Should Martin return to Boise to visit his son, there is a reasonable possibility that he might again seek shelter at Sanctuary, only to discover (after BRM has closed for the night) that Sanctuary has no space for him. Anderson, for his part, continues to live in Boise and states that he remains homeless.

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective
611 relief.*611 **B. *Heck v. Humphrey***

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the plaintiffs maintain that *Heck* should not bar their claims because, with one exception, all of the plaintiffs were sentenced to time served.[7] It would therefore have been impossible for the plaintiffs to obtain federal habeas relief, as any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." *See* 28 U.S.C. § 2254(a) ; *Spencer v. Kemna* , 523 U.S. 1, 7, 17–18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). With regard to prospective relief, the plaintiffs emphasize that they seek only equitable protection against *future* enforcement of an allegedly unconstitutional statute, and not to invalidate any prior conviction under the same statute. We hold that although the *Heck* line of cases precludes most — but not all — of the plaintiffs' requests for retrospective relief, that doctrine has no application to the plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez* , 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful confinement, *Preiser* recognized an implicit exception from § 1983 's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id* . at 487, 500, 93 S.Ct. 1827. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Wolff v. McDonnell* , 418 U.S. 539, 555, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (emphasis added).

Heck addressed a § 1983 action brought by an inmate seeking compensatory and punitive damages. The inmate alleged that state and county officials had engaged in unlawful investigations and knowing destruction of exculpatory evidence. *Heck* , 512 U.S. at 479, 114 S.Ct. 2364. The Court in *Heck* analogized a § 1983 action of

this type, which called into question the validity of an underlying conviction, to a cause of action for malicious prosecution, *id.* at 483–84, 114 S.Ct. 2364, and went on to hold that, as with a malicious prosecution claim, a plaintiff in such an action must demonstrate a favorable termination of the criminal proceedings before seeking tort relief, *id* . at 486–87, 114 S.Ct. 2364. "[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,
612 expunged by executive order, declared *612 invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id* .

Edwards v. Balisok , 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) extended *Heck* 's holding to claims for declaratory relief. *Id.* at 648, 117 S.Ct. 1584. The plaintiff in *Edwards* alleged that he had been deprived of earned good-time credits without due process of law, because the decisionmaker in disciplinary proceedings had concealed exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed," *Edwards* held, it was "not cognizable under § 1983." *Id* . *Edwards* went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not *Heck* -barred, reasoning that a "prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id* . (emphasis added).

Most recently, *Wilkinson v. Dotson* , 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), stated that *Heck* bars § 1983 suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81–82, 125 S.Ct. 1242 (emphasis omitted). But *Wilkinson* held that the plaintiffs in that case *could* seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings in the future. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." *Id* . at 82, 125 S.Ct. 1242.

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck'* s favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a petition for habeas corpus. *See Muhammad v. Close* , 540 U.S. 749, 752 & n.2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004). But in *Spencer* , five Justices suggested that *Heck* may not apply in such circumstances. *Spencer* , 523 U.S. at 3, 118 S.Ct. 978.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck* , yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id* . at 18–19, 118 S.Ct. 978 (Souter, J., concurring). Justice Souter stated that in his view " *Heck* has no such effect," and that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id* . at 21, 118 S.Ct. 978. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear ... that he may bring an action under 42 U.S.C. § 1983." *Id* . at 25, 118 S.Ct. 978 n.8
613 (Stevens, J., dissenting).*613 Relying on the concurring and dissenting opinions in *Spencer* , we have held that the "unavailability of a remedy in habeas corpus because of mootness" permitted a plaintiff released from

custody to maintain a § 1983 action for damages, "even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits." *Nonnette v. Small* , 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles* , 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. *Id* . at 1192 & n.12.

2. Retrospective Relief

Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall.* It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall.*

Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[ ] ... the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[ ] ... any criminal fines paid ... [or] costs of incarceration billed."

With respect to these two incidents, the district court erred in finding that the plaintiffs' Eighth Amendment challenge was barred by *Heck* . Where there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application. 512 U.S. at 486–87, 114 S.Ct. 2364 ; *see also Wallace v. Kato* , 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

Relying on *Ingraham v. Wright* , 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the City argues that the Eighth Amendment, and the Cruel and Unusual Punishments Clause in particular, have no application where there has been no conviction. The City's reliance on *Ingraham* is misplaced. As the Supreme Court observed in *Ingraham* , the Cruel and Unusual Punishments Clause not only limits the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to the severity of the crime, but also "imposes substantive limits on what can be made criminal and punished as such." *Id* . at 667, 97 S.Ct. 1401. "This [latter] protection governs the criminal law process as a whole, not only the imposition of
614 punishment postconviction." *Jones* , 444 F.3d at 1128.*614 *Ingraham* concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual punishment." 430 U.S. at 667, 97 S.Ct. 1401. *Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted. If conviction were a prerequisite for such a challenge, "the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process." *Jones* , 444 F.3d

at 1129. For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate only the initiation of the criminal process against him, not a conviction.

3. Prospective Relief

The district court also erred in concluding that the plaintiffs' requests for prospective injunctive relief were barred by *Heck.* The district court relied entirely on language in *Wilkinson* stating that "a state prisoner's § 1983 action is barred (absent prior invalidation) ... no matter the relief sought (damages or equitable relief) ... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson* , 544 U.S. at 81–82, 125 S.Ct. 1242. The district court concluded from this language in *Wilkinson* that a person convicted under an allegedly unconstitutional statute may never challenge the validity or application of that statute after the initial criminal proceeding is complete, even when the relief sought is prospective only and independent of the prior conviction. The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff* , *Edwards* , and *Wilkinson* compel the opposite conclusion.

Wolff held that although *Preiser* barred a § 1983 action seeking restoration of good-time credits absent a successful challenge in federal habeas proceedings, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid ... regulations." *Wolff* , 418 U.S. at 555, 94 S.Ct. 2963. Although *Wolff* was decided before *Heck* , the Court subsequently made clear that *Heck* effected no change in the law in this regard, observing in *Edwards* that "[o]rdinarily, a prayer for ... prospective [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Edwards* , 520 U.S. at 648, 117 S.Ct. 1584 (emphasis added). Importantly, the Court held in *Edwards* that although the plaintiff could not, consistently with *Heck* , seek a declaratory judgment stating that the procedures employed by state officials that deprived him of good-time credits were unconstitutional, he *could* seek an injunction barring such allegedly unconstitutional procedures in the future. *Id* . Finally, the Court noted in *Wilkinson* that the *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement* ," *Wilkinson* , 544 U.S. at 81, 125 S.Ct. 1242 (emphasis added), alluding *615 to an existing confinement, not one yet to come.

The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson* 's holding that the *Heck* doctrine bars a § 1983 action "no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration" applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. *Id* . at 81–82, 125 S.Ct. 1242 (emphasis added). As *Wilkinson* held, "claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)" are distant from the "core" of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. *Id* . at 82, 125 S.Ct. 1242.

In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck* , but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.

C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham* , 430 U.S. at 667, 97 S.Ct. 1401. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.

"Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California* , 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham* , 430 U.S. at 667, 97 S.Ct. 1401.

Robinson , the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. *Id* . Recognizing narcotics addiction as an illness or disease — "apparently an illness which may be contracted innocently or involuntarily" — and observing that a "law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of *616 cruel and unusual punishment," *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id* . at 666–67, 82 S.Ct. 1417.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones* , 444 F.3d at 1133. In *Powell v. Texas* , 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), however, the Court elaborated on the principle first articulated in *Robinson* .

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson* ; nor has it attempted to regulate appellant's behavior in the privacy of his own home." *Id* . at 532, 88 S.Ct. 2145 (plurality opinion).

The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson* 's interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has

engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' ...." *Id* . at 533, 88 S.Ct. 2145.

Four Justices dissented from the Court's holding in *Powell* ; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. ... For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." *Id* . at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson* , "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, ... could not prevent himself from appearing in public places." *Id* . at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Jones* , 444 F.3d at 1135 ; *see also United States v. Robertson* , 875 F.3d 1281, 1291 (9th Cir. 2017).

This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain
617 shelter. As *Jones* reasoned, "[w]hether sitting, lying, and sleeping are *617 defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones* , 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id* . at 1137.

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Id* . at 1138. We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id* . That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[8]

We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. ... As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment — sleeping, eating and other innocent conduct." *Pottinger v. City of Miami* , 810 F.Supp. 1551, 1565 (S.D. Fla. 1992) ; *see also Johnson v. City of Dallas* , 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a "sleeping in public ordinance as applied against the homeless is unconstitutional"), *rev'd on other grounds* , 61 F.3d 442 (5th Cir. 1995).[9]

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with
618 a blanket or other basic bedding. The Disorderly *618 Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones* , which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." 444 F.3d at 1123.

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping" — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to the plaintiffs' requests for retrospective relief, except as such claims relate to Hawkes's July 2007 citation under the Camping Ordinance and Martin's April 2009 citation under the Disorderly Conduct Ordinance. We **REVERSE** and **REMAND** with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive, and to the plaintiffs' claims for retrospective relief insofar as they relate to Hawkes' July 2007 citation or Martin's April 2009 citation.[10]

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the doctrine of *Heck v. Humphrey* , 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles* , 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).

619 I also agree that *Heck* and its progeny have no application where there is no "conviction *619 or sentence" that would be undermined by granting a plaintiff's request for relief under § 1983. *Heck* , 512 U.S. at 486–87, 114 S.Ct. 2364 ; *see also Wallace v. Kato* , 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). I therefore

concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief.

Where I part ways with the majority is in my understanding of *Heck* 's application to the plaintiffs' claims for declaratory and injunctive relief. In *Wilkinson v. Dotson* , 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), the Supreme Court explained where the *Heck* doctrine stands today:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 81–82. Here, the majority acknowledges this language in *Wilkinson* , but concludes that *Heck* 's bar on any type of relief that "would necessarily demonstrate the invalidity of confinement" does not preclude the prospective claims at issue. The majority reasons that the purpose of *Heck* is "to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge," and so concludes that the plaintiffs' prospective claims may proceed. I respectfully disagree.

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck* 's application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok* , 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards* , the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner's confinement "as a substantive matter," it improperly distinguished as not *Heck* -barred *all* claims alleging only procedural violations. 520 U.S. at 645, 117 S.Ct. 1584. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction "as a substantive matter" are barred by *Heck* . *Id.* ; *see also Wilkinson* , 544 U.S. at 82, 125 S.Ct. 1242 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures* " and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]' " (emphasis added) (quoting *Heck* , 512 U.S. at 487, 114 S.Ct. 2364)).

Edwards thus leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. *See*
620 *620 *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs* , 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (assuming that a § 1983 claim challenging "the constitutionality of the ordinance under which [the petitioner was convicted]" would be *Heck* -barred). I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief.

We are not the first court to struggle applying *Heck* to "real life examples," nor will we be the last. *See, e.g.* , *Spencer v. Kemna* , 523 U.S. 1, 21, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (Ginsburg, J., concurring) (alterations and internal quotation marks omitted) (explaining that her thoughts on *Heck* had changed since she joined the

majority opinion in that case). If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.