

GUIDE



Guide to Persons Experiencing Homelessness in Public Spaces

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Cities possess a significant amount of property—from parks, greenways, sidewalks, and public buildings to both the developed and undeveloped rights of way—sizable portions of a city belong to the city itself and are held in trust for particular public purposes or use by residents. Historically cities have regulated their various property holdings in a way that prohibits persons from camping, sleeping, sitting or lying on the property. The historic regulation and management of a city’s public spaces must be reimagined in light of recent federal court decisions and the Oregon Legislature’s enactment of HB 3115¹, both of which direct cities to consider their local regulations within the context of available local shelter services for those persons experiencing homelessness.

As the homelessness crisis intensifies, and the legal parameters around how a city manages its public property contract, cities need guidance on how they can regulate their property in a way that respects each of its community members, complies with all legal principles, and protects its public investments. A collective of municipal attorneys from across the state of Oregon convened a work group to create this guide, which is intended to do two things: (1) explain the legal principles involved in regulating public property in light of recent court decisions and statutory enactments; and (2) provide a checklist of issues/questions cities should review before enacting or amending any ordinances that may impact how their public property is managed.

Legal Principles Involved in Regulating Public Property

Three key federal court opinions, *Martin v. Boise* and *Blake v. Grants Pass*, and *Grants Pass v. Johnson* significantly impacted the traditional manner in which cities regulate their public property. Some of these cases sought to expand, limit, or clarify the decisions reached in *Martin* and *Blake*, while other cases sought to explain how the well-established legal principle known as State Created Danger applies to actions taken, or not taken, by cities as they relate to persons experiencing homelessness. The ability of cities to directly address the homelessness crisis over the past six years has been largely guided by these court decisions as each court opinion changed the legal landscape. An overview of *City of Grants Pass v. Johnson* is provided below as well as a recent District Court of Oregon case, exemplifying a judicial analysis of objectively reasonable ordinance, *Bilodeau v. City of Medford*. For an in-depth overview of the other court decisions identified above, see Appendix A.

In addition to these pivotal cases, the Oregon Legislature enacted HB 3115² during the 2021 legislative session as an attempt to clarify, expand, and codify some of the key holdings within the then existing federal court decisions. An additional piece of legislation, HB 3124, also impacts the manner in which cities regulate public property in relation to its use by persons experiencing homelessness. And, as the homelessness crisis intensifies, more legal decisions that directly impact how a city regulates its public property when it is being used by persons experiencing homelessness are expected.

¹ ORS 195.530 (2021).

² *Id.*

A. *City of Grants Pass v. Johnson* (2024)

On June 28, 2024, the U.S. Supreme Court released its [opinion](#)³ considering the question of whether the city of Grants Pass’s ordinance regulating public property by prohibiting activities such as camping or parking overnight on city property or parks violated the U.S. Constitution’s Eighth Amendment, particularly as it relates to people experiencing homelessness. The Court held that it does not.

In a 6-3 opinion, the majority reversed and remanded the case back to the Ninth Circuit Court of Appeals. The Court concluded that the cruel and unusual clause in the U.S. Constitution’s Eighth Amendment does not extend to the enforcement of generally applicable laws, such as public camping ordinances regulating public property. Further, the Court concluded that Grants Pass’s public camping ordinance does not criminalize the status of being homeless but rather, it prohibits specific actions, such as camping, undertaken by any persons.

With this ruling, the Supreme Court implicitly overruled the Ninth Circuit decision of *Martin v. Boise*. The Court highlighted that no other circuit had followed the *Martin* decision with respect to camping laws. Further, the Court relied on the League of Oregon Cities *amicus* brief statements that focused on how the *Martin* decision “limited the tools available to local governments for tackling [what is a] complex and difficult human issue” and that unsheltered persons have “increased dramatically in the Ninth Circuit since *Martin*”⁴ The majority also strongly questioned the continued viability of the 1962 Supreme Court ruling *Robinson v. California*, but it chose to not overrule that decision.

In the majority opinion, Justice Gorsuch explained the many unfortunate problems that unsheltered people face, along with challenges the homelessness crisis has caused local governments. One challenge is that unsheltered people often refuse shelter. The majority opinion cited statistics from the LOC *amicus* brief showing that 70 percent of the City of Portland’s offers of shelter beds were declined between April 2022 and January 2024.⁵ The majority also described the “many and complex” reasons that unsheltered people may refuse shelter—including safety concerns and rules regarding curfews, drug use, or religious practices.⁶

The majority went on to explain that Grants Pass—like many other local governments—have laws restricting public camping. Those laws include escalating penalties, which ultimately, an unsheltered person could be charged with criminal trespass and face a maximum of 30 days in jail and a \$1,250 fine. However, the majority stated that those escalating penalties are neither “cruel” nor “unusual” under the Eighth Amendment.⁷ The majority again noted that many local

³ *City of Grants Pass v. Johnson et al*, 603 US __ (2024). Note: The Supreme Court indicated in a letter to the Ninth Circuit, which accompanied the decision, that a judgment or mandate from the Court would not be issued for “at least” 32 days and that the judgment will be stayed further if a petition for rehearing is timely filed.

⁴ *Id.* at 9-10.

⁵ *Id.* at 5.

⁶ *Id.*

⁷ *Id.* at 16-17.

governments prohibit public camping, so the Grants Pass laws are not “unusual” and the laws are not “cruel” within the understanding of the Framers of the U.S. Constitution (who were concerned about the use of medieval punishments).⁸

With respect to *Robinson*, the majority noted that it held that persons cannot be punished merely for the “status” of being an addict.⁹ But “[p]ublic camping ordinances like those before us are nothing like the law at issue in *Robinson*.”¹⁰ The majority noted that other people, including “a backpacker on vacation passing through town” and “a student who abandons his dorm room to camp out” would be subject to the laws too.¹¹ Thus, “*Robinson* was not implicated.”¹²

The majority then discussed interpretation issues the *Martin* decision had caused local governments, including the need to determine why an unsheltered person turned down an offer of shelter and whether those reasons were “sufficiently weighty” to make the person “involuntarily” homeless.¹³ The majority cited the LOC’s *amicus* brief, which noted that local governments had found *Martin*’s “ill-defined involuntariness test” to be “unworkable” and the cause of a “threat of federal litigation[.]”¹⁴ The Court went on to say that “[b]y extending *Robinson* beyond the narrow class of status crimes, the Ninth Circuit has created a right that has proven ‘impossible’ for judges to delineate except ‘by fiat.’”¹⁵ In reversing the Ninth Circuit, the majority held that the Eighth Amendment “does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation’s homelessness policy.”¹⁶

Justice Thomas wrote a concurring opinion which mostly focused on *Robinson*. Justice Thomas believed that the *Robinson* decision “was wrongly decided” and “we should dispose of it once and for all.”¹⁷ The dissent, in turn, cited several specific examples of the many unfortunate problems that unsheltered people face, and relied on *Robinson* for the argument that homelessness is a “status” that should be protected under the Eighth Amendment.¹⁸ The dissent asserted that “[p]ut another way, the Ordinances single out for punishment the activities that define the status of being homeless.”¹⁹

Despite the Supreme Court reversing and remanding the case, HB 3115 (2021) remains in effect and remains enforceable. The practical effects of the *Grants Pass* decision will not be significant. Municipal attorneys are still challenged in determining the answers to such questions as the following: what regulations are objectively reasonable and what qualifies as measures necessary for an individual to survive outdoors.

⁸ *Id.* at 20.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 21.

¹³ *Id.* at 26.

¹⁴ *Id.* at 27.

¹⁵ *Id.* at 29.

¹⁶ *Id.* at 35.

¹⁷ *Id. Concurrence* at 2.

¹⁸ *Id. Dissent* at 15.

¹⁹ *Id.*

Given the legal issues discussed in this Guide, before adopting any new policy, or revising an existing policy, that touches on the subject matter described herein, cities are strongly encouraged to speak with their legal advisor to ensure the policy complies with state law.

B. House Bill 3115 (ORS 195.530)

HB 3115 was enacted by the Oregon Legislature during its 2021 session and is codified as ORS 195.530. It is the product of a workgroup involving the LOC and the Oregon Law Center as well as individual cities and counties.

This bill requires that any city or county law regulating the acts of sitting, lying, sleeping, or keeping warm and dry outside on public property must be “objectively reasonable” based on the totality of the circumstances as applied to all stakeholders, including persons experiencing homelessness. What is objectively reasonable may look different in different communities. This bill retains cities’ ability to enact reasonable time, place, and manner regulations, aiming to preserve the ability of cities to manage public spaces effectively for the benefit of an entire community.

HB 3115 included a delayed implementation date of July 1, 2023, to allow local governments time to review and update ordinances and support intentional community conversations.

From a strictly legal perspective, HB 3115 intended to capture and codify the key principles of *Martin v. City of Boise*²⁰ and *Blake v. City of Grants Pass*.²¹ The bill directed Oregon cities to update any laws regulating the acts of sitting, lying, sleeping, or keeping warm and dry on public property to be objectively reasonable as to time, place, and manner, with regards to persons experiencing homelessness. However, HB 3115 did impose a hard deadline to comply with the newly codified requirements. The bill provided no further clarity to the judicial decisions, but it also imposed no new requirements or restrictions.

C. Bilodeau v. City of Medford

In January 2024, the U.S. District of Oregon issued a decision in *Bilodeau v. City of Medford*, serving as a promising win for cities across the state with their attempt to enact a constitutional ordinance addressing public camping.²²

In response to HB 3115 (2021), the city of Medford adopted such an ordinance which permitted sleeping in specific areas.²³ Shortly after the passage of Medford’s ordinance, a group of individuals experiencing homelessness sued the city claiming the ordinance violated the U.S.

²⁰ 920 F.3d 584 (9th Cir. 2019).

²¹ No. 1:18-CV-01823-CL, 2020 WL 4209227 (D. Or. My 22, 2020); *see* HB 3115, 81st Leg Assemb, Reg Sess (Or 2021).

²² *Bilodeau v. City of Medford*, No. 1:21-CV-00766-CL, 2024 WL 1470516, at *1 (D. Or. Jan. 16, 2024), report and recommendation adopted, No. 1:21 CV 00766-CL, 2024 WL 1462328 (D. Or. Apr. 4, 2024).

²³ Medford Municipal Code 5.257.

Constitution’s Eighth Amendment’s prohibition against cruel and unusual punishment because the ordinance punished involuntary human acts of resting, sleeping, or seeking shelter.

The court rejected the plaintiffs’ claim and upheld the ordinance as constitutional. Specifically, the court held that “[b]eing that the City allows its unhoused residents to reasonably sleep with bedding to keep warm and dry in designated public areas around Medford, the Court finds the Camping Ordinance reasonable.”²⁴ The court distinguished the circumstance at play in the City of Medford from the *Martin* and *Blake* cases in that the City of Medford preserved “times, places, and manners in which homeless residents may humanely rest.”²⁵

The *Bilodeau* case is instructive for cities who are seeking to achieve and survive legal scrutiny of their ordinances regulating public camping. The court highlighted the following as important and persuasive action items the city took to meet the HB 3115 and the then-current federal case law parameters:

- Low barrier shelter options available for those unhoused to access, as well as more restrictive shelters are available.
- Future duplexes, stable urban campground site(s), affordable housing and building restoration projects that were planned, approved, and funded.
- A person merely engaging in the life-sustaining activities of sleeping, resting, or seeking shelter were not implicated in the ordinance language.
- The ordinance had built in exceptions which served as a safeguard to protect fundamental rights of individuals.
- The city engaged in hearing processes involving various stakeholders over a lengthy period of time, when developing the ordinance, to include the following: seeking public feedback on numerous ordinance drafts, involvement of feedback from the public and local housing groups, and activists.
- Multi-jurisdictional team provided “resources first, enforcement last” approach to educate and inform public.
- Frequent notice to public of enforcement acts.

For guidance on how to proceed with creating an adequate and legally sufficient record prior to passing an ordinance, it is best to work with your city attorney to ensure your unique local circumstances are thoughtfully included in the process.

²⁴ *Bilodeau*, No. 1:21-CV-00766-CL at 8.

²⁵ *Id.* at 7.

D. House Bill 3124

Also enacted during the 2021 legislative session, HB 3124 does two things. First, it changed and added to existing guidance and rules for how a city is to provide notice to homeless persons that an established campsite on public property is being closed, previously codified at ORS 203.077 *et seq.*, now found at ORS 195.500, *et seq.* Second, it provided instructions on how a city is to oversee and manage property it removes from an established campsite located on public property. It is important to remember that HB 3124 applies to public property—it is not applicable to private property. This means that the rules and restrictions imposed by HB 3124 are not applicable city-wide, rather they are only applicable to property classified as public.

HB 3124 does not specify, with any true certainty, what constitutes public property. There has been significant discussion within the municipal legal field as to whether rights of way constitute public property for the purpose of interpreting and implementing HB 3124. The general consensus of the attorneys involved in producing this Guide is that the rights-of-way should be considered public property for purposes of HB 3124. If an established homeless camp is located on the right-of-way, it should generally be treated in the same manner as an established camp located in a city park. However, as discussed below, depending on the dangers involved with a specific location, exceptions to this general rule exist.

When a city seeks to remove an established camp site located on public property, it must do so within certain parameters. Specifically, a city is required to provide 72-hour notice of its intent to remove the established camp site. Notices of the intention to remove the established camp site must be posted at each entrance to the site. In the event of an exceptional emergency, or the presence of illegal activity other than camping at the established campsite, a city may act to remove an established camp site from public property with less than 72-hour notice. Examples of an exceptional emergency include the following: possible site contamination by hazardous materials, a public health emergency, or immediate danger to human life or safety.

While HB 3124 specifies that the requirements contained therein apply to established camping sites, it fails to define what constitutes an established camping site. With no clear definition of what the word established means, guidance on when the 72-hour notice provisions of HB 3124 apply is difficult to provide. The working group which developed this Guide believes a cautious approach to defining the word established at the local level is prudent. To that end, the LOC recommends that if, for example, a city was to enact an ordinance which permits a person to pitch a tent between the hours of 7 p.m. and 7 a.m., that the city also then consistently and equitably enforce the removal of that tent by 7 a.m. each day, or as close as possible to 7 a.m. Failing to require the tent's removal during restricted camping hours each day, *may*, given that the word established is undefined, provide an argument that the tent is now an established camp site that triggers the requirement of HB 3124.

In the process of removing an established camp site, oftentimes, city officials will also remove property owned by persons who are experiencing homelessness. When removing items from established camp sites, city officials should be aware of the following statutory requirements:

- Items with no apparent value or utility may be discarded immediately;

- Items in an unsanitary condition may be discarded immediately;
- Law enforcement officials may retain weapons, drugs, and stolen property;
- Items reasonably identified as belonging to an individual and that have apparent value or utility must be preserved for at least 30 days so that the owner can reclaim them; and
- Items removed from established camping sites in counties other than Multnomah County must be stored in a facility located in the same community as the camping site from which it was removed. Items removed from established camping sites located in Multnomah County must be stored in a facility located within six blocks of a public transit station.

Cities are encouraged to discuss with legal counsel the extent to which these or similar requirements may apply to any camp site, “established” or not, because of due process protections.

E. Cars, Motor Vehicles, and Recreational Vehicles

Cities need to be both thoughtful and intentional in how they define and regulate sitting, sleeping, lying, and camping on public property. Is sleeping in a car, a motor vehicle, or a recreational vehicle (RV) that is located on public property considered sitting, lying, sleeping, or camping on public property under the city’s ordinances and policies? This Guide will not delve into the manner in which cities can or should regulate what is commonly referred to as car or RV camping. However, cities do need to be aware that they should consider how their ordinances and policies relate to car, motor vehicle, and RV camping, and any legal consequences that might arise if such regulations are combined with ordinances regulating sitting, lying, sleeping, or camping on public property.

Motor and recreational vehicles, their location on public property, their maintenance on public property, and how they are used on or removed from public property are heavily regulated by various state and local laws, and how those laws interact with a city’s ordinance regulating sitting, lying, sleeping, or camping on public property is an important consideration of this process. The Ninth Circuit Court of Appeals Amended Opinion in *Johnson v. City of Grants Pass* did alter the language from “vehicle” to “car” which may have implications in determining how cities can regulate motor vehicles.²⁶

F. State Created Danger

In 1989, the U.S. Supreme Court, in *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, interpreted the Fourteenth Amendment to the U.S. Constitution to impose a duty upon the government to act when the government itself has created dangerous conditions – this interpretation created the legal principle known as State Created Danger.²⁷ The Ninth Circuit has interpreted the State Created Danger doctrine to mean that a governmental entity has a duty to

²⁶ Denial of Rehearing en banc *Johnson v. City of Grants Pass*, 72 F4th 868 (9th Cir 2023).

²⁷ 489 U.S. 189 (1989).

act when the government actor “affirmatively places the plaintiff in danger by acting with ‘deliberate indifference’ to a ‘known or obvious danger.’”²⁸

The State Created Danger principle has three elements. First, the government’s own actions must have created or exposed a person to an actual, particularized danger that the person would not have otherwise faced. Second, the danger must have been one that is known or obvious. Third, the government must act with deliberate indifference to the danger. *Id.* Deliberate indifference requires proof of three elements:

“(1) there was an objectively substantial risk of harm; (2) the [state] was subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed; and (3) the [state] either actually drew that inference or a reasonable official would have been compelled to draw that inference.”

Id. Municipal attorneys are closely reviewing the State Created Danger principle as it relates to the use of public spaces by persons experiencing homelessness for three reasons. First, many cities are choosing to respond to the homeless crisis, the legal decisions of *Martin, Blake, and Johnson*, and HB 3115, by creating managed homeless camps where unhoused persons can find shelter and services that may open the door to many State Created Danger based claims of wrongdoing (*e.g.* failure to protect from violence, overdoses, etc. within the government sanctioned camp). Second, in California, at least one federal district court has recently ruled that cities have a duty to act to protect homeless persons from the dangers they face by living on the streets, with the court’s opinion resting squarely on the State Created Danger principle. Third, when imposing reasonable time, place, and manner restrictions to regulate the sitting, sleeping or lying of persons on public rights of way, cities should consider whether their restrictions, and the enforcement of those restrictions, trigger issues under the State Created Danger principle. Fourth, when removing persons and their belongings from public rights of way, cities should be mindful of whether the removal will implicate the State Created Danger principle.

In creating managed camps for persons experiencing homelessness, cities should strive to create camps that would not reasonably expose a person living in the camp to a known or obvious danger they would not have otherwise faced. And if there is a danger to living in the camp, a city should not act with deliberate indifference to any known danger in allowing persons to live in the camp.

And while the California opinion referenced above has subsequently been overturned by the Ninth Circuit Court of Appeals, at least one federal district court in California has held that a city “acted with deliberate indifference to individuals experiencing homelessness” when the city allowed homeless persons to “reside near overpasses, underpasses, and ramps despite the inherent dangers – such as pollutants and contaminant.”²⁹ The court essentially found a State Create Danger situation when a city allowed persons experiencing homelessness to live near interstates—a living situation it “knew” to be dangerous.

²⁸ *LA Alliance for Human Rights v. City of Los Angeles*, 2021 WL 1546235.

²⁹ *Id.*

Before a city official enforces a reasonable time, place, and manner restriction which regulates the sitting, sleeping, and lying of persons on public property, the official should review the enforcement action they are about to take in light of the State Created Danger principle. For example, if a city has a restriction that allows persons to pitch a tent on public property between the hours of 7 p.m. and 7 a.m., a city official requiring the person who pitched the tent to remove it at 7:01 a.m. should be mindful of all environmental conditions present at the time their enforcement order is made. The same thoughtful analysis should be undertaken when a city removes a person and their belongings from the public rights of way.

How Cities Proceed

The law surrounding the use of public spaces by persons experiencing homelessness is newly emerging, complex, and ripe for additional change. In an effort to simplify, as much as possible, the complexity of this legal conundrum, below is an explanation of what municipal attorneys know cities must do, must not do, and may potentially do.

A. What Cities Must Do

In light of court decisions and the recent house bills enacted by the Oregon Legislature, cities must do the following:

1. Review all ordinances and policies with your legal advisor to determine which ordinances and policies, if any, are impacted by the court decisions or recently enacted statutes.
2. Review your city's response to the homelessness crisis with your legal advisor to ensure the chosen response is consistent with all court decisions and statutory enactments.

If your city chooses to exclude persons experiencing homelessness from certain areas of the city for violating a local or state law, the person must be provided the right to appeal that expulsion order, and the order must be stayed while the appeal is pending.

3. If your city chooses to remove a homeless person's established camp site, the city must provide at least 72 hours notice of its intent to remove the site, with notices being posted at entry point into the camp site.
4. If a city obtains possession of items reasonably identified as belonging to an individual and that item has apparent value or utility, the city must preserve that item for at least 30 days so that the owner can reclaim the property, and store that property in a location that complies with state law.

B. What Cities Must Not Do

Cities must not do the following given the legal landscape and Oregon laws:

1. Cities are required to review any city legislation that regulates the acts of sitting, lying, sleeping, or keeping warm and dry outside on public property and these regulations must

be objectively reasonable based on the totality of the circumstances as applied to all stakeholders, including persons experiencing homelessness.

2. Cities are required to implement HB 3115 by July 1, 2023.

C. What Cities May Potentially Do

Within the existing statutory framework, there is a lack of clarity, regarding how the homelessness crisis impacts a city's management of public property.

1. Cities may impose reasonable time, place, and manner restrictions on where persons, including those persons experiencing homelessness, may sit, sleep, or lie. Any such regulation imposed by a city should be carefully vetted with the city's legal advisor.
2. Cities may prohibit persons, including those persons experiencing homelessness, from blocking rights of way. Any such regulation should be carefully reviewed by the city's legal advisor to ensure the regulation is reasonable and narrowly tailored.
3. Cities may prohibit persons, including those persons experiencing homelessness, from erecting either temporary or permanent structures on public property. Given that cities are required, by HB 3115, to allow persons experiencing homelessness to take keep warm and dry using measures necessary for an individual to survive outdoors given the environmental conditions, excluding fire or flame, any such provisions regulating the erection of structures, particularly temporary structures, should be carefully reviewed by a legal advisor to ensure the regulation complies with all relevant legal parameters.
4. If a city chooses to remove a camp site, when the camp site is removed, cities may discard items with no apparent value or utility, may discard items that are in an unsanitary condition, and may allow law enforcement officials to retain weapons, drugs, and stolen property.
5. Cities may create managed camps where persons experiencing homelessness can find safe shelter and access to needed resources. In creating a managed camp, cities should work closely with their legal advisor to ensure that in creating the camp they are not inadvertently positioning themselves for a State Created Danger allegation.

D. What Cities Should Practically Consider

While this Guide has focused exclusively on what the law permits and prohibits, cities are also encouraged to consider the practicality of some of the actions they may wish to take. Prior to imposing restrictions, cities should work with all impacted staff and community members to identify if the suggested restrictions are practical to implement. Before requiring any tent pitched in the public right of way to be removed by 8 a.m., cities should ask themselves if they have the ability to practically enforce such a restriction – does the city have resources to ensure all tents are removed from public property every morning 365 days a year? If a city intends to remove property from a camp site, cities should practically ask themselves if they can store said

property in accordance with the requirements of HB 3124. Both questions are one of only dozens of practical questions cities need to be discussing when reviewing and adopting policies that touch on topics covered by this guide.

Conclusion

Regulating public property, as it relates to persons experiencing homelessness, in light of recent court decisions and legislative actions, is nuanced and complicated. It is difficult for cities to know which regulations are permissible and which are problematic. This Guide is an attempt to answer some of the most common legal issues raised by *Martin, Blake, and Johnson*, HB 3115, HB 3124, and the State Created Danger doctrine—it does not contain every answer to every question a city may have, nor does it provide guidance on what is in each community’s best interest.

Ultimately, how a city chooses to regulate its public property, particularly in relation to persons experiencing homelessness, is a decision each city must make on its own. A city’s decision should be made not just on the legal principles at play, but on its own community’s needs, and be done in coordination with all relevant partners. As with any major decision, cities are advised to consult with experts on this topic, as well as best practice models, while considering the potential range of public and private resources available for local communities. Cities will have greater success in crafting ordinances which are not only legally acceptable, but are accepted by their communities, if the process for creating such ordinances is an inclusive process that involves advocates and people experiencing homelessness.

Recognition and Appreciation

The LOC wishes to extend its sincerest thanks to the municipal attorneys who assisted in the development of this Guide. Attorneys from across Oregon came together over several months to vet legal theories, share best practices, and create this Guide. These attorneys donated their time, experience, and resources—seeking nothing in return. And while a core team of attorneys was gathered to build this guide, the LOC recognizes that the team’s work stands on the shoulders of every city and county attorney in Oregon who has been working, and who will continue to work, to assist their community in addressing the homelessness crisis. For those attorneys not specifically named below, please know your contributions are equally recognized and respected:

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APPENDIX A

A. *The Eighth Amendment to the U.S. Constitution*

The Eighth Amendment to the U.S. Constitution states that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. In 1962, the U.S. Supreme Court, in *Robinson v. California*, established the principle 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.”³⁰

B. *Martin v. Boise*

In 2018, the U.S. Ninth Circuit Court of Appeals, in *Martin v. Boise*, interpreted the Supreme Court’s decision in *Robinson* to mean that the Eighth Amendment to the U.S. Constitution “prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter ... because sitting, lying, and sleeping are ... universal and unavoidable consequences of being human.” The court declared that a governmental entity cannot “criminalize conduct that is an unavoidable consequence of being homeless – namely sitting, lying, or sleeping.”³¹

The Ninth Circuit clearly stated in its *Martin* opinion that its decision was intentionally narrow, and that some restrictions on sitting, lying, or sleeping outside at particular times or in particular locations, or prohibitions on obstructing the rights of way or erecting certain structures, might be permissible. But despite the narrowness of the decision, the opinion only truly answered some of the many questions cities are rightly asking. After *Martin*, municipal attorneys could advise their clients in limited ways—some things were clear and others were murky.

One of the most commonly misunderstood aspects of the *Martin* decision is the belief that a city can never prohibit a person experiencing homelessness from sitting, sleeping or lying in public places. The *Martin* decision, as noted, was deliberately limited. Cities are allowed to impose city-wide prohibitions against persons sitting, sleeping, or lying in public, provided the city has a shelter that is accessible to the person experiencing homelessness against whom the prohibition is being enforced. Even if a city lacks enough shelter space to accommodate the specific person experiencing homelessness against whom the prohibition is being enforced, it is still allowed to limit sitting, sleeping, and lying in public places through reasonable restrictions on the time, place and manner of these acts (“where, when, and how”)—although what constitutes a reasonable time, place, and manner restriction is often difficult to define.

A key to understanding *Martin* was recognizing that an analysis of how a city’s ordinance, and its enforcement of that ordinance, can be individualized. Pretend a city has an ordinance which prohibits persons from sleeping in city parks if a person has nowhere else to sleep. A person who violates that ordinance can be cited and arrested. A law enforcement officer finds 11 persons sleeping in the park and is able to locate and confirm that 10 of said persons have access to a shelter bed or a different location in which they can sleep. If any of those 10 people refuse

³⁰ 370 U.S. 660 (1962).

³¹ 902 F3d 1031, 1048 (2018).

to avail themselves of the available shelter beds, the law enforcement officer is within their rights, under *Martin*, to cite and arrest the persons who refuse to leave the park. The practicality of such an individualized assessment is not to be ignored, and cities are encouraged to consider the ability to make such an assessment as they review their ordinances, policies, and procedures.

What was clear from the *Martin* decision is the following:

1. Cities cannot punish a person who is experiencing homelessness for sitting, sleeping, or lying on public property when that person has no place else to go;
2. Cities are not required to build or provide shelters for persons experiencing homelessness;
3. Cities can continue to impose the traditional sit, sleep, and lie prohibitions and regulations on persons who do have access to shelter; and
4. Cities are allowed to build or provide shelters for persons experiencing homelessness.

After *Martin*, what remained murky, and unknown was the following:

1. What other involuntary acts or human conditions, aside from sleeping, lying and sitting, are considered to be an unavoidable consequence of one's status or being?
2. Which specific time, place and manner restrictions can cities impose to regulate when, where, and how a person can sleep, lie or sit on a public property?
3. What specific prohibitions can cities impose that will bar a person who is experiencing homelessness from obstructing the right of way?
4. What specific prohibitions can cities impose that will prevent a person who is experiencing homelessness from erecting a structure, be it temporary or permanent, on public property?

The city of Boise asked the United States Supreme Court to review the Ninth Circuit's decision in *Martin*. The Supreme Court declined to review the case, which meant the opinion remained the law in the Ninth Circuit.

C. Johnson v. City of Grants Pass [formerly *Blake v. City of Grants*]

Before many of the unanswered questions in *Martin* could be clarified by the Ninth Circuit or the U.S. Supreme Court, an Oregon federal district court issued an opinion, *Blake v. Grants Pass*, which provided some clarity, but also provided an additional layer of murkiness.

The holding in the District Court's ruling in the *Blake* case was the following:

1. Whether a city’s prohibition is a civil or criminal violation is irrelevant. If the prohibition punishes an unavoidable consequence of one’s status as a person experiencing homelessness, then the prohibition, regardless of its form, is unconstitutional.
2. Persons experiencing homelessness who must sleep outside are entitled to take necessary minimal measures to keep themselves warm and dry while they are sleeping.
3. A person does not have access to shelter if:
 - They cannot access the shelter because of their gender, age, disability or familial status;
 - Accessing the shelter requires a person to submit themselves to religious teaching or doctrine for which they themselves do not believe;
 - They cannot access the shelter because the shelter has a durational limitation that has been met or exceeded; or
 - Accessing the shelter is prohibited because the person seeking access is under the influence of some substance (for example alcohol or drugs) or because of their past or criminal behavior.

But much like *Martin*, the *Blake* decision left unanswered questions. The key unknown after *Blake*, was this: What constitutes a minimal measure for a person to keep themselves warm and dry—is it access to a blanket, a tent, a fire, etc.?

On September 28, 2022, the U.S. Ninth Circuit Court of Appeals rendered their opinion and affirmed *Blake v. City of Grants Pass*.³² The Ninth Circuit Court of Appeals upheld the District Court’s prior ruling that persons experiencing homelessness are entitled to take necessary minimal measures to keep themselves warm and dry while sleeping outside. The Ninth Circuit Court of Appeals noted that the decision in this case was narrow and that “it is ‘unconstitutional to [punish] simply sleeping somewhere in public if one has nowhere else to do so.’”³³

The Ninth Circuit Court of Appeals opined that cities violate the Eighth Amendment if they punish a person for the mere act of sleeping outside *or for sleeping in their vehicles at night* when there is no other place *in the city* for them to go.³⁴ As a result of this ruling, this decision expanded the application of *Martin v. Boise*. The opinion concluded that class actions are permissible in these types of cases and remanded the decision for the District Court to make findings on several outstanding matters in the case.

This opinion, in most respects, affirmed what was already known from both the *Martin* and *Blake* cases. However, the opinion failed to provide much anticipated clarification on

³² *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022) [formerly *Blake v. City of Grants Pass*; class representative Blake became deceased during pendency of the appeal.]

³³ *Id.* at 813.

³⁴ *Id.*

several issues, such as what constitutes “necessary minimal measures” to keep warm or dry or what “rudimentary protections from elements” means.

On November 14, 2022, the City of Grants Pass filed a Petition for Panel Rehearing and Rehearing En Banc—a petition for the three-judge panel opinion be re-heard by a panel of twelve judges.

On July 5, 2023, the Ninth Circuit Court of Appeals denied the request for an en banc hearing.³⁵ Despite the Ninth Circuit Court of Appeals not rehearing the case, the Court did issue an Order and Amended Opinion. These amendments were slight but offered some clarifying advice.

What we know from the Amended Opinion is as follows:

- Class action certification was appropriate.
- Pursuant to *Martin*, it is an Eighth Amendment violation to enforce anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.³⁶

The Ninth Circuit Court of Appeals did vacate and remand back to the District Court to make specific findings regarding the below items:

- Consider whether there is an adequate class representative who may be substituted for Blake.
- Must narrow injunction to enjoin the portions of the anti-camping ordinances that prohibited conduct protected by *Martin*.
- Should narrow injunction to anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless persons for engaging in conduct necessary to protect themselves from the elements when there is no shelter option.

Noteworthy, a number of judges filed dissenting statements and opinions in support of the City, creating a favorable record for an appeal to a higher court. On September 22, 2023, the City of Grants Pass filed a petition for certiorari asking the United States Supreme Court to review the Ninth Circuit Court of Appeals opinion. On January 12, 2024, the U.S. Supreme Court granted certiorari and heard oral argument during the 2023-2024 term. Noted in the above section, the U.S. Supreme Court issued an opinion in this case on June 28, 2024, reversing and remanding this case back to the Ninth Circuit to apply its ruling that the U.S. Constitution’s Eighth Amendment was not violated in this case.

³⁵ See Denial of Rehearing en banc *Johnson v. City of Grants Pass* 72 F4th 868 (9th Cir 2023). Access the published opinion at <https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/20-35752.pdf>.

³⁶ *Id.* at 49.