CONSTITUTIONAL LAW – EIGHTH AMENDMENT: ORDINANCES AGAINST HOMELESS CONDUCT ARE NOT BARRED BY THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).

ABSTRACT

In *City of Grants Pass v. Johnson*, the United States Supreme Court addressed whether it is cruel and unusual punishment to enforce statutes prohibiting encampments on public property when the prohibition directly affects the homeless population. The Court noted that the federal government has reported the highest rate of homelessness in America to date, leading to a rise in homeless encampments across the country and creating challenges for all levels of government to navigate. Like many others, the City of Grants Pass, Oregon, has taken several measures toward a solution to the homelessness crisis. Of those actions, three facially neutral ordinances in Grants Pass prohibit all persons from encamping on public property and impose a citation to those who fail to adhere to the local laws. Previously decided by the Ninth Circuit in *Martin v. City of Boise*, such restrictions were held to be prohibited by the Eighth Amendment because those experiencing homelessness have no alternative to sleeping on public property if the cities lack available shelter beds. In *Johnson*, the U.S. Supreme Court reviewed an injunction issued by the district court prohibiting Grants Pass from enforcing ordinances against encampments due to the *Martin* precedent. However, the U.S. Supreme Court *held* that ordinances against homeless conduct do not violate the Eighth Amendment of the U.S. Constitution, nor should the amendment be construed to preclude governments from criminalizing certain conduct. This pivotal decision resolved a circuit split, but its holding will likely be the subject of future litigation across the nation, and North Dakota is no exception. *Johnson* authorizes North Dakota state and local governments to enforce ordinances against camping on public property, and North Dakota practitioners should be cognizant of the legal liability that could be imposed by way of this decision.

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I. FACTS

On November 13, 2019, Debra Blake, Gloria Johnson, and John Logan ("Named Plaintiffs") filed a putative class action lawsuit in the United States District Court for the District of Oregon ("District Court") on behalf of the community's homeless population.[1] The Named Plaintiffs were involuntarily

1. Third Amended Complaint, Blake v. City of Grants Pass, No. 1:18-cv-01823-CL (D. Or. Nov. 13, 2019), 2019 WL 11070914; *see also* City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2213 (2024) (Grants Pass, Oregon, "is home to roughly 38,000 people. Among them are an estimated 600 individuals who experience homelessness on a given day.").

homeless individuals with no alternative to sleeping outside or in their vehicles on public property.[2] The City of Grants Pass police officers enforced the ordinances, which affected the Named Plaintiffs and other members of the homeless community.[3] Plaintiffs sought to enjoin Grants Pass from enforcing three municipal ordinances prohibiting all persons from camping or otherwise sleeping overnight on public property.[4] Plaintiffs' complaint states, among other claims, that the ordinances impose cruel and unusual punishment in violation of the U.S. Constitution's Eighth Amendment, alleging the enforcement of laws against encampments constructively criminalizes the status of being homeless rather than criminalizing conduct.[5]

An encampment refers to "[a] group of people sleeping outside in the same location for a sustained period" and often includes "[t]he presence of some type of physical structures (e.g., tents, tarps, lean-tos)" and personal belongings.[6] Thus, the prohibition of camping on public property in *Johnson* would prevent people from forming encampments and otherwise prevent individuals from sleeping on public property. The three municipal ordinances at issue in *Johnson* are as follows:

> The first prohibits sleeping "on public sidewalks, streets, or alleyways." The second prohibits "[c]amping" on public property. Camping is defined as "set[ting] up . . . or remain[ing] in or at a campsite," and a "[c]ampsite" is defined as "any place where bedding, sleeping bag[s], or other material used for bedding purposes, or any stove or fire is placed . . . for the purpose of maintaining a temporary place to live." The third prohibits "[c]amping" and "[o]vernight parking" in the city's parks.[7]

The District Court relied on the Ninth Circuit's holding in *Martin v. City of Boise* to issue the plaintiffs' requested injunction and enjoin Grants Pass from enforcing ordinances directly affecting the city's homeless population.[8] "According to the Ninth Circuit [in *Martin*], the Eighth Amendment's Cruel

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2. Third Amended Complaint, *supra* note 1, ¶¶ 18-21, 27-29, 37, 42.
3. *See id.* ¶¶ 22-24, 30-32.
4. *Id.* ¶¶ 2-3.
5. *Id.* ¶¶ 63-70.
6. U.S. DEP'T HOUS. & URB. DEV., OFF. POL'Y & RSCH., UNSHELTERED HOMELESSNESS AND HOMELESS ENCAMPMENTS IN 2019 2 (2021), https://www huduser.gov/portal/sites/default/files/pdf/Unsheltered-Homelessness-and-Homeless-Encampments.pdf [https://perma.cc/E5NU-ELWE].
7. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2213 (2024) (alteration in original) (internal citations omitted) (citing GRANTS PASS, OR., MUN. CODE §§ 5.61.020(A), 5.61.030, 5.61.010(A)-(B), 6.46.090(A)-(B) (2023); App. to Pet. for Cert. 221a, 222a; Johnson v. City of Grants Pass, 72 F.4th 868, 876 (2023), *rev'd*, 144 S. Ct. 2202 (2024)).
8. *Id.* at 2211 (citing Martin v. City of Boise, 920 F.3d 584, 615, 617 (9th Cir. 2019)).

and Unusual Punishments Clause barred Boise from enforcing its public-camping ordinance against homeless individuals who lacked 'access to alternative shelter.'"[9] The District Court applied the *Martin* precedent to *Johnson*, holding that the ordinances violated the Cruel and Unusual Punishments Clause because Grants Pass had more homeless individuals than available shelter beds.[10]

On appeal, the Ninth Circuit affirmed the District Court's holding in part, relevant to the issue of the Eighth Amendment.[11] Grants Pass sought review from the United States Supreme Court by filing a Petition for Certiorari.[12] The question presented was whether enforcing anti-encampment laws on public property violates the Eighth Amendment.[13] Several briefs in support of Grants Pass's Petition for Certiorari were filed, emphasizing the importance of the U.S. Supreme Court's input on the question presented.[14]

The U.S. Supreme Court granted certiorari to review this question and addressed the applicability of the Cruel and Unusual Punishments Clause of the Eighth Amendment to the ordinances at issue.[15] First, the Court asserted the Cruel and Unusual Punishments Clause serves to regulate the "method or kind of punishment" assessed after a person has been convicted of a crime.[16] Therefore, restricting what "particular behavior" may be criminalized "in the first place" would need to be found under the scope of an alternative course of action, but prohibiting homeless conduct does not invoke a violation of the Eighth Amendment.[17] Second, the Court stated that the punishments issued for a violation of the anti-encampment ordinances in the city, standing alone, are not cruel and unusual.[18] Therefore, the nature of the punishments do not invoke a violation of the Eighth Amendment.[19] Third, the Court found the

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9. *Id.* (citing *Martin*, 920 F.3d at 615).

10. *See Johnson*, 72 F.4th at 877-79, *rev'd*, 144 S. Ct. 2202 (2024); *see also Martin*, 920 F.3d at 617.

11. *Johnson*, 72 F.4th at 896, *rev'd*, 144 S. Ct. 2202 (2024). Debra Blake, class representative, passed away while this case was on appeal. Ms. Blake was subsequently removed from the case caption. The United States Court of Appeals for the Ninth Circuit held that "Blake's death does not moot the class's claims as to all challenged ordinances. . . . With respect to the park exclusion, criminal trespass, and anti-camping ordinances, the surviving class representatives, Gloria Johnson and John Logan, have standing in their own right." *Id.* at 883-84.

12. *Johnson*, 144 S. Ct. at 2208.

13. Petition for Writ of Cert., City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175), 2023 WL 5530379 at *i.

14. *See Johnson*, 144 S. Ct. at 2214.

15. *Id.* at 2208.

16. *See id.* at 2216 (quoting Powell v. Texas, 392 U.S. 514, 531-32 (1968)).

17. *Id.*

18. *Id.* at 2204, 2216 ("The city imposes only limited fines for first-time offenders, an order temporarily barring an individual from camping in a public park for repeat offenders, and a maximum sentence of 30 days in jail for those who later violate an order.").

19. *See id.* at 2216.

ordinances at issue are facially neutral and enforceable against any person in Grants Pass.[20] Therefore, the laws do not criminalize status because they prohibit all persons from the conduct of encamping on public property and do not invoke a violation of the Eighth Amendment.[21] The U.S. Supreme Court *held* that enforcing anti-encampment ordinances does not constitute cruel and unusual punishment.[22]

II. LEGAL BACKGROUND

A. THE EIGHTH AMENDMENT

The Eighth Amendment of the United States Constitution declares, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[23] At the time of its adoption, the Cruel and Unusual Punishments Clause was intended to distinguish punishments permitted in the "new Nation" from those "formally tolerated" under English law.[24] The clause is "directed at the method or kind of punishment imposed for the violation of criminal statutes" but does not address the conduct that may be criminalized.[25] Rather, the conduct that resulted in punishment will only be relevant to the Cruel and Unusual Punishments Clause when determining an appropriate consequence for the severity of the crime.[26]

B. DEFINING CRUEL AND UNUSUAL PUNISHMENT

The U.S. Supreme Court previously addressed the Cruel and Unusual Punishments "Clause's origin[] and meaning" in *Bucklew v. Precythe*.[27] Using eighteenth and nineteenth century dictionaries, along with relevant evidence, the U.S. Supreme Court provided an analysis in *Bucklew* of the clause that the Court referred to in *Johnson*.[28] To this end, "cruel" was most likely understood by its definitions, "[p]leased with hurting others; inhuman; hardhearted; void of pity; wanting compassion; savage; barbarous; unrelenting" or "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness."[29]

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20. *See id.* at 2218.
21. *See id.*
22. *Id.* at 2226.
23. U.S. CONST. amend. VIII.
24. *Johnson*, 144 S. Ct. at 2204.
25. Powell v. Texas, 392 U.S. 514, 531-32 (1968).
26. *Id.*
27. *Johnson*, 144 S. Ct. at 2215; *see generally* Bucklew v. Precythe, 587 U.S. 119 (2019).
28. *Bucklew*, 587 U.S. at 130-33; *Johnson*, 144 S. Ct. at 2215-16.
29. *Bucklew*, 587 U.S. at 130 (alterations in original) (quoting *Cruel*, DICTIONARY ENG. LANGUAGE (4th ed. 1773); *Cruel*, AM. DICTIONARY ENG. LANGUAGE (1828)).

"Unusual" is included to prevent Congress from permitting punishments that are no longer used.[30] Acknowledging the conflicting definition, "unusual" is not meant to "refer to punishments that are rare or out of the ordinary, but rather to punishments that are 'contrary to long usage.'"[31] At its core, the Eighth Amendment serves to limit the degree of criminal punishments, protect human dignity, and align with "civilized standards."[32]

III. ANALYSIS

In *Johnson*, the U.S. Supreme Court held that enforcing ordinances regulating camping on public property does not violate the Eighth Amendment's Cruel and Unusual Punishments Clause.[33] The clause does not take away the States' "primary responsibility for drafting their own criminal laws" nor does it provide any foundation to determine what "may or may not" be prohibited by cities and states.[34] This decision does not prevent "[s]tates, cities, and counties from declining to criminalize people for sleeping in public when they have no available shelter," instead it gives local, state, and federal governments the ability to use legal authority to address homelessness.[35] The Court identified that ordinances of the same or similar nature could aid in government efforts to encourage homeless individuals to accept resources available to them by their communities, to regulate encampments for public health and safety concerns, and to keep public property available for community use.[36]

A. THE MAJORITY OPINION

1. The Climbing Rate of Homelessness in the United States

Justice Neil Gorsuch wrote for the majority and began by addressing homelessness in the United States.[37] The Court looked to a federal government report that found that the number of individuals currently experiencing homelessness in the United States is the highest it's been since federal reporting began in 2007.[38] The briefs in support of the Grants Pass Petition for

30. *Id.*
31. John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U.L. REV. 1739, 1815 (2008).
32. *See* Trop v. Dulles, 356 U.S. 86, 100 (1958).
33. *Johnson*, 144 S. Ct. at 2204, 2226.
34. *Id.* at 2221, 2224.
35. *See id.* at 2241 (Sotomayor, J., dissenting); *see also id.* at 2220 (majority opinion).
36. *Id.* at 2210, 2212-13 (majority opinion).
37. *See id.* at 2207-08.
38. *Id.* at 2208 (citing TANYA DE SOUSA ET AL., OFF. OF CMTY. DEV. & PLAN., THE 2023 HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS 2-3 (2023)).

Certiorari identify concerns and emphasize the need for clarification on permissible action in light of this crisis.[39] The Court asserted that due to the climbing number of homeless individuals, communities around the country have also experienced a rise in the number of encampments.[40] While shelters may be an alternative to public encampment, there are several reasons why such assistance may be rejected.[41] Therefore, simply "building more shelter beds and public housing options is almost certainly not the answer by itself."[42] The reasons that homeless encampments develop in communities also vary depending on the individual and their situation; however, "homeless encampments pose not only a grave risk to the public at large, but also to homeless individuals themselves."[43] For individuals living in encampments, dangers include "heightened risks of 'sexual assault' and 'subjugation to sex work,'" the facilitation of drug distribution, and an increased risk of disease due to the lack of sanitation facilities.[44]

2. *The District Court's Reliance on Ninth Circuit Precedent in Martin v. City of Boise*

Justice Gorsuch continued by explaining the distinction between the present case and *Martin*.[45] In *Martin*, there were three homeless shelters in Boise, Idaho with a total of "354 beds and 92 overflow mats for homeless individuals."[46] However, the shelters were incapable of sufficiently providing shelter to the county's homeless population, and questions were raised regarding what it means for a shelter to have available beds due to certain restrictions placed on occupants by the shelters.[47] In *Martin*, the Ninth Circuit narrowly held 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,

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39. *See id.* at 2212, 2214.

40. *Id.* at 2209.

41. *See id.* at 2209-10.

42. *Id.* at 2209 (citing Brief for Local Government Legal Center et al. as Amici Curiae, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1008650, at *11).

43. Brief of Amici Curiae Members of Congress in Support of Petitioner, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1009146, at *4; *see also* Johnson, 144 S. Ct. at 2208-09 (noting that reasons for encampments include "freedom," "sense of community," and "dependable access to illegal drugs") (internal quotations omitted) (citing REBECCA COHEN ET AL, OFF. OF POL'Y DEV. & RSCH., DEP'T OF HOUS. & URB. DEV., UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING HOMELESSNESS AND COMMUNITY RESPONSES 5 (2019)).

44. *Johnson*, 144 S. Ct. at 2209.

45. *Id.* at 2211; *see generally* Martin v. City of Boise, 920 F.3d 584 (9th Cir. 2019).

46. *Martin*, 920 F.3d at 606.

47. *See id.* at 604 ("In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered."); *see also Johnson*, 144 S. Ct. at 2222.

lying, and sleeping in public.'"[48] The Ninth Circuit found it unconstitutional to impose criminal penalties against individuals experiencing homelessness for sleeping on public property in violation of anti-encampment ordinances.[49] It reasoned that the Eighth Amendment precludes enforcement of statues that criminalize homeless conduct because the homeless individuals have no alternative to sleeping on public property.[50] Thus, under *Martin*, "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."[51]

The Ninth Circuit denied rehearing *en banc*, with Judges Smith and Bennet dissenting.[52] First, Judge Smith noted that the *Martin* majority misread precedent regarding the Eighth Amendment and its applicability to the ordinances.[53] Judge Smith went further, concluding *Martin* conflicts with prior holdings of its sister circuits. Noting that the "Fourth Circuit correctly recognized that these kinds of laws[, i.e., the City of Grants Pass camping ordinances,] do not run afoul of *Robinson* and *Powell*."[54] Second, Judge Bennett wrote a separate dissent, stating that the Cruel and Unusual Punishments Clause "does not impose substantive limits on what conduct a state may criminalize."[55] Judge Bennett emphasized that invoking a violation of the clause prior to a conviction would be improper as the clause has always been concerned with prohibiting methods or kinds of punishments.[56]

3. *The Supreme Court's Analysis of Martin v. City of Boise in Johnson*

In *Johnson*, the U.S. Supreme Court disagreed with the *Martin* decision.[57] To explain the purpose of ordinances like those at issue, Justice Gorsuch relied on briefs filed in support of the Petition for Certiorari and a federal ordinance restricting encampments.[58] Ordinances that prohibit encampments "provide the statutory authority that officials need to clear problematic

48. *Martin*, 920 F.3d at 617 (alterations in original) (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).
49. *Id.* at 604.
50. *Id.*
51. *Id.* at 617.
52. *Johnson*, 144 S. Ct. at 2211.
53. *Martin*, 920 F.3d at 590 (Smith, J., dissenting).
54. *Id.* at 594 (citing Powell v. Texas, 382 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962)).
55. *Id.* at 599 (Bennett, J., dissenting).
56. *Id.* at 602.
57. *See generally* City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024).
58. *Id.* at 2210; *see* 36 C.F.R. § 7.96(j)(1) (2023) ("In Lafayette Park the storage of . . . bedding, . . . pillows, sleeping bags, food, clothing, . . . and all other similar property is prohibited.").

encampments that pose significant health and safety risks."[59] Most often, regulations similar to the Grants Pass ordinances are used in conjunction with other devices to address homelessness.[60] Here, the Court discussed how the city adopted a "multifaceted approach" to respond to the homelessness crisis experienced in its community.[61] In addition to local shelters, these initiatives included policies to support individuals experiencing homelessness, an appointed "homeless community liaison" to assist the city's homeless population in accessing the city's resources, and ordinances that prohibit encampments on public property.[62]

The *Johnson* opinion states that anti-encampment ordinances provide governments with an additional avenue to respond to the homeless crisis.[63] However, the Court asserted that *Martin* created a challenge for cities in the Ninth Circuit as they expend resources to provide shelters and programs to their homeless populations while lacking legal authority to prompt homeless individuals to use city-provided resources.[64] The Court suggested *Martin* based injunctions make the enforcement of multifaceted approaches difficult because *Martin* diminishes the local governmental power "to persuade persons experiencing homelessness to accept shelter beds and [other] services."[65] Notably, the Grants Pass shelter reported an approximate forty percent decrease in use of its services since the injunction was issued by the District Court.[66] The majority acknowledged that lack of legal authority to prevent individuals from sleeping or camping on public property weakens efforts in addressing homelessness. [67]

4. *Distinguishing Johnson from Prior Caselaw Regarding the Eighth Amendment*

Justice Gorsuch continued by addressing the purpose of the Eighth Amendment's Cruel and Unusual Punishments Clause and the parties' comparison of Grants Pass' ordinances to ordinances at issue in prior cases.[68]

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59. Brief of Local Government Legal Center et al. as Amici Curiae, *supra* note 42, at *11.
60. *Johnson*, 144 S. Ct. at 2210; *see also* Brief for Local Government Legal Center et al. as Amici Curiae, *supra* note 42, at *11.
61. *Johnson*, 144 S. Ct. at 2208.
62. *Id.*
63. *Id.* at 2210-11.
64. *See id.* at 2223.
65. *Id.* at 2212 (quoting Brief of Amici Curiae Ten California Cities and The County of Orange, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175) 2023 WL 6367637, at *2).
66. *Id.* at 2223.
67. *See id.* at 2212, 2223-24.
68. *See id.* at 2215-20.

The majority asserted that the purpose behind the Eighth Amendment is to limit the punishments imposed on an individual who has been convicted of a crime, while other amendments limit governments on what may be criminalized.[69] The "Cruel and Unusual Punishments Clause" was incorporated into the Constitution to prevent *cruel* punishments that inflicted "terror, pain or disgrace," and "barbaric punishments like 'disemboweling, quartering, public dissection, and burning alive,'" deemed *unusual* because they "had 'long fallen out of use.'"[70] In the Court's analysis, it found the punishment(s) imposed on violators are comparable to those administered by governments around the country for offenses of the same degree, and the nature of these punishments cannot be understood as either cruel or unusual under the Eighth Amendment.[71]

The argument made by respondents was heavily reliant on the Ninth Circuit's holding in *Robinson v. California*.[72] In *Robinson*, the U.S. Supreme Court held that a California statue making "it a criminal offense for a person to be 'addicted to the use of narcotics'" inflicted "cruel and unusual punishment" because the statute at issue criminalized a person due to their *status* as an addict.[73] Since the statute did not seek to prosecute conduct, any punishment imposed on a person for their mere *status* as an addict would invoke a violation of the Cruel and Unusual Punishments Clause.[74] Respondents argued that limiting "status-based punishments" should be recognized in *Johnson* because anti-encampment ordinances make it "impossible for a homeless person who does not have access to shelter to live in Grants Pass without violating the ordinances."[75]

In its reply brief, Grants Pass reaffirmed that the ordinances prohibiting all persons from encamping on public property are prohibitive of conduct, not status.[76] To support the proposition, the city cited *Powell v. Texas*.[77] In *Powell*, the U.S. Supreme Court declined to extend *Robinson* over a Texas

69. *Id.* at 2215 (quoting Powell v. Texas, 382 U.S. 514, 531-532 (1968)).

70. *Id.* at 2215-16 (quoting Bucklew v. Precythe, 587 U.S. 119, 130 (2019)).

71. *See id.* at 2216; *see also supra* note 18.

72. *See* Brief for Respondents, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1420950; *see also* Robinson v. California, 370 U.S. 660 (1962).

73. *Robinson*, 370 U.S. at 660, 666 (citing CAL. HEALTH & SAFETY CODE § 11721 (repealed by Stats. 1972, c. 1407, p. 2987, § 2)).

74. *Id.* at 667 (Noting that addiction is recognized as an illness and "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the 'crime' of having a common cold.").

75. Brief for Respondents, *supra* note 72, at *12, *18, *23.

76. Reply Brief for Petitioners, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1657077, at *5.

77. *Id.* (citing Powell v. Texas, 382 U.S. 514, 532-33 (1968)).

ordinance that imposed a fine on any person who appeared in public while intoxicated.[78] The person charged sought relief under *Robinson* due to his involuntary condition as a chronic alcoholic, but the Court reasoned that his status did not preclude him from escaping criminal liability.[79] "[B]ecause the defendant . . . had not been convicted 'for being' an 'alcoholic, but for [engaging in the act of] being in public while drunk on a particular occasion,' *Robinson* did not apply."[80]

In *Johnson*, the U.S. Supreme Court declined to extend *Robinson* to the ordinances at issue for the same reason that it declined to do so in *Powell*.[81] Because the Grants Pass ordinances do not criminalize the status of being homeless, but rather apply neutrally to prohibit all persons from certain conduct, the Court found there was no "lawful authority to extend *Robinson* beyond its narrow holding."[82] Instead, governments may pursue alternative legal protections, such as criminal defenses and substantive or procedural laws, to provide boundaries when regulating homeless conduct.[83] States are at liberty to adopt a response to the homelessness crisis, but the Court cannot prohibit encampment-related ordinances under the Eighth Amendment.[84]

B. THE CONCURRENCE

Justice Clarence Thomas wrote separately to concur with the majority, offering two additional points.[85] First, Justice Thomas stated that *Robinson* "was wrongly decided" and that its holding contradicts the plain meaning of the Eighth Amendment's Cruel and Unusual Punishments Clause.[86] The concurrence disagreed with *Robinson* and other U.S. Supreme Court precedent regarding the Eighth Amendment's interpretation, and Justice Thomas wrote that "[m]odern public opinion is not an appropriate metric for interpreting the Cruel and Unusual Punishments Clause–or any provision of the Constitution for that matter."[87] This rejection stems from *Trop v. Dulles*, where the U.S. Supreme Court provided that the "[Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a

78. *Powell*, 382 U.S. at 532-33 (citing *Robinson*, 370 U.S. at 667).
79. *See id.* at 533-36.
80. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2219 (2024) (alterations in original) (citing *Powell*, 392 U.S. at 532).
81. *Id.* at 2220.
82. *Id.*
83. *See id.* at 2220, 2224.
84. *See id.* at 2224, 2226.
85. *Id.* at 2226 (Thomas, J., concurring).
86. *Id.*
87. *Id.* at 2227.

maturing society."[88] Under the *Johnson* concurrence, a challenge to the Cruel and Unusual Punishments Clause should be based solely on its "fixed meaning" as written in the Constitution.[89] Lastly, the concurrence stated that respondents failed to demonstrate "that their claims implicate the Cruel and Unusual Punishments Clause in the first place."[90]

C. THE DISSENT

Writing for the dissent, Justice Sonya Sotomayor began with the axiom "[s]leep is a biological necessity, not a crime."[91] The dissent argued governments must balance "public health and safety" with "the humanity and dignity of homeless people" to respond to homelessness experienced nationwide.[92] However, the dissent stated the majority failed to consider the humanitarian response to homelessness–the "causes of homelessness, the damaging effects of criminalization, and the myriad [of] legitimate reasons people may lack or decline shelter"–and instead focused primarily on governmental powers.[93]

The dissent noted that homelessness is complex, with varying causes that are sometimes beyond individual control, but criminalization is not proven to effectively reduce homelessness.[94] Instead, it can result in fear to seek assistance from law enforcement in times of need due to adverse consequences that may result.[95] Additionally, using the criminal justice system for homeless individuals who violate ordinances is not only expensive but can also adversely affect the individual.[96] Specifically, "[i]ncarceration and warrants from unpaid fines can . . . result in the loss of employment, benefits, and housing options."[97]

The dissent reasoned that *Martin* did apply, and the majority incorrectly reversed the District Court.[98] Merely stating the city ordinances criminalize

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88. Trop v. Dulles, 356 U.S. 86, 101 (1958).
89. *Johnson*, 144 S. Ct. at 2226-27 (Thomas, J., concurring).
90. *Id.* at 2227.
91. *Id.* at 2228 (Sotomayor, J., dissenting).
92. *Id.*
93. *Id.* at 2229.
94. *See id.* at 2230-31.
95. *See id.* at 2231 (citing Brief of 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents, City of Grants Pass v. Johnson, 144 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1513058, at *27). ("[C]riminalization can lead homeless people to 'avoid calling the police in the face of abuse or theft for fear of eviction from public space.'").
96. *See id.* at 2230.
97. *Id.* (citing Brief of 57 Social Scientists with Published Research on Homelessness as Amici Curiae in Support of Respondents, *supra* note 95, at *13, *17).
98. *See id.* at 2232, 2241 (citing Martin v. City of Boise, 920 F.3d 584 616 (2019)) ("In 2019, the Ninth Circuit held that 'the Eighth Amendment prohibits the imposition of criminal penalties

conduct, as opposed to status, does not necessarily mean the ordinances do not *constructively* criminalize the status of being homeless.[99] Thus, the dissent argued "*Robinson* should squarely resolve this case."[100] Justice Sotomayor continued by noting that this case did not decide whether the ordinances violate other constitutional amendments, but that the majority "misstep[s]" by limiting its review to *Robinson* applicability.[101]

IV. DECISION IMPACT

The decision in *Johnson* is one that will affect the entire country, and North Dakota is no exception. Addressing homelessness is a shared responsibility.[102]

A. HOMELESSNESS IN THE UNITED STATES

In 2023, the U.S. Department of Housing and Urban Development ("HUD") reported to Congress in its Annual Homelessness Assessment Report ("AHAR") that approximately 653,100 individuals in the United States are experiencing homelessness.[103] According to the AHAR, the overall "number of individuals experiencing sheltered and unsheltered homelessness is the highest it has ever been since data reporting began in 2007" and "the number of people experiencing homelessness increased by 12 percent, or roughly 70,650 more people" since 2022.[104] Though these numbers cannot be ascertained with absolute certainty due to the nature of homelessness, AHAR releases estimates based on their Point-In-Time ("PIT") data collection, "offering a snapshot of experiences of homelessness–both sheltered and unsheltered–on a single night."[105] The PIT count takes place annually on a single night in January across the country to provide data on the number of people experiencing homelessness, demographics of the homeless

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for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.'").

99. *See id.* at 2234 ("The status of being homeless (lacking available shelter) is defined by the very behavior singled out for punishment (sleeping outside).").

100. *Id.* at 2237.

101. *Id.* at 2241-43. In response to this position, Justice Gorsuch stated: "Rather than address what we have actually said, the dissent accuses us of extending to local governments an 'unfettered freedom to punish,' and stripping away any protections 'the Constitution' has against 'criminalizing sleeping. Either stay awake,' the dissent warns, 'or be arrested.' That is gravely mistaken. We hold nothing of the sort." *Id.* at 2224 (majority opinion).

102. *Id.* at 2244 (Sotomayor, J., dissenting).

103. DE SOUSA ET AL., *supra* note 38, at 2.

104. *Id.* at 2, 6 (The report provides the most current statistics on the homeless population in the country, detailing demographics of the individuals and the "nation's capacity to serve people who are currently or formerly experiencing homelessness.").

105. *Id.* at 6.

population, and the states' capacity to provide resources.[106] According to the AHAR, "[s]heltered [h]omelessness refers to people who are staying in emergency shelters, transitional housing programs, or safe havens," whereas "[u]nsheltered [h]omelessness refers to people whose primary nighttime location is a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for people (for example, the streets, vehicles, or parks)."[107]

In 2023, approximately "20 of every 10,000 people in the United States" experienced homelessness, and of those individuals, "[s]ix in ten people were experiencing sheltered homelessness."[108] The remaining four in ten people, approximately 261,240 people in the United States, experienced unsheltered homelessness with no "primary nighttime location" adequately "designated for, or ordinarily used as, a regular sleeping accommodation for people."[109] Regardless of the size, homelessness exists in all fifty states and is a humanitarian concern that is relevant to all.

B. HOMELESSNESS IN NORTH DAKOTA

In North Dakota, AHAR estimates there are 784 total people experiencing homelessness, a 28.5 percent increase from 2022.[110] Of the total number of people in 2023 experiencing homelessness in North Dakota, AHAR estimates approximately 568 persons are individuals, 216 are homeless families, 68 persons are unaccompanied youth, 27 persons are homeless veterans, and 174 persons are chronically homeless.[111] The majority of North Dakota's homeless population are between the ages of 25 and 44 (346 people), while 137 people experiencing homelessness are children, and 115 people experiencing homelessness are over the age of 55.[112]

In the past five years, the percentage of unsheltered homeless individuals has increased in North Dakota, underscoring the impact *Johnson* may have on local communities looking to implement ordinances to prohibit individuals experiencing homelessness from forming encampments while encouraging them to use community resources.[113] In 2023, 608 people in North Dakota

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106. *See id.*
107. *Id.* at 5.
108. *Id.* at 2.
109. *Id.* at 2, 5.
110. *Id.* at 109.
111. *Id.*
112. *See* U.S. DEP'T OF HOU. & URB. DEV., 2007-2023 POINT-IN-TIME ESTIMATES BY COC (2023), https://www huduser.gov/portal/datasets/ahar/2023-ahar-part-1-pit-estimates-of-homelessness-in-the-us html#:~:text=2007%20%2D%202023%20Point%2Din%2DTime%20Estimates%20by%20CoC [https://perma.cc/7F8N-K3UB].
113. *See generally* DE SOUSA ET AL., *supra* note 38.

experienced sheltered homelessness and an additional 176 people experienced unsheltered homelessness.[114] Though North Dakota's homeless population is lower than the number of homeless individuals estimated to live in other states, North Dakota has a homeless population and approximately 22.4 percent are unsheltered.[115]

HUD also gathers information on the available number of shelter beds in each state. In North Dakota, there is a total of 1,544 year-round beds available to people experiencing homelessness.[116] While some of these beds are restricted for use based on the individual, such as 539 designated family beds, 995 adult-only beds, and 10 child-only beds, shelter and other resources are available to North Dakota's homeless population.[117] Though the data indicates a sufficiency in the total number of shelter beds, it is difficult to state with certainty whether all persons experiencing homelessness in North Dakota have the knowledge, desire, and ability to access these resources.

Though the U.S. Supreme Court specifically identifies the AHAR in *Johnson*, other entities' findings on homelessness can shed light on homelessness concerns in North Dakota. In its 2023 annual report, the FM Coalition to End Homelessness (the "Coalition") provided information on "concerns surrounding homelessness in the Fargo-Moorhead" metropolitan area ("FM area").[118] The FM area consists of Fargo and West Fargo in North Dakota, Moorhead and Dilworth in Minnesota, and neighboring communities.[119] Per the Coalition's findings, "2,570 individuals, 46 adult couples without children, and 298 families inquired about seeking shelter" in the FM

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114. *Id.* at 109.

115. *Id.* at 96-114; *see generally* HUD EXCHANGE, 2007-2023 PIT ESTIMATES BY STATE (2023), https://www hudexchange.info/resource/3031/pit-and-hic-data-since-2007/ [https://perma.cc/5LAT-PQKC] (Since AHAR began reporting data in 2007, North Dakota's highest number of homelessness occurred in 2013 with a total of 2,069 persons.).

116. U.S. DEP'T OF HOUS. & URB. DEV., HUD 2023 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOUSING INVENTORY COUNT REPORT 19 (2023), https://files hudexchange.info/reports/published/CoC_HIC_NatlTerrDC_2023.pdf [https://perma.cc/NBW7-PBG6] ("Th[e] report is based on information provided to HUD by Continuums of Care in the 2023 Continuum of Care application and has not been independently verified by HUD."); *see* DE SOUSA ET AL., *supra* note 38, at 4 ("Continuums of Care (CoC) are local planning bodies responsible for coordinating the full range of homelessness services in a geographic area, which may cover a city, county, metropolitan area, or an entire state.").

117. U.S. DEP'T OF HOUS. & URB. DEV., *supra* note 116, at 19; *see generally supra* note 38 and accompanying text (Note that the AHAR report has estimated demographics of North Dakota's homeless population, and beds with occupancy restrictions may pose an additional challenge.).

118. CORINA BELL ET AL., FM COALITION TO END HOMELESSNESS, THE 2023 STATE OF HOMELESSNESS IN THE FARGO-MOORHEAD METRO AREA 2 (2023), https://www fmhomeless.org/ [https://perma.cc/4KZU-W747].

119. *Id.* at 5.

area in 2022.[120] This indicates a significant number of North Dakotans are either experiencing homelessness or are at risk of becoming homeless.[121]

C. RESPONDING TO HOMELESSNESS IN NORTH DAKOTA

The decision in *Johnson* did not resolve how local or state governments may respond to homelessness, but instead has opened additional avenues for communities to combat homelessness. North Dakota communities are no different from other governments employing a multifaceted approach to end homelessness in a collaborative effort balancing public interests and humanity.[122] Under the U.S. Supreme Court's holding in *Johnson*, cities and states "may experiment" with approaches and "may find certain responses more appropriate for some communities than others."[123]

While North Dakota, at both state and local levels, has implemented camping-prohibitive ordinances for public parks, state and local parks are under different operative authority than other public property controlled by the governing body of each city. For example, the North Dakota Parks and Recreation Department may enforce camping-related ordinances within state parks, and the Grand Forks Park District may enforce anti-camping ordinances within Grand Forks' parks.[124] Despite the lack of camping ordinances on public city property in North Dakota, many local governments have implemented other conduct-prohibitive ordinances that provide legal authority for cities to regulate certain acts.

In Fargo, Bismarck, and Grand Forks, local governments have long used ordinances to prohibit behaviors pertaining to disruptive conduct and indecent exposure, which can also give cities the authority to regulate some conduct associated with homelessness.[125] Since the decision to implement camping-related ordinances is now left to the individual cities and states, North Dakota communities could implement laws that supplement their approaches to addressing homelessness. With North Dakota state and local governments already expending efforts to assist the homeless population, the use of camping-related ordinances may serve a similar purpose as they do in other cities.

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120. *Id.* at 37.
121. *See id.* at 36-38.
122. *See generally supra* text accompanying notes 57-62.
123. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2226 (2024).
124. *See* N.D. ADMIN. CODE 58-02-08-06 (2018); GRAND FORKS, N.D., PARK DIST. ORDINANCES § 4(17) (2017).
125. *See* FARGO, N.D., CODE OF ORDINANCES § 10-0301(A)(4) (2024); BISMARCK, N.D., CODE OF ORDINANCES § 6-05-02(1); GRAND FORKS, N.D., CODE OF ORDINANCES § 9-0107(4)-(5) (2024).

For instance, the City of San Francisco stated that its relevant ordinance functions "as one important tool among others to encourage individuals experiencing homelessness to accept services and to help ensure safe and accessible sidewalks and public spaces."[126] Like San Francisco, North Dakota communities have an interest in providing safe public spaces, but they also have an interest in ensuring that all North Dakota residents are sleeping in a habitable space. North Dakota cannot require that people experiencing homelessness accept the resources that are available to them, nor should North Dakota communities overlook the individual autonomy of people declining assistance. As noted by the *Johnson* majority, assistance may be declined for several reasons, including shelter location, safety concerns, curfews, and religious practices.[127] However, enforcing certain ordinances can give cities the legal authority to encourage homeless individuals to take advantage of available assistance as *Johnson* suggests.

The enforcement of conduct-prohibitive ordinances, especially related to camping or sleeping on public property, could also negatively impact local communities. Individuals experiencing homelessness may become more fearful to seek assistance from law enforcement in times of need or may have trouble finding a place to sleep if communities lack available shelter beds.[128] Additionally, run-ins with the criminal justice system could have a negative effect on a homeless person's ability to receive benefits, find employment, or sleep at a shelter due to a violation of an ordinance.[129]

D. IMPLEMENTATION OF ANTI-ENCAMPMENT ORDINANCES IN NORTH DAKOTA

As of October 2024, the two largest cities in North Dakota have passed anti-encampment ordinances pursuant to the *Johnson* decision. In Fargo, Article 10-14 was recently added to the Code of Ordinances, prohibiting persons from camping or establishing a campsite on public property.[130] The ordinances require those unlawfully encamping on public property to "vacate and remove all belongings . . . within forty-eight (48) hours of receiving notice to vacate from an enforcement officer."[131] Unclaimed items "with apparent value or utility will be stored for 60 days" while unclaimed items "that have

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126. *Johnson*, 144 S. Ct. at 2212 (citing Brief for City and Cnty. of S.F. & Mayor Breed as Amici Curiae, City of Grants Pass v. Johnson, 114 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 966400, at *7-*8).

127. *Id.* at 2210.

128. *See supra* text accompanying note 93.

129. *See supra* text accompanying note 95.

130. FARGO, N.D., CODE OF ORDINANCES art. 10-14 (2024).

131. *Id.* § 10-1403(1).

no apparent utility or value, are in an unsanitary condition, or present an immediate hazard or danger," will be discarded when persons unlawfully encamping vacate.[132]

As provided by definition in Article 10-14, "'[u]nsanitary' means a hazard to the health and safety of the public, to include but not limited to human waste, bodily fluids, or chemical contamination."[133] In addition, "'[c]ampsite' means to pitch, erect, create, use, or occupy camp facilities for the purposes of habitation or maintaining a temporary place to live, as evidenced by the use of camp paraphernalia."[134] Violations are "punishable as an infraction[, and violators] shall be punished by a fine not to exceed $1,000.00; the court to have power to suspend said sentence and to revoke the suspension thereof."[135]

The second city in North Dakota that has implemented encampment-related legislation is Bismarck. Comparing the Fargo and Bismarck ordinances, one distinction in Bismarck's approach is the shorter time a violator has to vacate the public property upon notice of violation. In Bismarck, removal of campsite and accompanying property begins twenty-four hours after notice of violation is given.[136] Within the campsite removal language, the ordinance specifies that the City must post a twenty-four-hour notice prior to taking removal action.[137] Within this time, "the City shall inform a local agency (delivering social services to homeless individuals) of the location of the campsite."[138] Bismarck police officers are then "authorized to remove the campsite and all personal property related thereto."[139]

Though there is additional language in both cities' ordinances regarding implementation, details remain that are unclear. The holding in *Johnson* permits local governments to use prohibitive camping ordinances to address the growing concern of homelessness, as Fargo and Bismarck have already done. North Dakota communities may continue to do so if implementation produces favorable results.

V. CONCLUSION

In *Johnson*, the U.S. Supreme Court held that enforcing ordinances that regulate camping or otherwise sleeping overnight on public property does not

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132. *Id.* § 10-1403(2)(a)-(b).
133. *Id.* § 10-1401(11).
134. *Id.* §10-1401(3).
135. *Id.* § 10-1404, Ord. No. 5450 § 2.
136. BISMARCK, N.D., CODE OF ORDINANCES, Ord. No. 6587 (2024).
137. *Id.*
138. *Id.*
139. *Id.*

violate the Cruel and Unusual Punishments Clause of the Eighth Amendment.[140] The text of the Eighth Amendment "focuses on the question [of] what 'method or kind of punishment' a government may impose after a criminal conviction, [rather than] whether a government may criminalize particular behavior in the first place."[141] The clause itself does not permit the Court to regulate the laws that state or local governments implement because other authorities serve that purpose.[142] For facially neutral ordinances that assess reasonable penalties akin to those imposed for similar offenses throughout the nation, the Cruel and Unusual Punishments Clause is not violated.[143] This holding has expanded the options for state and local governments to respond to homelessness, but it will likely be the subject of future litigation for practitioners across the nation as communities navigate the details of conduct-prohibitive laws following this decision. North Dakota practitioners must be aware of potential legislation, the influx that criminalization may have on the criminal justice system, changes to local law, the impact on the homeless population, and the trickle-down effect that an action taken in light of this decision could have on residents of North Dakota.

Taylor House[*]

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140. City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2224, 2226 (2024).
141. *Id.* at 2216 (citing Powell v. Texas, 382 U.S. 514, 531-32 (1968)).
142. *See id.* at 2215, 2220.
143. *Id.* at 2216, 2218.

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