

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Respondent,

v.

ALEXANDRA CHANEL BARRETT,

Defendant-Appellant.

Multnomah County Circuit Court Case
Nos. 14CR10631, 14CR14443,
14CR16019, 14CR17841, 14CR20088,
14CR32814, 15CR00103

CA A159139 (Control), A159140,
A159141, A159142, A159143,
A159144, A159145

**BRIEF OF *AMICI CURIAE* OREGON
JUSTICE RESOURCE CENTER, AMERICAN
CIVIL LIBERTIES UNION OF OREGON,
PORTLAND CHAPTER OF THE NATIONAL
LAWYERS GUILD, HOMELESS YOUTH
LAW CLINIC, COMMON CUP FAMILY
SHELTER, OPERATION NIGHTWATCH,
RIGHT TO DREAM TOO, SISTERS OF THE
ROAD, FIRST UNITARIAN CHURCH OF
PORTLAND, AUGUSTANA LUTHERAN
CHURCH, AND ALBINA MINISTERIAL
ALLIANCE**

Appeal from the Judgment of the Circuit Court
for Multnomah County
Honorable Stephen K. Bushong, Judge

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**BRIEF OF *AMICI CURIAE* OREGON JUSTICE RESOURCE CENTER,
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INTRODUCTION

Amici curiae include several legal organizations in Oregon that work to protect and advance civil rights for all Oregonians. The Oregon Justice Resource Center (OJRC) is a non-profit organization dedicated to promoting civil rights, combating systemic discrimination, and enhancing the quality of legal representation to traditionally underserved communities.¹ The American Civil Liberties Union Foundation of Oregon, Inc. (ACLU) is a non-profit, non-partisan organization dedicated to preserving and advancing civil rights and liberties guaranteed or reserved to the people by the Oregon and United States constitutions. The National Lawyers Guild (NLG) is a non-profit corporation formed in 1937 as the nation's first racially integrated voluntary bar association, with a mandate to advocate for fundamental principles of human and civil rights, including the protection of rights guaranteed by the United States Constitution. The Portland Chapter of the NLG seeks to implement these goals in Portland and in Oregon as a whole.

¹ Undersigned counsel would like to thank and specifically credit Ben Scissors, office manager of the OJRC, for his excellent research assistance.

Amici curiae also include non-profit organizations that serve Portland's homeless community. The Homeless Youth Law Clinic is a non-profit organization providing legal advocacy, education and resources to Portland area youth on a variety of civil legal issues, including expungement hearings, family rights, debt relief, housing, access to education, and aging out of foster care, among others. The Common Cup Family Shelter is a small shelter in Southeast Portland serving homeless families with beds, showers, dinner, and breakfast during the coldest months of the year. Operation Nightwatch is a nonsectarian night-ministry of hospitality that serves the city's homeless population through centers in downtown and southeast Portland. Right to Dream Too is a nonprofit organization operating a space that provides refuge and a safe space to rest or sleep undisturbed for Portland's unhoused community who cannot access affordable housing or shelter. Sisters of the Road, founded in 1979, is a nonprofit barter cafe in Portland's Old Town neighborhood that works to create systemic change that will end poverty and homelessness forever by providing nourishing meals in a safe, dignified space.

Amici curiae also include religious-affiliated non-profit organizations that serve Portland's homeless community. The First Unitarian Church of Portland, founded in 1866, is a large, dynamic church in the heart of city that hosts 13 Salmon Family Center, a shelter for homeless families, and provides progressive leadership on important civic issues, including homelessness and

affordable housing. Augustana Lutheran Church is a large multicultural, multinational congregation that is also home to the Augustana Non Profit Collaborative of six non-profits including the Community Alliance of Tenants. Albina Ministerial Alliance is the largest ecumenical gathering of ministers and churches in Northeast Portland that has advocated for the community in civil rights, police justice, education, health, and serving the houseless for over 60 years.

Amici are aligned with defendant-appellant Alexandra Barrett and adopt defendant's statement of the case and assignments of error. *Amici* wish to be heard by this Court to place homelessness in a broader context than a single individual's criminal conviction. *Amici* wish to present the words of homeless people themselves, as only they can fully illuminate the impact of the Portland anti-camping ordinance on their lives. Portland's housing crisis and lack of available shelter leave homeless people no alternative but to sleep outside. Thus, *amici* contend that punishment of homeless individuals for this basic, life-sustaining activity subjects the most vulnerable members of our community to cruel and unusual punishment in violation of their constitutional rights.

SUMMARY OF ARGUMENT

Under the Eighth Amendment, applied to the states through the Fourteenth Amendment, and Article I, section 16, of the Oregon Constitution, the state cannot impose a criminal penalty on an individual based on her

involuntary status. *See, e.g., Robinson v. California*, 370 US 660, 666-67, 82 S Ct 1417, 8 L Ed 2d 758 (1962). *Amici* urge the court to hold that an individual likewise cannot be punished for conduct that is inseparable from her involuntary status. *See Jones v. City of Los Angeles*, 444 F3d 1118, 1132-37 (9th Cir 2006), *vac'd after settlement*, 505 F3d 1006 (2007). When conduct “is involuntary and inseparable from status,” the distinction between punishment for conduct versus punishment of status is meaningless; “they are one and the same.” *Id.* at 1136.

In Portland, sleeping outdoors is involuntary and inseparable from homelessness. At any given time, homeless people in Portland have no place to go, either because they could not find shelter, or because they would be turned away from shelter for having failed to meet eligibility requirements. Thus, they must be outdoors, and they must sleep there. Moreover, as a matter of survival, homeless people in Portland cannot sleep outside without the use of bedding, a sleeping bag or other sleeping matter. Yet this is the very activity that the anti-camping ordinance prohibits.²

² The ordinance at issue in this case, PCC 14A.05.020, provides:

“A. As used in this Section:

1. ‘To camp’ means to set up, or to remain in or at a campsite, for the purpose of establishing or maintaining a temporary place to live.

2. ‘Campsite’ means any place where any bedding, sleeping bag, or other sleeping matter, or any stove or fire is placed, established, or maintained, whether or not such place incorporates

In light of the evidence that sleeping outside is involuntary and inseparable from homelessness in Portland, the trial court erred when it relied on the availability of a choice-of-evils defense to uphold Portland's anti-camping ordinance. If the ordinance punishes the defendant's homeless status, the availability of a choice-of-evils defense does not save it from constitutional infirmity. Rather, the ordinance is unconstitutionally cruel as a matter of law, and a defendant should not bear the burden of proof to establish a reasonable belief that there was no other choice.

ARGUMENT

I. Portland's anti-camping ordinance punishes homeless people for involuntary, innocent conduct that is inseparable from homelessness itself.

In Portland, there are just 20 affordable and available rental units for every 100 extremely low-income individuals (those with incomes at or below 30 percent of the average median income for the metropolitan area). Nat'l Low Income Housing Coalition, *The Affordable Housing Gap Analysis Report*, 8 (Mar 24, 2016), available at <http://nlihc.org/sites/default/files/Gap->

the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

“B. It is unlawful for any person to camp in or upon any public property or public right of way, unless otherwise specifically authorized by this Code or by declaration by the Mayor in emergency circumstances.”

“C. The violation of this Section is punishable, upon conviction, by a fine of not more than \$100 or by imprisonment for a period not to exceed 30 days or both.”

[Report_print.pdf](#). Rents in the Portland metro area rose 20 percent over the last five years. Kristina Smock Consulting, *2015 Point-In-Time Count of Homelessness in Portland/Gresham/Multnomah County, Oregon*, 11 (June 2015), available at <https://www.portlandoregon.gov/phb/article/532833> [hereinafter *Point-In-Time Count*].³ Low-income households continue “to see their inflation-adjusted wages fall, while housing costs in Portland have grown at rates faster than inflation.” *Id.* at 11. Portland saw rents appreciate nearly 15 percent in 2015 alone and currently has a three percent vacancy rate. Melanie Sevchenko, *Soaring Rents in Portland Lead to More Evictions and Homelessness*, *The Guardian*, Feb 11, 2016. Simply put, in Portland, poor people with homes are in danger of losing them, and those without homes have little hope of finding one.

At the same time, limited emergency shelter space in Portland renders it impossible for a homeless person, such as defendant, to consistently find shelter inside on any given night. The basic human need for protection from the elements requires the use of “sleeping matter” to sleep outside, yet this is the very act that the anti-camping ordinance punishes. Thus, the ordinance punishes homeless people for involuntary, innocent conduct that is inseparable from their homeless status.

³ Federal funders require that communities that receive funding for homeless services conduct the “point-in-time count,” a one-night count of the homeless population in the community, once every two years. *Point-In-Time Count* at 44.

A. Portland lacks sufficient shelter space to meet demand.

At the time of defendant's arrests, Portland had a severe shortage of emergency shelter beds. Nationwide, emergency beds made up 33 percent of the housing inventory for homeless men and women in 2014. Anna Griffin, *No Space Anywhere*, *The Oregonian*, (Jan 24, 2015). In Portland, emergency beds made up only 8.1 percent of available shelter space. *Id.* Even when transitional housing and other types of shelter are taken into account, Portland had just 0.61 available beds per homeless person. *Id.*

The most recent count of the number of homeless people in the area reflects the lack of available shelter. On the night of January 28, 2015, there were 3,800 homeless people in Multnomah County. Smock, *Point-In-Time Count* at 41. This figure is a conservative estimate of the homeless population, as it does not include people who are "doubled up" with friends or relatives. *Id.* at 38-40. The size of Multnomah County's homeless population on one night, if those people are taken into account, would be more than 16,000 people. *Id.* at 40. Moreover, these numbers are merely a snapshot of the homeless population and do not reflect that over the course of a year, many more people experience homelessness. *Id.* at 13.

Out of the 3,800 homeless people who were included in the count, 1,900 were unsheltered, "sleeping outside, in a vehicle, or other places not intended for human habitation." *Id.* at 7, 41. This figure does not include an additional

635 people who were sleeping outside but who were unwilling or unable to provide sufficient identifying information to eliminate the possibility that they had already been counted that night. *Id.* at 12. Nonetheless, of the 1,900 unsheltered people counted, ninety percent of those—1,700 men, women and children—were sleeping outside in Portland. *Id.* at 33.

B. Homeless people cannot consistently find shelter indoors in Portland; there is no place for them to go.

Homeless shelters have limited space and limited hours, and they often must turn people away. Homeless people's words best describe what they go through to find a place to sleep inside, and how, despite these efforts, they are unable to do so.

Kyle, downtown waterfront area, March 6, 2016⁴

If I was to go up to [a local shelter], I got to stand in line, and I got to have a number. And, if my number doesn't get called, I'm back on the street anyways. They only have a certain amount of beds and it's cold, depends on the season really. But I'm standing there waiting, hoping to get a bed, and I'm not getting in so I just go back to the street anyway.

Scott, Springwater Corridor, March 6, 2016

Man, it's pretty tough, don't get me wrong. I got family all throughout Portland where I can stay but every now and then it's hard enough for me to find somewhere to go when it's raining and it's cold outside. A lot of times, I have to knock on a tent's door and say can I come in and stay the night? Just to get out of the rain or the cold, whatever it is, so I can survive myself. * * * I've been to plenty of shelters, and especially when it's full they kick you out

⁴ All interviews were conducted in Portland. Interviewees were asked to provide a name, but did not necessarily provide their real names.

and tell you it's full and you can't go.

John, downtown, waterfront area, March 6, 2016

You've got to be down there 5:30, 6:00 in the morning to get in line and hopefully at 5:30 or 6:00 you're going to be first in line. And then you've got to sign up for the shelter * * * And then you've got to go down there by 7 pm at night to check in with them also. And if they have room, they will let you in. If they do not, they will not let you in. But you've got to do that every night. You've got to check in with them every evening, at 7 o'clock. * * * You've got your stuff you've got to carry with you too. * * * Shelter sleeping right now, shelter living right now is very slim. I mean, there's, it's so packed right now, that it's a matter of, when you go to this one, it's hoping that someone else does not show up or does not check in and they're not going to be there. Then, if you don't do that, then you're out for the night.

Kalis, youth drop-in center, March 30, 2016

I was on the streets for like a year, and the first time, the first couple months were really, really difficult, mostly because it was during the winter and the shelters close up really fast and there's no room for anybody. Pretty much you can't find shelter almost anywhere. * * * They close up so fast. The chances of you getting in unless you've been waiting there at 7:00 are slim. * * * It's first come first serve and there's a lot of people in Portland and the shelters can't hold everybody and so many people are wet and miserable, just trying to live and be.

Emergency shelters serve only specific groups of individuals. In late 2014, the total number of available emergency-shelter beds, including shelters that only open in winter or during severe weather, was just 1,146. City of Portland, *Emergency Shelter and Services for Persons Experiencing Homelessness in Portland & Multnomah County, Oregon, 2014 - 2015*, (Oct 17, 2014), available at <https://www.portlandoregon.gov/phb/article/509105>. When

it is not winter or severe weather, the available space decreases by almost half, to just 619 year-round beds. *Id.* Of those, 150 are in shelters that serve only families with children and another 41 serve only youth under age 23. *Id.* Another 298 beds are in shelters for men only. *Id.* There are 238 slots for single women, but 13 of those are for domestic violence victims. *Id.*

Thus, as a single woman seeking shelter in May and July of 2014, defendant faced limited shelter options. At the time of defendant's arrests there were only 225 emergency shelter beds available to single, adult women who did not identify as domestic violence victims. Yet, at the last count, there were 1,161 homeless adult women, 566 of whom were without shelter. Smock, *Point-In-Time Count* at 24. Thus, even under the Point-In-Time Count's conservative estimate of the homeless population, on any given non-severe weather night, only 19 percent of homeless adult women would be able to obtain emergency shelter in Portland.

C. Homeless people face multiple barriers to securing the limited shelter space available.

Homeless people face multiple challenges to accessing emergency shelter, including lack of access to information, lack of transportation, health issues and other barriers. Their stories illustrate the obstacles, large and small, that prevent them from finding a place to sleep inside.

Jeremy, youth drop-in center, March 30, 2016

[It's] pretty hard because I work, like, graveyard. I just got a

job and I don't sleep in shelters. I sleep on the Max. Like 2, 3 hours riding back and forth. That's all I get. Because that's the hours that they are willing to give me and the only shelters are only available at night from 9:00 to 9:00 or 8:45 to 8:45 for my age group.

Jason, Springwater Corridor, March 6, 2016

There are certain requirements and sometimes the shelters are full. Sometimes you have to have a current tuberculosis test confirming that you don't have tuberculosis or carry the virus. And sometimes it's hard to find bus fare. Most of the shelters are downtown Portland and this is Southeast and it's kind of far and I don't always have money and a lot of other people don't always have money to spare for busses.

Vic, Springwater Corridor, March 6, 2016

I've had very a hard time to get things going in the medical area and so it absorbs everything I've got as far as exhausting any kind of ability to get out of this kind of environment. It's almost like I'm trapped here.

Kay, Springwater Corridor, March 6, 2016

We do have some money coming in but not a lot. We tried doing the motel thing, but that is really expensive. That only lasts about two weeks and then that's how we ended up here [in a tent]. * * * There is some [family shelters] but it's very limited, very limited. I got that Roots book, and was going through it, and my husband was sitting there with me. And you go to one, and it's one for only men. And there's one only for women, or women and children only or women with domestic violence and everything. There's all kinds of those ones, I mean, a lot. And then when you get to family shelters, there's only one through four. * * * There is shelters we can go to, but it's the weekend. With 211, you got to call to go to a shelter and do the process. It's only Monday through Friday. * * * It's a service that you call to get resources and stuff to the shelters. But it's only Monday through Friday, and see I called that yesterday [Saturday], and so here we are.

Plugs, youth drop-in center, March 30, 2016

If you're over the age limit of 25 . . . being able to get indoors is a lot harder and also the fact that in Portland I get lost all the time and I don't know where things are. The streets confuse me and I just get lost. That's my difficulty with trying to find shelters.

Anokanotin, youth drop-in center, March 30, 2016

I'm very unfamiliar with most of any shelters. I'm familiar with one that is accessible for youth, people in between the ages of 17 and 25. * * * There are some places that are available for pretty much all adults, but they require TB testing before you can get in. * * * It is not well advertised at all. It's not made known and it's hard to find out that kind of stuff. Nobody knows where to start, you know, to find that kind of stuff and there's also limitation in what there is once you do find that stuff. And then traveling to the places, you know * * * So yeah, that's why there's a struggle with the shelters, is there a lack of awareness of where they're at and just a lack of them in the first place.

Tawny, Springwater Corridor, March 6, 2016.

[Finding shelter inside is] very hard, especially if you're a couple. There isn't none until just recently, I think here in the last month they got one somewhere in the Portland area. * * * So it's either, you know, we came into this situation together, we're not going to walk out and leave one alone.

Trish, Chinatown, April 3, 2016

Couples, there's nowhere for couples to be together in a shelter. * * * This is my main support system right here. I mean, being separated from him, no.

D. Homeless people cannot sleep outside in portland without the use of “sleeping matter.”

A person violates the anti-camping ordinance when she “sets up” or “remains in” a public place where she has placed “sleeping matter.” The

ordinance prohibits “camping” in “any public property or public right of way.”

PCC 14A.50.020(B). “To camp” means to “set up, or to remain in or at a campsite” and a “campsite” “means any place where any bedding, sleeping bag, or other sleeping matter * * * is placed, established, maintained, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure[.]” PCC 14A.50.020(A). Thus, the ordinance forbids homeless people from using any protective covering when they attempt to sleep outside.

Homeless people, like all people, cannot sleep without some protection from the elements. However, unlike people with homes, homeless people face daily exposure to the rain, wind and cold. Thus, “sleeping matter” is crucial to their mental and physical health.

Kay, Springwater Corridor, March 6, 2016

A tent is your shelter. It is like a house. When someone lives in an apartment, or a house, why do they need a building? I mean, you want, does someone want to sleep outside with rain and get wet and sick? There’s a safety issue. Yes, I would say it’s a safety issue. Your safety and your well-being and everything.

John, downtown waterfront area, March 6, 2016

[You] definitely need something underneath you. Even though you are sleeping on concrete and it’s dry, it still sucks the heat right out of your body. Even though you have a blanket on you, it still sucks the heat right out of your body. So I’ve got that orange sleeping pad. I have a tarp over the top of that and then I’ve also got a sleeping cloth, I guess, between me and that. That way it does keep me a bit warmer. I know when I’m on the concrete because I can feel it and then I move in and bring my blankets in closer to me.

Scott, Springwater Corridor, March 6, 2016

[I need a tent] just to get out of the elements. Just to keep the rain off you, to keep the wind from blowing on you so you can stay alive the next day, to be quite honest. I mean if you don't have the necessities to sleep outside, camping, you're pretty much going to get sick from pneumonia or other things.

Kalis, youth drop-in center, March 30, 2016

I just have a sleeping bag and a blanket and I'm not very warm, still, because the wind chill is pretty bad. No matter how warm it is, you still have that wind, you're still in the cold, you don't have a layer of protection to keep that warmth in. * * * Not everybody can afford a sleeping bag, or carry sleeping bags around, you know. Sleeping bags are heavy and bulky. * * * It's really inconvenient. I'd like it if I could just -- Nothing makes you feel more homeless than carrying around your sleeping bag and not being able to find a place to sleep.

More than half, 57 percent, of the homeless population in the Portland area has a disabling condition. Smock, *Point-In-Time Count* at 26. For these individuals, the use of "sleeping matter" is a matter of basic survival.

Tawny, Springwater Corridor, March 6, 2016

My husband does [need a tent and air mattress] because he's got a broken hip, a fractured hip, actually, and a deteriorating bone disease and so it hurts him to sleep on the ground. He needs hip surgery on his hip but his doctor won't do the surgery until we get into some sort of stable housing situation.

Vic, Springwater Corridor, March 6, 2016

I currently have frostbite on my feet and it was from sleeping in a tent that was too small * * * so I had my feet out the door and covered but it got uncovered and I got frostbite. * * * This is an unforeseen thing that I didn't expect. I was diagnosed

with some cancer. What happened is my white blood cell count is real high and everything was just right to get the frostbite.

II. In light of the lack of shelter space, Portland’s anti-camping ordinance constitutes cruel and unusual punishment as applied to homeless people.

The constitutional prohibition of cruel and unusual punishment creates “substantive limits on what can be made criminal.” *Ingraham v. Wright*, 430 US 651, 667-68, 97 S Ct 1401, 51 L Ed 2d 711 (1977) (citing *Robinson*, 370 US 660). One such limit is the constitutional prohibition against a criminal penalty based solely on an individual’s involuntary status. *See Robinson*, 370 US at 666-67. In *Robinson*, the Court struck down a law that criminalized drug addiction, concluding that “in light of contemporary knowledge, a law which made a criminal offense of * * * a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.” *Id.*

In *Powell v. Texas*, 392 US 514, 88 S Ct 2145, 20 L Ed 2d 1254 (1968), in the context of a chronic alcoholic’s conviction for public intoxication, the Supreme Court addressed the distinction between when a law permissibly punishes conduct and when it impermissibly punishes status. The plurality interpreted *Robinson* to prohibit only those laws that solely criminalized status, not conduct tied to that status. *Id.* at 532-534 (plurality opinion). The dissent’s interpretation, however, asserted that the Eighth Amendment prohibited

criminalization of “being in a condition” which the defendant “had no capacity to change or avoid.” *Id.* at 568 (Fortas J., dissenting).

Justice White, in his tie-breaking concurrence, agreed with the dissent that the Eighth Amendment prohibited criminalization of acts *or* conditions that individuals are powerless to avoid, but sided with the majority because the record failed to demonstrate that the defendant’s public drunkenness was involuntary. *Id.* at 548, 550 n 2, 553 (White, J., concurring in the judgment). Justice White explained that the Court in *Robinson* “was dealing with a condition [drug addiction] brought about by acts remote in time from the application of the criminal sanctions * * * and a condition of great magnitude and significance in terms of human behavior and values.” *Id.* at 550 n 2. In contrast, “being drunk in public” was a “mere transitory state . . . not far removed in time from the acts of ‘getting’ drunk and ‘going’ into public.” *Id.*

Most importantly for the present analysis, Justice White acknowledged that, for homeless alcoholics, “a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible.” He concluded, “As applied *to them* this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.” *Id.* at 551 (emphasis added). Thus, Justice White believed that homelessness, like addiction, is an involuntary status—it is not a “mere transitory state.” *See id.* at 550 n 2, 551.

Several courts have construed the rulings in *Robinson* and *Powell* to recognize that enforcement of public sleeping bans against homeless individuals constitutes cruel and unusual punishment. In *Jones*, 444 F3d at 1132-37, for example, the Ninth Circuit concluded that an ordinance that criminalized public sleeping violated the Eighth Amendment as applied to homeless individuals who had no choice but to sleep in public. *See also, Pottinger v. City of Miami*, 810 F Supp 1551, 1563 (SD Fla 1992) (same); *Johnson v. City of Dallas*, 860 F Supp 344, 350 (ND Tex 1994) *rev'd on other grounds*, 61 F3d 442 (5th Cir 1995) (same); *State v. Adams*, 91 So 3d 724 (Ala App Ct 2010) (punishment of convicted sex offenders for failure to register a home address was cruel and unusual as applied to homeless individuals because their failure to comply was involuntary conduct inseparable from their homeless status).

These courts, like Justice White's concurrence in *Powell*, recognized that homelessness is an involuntary status. The court in *Jones* explained,

“Appellants had no choice other than to be on the streets. Even if Appellants' past volitional acts contributed to their current need to * * * sleep on public sidewalks at night, those acts are not sufficiently proximate to the conduct at issue here for the imposition of penal sanctions to be permissible.”

444 F3d at 1137; *see also Pottinger*, 810 F Supp at 1563-66 (“[T]he the lack of reasonable alternatives should not be mistaken for choice.”); *Johnson*, 860 F Supp at 350 (“[T]he unavailability of shelter is not a function of choice.”)

Thus, several courts that have reviewed the issue have concluded that a city

violates the prohibition on cruel and unusual punishment when it fails to provide adequate shelter and then seeks to criminalize a homeless person's response to his or her plight. *Jones*, 444 F3d at 1132-37; *Pottinger*, 810 F Supp at 1563; *Johnson*, 860 F Supp at 350.

Portland's lack of adequate shelter space supports this application of the prohibition on cruel and unusual punishment in the present case. As explained above, homeless people in Portland cannot consistently avoid sleeping outside, and they require some form of sleeping material to carry out that basic life activity. Thus, as applied to them, the anti-camping ban is cruel and unusual punishment.

III. The trial court erred in its agreement with the holding in *Anderson*.

The trial court, in its analysis of defendant's Eighth Amendment challenge to the anti-camping ordinance, agreed with *Anderson v. City of Portland*, No. 08-cv-01447-AA, 2011 US Dist LEXIS 140728 at *20 (D Or Dec 11, 2011) (*Anderson II*) that "facts regarding enforcement" were necessary. ER 64-65. *Anderson* was a civil rights action under 42 USC 1983, which challenged Portland's anti-camping ordinance as cruel and unusual punishment as applied to homeless people. *Id.* at *3-4. The court in *Anderson* recognized at the pleading stage that enforcement of Portland's anti-camping ordinance could constitute cruel and unusual punishment if it criminalized homeless people's "involuntary and innocent conduct." *Anderson v. City of Portland*,

2009 US Dist LEXIS 67519, at *20 (D Or July 30, 2009) (*Anderson I*).

However, the court ultimately denied the plaintiffs' motion for summary judgment on that issue because it found that the plaintiffs had not presented undisputed "evidence of the specific manner in which the ordinances are enforced or the specific conduct which led to the enforcement actions."

Anderson II, 2011 US Dist LEXIS 14078, at *6.

The trial court's agreement with *Anderson II* was in error. The plaintiffs in that case asserted claims under 42 USC 1983. Thus, unlike defendant, those plaintiffs bore the burden to prove that the Eighth Amendment violations were due to the City's policy or custom, as demonstrated by a persistent and widespread practice. *See City of St. Louis v. Praprotnik*, 485 US 112, 127, 108 S Ct 915, 99 L Ed 2d 107 (1988) (so holding). In addition, the *Anderson* case was litigated in 2007-2011, before the current housing and shelter crisis in Portland significantly worsened conditions for the homeless. Most importantly, in this case, the factual evidence is undisputed that officers found defendant with a backpack, cardboard, blankets and a tarp on multiple occasions, Tr 107, 112-13, 118, 121, 125, told her that camping in the City of Portland was illegal, Tr 109, 119-120, 122, and "not to camp in the City of Portland at any place, any time," Tr 115, 140, 143, and arrested her, Tr 115-116, 123, 127—despite the lack of available shelter space in Portland at the time. Thus, the concerns in *Anderson* about the lack of evidence of the specific manner of police

enforcement are not present here.

Moreover, Portland’s anti-camping ordinance sweeps so broadly that evidence regarding the specific conduct that led to enforcement is unnecessary to decide whether it is cruel and unusual as applied to homeless people. As explained above, the ordinance effectively prohibits all public sleeping, because it defines “campsite” to include any space where a person places “sleeping matter.” Thus, it encompasses every homeless person who lays down on a blanket or crawls into a sleeping bag to seek some rest—no matter how small or inconspicuous the “campsite.”

The broad sweep of the anti-camping ban means that every homeless person who seeks rest outdoors fears possible arrest.

Kalis, youth drop-in center, March 30, 2016

I’ve gone nights where I just haven’t slept. I mean sometimes it’s nice because like, I’ll find a place that’s hidden. You are always hiding, places you think that no patrollers or anybody will come mess with you. It’s hard because everybody’s looking for that. There are so many homeless people and they’re all looking for that.

Mike, Chinatown, March 30, 2016

It’s not hard to find a place to sleep, but it’s hard to find a comfortable place to sleep because you are afraid that you are going to get caught, you are afraid that a cop’s going to come, you are afraid that someone’s going to steal your stuff. So it’s hard to have peace on the street, it really is.

This constant threat of punishment is significant to the Eighth

Amendment analysis. In *Trop v. Dulles*, 356 US 86, 100–02, 78 S Ct 590, 2 L Ed 2d 630 (1958), the Court struck down expatriation as a cruel and unusual punishment in part because, even if a person suffered no negative consequence, he suffered “a fate of ever-increasing fear and distress.” Thus, the Court reasoned, “the uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor.” *Id.* at 111 (Brennan, J., concurring in the judgment). Here, homeless people live under constant threat of arrest for engaging in a necessary, life-sustaining activity within the city limits. The “uncertainty and the consequent psychological hurt” caused by that threat supports a finding that the ordinance is cruel and unusual as applied to homeless people.

IV. The trial court erred when it relied on the availability of a choice-of-evils defense to conclude that the anti-camping ordinance did not constitute cruel and unusual punishment.

The prohibition against cruel and unusual punishment “limits the state's ability to criminalize certain behaviors or conditions, not merely its ability to convict and then punish post conviction.” *Jones*, 444 F3d at 1129; *see also Robinson*, 370 US at 666 (“[A] law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment”); *Anderson I*, 2009 US Dist LEXIS 67519 at *10 (holding a conviction is not a prerequisite to an Eighth Amendment claim); *Lehr v. City of Sacramento*, 624 F Supp 2d 1218, 1226 (ED Cal 2009) (same);

Joyce v. City and County of San Francisco, 846 F Supp 843, 853 (ND Cal 1994) (same).

Here, however, the trial court held that Portland's anti-camping ban did not unconstitutionally punish defendant for her status because she could avail herself of a necessity or "choice-of-evils" defense. The court apparently reasoned that the Eighth Amendment was not implicated because defendant could avoid conviction were she able to prove both that her homelessness was involuntary and that camping in public was an unavoidable consequence of that status. Under the trial court's approach, the state could "criminalize a protected behavior or condition and cite, arrest, jail, and even prosecute individuals for violations, so long as no conviction resulted." *Jones*, 449 F3d at 1129. The Eighth Amendment prohibits that result. *Id.*

Additionally, the circumstances under which a homeless person becomes homeless and the possibility that he or she may overcome that status are irrelevant to the Eighth Amendment inquiry. In *Robinson*, the Supreme Court did not inquire as to how the defendant became an addict, nor was it relevant that the defendant may have been able to alter his status by seeking treatment. 370 US at 666-667. Thus, in *Jones*, the court reasoned, "[A]n individual may become homeless based on factors both within and beyond his immediate control * * * That Appellants may obtain shelter on some nights and may eventually escape from homelessness does not render their status at the time of

arrest any less worthy of protection than a drug addict's or an alcoholic's." 444 F3d at 1137.

Moreover, the trial court's erroneous reliance on the choice-of-evils defense unfairly converts the Eighth Amendment question of law into a question of fact—one in which the defendant bears the burden of proof. Yet homeless people face multiple obstacles to successfully asserting this defense, as explained more fully below.

A. The choice-of-evils defense does not adequately account for the reasons homeless people must sleep outside.

Oregon's choice-of-evils defense requires a *defendant* to prove: "(1) a defendant's conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the threatened injury was greater than the potential injury of his illegal actions." *State v. Seamons*, 170 Or App 582, 585-86, 13 P3d 573 (2013) (internal citations omitted). An imminent threat is "immediate, ready to take place, or near at hand." *State v. McPhail*, 273 Or App 42, 50, 359 P3d 325(2015), *rev den*, 358 Or 529 (2016) (internal citation omitted). Thus, threats of future injury are insufficient to establish the defense. *Id.*

As explained above, homeless people violate the ordinance when they use "sleeping matter" to protect themselves from the elements. But the threat of illness from repeated outdoor sleeping is not likely to qualify as an "imminent" injury. Likewise, the increased risks for various health problems associated

with sleep deprivation may be too speculative to constitute “injury,” and may be too difficult for homeless defendants to prove as it may require expensive medical expert witnesses. *See, e.g.,* Gonzalo G. Alvarez & Najib T. Ayas, *The Impact of Daily Sleep Duration on Health: A Review of the Literature*, 19 *Progress in Cardiovascular Nursing*, 56-59 (Spring 2004) (restriction of sleep results in a variety of adverse physiologic effects, including hypertension, activation of the sympathetic nervous system, impairment of glucose control, and increased inflammation and, long-term, leads to increased risk of cardiovascular disease and developing symptomatic diabetes).

Moreover, “ORS 161.200 requires that a defendant’s perception of a threat be reasonable as gauged by an objective ‘reasonable person’ standard, rather than a subjective, defendant-specific standard.” *State v. Oneill*, 256 Or App 537, 544-45, 303 P3d 944 (2013), *rev den*, 354 Or 342 (2013). A trial court has the power to refuse to instruct a jury on a choice-of-evils defense where the defendant has not presented sufficient evidence. In *Oneill*, the court upheld the trial court’s refusal to instruct the jury on the choice-of-evils defense when a defendant only presented evidence on her past trauma, circumstances and subjective perception of threat rather than evidence that a person of “ordinary intelligence and understanding” would believe there was threat of imminent injury. 256 Or App at at 540; *see also McPhail*, 273 Or App at 52

(discussing the trial court's "screening function" in determining sufficiency of evidence to get a jury question on "choice-of-evils").

This objective standard fails to comprehend the complexities of homelessness and homeless individuals. The Point-In-Time Count found that 36 percent of homeless people in the greater Portland area experience mental health problems and 49 percent suffer from substance abuse. Smock, *Point-In-Time Count* at 26-27. "[N]early half of the women surveyed reported having been victims of domestic violence." *Id.* at 3. Homeless victims of domestic abuse, post-traumatic stress, or chronic alcoholism undoubtedly perceive threats of harm beyond the scope of what an ostensibly "reasonable" trier of fact, or trial court, can comprehend.

Aisha, Portland, youth drop-in center, March 30, 2016

Last night, I left shelter, and once you leave shelter you are not allowed to go back. And I lost something that was really important to me so I had to go look for it. So I got stuck outside with no blankets, no nothing. * * * That was pretty wretched. * * * [I lost] an amethyst. It's this really important rock that's helping me stay clean and sober and, I don't know, it just helps me with my anxiety.

Reptar, youth drop-in center, March 30, 2016

Right now, I'm on the streets, and I have a difficult time finding a consistent place to be, well for sleeping. I haven't gone to a shelter yet for overnight. * * * There are reasons for why I don't go there. When I sleep outside, I tend to have more connection to the people that I know out there, so I have more, there's safety in numbers. Going from a shelter to --at a shelter, you have a lot of people that are of mixed experiences. So there are some people who are untrustworthy there and that's a reason I don't go to a shelter.

Anonymous, youth drop-in center, March 30, 2016

I slept outside because the current shelter I'm at [was] too stressful. It's not the shelter in itself. It was the variety of people, arguments, hearing shame drama on a daily basis. It gets old if you are one of the people who actually pays attention to what people say and what people do on a daily, you start to notice a lot of the same patterns.

Finally, fear of injury may not be the factor that forces someone to use “sleeping matter” when she is forced to sleep outside. The human need for privacy and dignity also lead people to seek cover when they sleep in a public space.

Ron, downtown waterfront area, March 6, 2016

I need a blanket, this and that. I can carry all that. We could be really good with a tarp, a couple shopping carts, wrap up an area. But then they're going to go and make a banning of this, banning of that. I just need some space, personal space. So people stop looking at me as if I'm a downgrade or something, you know?

B. Homeless people face barriers to mounting a choice-of-evils-defense.

Counsel for homeless defendants face special difficulties in their representation. First and foremost, homeless people may not seek to mount a defense at all. Once arrested, homeless people are unlikely to be able to afford bail, which means they are nearly always incarcerated until their trials occur -- or until they agree to waive their trial rights in exchange for convictions. Second, as noted above, a majority of the homeless population struggles with mental-health or substance-abuse issues which may impact their ability to participate in their defense. Finally, defense counsel for a homeless defendant

may lack the resources—in terms of both time and money—to put on expert testimony or otherwise compile sufficient evidence to establish the basis for a choice-of-evils defense.

V. Current standards of decency support the conclusion that the criminalization of involuntary activities associated with homelessness constitutes cruel and unusual punishment.

“The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 at 100–01. Thus, the Supreme Court “has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment’s prohibition of “cruel and unusual punishments.” *Roper v. Simmons*, 543 US 551, 575, 125 S Ct 1183, 161 L Ed 2d 1 (2005); *see also Graham v. Florida*, 560 US 48, 80, 130 S Ct 2011, 176 L Ed 2d 825 (2010) (“The Court has looked beyond our Nation's borders for support for its independent conclusion that a particular punishment is cruel and unusual.”); *Atkins v. Virginia*, 536 US 304, 316 n 21, 122 S Ct 2242, 153 L Ed 2d 335 (2002) (referring to a “broader social and professional consensus” and the “world community” as support for its conclusion that imposition of the death penalty on a mentally retarded individual is cruel and unusual).

That inquiry is particularly relevant here, because the U.S. Interagency Council on Homelessness, the federal agency charged with coordinating the federal response to homelessness, has acknowledged that measures that

criminalize homelessness may violate the Convention Against Torture (CAT) and the International Covenant on Civil and Political Rights (ICCPR). US Interagency Council on Homelessness, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness*, 8 (2012), available at https://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf. The CAT, which the United States ratified in 1990, protects against cruel, inhuman, and degrading treatment, a standard similar to the Eighth Amendment. Julie Hunter *et al*, *Welcome Home: The Rise of Tent Cities in the United States*, National Law Center on Homelessness & Poverty and Allard K. Lowenstein International Human Rights Clinic, Yale Law School, Mar 2014, 74, https://www.nlchp.org/documents/WelcomeHome_TentCities. The ICCPR, which the United States ratified in 1992, also states that no one shall be subjected to “cruel, inhuman or degrading treatment. *Id.* at 72. It further recognizes the right to life, which the Human Rights Committee, the treaty oversight body, has interpreted to include the right to shelter oneself from the elements. *Id.*

Moreover, the bodies charged with overseeing the United States’ compliance with its human rights obligations have called for the abolition of laws that criminalize homelessness. In March 2014, the UN Human Rights Committee voiced concern over “reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular

areas.” Human Rights Committee, *Concluding Observations*, CCPR/C/USA/CO/4, ¶ 19 (April 23, 2014), <http://www.state.gov/documents/organization/235641.pdf>. It called on the United States to “engage with local authorities to abolish the laws and policies criminalizing homelessness at state and local level.” *Id.* Similarly, in August 2014, the UN Committee on the Elimination of Racial Discrimination (CERD) noted “the high number of homeless persons who are disproportionately from racial and ethnic minorities” and criticized the “criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging and lying down in public spaces.” Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12, Aug 29, 2014, <http://www.state.gov/documents/organization/235644.pdf>. In November 2014, the Committee Against Torture questioned the United States on the status of the implementation of the recommendations to decrease criminalization of the homeless. Committee Against Torture, *Committee Against Torture Considers Report of the United States*, Nov 13, 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15290&LangID=E>. Additionally, “numerous special rapporteurs and international authorities have similarly condemned criminalization of homelessness as cruel, inhumane and degrading treatment.” Nat’l Law Center on Homelessness & Poverty et al, *Criminalization of Homelessness in the United States of America:*

A Report to the UN Committee Against Torture, 8 n 22 (Sept 22, 2014),
available at,

https://www.nlchp.org/documents/CAT_Criminalization_Shadow_Report_2014
(accessed Apr 8, 2016) (listing authorities).

The basic concept underlying the prohibition on cruel and unusual punishments “is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards.” *Trop*, 356 US at 100–01. The constitutional protections embody “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.” *Estelle v. Gamble*, 429 US 97, 102, 97 S Ct 285, 50 L Ed 2d 251 (1976). The anti-camping ordinance, as-applied to homeless people—the most vulnerable members of our society—offends those ideals.

CONCLUSION

For the foregoing reasons, this court should reverse defendant’s convictions for interfering with a police officer, second-degree criminal trespass, and violating Portland’s public camping ordinance.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS**

Brief length

I certify that (1) this brief on the merits complies with the word-count limitation in ORAP 5.05(2)(b)(i) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 7,620 words.

Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

Respectfully Submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on April 21, 2016, I filed the original of this Brief of *Amici Curiae* Oregon Justice Resource Center, ACLU of Oregon, Portland Chapter of the National Lawyers Guild, Homeless Youth Law Clinic, Common Cup Family Shelter, Operation Nightwatch, Right to Dream Too, Sisters of the Road, First Unitarian Church of Portland, Augustana Lutheran Church and Albina Ministerial Alliance with the State Court Administrator by the eFiling system.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief of *Amici Curiae* Oregon Justice Resource Center, ACLU of Oregon, Portland Chapter of the National Lawyers Guild, Homeless Youth Law Clinic, Common Cup Family Shelter, Operation Nightwatch, Right to Dream Too, Sisters of the Road, First Unitarian Church of Portland, Augustana Lutheran Church and Albina Ministerial Alliance will be eServed pursuant to ORAP 16.45 (regarding electronic service on registered eFilers) on Benjamin Gutman #160599, Solicitor General, attorney for Plaintiff-Respondent.

Respectfully Submitted,

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