
Nos. 26-2820

**In the United States Court of Appeals
for the Ninth Circuit**

BERKELEY HOMELESS UNION, et al.

Plaintiffs-Appellees,

v.

CITY OF BERKELEY, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of California (Chen, J.)
3:25-cv-01414-EMC

**[PROPOSED] BRIEF AMICUS CURIAE OF
HARRISON STREET RESIDENTS
SUPPORTING REVERSAL**

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INTEREST OF AMICI CURIAE

Amici are residents, property owners, and business owners along Harrison Street between Fourth Street and Ninth Street in Berkeley. They include Chaim LLC d/b/a Covenant Winery, Kathy Dennison, Far West Brewing LLC d/b/a Fieldwork Brewing, KJD Investments, and Emily Winston. Amici are plaintiffs in a state-court action alleging private and public nuisance against the City of Berkeley stemming from the public homeless encampments on Harrison Street (and elsewhere), which are at issue in these consolidated federal cases. *Dennison et al. v. City of Berkeley*, 24CV091288 (Karin Schwartz, Judge). The Superior Court denied the City of Berkeley's demurrer, agreeing that the plaintiffs (amici here) stated a claim for relief under state law.

The City of Berkeley, however, claims that it cannot take any action to abate any nuisances whatsoever because of the existence of various federal-court orders, including the one under review in this case. Amici file this amicus brief to defend their interests in the state-court litigation. In particular, they file this brief because the Americans with Disabilities Act (ADA) does not apply to generally applicable legal prohibitions on public camping and obstructing rights of way. This is an argument that

neither the City of Berkeley nor the federal plaintiffs are making. They both presume the ADA applies, although they disagree about its scope. But the ADA does not apply because generally applicable laws are not programs or services. There is no reasonable accommodation for theft or murder. And so too here the ADA does not require reasonable accommodations from generally applicable legal prohibitions on public camping.

Additionally, here the District Court used the state-created danger doctrine similarly to create exemptions from generally applicable laws; the Court effectively held that plaintiffs are allowed to undertake illegal acts to ameliorate their conditions, and that the City is not allowed to undo those illegal acts because doing so would place the plaintiffs back in their preexisting dangerous condition. There is no authority, however, for using the state-created danger doctrine to create exemptions from generally applicable, neutral laws. The City of Berkeley also does not make this argument, but it is dispositive.

Taken together, the District Court's ADA and Fourteenth Amendment rulings are naked end-runs around the Supreme Court's

City of Grants Pass v. Johnson, 603 U.S. 520 (2024) decision, which Proposed Amici have a great interest in preserving and upholding.¹

STATEMENT REGARDING ORAL ARGUMENT

Because neither of the parties present to this Court the full and complete legal argument respecting the ADA and the state-created danger doctrine and their inapplicability to generally applicable legal prohibitions, and because it is crucially important for amici to defend their interests in the state-court litigation, amici request to participate in oral argument pursuant to FRAP 29(a)(8).

SUMMARY OF THE ARGUMENT

The ADA does not apply to these plaintiffs. The ADA only applies when a disabled individual is “denied the benefits of the services, programs, or activities of a public entity,” or when a disabled individual is “subjected to discrimination by any such entity,” by reason of that individual’s disability. 42 U.S.C. § 12132. There are no reasonable accommodations from generally applicable legal prohibitions like theft or

¹ No party’s counsel authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than amici curiae contributed money that was intended to fund preparing or submitting this brief.

murder. Laws against theft or murder are not a “service” or “program” or “activity” of a public entity. There is no right for disabled individuals to commit such crimes.

The only cases in which this Court has ever concluded that generally applicable laws, regulations, or ordinances implicate the ADA are far removed from this one. A particular zoning decision—not a generally applicable law respecting the promulgation of zoning—can violate the ADA if the particular zoning decision *discriminates* against disabled individuals in the sense of targeting them. *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999). And the laws cannot be enforced in ways that discriminate against those with disabilities. *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004) (ADA implicated where city did not give plaintiff additional time to self-abate a nuisance on his property). Otherwise, only once has this Court held that something like a generally applicable regulation could violate the ADA—and that was over the vigorous dissent of Judge O’Scannlain, and the regulation in question directly regulated dogs, which the blind use to access all manner of services and programs. *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996).

There is absolutely no ADA right, however, for disabled individuals to be free of generally applicable laws respecting public encampments and sleeping in public.

The state-created danger doctrine suffers from the same defect. The District Court here effectively held that an unsheltered homeless individual may seek to ameliorate his dangerous condition by *violating the law*—and that the City’s efforts to *undo* those legal violations would create a danger, even though that danger preexisted the plaintiffs’ violation of the law. In other words, the District Court erroneously expanded the state-created danger doctrine to create heretofore unheard of exemptions from generally applicable and neutral laws enacted pursuant to longstanding police powers. There is no warrant in text, history, or any precedent for such a dramatic expansion.

This Court should treat this case for what it is: a naked attempt to end-run around the Supreme Court’s decision in *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024), which held that cities may constitutionally enforce bans on public sleeping and camping without violating the Eighth Amendment. Until this Court’s erroneous turn in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018) and *Johnson v. City of Grants Pass*, 72

F.4th 868 (9th Cir. 2023), no one had thought the Amendment applied to homeless encampments. Similarly, no one until now has believed that laws against homeless encampments (note: not against homelessness) stated a claim under the ADA. If anything, the ADA requires *abatement* of public homeless encampments so that disabled citizens can access sidewalks and streets *for their intended purposes*. This Court should not be the first to recognize a claim that the ADA or Fourteenth Amendment requires *permitting* obstructions to the public rights of way.

This Court should swiftly put an end to the District Court's legislative policymaking.²

² There is also another fatal defect in the District Court's summary judgment order. It purports to be a summary judgment order, but on the same day, the Court issued a *new* preliminary injunction with respect to *over a dozen new members of BHU*. That very maneuver proves why it was legal error for the District Court to grant associational standing, which is only permitted if the participation of individual members is not required. If the District Court has *different* injunctions applicable to *different* members, how is it possible that the individual participation of members is not necessary? Indeed, the whole point of associational standing is that a summary judgment involving the association is a *final* judgment, which resolves the litigation. But the District Court has created a loophole for finality. He issued a "summary judgment" order but apparently reserves the right to issue new preliminary injunctions with respect to new members of BHU for the rest of eternity. All of which goes to show that these entire proceedings have been in legal error. This Court must put a stop to them.

ARGUMENT

I. The ADA does not abolish generally applicable legal prohibitions.

Title II of the Americans with Disabilities Act (ADA) ensures meaningful access to public services. It does not provide a basis for exemption from generally applicable rules and legal prohibitions absent restrictions on or meaningful impediments to access to any public services. Both the statutory text and this Court's precedents establish that disabled individuals are to be provided reasonable access to government benefits and protection from discrimination, yet they nonetheless remain subject to the same standards of conduct, the same legal prohibitions, and the same consequences for misconduct as non-disabled individuals. The ADA, for example, permits enforcement of criminal laws, such as prohibitions on murder or theft, regardless of an individual's disability status, as the enforcement of such generally applicable prohibitions do not deny meaningful access to a government service based on disability.

A. The statute's text is inconsistent with the notion that generally applicable legal prohibitions are a service, program, or activity.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from

participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. This provision explicitly ensures that disabled individuals are provided with meaningful access to government services and programs, but it does not anywhere provide an excuse from abiding by generally applicable rules and legal standards that do not implicate access to government services.

As a simple textual matter, general legal prohibitions enacted pursuant to a municipality’s delegated police power is not a “service,” “program,” or “activity.” Any ordinary reader of the phrase “services, programs, or activities” would immediately think “access to government buildings,” “access to public employment,” “access to the local library,” or “access to the annual fourth of July fireworks show.” Indeed, the 1983 edition of Webster’s Ninth New Collegiate Dictionary defines “service” as “a facility supplying some public demand,” or “a helpful act,” or “useful labor that does not produce a tangible commodity,” or “contribution to the welfare of others.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1076 (Springfield, MA: Merriam-Webster 1990), *available at* <https://archive.org/details/webstersninthne000merr>. It defines

“program” as “to work out a sequence of operations to be performed by (a mechanism),” or “a plan or system under which action may be taken toward a goal.” *Id.* at 940. And it defines “activity” as “a form of organized, supervised, often extracurricular recreation” or “an organizational unit for performing a specific function; *also*: its functions or duties.” *Id.* at 54. Not one of these definitions—nor any of the other less applicable definitions—makes any sense if one plugs in “generally applicable legal prohibition.”

Further, generally applicable legal prohibitions would make no sense in light of the verb phrases for which “services, programs, or activities” are the objects. What does it mean to be “excluded from participation in” the laws prohibiting murder? What does it mean to be “excluded from participation in” generally applicable health and safety regulations? The concept is meaningless. And that is fatal to the parties’ interpretation of the ADA here. Ordinarily, all verbs or verb phrases must make sense in light of the objects of those verbs or verb phrases.

In the classic case of *Yates v. United States*, for example, the question was whether a grouper fish was a “tangible object” within the meaning of the Sarbanes-Oxley Act. The statutory provision provided

criminal punishment for anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object” with intent to impede a federal investigation. 574 U.S. 528 (2015); 18 U.S.C. § 1519. The plurality held that “tangible object” was not to be taken literally but rather was limited in scope to things like documents and records that record information. The plurality explained:

This moderate interpretation of “tangible object” accords with the list of actions §1519 proscribes. The section applies to anyone who “alters, destroys, mutilates, conceals, covers up, *falsifies*, or *makes a false entry in* any record, document, or tangible object” with the requisite obstructive intent. (Emphasis added.) The last two verbs, “falsif[y]” and “mak[e] a false entry in,” typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives.

Yates, 574 U.S. at 544. Justice Alito who provided the fifth vote in the case similarly explained,

Next, consider § 1519’s list of verbs: “alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in.” Although many of those verbs could apply to nouns as far-flung as salamanders, satellites, or sand dunes, the last phrase in the list—“makes a false entry in”—makes no sense outside of filekeeping. How does one make a false entry in a fish? “Alters” and especially “falsifies” are also closely associated with filekeeping. Not one of the verbs, moreover, cannot be applied to filekeeping—certainly not in the way

that “makes a false entry in” is always inconsistent with the aquatic.

Id. at 551 (Alito, J., concurring). Of course, the requirement that all the verbs make sense in light of all the objects is not a hard and fast one. But it helps give the context of the law in question and guides the ordinary interpretation of the law.

Here, moreover, *neither* verb phrases makes sense in light of the objects if those objects are read to include generally applicable legal prohibitions. That is, it does not make sense to say that someone is “denied the benefits of” a generally applicable law on the basis of one’s disability. What would such a claim even look like? “We let him be murdered because he was disabled”? That makes no sense. Denying the benefits of generally applicable laws in this sense would always be covered by the statute’s secondary provision: “or be subjected to discrimination by any such entity.” Thus, even if the phrase “denied the benefits of” could sensibly be applied to generally applicable prohibitions, it would always be superfluous of that secondary statutory injunction against discrimination. It therefore makes no sense to include generally applicable legal prohibitions as a service, program, or activity for purposes of the first part of the statutory provision.

B. This Court’s cases have never held that a generally applicable legal prohibition implicates the ADA except in very narrow and specific circumstances not applicable here.

This Court has defined “services, programs, or activities” under the ADA as “anything a public entity does,” stating that the relevant inquiry is “not so much...whether a particular public function can technically be characterized as a service, program, or activity, but whether it is a normal function of a governmental entity.” *Barden v. City of Sacramento*, 292 F.3d 1073, 1076 (9th Cir. 2002). This definition may seem broad, but the case law underscores that the ADA’s primary concern is ensuring *access* to such services for disabled individuals, rather than exempting them from otherwise applicable rules or legal prohibitions.

Specifically, courts in this circuit have recognized potential ADA claims in the context of access barriers to government programs and services such as public right-of-way, pools, libraries, parks, recreational facilities, courthouses, and university facilities, focusing on whether such programs and services are “readily accessible to and usable by individuals with disabilities” when viewed in their entirety. *Kirola v. City and County of San Francisco*, 860 F.3d 1164, 1168-69, 1174 (9th Cir. 2017) (“We address whether the City and County of San Francisco have

complied with their obligations under [the ADA]. In particular, we are concerned with whether San Francisco’s public right-of-way, pools, libraries, parks, and recreation facilities are readily accessible to and usable by mobility-impaired individuals.”); *Barrilleaux v. Mendocino County*, 61 F. Supp. 3d 906, 916 (N.D. Cal. 2014) (“Plaintiff’s inability to exit the courtroom safely and make her way to the Clerk’s office is at least a partial barrier to her access to the court facilities.”); *Twede v. University of Washington*, 309 F. Supp. 3d 886, 904 (W.D. Wash. 2018) (deciding that “plaintiffs... failed to allege facts sufficient to show that it is plausible that they have been excluded or denied ‘meaningful access’ to UW’s alleged parking services when those services are viewed in their entirety.”). The prototypical ADA case thus focuses on access and does not generally operate to exempt disabled individuals from neutral rules and generally applicable prohibitions under the law.

This Court illustrated this very principle in 1995 in the context of the ADA’s employment provisions. The Court emphasized the difference between “termination of employment because of misconduct and termination of employment because of a disability,” and it affirmed that “alcoholics and drug addicts are not exempt from reasonable rules of

conduct, such as prohibitions against the possession or use of alcohol or drugs in the workplace, and employers must be allowed to terminate their employees on account of misconduct, ‘irrespective of whether the employee is handicapped.’” *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832-33 (9th Cir. 1995) (citing and quoting *Little v. FBI*, 1 F.3d 255, 258-59 (4th Cir.1993)) (internal citations omitted).

In *Collings*, the Court held that the defendant permissibly terminated employees “on the basis of their drug-related misconduct,” not on the basis of “any alleged disability.” *Id.* at 832-33 (citing *Little*, 1 F.3d at 258-59; *Grimes v. U.S. Postal Serv.*, 872 F. Supp. 668, 675 (W.D.Mo.1994); *Richardson v. U.S. Postal Serv.*, 613 F. Supp. 1213, 1215 (D.D.C. 1985)). That is, while the ADA may require targeted modifications to certain rules or programs in order to ensure access to a particular service or to prevent targeted discrimination as a result of disability, it does not require exemption from generally valid rules and laws or prohibit their enforcement altogether where doing so is not necessary to provide meaningful access to a public service or protection from discrimination.

Ultimately, there is nothing in the ADA's text or this Court's precedents to suggest that the statute transforms neutral rules governing the use of public property into individualized entitlements to use that property in ways contrary to its intended purpose and contrary to legal prohibitions.

To be sure, in a few cases, this Court has held that general regulations or prohibitions might implicate the ADA, but each of these cases involved a very specific context and the discrimination provision of the statute was usually implicated, not the access to public services prong of the statute that is at issue here. In *Bay Area Addiction Research & Treatment, Inc. v. City of Antioch*, 179 F.3d 725 (9th Cir. 1999), this Court held that individual zoning decisions can implicate the ADA. As an initial matter, an individual zoning decision is not the same thing as a generally applicable law, whereas the laws respecting how cities may make zoning decisions would be. An individual zoning decision may be a "service" or "activity," but the general zoning laws are not. What is more, the zoning decision in *Bay Area* specifically targeted a methadone clinic that treated disabled individuals. Of course, a municipality cannot use municipal codes and ordinances to target disabled individuals

specifically. That would violate the discrimination provision of the ADA. It hardly follows, however, that generally applicable laws are a program, service, or activity within the meaning of that provision of the ADA.

In *McGary v. City of Portland*, 386 F.3d 1259 (9th Cir. 2004), this Court held that an individual municipal code enforcement decision could create discrimination prohibited by the ADA. In that case, the City did not give extra time for a disabled individual to self-abate a nuisance in his yard even though he was disabled and in the hospital at the time of the abatement order. The Court held that there was “no reason to distinguish between municipal code enforcement and the other mandatory activities we have found to fall within the purview of the ADA.” *Id.* at 1268.

Although the Court stated that municipal code enforcement was therefore a “benefit” and nuisance abatement a “program,” its *holding* really extended no farther than the proposition that the enforcement of laws cannot be done in a *discriminatory manner*. *Id.* (“It is axiomatic that ‘the ADA must be construed broadly in order to effectively implement the ADA’s fundamental purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against

individuals with disabilities.”) (quoting *Barden*, 292 F.3d at 1077). It cited the zoning case described above. And then it cited cases involving mandatory “programs” like prisons. *Id.* (citing *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998); *Lee v. City of Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001)). But of course, prison is a “program” and a “service” that must accommodate disabled individuals. It does not follow that generally applicable laws are themselves a program or service. Granting a reasonable accommodation so one can serve jail time is not the same thing as giving a reasonable accommodation so one can commit the crime that would otherwise send them to jail.

The only case that seems squarely to hold that generally applicable regulations could implicate the ADA is *Crowder v. Kitagawa*, in which this Court held that Hawaii’s carnivorous animal quarantine requirement “den[ied] visually-impaired persons the ability to make meaningful use of services the state provides” because the “plaintiffs rel[ied] upon their guide dogs to assist them in negotiating public streets and using transportation systems.” 81 F.3d 1480, 1482 (9th Cir. 1996). That case was decided over a vigorous dissent of Judge O’Scannlain, who argued that the quarantine law was not a “program” or “service.” Indeed,

the majority seemed to agree, holding only that this quarantine law, if applied to the guide dogs of the blind, would lead to a widespread inability to access *other* programs and services.³

Simply put, no case from this circuit or any other circuit, as far as amici are aware, has ever held that the ADA requires reasonable accommodations from generally applicable legal prohibitions. At most, generally applicable laws cannot be *enforced* in a discriminatory manner, and the law or ordinance cannot *target* disabled individuals. But that’s all common sense. And generally applicable laws that make it difficult for disabled individuals *generally* to access some public service might state a claim. But none of these cases stands for the proposition that disabled individuals are generally entitled to accommodations from generally applicable and neutral legal prohibitions.

³ In *Where Do We Go Berkeley v. California Department of Transportation*, 32 F.4th 852 (9th Cir. 2022), this Court held that Caltrans’ use of the highways for its transportation program, including the clearing of encampments, was a “program” for purposes of the ADA. However, the parties did not argue to the Court that the ADA does not apply because public camping violates generally applicable and neutral laws. Rather, the state argued that the ADA did not apply to private property. *Id.* at 861. The Court rejected *that* proposition, no more. *Id.*

C. The plaintiffs here want nothing other than an exemption from generally applicable laws.

Here, neither the ADA's text nor this Court's precedents justify the District Court's restrictions imposed on the City of Berkeley's enforcement of generally applicable prohibitions against public encampments and nuisances in the Harrison Street corridor. Unlike in *McGary*, this case is not about enforcing a municipal ordinance against a particular individual in a discriminatory manner. Unlike *Bay Area*, no municipal ordinances or zoning regulations have been passed for the purpose of targeting disabled individuals. And unlike in *Crowder*, there is no question of any downstream ability to access general programs or services. Here, prohibitions on public camping are neutral and generally applicable legal prohibitions, just like the laws against theft and murder. There is no exemption from such laws merely because one is disabled. Thus, this case is on all fours with *Collings*: these individuals are not being targeted because they are disabled but rather are being targeted because *anyone* who engages in their behavior is committing unlawful misconduct.

To be sure, this Court has stated that sidewalks are a “service, program, or activity” of the government “within the meaning of Title II of

the ADA.” *L.A. Alliance for Human Rights v. Cnty. of L.A.*, 14 F.4th 947, 959 (9th Cir. 2022). And, with respect to public rights-of-way generally, the City’s “service” or “program” certainly includes maintaining public roadways and sidewalks in a manner that is consistent with ensuring their intended use and public health. But this militates against the District Court’s orders because if anything, it is disabled individuals who wish to use the sidewalk for their *intended purpose* that are prevented from doing so because of the encampments. The provision of this service simply does not include allowing individuals to block the sidewalks with large tents or impede the roadways by illegally parking RVs in direct contravention of prohibitions against such activity—whether such individuals have a disability or not.

In *Crowder*, it was necessary to modify the carnivorous animal quarantine requirement that would have led to disabled individuals’ temporary loss of their service dogs, as without the service dogs, they would have been unable to meaningfully access public services, such as public rights-of-way. 81 F.3d 1480, 1482 (9th Cir. 1996). With respect to the encampments, however, there is no related need to exempt disabled individuals from the laws prohibiting certain tent structures on the

sidewalks or restrictions that prohibit long-term RV parking, as the public rights-of-way provide a service or program centered on passage, not habitation.

To draw an analogy, the provision of meaningful access to public courthouses would not require a courthouse to allow individuals to camp inside the courthouse, as prohibiting camping in the building would not prevent meaningful access to a government program or service of public courts as a result of disability. Shelter, or habitation, is not the intended use of public courthouses and thus is not part of the service or program offered through them. Accordingly, because the requested modifications in this case are not necessary to provide meaningful access to the public service or program of the sidewalks and rights-of-way, the ADA does not require the City to suspend enforcement of its generally applicable prohibitions against public camping.

II. The state-created danger doctrine also does not abolish generally applicable legal prohibitions.

The District Court's invocation of the state-created danger doctrine suffers the same defect. The individual plaintiffs in this case *were already homeless*. Additionally, they were already *unsheltered*. It is undisputed in this case that every single plaintiff was offered shelter, and

in fact was offered the gold standard of non-congregate shelter (motel rooms). *See* MSJ Order at 3 n.2. So the danger of the plaintiffs' condition entirely preexisted the state's action.

What the District Court effectively concluded is that the plaintiffs may attempt to ameliorate their condition *by taking illegal actions*—and that the state, by trying to *undo* those illegal actions, is thereby responsible for creating a danger. But again, the danger preexisted the state's action. To say that *undoing an illegal act* creates a danger is to say that the state-created danger doctrine creates an exemption from generally applicable and neutral laws where undertaking an illegal action would ameliorate someone's preexisting dangerous condition. No court has ever held anything that would remotely justify such an exemption from generally applicable rules.

To hold otherwise here would be tantamount to saying that police cannot remove a homeless individual who *trespasses into someone's private home*, because doing so would return the individual to the street—and thereby to a dangerous condition. That cannot be right, and yet it is exactly the equivalent of what the District Court held here.

This Court’s and the Supreme Court’s precedents demonstrate the severity of this error. In *Deshaney v. Winnebago County Department of Social Services*, the Supreme Court found that the state-created danger doctrine did not apply even when a state-created “Child Protection Team” transferred a young boy from their custody back to the custody of his father, and there was evidence that the father was abusive. 489 U.S. 189 (1989). Although the state’s actions arguably left the child in a more dangerous position, the Supreme Court held that “while the State may have been aware of the dangers that [the boy] faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them.” *Id.* at 190. That applies word-for-word here. The state played no role in the plaintiffs’ condition; the state was merely returning them to that condition *because the tents and RVs are illegal public nuisances* (and violate numerous other City ordinances).

In *Martinez v. City of Clovis*, this Court explained that the state-created danger doctrine applies where (1) “a state actor’s affirmative actions created or exposed” the plaintiff to an “actual, particularized danger” that the plaintiff “would not otherwise have faced”; (2) their subsequent injury was foreseeable; and (3) the state was deliberately

indifferent to the known danger. 943 F.3d 1260, 1271 (9th Cir. 2019). In *Martinez*, the Court noted that whether a danger is actual and particularized depends on “whether the officers left the person in a situation that was more dangerous than the one in which they found” him, and that “the relevant question is whether state action creates or exposes an individual to a danger which he or she would not have otherwise faced.” *Id.* at 1271-72. Here, the plaintiffs *would have been exposed to the exact danger they alleged if they had not violated the law*. The City, surely, is allowed to *undo* such legal violations, and thereby return plaintiffs to the *same* condition in which they were originally found. It was the exact danger the plaintiffs would “have otherwise faced” if only they hadn’t violated the law.

Consider also *Sinclair v. City of Seattle*, in which this Court held that the state-created danger doctrine did not apply to the City of Seattle’s affirmative action to “surrender[] an entire precinct and a large area of the surrounding neighborhood to protestors for a month.” 61 F.4th 674, 676 (9th Cir. 2023). The Court ruled that the danger created by the City was not “particularized” to the plaintiffs, as required under the doctrine, because the “City-created danger was a generalized danger

experienced by all those members of the public who chose to visit” the area. *Id.* at 683. So too here. Unsheltered homelessness is a “generalized danger experience by all” unsheltered homeless individuals. The state, by enforcing its laws, did not create that danger. To hold otherwise would be to create a novel and unwarranted expansion in the doctrine: an expansion that would create exemptions from generally applicable and neutral laws with no foundation in text, history, or precedent.

III. The District Court’s ruling is a naked end-run around the Supreme Court’s *Grants Pass* decision.

This Court should not lose sight of what this case is really about. It is a naked attempt to do an end-run around the Supreme Court’s recent *Grants Pass* decision. It was this Court that first created a constitutional right under the Eighth Amendment to occupy public spaces. *See Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018); *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023). It took six years from the initial *Boise* decision until the Supreme Court finally reversed this Court’s novel constitutional interpretation on the merits. *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024).

In *Grants Pass*, the Supreme Court expressly declared that federal judges should not interfere with the complexities of homelessness policies. The Court stated,

[P]eople will disagree over which policy responses are best; they may experiment with one set of approaches only to find later another set works better; they may find certain responses more appropriate for some communities than others. But in our democracy, that is their right. Nor can a handful of federal judges begin to “match” the collective wisdom the American people possess in deciding “how best to handle” a pressing social question like homelessness. The Constitution’s Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation’s homelessness policy.

603 U.S. at 560. Yet that is what Judge Chen’s ruling does. His ruling uses the ADA and the state-created danger doctrine precisely to disable municipalities and their constituents from making the important policy choices surrounding homeless encampments. Judge Chen’s ruling literally “dictate[s]” Berkeley’s homelessness policy. If his interpretation of the ADA (or the Fourteenth Amendment) were correct, then the ADA or the Amendment would effectively nationalize homelessness policy. No one has ever thought that to be the case.

CONCLUSION

The ADA does not *sub silentio* preempt generally applicable laws enacted pursuant to a state's longstanding police powers. Nor does the state-created danger doctrine. The Court should reverse the District Court and order this case dismissed.

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Respectfully submitted,


/s/

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of 9th Cir. R. 29(a)(5) because this brief contains 5,405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Century type.

/s/ Ilan Wurman
Ilan Wurman

[PROPOSED] CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July , 2026. All participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I certify that I served the foregoing documents on this date by hand delivery, mail, third party commercial carrier for delivery within 3 calendar days, or, having obtained prior consent, by email to the following unregistered case party participants:

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