

## Punishment or “Protection”? The Case Challenging Racialized Homelessness Nationwide

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Homelessness is one of the most prominent, urgent, and ever-growing crises in America today. As of 2023, roughly 653,100 people in the United States were experiencing homelessness on any given night.<sup>1</sup> Rising housing costs, shifts in the labor market, and deinstitutionalization all contribute to this complex issue.<sup>2</sup> Yet rather than implementing humane solutions, many cities have instead turned to punitive measures: criminalizing homelessness, conducting encampment sweeps without notice, and confiscating personal belongings are just a few of many unjust actions taken.<sup>3</sup>

One legal battle at the forefront of this debate is *Fund for Empowerment v. City of Phoenix*, a federal case in Arizona that challenges how municipalities wrongfully treat their unhoused populations.<sup>4</sup> Although this case was in part abrogated by *City of Grants Pass v. Johnson*, other claims in this lawsuit could pose far-reaching consequences for homelessness policies nationwide, shaping how cities can challenge enforcement with human rights.<sup>5</sup>

### *Legal Background: The Fight Over Homelessness Rights*

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<sup>1</sup> *Homeless Persons’ Memorial Day: December 21, 2023*, U.S. CENSUS BUREAU (Dec. 21, 2023), <https://www.census.gov/newsroom/stories/homeless-persons-memorial-day.html>.

<sup>2</sup> Institute of Medicine (US) Committee on Health Care for Homeless People, *Homelessness, Health, and Human Needs*, NATL. LIBRARY OF MEDICINE (1988), <https://www.ncbi.nlm.nih.gov/books/NBK218240/>.

<sup>3</sup> Lynette Kalsnes and Justin Perl, *Minneapolis, Parks Sued to Stop Homeless Encampment Sweeps*, ACLU (Oct. 19, 2020), <https://www.aclu-mn.org/en/press-releases/minneapolis-parks-sued-stop-homeless-encampment-sweeps>.

<sup>4</sup> *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117 (D. Ariz. 2022).

<sup>5</sup> *City of Grants Pass v. Johnson*, 603 U.S. 520 (2024) (holding that ordinances do not constitute cruel and unusual punishment under the Eighth Amendment when applied to individuals experiencing homelessness, even if homelessness was involuntary).

In November 2022, the American Civil Liberties Union (“ACLU”) filed suit against the city of Phoenix on behalf of non-profit organization Fund For Empowerment (“FFE”) and chronically unsheltered individuals.<sup>6</sup> The lawsuit targeted limited notice to vacate encampments, confiscation and destruction of plaintiffs’ property, and criminalization of sleeping or camping outside.<sup>7</sup>

The ACLU posed three constitutional challenges to the city’s actions: (1) the Fourth Amendment, which protects against unlawful searches and seizures; (2) the Eighth Amendment, prohibiting cruel and unusual punishment; and (3) the Fourteenth Amendment, guaranteeing due process rights.<sup>8</sup>

The plaintiffs’ Fourth and Fourteenth Amendment claims arise from the city’s enhanced cleaning plan and abandoned property procedures, which in effect allows the city to (1) conduct warrant checks and (2) destroy unsheltered persons’ materials once seized, if they cannot be contacted.<sup>9</sup> Unsurprisingly, contacting these individuals would prove to be difficult, as methods to notify (namely, digital technology) are less utilized among individuals of lower socio-economic status.<sup>10</sup>

Plaintiffs’ Eighth Amendment claim targets two city ordinances that effectively criminalized camping and sleeping outside.<sup>11</sup> However, these measures do little to help Phoenix’s issue of homelessness—of over 3,000 homeless individuals in the city, there are approximately 1,788 shelter beds available for those struggling to find housing.<sup>12</sup> Thus as a result of these

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<sup>6</sup> *Fund for Empowerment*, 646 F. Supp. at 1121.

<sup>7</sup> *Id.* at 1122-23.

<sup>8</sup> U.S. CONST. amend. IV, VIII, XIV.

<sup>9</sup> *Fund for Empowerment*, 646 F. Supp. at 1122-23.

<sup>10</sup> A. McAuley, *Digital health interventions: widening access or widening inequalities?*, 128 PUB. HEALTH 12, 1118-20 (2014).

<sup>11</sup> *Fund for Empowerment*, 646 F. Supp. at 1124.

<sup>12</sup> *Id.*

ordinances, there are over one thousand individuals unaccounted for that would suffer legal repercussions through no fault of their own. These Eighth Amendment claims, however, were unfortunately overturned on the Supreme Court level in *City of Grants Pass v. Johnson*. The court reasoned that the public-camping ordinances do not intend to criminalize one's "status," as the laws "make no difference" as to whether the charged individual is experiencing homelessness.<sup>13</sup>

Unfortunately, other cities and states across America have already followed suit with similar ordinances. In California, the governor passed an executive order requiring state agencies to remove homeless encampments on public property,<sup>14</sup> and Portland likewise enforced a camping ban that was designed to connect people to shelter services and "not criminalize homelessness."<sup>15</sup> Similarly in Des Moines, a \$50 fine is enforced for those caught sleeping in public—a fine that the unsheltered population indisputably cannot afford.<sup>16</sup> In the latter two cities, although Black individuals account for under ten percent of the entire city population, they comprise over twenty percent of those sleeping on the street.<sup>17</sup> Tragically, this disproportionality of homeless, marginalized groups is far too common in major cities nationwide.

### ***Nationwide, Racial Implications of Fund for Empowerment***

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<sup>13</sup> *City of Grants Pass*, 603 U.S. at 522.

<sup>14</sup> Elleiana Green, 'It's mayhem and craziness': Californians react to Gavin Newsom's order to remove homeless encampments, NBC NEWS (Aug. 10, 2024), <https://www.nbcnews.com/politics/politics-news/s-mayhem-craziness-californians-react-gavin-newsoms-order-remove-homel-rcna165401>.

<sup>15</sup> Adrian Thomas, *Enforcement of new Portland camping ban to start July 1*, FOX 12 (Jun. 25, 2024), <https://www.kptv.com/2024/06/25/enforcement-new-portland-camping-ban-start-july-1/>.

<sup>16</sup> Kay Henderson, *New Des Moines homelessness ordinance includes \$50 fine*, RADIO IOWA (Jul. 23, 2024), <https://www.radioiowa.com/2024/07/23/new-des-moines-homelessness-ordinance-includes-50-fine/>.

<sup>17</sup> Adam Mahoney, *In Brooklyn, a New Homeless Shelter Reignites Decades of Racism*, CAPITAL B NEWS (Aug. 15, 2024), <https://capitalbnews.org/nyc-housing-homelessness-bensonhurst/>.

Studies show that encampment sweeps and cleanups are, obviously, ineffective solutions: these ordinances only lead to increases in overdose deaths and hospitalizations.<sup>18</sup> In fact, in cities across the board, these laws are shown to play a role in 15-25% of homelessness deaths over the last decade.<sup>19</sup> Furthermore, confiscation of personal property will inevitably impact thousands of individuals suffering in brutal weather conditions, which may further put unsheltered persons at risk to deaths by hypothermia.<sup>20</sup>

Additionally, the problem of homelessness further perpetuates racial inequalities that are deeply engrained in our society: people of color or mixed race account for over half of all homeless individuals, despite comprising less than a quarter of the total American population.<sup>21</sup> Even in states where Black persons make up a minority of the entire population, they are nearly ten times more likely to experience homelessness than White people.<sup>22</sup> What is the reason for these contemporary disparities? Due to the complexity of factors that are at play, this is question is difficult to answer. However, studies point toward structural flaws in how cities were developed and operate—tragically there are significant racial imbalances in homelessness and its related systems, such as housing, child welfare, education, and health.<sup>23</sup> It is also reasonable to assume that the overrepresentation of people of color is a byproduct of the decades of

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<sup>18</sup> *Study Shows Involuntary Displacement of People Experiencing Homelessness May Cause Significant Spikes in Mortality, Overdoses and Hospitalizations*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (Apr. 10, 2023), <https://nhchc.org/study-shows-involuntary-displacement-of-people-experiencing-homelessness-may-cause-significant-spikes-in-mortality-overdoses-and-hospitalizations/>.

<sup>19</sup> *Id.*

<sup>20</sup> *Denver PD Defends Officers Who Confiscated Blankets from Homeless*, ABC NEWS (Dec. 16, 2016), <https://abcnews.go.com/US/denver-pd-defends-officers-confiscated-blankets-homeless/story?id=44236705>.

<sup>21</sup> M. Fowle, *Racialized Homelessness: A Review of Historical and Contemporary Causes of Racial Disparities in Homelessness*, 32 HOUSING POL'Y DEBATE 6, 940-967 (2022).

<sup>22</sup> Earl James Edwards, *Who are the Homeless? Centering Anti-Black Racism and the Consequences of Colorblind Homeless Policies*, 10 SOC. SCIS. 9, 340 (2021) ("For example, while Black people make up just 2% and 18% of the Maine and New York total population, respectively, and Black people are ten times more likely to experience homelessness than White people in each respective state.").

<sup>23</sup> Bill Pitkin, *Homelessness Is a Housing and Racism Problem*, HOUSING MATTERS (May 11, 2022), <https://housingmatters.urban.org/articles/homelessness-housing-and-racism-problem>.

discriminatory policies that have excluded Black and indigenous communities from equal housing and economic opportunities.<sup>24</sup>

Furthermore, most homelessness response systems that currently operate to aid unsheltered persons predominantly assume that mental health and substance abuse problems are the primary contributors to homelessness.<sup>25</sup> However, this is rarely cause to a person's homelessness, and even less common among unsheltered persons of color—suggesting that the systems currently in place disproportionately service White individuals.<sup>26</sup> Thus, even if cities enforcing encampments and criminalization in line with *Fund for Empowerment* attempt to justify their ordinances by implementing these response systems, massive changes are essential to equally aid homeless persons of *all* racial demographics. As a starting point, cities must invest in culturally competent response systems that recognize, and attempt to combat, the unique barriers of Black, indigenous, and other marginalized communities.

Moreover, as encampment populations across many major U.S. cities are currently comprised of Black, Hispanic, and indigenous residents, the abolishment of these encampments will only serve to disproportionately target people of color.<sup>27</sup> If these encampments are eradicated, the homeless will have nowhere to go—with many cities lacking the temporary housing necessary for all unsheltered individuals,<sup>28</sup> this is essentially an invitation for homeless persons to be criminalized for sleeping outside. Thus, the correlation between crime, race, and homelessness becomes cyclical: people of color are incarcerated at higher rates than their White

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<sup>24</sup> J. Rosie Tighe, et al., *Source of Income Discrimination and Fair Housing Policy*, 32 J. OF PLANNING LITERATURE 1, 3-15 (2017).

<sup>25</sup> See Mahoney, *supra* note 17 at 955.

<sup>26</sup> *Id.*

<sup>27</sup> Lauren Dunton, et al., *City Approaches to Encampments and What They Cost*, U.S. DEP'T OF HOUSING AND URB. DEV. (2020).

<sup>28</sup> *Many Western and Southern States Lack Sufficient Shelter Capacity for Individual Homeless Adults*, NAT'L ALLIANCE TO END HOMELESSNESS (Apr. 24, 2019), <https://endhomelessness.org/resource/many-western-and-southern-states-lack-sufficient-shelter-capacity-for-individual-homeless-adults/>.

counterparts, and formerly incarcerated individuals are ten times more likely to become homeless.<sup>29</sup>

If cities such as Phoenix want to truly address homelessness, they must first acknowledge its racialized nature. Encampments, destruction of property, and criminalization do not address the root causes of homelessness; rather, they exacerbate racial disparities by punishing those already affected by systemic discrimination. The fight in *Fund for Empowerment* is not simply about the rights of the unhoused—rather, it will pave the way in determining whether our legal system will continue to reinforce racial inequality or take meaningful steps toward justice.

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<sup>29</sup> Jeffrey Olivet, et al., *Racial Inequality and Homelessness: Findings from the SPARC Study*, 693 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 82-100; MICHELLE ALEXANDER, *THE NEW JIM CROW* (rev. ed. 2012); Lucius Couloute, *Nowhere to Go: Homelessness among formerly incarcerated people*, PRISON POL’Y INITIATIVE (2018), <https://www.prisonpolicy.org/reports/housing.html>.