Public Camping Ban Survives Eighth Amendment Challenge in the U.S. Supreme Court

What Does This Mean for Your Entity's Approach to Addressing the Homelessness Crisis?

If your municipality has considered an ordinance banning camping on public property, your municipal attorney likely warned that enforcing such a ban could give rise to a lawsuit from persons experiencing homelessness or groups representing them. Indeed, Eighth Amendment jurisprudence previously suggested camping bans impermissibly criminalized "status" when applied to the unhoused community—at least in jurisdictions where the number of persons experiencing homelessness exceeds shelter beds available.

Emboldened by mostly favorable decisions of courts across the country, the Eighth Amendment's prohibition on cruel and unusual punishment became a staple of lawsuits challenging public-camping bans as applied to persons experiencing homelessness. The prospect of a lawsuit—which seemed like a losing proposition even in jurisdictions without binding precedent—was enough to deter most municipalities from enforcing camping bans. But now, the U.S. Supreme Court has weighed in, ruling in a June 28, 2024 opinion (available here) that the Cruel and Unusual Punishment Clause of the Eight Amendment does not prohibit the enforcement of generally applicable laws regulating camping on public property.

In *City of Grants Pass v. Johnson*, the Supreme Court upheld three ordinances by which the City of Grants Pass, Oregon prohibited (1) sleeping on public sidewalks, streets, or alleyways, (2) camping on public property, and (3) camping and overnight parking in city parks. The ordinances authorized fines for first-time offenders, an order temporarily barring an individual from camping in a public park for repeat offenders, and a maximum sentence of 30 days in jail for those who later violate an order.

In coming to its holding, the Supreme Court rejected arguments that the City's public-camping laws criminalized "status," finding that the ordinances prohibit actions undertaken by any person, regardless of status. The Court cited its earlier precedent as supporting the notion that the Cruel and Unusual Punishment Clause focuses on what "method or kind of punishment" a government may impose after a criminal conviction, and not on whether a government may criminalize a particular behavior in the first place. According to the Court, enforcement of the penalty provisions of the City's public-camping laws did not amount to cruel and unusual punishment because the penalties were among the "usual modes of punishing criminal offenses throughout the country," and not among those punishments considered cruel and unusual by the Constitution's framers—i.e., punishments designed to "superadd terror, pain, or disgrace" that had "long fallen out of use" by the time the Eighth Amendment was adopted.

Does the Supreme Court's recent decision mean municipalities may enact and enforce public-camping bans without fear of liability? Of course not! For one, the Court did not foreclose the possibility that certain punishments could still run afoul of the Cruel and Unusual Punishment Clause when enforced and, to be sure, *Grants Pass* involved only certain relatively minor criminal penalties. Second, there are other constitutional amendments, such as the First (freedom of speech and assembly), Fourth (protection against unreasonable searches and seizures), and Fourteenth (equal protection, due process, and takings), that impose significant limits on actions municipal officials and employees can take in the course of enforcement of public camping bans. Violation of these other constitutional protections are and will remain a significant source of potential civil rights liability.

The decision in *Grants Pass* does not address the ability of local governments to abate homeless encampments on public property, as the City's laws did not authorize abatements or "sweeps" as part of its penalty and enforcement provisions. Various state and federal courts have interpreted the Fourth and Fourteenth Amendments to require, at minimum, the provision of ample notice to those who are to be affected by a sweep—so that they may collect their belongings and seek alternative arrangements—and procedures for the respectful handling, cataloguing, and storing of personal property to be retrieved by its owner, and identifying items that may be discarded.

Therefore, if your entity is considering a public-camping ban, particularly one enforced in part by the ability to abate encampments on public property, it is paramount to consult closely with your entity's attorney and other professionals as needed to ensure your proposed policies and procedures will not run afoul of the constitutional protections afforded to the unhoused community.

In addition to other risk management practices, you may greatly mitigate your entity's risk of violating the constitutional rights of persons experiencing homelessness by requesting the voluntary removal of personal property rather than requiring the removal. You can also further mitigate risks related to abatements by engaging with the homeless community and advocacy groups for input on humane solutions to abatement and relocation of individuals affected, ensuring adequate training for police officers and other personnel tasked with abatements, and implementing mechanisms to monitor, evaluate, regularly assess, and adjust your entity's practices to ensure the continued effectiveness of your policies and procedures without violating constitutional rights.

Finally, it's important to note that the Supreme Court did not say that municipalities must impose public-camping bans or anything about whether or how bans must be enforced. Thus, local governments still have discretion to adopt laws they think are appropriate and to choose how to enforce (or not enforce) laws already enacted.

If you have questions or would like additional CIRSA assistance regarding the topics addressed in this article, contact CIRSA's Deputy Executive Director/General Counsel Sam Light at saml@cirsa.org, or Associate General Counsel Nick Cotton-Baez at nickc@cirsa.org.

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