

## DEAR MEMBERS OF THE HONOLULU CITY COUNCIL,

We are 35 legal scholars writing in response to the latest [proposed expansion](#) of Honolulu's criminal prohibition on sleeping or lying in public places. Expanding the law yet again—especially now, when shelters are overcrowded and soaring unemployment will drive more people into homelessness—unconstitutionally punishes people for experiencing homelessness. People without shelter have no choice but to sleep outside in public; their survival depends on it. And further restricting where they may do so without fear of prosecution turns their status as people experiencing poverty and homelessness into a crime, violating their rights under the Eighth Amendment.

Honolulu's ordinance, first enacted in 2014, has never served its ostensible purpose of helping unhoused people find access to shelters and housing, nor could it given the city's insufficient shelter capacity. Instead, as the city council has repeatedly expanded the ban to wider geographic areas, the law has pushed people from one place to the next under the threat of citation and arrest, while the proportion of unhoused people without shelter has continued to grow.

Now the city council is poised to double down on this policy amid a pandemic and devastating job loss. As [shelters limit space even further](#) to allow for social distancing, and as even more people are thrown into housing insecurity through no fault of their own, Honolulu is preparing to arrest and punish more people forced to live outside instead of helping them. This is, according to the Centers for Disease Control and Prevention (CDC), bad public health policy, and could make an already vulnerable population even more susceptible to contracting and spreading disease.<sup>1</sup> It is also unconstitutional.

In 2018, the federal Ninth Circuit Court of Appeals, which has jurisdiction over the western United States, including Hawaii and Alaska, held that “the Eighth Amendment’s prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to.”<sup>2</sup> That is precisely the effect of Honolulu’s “sit-lie” ban. It rests on the “false premise” that unhoused people who are sleeping outside “ha[ve] a choice in the matter.”<sup>3</sup> And the more area it covers—the more it narrows the space where people without shelter may permissibly sleep or rest—the more blatantly it violates the Constitution.

1. In [March guidance](#) on how to protect people experiencing homelessness during the pandemic, the CDC advised that: “Unless individual housing units are available, do not clear encampments during community spread of COVID-19. Clearing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.” Yet, [according to the ACLU of Hawaii](#), law enforcement sweeps of encampments on Oahu have continued.

2. [Martin v. City of Boise](#), 902 F.3d 1031, 1035 (9th Cir. 2018).

3. *Id.* at 1048.

Hawaii has [the second-highest homelessness rate](#) in the United States, with most of its unhoused population living in Honolulu on the Island of Oahu. Without nearly enough shelter space to meet the need, the percentage of unhoused people who lack shelter has been climbing for years. According to the [Oahu 2019 Point in Time Count](#), a report required by the U.S. Department of Housing and Urban Development (HUD) each year to measure homelessness, at the end of last year there were about 2,400 unsheltered people on the island but only [a few hundred vacant shelter beds](#). For the first time, the majority of Oahu's unhoused people did not have shelter.

This dire situation will only grow worse during the pandemic. Experts and local advocates [predict a surge in homelessness](#) as more people who lived paycheck to paycheck stop paying rent after losing their jobs. Meanwhile, already overwhelmed shelters are reducing capacity and at least one [has halted intakes](#) entirely. If Honolulu further expands its ban on sleeping outside, it will ensnare more people who lost their jobs, and their income, because of the coronavirus-induced economic crisis.

Instead of providing adequate housing and services for those in need, Honolulu has addressed its housing crisis through law enforcement and criminal punishment. The city's sit-lie ban has saddled people with fines, fees, and arrest records that only make it harder to exit homelessness. This ineffective and harsh approach is also expensive, with [numerous studies](#) showing how the costs of enforcement exceed the costs of providing services.

When it started in 2014, Honolulu's ban applied to one commercial area of Waikiki. But it has been [repeatedly expanded](#) over the years to cover more than [15 separate geographic zones](#). Every expansion, every amendment that creates a new crime for houseless people to be where they were just forced to go, shows how the law's target is unhoused people themselves; not their conduct, but their status as part of the city's houseless population. That is precisely what the Constitution forbids.

Under Ninth Circuit and Supreme Court precedent, "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."<sup>4</sup> In *Martin v. City of Boise*, decided in 2018, the Ninth Circuit recognized what need hardly be said: "sitting, lying, and sleeping are ... unavoidable consequences of being human," and doing so in public is the unavoidable consequence of being human without a home.<sup>5</sup> Therefore, the court held, "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute houseless individuals for "involuntarily sitting, lying, and sleeping in public."<sup>6</sup>

4. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), vacated 505 F.3d 1006 (9th Cir. 2007); see also *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting); *United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).

5. *City of Boise*, 902 F.3d at 1048 (internal quotation marks omitted).

6. *Id.*

This ruling, which barred the enforcement of two ordinances in Boise, Idaho, followed an earlier Ninth Circuit decision, *Jones v. City of Los Angeles*,<sup>7</sup> that likewise barred Los Angeles from enforcing a ban on sitting, lying, or sleeping on public streets against people without shelter. (That 2006 decision is not binding precedent only because the parties to the litigation eventually reached a settlement.)

Yet Honolulu seeks to do what the Ninth Circuit has twice before ruled it cannot.<sup>8</sup> No one contends that Honolulu has the shelter capacity to meet the needs of its unhoused population. Without that capacity, its sit-lie ordinance turns the inevitable, involuntary consequence of being houseless and without shelter into a crime. It is no answer for the city to say that its ban, unlike those in Boise and Los Angeles, applies to only certain areas, allowing people to move elsewhere to sleep. For years now, the city has effectively chased people with new and wider bans, and it is doing so again with the latest proposal. Enforcing such bans against people without access to shelter is cruel and unusual punishment, and the Constitution forbids it.

Sincerely,

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7. *Jones*, 444 F.3d 1118 (9th Cir. 2006).

8. Other federal courts have reached the same conclusion. See *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla. 1992) (“As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment—sleeping, eating and other innocent conduct.”); see also *Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a “sleeping in public ordinance as applied against the homeless is unconstitutional”), *rev’d on other grounds*, 61 F.3d 442 (5th Cir. 1995).

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