

# MENTAL HEALTH DISABILITIES AND THE CRIMINALIZATION OF HOUSELESSNESS: CHALLENGING MUNICIPAL SIT-LIE ORDINANCES AS DISPARATE IMPACT DISCRIMINATION UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990

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## ABSTRACT

*Sit-lie laws and camping bans criminalize houselessness by imposing criminal penalties for sitting, lying, and sleeping in public spaces. These laws have a disproportionate impact on people with mental health disabilities. People with mental health disabilities are disproportionately affected by houselessness, more vulnerable to policing, and likely to face harsher consequences of policing under sit-lie laws and camping bans than people without mental health disabilities. It is essential to develop robust strategies for dismantling these laws to protect unhoused people with mental health disabilities. This is especially true as the number of people who are houseless, which has been on the rise since 2016, is projected to grow by over half a million people as a result of the COVID-19 pandemic. Constitutional challenges to sit-lie laws and camping bans have been met with mixed results and may be insufficient to protect most unhoused people from criminalization under such laws. I propose that advocates mount a facial challenge to sit-lie laws under Title II of the Americans with Disabilities Act of 1990 (ADA) based upon a disparate impact theory.*

*This Article proceeds in four parts. Part I provides an introduction to sit-lie laws and camping bans and their impact on people who are houseless. Part II explores the disproportionate effects of houselessness and policing on people with mental health disabilities. Part III provides a critical analysis of *Martin v. City of Boise*—a Ninth Circuit decision invalidating Boise’s sit-lie and camping ordinances under the Eighth Amendment—and its limitations. It also reviews the limited success of other constitutional challenges to sit-lie laws. Finally, Part IV provides a framework for a disparate impact discrimination claim under Title II of the ADA, explains why such a claim brought against a municipality for the enforcement of sit-lie laws is consistent with the purpose and mandate of the ADA, and considers the viability of affirmative defenses that may be raised by municipalities.*

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## I. INTRODUCTION

In 2005, Pamela Hawkes moved with her boyfriend to Boise in search of employment and secure housing after becoming houseless.<sup>1</sup> Once in Boise, the

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1. Wilson Criscione, *Her Lawsuit Against Boise Made Cities Change How They Treat Homeless People. A Decade Later, She's Found a Home in Spokane*, INLANDER (Dec. 19, 2019), <https://www.inlander.com/spokane/her-lawsuit-against-boise-made-cities-change-how-they-treat-homeless-people-a-decade-later-shes-found-a-home-in-spokane/Content?oid=18771107> [<https://perma.cc/VZ6E-LUD3>].

couple remained unhoused<sup>2</sup> and often slept in public.<sup>3</sup> Shelters did not always have space for them.<sup>4</sup> Even when shelter space was available, Ms. Hawkes, who has bipolar 1 disorder, preferred to sleep outside; she felt “scared and not welcome” in shelters, and sleeping outside felt safer and “mentally healthier” for her.<sup>5</sup>

The first time that the Boise police arrested Ms. Hawkes for sleeping outside, they threw her in jail.<sup>6</sup> Despite her best efforts to avoid the police, Ms. Hawkes received 12 more citations between 2006 and 2007<sup>7</sup> for violating Boise’s Camping Ordinance, which prohibited the use of “any of the streets, sidewalks, parks, or public places” as “a temporary or permanent place of dwelling, lodging, or residence,”<sup>8</sup> and its Disorderly Conduct Ordinance, which banned the occupation of and lodging or sleeping in “any building, structure, or public place, whether public or private . . . without the permission of the owner.”<sup>9</sup> The police were relentless in their policing of Ms. Hawkes under Boise’s sit-lie laws.<sup>10</sup> These are laws that

2. I use the terms “houseless” and “unhoused” rather than “homeless” throughout this article. These terms are used by some people who do not have permanent housing; some use “houseless” because “homeless” does not accurately describe their circumstances. See Natalie Orenstein, *Homeless? Unhoused? Unsheltered? Word Choice Matters When Reporting on Oaklanders Who Don’t Have Permanent Housing*, THE OAKLANDSIDE (Nov. 10, 2020), <https://oaklandside.org/2020/11/10/homeless-unhoused-unsheltered-word-choice-matters-when-reporting-on-oaklanders-who-dont-have-permanent-housing/> [<https://perma.cc/FN52-K7QC>] (“We do have a home—my tent is my home.”); Jocelyn Dong, ‘Homeless’ or ‘Unhoused’? If You Call People Who Live on the Streets “Homeless,” Norm Carroll Is Likely to Correct You., PALO ALTO WEEKLY (Aug. 24, 2005), [https://www.paloaltoonline.com/weekly/morgue/2005/2005\\_08\\_24.homesidea.shtml](https://www.paloaltoonline.com/weekly/morgue/2005/2005_08_24.homesidea.shtml) [<https://perma.cc/9BQQ-UWQ9>] (“I had a home (Lytton Plaza), but people kept walking through my living room.”). Some also prefer “houseless” because of the stigma attached to the word “homeless.” See Hailey Winetrobe, Harmony Rhoades, Eric Rice, Norweeta Milburn, & Robin Petering, “I’m Not Homeless, I’m Houseless”: Identifying as Homeless and Associations with Service Utilization Among Los Angeles Homeless Young People, 26 J. SOC. DISTRESS & HOMELESS 16, 21-22 (2017) (citations omitted) (“[S]ocial service providers must consider that their target population may not identify or relate to the label of ‘homeless.’ Such a label may instead deter young people’s access to services because of its impeding, disenfranchising stigma.”). It is important to note that many people do use and prefer the term homeless to describe their circumstances or their living situation; it’s just “not appropriate in every case: for some, the term feels insensitive or simply inaccurate.” Orenstein, *supra*.

3. See Mike Baker, *Punished for Sleeping on the Streets, They Prevailed in Court*, N.Y. TIMES (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/us/boise-idaho-homeless-supreme-court.html> [<https://perma.cc/FJ44-X5D8>].

4. Criscione, *supra* note 1.

5. *Id.*

6. Baker, *supra* note 3.

7. Criscione, *supra* note 1.

8. *Martin v. City of Boise*, 920 F.3d 584, 603–04 (9th Cir. 2019) (quoting BOISE, IDAHO CODE § 7-3A-2(A) (2021) (formerly BOISE, IDAHO CODE § 9-10-02 (2009))).

9. *Id.* (quoting BOISE, IDAHO CODE § 5-2-3(A)(1) (formerly BOISE, IDAHO CODE § 6-01-05 (2009))).

10. See Scott Greenstone, *How a Federal Court Ruling on Boise’s Homeless Camping Ban Has Rippled Across the West*, THE SEATTLE TIMES (Sep. 16, 2019, 6:00 AM), <https://www.seattletimes.com/seattle-news/homeless/a-federal-ruling-limiting-cities-from-criminalizing-homeless-has-rippled-across-the-west/> [<https://perma.cc/XLY7-WK4W>]; Criscione, *supra* note 1.

make it a criminal offense to sit, lie down, and sleep in public spaces.<sup>11</sup> Camping bans—a phrase sometimes used interchangeably with “sit-lie laws”<sup>12</sup>—also criminalize sleeping in public spaces, along with other activities such as laying down a bedroll or cooking in public.<sup>13</sup> Ms. Hawkes told the *Seattle Times*, “I’d be in the park and if [the police] felt like I had a blanket or a piece of clothing too much on the ground, they considered me ‘camping.’ . . . They’d rouse me and make me pick everything up and move on . . . .”<sup>14</sup> She was cited by the police even when the shelters were full and there was nowhere else for her to go.<sup>15</sup> Twice, these citations resulted in jail time.<sup>16</sup>

After being jailed multiple times, Ms. Hawkes knew that her mental health was deteriorating.<sup>17</sup> In 2008, she moved back to her hometown of Spokane, Washington, where she sought mental health counseling.<sup>18</sup> Back in Spokane, she cycled on and off the streets for a decade, unable to secure housing in part because of her criminal record.<sup>19</sup>

In 2009, Ms. Hawkes and several others who were cited under Boise’s sit-lie laws brought suit against the city, alleging that Boise’s enforcement of the laws constituted cruel and unusual punishment in violation of the Eighth Amendment.<sup>20</sup> Nearly ten years later, in a landmark decision in *Martin v. City of Boise*, the Ninth Circuit agreed.<sup>21</sup> While many celebrated *Martin* as a success on the path to the decriminalization of homelessness, in reality its holding is so narrow that it does little to protect people from the fate Ms. Hawkes faced in Boise.<sup>22</sup> An Eighth Amendment violation only occurs under *Martin* when an individual is cited under an ordinance that prohibits “sleeping outdoors, on public property, when no alternative shelter is available.”<sup>23</sup> This leaves a wide range of other conduct open for criminalization. Indeed, Ms. Hawkes herself was criminally cited under a sit-lie

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11. See ACLU OF ARIZ., HOMELESS IN PHOENIX: KNOW YOUR RIGHTS 5, [https://www.acluz.org/sites/default/files/field\\_documents/homeless\\_rights\\_in\\_phoenix.pdf](https://www.acluz.org/sites/default/files/field_documents/homeless_rights_in_phoenix.pdf) [https://perma.cc/JN9J-SDBS].

12. See, e.g., Elizabeth Chou, *What’s Next: LA Ban on Sitting, Lying Down and Sleeping on Sidewalks Will Launch Sept. 3*, L.A. DAILY NEWS (July 30, 2021, 5:19 PM), <https://www.dailynews.com/2021/07/30/whats-next-la-ban-on-sitting-lying-down-and-sleeping-on-sidewalks-will-launch-sept-3/> [https://perma.cc/F3PF-LLG8]; *Everett to Begin Enforcing ‘No-Sit, No-Lie’ Homeless Camping Ban*, MYNORTHWEST (Jun. 6, 2021, 9:04 AM), <https://mynorthwest.com/3017066/everett-enforcing-no-sit-no-lie-homeless-camping-ban/> [https://perma.cc/75CT-HM66].

13. *Id.*

14. Greenstone, *supra* note 10.

15. Criscione, *supra* note 1.

16. *Id.*

17. Baker, *supra* note 3.

18. Criscione, *supra* note 1.

19. *Id.*

20. Greenstone, *supra* note 10; *Martin v. City of Boise*, 920 F.3d 584, 606 (9th Cir. 2019).

21. *Martin v. City of Boise*, 902 F.3d 1031, 1046 (9th Cir. 2018).

22. Criscione, *supra* note 1.

23. *Martin*, 920 F.3d at 604 (Berzon, J., concurring in the denial of rehearing en banc).

law in Spokane around February 2019, less than one year after *Martin* was first decided in September 2018.<sup>24</sup> The Spokane law prohibits sitting, sleeping, and lying on sidewalks when shelter space is open.<sup>25</sup> This law is narrowly tailored enough to comply with *Martin*: assuming that the Spokane police called to confirm that shelter beds were available before issuing the citation to Ms. Hawkes, the citation was constitutional.<sup>26</sup>

Sit-lie laws are facially neutral, meaning that they do not explicitly discriminate against a particular group.<sup>27</sup> Nevertheless, these laws have a disproportionate impact on people with mental health disabilities, like Ms. Hawkes.<sup>28</sup> This impact is twofold. First, people with mental health disabilities are overrepresented in unsheltered, unhoused communities that are targeted by sit-lie laws and are thus more at risk of policing under these laws.<sup>29</sup> Second, as the consequences of policing for people with untreated mental health disabilities are worse than for those without them,<sup>30</sup> people with mental health disabilities are also likely to face more severe consequences when policed under sit-lie laws. Together, these realities intensify the barriers to permanent housing that people with mental health disabilities already face.

It is essential to consider strategies for dismantling sit-lie ordinances and other measures that criminalize homelessness. Criminalization worsens

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24. Criscione, *supra* note 1.

25. *Id.*

26. *See id.*

27. *See* BOISE, IDAHO CODE § 7-3A-2(A) (2021) (formerly BOISE, IDAHO CODE § 9-10-02 (2009)) (stating that “[i]t shall be unlawful for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time” and not singling out a particular group for policing); AUSTIN, TEX. CODE § 9-4-11 (2019) (not singling out a particular group for policing to enforce Austin’s camping ban); SPOKANE, WASH. MUNICIPAL CODE § 12.02.1010 (2018) (stating generally that “[n]o person may camp in or upon any public property” and not singling out a particular group for policing to enforce Spokane’s camping ban).

28. *See infra*, Part II.

29. *See* Heidi Schultheis, *Lack of Housing and Mental Health Disabilities Exacerbate One Another*, CTR. FOR AM. PROGRESS (Nov. 20, 2018, 9:01 AM), <https://www.americanprogress.org/issues/poverty/news/2018/11/20/461294/lack-housing-mental-health-disabilities-exacerbate-one-another/> [<https://perma.cc/2P9T-BQ2J>].

30. *See* Minyvonne Burke, *Policing Mental Health: Recent Deaths Highlight Concerns over Officer Response*, NBC NEWS (May 16, 2021, 4:30 AM), <https://www.nbcnews.com/news/us-news/policing-mental-health-recent-deaths-highlight-concerns-over-officer-response-n1266935> [<https://perma.cc/ET8N-M2JK>]; DORIS A. FULLER, H. RICHARD LAMB, MICHAEL BIASOTTI, & JOHN SNOOK, TREATMENT ADVOC. CTR., *OVERLOOKED IN THE UNDERCOUNTED: THE ROLE OF MENTAL ILLNESS IN FATAL LAW ENFORCEMENT ENCOUNTERS 1* (2015) [*hereinafter* UNDERCOUNTED], <https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf> [<https://perma.cc/226D-75H2>] (reporting that the risk of being killed during a police incident is higher for people with mental health disabilities than for those without them).

houselessness by increasing barriers to housing.<sup>31</sup> In contrast, a “Housing First” model that focuses on providing people with permanent housing and other social support has had the “greatest success in permanently ending [houselessness]” where implemented.<sup>32</sup> Nevertheless, in the face of an unhoused population that has steadily increased since 2016,<sup>33</sup> local governments continue to increase the number of policies criminalizing the unhoused population.<sup>34</sup> This is a particularly concerning pattern given that the unhoused population is projected to grow by over half a million people as a result of the COVID-19 pandemic.<sup>35</sup> Indeed, local governments have continued to pass and implement new measures criminalizing houselessness throughout the pandemic.<sup>36</sup> For example, less than two months into its pandemic response, New York City took swift action to increase policing of people who are houseless for things like sleeping and sheltering on the subway.<sup>37</sup> One year into the pandemic, the Texas legislature heard a bill proposing a statewide camping ban, which was signed into law a few months later.<sup>38</sup>

Sit-lie laws have generated substantial controversy across the country. Between 2019 and 2021 alone, highly publicized debates about sit-lie laws and

31. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS FACT SHEET: THE TOP FIVE WAYS CRIMINALIZATION OF HOMELESSNESS HARMS COMMUNITIES 1 (2018), <https://nlchp.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf> [<https://perma.cc/82MN-T2PZ>] (“When [house]less people are saddled with [exceedingly] high fines and fees for minor traffic tickets or incarcerated for having to live outdoors, it hurts their employment and housing options, access to education, family stability, and communities.”).

32. *Id.* at 2.

33. *See infra* Part II.B.

34. *See, e.g.*, Stephen Nessen, *Governor Cuomo and Mayor De Blasio Agree: Subway Homeless Must Go*, GOTHAMIST (Apr. 28, 2020, 5:17 PM), <https://gothamist.com/news/governor-cuomo-and-mayor-de-blasio-agree-subway-homeless-must-go> [<https://perma.cc/QZM3-GC45>].

35. ECON. ROUNDTABLE, LOCKED OUT: UNEMPLOYMENT AND HOMELESSNESS IN THE COVID ECONOMY 27 (2021) [hereinafter LOCKED OUT], <https://economicrt.org/wp-content/uploads/2021/01/Locked-Out.pdf> [<https://perma.cc/BNT2-63W6>].

36. *See, e.g.*, Nessen, *supra* note 34; Catherine Kim, *It Took a Pandemic for Cities to Finally Address Homelessness*, VOX (Apr. 21, 2020, 10:30 AM), <https://www.vox.com/2020/4/21/21227629/coronavirus-homeless-covid-19-las-vegas-san-francisco> [<https://perma.cc/4LKH-WWYA>]; Sydney Brownstone, *Auburn City Council Votes to Create Criminal Penalty for Camping on City Property*, SEATTLE TIMES (Apr. 22, 2021, 6:12 PM), <https://www.seattletimes.com/seattle-news/homeless/auburn-city-council-creates-criminal-penalty-for-camping-on-city-property/> [<https://perma.cc/C3QY-UMPU>]; Paige Cornwell, *Mercer Island Restricts Camping on Public Property in Near-Unanimous Vote*, SEATTLE TIMES (Feb. 17, 2021, 11:05 AM), <https://www.seattletimes.com/seattle-news/eastside/in-near-unanimous-vote-mercero-island-restricts-camping-on-public-property/> [<https://perma.cc/F5HH-GE5K>]; Brian Melley, *Los Angeles Passes Measure Limiting Homeless Encampments*, ASSOCIATED PRESS (July 1, 2021), <https://apnews.com/article/los-angeles-lifestyle-business-government-and-politics-4f1ef8aef6c1784e3b1a6193b6ed5016> [<https://perma.cc/K9F3-HNQD>].

37. Nessen, *supra* note 34.

38. Brad Johnson, *Aimed at Austin’s Homelessness, Texas Legislature Poised to Ban Public Camping*, TEXAN (Mar. 15, 2021), <https://thetexan.news/aimed-at-austins-homelessness-texas-legislature-poised-to-ban-public-camping/> [<https://perma.cc/YXD7-4HW8>]; *Texas Passes Statewide Camping Ban*, NAT’L LOW INCOME HOUS. COAL. (June 28, 2021), <https://nlihc.org/resource/texas-passes-statewide-camping-ban> [<https://perma.cc/G6MR-3W4Z>].

camping bans raged in at least 31 counties and major cities<sup>39</sup> and two state legislatures.<sup>40</sup> For example, since 2019, the city of Austin, Texas has been embroiled

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39. See Amy Abdelsayed & Jordan Gartner, *Las Vegas City Council Passes Second 'Homeless Ordinance'*, KTNV LAS VEGAS (Jan. 16, 2020, 5:04 PM), <https://www.ktnv.com/news/las-vegas-city-council-to-discuss-second-homeless-ordinance> [<https://perma.cc/3PB3-DUPA>]; Madeline Ackley, *Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protesters Say*, AZ MIRROR (Jan. 9, 2020, 9:13 AM), <https://www.azmirror.com/2020/01/09/phoenix-still-criminalizes-homelessness-despite-court-ruling-protesters-say/> [<https://perma.cc/5SFP-UG5J>]; Jay Barmann, *Supreme Court Lets Stand Ninth Circuit Ruling Permitting Homeless to Sleep Outside*, SFIST (Dec. 16, 2019), <https://sfist.com/2019/12/16/supreme-court-lets-stand-ninth-circuit-ruling-permitting-homeless-to-sleep-outside/> [<https://perma.cc/T54N-L3FH>]; Nick Bowman, *Everett City Council Passes 'No-Sit, No-Lie' Homeless Camping Ban*, MYNORTHWEST (Seattle) (Mar. 18, 2021, 7:17 AM), <https://my-northwest.com/2689104/everett-city-council-to-vote-on-no-sit-no-lie-homeless-camping-ban/> [<https://perma.cc/GVN6-XU74>]; Michael Cerullo, *Eugene Residents Voice Concern over Growing Homeless Crisis*, KEZI (Eugene, Or.) (Mar. 5, 2021, 8:01 PM), <https://www.kezi.com/content/news/Eugene-residents-voice-concern-over-growing-camping-crisis-573929291.html> [<https://perma.cc/M8AC-2LBF>]; Rachael Chavez, Guest Commentary, *Santa Cruz's TOLO an Expensive and Harmful Policy on Homelessness*, SANTA CRUZ SENTINEL (Mar. 27, 2021, 6:38 AM), <https://www.santacruzsentinel.com/2021/03/25/guest-commentary-santa-cruzs-tolo-an-expensive-and-harmful-policy-on-homelessness/> [<https://perma.cc/SHQ3-88XR>]; Bettie Cross, *Austin's Homeless Camping Rules Could Be Decided by Voters*, CBS AUSTIN (Feb. 24, 2020), <https://cbsaustin.com/news/local/austins-homeless-camping-rules-could-be-decided-by-voters> [<https://perma.cc/P894-X7TV>]; Robin Epley, *Car Horns Echo over City Council Proceedings as More than 250 People Protest*, ENTERPRISE-RECORD (Chico, Cal.) (Feb. 4, 2020, 11:47 PM), <https://www.chicoer.com/2020/02/04/car-horns-echo-over-city-council-proceedings-as-more-than-250-people-protest/> [<https://perma.cc/C3A2-3J5Z>]; Taylor Girtman, *Leander Bans Camping in Public Areas*, COMMUNITY IMPACT NEWSPAPER (Austin, Tex.) (Aug. 24, 2020, 12:09 PM), <https://communityimpact.com/austin/cedar-park-leander/government/2020/08/21/leander-bans-camping-in-public-areas/> [<https://perma.cc/X9QZ-4ZCU>]; Christina Jedra, *Honolulu Homeless Sweeps Will Continue Despite Supreme Court Decision*, HONOLULU CIVIL BEAT (Dec. 17, 2019), <https://www.civilbeat.org/2019/12/honolulu-homeless-sweeps-will-continue-despite-supreme-court-decision/> [<https://perma.cc/BSR3-A8ZE>]; Peter Johnson, *SLO Moves to Rid Parks of Tents amid Influx of Homeless*, NEW TIMES (San Luis Obispo, Cal.) (Feb. 25, 2021), <https://www.newtimeslo.com/sanluisobispo/slo-moves-to-rid-parks-of-tents-amid-influx-of-homeless/Content?oid=10645389> [<https://perma.cc/NU3Y-RKUR>]; Marisa Kendall, *Oakland Moves Forward with New Rules Governing Homeless Encampments*, MERCURY NEWS (San Jose, Cal.) (Sep. 21, 2020, 11:08 AM), <https://www.mercurynews.com/2020/09/21/oakland-new-proposed-rules-lay-out-where-homeless-resident-can-and-cant-camp/> [<https://perma.cc/AR9E-5UNL>]; Sam Lounsberry, *Boulder Officials Defend Urban Camping Ban*, BOULDER DAILY CAMERA (Jan. 10, 2020, 10:38 AM), <https://www.dailycamera.com/2019/12/30/boulder-officials-defend-urban-camping-ban/> [<https://perma.cc/BF3V-FW46>]; Austen Macalus, *'No Place to Go': How Kitsap Is Responding to a Federal Court Ruling on Homeless Camping Laws*, KITSAP SUN (Dec. 8, 2019, 5:01 AM), <https://www.kitsapsun.com/story/news/2019/12/08/no-place-go-how-kitsap-responding-federal-court-ruling-homeless-camping-laws/2624812001/> [<https://perma.cc/SF2T-N573>]; Jacy Marmaduke, *Fort Collins Won't Appeal Ruling on ACLU Camping Ban Lawsuit*, COLORADOAN (Mar. 4, 2021, 12:43 PM), <https://www.coloradoan.com/story/news/2021/03/04/fort-collins-homeless-camping-ban-city-wont-appeal-aclu-lawsuit/6903567002/> [<https://perma.cc/XB4V-AW5H>]; Conor McCormick-Cavanagh, *Denver Appeals Judge's Decision Declaring Camping Ban Unconstitutional*, WESTWORD (May 8, 2020, 5:50 AM), <https://www.westword.com/news/denver-camping-ban-unconstitutional-homeless-appeals-11707178> [<https://perma.cc/X2GS-8EQT>]; Riley Miller, *As Port Royal Implements Camping Ban, Beaufort County Leaders Look to Solve Homelessness Issues*, WJCL SAVANNAH (Jan. 25, 2021, 5:43 PM), <https://www.wjcl.com/article/as-port-royal-implements-camping-ban-beaufort-county-leaders-look-to-solve-homelessness-issues/35312961> [<https://perma.cc/QFY8-CPTZ>]; Lorenzo Morotti, *Sausalito Homeless Campers Can Stay at Park*,

in debate about a municipal ordinance banning camping, sitting, and lying in public. Proponents of a 2021 ballot measure to criminalize camping and expand the city's sit-lie ordinance argued that the decriminalization of such conduct in 2019 increased Austin's unhoused population; made it a "dirty and unsafe city"; and harmed its parks, public image, and tourism.<sup>41</sup> On the other hand, unhoused and formerly unhoused Austinites and organizations supporting unhoused

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*Judge Rules*, MARIN INDEP. J. (Mar. 2, 2021, 8:44 AM), <https://www.marinij.com/2021/03/01/sausalito-homeless-campers-can-stay-at-park-judge-rules/> [<https://perma.cc/2VQP-M337>]; Jackie Rehwald, *City Declines to Temporarily Lift Ban on Tents for Unsheltered Homeless*, SPRINGFIELD NEWS-LEADER (Dec. 16, 2020, 2:43 PM), <https://www.news-leader.com/story/news/local/ozarks/2020/12/15/springfield-missouri-declines-lift-ban-tents-unsheltered-homeless/3906285001/> [<https://perma.cc/X9MP-89H7>]; Logan C. Ritchie, *Tucker Considers Banning Urban Camping on Public Property*, DECATURISH (Nov. 24, 2020), <https://decaturish.com/2020/11/tucker-considers-banning-urban-camping-on-public-property/> [<https://perma.cc/2MHE-LV79>]; *Seattle Suburb OKs Camping Ban It May Not Be Able to Enforce*, ASSOCIATED PRESS (Feb. 17, 2021), <https://apnews.com/article/seattle-paul-allen-coronavirus-pandemic-courts-3323f65c2146411ace9f99a255daf44> [<https://perma.cc/QDE2-AGLN>]; Susan Shelley, *Cities Are Under No Obligation to Destroy Themselves*, ORANGE COUNTY REGISTER (May 25, 2019, 11:05 AM), <https://www.ocregister.com/2019/05/25/cities-are-under-no-obligation-to-destroy-themselves/> [<https://perma.cc/U268-C9MG>]; Susan Shelley, *How Courts Set the Stage for Los Angeles' Public Camping Problems*, L.A. DAILY NEWS (Apr. 29, 2020, 11:11 AM), <https://www.dailynews.com/2020/04/29/how-courts-set-the-stage-for-los-angeles-public-camping-problems/> [<https://perma.cc/FP7F-ZFSY>]; Linda Stansberry, *Updated: Eureka City Council to Consider Camping Ban*, NORTH COAST J. (Eureka, Cal.) (Nov. 16, 2020, 4:18 PM), <https://www.northcoastjournal.com/NewsBlog/archives/2020/11/16/eureka-city-council-to-consider-camping-ban> [<https://perma.cc/MJF8-8NWQ>]; Joe Utter, *Moses Lake Enacts 24/7 Camping Ban with Homeless Sleep Center Opening Soon*, IFIBER ONE NEWS (Ephrata, Wash.) (Oct. 28, 2020), [https://www.ifiberone.com/columbia\\_basin/moses-lake-enacts-24-7-camping-ban-with-homeless-sleep-center-opening-soon/article\\_5557f2be-194b-11eb-adbb-0b1bcc401f76.html](https://www.ifiberone.com/columbia_basin/moses-lake-enacts-24-7-camping-ban-with-homeless-sleep-center-opening-soon/article_5557f2be-194b-11eb-adbb-0b1bcc401f76.html) [<https://perma.cc/K53B-R25C>]; Mitchell White, *City Clears out Cacique Underpass as Officials Discuss Future Sit Lie Ordinance*, SANTA BARBARA NEWS-PRESS (Apr. 30, 2020), <https://newspress.com/city-clears-out-cacique-underpass-as-officials-discuss-future-sit-lie-ordinance/> [<https://perma.cc/MWX6-W7D6>]; Jeff Weinberger, *Fort Lauderdale's Proposed Camping Ban Criminalizes the Homeless. It's Immoral*, SUN SENTINEL (Fla.) (Mar. 10, 2020, 1:07 PM), <https://www.sun-sentinel.com/opinion/commentary/fl-op-com-weinberger-homeless-city-fort-lauderdale-camping-20200310-7aot6excrbh67lwjwftgj533qq-story.html> [<https://perma.cc/2JVE-TC3X>]; Rebecca White, *City to Resume Sit-Lie Enforcement in February*, SPOKESMAN-REVIEW (Spokane, Wash.) (Jan. 18, 2019), <https://www.spokesman.com/stories/2019/jan/18/city-to-resume-sit-lie-enforcement-in-february/> [<https://perma.cc/SY9C-X7ED>]; Megan Willgoos & Christina Giardinelli, *Greenway Campers React to Proposed Ordinance Banning Use of Tents*, KTVL (Medford, Or.) (Mar. 22, 2021), <https://ktvl.com/news/local/greenway-campers-react-to-proposed-ordinance-banning-use-of-tents> [<https://perma.cc/U4S6-YU95>]; Whitney Woodworth, *Salem Homelessness: City Council to Revisit Controversial Sit-Lie Ordinance*, STATESMAN J. (Salem, Or.) (Feb. 14, 2020, 2:18 PM), <https://www.statesmanjournal.com/story/news/2020/02/11/salem-city-council-revisit-controversial-sit-lie-ordinance-homeless/4695497002/> [<https://perma.cc/42MQ-DKT2>].

40. Johnson, *supra* note 38; Maggie Vespa, *Oregon Bill Aims to Largely Ban 'Sit-Lie' Laws*, KGW8 (Portland, Or.) (Feb. 8, 2021, 7:37 PM), <https://www.kgw.com/article/news/local/homeless/oregon-bill-aims-mostly-ban-sit-lie-laws/283-7f6933c9-5f50-4b35-b9fb-b6067991ff7f> [<https://perma.cc/RCL8-TFJ2>].

41. Alyssa Goard, *Austin Camping Ban Debate Highlights Fundamental Rift over How to Address Homelessness*, KXAN (Mar. 11, 2021, 7:47 PM), <https://www.kxan.com/news/local/austin/austin-camping-ban-debate-highlights-fundamental-rift-over-how-to-address-homelessness/> [<https://perma.cc/DZW2-MRCS>].

communities countered that the criminalization of houselessness actually makes unhoused people feel less safe and urged the city to take a Housing First approach to houselessness.<sup>42</sup>

As the aftermath of *Martin* suggests, constitutional challenges to sit-lie laws may be insufficient to protect most people from criminalization under sit-lie laws. More robust measures are needed to protect people with mental health disabilities from the disproportionately severe consequences they face under sit-lie laws. I propose a facial challenge to sit-lie laws under Title II of the Americans with Disabilities Act of 1990 based on a disparate impact theory as one such measure.<sup>43</sup> Such a challenge could result in the cessation of enforcement or the repeal of sit-lie laws.

I advance this argument in parts II–IV of this article. Part II explores the disproportionate effects of houselessness and policing on people with mental health disabilities. Part III provides a critical analysis of *Martin v. City of Boise* and its limitations and reviews the limited success of other constitutional challenges to sit-lie laws. Finally, Part IV offers a framework for a disparate impact discrimination claim under Title II of the ADA, explains why such a claim brought against a municipality for the enforcement of sit-lie laws is consistent with the purpose and mandate of the statute, and considers the viability of affirmative defenses municipalities may raise.

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42. Anna Joaquin & Gabe Patrick, *A Key Fight Against Criminalizing Homelessness Is Playing Out in Austin, Texas*, JACOBIN (Feb. 22, 2021), <https://www.jacobinmag.com/2021/02/austin-texas-homeless-rights-housing> [<https://perma.cc/8S6Q-J5FX>]; NORMA A. HERRERA, HOMES NOT HANDCUFFS 10 (2018), [https://grassrootsleadership.org/sites/default/files/reports/homes\\_not\\_handcuffs\\_final\\_web.pdf](https://grassrootsleadership.org/sites/default/files/reports/homes_not_handcuffs_final_web.pdf) [<https://perma.cc/8SSM-ZRSP>] (reporting that 64.6% of houseless Austinites who were surveyed responded that the criminalization of houselessness made them feel less safe). The Austin ballot measure passed on May 1, 2021 and came into effect 10 days later. Faith Castle, *Austin's Public Camping Ban to Be Reinstated After Voters Approve Proposition B*, KXAN (Austin, Tex.) (May 17, 2021, 2:41 PM), <https://www.kxan.com/news/your-local-election-hq/austin-proposition-b-voters-decide-whether-to-reinstate-camping-ban-largely-affecting-homeless-people/> [<https://perma.cc/N2BH-HXNM>].

43. The existing literature on the criminalization of houselessness focuses on challenges to sit-lie laws and similar measures on Eighth Amendment, Fourth Amendment, First Amendment, and substantive and procedural due process grounds. *See generally* Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413 (2006) (arguing that laws that criminalize the status of houselessness violate state constitutional due process guarantees); David Rudin, “*You Can’t Be Here*”: *The Homeless and the Right to Remain in Public Space*, 42 N.Y.U. REV. L. & SOC. CHANGE 309 (2018) (advocating a right to remain in a public space that derives from due process analysis, the Eighth Amendment, privacy, the right to travel, and vagueness doctrines); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992) (analyzing equal protection, due process, freedom of movement, Fourth Amendment, and Eighth Amendment challenges to tactics used to drive houseless individuals from cities).

## II.

PEOPLE WITH MENTAL HEALTH DISABILITIES ARE DISPROPORTIONATELY  
AFFECTED BY SIT-LIE LAWS

Since people with mental health disabilities are disproportionately affected by houselessness, especially those forms of houselessness that sit-lie laws target, they are also more likely to be policed under sit-lie laws.<sup>44</sup> Moreover, they face worse outcomes, including harsher penalties and more severe collateral consequences than people without mental health disabilities when policed under these laws.<sup>45</sup> As both houselessness and measures criminalizing sitting, lying, and sleeping in public are increasing,<sup>46</sup> the disproportionate effects of policing on people with mental health disabilities will likely worsen in years to come.

*A. People with Mental Health Disabilities are Disproportionately Affected by Houselessness and Policing*

Houselessness is caused by a lack of affordable housing, not mental health disabilities.<sup>47</sup> However, people with mental health disabilities are disproportionately affected by houselessness because of the barriers that systemic ableism creates to securing and maintaining permanent housing,<sup>48</sup> and because the trauma and stress experienced by unhoused people can cause them to develop mental health disabilities that they did not have prior to being houseless.<sup>49</sup> Between one-quarter and one-third of all people who are houseless have a serious mental health disability<sup>50</sup> (a disability that causes serious functional impairment that interferes with one or more major life activities).<sup>51</sup> This is nearly seven times the rate of the incidence of serious mental health disabilities in the general population.<sup>52</sup>

People with mental health disabilities are at an increased risk of housing insecurity because systemic ableism complicates access to essential resources. They face significant barriers to federal housing programs and other resources that make

44. See Schultheis, *supra* note 29.

45. See Burke, *supra* note 30; UNDERCOUNTED, *supra* note 30, at 1. See also *infra* Part II(A).

46. See, e.g., Nessen, *supra* note 34; Kim, *supra* note 36; Brownstone, *supra* note 36; Cornwell, *supra* note 36; Melley, *supra* note 36.

47. See Schultheis, *supra* note 29.

48. KAYA LURIE, BREANNE SCHUSTER, & SARA RANKIN, HOMELESS RTS. ADVOC. PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS, 24–27 (2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1002&context=hrap> [<https://perma.cc/RT47-EQ5M>].

49. COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, HOMELESSNESS, HEALTH, AND HUMAN NEEDS 51 (1988) [hereinafter, “COMM. ON HEALTH CARE FOR HOMELESS PEOPLE”].

50. *The Homeless Mentally Ill*, 21 HARV. MENTAL HEALTH LETTER (Harvard Health Publ’g, Boston, Mass.), May 2005 [hereinafter *The Homeless Mentally Ill*].

51. NAT’L INST. OF MENTAL HEALTH, *Mental Illness*, <https://www.nimh.nih.gov/health/statistics/mental-illness.shtml> [<https://perma.cc/FM38-7TP5>] (last visited May 26, 2021).

52. *Id.*

housing accessible<sup>53</sup> including employment, financial stability, and support networks.<sup>54</sup> As a result, they “are the first victims of housing shortages” and rent hikes.<sup>55</sup> People with mental health disabilities are also at a greater risk of eviction because neighbors and landlords are often intolerant of behaviors that may be symptoms of mental health disabilities.<sup>56</sup> Furthermore, they are more likely to have adverse experiences that increase the risk of houselessness, such as contact with the criminal legal system<sup>57</sup> and domestic violence<sup>58</sup>—experiences that themselves can both cause and exacerbate mental health disabilities.<sup>59</sup> People with mental health disabilities who are incarcerated are at an “especially high risk” of houselessness after they are released.<sup>60</sup> The *Harvard Mental Health Letter* describes how for formerly incarcerated people with mental health disabilities, it is “difficult to negotiate the complex process of regaining the entitlements they have lost after incarceration. They have to wait for resumption of their Social Security benefits at a time when they may already have been evicted. Their criminal records make it especially difficult to get housing.”<sup>61</sup>

Moreover, the experience of being unhoused causes trauma and stress that can worsen the symptoms of mental health disabilities and create a “vicious cycle” of houselessness.<sup>62</sup> Importantly, houselessness itself can be disabling: trauma and stress related to being unhoused can cause people who do not have mental health disabilities to develop them.<sup>63</sup>

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53. *The Homeless Mentally Ill*, *supra* note 50.

54. Ellen L. Bassuk, Lenore Rubin, & Alison Lauriat, *Is Homelessness a Mental Health Problem?*, 141 AM. J. PSYCH. 1546, 1549 (1984).

55. *See The Homeless Mentally Ill*, *supra* note 50.

56. *Id.*

57. *See id.*; *see also* Donna Hall, Li-Wen Lee, Marc W. Manseau, Leah Pope, Amy C. Watson, & Michael T. Compton, *Major Mental Illness as a Risk Factor for Incarceration*, 70 PSYCH. SERVS. 1088, 1093 (2019) (reporting that differential adjudication of people with severe mental health disabilities arrested for misdemeanors contributes to their overrepresentation in the jail population).

58. Hind Khalifeh, Sian Oram, Kylee Trevillion, Sonia Johnson, & Louise M. Howard, *Recent Intimate Partner Violence Among People with Chronic Mental Illness: Findings from a National Cross-Sectional Survey*, 207 BRITISH J. PSYCH. 207, 209, 211 (2015).

59. *See* Katie Rose Quandt & Alexi Jones, *Research Roundup: Incarceration Can Cause Lasting Damage to Mental Health*, PRISON POL’Y INITIATIVE (May 13, 2021), <https://www.prisonpolicy.org/blog/2021/05/13/mentalhealthimpacts/> [<https://perma.cc/UTF4-Y86Q>]; *see generally* Marianna Mazza, Giuseppe Marano, Angela Gonzalez Del Castillo, Daniela Chieffo, Laura Monti, Delfina Janiri, Lorenzo Moccia, & Gabriele Sani, *Intimate Partner Violence: A Loop of Abuse, Depression, and Victimization*, 11 WORLD J. PSYCH. 215, 215–17 (2021).

60. *The Homeless Mentally Ill*, *supra* note 50.

61. *Id.*

62. *See* Schultheis, *supra* note 29.

63. COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, *supra* note 49, at 51.

People with mental health disabilities are significantly overrepresented in the unsheltered<sup>64</sup> and chronically houseless<sup>65</sup> populations targeted by sit-lie laws. While approximately four percent of all adults in the United States had a serious mental health disability in 2016,<sup>66</sup> over 33 percent of people who are chronically houseless had serious mental health disabilities during that same period.<sup>67</sup> A national survey of people who are houseless found that 78 percent of unsheltered respondents reported mental health conditions in 2018.<sup>68</sup> Half of these respondents reported that their mental health conditions contributed to their loss of housing.<sup>69</sup>

The inaccessibility of shelters also contributes to the high number of people with mental health disabilities in the unsheltered houseless population. “[T]he structure of the system is a barrier.”<sup>70</sup> Overcrowding, noisy environments, discrimination by shelter staff, onerous procedures for accessing shelters, and the stress and confusion of cycling on and off short-term shelter reservation systems can trigger or exacerbate mental health symptoms and “increase the likelihood that

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64. Unsheltered houselessness occurs when a person’s primary night-time residence is an area not ordinarily used or designated for regular sleeping accommodations. MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN, & THOMAS JOE BEDNAR, U.S. DEP’T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS pt. 1, at 3 (2021) [hereinafter HUD REPORT 2020], <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf> [<https://perma.cc/9M5G-LK4F>].

65. Chronic houselessness occurs when a person with a disabling condition has been houseless for over a year or has experienced episodic houselessness four or more times in three years “where the combined length of time homeless on those occasions is at least 12 months.” *Id.* at 2.

66. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2019 NATIONAL SURVEY ON DRUG USE AND HEALTH 44 (2020), <https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf> [<https://perma.cc/3VAZ-5ELM>].

67. TREATMENT ADVOC. CTR., SERIOUS MENTAL ILLNESS AND HOMELESSNESS: BACKGROUND PAPER 1 (2016), <https://www.treatmentadvocacycenter.org/storage/documents/backgrounders/smi-and-homelessness.pdf> [<https://perma.cc/TDR3-263G>].

68. JANEY ROUNTREE, NATHAN HESS, AUSTIN LYKE, & CAL. POL’Y LAB, HEALTH CONDITIONS AMONG UNSHELTERED ADULTS IN THE U.S. 4 (2019), <https://www.capolicylab.org/wp-content/uploads/2019/10/Health-Conditions-Among-Unsheltered-Adults-in-the-U.S.pdf> [<https://perma.cc/4PQ2-GUMM>].

69. *Id.* at 3.

70. COAL. ON HOMELESSNESS, SHELTER SHOCK: ABUSE, CRUELTY, AND NEGLECT IN SAN FRANCISCO’S SHELTER SYSTEM 21 (2007), <http://www.cohsf.org/wp-content/uploads/2014/08/ShelterShock.pdf> [<https://perma.cc/2TVB-T72J>]. See also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 584, 606 (1999) (holding that the ADA requires states to provide disabled people treatment in the most integrated setting possible, noting that homeless shelters are inappropriate settings for people with mental health disabilities); Donna Bryson, *It’s Not Just the Camping Ban that Keeps Denverites Experiencing Homelessness on the Move*, DENVERITE (Jan. 21, 2020, 5:20 AM), <https://denverite.com/2020/01/21/its-not-just-the-camping-ban-that-keeps-you-on-the-move-if-youre-experiencing-homelessness/> [<https://perma.cc/7T5V-YZZF>] (“Judge Johnny Barajas cited trial testimony he had heard that among those with ‘limited access to adequate shelter’ in Denver are individuals with serious mental illness. . .”).

people with mental [health disabilities] . . . fall through the cracks.”<sup>71</sup> Some shelter staff demonstrate inadequate training, experience, and empathy, and a study of the San Francisco shelter system reported that “instead of working with people with mental [health disabilities] to de-escalate situations that arise, shelter staffs frequently punish[ed] them for ‘acting out’ or ‘breaking rules.’”<sup>72</sup> Shelters are unsafe and residents are at risk of physical violence or other abuse in shelters; the Coalition on Homelessness reports that 55 percent of shelter residents surveyed reported some form of abuse from staff or other residents.<sup>73</sup> As people with mental health disabilities are at significantly greater risk of experiencing violence,<sup>74</sup> they are likely disproportionately affected by violence and abuse in shelters.

People with mental health disabilities who are unhoused and unable to access shelter are particularly at risk of policing under sit-lie laws and camping bans. Indeed, some proponents of such laws have indicated a specific intent that they be used to remove unhoused people with mental health disabilities from public space. For example, a recent proposed ballot measure in Seattle suggested that the city should increase funding for “mental health and substance use disorder treatment services” to facilitate the removal of encampments from public space.<sup>75</sup> Former Seattle Mayor Tim Burgess, writing in support of this measure, noted that “[i]t’s about a direct focus on the medical conditions most of these campers have.”<sup>76</sup>

71. COAL. ON HOMELESSNESS, *supra* note 70, at 21.

72. *Id.* at 20–21.

73. *Id.* at 5, 24–27.

74. See generally Verena Rossa-Roccor, Peter Schmid, & Tilman Steinert, *Victimization of People with Severe Mental Illness Outside and Within the Mental Health Care System: Results on Prevalence and Risk Factors from a Multicenter Study*, 11 FRONTIERS IN PSYCH. 1 (2020) (reporting on the higher rate of violent and non-violent victimization of people with mental health disabilities both in and outside of the mental healthcare system).

75. King 5 Staff, *Measure that Would Ban Encampments in Seattle Parks, Build Housing Qualities for November Ballot*, K5 (Seattle, Wash.) (Aug. 16, 2021, 11:34 AM), <https://www.king5.com/article/news/local/seattle/compassion-seattle-charter-amendmnt-november-ballot/281-bbe7e109-7d2f-4eeb-8828-eb40f7afdb44> [<https://perma.cc/CFQ7-YPYM>].

76. Scott Greenstone, *Looking to Get Around Court Rulings on Homelessness, Washington Cities May Offer Shelter, Then Crack Down*, SEATTLE TIMES (Apr. 14, 2021, 3:08 PM), <https://www.seattletimes.com/seattle-news/homeless/to-skirt-federal-court-rulings-around-homeless-camps-lawmakers-offer-shelter-or-jail-options-instead/> [<https://perma.cc/J2NW-7Y68>]; see also Judge Glock, *Texas’s Camping Bans Will Help the Homeless*, CITY-JOURNAL (June 21, 2021), <https://www.city-journal.org/texas-camping-bans-will-help-the-homeless> [<https://perma.cc/A5LQ-DTZX>] (arguing in support of the Austin municipal camping ban that “[t]he sad truth is that individuals on the street simply aren’t in any condition to seek help on their own . . . . Allowing people suffering a mental-health crisis or debilitating addiction to live on the street almost ensures their eventual arrest or death.”); cf. Sara Li, *Andrew Yang’s Comments About Mental Illness Are Deeply Offensive*, TEEN VOGUE (June 22, 2021), <https://www.teenvogue.com/story/andrew-yang-mental-health-comments> [<https://perma.cc/7NQ8-U3NN>] (discussing Andrew Yang’s comments about unhoused people with mental health disabilities before the 2021 New York City mayoral primary, wherein he proposed removing people with mental health disabilities from public space by increasing institutionalization because “[w]e have the right to walk the street and not fear for our safety because a mentally ill person is going to lash out at us.”).

People with mental health disabilities also face an increased risk of severe penalties under sit-lie laws. A person cited under a sit-lie law can generally take one of three paths: they can pay a fine, contest the citation in court, or do nothing.<sup>77</sup> However, people who are houseless may have difficulty accessing the financial resources and transportation that are necessary to pay fines and attend court hearings.<sup>78</sup> Mental health disabilities can complicate access to these resources even further. People with mental health disabilities are at increased risk of poverty.<sup>79</sup> Thus, for unhoused people with mental health disabilities who are cited under sit-lie laws, the third option—doing nothing—may be most viable. However, doing nothing in the face of a criminal citation comes with significant consequences: failure to enter a plea or appear in court can result in even greater fines, arrest, incarceration, and a criminal record.<sup>80</sup>

People with mental health disabilities also experience more severe effects of criminal citations in the long-term. As described earlier in this section, people with mental health disabilities already face barriers to mainstream social and economic life.<sup>81</sup> Citations under sit-lie laws can create collateral consequences that last long after the initial policing event and lock people with mental health disabilities out of these mainstreams more permanently: criminal records create barriers to employment, housing, public benefits, and social support systems.<sup>82</sup> Thus, policing unhoused people with mental health disabilities under sit-lie laws compounds the barriers that many disabled people already face in having their basic needs met.

Policing under sit-lie laws also puts people with mental health disabilities at a greater risk of physical harm than people without them. Since 2015, 22 percent of people shot and killed by police had a known mental health disability.<sup>83</sup> Police

77. Hannah Kieschnick, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1574–75 (2018).

78. See *id.* at 1575 (“[W]hile about 21% of [house]less individuals attempt to protest the citation in court, appearing in court is challenging without housing. An individual must schedule a court date, attend arraignment, participate in community service or receive social services through formal programs, and then reappear in court to present a signed document confirming the hours spent performing or receiving services. This process means traveling to and from court, leaving personal items unattended, missing work, and potentially losing a spot on an emergency shelter’s long waiting list.”).

79. WHO MIND PROJECT, BREAKING THE VICIOUS CYCLE BETWEEN MENTAL ILL-HEALTH AND POVERTY 1 (2007), [https://www.who.int/mental\\_health/policy/development/1\\_Breakingvicious\\_cycle\\_Infosheet.pdf](https://www.who.int/mental_health/policy/development/1_Breakingvicious_cycle_Infosheet.pdf) [<https://perma.cc/EDZ7-EDNC>] (“Best evidence indicates that the relationship between mental ill-health and poverty is cyclical: poverty increases the risk of mental disorders and having a mental disorder increases the likelihoods of descending into poverty[.]”).

80. Kieschnick, *supra* note 77, at 1606–07.

81. See *supra* notes 53–54 and accompanying text.

82. See generally A.B.A., COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: JUDICIAL BENCH BOOK 4 (2018), <https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf> [<https://perma.cc/43AX-DWUZ>].

83. Julie Tate, Jennifer Jenkins, & Steven Rich, *Fatal Force*, WASH. POST, [https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk\\_inline\\_manual\\_3](https://www.washingtonpost.com/graphics/investigations/police-shootings-database/?itid=lk_inline_manual_3) [<https://perma.cc/P7H4-XT5Q>] (last updated Feb. 28, 2022).

officers are ill-equipped to interact with people with mental health disabilities: they are “taught to make themselves look commanding and threatening by standing with their legs spread wide, chest out, and hands on weapons. Voices should be loud, commands shouted. If the suspect doesn’t obey or doesn’t obey quickly enough, the police are trained to move in closer and shout louder . . . .”<sup>84</sup> This can be triggering for people with mental health disabilities—especially those with psychosis or paranoia—and can cause them to react in ways police interpret as dangerous, leading to devastating violence at the hands of law enforcement.<sup>85</sup>

Even if direct physical harm does not result from police contact, the stress and anxiety of repeated interactions with law enforcement can take a significant toll on people with mental health disabilities. Jacob, who is unhoused, described his experience with a camping ban: one night he “couldn’t even get a full eight hours of sleep because [he] was getting woken up by cops and told to go from place to place. And [he] would just go lay down and get woken up an hour later. . . . [He] got five tickets that night.”<sup>86</sup> Whether he was sleeping in a park, on the sidewalk, or on the street, he was “at risk of getting a ticket every night. . . . No matter where [he goes he] get[s] a ticket.”<sup>87</sup>

### *B. Houselessness and Policing of Houselessness are Increasing*

The rate of houselessness has increased every year since 2016 and will likely continue to increase through at least 2023.<sup>88</sup> According to HUD, the number of people who were houseless on a single night increased by 2.2 percent between

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84. Alisa Roth, *A Worried Mom Wanted the Police to Take Her Mentally Ill Son to the Hospital. They Shot Him.*, VOX (May 30, 2018, 9:40 AM), <https://www.vox.com/the-big-idea/2018/5/30/17406900/police-shootings-mental-illness-book-vidal-vassey-mental-health> [<https://perma.cc/FFL4-92HS>].

85. *Id.*

86. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 20 (2019), [https://homelesslaw.org/wp-content/uploads/2019/02/No\\_Safe\\_Place.pdf](https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf) [<https://perma.cc/JG3W-KN8W>].

87. *Id.*

88. Hannah Knowles, *Homelessness in the U.S. Rose for a Third Year, Driven by a Surge in California*, HUD Says, WASH. POST (Dec. 21, 2019, 2:35 PM), <https://www.washingtonpost.com/nation/2019/12/21/homelessness-us-rose-third-year-driven-by-surge-california-hud-says/> [<https://perma.cc/J239-487R>]; LOCKED OUT, *supra* note 35, at 27.

2019 and 2020.<sup>89</sup> While the percentage of unsheltered houseless people was declining until 2015, it has steadily increased every year since 2015.<sup>90</sup> On the night of the count in 2020, nearly 40 percent of people who were houseless were unsheltered—almost a 10 percent increase from 2015.<sup>91</sup> Critically, the number of people who, like Ms. Hawkes, are unsheltered and chronically houseless—and thus the number of people who are most at risk of policing because of their visibility—has also increased significantly. Between 2019 and 2020, the number of individuals who were unsheltered and chronically houseless increased by 21%.<sup>92</sup> Economic Roundtable, a non-profit research organization, estimates that an additional 603,000 adults will be houseless by 2023 as a result of the economic recession caused by the COVID-19 pandemic, if this is not addressed by better federal and state housing and employment policies.<sup>93</sup>

Likely in response to the rising rates of visible houselessness, cities are increasingly instituting sit-lie prohibitions. A 2019 survey of municipalities across the country reports that between 2016 and 2019, the number of laws prohibiting sleeping in specific public spaces increased by 44 percent.<sup>94</sup> Prohibitions on sitting or lying in public increased by 17 percent.<sup>95</sup> More than half of cities surveyed reported that they had “at least one law prohibiting sleeping in public,” 21% had “one or more laws prohibiting sleeping in public citywide,” and 39% had “one or more laws prohibiting sleeping in particular public places.”<sup>96</sup>

Without legal intervention, cities will likely continue to increase criminal penalties for sitting, lying, and sleeping in public. Though President Biden committed to returning to a Housing First approach to houselessness during his 2020

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89. HUD REPORT 2020, *supra* note 64, at 7. HUD’s reporting is based on the “Point-in-Time” count, which measures the number of people in shelters, transitional housing, and unsheltered locations based on street counts on a single night within the year. *The Pitfalls of HUD’s Point-in-Time Count*, SCHOOLHOUSE CONNECTION (Jan. 7, 2020), <https://schoolhouseconnection.org/the-pitfalls-of-huds-point-in-time-count/> [<https://perma.cc/DBA3-AEQB>]. The count does not account for people who are sheltered temporarily in motels, staying with other people, couch surfing, or living unsheltered in locations not surveyed by street counts. *Id.* HUD reported that 580,466 people were houseless on a single night in 2020. HUD REPORT 2020, *supra* note 64, at 6. According to the National Law Center on Homelessness & Poverty, “at least 2.5 to 3.5 million Americans sleep in shelters, transitional housing, and public places not meant for human habitation” each year. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES 1 (2015), [https://homelesslaw.org/wp-content/uploads/2018/10/Homeless\\_Stats\\_Fact\\_Sheet.pdf](https://homelesslaw.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf) [<https://perma.cc/7SPX-CLVK>].

90. HUD REPORT 2020, *supra* note 64, at 6.

91. *Id.* In 2015, 173,268 out of 564,708 total houseless people (30.68%) were unsheltered. *Id.* On the night of the count in 2020, 580,466 people were houseless and 39% were unsheltered. *Id.*

92. *Id.* at 1.

93. LOCKED OUT, *supra* note 35, at 27–28.

94. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 42 (2019), <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/ZYA2-P56K>] [hereinafter HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES].

95. *Id.*

96. *Id.* at 41.

election campaign<sup>97</sup>—shifting away from the Trump administration’s focus on policing<sup>98</sup>—the impact of this commitment is yet to be seen. Meanwhile, local governments continue to criminalize houselessness. Indeed, within two months of Biden taking office, six municipalities considered or implemented sit-lie laws or camping bans.<sup>99</sup>

### III.

#### THE LIMITS OF THE CONSTITUTION IN THE FIGHT AGAINST THE CRIMINALIZATION OF HOUSELESSNESS

People who are houseless have brought litigation against municipalities for the enforcement of sit-lie laws and camping bans under several provisions of the Constitution. I review the successes and limitations of this litigation below, paying particular attention to the recent Ninth Circuit decision in *Martin v. City of Boise*. While this section does not review disability-specific litigation, it demonstrates that constitutional challenges may be insufficient to challenge the criminalization of unhoused people regardless of their disability status.

##### A. *Martin v. City of Boise and the Mixed Results of Constitutional Challenges to the Criminalization of Houselessness*

*Martin v. City of Boise*<sup>100</sup> was a landmark ruling from the Ninth Circuit where the court granted relief to six plaintiffs-appellants who were houseless for citations

97. *The Biden Plan for Investing in Our Communities Through Housing*, BIDEN HARRIS, <https://joebiden.com/housing/> [<https://perma.cc/4L74-6JHW>] (last visited May 26, 2021).

98. See, e.g., Catherine Kim, *It Took a Pandemic for Cities to Finally Address Homelessness*, VOX (Apr. 21, 2020, 10:30 AM), <https://www.vox.com/2020/4/21/21227629/coronavirus-homeless-covid-19-las-vegas-san-francisco> [<https://perma.cc/RA2T-DQWL>]. A report released by a White House task force during Donald Trump’s presidency suggested that “the tolerability of sleeping on the street . . . increases [houselessness],” which can be rectified through “policing of street activities.” COUNCIL OF ECON. ADVISERS, *THE STATE OF HOMELESSNESS IN AMERICA* 6 (2019), <https://www.nhipdata.org/local/upload/file/The-State-of-Homelessness-in-America.pdf> [<https://perma.cc/AW7A-S7VL>]. The report notes that the White House has “consistently supported the police” and indicated that Donald Trump’s Council of Economic Advisers would look into whether policing somehow improves the outcomes—including mental health, employment, and “other dimensions of wellbeing”—of people who are houseless. *Id.* at 3, 19.

99. See Bowman, *supra* note 39 (Everett, Washington, ban on sitting or lying on streets and sidewalks); Johnson, *supra* note 39 (San Luis Obispo, California, ban on tents in parks); Miller, *supra* note 39 (Port Royal, South Carolina, ban on camping and sleeping in public spaces); Willgoos & Giardinelli, *supra* note 39 (Medford, Oregon, ban on camping along the Greenway and using tents where camping is not allowed); *Seattle Suburb OKs Camping Ban It May Not Be Able to Enforce*, *supra* note 39 (Mercer Island City, Washington, ban on staying outside or staying in cars overnight); Ellie Prickett-Morgan & Thomas Sawano, *City Council Passes Temporary Outdoor Living Ordinance*, CITY ON A HILL PRESS (Santa Cruz, Cal.) (Mar. 11, 2021), <https://www.cityonahillpress.com/2021/03/11/city-council-passes-temporary-outdoor-living-ordinance/amp/> [<https://perma.cc/X7VH-EFZD>] (Santa Cruz, California, limitations on “the time, place, and manner where houseless people can camp”).

100. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019).

that they had received under a pair of city ordinances that effectively criminalized homelessness.<sup>101</sup>

All six *Martin* plaintiffs were cited at least once under Boise’s sit-lie laws.<sup>102</sup> Pamela Hawkes was cited 12 times in the span of one year, including for sleeping in a tent on a trail and sitting in a park with a blanket wrapped around her.<sup>103</sup> Janet Bell was cited “once for sitting on a riverbank with her backpack” and again for “putting down her bedroll in the woods.”<sup>104</sup> Robert Anderson, who was expelled from a shelter because he declined to enter its religious program, was fined \$25 for sleeping outside.<sup>105</sup> Robert Martin, who has difficulty walking, was ordered to pay \$150 after he was found guilty of resting close to a shelter.<sup>106</sup>

The *Martin* plaintiffs alleged that Boise’s enforcement of its sit-lie laws violated the Eighth Amendment’s prohibition of cruel and unusual punishment.<sup>107</sup> The Ninth Circuit’s analysis of the plaintiffs’ claims under the Eighth Amendment focused on the “substantive limits on what the government may criminalize.”<sup>108</sup> The court held that these statutes violate the Eighth Amendment.<sup>109</sup> In so holding, the court construed Supreme Court precedent that established that “status crimes” are unconstitutional as prohibiting the criminalization of involuntary conduct.<sup>110</sup> The court then reasoned that because human beings are “biologically compelled to rest, whether by sitting, lying, or sleeping,” Boise could not criminalize “the state of being [houseless] in public places” or “conduct that is an unavoidable consequence of being [houseless]—namely sitting, lying, or sleeping on the streets.”<sup>111</sup>

The outcome of *Martin* was undoubtedly positive. It forced Boise to change how it administers its sit-lie laws and significantly reduced the number of citations issued under them: while the Boise police issued nearly 300 citations for camping in public in 2015, only 39 were issued in 2018.<sup>112</sup> Boise also opened a “housing

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101. *Martin*, 920 F.3d at 603–04.

102. *Id.*

103. Criscione, *supra* note 1.

104. *Eight Amendment – Criminalization of Homelessness – Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public.* – *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), 133 HARV. L. REV. 699, 699 (2019) [hereinafter *Ninth Circuit Refuses to Reconsider Invalidation of Ordinances*].

105. *Martin*, 920 F.3d. at 606.

106. *Ninth Circuit Refuses to Reconsider Invalidation of Ordinances*, *supra* note 104, at 700.

107. *Martin*, 920 F.3d. at 606. The court observed that cases addressing this limitation are rare “for good reason,” namely that the limitation “is one to be applied sparingly.” *Id.* at 615.

108. *See id.* at 615–16.

109. *Id.* at 617.

110. *Id.* at 616 (“[C]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change . . . .”) (citing *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., diss.)).

111. *Id.* at 617 (internal quotations omitted) (citing *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136–37 (9th Cir. 2006)).

112. Greenstone, *supra* note 10.

first” complex to house people who are unsheltered.<sup>113</sup> After the ruling, other cities in the Ninth Circuit also changed the way they treated people who are houseless: police in Honolulu, Hawai’i stopped enforcing the city’s camping bans; Costa Mesa, California waited until it had opened a new 50-bed shelter before enforcing the city’s anti-camping laws; Olympia, Washington, sanctioned a camp in a designated area downtown;<sup>114</sup> and Modesto, California created more shelter beds and allowed an encampment to be established in a park.<sup>115</sup>

Despite these positive outcomes, *Martin* is not enough. The Ninth Circuit stressed throughout *Martin* that its holding is narrow.<sup>116</sup> As Judge Berzon noted in her concurrence, the Eighth Amendment only prohibits municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available.<sup>117</sup> The Ninth Circuit also reassured cities that they could prohibit sleeping, sitting, or lying in *some* public spaces, even if shelter space is unavailable, as long as the prohibition is for a legitimate reason like keeping public ways free from obstruction.<sup>118</sup> Thus, if (1) there is somewhere else for people to sit, lie, or sleep or (2) cities can cite a good reason for enforcing laws like those struck down in *Martin*, it is perfectly constitutional under *Martin* to prosecute people for resting in public.

Indeed, instead of abandoning the project of criminalizing houselessness, cities took the narrowness of *Martin* as an invitation to get creative. The city of Olympia, Washington opened a new camp for unhoused people and made sure spaces were available at a local shelter, which would allow them to continue enforcing their camping ban.<sup>119</sup> Others passed new ordinances that banned camping in effect, even though not in name, by prohibiting activities essential to it such as

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113. *Id.*

114. *Id.*

115. Gregory Scruggs, *Western Cities Scramble to Comply with Court Ruling on Homelessness*, U.S. NEWS (Feb. 10, 2020, 8:00 AM), <https://www.usnews.com/news/cities/articles/2020-02-10/western-cities-scramble-to-comply-with-court-ruling-on-homelessness> [<https://perma.cc/KNY3-NLNF>].

116. *Martin v. City of Boise*, 920 F.3d 584, 617, 617 n.8 (9th Cir. 2019) (“[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.’ We hold only that ‘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 homeless individuals for ‘involuntarily sitting, lying, and sleeping in public’ . . . on the false premise they had a choice in the matter.” (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006))).

117. *Id.* at 617 (Berzon, J., concurring in the denial of rehearing en banc).

118. *Id.* at 617 n.8.

119. Greenstone, *supra* note 10.

laying out bedrolls or other belongings on sidewalks<sup>120</sup> or in parks.<sup>121</sup> It is no secret that these measures were designed to skirt the holding in *Martin*. Advocating for the removal of encampments in public parks, legislators in Anchorage, Alaska argued that “[s]o long as Anchorage has *some place* individuals can sleep outside, case law does not limit removal of waste from the park system.”<sup>122</sup>

There is no indication that *Martin* will be useful in combatting these modified criminalization measures. Courts have declined to extend the *Martin* holding beyond the narrow circumstances in that case.<sup>123</sup> For example, just one month after the Supreme Court denied certiorari in *Martin*, the Oregon Supreme Court rejected an Eighth Amendment claim by Alexandra Barrett.<sup>124</sup> Ms. Barrett had been charged with a number of offenses, including violation of Portland’s camping ban, and claimed that “camping in a public place was an involuntary act that was an unavoidable consequence of her status of being homeless.”<sup>125</sup> Relying on a footnote in *Martin* that acknowledged “that an as-applied challenge would include consideration of additional facts, including a defendant’s specific efforts at finding shelter,” the Oregon Supreme Court found that the trial court record did not adequately establish whether Ms. Barrett’s acts of camping were involuntary acts.<sup>126</sup> Without evidence “about the availability of shelter . . . [or] personal information about [Ms. Barrett’s] attempts to be among those sheltered,” the Oregon Supreme Court found that it could not reach the merits of her Eighth Amendment claim.<sup>127</sup> Similarly, a federal court in California rejected an Eighth Amendment claim by a pro se plaintiff who alleged that police officers wrote “false tickets or reports regarding [his] failing to take down a tent or that [he] was loitering.”<sup>128</sup> In reaching this finding, the court cited the same footnote from *Martin*, noting in part that it is “not clear whether the laws these citations were based on would be barred by the Eighth Amendment because an ordinance that prohibits tenting or loitering at particular times or particular locations may be permissible.”<sup>129</sup> In 2020, a district

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120. BERKELEY, CAL., MUNICIPAL CODE § 14.48.020 (2021).

121. FOUNTAIN VALLEY, CAL., MUNICIPAL CODE § 12.08.095 (2020); Hillary Davis, *Fountain Valley Bans After-Hours Storage of Personal Belongings in Parks*, L.A. TIMES (Apr. 8, 2020, 12:37 PM), <https://www.latimes.com/socal/daily-pilot/news/story/2020-04-08/fountain-valley-bans-after-hours-storage-of-personal-belongings-in-parks> [<https://perma.cc/4Z56-7P4F>] (noting that Fountain Valley City Council banned overnight storage of personal belongings in parks in a roundabout effort to disrupt encampments).

122. Tegan Hanlon, *Anchorage Isn’t Doing Enough to Clean up Illegal Camps, Say Some Alaska Lawmakers*, ANCHORAGE DAILY NEWS (July 20, 2019) (emphasis added), <https://www.adn.com/alaska-news/anchorage/2019/06/04/group-of-alaska-legislators-says-anchorage-isnt-doing-enough-to-clean-up-illegal-camps-city-fires-back/> [<https://perma.cc/RDC8-XPT8>].

123. See, e.g., *State v. Barrett*, 460 P.3d 93 (Or. Ct. App. 2020); *Young v. City of Los Angeles*, No. CV 20-00709 JFW (RAO), 2020 WL 616363 (C.D. Cal. Feb. 10, 2020).

124. *Barrett*, 460 P.3d at 98.

125. *Id.* at 95–96.

126. *Id.* at 97 (citing *Martin v. City of Boise*, 920 F.3d 584, 617 n.8 (9th Cir. 2019)).

127. *Id.* at 98.

128. *Young*, 2020 WL 616363, at \*5.

129. *Id.* (citing *Martin*, 920 F.3d at 617 n.8).

court in Colorado overturned a lower court's ruling in favor of Jerry Rodrick Burton, who argued that Denver's camping ban violated the Eighth Amendment.<sup>130</sup> The court declined to interpret the ordinance as criminalizing houselessness and held that *Martin* was inapplicable to Burton's case because he was alerted that shelter space was available before he was cited for camping on public property.<sup>131</sup>

Aside from those brought under the Eighth Amendment, other constitutional challenges to sit-lie laws and related ordinances have achieved mixed results.<sup>132</sup> Courts have rejected facial challenges to anti-camping and sitting ordinances in which the plaintiffs alleged that the laws violated their right to travel.<sup>133</sup> Claims that anti-houseless ordinances violate the Equal Protection Clause of the Fourteenth Amendment have also failed because "no court has ever held [housing status] to be a suspect class[ification]" subject to review under the Equal Protection Clause.<sup>134</sup> Fourth Amendment claims for unreasonable search and seizure under anti-camping ordinances have succeeded in some cases but failed in cases where courts have found that unhoused people do not have a reasonable expectation of privacy in public spaces.<sup>135</sup>

Some plaintiffs have successfully challenged sit-lie ordinances and similar laws as improper regulation of expressive conduct under the First Amendment.<sup>136</sup> In *Berkeley Community Health Project v. City of Berkeley*, a district court in California enjoined enforcement of an ordinance that prohibited sitting and lying on

130. Order on Appeal at 6, *City & Cnty. of Denver v. Burton*, No. 19CV34925 (Denver Dist. Ct. Sept. 3, 2020).

131. *Id.* at 4.

132. Simon, *supra* note 43, at 648–49.

133. *State v. Barrett*, 460 P.3d 93, 98 (Or. Ct. App. 2020); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1161–65 (Cal. 1995); *City of Seattle v. McConahy*, 937 P.2d 1133, 1133–34 (Wash. Ct. App. 1997).

134. Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 38 N.Y.U. REV. L & SOC. CHANGE HARBINGER 1, 13 (2015) (quoting *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996)); *see also* *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1109 (E.D. Cal. 2012) (choosing to follow "the overwhelming weight of authority indicating the [house]less are not a suspect class").

135. Laine, *supra* note 134, at 12 (citing *Pottinger v. Miami*, 810 F. Supp 1551, 1571 (S.D. Fla. 1992)) (finding that the city of Miami violated the plaintiffs' rights under the Fourth Amendment when law enforcement gathered and destroyed their property during houseless sweeps); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005 (C.D. Cal. 2011) (finding a Fourth Amendment violation where law enforcement conducted sweeps, confiscated, and destroyed personal property of houseless people); *Whiting v. State*, 885 A.2d 785, 799–801 (Md. 2005) (finding that houseless people have no reasonable expectation of privacy on public property).

136. *See, e.g., Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084, 1093–95 (N.D. Cal. 1995), *vacated in part*, 966 F. Supp. 941, 941 (N.D. Cal. 1997) (vacating preliminary injunction against enforcement of a sit-lie ordinance based on stipulation by parties and city council's intent to amend that chapter to "delete the provisions thereof relating to solicitation after dark, from persons entering or exiting automobiles and within six feet of building fronts adjacent to the public right of way"); *cf. Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 718 (6th Cir. 1995) (noting in dicta that a law that prohibited sitting and lying down in a public place to prevent interference with pedestrian or vehicular traffic could be successfully challenged if it was "being enforced in such a manner as to infringe upon protected First Amendment rights").

a public sidewalks near buildings in Berkeley's commercial areas.<sup>137</sup> In its ruling, the court made clear that the act of sitting can constitute expressive conduct subject to First Amendment protection if it is sufficiently communicative—that is, if (1) it is “intend[ed] to communicate a particularized message,” and (2) “the surrounding circumstances . . . create a great likelihood that the message will be understood by those who view it.”<sup>138</sup> In this case, the court found that the plaintiffs' act of sitting on the sidewalk while requesting money to meet their survival needs was “intended to and perceived to communicate particularized messages,” such as that they were “in serious need.”<sup>139</sup> However, at least one circuit court has rejected a similar claim.<sup>140</sup> In *Stone v. Agnos*, for example, the Ninth Circuit held that Arthur Agnos's First Amendment rights were not violated when he was arrested and jailed for sleeping in a public plaza in violation of a California state law that criminalizes lodging in public or private places without the owner's permission.<sup>141</sup> Though the Ninth Circuit declined to decide whether sleeping is expressive conduct subject to First Amendment protection, it suggested it would not be open to such an interpretation, noting that “sleeping would seem to be the antithesis of speaking.”<sup>142</sup>

Finally, while claims that sit-lie laws are overbroad and unconstitutionally vague have prevailed in some cases,<sup>143</sup> the success of these claims has also been limited as municipalities are able to enforce sit-lie laws that are more narrowly-tailored.<sup>144</sup> For example, in *State v. Beltran*, the Supreme Court of Hawai'i invalidated an anti-camping ordinance that prohibited using a public park as living accommodations.<sup>145</sup> The court found that the ordinance was overbroad because it allows for the regulation of conduct both beyond what is specified by the ordinance and regardless of a person's intent while engaging in the activity.<sup>146</sup> The court also found that the ordinance was unconstitutionally vague because it did not specify how to avoid violating it and invited subjective application by law

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137. *Berkeley Cmty. Health Project*, 902 F. Supp. at 1086, 1093.

138. *Id.* at 1092 (citing *Spence v. Washington*, 418 U.S. 406, 410-11 (1974); *Brown v. Louisiana*, 383 U.S. 131, 140-42 (1966) (finding that Black Americans sitting silently in a public library to protest segregation is expressive conduct protected by the First Amendment)); *cf.* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296-99 (1984) (holding that a National Park Service regulation prohibiting overnight sleeping outside of designated areas did not violate the First Amendment because it was narrowly tailored to achieve the Government's substantial interest in maintaining parks in the heart of the Capitol, despite the Court's assumption in this case that the demonstrators' act of sleeping in park to draw attention to issues surrounding homelessness was expressive).

139. *Id.* at 1092.

140. *Stone v. Agnos*, 960 F.2d 893, 895 (9th Cir. 1992).

141. *Id.*

142. *Id.* (“Although sleeping would seem to be the antithesis of speaking, we need not determine whether Stone's conduct was a form of expression.”)

143. *See, e.g., State v. Beltran*, 172 P.3d 458 (Haw. 2007).

144. *See, e.g., McArdle v. City of Ocala*, 519 F. Supp. 3d 1045, 1049 (M.D. Fla. 2021).

145. *Beltran*, 172 P.3d at 460-61 (internal quotations omitted).

146. *Id.* at 464.

enforcement.<sup>147</sup> But municipalities can easily overcome these procedural due process challenges by tailoring sit-lie laws more narrowly. For example, in *McArdle v. City of Ocala, FL*, a federal district court declined to find an ordinance that prohibits lodging in public or on private property “inside, on, or near a tent or sleeping bag, or asleep atop or covered by materials (i.e., bedroll, cardboard, newspapers), or inside some form of temporary shelter” unconstitutionally vague because it could be reasonably understood to prohibit the conduct for which the plaintiffs were cited: sleeping using bags and clothing as pillows, on top of a pair of jeans, on a park bench with belongings, and in a covered alcove.<sup>148</sup> Thus, like Eighth Amendment claims, challenges alleging that sit-lie laws are unconstitutionally vague and overbroad only invite municipalities to craft laws that are more targeted and, in the long run, do little to address the real issue of criminalization of people who are houseless.

#### IV.

##### ADVOCATES SHOULD CHALLENGE SIT-LIE LAWS UNDER TITLE II OF THE AMERICANS WITH DISABILITIES ACT

Without substantial social change, legislative overhaul, or, at the very least, effective legal claims, municipalities will continue to criminalize people with mental health disabilities under sit-lie laws. Thus, it is essential to develop new legal arguments both to directly combat the criminalization of houselessness and to support social movements organizing around this issue. I argue that Title II of the Americans with Disabilities Act of 1990 may be a useful resource for this project. To support this argument, this Part proceeds in four sections. First, I provide an overview of the broad remedial purpose of the ADA and the structure of a disparate impact claim under Title II. Second, I lay out a potential framework for a disparate impact claim that could be brought by unhoused people with mental health disabilities against municipalities for the repeal or cessation of enforcement of sit-lie laws. Third, I argue that such a claim is consistent with the ADA’s purpose and mission to eradicate disability discrimination. Fourth and finally, I address the affirmative defenses that municipalities would most likely raise in the face of such a claim.

##### *A. Brief Overview of the Americans with Disabilities Act of 1990 and Disparate Impact Claims*

The Americans with Disabilities Act of 1990 is a powerful but underutilized statute. The ADA “has the broadest scope of coverage of any single civil rights

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147. *Id.* at 465.

148. *McArdle*, 519 F. Supp. 3d at 1048 (quoting OCALA, FLA., CODE § 42-10).

measure enacted to date” and was intended by Congress to confer sweeping protection against discrimination by a “broad array of individuals and entities.”<sup>149</sup>

The ADA’s purpose is to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities and for the integration of persons with disabilities into the economic and social mainstream of American life.”<sup>150</sup> Further, Congress intended the ADA to remedy the United States’ long and persistent history of “unjustified ‘segregation’ of persons with disabilities as a ‘for[m] of discrimination’”<sup>151</sup> and to prevent the “unjust, unwanted dependency on families, charity, and social welfare” that can result from such discrimination.<sup>152</sup> To achieve these goals, Congress was careful to ensure that the ADA had teeth: the statute guarantees “clear, strong, consistent, enforceable standards” to protect against disability discrimination.<sup>153</sup> It also imposed affirmative obligations on public entities to accommodate disabled people.<sup>154</sup>

### 1. Title II Protections Against Disability Discrimination by Public Entities

Title II of the ADA prohibits discrimination on the basis of disability by public entities including state and local governments and their instrumentalities.<sup>155</sup> Specifically, Title II states 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.”<sup>156</sup> This broad prohibition includes within its scope “anything a public entity does”<sup>157</sup> and thus must be read to prohibit “*all* discrimination by a public entity, regardless of context.”<sup>158</sup> Under Title II, plaintiffs can bring two types of claims: (1) disparate treatment claims, i.e., claims of intentional discrimination, and (2) disparate impact claims.<sup>159</sup> In this regard, Title

149. Robert L. Burgdorf Jr., *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 HARV. C.R.-C.L. L. REV. 413, 453 (1991).

150. S. REP. NO. 101-116, at 118 (1989).

151. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 600 (1999) (citing 42 U.S.C. §§ 12101(a)(2), 12101(a)(5) (2018)).

152. S. REP. NO. 101-116, at 114 (1989).

153. 42 U.S.C. § 12101(b)(2) (2018).

154. See 28 C.F.R. § 35.150 (2020). The Department of Justice is responsible for regulating and enforcing Title II. 42 U.S.C. § 12134(a) (2012).

155. 42 U.S.C. §§ 12131(1), 12132 (2012).

156. 42 U.S.C. § 12132 (2012) (emphasis added).

157. *Yeskey v. Pa. Dep’t of Corr.*, 118 F.3d 168, 171, 171 n.5 (3rd Cir. 1997) (internal citations omitted), *aff’d*, 527 U.S. 206 (1998).

158. *Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 44–45 (2d Cir. 1997) (emphasis added), *overruled on other grounds by* *Zero’s v. Verizon N.Y., Inc.*, 252 F.3d 163 (2d Cir. 2001).

159. See *Crowder v. Kitagawa*, 81 F.3d 1480, 1483 (9th Cir. 1996) (noting that with section 12132 of the ADA, “Congress intended to prohibit outright discrimination, as well as those forms of discrimination which deny disabled persons public services disproportionately due to their disability.”).

II of the ADA provides for more expansive protection against discrimination than Title VI of the Civil Rights Act of 1964, because Title II provides a private right of action for disparate impact discrimination<sup>160</sup> while Title VI does not.<sup>161</sup>

Disparate impact discrimination occurs when an entity employs policies, practices, or procedures that are facially neutral but have a disproportionately negative effect on members of legally protected groups like people with mental health disabilities.<sup>162</sup> The ADA proscribes criteria or methods of administration “[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability” or “the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity’s program with respect to individuals with disabilities.”<sup>163</sup> The ADA’s statement of findings and purpose note that the statute is meant to address “the discriminatory effects of . . . overprotective rules and policies.”<sup>164</sup> Thus, claims that facially neutral laws

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160. 28 C.F.R. § 35.164 pt. F app. A (2002). (“As with section 504 [of the Rehabilitation Act of 1973], there is also a private right of action for persons with disabilities, which includes the full panoply of remedies.”) Congress intended any interpretation of the ADA to incorporate judicial interpretations of the Rehabilitation Act. *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 n.3 (9th Cir. 1995). Thus, the ADA incorporates the Supreme Court’s finding in *Alexander v. Choate* that Congress intended the RA to proscribe discrimination resulting from animus in addition to “thoughtlessness,” “indifference,” or “benign neglect.” *See Alexander v. Choate*, 469 U.S. 287, 295 (1985).

161. *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (finding no private right of action for disparate impact claims under Title VI).

162. *See generally* Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L. J. 409 (1998) (discussing the evolution of disparate impact liability theory).

163. 28 C.F.R. § 35.130(b)(3)(i)–(ii) (2010); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003). The legislative history of the ADA reflects that Congress intended it to eradicate “harms resulting from . . . the adoption or application of standards and criteria and practices and procedures based on thoughtlessness or indifference—of benign neglect.” S. REP. NO. 101-116, at 104 (1989).

164. 42 U.S.C. § 12101 (a)(5) (2018); John D. Briggs, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 DUKE L.J. 197, 210 (1986) (“[T]he statutory scheme that Congress created acknowledges the modest role that intent plays in discrimination against [people with disabilities].”).

have a disparate impact on people with mental health disabilities are actionable as disability discrimination under the ADA.<sup>165</sup>

Courts must be open to a wide range of remedies under Title II. The ADA is a “broad remedial statute.”<sup>166</sup> As such, “[it] must be broadly construed to effectuate its purpose of providing a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”<sup>167</sup> In 2008, Congress reaffirmed its commitment to ensuring that disabled people can fully participate in society when it passed the ADA Amendments Act, in part to reject limitations that the Supreme Court had improperly read into the original legislation.<sup>168</sup> Specifically, Congress rejected the Court’s contention in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* that the definition of disability “need[ed] to be interpreted strictly to create a demanding standard for qualifying as disabled,” stressing that the “substantially limits” standard created by the Court in that case was an “inappropriately high” bar and that “[t]he definition of disability in this [Act] shall be construed in favor of broad coverage of individuals.”<sup>169</sup>

The ADA requires public entities to “operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.”<sup>170</sup> To comply with this accessibility requirement, public entities must make “reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate

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165. See *Crowder v. Kitagawa*, 81 F.3d 1480, 1485, 1489 (9th Cir. 1996) (holding that a law preventing carnivorous animals from entering Hawai’i for 120 days was discriminatory based on a disparate impact theory because it was “a policy, practice or procedure which discriminates against visually-impaired individuals [with guide dogs] by denying them meaningful access to state services, programs or activities [by reason of their disability] in violation of the ADA”); *Smith v. City of Oakland*, No. 19-cv-05398-JST, 2020 WL 2517857, at \*10 (N.D. Cal. Apr. 2, 2020) (denying city defendants’ motion to dismiss a Title II disparate impact claim by disabled renters who were unduly burdened by and left out of the city’s rent control program which excluded accessible units); *M.S. v. County of Ventura*, No. CV 16-03084-BRO (RAOx), 2017 WL 10434015, at \*18–20 (C.D. Cal. Mar. 7, 2017) (denying state defendants’ motion to dismiss a Title II disability discrimination based on the theory that a facially neutral mental health treatment admittance policy had a disparate impact on those with mental health disabilities since they were the only ones seeking admittance); see also *Ability Ctr. v. City of Sandusky*, 385 F.3d 901, 905 (6th Cir. 2004) (noting that Title II incorporates via reference the remedies, procedures, and rights under Section 505 of the Rehabilitation Act of 1973, which, in turn, adopts the remedies, procedures, and rights, set forth in Title VI of the Civil Rights Act of 1964, including Title VI’s prohibition of regulations that have the effect of discrimination on the basis of race, color, or national origin); cf. *Raytheon Co.*, 540 U.S. at 53 (“Both disparate-treatment and disparate-impact claims are cognizable under the ADA.”) (citing 42 U.S.C. § 12112(b) (2018)).

166. *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997).

167. *Nat’l Fed’n of the Blind v. Scribd Inc.*, 97 F. Supp. 3d 565, 573 (D. Vt. 2015) (quoting *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 160 (2d Cir. 2013)).

168. See ADA Amendments Act of 2008, Pub. L. No. 110-325, 2008 U.S.C.A.N. (122 Stat.) 3553 (codified at 42 U.S.C. § 12101 (2012)).

169. *Id.* (overruling *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002)).

170. 28 C.F.R. § 35.150(a) (2020).

that making the modifications would fundamentally alter the nature of the service, program, or activity.”<sup>171</sup> Reasonable modifications are not limited to accommodations of the immediate manifestations of an individual’s disability.<sup>172</sup>

## 2. *Proving Disparate Impact Claims*

To succeed under Title II of the ADA, a plaintiff must generally prove that they: (1) have a disability within the meaning of the ADA; (2) are a “qualified” individual with a disability; and (3) that they were “excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity” or otherwise discriminated against by a public entity because of their disability.<sup>173</sup>

A plaintiff can satisfy the first prong of an ADA Title II claim by showing that they have a disability within the meaning of the ADA.<sup>174</sup> A “disability” within the meaning of the ADA can be established by proof of “a physical or mental impairment that substantially limits one or more major life activities[,] . . . a record of such an impairment[,] or . . . being regarded as having such an impairment.”<sup>175</sup> The ADA lists examples of “major life activities”—including self-care, thinking, communicating, eating, sleeping, speaking, and the performance of major bodily functions including neurological and brain functions—but this list is non-exhaustive.<sup>176</sup>

To satisfy the second prong of an ADA Title II claim, a plaintiff must show that they are a “qualified individual” with a disability.<sup>177</sup> A “qualified individual” is an individual who “with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”<sup>178</sup> A plaintiff can establish eligibility by (1) showing that they meet the eligibility criteria to participate in or receive the

171. 28 C.F.R. § 35.130(b)(7)(i) (2020).

172. *Cf.* U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 397–98 (2002) (holding that the ADA “requires preferences in the form of ‘reasonable accommodations’ that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities automatically enjoy” even if those preferences may violate an employer’s disability-neutral rules).

173. 42 U.S.C. § 12132 (2012); *see* Sheehan v. City & Cnty. of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014), *aff’d in part and rev’d in part on other grounds*, 575 U.S. 600, 600 (2015) (“To state a claim under Title II of the ADA, a plaintiff generally must show: (1) she is an individual with a disability; (2) she is otherwise qualified to participate in or receive the benefit of a public entity’s services, programs or activities; (3) she was either excluded from participation in or denied the benefits of the public entity’s services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of her disability.”).

174. 42 U.S.C. § 12132 (2012); *Sheehan*, 743 F.3d at 1232.

175. 42 U.S.C. § 12102(1) (2012).

176. 42 U.S.C. § 12102(2) (2012).

177. 42 U.S.C. § 12132 (2012); *Sheehan*, 743 F.3d at 1232.

178. 42 U.S.C. § 12131(2) (2012).

benefits of a public entity's services, programs, or activities<sup>179</sup> or (2) by showing that they engaged with a public entity's services, programs, or activities involuntarily.<sup>180</sup> Examples of involuntary engagement include penalization under state law,<sup>181</sup> interactions with law enforcement during the course of an arrest,<sup>182</sup> and mandated participation in a rehabilitation program while incarcerated.<sup>183</sup>

Under a disparate impact theory, the third prong of a Title II ADA claim can be established through evidence that a public entity's policy, practice, or procedure burdens disabled people "in a manner different and greater than it burdens others" and in such a way that denies them "meaningful access" to the entity's services, programs, or activities.<sup>184</sup> The plaintiff need not present evidence that the public entity had the subjective intent to discriminate against disabled people.<sup>185</sup> Instead, a plaintiff need only show that the policy, practice, or procedure disproportionately burdens disabled people.<sup>186</sup>

Once a disparate impact claim is established, the implementing regulations require public entities to make "reasonable modifications in policies, practices, or procedures . . . to avoid discrimination on the basis of disability" in violation of Title II.<sup>187</sup> A plaintiff bears the burden of proving that a reasonable modification is available.<sup>188</sup> If a plaintiff successfully establishes that a reasonable modification is available, the burden shifts to the public entity to plead and prove affirmative defenses prescribed in Title II.<sup>189</sup> A public entity can successfully avoid making a requested modification by proving that the modification would "fundamentally alter" a service, program, or activity, or that it would cause an "undue financial or administrative burden."<sup>190</sup>

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179. *See id.*

180. *See, e.g.,* Crowder v. Kitagawa, 81 F.3d 1480, 1483–84 (9th Cir. 1996).

181. *Id.* (finding that in a disparate impact challenge to a facially neutral state regulation, eligibility under the ADA is established by penalization under state law).

182. Bircoll v. Miami-Dade County, 480 F.3d 1072, 1084–85 (11th Cir. 2007).

183. *See* Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 211 (1998).

184. *See* Crowder, 81 F.3d at 1484–85.

185. *See* Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645–46 (1989), *superseded by statute on other grounds*, Civil Rights Act of 1991, §2, Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. 2000(e)–2(k) (1994)).

186. *See* Crowder, 81 F.3d at 1483–84.

187. 28 C.F.R. § 35.130(b)(7) (2020).

188. Vinson v. Thomas, 288 F.3d 1145, 1154 (9th Cir. 2002) (citing Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 816–17 (9th Cir. 1999)).

189. *Cf.* Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 606 n.16 (1999) (citing 28 CFR § 41.53) (noting that Congress intended for Title II ADA claims for reasonable modifications to be made to a public entity's policies, practices, or procedures to be considered under the same standard as the "reasonable-modifications" regulation in § 504 of the Rehabilitation Act, which states, "[a] recipient [of federal funds] shall make reasonable accommodation to . . . an otherwise qualified [disabled] applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.")

190. Tennessee v. Lane, 541 U.S. 509, 532 (2004).

*B. Framework of a Title II Disparate Impact Claim Grounded in the Discriminatory Effect of Sit-Lie Laws on People with Mental Health Disabilities*

People with mental health disabilities who are houseless would have cognizable disparate impact claims against municipalities for the discriminatory effect of sit-lie laws. Municipalities are public entities under the ADA and are thus subject to suit.<sup>191</sup> A successful disparate impact suit against a municipality could result in the cessation of enforcement or repeal of sit-lie laws.<sup>192</sup>

An unsheltered person with a mental health disability could easily establish the first element of a Title II disparate impact claim. The broad definition of “disability” in the ADA encompasses a wide range of mental health disabilities,<sup>193</sup> including those that are most common in the population of people who are houseless, such as depression, schizophrenia, bipolar disorder, anxiety, and substance use disorders.<sup>194</sup>

The eligibility requirement of a Title II disparate impact claim would also be easily satisfied in a facial challenge to sit-lie laws. Under current ADA jurisprudence, an unsheltered person with a mental health disability could likely establish that they are a “qualified individual” with a disability simply by presenting

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191. 42 U.S.C. § 12131(1)(a) (2012) (defining public entity as “any State or local government”).

192. See *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 163 (2nd Cir. 2013) (“We conclude that the ADA’s reasonable modification requirement contemplates modification to state laws, thereby permitting preemption of inconsistent state laws, when necessary to effectuate Title II’s reasonable modification provision.”).

193. See 42 U.S.C. § 12102(2) (2012) (defining “major life activities” as including “*but . . . not limited to*, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working” (emphasis added)); *Olmstead*, 572 U.S. at 597–99 (noting that States must “maintain a range of facilities for the care and treatment of persons with diverse mental disabilities”).

194. Peter Tarr, *Homelessness and Mental Illness: A Challenge to Our Society*, BRAIN & BEHAVIOR (Nov. 19, 2018), <https://www.bbrfoundation.org/blog/homelessness-and-mental-illness-challenge-our-society> [<https://perma.cc/AQS6-8GZG>]. Notably, the federal government’s definition of chronic homelessness incorporates a definition of disability that is virtually identical to the ADA definition. OFFICE OF CMTY. PLANNING AND DEV. & OFFICE OF SPECIAL NEEDS ASSISTANCE PROGRAMS, *DEFINING CHRONIC HOMELESSNESS: A TECHNICAL GUIDE FOR HUD PROGRAMS 3–4* (2007), <https://files.hudexchange.info/resources/documents/DefiningChronicHomeless.pdf> [<https://perma.cc/H6JA-LN7K>] (“[A] disabling condition limits an individual’s ability to work or perform one or more activities of daily living.”).

evidence that they involuntarily engaged with a state program through citation or police contact under sit-lie laws.<sup>195</sup>

The third element of a Title II disparate impact claim could be established using the significant body of evidence that homelessness and policing disproportionately impact and result in more severe consequences for people with mental health disabilities than those without mental health disabilities.<sup>196</sup> Unhoused people with mental health disabilities can show that sit-lie ordinances burden them “in a manner different and greater than [they] burden[.]” people without mental health disabilities<sup>197</sup> using evidence that they are more likely to face citation, harsh criminal penalties, severe collateral consequences, and police brutality under these ordinances.<sup>198</sup> To establish that sit-lie laws deny people with mental health disabilities “meaningful access” to state services, programs, or activities,<sup>199</sup> it may be sufficient to show that the threat of policing under sit-lie ordinances drives

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195. Pa. Dep’t of Corrections v. Yeskey, 524 U.S. 206, 211 (1998) (“While ‘eligible’ individuals ‘participate’ voluntarily in many programs, services, and activities, there are others for which they are ‘eligible’ in which ‘participation’ is mandatory. A [person with a substance use disorder] convicted of drug possession, for example, might, as part of his sentence, be required to ‘participate’ in a drug treatment program for which only [people with substance use disorders] are ‘eligible.’”); see Crowder v. Kitagawa, 81 F.3d 1480, 1483–84 (9th Cir. 1996) (finding that citation by the state under Hawai’i’s discriminatory quarantine law was a sufficient basis for showing qualification under a disparate impact theory); Bircoll v. Miami-Dade Cnty., 480 F.3d 1072, 1084–85 (11th Cir. 2007) (“[T]he ADA applies to police transportation of the arrestee from the scene to the police station.”).

196. See *supra* Part II.

197. Crowder, 81 F.3d at 1484–85.

198. See *supra* Part II; ROUNTREE, HESS, & LYKE, *supra* note 68, at 4 (reporting that 78 percent of unsheltered respondents in a national survey had mental health conditions); Kieschnick, *supra* note 77, at 1575 (showing that homeless people face challenges accessing the financial resources to pay fines and attend court hearings associated with a citation under sit-lie laws); WHO MIND PROJECT, *supra* note 79, at 1 (noting that people with mental health disabilities are at an increased risk of poverty); A.B.A., *supra* note 82, at 4 (showing that citations under sit-lie laws can have collateral consequences by creating barriers to employment, housing, public benefits, and support systems, which are already challenges for people with mental health disabilities); UNDERCOUNTED, *supra* note 30, at 1 (reporting that people with mental health disabilities are more likely to be killed by police).

199. Crowder, 81 F.3d at 1484.

unhoused people with mental health disabilities away from public spaces<sup>200</sup> and public services and programs,<sup>201</sup> and into more dangerous environments.<sup>202</sup> Further, plaintiffs could produce evidence that the consequences of policing under sit-lie laws deny unhoused people with mental health disabilities “the ability to make meaningful use of” a wide array of municipal services,<sup>203</sup> such as public housing and job training programs.<sup>204</sup>

People with mental health disabilities could request repeal or cessation of a municipality’s sit-lie law as a reasonable modification under the ADA. While these may appear to be drastic measures, courts have held that “the ADA’s reasonable modification requirement contemplates modification to state laws . . . when necessary to effectuate Title II’s reasonable modification provision.”<sup>205</sup>

Total repeal or cessation of enforcement of sit-lie laws is reasonable. Aside from unreasonably burdening people with mental health disabilities, sit-lie laws

200. Schultheis, *supra* note 29 (describing the disproportionate criminalization of people with mental health disabilities and unhoused people); Elizabeth Findell, *City Council Rescinds Measures That Critics Say Criminalize Homelessness*, STATESMAN (June 21, 2019, 6:14 PM), <https://www.statesman.com/news/20190621/city-council-rescinds-measures-that-critics-say-criminalize-homelessness> [<https://perma.cc/2WVK-YGBT>] (“Alvin Sanderson, who is [houseless], told the council that he and others have to hide after receiving tickets for camping, which often forces them into dangerous areas. He recalled a late friend, Suzie, who died sleeping in a tunnel that flooded.”); Tim Craig, *Should People Have a Right to Sleep on City Streets? Texas Joins National Battle over Urban Homeless Crisis*, WASH. POST (Aug. 28, 2019), [https://www.washingtonpost.com/national/austin-eases-rules-for-sleeping-on-street--and-tests-tolerance-levels/2019/08/21/f67efb20-c1df-11e9-9986-1fb3e4397be4\\_story.html](https://www.washingtonpost.com/national/austin-eases-rules-for-sleeping-on-street--and-tests-tolerance-levels/2019/08/21/f67efb20-c1df-11e9-9986-1fb3e4397be4_story.html) [<https://perma.cc/D8PR-WRMK>] (“After he received two citations for public camping, [Alvin] Sanderson slept in drainage ditches to avoid the police until, one night in 2018, he was awakened by a thunderous wall of water that crashed down the creek bed during a flash flood . . . [and] was swept downstream.”).

201. *Cf.* Matt Mollica, *Opinion: Decriminalizing Homelessness is Working. Now Austin Needs Investment to Take the Next Step*, THE AUSTIN CHRONICLE (July 17, 2020), <https://www.austinchronicle.com/columns/2020-07-17/opinion-decriminalizing-homelessness-is-working-now-austin-needs-investment-to-take-the-next-step/> [<https://perma.cc/2VPP-33HG>] (noting that the 2019 repeal of the sit-lie ordinance and camping ban in Austin, Texas allowed service providers to conduct a more accurate point in time count and more strategically distribute resources, which “would not have been possible if people still feared arrest or harassment due to their unsheltered status.”).

202. *Cf. supra* note 200.

203. *Crowder*, 81 F.3d at 1482.

204. *See supra* Part II; Kieschnick, *supra* note 77, at 1575, 1606–07 (highlighting the challenges that houseless people face in accessing the financial resources to pay fines and attend court hearings associated with a criminal citation under sit-lie laws, which could lead to incarceration or a criminal record if not attended to); A.B.A., *supra* note 82, at 4 (describing the collateral consequences of criminal convictions, including barriers to welfare, housing, and employment).

205. *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 162–63 (2d Cir. 2013) (“At the outset, we find nothing in the statutory phrase ‘reasonable modification’ to suggest that Congress intended to exclude modifications that require violation or waiver of mandatory state statutes in some circumstances. In light of the broad scope and purpose of the ADA, we think it unlikely that Congress would have hidden such a significant limitation in such an anodyne statutory phrase.”).

also significantly burden municipalities with little payoff.<sup>206</sup> An analysis of 36 sit-lie laws in San Francisco shows that these laws are incredibly expensive to enforce, do little to preserve public spaces, and unnecessarily drain government resources.<sup>207</sup> Sit-lie laws have also been shown to harm public health and safety.<sup>208</sup> While there is an argument that partial enforcement or modification of sit-lie laws excepting people with mental health disabilities from citation is a more reasonable accommodation, this argument fails for two reasons. First, partial enforcement would only be reasonable—under the rationale advanced by proponents of sit-lie laws—if sit-lie laws actually achieved their alleged goals of increasing public health and safety and protecting industry.<sup>209</sup> However, enforcement of sit-lie laws merely drains municipalities’ financial and administrative resources without achieving these goals.<sup>210</sup> Second, partial enforcement would likely impose more financial and administrative burdens on municipalities than would full repeal or cessation of enforcement. Since police officers are tasked with enforcing sit-lie laws,<sup>211</sup> partial enforcement, unlike full repeal, would likely require public entities to develop and implement methods for police to screen out people with mental health disabilities. Given the complexities of mental health diagnosis, this would be implausible, unethical, and dangerous without adding mental health

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206. See, e.g., BUDGET & LEGIS. ANALYST’S OFF., CITY & CNTY. OF S.F. BD. OF SUPERVISORS, POLICY ANALYSIS REPORT 1–2 (2016) [hereinafter SF POLICY ANALYSIS REPORT], <http://2zwmzkboel625qdrf2qqfok-wpengine.netdna-ssl.com/wp-content/uploads/2016/06/Budget-and-Legislative-Analyst-Report.Quality-of-Life-Infactions-and-Homelessness.052616-1.pdf> [<https://perma.cc/MSU6-V3XN>] (finding high costs to the City of San Francisco for enforcing sanctions against houseless citizens and no benefit in terms of reducing the number of houseless individuals); RACHEL A. ADCOCK, REBECCA BUTLER-DINES, DAVID W. CHAMBERS, MICHAEL J. LAGARDE, ALEXANDRA M. MOORE, CHARLOTTE F. NUTTING, SUZETTE M. REED, ARIELLE M. SCHREIBER, PAUL M. WARREN, KOBI A. WEBB, & ELIE M. ZWIEBEL, TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO 2 (2016) [hereinafter TOO HIGH A PRICE], <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf> [<https://perma.cc/VX45-E2K3>] (finding that in just 2014, the city of Denver spent close to \$750,000 enforcing anti-houseless ordinances and in five years, six cities in Colorado spent at least \$5 million enforcing anti-houseless ordinances); HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, *supra* note 94, at 63–71 (reporting that sit-lie laws are expensive, do not address the root causes of homelessness, make it harder to escape from the cycle of homelessness, harm public safety and public health, and worsens the relationship between houseless people and the police).

207. SF POLICY ANALYSIS REPORT, *supra* note 206, at 14–15.

208. HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, *supra* note 94, at 65–69.

209. *Cf. Tennessee v. Lane*, 541 U.S. 509, 532 (2004) (stating that “[i]n no event is [an] entity required to undertake measures that would impose an undue financial or administrative burden”). Given the high cost of enforcement of sit-lie laws, they would be an undue burden unless they conferred some benefit on a municipality. See *infra* Part IV.D (describing the ways in which sit-lie ordinances do not promote public health and safety).

210. See *infra* Part IV.D.

211. *Legislative Memo: Loitering and Aggressive Begging*, NYCLU, <https://www.nyclu.org/en/legislation/legislative-memo-loitering-and-aggressive-begging> [<https://perma.cc/2VZT-LUCL>] (last visited Sept. 18, 2021).

professionals on the ground<sup>212</sup> (which would bring its own set of problems<sup>213</sup>) and could open municipalities up to further liability for disability discrimination under the ADA.

*C. Combatting the Criminalization of Houselessness Under Sit-Lie laws is Consistent with the Broad Purpose and Mandate of the ADA*

The ADA unequivocally contemplates protections for people with mental health disabilities who are houseless. It is of no import that unhoused people are not expressly mentioned in the ADA: in the context of the ADA's "unambiguous statutory text . . . the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'"<sup>214</sup> Moreover, the ADA's implementing regulations expressly contemplate regulation of social services and programs for unhoused people under the statute.<sup>215</sup> Many states and cities are required under settlement with the Department of Justice—which is tasked with enforcing the ADA—to create housing for people with mental health disabilities.<sup>216</sup> Under the ADA, disabled people who were previously denied access to shelters on the basis of their disabilities have secured comprehensive physical accessibility plans, accessible transportation to

212. See LJ Dawson, *Taking Police Officers out of Mental Health-Related 911 Rescues*, NBC NEWS (Oct. 10, 2019, 4:30 AM), <https://www.nbcnews.com/health/mental-health/taking-police-officers-out-mental-health-related-911-rescues-n1063951> [<https://perma.cc/WCU5-VKEZ>]; Eric Westervelt, *Mental Health and Police Violence: How Crisis Intervention Teams Are Failing*, NPR (Sept. 20, 2020, 5:00 AM), <https://www.npr.org/2020/09/18/913229469/mental-health-and-police-violence-how-crisis-intervention-teams-are-failing> [<https://perma.cc/8NTS-27E2>].

213. See Mia Sato, *Social Workers Are Rejecting Calls for Them to Replace Police*, APPEAL (Aug. 20, 2020), <https://theappeal.org/social-workers-are-rejecting-calls-for-them-to-replace-police/> [<https://perma.cc/M2ZU-RKPU>] ("Social work . . . already involves law enforcement and can embrace punitive practices that disproportionately harm communities of color.").

214. See Pa. Dep't of Corr. v. Yeskey, 524 U.S. 206, 212 (1998) (quoting *Sedima v. Imrex Co.*, 473 U.S. 479, 499 (1985)). In *Yeskey*, Justice Scalia, writing for a unanimous Court, rejected a claim that the term "qualified individual with a disability" in Title II is ambiguous with regard to state prisoners who are not expressly mentioned in the ADA itself, emphasizing the breadth of the statute. *Id.* at 210.

215. See 28 C.F.R. § 35.151(e) (2020) ("Group homes, halfway houses, shelters, or similar social service establishments that provide either temporary sleeping accommodations or residential dwelling units that are subject to this section shall comply with the provisions of the 2010 [ADA Standards for Accessible Design] applicable to residential facilities . . .").

216. See Press Release, U.S. Dep't of Just., Justice Department Obtains Comprehensive Agreement Regarding North Carolina Mental Health System (Aug. 23, 2012), <https://www.justice.gov/opa/pr/justice-department-obtains-comprehensive-agreement-regarding-north-carolina-mental-health> [<https://perma.cc/LL7K-YPLV>]; Press Release, U.S. Dep't of Just., Justice Department Obtains Comprehensive Agreement to Ensure New York City Adult Home Residents with Mental Illness Are Afforded Opportunities to Live in the Community (July 23, 2013), <https://www.justice.gov/opa/pr/justice-department-obtains-comprehensive-agreement-ensure-new-york-city-adult-home-residents> [<https://perma.cc/MQJ4-ZWMW>]; Press Release, U.S. Dep't of Just., Justice Department Reaches Extension Agreement to Improve Georgia's Developmental Disability and Mental Health System (May 18, 2016), <https://www.justice.gov/opa/pr/justice-department-reaches-extension-agreement-improve-georgia-s-developmental-disability-and> [<https://perma.cc/PNE4-NBBN>].

and from shelters, more effective communication with shelter staff,<sup>217</sup> and potentially shorter wait times for some disabled people applying for shelter space.<sup>218</sup>

The ADA can be used to stay the enforcement of facially neutral laws that have a disparate impact on people with mental health disabilities who are houseless.<sup>219</sup> Facially neutral laws that deny disabled people “the ability to make meaningful use of” state services like public streets violate Title II of the ADA.<sup>220</sup> Facially neutral laws that do not provide any benefits to disabled people but rather act as barriers to their participation in public life—like sit-lie laws, which make it impossible for unhoused people with mental health and other disabilities to exist in public spaces—can also “effectively deny [them] the benefits of state services, programs or activities.”<sup>221</sup>

Combating the criminalization of unhoused people with mental health disabilities under sit-lie laws is consistent with the broad purpose and mandate of the ADA. The consequences of sit-lie laws for people with mental health disabilities subvert the ADA’s goals against the continued segregation and isolation of those with disabilities and its guarantees of greater self-reliance and independent living.<sup>222</sup> Unhoused people with mental health disabilities already exist on the fringe of the “economic and social mainstream of American life” to which the ADA guarantees access.<sup>223</sup> Sit-lie laws reinforce this exclusion by driving people with

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217. See *FACT SHEET: Settlement Agreement in U.S. v. District of Columbia*, ADA.GOV, [https://www.ada.gov/dc\\_shelter\\_factsheet.htm](https://www.ada.gov/dc_shelter_factsheet.htm) [<https://perma.cc/6SVP-W5CG>] (last visited April 13, 2021).

218. Jacquelyn Simone, *Today’s Read: Under Settlement, City Shelters Will Do More for Homeless People with Disabilities*, COAL. FOR THE HOMELESS (May 19, 2017), <https://www.coalitionforthehomeless.org/todays-read-settlement-city-shelters-will-homeless-people-disabilities/> [<https://perma.cc/Q2UG-BMUN>].

219. See *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996); Order Granting in Part and Denying in Part Plaintiffs’ Motion for Preliminary Injunction, *Bloom v. City of San Diego*, No. 17-cv-2324-AJB-NLS (S.D. Cal. Aug. 21, 2018) [hereinafter *Bloom Order*]. In *Crowder*, the Ninth Circuit overturned summary judgment in favor of a class of plaintiffs who argued that a Hawai’i Department of Agriculture regulation that established a 120-day quarantine requirement for animals entering Hawai’i discriminated against people with visual impairments who use guide dogs. *Crowder*, 81 F.3d at 1481. The Ninth Circuit recognized that the quarantine requirement applied “equally to all persons entering the state with a dog,” but found that it violated Title II because “its enforcement burdens visually-impaired persons in a manner different and greater than it burdens others,” denying them “meaningful access” to state services, programs, and activities like public streets and transportation systems. *Id.* at 1484–85. The Department of Justice intervened in the case on remand, and ultimately entered a settlement agreement that required the State of Hawai’i to make substantial modifications to the regulation. See *Settlement Agreement, Crowder v. Nakatani*, No. 93-00213DAE, <https://www.ada.gov/crowder.htm> [<https://perma.cc/KDB8-H7YA>] (last visited Aug. 24, 2021).

220. *Crowder*, 81 F.3d at 1482.

221. *Id.* The Supreme Court’s interpretation of the Rehabilitation Act of 1973 provides additional evidence that Congress intended to address discrimination resulting from facially neutral laws. See *supra* note 160.

222. See *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 584 (1999); S. REP. NO. 101-116, at 115 (1989).

223. S. REP. NO. 101-116, at 118 (1989); see *supra* Part II.

mental health disabilities away from essential resources for fear of citation and, in the case of those who receive citations, subjecting them to collateral consequences that create further barriers to engaging with mainstream society.<sup>224</sup> In this way, sit-lie laws strip people with mental health disabilities of access to opportunities to secure permanent housing, increasing the likelihood that they will be forced into “unjust . . . dependenc[e]” on systems they may not want to be in contact with for their survival—exactly the scenario that the ADA was designed to prevent.<sup>225</sup>

People with mental health disabilities have already used the ADA to challenge facially neutral laws criminalizing houselessness under a disparate impact theory. In 2018, a group of plaintiffs who are houseless, including several with mental health disabilities, sought a preliminary injunction to enjoin the City of San Diego from enforcing a pair of anti-houselessness ordinances, including one that prohibits habitation in a vehicle.<sup>226</sup> People who violated the vehicle habitation ordinance by sheltering in their vehicles were ticketed and had their vehicles impounded when the tickets were not paid.<sup>227</sup> Plaintiffs alleged that this ordinance violated Title II of the ADA because disabled people are disproportionately harmed by San Diego’s housing crisis and often cannot access shelters.<sup>228</sup> The District Court of Southern California granted the plaintiffs’ request for a preliminary injunction with respect to the vehicle habitation ordinance.<sup>229</sup> In this case, the injunction was granted on due process grounds, and the court did not specifically address plaintiffs’ disability discrimination argument under the ADA.<sup>230</sup> Nonetheless, that argument was integral to the court’s harm analysis.<sup>231</sup> In particular, the court appeared to embrace the plaintiffs’ argument that disabled people

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224. *See supra* Part II.

225. *See* S. REP. NO. 101-116, at 115 (1989).

226. Bloom Order, *supra* note 219, at 2–3 (order granting in part and denying in part preliminary injunction).

227. Class Action Complaint for Declaratory Relief, Injunctive Relief, Restitution and Damages under the United States Civil Rights Act (42 U.S.C. § 1983), Americans With Disabilities Act (42 U.S.C. § 12132), Section 504 of the Rehabilitation Act (29 U.S.C. § 794), the United States Civil Rights Act (42 U.S.C. § 1983), the U.S. and California Constitutions, and California Civil Code §52.1 at 1–2, 4–11, Bloom v. City of San Diego, No. 17-cv-2324-AJB-NLS (S.D. Cal. Nov. 15, 2017) [hereinafter Bloom Class Action Complaint]. *See also id.* at 7–8, 11.

228. Bloom Class Action Complaint, *supra* note 227, at 20–21, 37, 39.

229. Bloom Order, *supra* note 219, at 1 (order granting in part and denying in part preliminary injunction).

230. *See id.* at 8–14 (considering disability discrimination claim in evaluating request for preliminary injunction).

231. *Id.* at 12 (“If the injunction is not entered, Plaintiffs will suffer irreparable harm through continued ticketing and impounding of their vehicles. These vehicles keep Plaintiffs off the streets, where they would face dangerous and unsanitary conditions. Plaintiffs’ vehicles also allow Plaintiffs a place to live that accommodates their disabilities, which a shelter cannot.”); *see* Bloom Class Action Complaint, *supra* note 227, at 18–21.

face unique economic hardships,<sup>232</sup> suggesting that it may be open to an argument that ceasing enforcement of criminal ordinances like sit-lie laws, which impose undue burdens on disabled people, is a “reasonable accommodation” under the ADA.<sup>233</sup>

*D. Potential Affirmative Defenses to the Reasonableness of Repeal or Cessation of Enforcement of Sit-Lie Laws as Accommodations Under Title II of the ADA*

Public entities will likely argue that repealing or ceasing enforcement of sit-lie laws is not a “reasonable accommodation” under Title II because it would negatively affect public health and safety, cause economic hardship, and impact sidewalk accessibility. I address these affirmative defenses in turn below.

*1. Fundamental Alteration to Public Health and Safety Programs*

Municipalities will likely argue that repealing or ceasing enforcement of sit-lie laws would constitute a “fundamental alteration” to their public health and safety programs.<sup>234</sup> Though courts typically decline to interrogate the public health and safety decisions of legislative bodies exercising their traditional police powers, “when Congress has passed antidiscrimination laws such as the ADA which require reasonable modifications to public health and safety policies, it is incumbent upon the courts to insure that the mandate of federal law is achieved.”<sup>235</sup>

There is little evidence that sit-lie ordinances or camping bans improve public safety. While sitting, lying, or sleeping in public may impede accessibility of public spaces, it can hardly be said that these acts themselves present an immediate danger. The public safety argument only holds weight if we accept that people who are houseless are more dangerous than people who are not. This is a false

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232. Bloom Order, *supra* note 219, at 12 (“If Plaintiffs’ vehicles are impounded, Plaintiffs are unlikely to afford the fees to recover them, and could be permanently displaced, along with all their possessions.”).

233. Other courts have recognized the unique and disproportionate burdens of houselessness on people with mental health disabilities. For example, in striking down a camping ban in Denver, a county court justified its decision by emphasizing that the shelter system is effectively unavailable for certain people, including those with serious mental health disabilities. Alex, *Judge Rules Denver’s Camping Ban Unconstitutional, Dismisses Jerry Burton’s Ban Ticket* (Jan. 3, 2020), UNICORN RIOT, <https://unicornriot.ninja/2020/judge-rules-denvers-camping-ban-unconstitutional-dismisses-jerry-burtons-ban-ticket/> [<https://perma.cc/A568-BYM9>].

234. See *Tennessee v. Lane*, 541 U.S. 509, 532 (2004). In California, community members pressured city agencies to dismantle encampments because they allegedly “pollute public areas and pose serious risk of fire, violence and disease.” Anna Maria Barry-Jester, *Sweeps of Homeless Camps in California Aggravate Key Health Issues*, NPR: SHOTS (Jan. 10, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/01/10/794616155/sweeps-of-homeless-camps-in-california-aggravate-key-health-issues> [<https://perma.cc/RK9J-EJK5>].

235. *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (citing *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 82–83 (1946)).

assumption,<sup>236</sup> and in any event, even if a municipality could show that unhoused people *were* more dangerous, it could not constitutionally rely on housing status as a justification for criminalization.<sup>237</sup> In reality, sit-lie laws threaten public safety by (1) diverting resources away from other social welfare programs that support safe communities, such as housing, healthcare, harm reduction programs for drug users, and community food security programs, (2) driving people who are houseless away from life-saving services,<sup>238</sup> and (3) increasing the risk of violence toward unhoused people.<sup>239</sup> Rather than policing, the most effective method of

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236. See Robert Polner, *The 12 Biggest Myths About Homelessness in America*, NYU NEWS (Sept. 24, 2019), <https://www.nyu.edu/about/news-publications/news/2019/september/Homeless-QandA.html> [<https://perma.cc/29E7-824X>] (“[House]less persons are far more likely to be the victims of violence than the perpetrators.”). The majority of arrests of unhoused people are for minor crimes. Tanvi Misra, *The Homelessness Problem We Don’t Talk About*, CITYLAB (Aug. 16, 2018, 3:01 PM), <https://www.citylab.com/equity/2018/08/the-homelessness-problem-we-dont-talk-about/567481/> [<https://perma.cc/A2D7-9P9R>]; Gale Holland & Christine Zhang, *Huge Increase in Arrests of Homeless in L.A. — But Mostly for Minor Offenses*, L.A. TIMES (Feb. 8, 2018, 8:20 A.M.), <https://www.latimes.com/local/politics/la-me-homeless-arrests-20180204-story.html> [<https://perma.cc/NN29-QMJN>].

237. Cf. *Robinson v. California*, 370 U.S. 660, 666–68 (1962) (holding that a statute that makes the status of having a substance use disorder a criminal offense is unconstitutional under the Eighth Amendment). While most sit-lie laws criminalize certain behaviors or actions rather than the status of being houseless, they are in effect making the status of being houseless a criminal offense when there is no other space for houseless people to go. See *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (“[J]ust as the state may not criminalize the state of being ‘[house]less in public places,’ the state may not ‘criminalize conduct that is an unavoidable consequence of being [house]less—namely sitting, lying, or sleeping on the streets.’”).

238. See *Illegal to Be Homeless: 2004 Report*, NAT’L COAL. FOR THE HOMELESS, <https://www.nationalhomeless.org/publications/crimreport2004/problem.html> [<https://perma.cc/UP7N-L9TS>] (last visited Apr. 6, 2021).

239. See Westside Cares, *Santa Cruz City Council’s Cruel Camping Ban Criminalizes—and Perpetuates—Houselessness*, DSA SANTA CRUZ (July 10, 2021), <https://dsasantacruz.org/articles/santa-cruz-city-councils-cruel-camping-ban/> [<https://perma.cc/BRM2-HHXM>]; NAT’L COAL. FOR THE HOMELESS, NO SAFE STREET: A SURVEY OF VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE 68 (2016), <https://nationalhomeless.org/wp-content/uploads/2016/07/HCR-2014-151.pdf> [<https://perma.cc/7ZKG-CQV2>] (“One possible explanation for [the correlation between laws criminalizing houselessness and the increase of violence against unhoused people] is the message that criminalizing [house]lessness sends to the general public: ‘[Unhoused] people do not matter and are not worthy of living in our city.’ This message is blatant in the attitudes many cities have toward [unhoused] people and can be used as an internal justification for attacking someone.”). See generally NAT’L COAL. FOR THE HOMELESS, NO SAFE PLACE: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2014 & 2015 (2016), <https://nationalhomeless.org/wp-content/uploads/2016/07/HCR-2014-15.pdf> [<https://perma.cc/NVS3-J34B>] (providing information about hate crimes against unhoused people); WHAT’S NEXT? SAFER AND MORE JUST COMMUNITIES WITHOUT POLICING 13–17 (Mariame Kaba ed., 2020), [https://defundpolice.org/wp-content/uploads/2020/12/national\\_comm\\_report\\_Whats-Next-Safer-and-More.pdf](https://defundpolice.org/wp-content/uploads/2020/12/national_comm_report_Whats-Next-Safer-and-More.pdf) [<https://perma.cc/FCN6-JVDC>] (describing the relationship between policing and safety and arguing that “police do not solve violence in our communities; they bring violence”).

reducing crime related to homelessness is increasing access to affordable housing.<sup>240</sup>

Sit-lie laws also do not improve public health. Unhoused people are more susceptible to outbreaks of contagious disease, which puts public health at risk.<sup>241</sup> However, appropriate mitigation of the health risks faced by unhoused people involves increasing access to essential resources such as food, shelter, clean water, and sanitation—not policing.<sup>242</sup> Stable housing is a “key ‘social determinant of health’ that directly impacts health outcomes.”<sup>243</sup> Policing, on the other hand, can worsen public health by driving people away from essential services and stripping them of access to their medications.<sup>244</sup> Moreover, courts have found that an unhoused person’s interest in their personal possessions, safety, and rights outweighs local government’s interest in promoting public health.<sup>245</sup>

It is important to note that public health and safety arguments fall flat against the backdrop of the historical development of sit-lie laws in the United States. This history suggests that these laws have more to do with insulating local economies than the health or safety of communities. Sit-lie laws were initially developed as economic recovery measures in response to an extreme uptick in the rate of homelessness in the 1980s.<sup>246</sup> In 1982, the Reagan administration slashed the federal affordable housing budget by nearly 70 percent while economic recession left many Americans in need of subsidized housing.<sup>247</sup> Denied access to permanent

240. Sarah Shortt, Opinion, *We Don’t Need Protection from the Homeless. They Need Protection from Us*, L.A. TIMES (Oct. 15, 2018, 4:05 AM), <https://www.latimes.com/opinion/op-ed/la-oe-shortt-homeless-victims-20181015-story.html> [<https://perma.cc/9QXZ-4GD7>].

241. Chris Woodyard, *As Homeless Are Suffering, Risk of Hepatitis, Typhus and Other Diseases Is Growing*, USA TODAY (July 10, 2019, 8:32 PM), <https://www.usatoday.com/story/news/nation/2019/06/18/homeless-homelessness-disease-outbreaks-hepatitis-public-health/1437242001/> [<https://perma.cc/J8UC-6LC7>].

242. *Id.*

243. NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL, HOMELESSNESS & HEALTH: WHAT’S THE CONNECTION? 2 (2019), <https://nhhc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf> [<https://perma.cc/S4V4-CLK3>].

244. See Barry-Jester, *supra* note 234.

245. *Jeremiah v. Sutter County*, No. 2:18-cv-00522-TLN-KJN, 2018 WL 1367541, at \*5 (E.D. Cal. Mar. 16, 2018) (holding that a preliminary injunction against an anti-encampment law was appropriate because the county’s interest in promoting “public health, safety, and general welfare” was outweighed by “Plaintiffs’ interest in their personal property and their constitutional rights”); *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1019 (C.D. Cal. 2011) (“[T]he City’s interest in clean streets is outweighed by Plaintiffs’ interest in maintaining the few necessary personal belongings they might have.”).

246. See Geoffrey DeVerteuil, Jon May, & Jürgen von Mahs, *Complexity Not Collapse: Recasting the Geographies of Homelessness in a ‘Punitive’ Age*, 33 PROGRESS HUM. GEOGRAPHY 646, 648–49, 652 (2009).

247. See Stanley Meisler, *25 Years After the Dream: Can L.B.J.’s Great Society Ever Exist?*, L.A. TIMES (July 14, 1989, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1989-07-14-mn-3673-story.html> [<https://perma.cc/7RGZ-RRL7>].

housing, people were pushed to live in public spaces.<sup>248</sup> At the same time, urban governments sought to revitalize their cities by developing their aesthetic appeal to attract international investment.<sup>249</sup> Increasing populations of poor people living in public impeded these projects because, “[l]ike canaries in a coal mine, [unsheltered] people are an index of the health of a place.”<sup>250</sup> Thus cities turned to their police powers to force unhoused people out.

## 2. *Undue Financial Hardship*

Municipalities will likely argue that eliminating sit-lie laws would be an “undue hardship” because they are essential to the economic success and viability of city centers. Punitive approaches to houselessness like sit-lie laws are most common in cities that rely heavily on financial, creative, tourism, and convention trade industries that may be negatively impacted by the public appearance of poverty.<sup>251</sup> Indeed, some proponents of sit-lie laws today explicitly identify the need to protect industry as a driving force in their activism and suggest that sit-lie laws will improve the business climate in commercial areas.<sup>252</sup>

However, financial impact alone is insufficient to show that an accommodation is unreasonable.<sup>253</sup> Further, there is little evidence supporting the argument

248. See *Why Are So Many People Homeless?*, COAL. FOR THE HOMELESS, <https://www.coalitionforthehomeless.org/why-are-so-many-people-homeless/> [<https://perma.cc/SRR3-5YGR>] (last visited Aug. 23, 2021); Jennifer Wolch, Michael Dear, Gary Blasi, Dan Flaming, Paul Tepper, & Paul Koegel, *The Rise of Homelessness in the 1980s*, KCET (Los Angeles, Cal.) (Feb. 22, 2017), <https://www.kcet.org/shows/socal-connected/the-rise-of-homelessness-in-the-1980s> [<https://perma.cc/2455-VZWQ>].

249. Phil Hubbard, *Revenge and Injustice in the Neoliberal City: Uncovering Masculinist Agendas*, 36 *ANTIPODE* 665, 667 (2004).

250. WILLIAM H. WHYTE, *CITY: REDISCOVERING THE CENTER* 55 (2d ed. 2009) (1988).

251. DeVerteuil, May, & von Mahs, *supra* note 246, at 655. See also Knowles, *supra* note 88 (“The latest [increase in houselessness] could fuel the Trump administration’s recent interest in combating [house]lessness in California, as the president decries damage to the ‘prestige’ of the country’s cities and laments people living on its ‘best highways, our best streets, and our best entrances to buildings.’”).

252. JOSEPH COOTER, ERICKA MEANOR, EMILY SOLI, & JEFFREY SELBIN, *DOES SIT-LIE WORK: WILL BERKELEY’S “MEASURE S” INCREASE ECONOMIC ACTIVITY AND IMPROVE SERVICES TO HOMELESS PEOPLE?* 2 (2012), <https://www.researchgate.net/publication/272300620> [<https://perma.cc/Z7SS-SCD9>].

253. *Pa. Prot. & Advoc., Inc. v. Pa. Dep’t. of Pub. Welfare*, 402 F.3d 374, 380 (3rd Cir. 2005) (“Though clearly relevant, budgetary constraints alone are insufficient to establish a fundamental alteration defense.”); see also *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) (“In evaluating a State’s fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State’s obligation to mete out those services equitably.”); *Bryant v. Better Bus. Bureau of Greater Md., Inc.*, 923 F. Supp. 720, 737 (D. Md. 1996) (citing 29 C.F.R. § 1630.2(p)) (noting that whether an accommodation would be an undue hardship “is a multi-faceted, fact-intensive inquiry, requiring consideration of: (1) financial cost, (2) additional administrative burden, (3) complexity of implementation, and (4) any negative impact which the accommodation may have on the operation of the employer’s business, including the accommodation’s effect on its workforce.”).

that sit-lie laws improve or protect local economies. A survey by the Berkeley Law Policy Advocacy Clinic that solicited information from community organizations, municipal human services and economic development agencies, business groups, and police departments in more than twelve municipalities with sit-lie ordinances found no statistical evidence that sit-lie laws positively impact local economies.<sup>254</sup> On the other hand, sit-lie ordinances carry significant enforcement costs that may outweigh any financial benefits sit-lie laws might confer.<sup>255</sup> Moreover, the project of policing has been unsuccessful in preserving the appearance of public spaces because of the incessantly increasing rate of homelessness and cities' failures to increase access to housing.<sup>256</sup>

### 3. *Maintaining Sidewalks in Compliance with ADA Accessibility Regulations*

Municipalities will also likely argue that repealing or ceasing enforcement of sit-lie laws would fundamentally alter their accessibility plans for sidewalks and streets.<sup>257</sup> Under the ADA, state and local governments are required to provide unobstructed passage on public sidewalks to accommodate disabled people and others.<sup>258</sup> ADA regulations require sidewalks to be at least 36 inches wide, and public entities must ensure that there are 32 inches of sidewalk space between the edge of a curb and any obstruction on a sidewalk.<sup>259</sup> These standards apply to new construction and also require public entities to upgrade non-compliant sidewalks to be accessible.<sup>260</sup>

While it is essential for public spaces to be accessible, this argument creates a dangerous false dichotomy between unhoused people and disabled people. This is “a misuse of the ADA and [is] rather exploitative of disabled people’s hard-

254. COOTER, MEANOR, SOLI, & SELBIN, *supra* note 252, at 2.

255. *See, e.g., id.* at 2 (finding potential for significant economic costs of enforcement of sit-lie laws but uncertain benefits); SF POLICY ANALYSIS REPORT, *supra* note 206, at 2 (observing that significant enforcement expenditures were not associated with decreases in the homeless population in San Francisco).

256. SF POLICY ANALYSIS REPORT, *supra* note 206, at 15.

257. *See* Chad Swiatecki, *Debates Continue Over Impacts, Enforcement of New Homelessness Ordinances*, AUSTIN MONITOR (Aug. 13, 2019), <https://www.austinmonitor.com/stories/2019/08/debates-continue-over-impacts-enforcement-of-new-homelessness-ordinances/> [<https://perma.cc/GH/U3-PWHN>] (noting that ADA sidewalk accessibility requirements and the mobility of people with physical disabilities were cited in the debate about camping bans in Austin, Texas); *see also* Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.-C.L. L. REV. AMICUS 8–9 (2011). After Portland’s sit-lie laws were struck down as unconstitutional, the mayor’s office created a new approach for advocating for sidewalk management: exploiting images of disabled people navigating public streets. “[F]or the first time, a city’s policing of its sidewalks would be ‘based on the federal American [sic] with Disabilities Act . . . .’” *Id.* at 9.

258. *See* DEP’T OF JUST., 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN, <https://www.ada.gov/reg2010/2010ADASTandards/2010ADASTandards.htm> [<https://perma.cc/M8/V7-R3XJ>] (last visited Apr. 7, 2021).

259. *Id.*

260. 28 C.F.R. § 35.151(b) (2020).

fought civil rights,” allows cities to scapegoat disabled people, and gives cover for cities’ failure to provide sufficient social services to people who are houseless.<sup>261</sup> It papers over an ugly history of cities criminalizing the existence of physically disabled people in public spaces.<sup>262</sup> Instead of furthering the ADA’s goal of eliminating disability discrimination and bringing all disabled people “into the economic and social mainstream of American life,”<sup>263</sup> this argument advances the idea that the statute protects only disabled people who have greater access to mobility and private space than do many unhoused disabled people. Cities must ensure that public spaces are accessible. But policing should not be the answer: the project of accessibility requires accommodating *all* disabled people—including by increasing services for unhoused people.

## V.

### CONCLUSION

Legal advocates working with unhoused communities should consider mounting a disparate impact challenge to sit-lie laws under Title II of the ADA. While facial challenges like those suggested by this article have been infrequently addressed under Title II, this in and of itself is not a barrier. People with mental health disabilities have a strong disparate impact argument: they are disproportionately affected by policing under sit-lie laws and the consequences of such policing are more severe for them than for those without mental health disabilities. Municipalities, in turn, have little justification for keeping sit-lie laws on the books; they are expensive and ineffective, and, most importantly, research shows that the problems they seek to solve are best addressed by increasing access to permanent housing.

With houselessness and measures criminalizing it on the rise, and the United States on the brink of its second housing crisis in two decades, it is imperative to develop legal challenges to sit-lie laws that have real teeth. The Americans with Disabilities Act, with its mission of eradicating disability discrimination in the United States, is a tool that may be fit to meet this challenge.

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261. Schweik, *supra* note 257, at 8–9 (internal citations and quotations omitted).

262. *See generally id.* (describing the history of “ugly laws” and civility codes, which criminalized the conduct and presence of the physically disabled in public spaces).

263. S. Rep. No. 101-116, at 118 (1989).