



## The Activist Files Episode 57: Unhoused & Queer - The Supreme Court decides if cities can punish people for sleeping outside

**Zee Scout:** Hi everyone. Welcome to The Activist Files, the Center for Constitutional Rights podcast. I'm Zee Scout, and I'm here with Mikaila Hernández and Eric Tars. Thank you all for joining us today. We're going to discuss a case before the Supreme Court and the broader issue of the criminalization of homelessness.

So, before we jump into that here, I thought it might be good to get a bit of an introduction with our 2 speakers. I'm Zee Scout. I'm a Bertha Justice fellow at the Center for Constitutional Rights and I'll be moderating the discussion today. Eric, would you love to tell us a little bit more about yourself and some of the work that you do?

**Eric Tars:** Sure. I'm Eric Tars and senior policy director at the National Homelessness Law Center. I've been here for coming up on 18 years now. And in that time have worked kind of across all of our different program areas. Came in as our human rights staff attorney, pushing for housing as human rights, but have rotated through and been doing a lot of work around the criminalization of homelessness as well as youth homelessness, domestic violence and other intersections with homelessness from a gender perspective. The Law Center is the national hub of the legal movement to end and prevent homelessness in America.

**Mikaila Hernández:** I'm Mikaila Hernández. I'm a Bertha Justice Fellow at the Center for Constitutional Rights. I've been here for just about a year and a half now. The caseload that I work on runs the gamut of different issue areas. Primarily I work on issues of gender and LGBTQI+ justice.

And I also do work against the criminalization of race, essentially, in different areas. And I've worked in the past as a law clerk and federal defenders and working against the carceral system in general, and how that works to replicate systems of oppression, so happy to be in discussion here with you today.

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The Center for Constitutional Rights, as, you know, is a group of movement attorneys. And so we do a lot of different issue areas. If you can talk a little bit more about the Center for Constitutional Rights Zee, that might be helpful.

**Zee Scout:** Sure, I'm glad to be here with both of you. The Center for Constitutional Rights opposes government overreach and oppression against lots of our already marginalized communities. We do so by building social and movement power and oftentimes embedding within social justice coalitions that are using the court is just one pillar of their strategy to achieve liberation for lots of our groups and communities.

So today with the both of you here really excited to have you both, Eric, I thought you might be able to start us off by talking about the case before the Supreme Court that's going to guide a lot of our conversation today. We've colloquially referred to it as Grants Pass, but would you mind giving us an overview of the case and what it's about?

**Eric Tars:** Yeah, happy to. So the case is Johnson, Gloria Johnson v. Grants Pass. It's a class action out of Grants Pass, Oregon. And it's core, it's really a simple case. This is about whether we as Americans believe that it's cruel and unusual, under the Eighth Amendment to our Constitution, to punish people who have no choice but to sleep outside for, for needing to sleep or wrap a blanket around themselves against the cold when they have literally nowhere else to go and in Grants Pass, Oregon, they don't Grants Pass is a city of about 40,000 people it's like many other cities across the country has experienced rapid population growth.

It's about doubled in size over the past 20 years. But their supply of affordable housing hasn't doubled along with it. And so rents have skyrocketed for people like Gloria Johnson, who has lived in the town for more than a decade, but just couldn't afford the rent and was you know, evicted, lost her housing.

Out on the streets, Grants Pass has zero emergency shelter available to the general public. And that's by design. And they have actively refused funding for emergency shelter. And instead what they have done is take these laws criminalize sleeping in alleyways and on public streets, camping, but they define camping to include using any form of bedding.

So as little as wrapping a blanket around yourself, it doesn't even have to be a tent or anything like that. And those impose you know, close to 300 fines on

people. If you don't pay, it doubles 500 something dollars. And if you get two of them, then they issue a trespass ban that bans you from the entire city for up to 30 days, and that's an arrestable offense.

And so for many people, that's what ends up happening to them. And Gloria Johnson and her colleagues in the class of involuntarily homeless people in Grants Pass said, "We don't believe this is just. This is cruel and unusually punishing us."

And so we brought that case to the district court in Oregon. They agreed under precedent that our organization, the National Homelessness Law Center, helped to set a year earlier. That's Martin v.

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Boise. The court said, yeah, we agree. The Ninth Circuit, the city appealed it up to the Ninth Circuit. The Ninth Circuit said, yeah, we already told you, we agree.

But the city kept on complaining. They recruited friends from other cities to complain about this as well. And their billionaire backed think tanks are out there also complaining about this issue, putting it into the Wall Street Journal and other places. And so they made enough noise to get the Supreme Court to take the case.

They granted certs on January 12th, and arguments are going to be on Monday April 22nd, and we will be outside the court. We'll have our allies inside the courtroom, but we will also be there with a crew of probably close to 600 currently, formerly homeless folks brought a movement of people who understand that this isn't what we should be standing for as America.

**Zee Scout:** Thank you so much for that overview. I was going to ask you a little bit about what these ordinances in Grants Pass do and you hit on a lot of them. I believe there was also one about not being able to stay on parks overnight, right? Would you mind touching on that for a moment? And then would you also mind sharing with us how you think this case fits into perhaps some of the broader national and international human rights fights around housing and homelessness.

**Eric Tars:** Yeah, there are kind of 3 ordinances at play: camping, sleeping and being in the park after dark. And they were really kind of a web of enforcement that was designed to make it impossible for people in Grants Pass to exist there.

And in some other towns where there is a limited amount of emergency shelter, often, you'll hear this kind of carrot-and-stick sort of phrasing of jurisdictions saying we need law enforcement enabled to be able to force people into a shelter when they are somehow shelter resistant, which is a myth in itself.

But in Grants Pass, they didn't even bother with that myth. The cruelty was the point that in a city council meeting one of the city council members said, " We need to make it so uncomfortable that people are just going to move elsewhere."

So really, they are trying to banish people from the city of Grants Pass who just can't afford the rent. And this is in a context in Grants Pass and nationally, where more than half of renters can't afford their rent. They are paying their rent burden, meaning they're paying more than they can afford in rent every month.

And we also have the national context of former President Trump campaigning on a platform which literally says he wants a national camping ban and to create relocation camps for people experiencing homelessness to force them out of our city centers and off into exile, essentially, under threat of arrest.

And so it's not being hyperbolic to say that is really a going to be a landmark case and may end up permitting a core tenet of fascism. And we know also that in the context nationally, marginalized

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groups are disproportionately impacted by homelessness and disproportionately impacted by its criminalization.

So although, African Americans make up about 13 percent of the population. There are about 40 and sometimes in some communities upwards of 50 percent of the homeless population. Studies have been done in San Francisco that show that even within that disparate impacted population that people experiencing homelessness who are black are 10 times more likely to receive a citation than white people.

Latinx people are close to six times more likely. Same thing with LGBTQ communities people experiencing disabilities. So if those are your issues, this is your issue too, because this is how so many people get wrapped into the carceral context in the first place. We see that in some communities, more than half of the people in jail on any given night are there because of homelessness related reasons.

And so this, this is the start. This is where so many people get wrapped into this harmful system and then are suffering all the collateral consequences of being in that system. And in the case of homelessness, it's, it's in fact counterproductive. To the very goals that cities say they have, because once people have a tickets or fine or fee that they can't pay or that they have to pay before they start saving up their first month's rent security deposit. An arrest record that's going to make it harder for them to get or maintain employment that just means they're going to be on the streets for longer.

So you're actually prolonging homelessness, continuing to churn people expensively through the criminal justice system and you're not doing anything to actually solve it. So it's really scary that this is The direction that our country is going in.

**Zee Scout:** Thank you so much for that overview. And I want to ask a follow up question here to Mikaila. You mentioned Eric about all of these criminalization approaches are having a deep and disparate impact on already marginalized groups.

So, Mikaila, I would invite you to share a little bit more about CCR's work in this context, particularly maybe in the queer and trans liberation space and how this is also a homelessness issue for those communities.

**Mikaila Hernández:** Absolutely. Yeah, I mean, to Eric's point, this is a choice. It does not have to be this way.

These are policy failures that they're trying to criminalize and punish folks for getting wrapped as a result of these policy failures that they themselves are responsible for. So CCR's work on this case is we submitted an amicus brief, which is called the Friend of the Court Brief in support of Johnson and in this case, they're the respondents so the folks that who brought this lawsuit in the first place against the city of Grants Pass and our amicus brief focused on the on the plight of LGBTQI folks.

And particularly how homelessness has affected them because of the discrimination to incarceration pipeline that they face so there is a general crisis of homelessness across the

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country, across all groups. But in this case, we did focus on LGBTQI folks who are disproportionately affected and especially if you're black, indigenous, or a person of color.

So those issues are compounded. You are facing even more of a dire situation because of these identities that that folks hold. And so, because of the housing crisis, because of record inflation, because a lack of meaningful protection from discrimination in employment and housing and education in the shelter system themselves, because of family rejection, this leads into this discrimination to incarceration pipeline, which keeps queer and trans folks trapped in poverty and trapped in incarceration. And so there's a record number of anti-queer and particularly anti-trans legislation being introduced this year.

And we felt it was important to let the Supreme Court know that it needs to use its power to protect LGBTQI folks, and especially our youth because they're the vulnerable folks that are bearing the brunt of these legislative failures in droves. We definitely agree that it's cruel and unusual to criminalize a person experiencing homelessness under these conditions and with no safe or available shelter to go.

And it's super important to recognize also that some of these shelters are very hostile and dangerous places for queer and trans folks, and trans folks in particular. There's folks who are assaulted who are not protected if they do go into a shelter or even allowed in the shelter. And with, in the example of city of Grants Pass, the only shelter that's there, it's not city run, it's run by a church.

And so the church is, it's a high barrier shelter, is what we call it, because, you know, It requires you know, attendance to church services. It essentially requires you to convert to that religion in order to be provided or to be even accepted. Or welcomed into that shelter system. And so, obviously, this is not something that is in line with protecting queer and trans folks. It's actually quite hostile to them.

And so, if people make the choice, have the bodily autonomy to say, actually, I don't feel safe in the shelter, I am going to choose to sleep in my car because I feel safer there. I'm not going to be assaulted there. I'm not going to be you know, misgendered. Whatever it is, the harms that folks are facing in shelter systems, they should be allowed to do that. That is a choice for bodily autonomy.

And so we do speak to that and we have folks you know, our community, the community that we, that we serve here at CCR they wrote in to us, we have three folks who wrote in and let us know their experience as homeless queer and trans folks.

And we see this replicated in real life that folks were either kicked out of their family home, family rejection, and then from there you know, in workplace, they weren't protected and then at their education, they were punished a lot, they were criminalized, you know even in their educational opportunities, and so that really stunts their economic prosperity that doesn't allow them to really flourish as human beings. And they're kept in this cycle of discrimination that is just very, very, very difficult to get out of. You know, it's a fact of life that everyone must sleep.

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Everyone has to sleep. It's a normal function, daily fact of life and to punish folks for sleeping, just because they don't have a home or a place or a shelter to lay their head, is just so wild to me, and it's so unacceptable in our society, and as Eric was saying, this is the road to fascism. You're criminalizing folks for choosing you for themselves where to lay their heads and while also denying them the protections and housing and in shelter systems that they are worthy of. And so I was very proud to be a part of the team here at CCR that wrote that amicus brief to shine a light on these issues for the Supreme Court.

**Eric Tars:** I'd love to just build off that because it's really that was part of our strategy as kind of this national legal organization that was coordinating all of the full breadth of amicus briefs for this case - that we wanted to bring in those stories of directly impacted individuals, emphasize to the members of the court and to the broader public that who you think is homeless is not actually who's going to be impacted by this case, it's youth, it's our elder population who's increasingly experiencing homelessness.

You know, it's victims of domestic and gender based violence. These laws, which are often passed based on stereotypes of who is deserving and undeserving and all those things that aren't helpful but this is who it's going to end up impacting are all these folks who are there on the streets for no cause, no fault of their own.

These are systemic causes. Whether it's identity based discrimination, economic discrimination but that's who's going to be impacted by this case. And so, as we were developing our kind of overall strategy, we had a legal strategy that was going to be oriented towards the nine justices on the Supreme Court.

But we also really wanted to use this as a moment to build a broader movement And help people understand those intersections, help people in the

LGBTQIA movement, in the Black Lives Matter movement, in the disability movement, focus in on this issue and understand how this issue is their issue as well because we know that as homeless advocates we aren't going to get to the solutions we need just advocating our own, this needs to be a broader movement to actually push us to those policy solutions that are ultimately going to get people out of homelessness. Even if we win this case, the most we win is the right not to be punished for sleeping outside, it doesn't actually get anybody inside. And so we need to be using this moment to build the movement.

So many of the briefs we brought in, all these different identity based discrimination aspects of things. We brought in the public health community to talk about how it's harmful to public health. And often you will hear public health being used as an excuse for why encampments need to be swept. But if you actually go to the public health experts, they will tell you that actually harms public health. It creates more mortality, more morbidity for people. And so if you want to take a public health approach, then you provide bathrooms, you get people indoors you do other things to mitigate the situation in place. But you don't criminalize them, ticket them, give them all these barriers, take away their ability to sleep sheltered from the elements, take away their walkers and medical devices and medicines, like that's all going against public health.

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We brought in religious figures to emphasize that, from a moral standpoint, this is not where we are or have been as a country. We brought in folks from the international human rights community to say not only is this unconstitutional under domestic law, but this is recognized around the globe as an international human rights violation.

International human rights monitors have said that this is cruel, inhuman, and degrading treatments under the Convention Against Torture. So we are not only out of step with our own values, but we are giving ourselves a black eye around the world by taking this approach.

And so really trying to broaden out the number of people who see this issue as their issue in order to be able to, you know, win or lose, take that next step down the line to say, not only should we not be punishing people for not having housing, but housing is a basic human rights, and we should be making sure that we get everybody into housing.

So, you know, just from I think it's really important to think about it. Think

about this case, not just as what's going to happen in the Supreme Court, but what we're doing to build power and build the movement outside of that.

**Mikaila Hernández:** When you're talking about that broad reach across different issue areas, because this affects everyone, no matter what area that you're working in, and especially these conservative arguments for fiscal responsibility and fiscal conservatism, it's way more expensive to incarcerate someone than it is to house them.

It's more expensive to incarcerate someone than it is to educate them. And so this argument should be reaching across, You know, the different parties and political views, because this affects everyone, and I did also kind of want to highlight a little bit more about, like, just, like, the statistics in terms of how trans folks are just, and especially our LGBTQ youth, are especially hit hard by these policy failures.

Of the adults that are supposed to be you know, building a better future for them. Right now, trans folks are eight times more likely to have a recent experience of homelessness than their cisgender counterparts. And especially the LGBTQI youth are especially vulnerable because although they make up less than 10 percent of the population, they make up 40 percent of all homeless youth in the US and 65 percent of all youth experiencing chronic homelessness which is defined as four or more episodes of 12 months or more of homelessness.

So these are chronic conditions that are only getting worse. And it's abysmal that we're allowing our youth to suffer the consequences of the failures of the adults in the room.

**Zee Scout:** Thank you both for that wealth of information. I'm really grateful that we were able to touch a bit on the amicus strategy and I wanted briefly to go over two things here First, I was curious if one of you would be willing to discuss a bit of the legal strategy and argument, maybe just kind of big picture.

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And then second, they were, as we both mentioned, or both of you mentioned. Amicus briefs filed, not just by friends of the respondents in this case, but also on behalf of folks who support these types of criminalization measures. So I wanted to also touch a bit on what these counter arguments are and why they're wrong.

So either one of you feel free to pick up the ball here, but I would love to start with just kind of a high. You know, 30,000 foot view of the legal argument.

**Eric Tars:** Sure, so this case is built off of a case, like I said, that we brought *Martin v. Boise* started back in 2009, but was ultimately cited by the 9th Circuit in 2018 and builds on previous precedents from both the 9th Circuit and the 11th Circuit, where courts have looked at the issues of what can and can't be criminalized under the Eighth Amendment.

So, normally when we think about the Eighth Amendment Cruel and Unusual Punishment Clause, we're talking about methods of punishment. So, is it permissible to draw and quarter someone or to burn somebody at the stake? Or, you know, what kind of method of execution you can use? It's also been, you know, seen to apply to should juveniles be able to be executed for, for crimes they committed.

In this case, what we have is a line of cases coming from a case called *Robinson v. California*, where basically there was a person, Mr. Robinson, who was criminalized under a California statute that made it illegal to be addicted to narcotics. not to possess them, not to be under the influence of them, but just to be an addict.

And in the case, literally the evidence they showed was that he had track marks going up his arm and that was enough to convict him. And the, this case went up to the Supreme Court and the court said that you can't convict somebody for simply their status for an aspect of their being.

And the way that this has been applied in the context of homelessness is that essentially, as human beings, we are addicted to sleeping, we are addicted to needing to shelter ourselves from the elements. And laws which forbid people who have nowhere else to go from doing those things are criminalizing essentially the status of being human while not having housing.

And so it's been applied originally in this case called *Pottinger v. The City of Miami* then *Jones v. Los Angeles*, then our *Martin v. Boise* case. And now here in *Johnson v. Grants Pass*, none of those previous cases made it up to the Supreme Court, but now it's teed up there.

That's basically the legal argument that we're making. The petitioner's side is saying that the Eighth Amendment doesn't even apply here that there should

be no substantive limits under the Eighth Amendment for what can and can't be criminalized that this is about conduct, not status. It's about creating, people are taking steps to camp or, you know, they're being criminalized for conduct of sleeping.

But we're saying that that is so intrinsically inherent to being human, you can't not sleep, you can't not shelter yourself from the elements that you can't really separate the two.



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So that's, that's the overview of the case.

**Mikaila Hernández:** To your point in terms of their argument that the Eighth Amendment doesn't apply, I mean, there's three different categories where statutorily the Eighth Amendment does apply. Right. And it can be the kinds of, or imposes three limitations on what can be criminalized and punished the kinds of punishment imposed for a criminal conviction, the proportionality of a sentence to the severity of the crime, and the third category, which is implicated here the kinds of behavior that can be punished in the first place.

And, you know, precedent has said categorically, status punishments are off limits. You can't punish someone for the status of being addicted because you're continuously guilty of that crime just for who you are. And so it's very similar here is just because you're homeless, you're being punished for the status of not having a home and for status of being a human without a home with the need to sleep.

And so that's categorically off limits under the Eighth Amendment. And so it's, it very much is implicated here, contrary to what the city of Grants Pass would say.

**Zee Scout:** Yes. Let's talk a little bit about what Grants Pass and some of these petitioners are saying in response to this argument. Pick it apart a bit and I would welcome either one of you to kind of get started and I can fill in the gaps.

**[Eric Tars:** Well, a bunch of cities did file briefs in favor of the court granting the petition for certs. Ultimately, at the merits time, they actually said, they backed off a little bit and said you know, we actually agree that on the merits of the case what Grants Pass is doing is wrong, but we want the court to

give us some more clarity on what's going on here.

But they have been really complaining and saying that *Martin v. Boise*, *Johnson v. Grants Pass* somehow bind the hands of jurisdictions and how they can deal with homelessness and with encampments. And this is complete political theater. They are trying to blame these court cases for their failure to address homelessness.

They can do anything under the sun to solve the problem of homelessness, to address encampments in their jurisdictions. The only thing they can't do is use criminal law to threaten and punish people when they don't even have an adequate alternative place to be. And so the only reason they want to overturn this is because they want to be able to continue using those methods that don't work but are politically expedient, without even bothering to make sure there's an adequate place where people can go.

And that's morally inexcusable. That's unconstitutional is what we're saying here. So yeah, this kind of faint helplessness is just a red herring that these cities are trying to use to misdirect attention away from their own failures to address housing policy.

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And blame the individuals and put the penalty for that failure on to the individuals who are already the victims of that failure.

**Mikaila Hernández:** It was really wild to me to read, "Oh, if, if we can't punish folks and we can't arrest them and find them, whatever are we going to do about homelessness in this city?"

And that was just such a disingenuous assertion, and it's clear to anyone with common sense to look at the situation and to understand how homelessness and incarceration run together. And who sees how the power of the state has been able to harm folks that it doesn't like, essentially, and who they think is a blight on their city.

As the city council member said in that town hall, saying, you know, we just want to make it a comfortable city. For homeless folks to just pass through or to exist outside of the city limits, so we don't have to look at it. And so they're really trying to impose criminalization for their own failures.

And it's really hard to take their arguments seriously that while we can't do

anything else other than arrest people. You can make policy for folks. You can create funding for folks to be housed. You can, you know, help with substance use disorders or create funds that actually address some of these root causes of homelessness and they just don't want to do that.

They don't want to be forced to reckon with their own failures. And so they're trying to make this argument saying if we can't arrest people, then we're not even a city anymore, you know?

**Eric Tars:** And the flip side of this is that the smart elected official would actually not see this as something that constrains their ability to make policy.

But actually expands it because we do know that it is the most politically expedient thing to be able to hide the homelessness problem in the jail budgets and not acknowledge it up front like you have to acknowledge the cost of creating affordable housing, or the difficulty of citing affordable housing, even when you've already funded it. Because of, you know, folks who don't want it in their backyard and you have to fight all these battles with neighborhood groups.

So when an elected official has somebody come into them and say, "There's an encampment on my corner. It's scaring me, scaring my kids. I want it gone." The easy thing for them to do is to say, well, we can pass a quick law, make it illegal to be homeless. I can hide the cost of it. and then we can move it off that corner. It's not going to solve homelessness for that person, so it's just going to appear somewhere else. I haven't actually done anything to solve the problem, but I've satisfied that constituent, and therefore I can get re elected.

And so that's a quick and easy thing for them to do. Whereas all of the, the actual solutions, they take a little bit more you know, political will to actually get through, to see through some time and some resources that you have to acknowledge up front. But the smart elected official can say, he can let the courts take the heat in this case and say, look, I agree with you, that camp shouldn't be there on your corner.

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But the courts have told me, you know, I can't just sweep it off the corner unless there's somewhere else for people to be. And so now let's work together, raise those resources, figure out how are we going to create some alternative housing, some low barrier shelter that's actually going to help

people off that corner.

And then once they're off and into housing, They're not going to be a problem for you. They're not going to be a problem for anybody else in the community. And we'll have resolved all of the negative consequences of people living outside in places. where they aren't supposed to be in the first place.

So it's really a decision that if these communities were looking at it in a smart way, it helps them open up the dialogue to the broader range of possibilities that are actually going to end homelessness, as opposed to being some kind of constraint on them when they are already Artificially constrained by kind of the political incentive to just do something quick even if it isn't going to be effective.

**Mikaila Hernández:** It's definitely hard because when you have these resources towards incarceration that you continue to funnel into incarceration and criminalizing and penalizing people ,for folks who don't have a home, that's diverting away from protecting from other types of harms that are violent crimes that are happening and it's actually diverting resources from the cities into something that's actually not going anywhere. And it's not going to be generative. There's no enforcement, especially for LGBTQIA folks, in terms of employment discrimination. They don't enforce that when employers are unlawfully discriminating against trans folks for being trans.

There's no enforcement of those sorts of laws, and so these folks get caught up in the system and then get criminalized later on, and it's just this, this repetitive cycle. And so they choose to actually go after the person who has been harmed from these cycles of oppression versus the people who have been doing the harming that have led to this result. And so it's just really a backward set of priorities for these cities that are pushing this punishment of folks who are actually victims of a bias and discrimination.

**[Zee Scout:** Thank you both. I think we're reaching the end of our conversation here, but I wanted to give you each a chance to plug to any work or resources that you think folks should look at if they want to get more involved or learn more about this issue or this case.

**Eric Tars:** All of the background on the case, all of the amicus briefs that were submitted on behalf of Gloria Johnson, and information on the rally we're going to be holding outside of the Supreme Court and more information

on how to get involved down the road is all at [johnsonvgrantspass.com](http://johnsonvgrantspass.com). And folks can also check out our resources at [housingnohandcuffs.org](http://housingnohandcuffs.org) or on our website, [homelesslaw.org](http://homelesslaw.org). And follow us on all social media.

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[**Mikaila Hernández:** Yeah, and I definitely would love to plug our amicus brief that CCR submitted to the court [ccrjustice.org](https://www.ccrjustice.org) and search for Grants Pass and the amicus should pop up. It has a lot of resources and citations to studies showing the discrimination to incarceration pipeline, if folks are interested and a summary of the legal arguments that we discussed here today.

**Zee Scout:** Well, thank you both. Mikaila, Eric, it's been a pleasure. This has been CCR Activist Files podcast, and we are very appreciative of this conversation. Thank you all.