

**STATE OF MCGEE  
IN DISTRICT COURT**

State of McGee,

Criminal No. 21-CR-51-3551

Plaintiff,

v.

**ORDER DENYING MOTION  
TO DISMISS**

Kendra Frockers,

Defendant.

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The State of McGee charged defendant Kendra Frocker with violating McGee's public camping law, McGee Stat. § 609.480. Frocker moves to dismiss the charge, arguing that enforcing the statute against her under the circumstances of the night in question would violate the Eighth and First Amendments of the United States Constitution. For the reasons that follow, this court concludes that, while the government's enforcement of the statute against people who have no shelter practically available does implicate the Eighth Amendment prohibition against cruel and unusual punishment, enforcement of the statute in these circumstances was permissible because shelter was practically available to Frocker and requiring her to utilize that available shelter to avoid liability under the statute would not violate her First Amendment rights.

**I. The Unlawful-Camping Statute**

McGee Statutes section 609.480 defines the misdemeanor crime of unlawful camping. The statute provides:

Prohibited Camping.

(a) In this section:

(1) "Camp" means to reside temporarily in a place, with shelter.

(2) "Shelter" includes a tent, tarpaulin, lean-to, sleeping bag, bedroll, or any form of semipermanent or permanent shelter which is designed to protect a person from weather conditions that threaten personal health and safety. Clothing is not "shelter" within the meaning of this statute.

(b) A person is guilty of the misdemeanor offense of prohibited camping if the person intentionally or knowingly camps in a public place without the express consent of an officer or agency who has the legal duty or authority to manage the public place.

(c) The actor's intent to camp in a public place or knowledge that the actor is doing so may be established through evidence of activities indicative of such knowledge or intent, including but not limited to:

(1) cooking;

- (2) building a fire;
  - (3) storing personal belongings;
  - (4) erecting a structure for shelter; and
  - (5) sleeping.
- (d) Violation of this section is a misdemeanor punishable by up to 90 days in jail and/or a fine of up to \$500.

## **II. Findings of Fact**

### *1. General shelter availability in McGee*

There are three homeless shelters in the City of McGee. None are operated by the state or municipality; all three are operated by private, nonprofit organizations.

Two of the shelters are operated by Open Doors, Inc., a secular nonprofit organization funded by government grants and private donations. The two shelters run by Open Doors are open to men, women, and families. The Open Doors shelters provide a variety of rooms and beds for families and single people to reside in. People obtain shelter at Open Doors by arriving at the shelter before 8:00 p.m. The two Open Doors shelters have capacity to house a maximum of 148 people on any given night. No religious iconography appears at any Open Doors shelter and no religious activities are run by the organization.

The third shelter is operated by Disciple Homes, a Christian nonprofit organization funded by private donations and support from local and national churches. Like Open Doors, the Disciple Homes shelter accepts men, women, and families, and people seeking shelter at Disciple Homes must arrive by 8:00 p.m.

Disciple Homes has capacity to house up to 64 people who are part of families with children, and up to 120 single adults. Families with children are housed in enclosed rooms within the shelter. Single men and women are given beds within one large hall. Though the Disciple Homes shelter is open to people of all faiths (or no faith), the walls of the hall where the single men and women are housed are emblazoned with a large mural depicting Christian imagery including a prominent cross, and the prominent phrases “Jesus is King” and “This is a Holy Place” are painted in script three feet high.

At 8:10 p.m. each night, a Christian pastor leads an explicitly Christian prayer of thanks and praise in the hall where the single men and women are housed. Pieces of paper containing the words of the prayer are distributed to every individual housed in the hall. People housed in the hall are not required to recite the prayer while the pastor leads it. However, Disciple Homes rules require each person housed in the hall to accept the piece of paper with the prayer written on it, and to either recite the prayer or remain silent while it is read. Residents must stand if they are able and must remove any headwear while the prayer is read, regardless of whether they recite the prayer or choose to remain silent. People who refuse to follow any of those shelter rules are discharged from the shelter and required to leave for the night.

At 8:30 each night, pursuant to an informal agreement with the city police department, Open Doors and Disciple Homes staff call the department to report whether their shelters reached capacity that evening. The shelters do so because the police department generally chooses not to strictly enforce the public camping ordinance against people sleeping in public places on nights where the shelters had reached capacity.

ii. *The arrest and charging of Kendra Frocker.*

At 8:30 p.m. on March 9, 2021, it was 46 degrees and lightly raining. Open Doors called the McGee Police Department and reported that its shelters had both reached capacity and could accept no more residents. Disciple Homes called to report that its shelter had not reached capacity.

At 10:15 that night, police entered McGee Central Park, McGee's largest and most-used public park, to investigate a report that a man recently seen in the park was approaching passersby to offer to sell illegal drugs. Police did not find any man matching the description, but during their search discovered the defendant, Kendra Frocker, sleeping beneath some trees near a sidewalk in the park.

When police found Frocker, she was sleeping on the ground beneath a foil blanket, with her head resting on a bunched-up sweatshirt. The place she was sleeping was covered by a small plastic dropcloth that Frocker had affixed by zipties to some nearby bush branches and the back of a park bench. A few feet from where Frocker slept, there was a small handcart containing her personal belongings, which was also covered by a small plastic dropcloth.

Police woke Frocker and told her it was unlawful to camp in the park. Frocker told police that she was homeless and had nowhere else to sleep. She told police that she had spent the previous night at the Open Doors shelter but that when she sought to enter that shelter at 7:15 this evening it had already reached capacity. She told police that she had previously spent a night at Disciple Homes but did not seek to do so that night because, due to her personal religious beliefs (which are not Christian), she did not feel welcome at Disciple Homes, particularly due to what she felt was her forced (albeit silent) participation in Christian prayer as a condition of staying at the shelter. Police told her that she could not lawfully camp in the park and that they would not allow her to stay there.

According to police, a person discovered unlawfully camping would typically be cited for the offense and given a summons to appear in court, not arrested. However, on the night police discovered Frocker, the temperature was predicted to drop into the low 30s and the light rain that had been falling earlier was predicted to possibly return as sleet.<sup>1</sup> One of the police officers speaking to Frocker was worried about Frocker's well-being if she slept outdoors elsewhere that night, since she had told them she had no other shelter to reside in.

Accordingly, police decided to utilize a state law that permits officers to arrest for misdemeanor offenses if necessary to protect the person arrested from injury. Police arrested Frocker for the misdemeanor public-camping offense and brought her to jail, where she was booked in at 11:15 p.m. Frocker was cited and released from jail at 7:00 the next morning.

### **III. Legal Analysis**

Frocker has moved to dismiss the unlawful-camping charge, arguing that the Eighth and First Amendments bar the state from prosecuting her for this offense in these circumstances. This court agrees that, in circumstances where other shelter is not available, the state may not enforce a criminal prohibition against engaging in life-sustaining activities in public places, such as

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<sup>1</sup> Contrary to the prediction, precipitation never returned and the temperature remained in the upper 40s throughout the evening.

sleeping or creating shelter from dangerous elements. However, Frocker’s motion to dismiss the charges is denied because shelter was available to her at Disciple Homes on the night in question and enforcing the law against her does not violate the First Amendment.

**1. Enforcement of McGee Statutes Section 609.480 Against a Person Who Has No Available Shelter Would Violate the Eighth Amendment.**

The Eighth Amendment to the United States Constitution states that “cruel and unusual punishments [shall not be] inflicted” by state or local governments. U.S. Const. amend. VIII; *Robinson v. California*, 370 U.S. 660, 666 (1962). The Cruel and Unusual Punishments Clause not only defines the limits of punishments the government can impose, but it also “imposes substantive limits on what can be made criminal and punished as such.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *see Robinson*, 370 U.S. 666-67.

Under these substantive limits imposed by the Eighth Amendment, the government may not define and punish as criminal acts or conditions which are natural and unavoidable consequences of being human. *See, e.g., Martin v. City of Boise*, 920 F.3d 584, 616-17 (9th Cir. 2019).<sup>2</sup> For instance, the government may not criminalize becoming ill; after all, “even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.” *Robinson*, 370 U.S. at 667. Applying that sensible principle in *Robinson*, the Supreme Court struck down a California law which criminalized the illness of substance use disorder (which was referred to in *Robinson* as “narcotic addiction”). The *Robinson* Court explained that because suffering from illness is an “involuntar[y]” and unavoidable part of being human, the Eighth Amendment prohibited enforcement of a law which made it a crime to suffer from that illness. *Id.* at 666-67.

This case presents a natural and fairly straightforward application of *Robinson*. Just as the state may not impose criminal punishment upon a person due to the mere fact that person suffers from illness, the state may not criminally punish the involuntary and unavoidable need for humans to sleep and obtain shelter from the elements, when no other shelter or place to sleep is available. *See Martin*, 920 F.3d at 615-18.

Relying on cases like *Powell v. Texas*, 392 U.S. 514 (1968), the state argues that the public-camping law can be enforced against Frocker because McGee’s law does not criminalize a status or condition like the law in *Robinson* did, but instead a specific volitional act: “camping” in public without authorization. But the state fails to convincingly explain how, when no shelter is available to a person, criminalizing the “act” of sheltering in public differs in any meaningful way from criminalizing the status or condition of homelessness.<sup>3</sup>

The also state argues that, even if the Eighth Amendment might prohibit enforcement of a law against sleeping in public when no shelter is available, Frocker’s conduct surpassed merely

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<sup>2</sup> Though decisions of the Ninth Circuit are not binding on this court, this court finds the analysis in *Martin* persuasive and consistent with United States Supreme Court precedent.

<sup>3</sup> Moreover, as the *Martin* Court persuasively explained, though the *Powell* Court ultimately concluded the public-drunkenness law in that case was constitutional, *Powell* was a plurality decision and in fact *five* Justices appear to have reached the conclusion that, with regard to *homeless* alcoholics in particular, a law prohibiting being intoxicated in public cannot be enforced against them, since such people “have no place else to go and no place else to be when they are drinking.” 920 F.3d 616 (quoting *Powell*, 392 U.S. at 551 (White, J., concurring in the judgment)).

sleeping in public. The state points in particular to Frocker's acts of using a blanket to cover herself and fastening a plastic sheet in place on the park grounds to protect her from the rain which had been falling earlier in the night. *See, e.g., Martin*, 920 F.3d at 617 n.8 (explaining that a law criminalizing certain *acts* associated with homelessness, such as "the erection of certain structures" on public grounds, could pass constitutional muster). The state stresses that the statute specifically defines such volitional acts as acts of "camping" which go beyond the act of "sleeping" which is biologically required for human life. This court finds that to be a distinction without a difference. After all, how could a person be realistically expected to engage in the biologically-necessary act of sleeping if he or she has no shelter at all from weather that would inhibit or prevent sleeping?<sup>4</sup> This court finds that the minimal acts Frocker undertook to enable herself to sleep and to protect herself as she could from the cold and rain which could have endangered her health do not constitute acts that strip from her the protection of the Eighth Amendment.

In summary, the Eighth Amendment prohibits the enforcement of McGee's unlawful-camping statute against a person to whom no other shelter was available. Accordingly, this court must decide whether other shelter was practically available to Frocker.

## **2. Because Shelter Was Available to Frocker, the Statute May Be Enforced Against Her, and the First Amendment Does Not Prohibit Enforcement of the Statute in These Circumstances.**

The fact that the Eighth Amendment prevents criminal prosecution of a person for sheltering and sleeping in public when he or she has no other place to do so does not mean the statute may not be enforced in this case. That is because shelter *was* available to Frocker at the Disciple Homes shelter, a place she knew of and in fact had obtained shelter at before. Because shelter was available to Frocker and she chose not to utilize it, and instead to voluntarily camp in a public park, the Eighth Amendment does not prohibit enforcement of the public camping ban against her.

Frocker argues, however, that the First Amendment prevents enforcement of the law against her in these circumstances. Citing Establishment Clause cases such as *Lee v. Weisman*, 505 U.S. 577 (1992), she argues that, because (1) the only available shelter was an overtly Christian environment and (2) she would be forced to receive a religious tract and stand silently during a prayer in order to stay at that shelter, enforcing the public-camping law would constitute impermissible government endorsement of religion in violation of the Establishment Clause, since she is not an adherent of the Christian religion.

However, this court concludes that the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), controls the outcome here.<sup>5</sup> In *Smith*, the appellants argued they should be exempt from a generally-applicable law

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<sup>4</sup> It is also not lost on this Court that the distinction the state seeks to draw, between "sleeping," which might be permissible, and acts like using a blanket or creating temporary shelter from weather, is not one that exists in McGee's law. To the contrary, the statute specifically states that the mere act of "sleeping" in a place is evidence that a person is unlawfully camping there. *See McGee Stat.* § 609.480(c).

<sup>5</sup> Unlike the federal government and some states, McGee does not have a Religious Freedom Restoration Act altering by statute the impact of *Smith*.

criminalizing possession of a controlled substance, arguing they used the substance for bona fide religious purposes and therefore the law could not be enforced against them. *Id.* at 874-76. The *Smith* Court ruled that, because infringing on the defendants' religious beliefs was “not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision,” the law could be enforced against the defendants. *Id.* at 878.

The situation is the same here. The public-camping law makes no reference to religion or religious practice and does not on its face burden or establish any particular religious belief. It is instead a generally-applicable criminal law and Frocker’s “religious beliefs [do not] excuse [her] from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.” *Id.* at 878-79.

Because the law whose enforcement Frocker challenges is generally applicable, under *Smith* it may be enforced against her despite her religious beliefs.

**IT IS HEREBY ORDERED THAT** defendant’s motion to dismiss is **DENIED**.

Dated: October 28, 2021

/s/ Jim B. Washington

Jim B. Washington  
Judge of District Court