

NO. 23-15912

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SABRINA BERAM,

Plaintiff-Appellant,

v.

CITY OF SEDONA,

Defendant-Appellee,

On Appeal from The United States District Court
District of Arizona
No. CV-21-08063
Hon. Diane J. Humetewa

**BRIEF OF THE LEAGUE OF ARIZONA CITIES AND TOWNS AS
AMICUS CURIAE IN SUPPORT OF AFFIRMANCE AND
OF APPELLEE CITY OF SEDONA
(WITH THE WRITTEN CONSENT OF THE PARTIES)**

Nancy L. Davidson, Esq. (#029991)
League of Arizona Cities and Towns
1820 W. Washington St., Phoenix, AZ 85007
(602) 258-5786
ndavidson@azleague.org
*Attorney for Amicus Curiae League of
Arizona Cities and Town*

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
IDENTITY OF AMICUS AND SOURCE OF AUTHORITY	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	10
I. Beram lacks standing for the Eighth Amendment claim	10
II. Beram lacks standing for the ADA Amendment claim	16
CONCLUSION	19
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bishop Paiute Tribe v. Inyo Cnty.</i> , 863 F.3d 1144, 1154 (9th Cir. 2017)	7, 8
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013).....	6
<i>Clark v. City of Seattle</i> , 899 F.3d 802, 813 (9th Cir. 2018)	7
<i>Diamond v. Charles</i> , 476 U.S. 54, 62 (1986).....	7
<i>Free Enterprise Fund v. Public Co. Accounting Oversight Bd.</i> , 561 U. S. 477, 505 (2010).....	12
<i>Hollingsworth v. Perry</i> , 570 U.S. 693, 707 (2013).....	7
<i>Johnson v. City of Dallas</i> , 61 F.3d 442, 443-45 (5th Cir. 1995).....	1, 8 fn. 3
<i>Johnson v. City of Grants Pass</i> , 72 F.4th 868 (9 th Cir. 2023)	1, 10 fn. 4
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555, 560 (1992)	2
<i>Martin v. Boise</i> , 920 F.3d 584, 610, 613, 617 (9 th Cir. 2019)	1, 2, 7, 10, 11
<i>O'Callaghan v. City of Portland</i> , No. 3:12-CV-0201-YY, 2020 WL 265197, at *1 (D. Or. Jan. 17, 2020)	8, 9

<i>O'Guinn v. Lovelock Corr. Ctr.</i> , 502 F.3d 1056, 1060 (9th Cir. 2007)	13
<i>Raines v. Byrd</i> , 521 U. S. 811, 826 (1997).....	12
<i>Smith v. City of Corvallis</i> , No. 6:14-CV-01382-MC, 2016 WL 3193190, at *9 (D. Or. June 6, 2016)	9
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330, 338 (2016).....	6
<i>Thomas v. Anchorage Equal Rights Comm'n</i> , 220 F.3d 1134, 1138 fn. 2 (9 th Cir. 2000)	2 fn. 2
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190, 2205 (2021).....	6, 7
<i>United States v. Richardson</i> , 418 U.S. 166, 176-77 (1974)	6
<i>Vinson v. Thomas</i> , 288 F.3d 1145, 1154 (9th Cir. 2002)	13
<i>Zukle v. Regents of Univ. of Cal.</i> , 166 F.3d 1041, 1047 (9th Cir. 1999)	13

Statutes

42 U.S.C. § 12131	12
42 U.S.C. § 12132	12
Boise City Code § 9-10-02.....	3
Sedona City Code 9.10.010.....	2
Sedona City Code 9.10.010(E)	8

Regulations

8 C.F.R. § 35-130(b)(7)13

Rules

FRAP 291

Constitutional Provisions

U.S. Const. art. III2, 7

U.S. Const. amend. VIII.....2, 3, 6, 9, 10, 11, 12

IDENTITY OF AMICUS CURIAE AND SOURCE OF AUTHORITY

The League of Arizona Cities and Towns (“League”) is a voluntary membership organization of 91 incorporated municipalities in Arizona.¹ The League represents the interests of these members before the Arizona Legislature, while also providing technical and legal assistance, coordinating shared services, and organizing conferences and educational events. The League is advised by its Amicus Committee, comprised of city and town attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies cases with statewide significance. The Committee has identified this case as having such significance because the League’s members have an interest in federal and state court lawsuits stemming from the Ninth Circuit decisions in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) (“*Martin*”) and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) (“*Grants Pass*”). They also have an interest in enforcing public health and safety ordinances of general applicability.

The League submits this brief with the written consent of the parties pursuant to Rule 29 of the Federal Rules of Appellate Procedure (“FRAP”). No counsel for any party authored this brief in whole or in part. No party and no counsel to any party contributed money that was intended to fund the preparation

¹ The League is not a corporation; it is an instrumentality of the State of Arizona. Therefore, it did not include a disclosure statement.

or submission of this brief. No person—other than the League, its members, or its counsel—contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case is not about the homelessness crisis. It is about Article III jurisdiction.

Article III confines federal judicial power to cases and controversies. *See* U.S. Const. art. III. A case or controversy can exist *only* if a plaintiff can show an injury in fact, caused by the defendant's conduct, that can be redressed by a favorable result.² *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The federal judiciary lacks Article III jurisdiction over this case because, despite multiple attempts, no such showing was made.

Appellant Sabrina Beram (“Beram”) filed this suit against the City of Sedona (“Sedona”), challenging the Sedona City Code 9.10.010 (“Code”) under Title II of the Americans with Disabilities Act (“ADA”) and the Eighth Amendment. The Code generally prohibits vehicular camping in Sedona if a camper does not have permission from the underlying property owner. *See generally* Sedona City Code 9.10.010. Since the ruling in *Martin*, however, Sedona

² The injury in fact and ripeness query are virtually the same. *See, e.g., Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

has not prosecuted violations of the Code against involuntarily transient persons on public property. *Martin* held that “the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to.” *Id.* at 603 (quoting Boise City Code § 9-10-02).

After five different complaints attempting to allege sufficient facts to establish standing, the District Court denied Beram’s Motion for Leave to File the Fourth Amended Complaint and dismissed the case with prejudice, finding that Beram lacked standing to bring the action. [Excerpts of Record, hereafter “ER”-11] This appeal followed.

While *Martin* emphasized that its ruling was narrow, *Martin*, 920 F.3d at 617, the impacts of *Martin* have been anything but narrow as illustrated in this case. Beram is contorting the ruling in *Martin* and attempting to lower the factual bar for standing, allowing her and other litigants to challenge lawful municipal ordinances without specifically stating any injury-in-fact.

Beram is correct that she “is not a typical challenger to city anti-camping statutes.” [Appellant’s Opening Brief, hereinafter “AOB”-2] She does not allege that she is homeless or that she sleeps outdoors in the elements. She acknowledges that she rents an apartment in Sedona. [AOB-4; ER-103; ER-127] She regularly sleeps in her vehicle at her apartment complex [ER-103; ER-107] where she does

not allege that any contact with Sedona has ever occurred. She does not allege that she was cited, arrested, or prosecuted under the Code. Instead, Beram alleges she was verbally “warned” by a Sedona police officer about violating the Code when she was sleeping inside her car as a “coping mechanism” to an alleged disability. [AOB-7; AOB-8] At no point does Beram allege that she *informed* any police officer during an encounter that she suffers from any disability or considers herself “transient” because of a disability. [ER-13; AOB-2; AOB-33; AOB-40] To the contrary, the incident report indicates that Beram told a Sedona police officer that “she has a place to stay but that she sometimes likes to rest in nature.” [ER-13; AOB-10; AOB-39, AOB-44; AOB-47] Beram mentions this language four times in her brief and has not disputed any information from the incident report. [AOB-10; AOB-39; AOB-44; AOB-47]

Beram also fails to show any credible risk that she is facing imminent prosecution under the Code. Since April 2, 2021, only *two* citations have been issued against others for violating the Code and *both were dismissed* by Sedona. [ER-17; ER-34; ER-35] The individuals in question were camping on *private* property without permission from the property owner. [ER-31; ER-55] Beram alleges no other incident of enforcement in the history of the Code, which was initially adopted in 1999. Beram even mentions Sedona’s letter [AOB-52] in which she is informed that Sedona generally does not prosecute sleeping in public places

when there is no room at a homeless shelter. [ER-121] There is nothing in the incident report that would indicate that any criminal charge is “certainly impending” against her. To the contrary, the police officer concluded the report with this sentence: “Nothing further.” [ER-13] And, as stated in the incident report, no criminal charge was ever filed against Beram, even though she regularly sleeps in her vehicle. [AOB-7; AOB-8; AOB-31; ER-103; ER-126]

With respect to the ADA claim, Beram fails to identify any cognizable injury for ADA purposes. First, “enforcement of the Code” is not service, program or activity for the purpose of ADA. Second, Beram fails to show how she was denied a reasonable accommodation request. She never alleges that, during any police encounter, she requested an accommodation or need for an accommodation. [ER-129] Regarding the letters to the Mayor and City Attorney, the request for blanket immunity from the prosecution of an ordinance on private and/or public property at any time with no regard for any disability (and without consent of the private property owner) is not a reasonable accommodation. To hold otherwise would create dangerous precedent and create an impossible standard for local governments to meet. Nothing in the ADA, its purpose, or the regulations can reasonably be read to give disabled individuals immunity from prosecution of generally applicable ordinances or grant them access to other privileges that would not be available to them if they did not have a disability. The purpose of the ADA

is to place those with disabilities on an equal footing, not to give them an unfair advantage.

Beram does not have standing. Allowing a litigant to challenge lawful municipal ordinances without specifically stating any injury-in-fact would negate standing as a doctrine, open litigation floodgates against municipalities, drain municipal budgets, insert the judiciary into policymaking, and hinder the enforcement of generally applicable public welfare and safety ordinances. The League urges this Court to avoid such results and affirm on both claims.

ARGUMENT

I. Beram lacks standing for the Eighth Amendment claim.

To have standing, a plaintiff must demonstrate an injury that is “concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398 (2013). For an injury to be “concrete,” it cannot be “abstract” but rather “must actually exist” and cause real-world harm to the plaintiff. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The “particularized” requirement, in turn, demands that the injury “affect the plaintiff in a personal and individual way.” *Id.* at 339. It cannot be a “generalized grievance” that is widely shared by other people in an “undifferentiated” way. *United States v. Richardson*, 418 U.S. 166, 176–77 (1974). In addition, the injury must “personally harm” the plaintiff. *TransUnion LLC v.*

Ramirez, 141 S. Ct. 2190, 2205 (2021). A plaintiff cannot bring suit merely as a concerned citizen or as a bystander, asserting standing based on an injury suffered by another person. *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (“Article III standing ‘is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as a ‘vehicle for the vindication of value interests.’” (quoting *Diamond v. Charles*, 476 U.S. 54, 62 (1986))).

Beram does not allege that she was arrested, cited, or prosecuted under the Code—despite her claim that she regularly sleeps in her vehicle as a coping mechanism to an alleged disability. [ER-126; ER-129] She does not allege that she suffered a monetary loss, physical harm, or the deprivation of any property. She alleges she was verbally “warned” by a Sedona police officer about violating the Code [ER-8] This is not a sufficient injury for the purpose of standing.

“[G]eneralized threats of prosecution do not confer constitutional ripeness. Rather, there must be a *genuine* threat of *imminent* prosecution.” *Clark v. City of Seattle*, 899 F.3d 802, 813 (9th Cir. 2018) (quoting with emphasis added *Bishop Paiute Tribe v. Inyo Cnty.*, 863 F.3d 1144, 1154 (9th Cir. 2017)).

To determine whether a genuine threat of imminent prosecution exists, courts look at three factors: “. . . whether the plaintiffs have articulated a concrete plan to violate the law in question, whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings, and the history

of past prosecution or enforcement under the challenged statute.” *Bishop Paiute Tribe*, 863 F.3d at 1154. Two of the factors are absent in this case.

Beram has not alleged that prosecuting authorities communicated a specific threat to prosecute her. She also has not pointed to anything in the incident report or elsewhere that would indicate that a criminal charge is being threatened or is “certainly impending” against her. To the contrary, the police officer concluded by saying there was “[n]othing further.” [ER-13] And, as stated in the report, no criminal charge was ever filed or threatened against Beram after this encounter, even though Beram regularly sleeps in her vehicle to this day. [AOB-7; AOB-8; AOB-31; ER-103; ER-126] It is important to note that the Code neither mandates a citation after a warning, nor does it limit the number of warnings that can be given to a person—and Beram has not alleged otherwise. Rather, the Code mandates the police to provide *warnings* and *opportunities to comply*. See Sedona City Code 9.10.010(E).

While some courts in other circuits³ have required a *conviction* to challenge a camping ordinance, there are cases in the Ninth Circuit where a citation, arrest, or seizure was sufficient to constitute the initiation of a criminal proceeding. In *O’Callaghan v. City of Portland*, however, a plaintiff lacked standing to raise an

³ See, e.g., *Johnson v. City of Dallas*, 61 F.3d 442, 443–45 (5th Cir. 1995) (concluding the plaintiffs lacked standing despite being issued numerous tickets because none had been convicted of violating the ordinance).

Eighth Amendment challenge to Portland's camping ordinance despite alleging that he “endured 19 illegal campsite notices” and “the destruction of three of his homes.” *See* No. 3:12-CV-0201-YY, 2020 WL 265197, at *1 (D. Or. Jan. 17, 2020). The court concluded that he did not face a credible risk of prosecution because he was never prosecuted or fined for violating the ordinance. *Id.*

Similarly, in *Smith v. City of Corvallis*, an Eighth Amendment claim was dismissed because “none of the plaintiffs [had] alleged that they were ever arrested or faced any criminal charges, citations, or fines of any kind.” No. 6:14-CV-01382-MC, 2016 WL 3193190, at *9 (D. Or. June 6, 2016) (citation omitted). As a result, “the criminal justice system was never utilized or instigated by the defendant against the plaintiffs” who were experiencing homelessness. *Id.* (citation omitted). Again, Beram does not allege that Sedona initiated any criminal proceeding against her.

With respect to the third factor, Beram points to *two* citations that were issued between April 2, 2021, and the present day [ER-17] regarding two individuals who were sleeping on private property without the permission of the property owner. [ER-31; ER-55] Both of these citations were *dismissed* by Sedona. [ER-34; ER-35] Beram alleges no other incident of enforcement in the history of the Code. Beram even quotes from Sedona’s letter [AOB-52] in which Sedona

states that it generally does not prosecute sleeping in public places when there is no room at a homeless shelter. [ER-120]

Beram does not cite to *Martin*⁴ in any of her standing arguments, but it will be addressed here because Beram mentions the ruling with respects to the merits of the Eighth Amendment claim. Regardless, *Martin* does not support any finding that Beram has standing. The Ninth Circuit panel in *Martin* concluded there was a genuine issue of material fact as to whether the plaintiffs were facing a credible threat of imminent prosecution under the city ordinances on a night when they lacked access to shelter space. *Martin*, 920 F.3d at 610. The plaintiffs were experiencing homelessness, had been *cited or convicted* at least once before, one of the plaintiffs had been refused access to shelter space in the past, and there was a reasonable possibility that the plaintiffs would lack access shelter space in the future. *See id.* The plaintiffs also alleged specific injuries stemming from the citations, including “the continued inclusion of the citations on plaintiffs’ criminal records” and “the accumulation of a host of criminal fines and incarceration costs.” *Id.* at 613 (internal citations omitted). Notably, the City of Boise was *continuing to issue citations* under both ordinances. *See id.* at 610 (noting that over 175 citations had been issued in a three-month span). With respect to the merits, *Martin*

⁴ Beram also does not cite or discuss *Grants Pass* to support any standing arguments.

ultimately held that “the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from *prosecuting* people criminally for sleeping *outside* on *public* property when those people have no home or other shelter to go to.” *Id.* at 603 (emphasis added).

The facts and legal issues in this case have no resemblance to those in *Martin*. Beram rents an apartment and does not allege that she is homeless or that she sleeps outside on public property. She argues she is “transient” because she sleeps in her car about one-third to one-half of all nights as a “coping mechanism” to a disability. [ER-126] Even if Beram considers herself “transient” because of her disability, she was never cited, arrested, or fined. She does not allege that she sought access to a shelter, was refused access to a shelter, or that there is a reasonable probability that she will be refused access to a shelter in the future. She does not allege that she *informed* any police officer during an encounter that suffered from a disability or that considered herself involuntarily homeless because it. Again, the incident report indicates that she informed the Sedona police officer that had a home, but occasionally preferred to sleep in nature. [ER-13; AOB-10; ER-39; ER-44; ER-47] The report also provides that Beram “agreed to move along without incident.” [ER-13] Finally, Sedona communicated to Beram that is generally does not prosecute sleeping in public places when there is no homeless shelter available—and Beram has not pointed to any instance where Sedona

prosecuted a person for sleeping outside on public property when there is no shelter space available. [ER-9; ER-34; ER-35; ER-121]

A “telling indication of the severe constitutional problem” with an assertion of standing “is the lack of historical precedent” supporting it. *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U. S. 477, 505 (2010) (internal quotation marks omitted). Beram has failed to provide any precedent to support her proposition that the alleged warnings are sufficient to establish standing for her Eighth Amendment claim.

II. Beram lacks standing for the Eighth Amendment claim.

Title II of the ADA provides that “no qualified individual with a disability shall by reason of such disability be excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C.A. § 12132. A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . . meets the essential eligibility requirements for receipt of services or the participation in programs or activities provided by a public entity.” 42 U.S.C. § 12131.

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. *See O'Guinn v. Lovelock Corr. Ctr.*, 502 F.3d 1056, 1060 (9th Cir. 2007).

In a Title II claim grounded in a public entity's alleged failure to provide a reasonable accommodation under 28 C.F.R. § 35.130(b)(7), the plaintiff bears the initial burden of producing evidence of the existence of a reasonable accommodation. *See Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002). A public entity may defeat a reasonable accommodation claim by showing “that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7); *see Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1047 (9th Cir. 1999).

Beram alleges Sedona wrongfully denied her accommodation requests, but she has failed to produce any evidence or case law to support her claim her requests were reasonable. *See Raines v. Byrd*, 521 U. S. 811, 826 (1997) (“Not only do appellees lack support from precedent, but historical practice appears to cut against them as well”).

To begin, it bears repeating that Beram does not allege that she requested an accommodation during any police encounter. Her first request was made

anonymously via Community Legal Services (“CLS”) in the form of a letter to the Mayor of Sedona on February 10, 2021. [ER-129] CLS asked Sedona to grant its unidentified client what amounts to blanket immunity from prosecution under the Code with respect to private and public property throughout Sedona at all times, regardless of whether their client was able to sleep in her apartment or not because of an alleged disability. [ER-129] The letter also asked the Mayor to rescind the Code. [ER-129] On February 22, 2012, Sedona declined request since it was overbroad, unreasonable, and not required by any law. [ER-120; ER-121]

On February 24, 2021, CLS sent a second letter to the Sedona City Attorney [ER-21], identifying its client as Beram and amending the accommodation request on her behalf. [ER-123] CLS requested the nonenforcement of the Code against her at all times with respect to the parking areas of the private apartment complex. [ER-123] CLS also asked for a written document “to show the property owners and any police persons of the reasonable modification.” [ER-123] Since this is a private parking lot, Sedona contacted the owners of the apartment complex to determine whether they would allow Beram to sleep in her vehicle on their property, but they were “unwilling to allow such activity.” [ER-122] On March 1, 2021, Sedona denied Beram’s amended request. [ER-122]

On April 2, 2021, Beram sued both the apartment complex and Sedona, alleging Sedona wrongfully denied her accommodation requests. [ER-125] She

requested declaratory and injunctive relief related to the Code. [ER-132; ER-133]
Shortly thereafter, Beram and the apartment complex entered into a confidential settlement agreement that allows her to sleep in her car at the apartment complex. [ER-5; ER-103; ER-105; ER-127]

Sedona has not denied any “benefit” to Beram because of her disability. Sedona denied her requests because nonenforcement of the Code or immunity from the Code is not a “service, program, or activity” within the scope of the ADA – and Beram has not alleged otherwise. Her requests were unreasonable and overbroad. They related to *private* property and were not tied to conduct that is affected by a disability. To hold otherwise would fundamentally alter Sedona’s law enforcement activities. It would also create dangerous precedent. Nothing in the ADA, its purpose, or the regulations can reasonably be read to give Beram access to privileges that would not be available to other Sedona residents who do not have a disability.

In sum, Beram failed to identify any cognizable injury that would confer standing for the ADA claim.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Date: January 9, 2024

League of Arizona Cities and Towns

/s/ Nancy L. Davidson

Nancy L. Davidson

*Attorney for Amicus Curiae League of
Arizona Cities and Towns*

CERTIFICATE OF COMPLIANCE

9th Cir. Case Number(s) No. 23-15912

I am the attorney.

This brief contains 4121 words, including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief:

is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

Signature s/ Nancy L. Davidson **Date:** January 9, 2024