

No. 19-247

In the
Supreme Court of the United States

CITY OF BOISE, IDAHO,
Petitioner,

v.

ROBERT MARTIN, LAWRENCE LEE SMITH, ROBERT
ANDERSON, JANET F. BELL, PAMELA S. HAWKES, AND
BASIL E. HUMPHREY,
Respondents.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF BOISE METRO CHAMBER OF
COMMERCE, INC. AS AMICUS CURIAE IN
SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*

Amicus, Boise Metro Chamber of Commerce, Inc., (the “Chamber”), is an Idaho non-profit corporation and an association of businesses and business people in the Boise metropolitan area. The Chamber currently serves more than 1,800 member businesses, which represents more than 120,000 employees. The Chamber, on behalf of its members, serves as the Boise region’s advocate for a vibrant and prosperous economy, and is concerned with ensuring that Boise remains a great place to live, visit, and do business.¹

SUMMARY OF ARGUMENT

As thoroughly pointed out by City of Boise (the “City”) in its Petition for Writ of Certiorari (the “Petition”), the Ninth Circuit’s decision greatly expands the “sparingly applied” substantive limits imposed by the Cruel and Unusual Punishment Clause of the Eighth Amendment and creates a conflict amongst circuit courts. Pet. Sections I, II; *see Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968); and *Ingraham v. Wright*, 430 U.S. 651 (1977). The Chamber agrees with the City that a grant of certiorari is appropriate on the grounds that the Ninth Circuit’s ruling is in conflict with this Court’s

¹ Pursuant to Rule 37.6, the Chamber affirms that no counsel for a party authored this brief in whole or in part and that no person other than the Chamber and their counsel made a monetary contribution to its preparation or submission. Pursuant to Rule 37.2, the Chamber provided notice of its intent to file its brief more than 10 days prior to the due date. All parties have submitted blanket consents to the submission of timely-filed amicus briefs.

precedent and because it creates a split of authority in the circuits. Pet. 24–25.

While the Chamber joins its voice with the above legal arguments raised by the City in its Petition, the Chamber submits this brief primarily to express its practical concerns about the effect of the Ninth Circuit’s ruling on the Chamber, its members, and the Boise business community. *See, e.g.*, Pet. Section III.

Simply put, the Ninth Circuit’s ruling extensively infringes upon the City’s exercise of police power – granted by the Idaho Constitution and the Idaho Code – to regulate conduct that affects the public health and welfare of the City and its residents. In addition, the Ninth Circuit panel’s decision elevates the interests of the City’s homeless population over the interests of other stakeholders in the community, including local businesses. Moreover, the negative impacts of the ruling are likely to extend far beyond the public sector. Indeed, the consequences of the ruling also include shifting the costs and burden to private businesses to deal with (or simply, live with) problems associated with homeless encampments in public spaces, damage to businesses in the Boise community, damage to tourism in the Boise community, and irreparable damage to the City’s reputation as a great place to live, work, and do business.

For these reasons, the Chamber urges this Court to grant the City’s Petition.

ARGUMENT

A. The Ninth Circuit’s ruling stretches this Court’s Eighth Amendment jurisprudence beyond its limits

In the case of *Ingraham v. Wright*, 430 U.S. 651 (1977), this Court summarized the three ways in which the Eighth Amendment’s Cruel and Unusual Punishment Clause “circumscribes the criminal process.” *Ingraham*, 430 U.S. at 667. First, “it limits the kinds of punishment that can be imposed on those convicted of crimes”; second, “it proscribes punishment grossly disproportionate to the severity of the crime”; and third, “it imposes substantive limits on what can be made criminal and punished as such.” *Ingraham*, 430 U.S. at 667 (citations omitted). In referencing the third substantive category, the Court recognized the Eighth Amendment’s substantive limitation as one “to be applied sparingly.” *Id.*

In *Robinson v. California*, 370 U.S. 660 (1962) this Court recognized and adopted an “act-status” distinction in evaluating the Eighth Amendment’s limits on substantive criminal law, holding that it violated the Eighth Amendment’s Cruel and Unusual Punishment Clause for California to criminalize Mr. Robinson’s *status* as a drug addict. *Robinson*, 370 U.S. at 666–68. Six years later in *Powell v. Texas*, 392 U.S. 514 (1968) (plurality op.) this Court’s plurality opinion again recognized the “act-status” distinction of the Eighth Amendment’s substantive component in a challenge to Mr. Powell’s conviction for public drunkenness. *Id.* at 532. Critically, the *Powell*

plurality, in distinguishing *Powell* from *Robinson*, noted that:

[Powell] was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.

Powell, 392 U.S. at 532. In further distinguishing *Powell* from *Robinson*, the *Powell* plurality also noted that:

[t]he entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'"

Id. at 533. Consistent with the *Powell* plurality, and as already ably pointed out by the City, this Court has

never exempted from regulation purportedly “involuntary” acts. Pet. 3. Indeed, such a holding would, as Justice Marshall observed in *Powell*, remove any “limiting principle” that would prevent the Court from becoming “the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country” and would significantly undermine “common-law concepts of personal accountability and essential considerations of federalism[.]” *Powell*, 392 U.S. at 533, 535.

The Ninth Circuit’s ruling, which found that the purportedly “involuntary” act of sleeping in public spaces is substantively proscribed by the Eighth Amendment’s Cruel and Unusual Punishment Clause (unless burdensome conditions are met) serves as a significant departure from the “act-status” principle discussed in *Robinson* and the *Powell* plurality, and thereby, stretches this Court’s prior Eighth Amendment jurisprudence beyond its limits.

B. The Ninth Circuit’s ruling will harm Boise businesses, tourism, and the City’s reputation by hamstringing the City’s efforts to enact and enforce generally applicable laws that place reasonable restrictions on camping in public spaces

As recognized by Judge Milan Smith in the six-judge dissent to the denial of rehearing *en banc*, the Ninth Circuit’s ruling “leaves cities with a Hobson’s choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a

host of laws regulating public health and safety.” Pet. App 15a–16a. Given that performing any sort of accurate, up-to-date “count” of Boise’s homeless population is unworkable in practice, the *de facto* effect of the Ninth Circuit’s ruling is to completely restrict the City’s police power to enact and enforce generally applicable laws geared towards proscribing camping in public areas, and consequently, to create a *de facto* “right” to camp and live in public areas. Pet. 27.

Notably, the Idaho Constitution provides that “[a]ny county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.” Idaho Const. art. XII, § 2 (emphasis added). This same broad police power is echoed in the Idaho Code, which provides that “[c]ities governed by this act shall be bodies corporate and politic...and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws of the constitution of the state of Idaho.” Idaho Code § 50-301.

Pursuant to the expansive grant of police power that originates from both the Idaho Constitution and the Idaho Code, the City enacted the two public camping ordinances at issue in the instant case. The Ninth Circuit, in ruling that the Eighth Amendment effectively prohibits the enforcement of these ordinances, completely restricts the City’s ability to use its constitutionally-granted police power to regulate camping in its public spaces.

The Chamber does not dispute that homeless individuals, in the absence of adequate shelter, rely on Boise's public spaces to live, play, and relax. However, businesses in the Boise area also rely on the physical infrastructure of Boise's public spaces, such as public rights of way like roads and sidewalks, to bring in business from Boise residents and visitors alike. Many local businesses, particularly businesses in Boise's vibrant downtown – including Boise's many restaurants and shops – rely on business brought in from residents and visitors who frequent Boise's parks and public spaces. This common need for, and reliance on, public spaces creates significant potential pressure points between the interests of Boise's homeless population and the interests of the Boise business community.

In essence, by recognizing a *de facto* right to camp in public spaces, the Ninth Circuit's ruling elevates the rights of the homeless to access and use public spaces over the rights of anyone else, including business owners, who rely on and/or use those same public spaces. With the City stripped of its ability to effectively regulate camping in public areas, problems that formerly could have been (and likely were) handled through the issuance of a citation by the City now become the problems of other stakeholders, including Boise's business owners, who are ill-equipped to do anything about it. Though well-intended, the Ninth Circuit panel's ruling has not, by judicial fiat, solved the problem of homelessness. Instead, the panel's ruling effectively "kicks the can down the road" to other stakeholders to deal with (or simply, live with)

the difficult situations associated with camping in public areas.

This effect is noted in Southern California, where in summer 2019, business owners took matters into their own hands to prevent the proliferation of homeless encampments. There, business owners placed “homeless encampment prevention” devices (such as planters and other objects) onto public sidewalks to prevent homeless individuals from setting up tents or other forms of shelter around their respective businesses.² These sorts of desperate self-help solutions, in addition to being illegal, also serve, as pointed out by Los Angeles Mayor Eric Garcetti, as yet another kick of the can down the road to the businesses on the next block.³ While the Chamber certainly does not condone such ineffective and illegal self-help methods, the recent occurrences in Los Angeles underscore that the Ninth Circuit’s ruling has not solved, or really even changed, the problem of homelessness. Instead, the Ninth Circuit’s ruling has simply shifted the costs and burden of public camping from the homeless to other stakeholders (including local businesses) who also use and rely on public spaces.

By elevating the interests of the homeless to access and camp in public spaces over the interests of local

² Rob Hayes, *Planters, other obstacles being used to block homeless camps in Los Angeles*, ABC7, July 10, 2019, available at <https://abc7.com/society/planters-other-obstacles-blocking-homeless-camps-in-la/5388218/>

³ *Id.*

businesses that rely on those same public spaces, and by shifting the cost and burden of camping in public spaces from the homeless to other stakeholders (such as local businesses), the Ninth Circuit's ruling has significantly and negatively impacted the Boise business community.

One Chamber member, the Greater Boise Auditorium District (the "District"), which operates a large convention center (the Boise Centre) in downtown Boise has, over the past year, dealt with the presence of campers in the public space adjacent to Boise Centre. Convention visitors, despite also noting the many wonderful things about Boise's downtown, made comments about public campers that indicated that public camping detracted from Boise's otherwise sterling reputation as a clean, walkable, vibrant city. The District, in its contacts with Boise police, were left with the impression that there was nothing that could be done unless the campers became boisterous or set up a tent immediately adjacent to the building or directly in front of emergency ingress or egress.

Similarly, the Boise Convention & Visitors Bureau ("BCVB"), an entity tasked with recruiting and bringing conventions and other meetings to Boise, has noted, based on observations during visits to Boise by out-of-state convention planners, a marked increase in Boise's homeless population over the last year. This is concerning to BCVB, because Boise's cleanliness and safety has always been a strength of the community noted by event planners during past site visits, and has contributed greatly to BCVB's success in bringing conventions and other events to downtown Boise.

BCVB is concerned that the proliferation of public camping could, in the future, negatively impact the City's hard-earned reputation and hamper its ability to bring events to Boise that stimulate economic activity in the area.

Another Chamber member, CoreStrong Studio (the "Studio"), a fitness facility located two doors down from the Corpus Christi House shelter, deals with significant issues related to public camping. While public camping has not occurred on the sidewalk directly in front of the Studio, the Studio recently felt the effects of camping that occurs on the public sidewalks approximately 50 feet away from its store front. The Studio and its patrons witness these campers openly urinating and defecating. The Studio deals with trash and human waste on its property, culminating with the discovery approximately six months ago of a can filled with human feces in its garbage can. The Studio witnesses drug deals in its parking lot. The Studio estimates it has spent between \$15,000 to \$20,000 installing fencing, security cameras, and other measures to mitigate the burden that public camping has placed on its business. The Studio believes that public camping occurring near its business directly impacts its ability to attract clients that might otherwise use its services, and generally, that public camping harms Boise's reputation as a great place to do business.

The above examples are just a small sample of the costs and burdens shifted to the Boise business community by the Ninth Circuit's ruling. Given that ruling, these types of situations and circumstances are

not only likely to persist, but also to increase in frequency. Additionally, the Ninth Circuit's ruling threatens Boise's hard-earned reputation as a wonderful place to live, work, and recreate.

The Chamber is not unsympathetic to the plight of Boise's homeless, and is fully supportive of the City's efforts to raise funds and to expand infrastructure and services for the City's homeless population. Pet. 4. In fact, at the September 18, 2019 "State of the City" address, Boise Mayor David Bieter called for the community to work toward ending family homelessness, highlighting the recently opened New Path Community Housing and the groundbreaking on Valor Pointe, which are two current City projects to combat chronic homelessness.⁴ In addition to highlighting these two projects, the Mayor also announced during the address that the City would be teaming up with Ada County and others to focus resources and expand services to serve Boise's homeless.⁵ In the Chamber's view, these sorts of focused, collaborative efforts at the local level are most effective in addressing homelessness.

The Chamber believes the Ninth Circuit's ruling to have been well-intended. If affirmed, however, Chamber members (and other Boise businesses) must, without the power to do anything at all, suffer the unfortunate collateral results of the ruling. The Ninth

⁴ *2019 State of the City*, City of Boise, available at <https://www.cityofboise.org/departments/mayor/state-of-the-city/>

⁵ *Id.*

Circuit's ruling – in stretching this Court's Eighth Amendment jurisprudence beyond its current limits – has elevated an issue best addressed by a municipality's police power to an issue of Constitutional import. By so doing, it has shifted the cost and burden of dealing with public camping to other stakeholders, such as Boise's business community.

The Chamber respectfully requests that this Court grant certiorari and review the decision of the Ninth Circuit. In so doing, the Chamber respectfully requests that the Court take into account the ruling's impacts (and potential impacts) on the Boise business community.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2019