No. 19-247

IN THE

Supreme Court of the United States

CITY OF BOISE,

Petitioner,

v.

ROBERT MARTIN, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* SEVEN CITIES IN ORANGE COUNTY IN SUPPORT OF PETITIONER

JOHN A. VOGT
JONES DAY
3161 Michelson Drive
Suite 800
Irvine, CA 92612

YAAKOV M. ROTH
Counsel of Record
ALEX POTAPOV
BENJAMIN J. CASSADY
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amici are seven Cities in Orange County, California: the City of San Clemente, the City of San Juan Capistrano, the City of Lake Forest, the City of Laguna Hills, the City of Rancho Santa Margarita, the City of Mission Viejo and the City of Aliso Viejo.

All of the *Amici* Cities share an interest in enforcing their public health and safety ordinances, and in effectively addressing the serious social problems associated with homelessness.

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[1] Pursuant to Rule 37.2(a), counsel for all parties received timely notice of the Cities' intent to file this brief, and consented to the filing of the brief. No counsel for any party authored this brief in any part, and no person or entity other than *amici*, *amici*'s members, or *amici*'s counsel made a monetary contribution to fund its preparation or submission.

INTRODUCTION & SUMMARY OF ARGUMENT

The decision below held that, under the Eighth Amendment, homeless individuals may not be penalized "for sleeping outdoors, on public property, when no alternative shelter is available to them." Pet.App. 36a. Although this rule may appear straightforward at first glance, in reality it gives rise to a welter of conceptual and practical imponderables. As a result, if this decision remains in effect, local governments throughout the Ninth Circuit may find themselves unable to enforce a wide range of public health and safety ordinances. The dangerous confusion wrought by the opinion below—which many of the *Amici* have already experienced firsthand—compels review.

I. To begin, it is not clear what it means for shelter to be "available" to a homeless individual. One open question is *where* shelter must be available. If the shelter must be located in the jurisdiction that is attempting to enforce the ordinance, then even small towns may suddenly be charged with maintaining a substantial stock of shelter beds.

Similarly, it is unclear *what kind* of shelter must be available. For example, *amicus* San Clemente has sought to comply with the decision below by designating a city-owned lot as a camping area for homeless individuals. But homeless advocates have argued that the decision below requires *indoor* shelter to be available before anti-camping ordinances can be enforced. And San Clemente has faced a barrage of complaints about the lot's conditions, including claims that the Constitution requires the City to provide cell-phone charging stations for the homeless.

Nor is it clear *at what time* availability should be measured. If the answer is "at the moment of enforcement," then a homeless person could immunize himself from public camping ordinances simply by violating shelter rules and getting evicted (with the result that the shelter would no longer be "available" to him). That cannot be right. But nor can any other answer be reasonably drawn from the decision below.

II. There are also difficult questions concerning how to measure whether shelter is available. The decision below arguably allows enforcement of public sleeping ordinances only if the number of available shelter beds exceeds the number of homeless persons in the jurisdiction. But calculating the number of homeless individuals is prohibitively difficult. Nor is it straightforward to monitor the number of available shelter beds, especially given that some shelters are privately run, and not all shelter beds are available to all homeless individuals.

In the end, many local governments may simply cease to enforce their public sleeping and camping ordinances rather than attempt to comply with the onerous requirements imposed by the decision below—indeed, some cities have already done so.

III. Finally, it is unclear what *other* laws are cast into doubt by the decision below. The opinion's logic is sweeping. It is possible that, beyond sleeping and camping ordinances, the decision prohibits cities from enforcing laws that prohibit sleeping in designated areas or at certain times; laws that prohibit obstructing traffic; laws that prohibit lighting fires or building of structures on public land; and even laws against public urination, defecation, and drug use.

Ultimately, what all of these problems illustrate is that the panel's approach to this matter is profoundly mistaken. A particular homeless individual's inability to comply with the law should be addressed in that individual's criminal proceeding, perhaps through the assertion of a necessity defense. Attempting to solve the problem wholesale via broad pre-enforcement injunctions inevitably begets precisely the confusion that the decision below has already caused.

For these reasons, this Court should intervene.

ARGUMENT

I. WHAT DOES IT MEAN FOR SHELTER TO BE AVAILABLE?

A. It Is Unclear *Where* Shelter Must Be Available

One significant question created by the Ninth Circuit decision is *where* the requisite shelter must be available—in other words, what is the jurisdictional level at which its rule must be applied.

Given that the rationale for the rule is that it is improper to punish *involuntary* behavior, Pet.App. 61a-62a, the relevant question would seem to be whether shelter is available in *any* jurisdiction that the homeless individual could reasonably access. But the decision below arguably goes broader. Instead, public sleeping and camping ordinances cannot be enforced as long as "there is a greater number of homeless individuals *in a jurisdiction* than the number of available [shelter] beds." Pet.App. 62a (emphasis added and internal quotation marks and alterations omitted); *see* Pet.App. 43a-51a (considering only whether shelters were available *in Boise*). This is certainly the interpretation adopted by homeless advocates.

That rule, however, makes little sense. Especially in areas containing many small jurisdictions, it may be completely impractical to ensure that each one has its own sufficient shelter space to house the maximum number of homeless individuals that might be present in that jurisdiction at a given time. California, for example, has over 100 incorporated cities with fewer than 10,000 residents each.[2]

Moreover, in some states—including California—the primary responsibility for providing indigent care lies with *a different level of government* than the primary responsibility for enforcing basic public order ordinances. While cities such as San Clemente enact ordinances regarding public sleeping and camping, it is *counties* that are charged by state law with caring for the indigent. *See* Cal. Welf. & Inst. Code § 17000; *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1165 n.18 (Cal. 1995) ("If the inability of ... homeless persons ... to afford housing accounts for their need to 'camp' on public property, their recourse lies not with the city, but with the county" to whom the legislature "allocat[ed] ... responsibility to assist destitute persons."); *Clinton v. Cody*, No. H044030, 2019 WL 2004842, at *8 (Cal. Ct. App. May 7, 2019) ("[C]ounties, not cities, have a statutory obligation regarding housing for the indigent.").

Under the Ninth Circuit's rule, then, cities can only enforce their ordinances by taking on the obligations that state law assigns to counties. The decision below thus works a significant and unwarranted intrusion

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[2] *See* League of California Cities, 2017 City Population Rankings, *available at* https://www.cacities.org/Resources-Documents/About-Us/Careers/2017-City-Population-Rank.aspx.

on California's scheme of governance. *Cf. Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) ("Whether and how to use th[e] discretion [to delegate governmental powers to local government units] is a question central to state self-government.")[3]

The Ninth Circuit's rule also raises an additional puzzle. Suppose that, in an attempt to comply with the decision below, a city purchased a building in a neighboring city in order to operate it as a shelter. Are those beds "available" to homeless individuals in the city that owns and operates the shelter, or would that city violate the Eighth Amendment by enforcing its anti-camping ordinance in reliance on that shelter? Would the answer change if the city offered to provide free transportation to the shelter? How convenient would that transportation have to be? The decision below provides no answers—and no certainty.

Furthermore, some homeless individuals may assert that they have a legal or practical obligation to remain in a limited geographical area (for example, to receive treatment for addiction). For such individuals, must shelter be "available" within that limited area? Again, the opinion below is silent.

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[3] The confusion as to the relevant jurisdictional level is reflected in a settlement that Orange County entered in order to resolve claims resembling those addressed by the decision below. Notice of Filing Settlement of Class Action, *Orange Cty. Catholic Worker v. Orange Cty., et al.*, No. 8:18-cv-00155, Dkt. 318 (C.D. Cal., July 23, 2019). Orange County agreed that, in attempting to place homeless individuals in shelters, it would not transport those individuals across "Service Planning Areas." *Id.* at 10. These "Service Planning Areas" are arbitrary units with no preexisting jurisdictional significance or relevance under state law or otherwise. *See id.* at 9.

B. It Is Unclear *What Kind* of Shelter Must Be Available

The Ninth Circuit's opinion also provides precious little guidance as to what sort of accommodations must be provided at a shelter in order to "qualify" as a true alternative to violating a public camping ordinance.

Perhaps the most basic question is whether the shelters must be indoors. This is of immediate practical concern to *amicus* San Clemente. Seeking to comply with the decision below, San Clemente adopted an emergency ordinance designating a city-owned lot as a camping site where anti-camping ordinances would not be enforced.[4] The City contracted for a decomposed granite floor covering, lighting and fencing, and bathroom facilities for the homeless population to use while at the site.[5] The City also provides security, including cameras and a security guard.[6] In addition, City staff have coordinated with a homeless-outreach service provider to make regular visits to the site to offer various social services.[7] The City's objective is to ensure that the homeless have a place to sleep without violating the law—such that the City's ordinances may be constitutionally enforced in the rest of the City.

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[4] *See* Request for Judicial Notice at 9-14, *Housing Is a Human Right Orange Cty. et al. v. Cty. of Orange et al.*, No. 8:19-cv-00388, Dkt. 72-2 (C.D. Cal. July 1, 2019).

[5] Declaration of Erik Sund, ¶¶ 2, 5, *Housing Is a Human Right Orange County et al. v. The County of Orange et al.*, No. 8:19-cv-00388, Dkt. 75-2 (C.D. Cal. July 1, 2019).

[6] *Id.* ¶¶ 2, 6.

[7] *Id.* ¶¶ 10, 11.

Under the basic logic of the opinion below, the availability of an outdoor camping area like the San Clemente lot *should* allow a jurisdiction to enforce its public sleeping ordinances. After all, the underlying question is whether the homeless person had *no choice* but to sleep in an area where sleeping is prohibited. Pet.App. 62a-63a. The San Clemente lot gives homeless individuals a choice by providing them with an alternative place to sleep.

However, homeless plaintiffs have invoked stray language in the opinion which suggests that only *indoor* shelter is acceptable. Pet.App. 62a (suggesting that the question is whether one has the "option of sleeping indoors"). If that is the rule, then no jurisdiction could enforce its public sleeping ordinances unless it erected and maintained sufficient *indoor* shelter space to house its entire homeless population—a prohibitively expensive proposition. *See* Pet.App. 17a-18a (M. Smith, J., dissenting from denial of rehearing en banc).

Even assuming an outdoor lot is acceptable, the next question is *what accommodations* must be offered at that site (or for that matter at any other kind of shelter). For example, San Clemente has already had to contend with claims that conditions at its outdoor lot violate both the Fourteenth Amendment and the Americans with Disabilities Act, among other laws.

Plaintiffs have asserted, among other things, that the lot violates the law because (1) it has overflowing trash receptacles; (2) there is no shade; (3) one must climb a hill to get to the site; (4) at the entrance to the camp, "the land dips several inches and there is a divot"; (5) the portable toilets are not serviced often

enough; (6) there is no easily accessible parking; (7) it is necessary to walk ".35 miles" to get to an area where cooking is permitted; and (8) there is no place for residents to charge cell phones.[8] The uncertainty around claims of this sort is putting insurmountable pressure on cities and counties to settle, rather than expose themselves to costly litigation and the threat of damages under Section 1983. *See, e.g.*, Notice of Filing Settlement of Class Action, *Orange Cty. Catholic Worker v. Orange Cty., et al.*, No. 8:18-cv-00155, Dkt. 318 (C.D. Cal., July 23, 2019).

Finally, yet another category of questions concerns whether, and under what circumstances, a shelter's policies can render it unavailable for a given homeless individual. For example, many shelters have a religious orientation. *See, e.g.*, Pet.App. 37a-39a. Is such a shelter unavailable to an individual who advances a religious objection? The panel suggested that "coerc[ing] an individual to attend religion-based treatment" "via the threat of prosecution" would violate the Establishment Clause. Pet.App. 47a. If that position is correct, it would potentially eliminate all religious shelters from the calculus required by the decision below. Moreover, it would also be necessary to ask what *other* constitutional rights may render large categories of shelters unavailable. For example, could "coerc[ing]" an individual to stay at a shelter that requires residents to surrender certain dangerous items constitute a Fourth Amendment violation (or a

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[8] Memorandum in Support of Ex Parte Application for a Temporary Restraining Order at 5, 15-18, *Housing Is a Human Right Orange Cty. et al. v. Cty. of Orange et al.*, No. 8:19-cv-00388, Dkt. 69-1 (C.D. Cal. June 30, 2019).

Second Amendment violation, for that matter)? Could a shelter policy against using profane language violate a resident's free speech rights? All of this remains to be determined, if the decision below holds.

Other questions readily present themselves, too. For example, some shelters are open exclusively to men or to women. *See, e.g.*, Pet.App. 38a-39a. Is such a shelter "available" to a married individual whose spouse would be excluded? Does that implicate his constitutional due process rights? Similarly, some have asserted that homeless individuals who own pets should not be required to use a shelter which does not allow pets. Indeed, it has been suggested that some homeless individuals are *acquiring pets* in the hopes that this will exempt them from the enforcement of anti-camping ordinances.

In addition, some shelters may not admit persons with prior convictions for various serious offenses (such as violent crimes or sex crimes). Under the Ninth Circuit rule, does every jurisdiction have to maintain a separate shelter for such individuals?

In short, the question of what constitutes "adequate" shelter remains profoundly unsettled.

C. It Is Unclear *When* Shelter Must Be Available

There are also serious lurking questions as to *when* a homeless individual must have access to shelter. The answer may appear to be obvious: shelter must be available as of the moment when the government attempts to enforce its ordinance. But that approach quickly devolves into paradox.

Consider a shelter which (as any shelter must) imposes some basic rules on its residents, such as a

prohibition on assaulting other residents. Should such a shelter still be viewed as available to an individual who does not wish to abide by those rules? The answer must surely be yes.

But now imagine that the same individual checks in to the shelter, violates the rule against assaulting other residents, and is evicted as a result. Should the shelter *now* be regarded as available? If the question is considered at the time of enforcement, the answer would appear to be no. *See* Pet.App. 48a-49a (suggesting that its rule would apply to individuals who were "denied entry" to a shelter "for reasons other than shelter capacity"). This cannot be right. There is no justification for allowing homeless individuals to exempt themselves from public sleeping ordinances simply by violating rules that, *ex ante*, all would agree they should be expected to follow.

This is no mere theoretical construct. The Orange County Sheriff's Department—which is the contract law-enforcement agency for many cities within its borders—has advised *amicus* San Clemente that its officers would not enforce the City's public camping ordinance against individuals who have been evicted from the San Clemente campsite, claiming that such enforcement is barred by the decision below. This regime—which rewards willful violations of even the most uncontroversial shelter rules—is perverse and dangerous.

And the same sort of temporal paradox reappears in any number of contexts. For example, the opinion below notes that two shelters in Boise deny admission to anyone arriving after 8 PM. Pet.App. 48a. If availability must be measured at the moment of

enforcement, a homeless individual could be cited for camping in public at 7:30 PM, but not at 8:30 PM (even though it would still be true at 8:30 PM that she *had been* free to go to the shelter at 7:30 PM).

The Boise shelters described in the opinion below also do not allow individuals who voluntarily leave the shelters to return immediately. Pet.App. 48a. It would be odd to treat a shelter as unavailable to someone who is excluded from it only because he made a choice to leave; yet that is what the opinion below suggests. Pet.App. 48a-49a.

Another version of the same difficulty arises with respect to homeless individuals who travel from one location to another. Suppose there is adequate shelter in City A, but a homeless individual makes a voluntary decision to relocate to City B. Should shelter in City A be viewed as available to that individual? May City B, at least, impose a durational residency requirement such that its shelters are available only to persons who have lived in City B for some prescribed period? Prohibiting such requirements would be untenable as a practical matter; a desirable city could be forced to provide more and more shelter, *ad infinitum*, as more homeless individuals arrived from all over the country. And yet, again, that is arguably what the decision below would require.

In all of these examples, the conceptual problem is traceable to the difficulty of assessing when an action should be considered "voluntary." The decision below completely fails to grapple with this question. *Jones v. City of Los Angeles*—an earlier Ninth Circuit opinion which reached the same conclusion but was vacated due to settlement—analyzed the matter a bit more

carefully. 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). *Jones* suggested that the underlying question was whether an individual's "past volitional acts" were "sufficiently proximate to the conduct at issue … for the imposition of penal sanctions to be permissible." *Id.* at 1137.

Under that framework, the issue in the examples above would be whether the lack of available shelter is so tightly linked to an individual's prior volitional acts that the individual should be viewed as sleeping on the streets voluntarily, even if no shelter is available to her at that precise moment. But it is not clear whether the decision below leaves room even for that modest qualification. And even if it did, the exception would not be administrable. There is no practical way for city officials making street-level enforcement decisions to conduct an all-things-considered evaluation of which "past volitional acts" (if any) deprived a particular homeless person of access to shelter.

II. HOW SHOULD SHELTER AVAILABILITY BE MEASURED?

A. It Is Prohibitively Difficult To Measure the Number of Homeless Individuals

The opinion below declares that public sleeping ordinances cannot be enforced "so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters." Pet.App. 62a (quotation marks & alterations omitted). Thus, to determine whether it may enforce its ordinances, a local government must determine how many homeless individuals are within its jurisdiction. Obtaining that information, however, is virtually impossible.

One logical place to start would be the "Point in Time" count (or "PIT Count"), a federally required census of the homeless population. However, the PIT Count of the unsheltered population is conducted only once every two years.[9] Thus, at most times the PIT Count information will be significantly out of date, especially given that homeless populations fluctuate dramatically. While governments may attempt to adopt enforcement policies based on the most recent PIT Count, it is far from certain that courts will treat the PIT Count as a safe harbor.

Any attempt to count the homeless population more frequently—for example, on any day when the local government would wish to enforce its public sleeping or camping ordinances—would be impossibly expensive and difficult. As Judge Smith noted, someone would have to "painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway." Pet.App. 16a (M. Smith, J., dissenting from denial of rehearing en banc). In Los Angeles, for example, this task requires three days even with the participation of thousands of volunteers—and still fails to produce a complete count. Pet.App. 16a.

Further, the problems of counting the homeless population are compounded by the fact that, for purposes of the decision below, not every individual sleeping on the streets should be counted. As the

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[9] *See* County of Orange, Everyone Counts: 2019 Point in Time Final Report 13 (July 30, 2019); Pet.App. 36a-37a (noting that the most recent available data for Boise was from 2016, and claiming that the "PIT Count likely underestimate[d] the number of homeless individuals" in the area).

panel explained, its "holding does not cover individuals who do have access to adequate temporary shelter," such as individuals who "have the means to pay for it" but decline to do so. Pet.App. 62a n.8.

Accordingly, to obtain an accurate count of individuals for whom shelter must be made available, local governments would have to somehow distinguish between individuals who are sleeping outside *by necessity* and those who are doing so *by choice*. There is simply no feasible way to do this.[10]

B. It Is Also Difficult To Assess the Number of Available Shelter Beds

Continually measuring the availability of shelter beds presents its own set of challenges. For one thing, some shelters are run by private organizations, so governments must engage in a complex coordination effort to maintain accurate and up-to-date records of vacancies at those shelters.

What is more, some shelters are limited to one gender, so simply knowing that shelter beds are available may not be sufficient. More generally, as discussed in Part I of this brief, determining whether a given shelter is "available" for a given individual is a complex and fraught fact-intensive inquiry.

In addition, it is not clear what relationship a given jurisdiction should strive to achieve between the

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[10] The task is made even more difficult by the fact that criminals often take up residence in homeless encampments in order to hide among—and victimize—the genuinely homeless. *See, e.g.*, Lolita Lopez & Phil Dreschler, NBC Los Angeles, *Gangs of LA on Skid Row* (Feb. 19, 2018), *available at* https://www.nbclosangeles.com/news/local/Gangs-of-LA-on-Skid-Row-474531353.html.

number of shelter beds and the number of homeless individuals. One option would be simply to aim for the number of beds to exceed the homeless population by at least one. But, as Judge Smith noted, it would be easy to miscalculate by failing to account for one or more homeless individuals. That innocent error would create an Eighth Amendment violation, "potentially leading to lawsuits for significant monetary damages and other relief." Pet.App. 17a (M. Smith, J., dissenting from denial of rehearing en banc).

The only safe alternative, then, would be to maintain shelter capacity *significantly* exceeding the homeless population. That would make compliance with the Ninth Circuit's rule even more extravagantly expensive. And the expense would not be justified by any coherent policy rationale. In effect, it would result in maintenance of a significant stock of shelter beds *that will never be used*. Indeed, even maintaining a number of beds *equal* to the number of homeless persons would guarantee that some beds would go unused, as some portion of the homeless population simply does not wish to reside in a shelter.[11]

In the end, it is far from clear what it would take to comply with the Ninth Circuit's rule. What is clear is that—as long as the decision below remains in force—local governments will not be able to enforce their ordinances without great risk and expense. As a result,

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[11] Perhaps in tacit recognition of this point, the court in one recent case approved a settlement requiring the defendants to have beds "for at least 60 percent of the unsheltered individuals" in the relevant area. Notice of Settlement at 5, *Orange Cty. Catholic Worker et al. v. Orange Cty. et al.*, No. 8:18-cv-00155, Dkt. 272 (C.D. Cal. Oct. 26, 2018). Of course, that figure is entirely arbitrary.

many cities will be forced to simply abandon them—as some have already begun to do. Pet.App. 17a-19a (M. Smith, J., dissenting from denial of rehearing en banc). The consequences for public safety and health will be as predictable as they are dire.

III. WHAT OTHER LAWS WILL BE AFFECTED?

A. The expansive logic of the decision below also threatens a host of other public health and safety laws. To appreciate the panel opinion's scope, it is helpful to compare it with its vacated predecessor, *Jones*.

The *Jones* panel made at least some effort to cabin its opinion. In particular, it identified a safe harbor for laws which required, as an element, "some conduct" beyond simply sitting, lying, or sleeping in the streets. 444 F.3d at 1123-24. *Jones* made clear that such laws were permissible because they did not "criminaliz[e] the status of homelessness." *Id.* at 1123. The decision below, however, contains no such assurances.

One category of laws falling within the *Jones* safe harbor are "time, place, and manner" laws—*e.g.*, ordinances that apply only during limited hours, or prohibit sleeping "in clearly defined and limited zones," or prohibit "obstruct[ing] pedestrian or vehicular traffic." *Id*. at 1123. The opinion below, by contrast, says only that such statutes "*might* well be constitutionally permissible." Pet.App. 63a n.8 (emphasis added). That is hardly reassuring.

Indeed, as noted above, the opinion below could be read as suggesting that cities must provide *indoor* shelter before enforcing their ordinances. Under that logic, would an ordinance restricting public sleeping in certain designated areas be construed as an attempt to, in effect, turn the rest of the city into an inadequate

outdoor shelter? If so, then Judge Smith was right to say that the decision "effectively allows homeless individuals to sleep and live wherever they wish on most public property." Pet.App. 18a-19a (M. Smith, J., dissenting from denial of rehearing en banc).

B. Another category of laws that *Jones* viewed as clearly permissible were ordinances against *camping* (as opposed to merely *sleeping*) in public. 444 F.3d at 1123. And yet one of the Boise ordinances at issue in the decision below *was* a camping ordinance. Pet.App. 64a-65a. The opinion made clear that this ordinance fell within the scope of its rule, because the ordinance could be "enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements." Pet.App. 65a.

One cannot help but wonder what else the Ninth Circuit will regard as constitutionally protected "rudimentary precautions … from the elements." For example, it is easy to imagine an argument that the decision below creates an Eighth Amendment right to light fires (necessary for cooking) or even erect structures (necessary to ensure shade from the sun and protection from the rain) on public property.

More generally, the panel's insistence that only voluntary conduct can be criminalized leads naturally to the conclusion that a wide range of other laws—such as laws against public urination, defecation, and drug use—may also be unconstitutional in many cases. *See* Pet.App. 17a-20a (M. Smith, J., dissenting from denial of rehearing en banc). As one pro-*Jones* commentator acknowledged:

> It is unclear … why the line should be drawn [at public sleeping ordinances]. Both sleeping

> and eating are human necessities. If criminalization of sleeping on the streets violates the Eighth Amendment when there is no alternative shelter, then surely criminalization of panhandling would face the same charge when there is no alternative source of money to purchase food.

Sarah Gerry, Note, *Jones v. City of Los Angeles: A Moral Response to One City's Attempt to Criminalize, Rather than Confront, Its Homelessness Crisis*, 42 Harv. C.R.-C.L. L. Rev. 239, 248-49 (2007).

In sum, it is clear that, unless it is checked, the logic of the decision below will expand widely, posing a profound threat to the protection of even the most basic health and safety standards within the Ninth Circuit. Unsurprisingly, a number of plaintiffs have already filed lawsuits relying on the panel opinion, and undoubtedly there are more to come.[12]

The issue, then, is not whether States within the Ninth Circuit will be able to "criminalize homelessness"; the issue is whether those States will be able to exercise their fundamental regulatory prerogatives. In addition, review of this decision

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[12] *See, e.g.*, *Shipp v. Schaaf*, No. 19-cv-01709-JST, 2019 WL 1644401 (N.D. Cal. Apr. 16, 2019); *Hung v. Schaaf*, No. 19-cv-01436-CRB, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019); *Quintero v. City of Santa Cruz*, No. 5:19-cv-01898-EJD, 2019 WL 1924990 (N.D. Cal. Apr. 30, 2019); *Aitken v. City of Aberdeen*, No. 3:19-cv-05322-RBL, 2019 WL 2764423 (W.D. Wash. July 2, 2019); Complaint, *Rios et al. v. Cty. of Sacramento et al.*, No. 2:19-cv-00922-KJM-DB (E.D. Cal. May 22, 2019); *see also, e.g.*, *Blake et al. v. City of Grants Pass*, No. 1:18-cv-01823-CL, 2019 WL 3717800 (D. Or. Aug. 7, 2019) (certifying class of homeless people in a challenge to city's sleeping and camping ordinances).

would provide much-needed clarity in other circuits, given that courts of appeals have now taken three different positions on the constitutionality of criminalizing purportedly involuntary conduct. Pet. 20-25; *see, e.g., Manning v. Caldwell*, 930 F.3d 264, 281-85 (4th Cir. 2019) (en banc).

* * *

As the many problems discussed above illustrate, the decision below is profoundly misconceived from a procedural standpoint. It simply makes no sense for courts to attempt to resolve these complex issues with broad pre-enforcement injunctions. If a particular homeless person cannot comply with a particular ordinance, that issue should be addressed in that person's criminal trial—perhaps via the traditional necessity defense, recognized under California law. *See In re Eichorn*, 81 Cal. Rptr. 2d 535, 539-40 (1998). That approach would properly allow individual circumstances to be taken into account.

By contrast, the blunderbuss approach adopted by the panel will severely undermine the ability of local governments to address difficult social problems. This Court should step in and prevent these grave practical consequences from coming to pass.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

September 25, 2019

Respectfully submitted,

JOHN A. VOGT
JONES DAY
3161 Michelson Drive
Suite 800
Irvine, CA 92612

YAAKOV M. ROTH
Counsel of Record
ALEX POTAPOV
BENJAMIN J. CASSADY
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
yroth@jonesday.com

Counsel for Amici Curiae