No. 19-247

In the

Supreme Court of the United States

CITY OF BOISE, IDAHO,

Petitioner,

v.

ROBERT MARTIN, *ET AL.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

CAROL M. MATHEIS
P. O. Box 2074
Newport Beach, CA 92659
(949) 455-9410
matheislaw@live.com

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
The Claremont Institute
Center for Constitutional Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

1. Whether misdemeanor criminal penalties for camping in a public place and disorderly conduct constitute cruel and unusual punishment under the Eighth Amendment.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

TABLE OF AUTHORITIES..... iii

INTEREST OF AMICUS CURIAE.....1

SUMMARY OF ARGUMENT.....2

REASONS WHY REVIEW SHOULD BE GRANTED 3

I. The Ninth Circuit's Holding that the Eighth Amendment Covers Municipal Ordinances Against Disorderly Conduct and Public Camping Is Contrary to the Original Public Meaning of "Cruel and Unusual Punishment."...3

II. The Ninth Circuit's Holding Goes Well Beyond This Court's Holding in *Robinson* That Criminalization of Mere Status Can Violate the Eighth Amendment, and Conflicts with the Decisions of Several Other Circuit and State Courts. 6

III. The Ninth Circuit's Decision Severely Intrudes Upon the States' Police Powers.....8

IV. The Eighth Amendment Cannot Be Used To Impose Unconstitutional Affirmative Obligations On Municipalities. 10

CONCLUSION 12

TABLE OF AUTHORITIES

Cases

City of Canton v. Harris,
489 U.S. 378 (1989).....11

County of Maricopa v. Lopez-Valenzuala,
135 S. Ct. 2046 (2015).....1

Deshaney v. Winnebago Cnty Dept. of Soc. Services,
489 U.S. 189 (1989).....3, 10, 11

Estelle v. Gamble,
429 U.S. 97 (1976).....5

Ewing v. O'Connor,
538 U.S. 11 (2003).....10

Harmelin v. Michigan,
501 U.S. 957 (1991).....4, 5

Horne v. Isaacson,
134 S. Ct. 905 (2014).....1

Ingraham v. Wright,
430 U.S. 651 (1977).....6, 7

Manning v. Caldwell,
900 F.3d 139 (4th Cir. 2018) 8

Manning v. Caldwell,
930 F.3d 264 (4th Cir. 2019) (en banc) 8

Metropolitan Life. Ins. Co. v. Massachusetts,
471 U.S. 724 (1985).....8

Nat'l Fed. of Ind. Bus. v. Sebelius,
567 U.S. 519 (2012).....9, 12

Obergefell v. Hodges,
135 S. Ct. 2584 (2015).....1

Overton v Bazzetta,
539 U.S. 126 (2003).....10

Powell v. Texas,
392 U.S. 514 (1968).....2, 6

Robinson v. California,
370 U.S. 660 (1962).....2, 6, 7

Second Trial of Titus Oates,
10 How. St. Tr. 1227 (K. B. 1685) 4

Stanford v. Kentucky,
492 U.S. 361 (1969).....5

Tobe v. City of Santa Ana,
892 P.2d 1145 (Cal. 1995).....8

Town of Greece, New York v. Galloway,
134 S. Ct. 1811 (2014).....1

United States v. Benefield,
889 F.2d 1061 (11th Cir. 1989).....7

United States v. Moore,
486 F.2d 1139 (D.C. Cir. 1973) (en banc).....7

United States v. Stenson,
475 F. App'x 630 (7th Cir. 2012) 7

Weems v. U.S.,
217 U.S. 349 (1910).....10

Whole Woman's Health v. Hellerstedt,
136 S. Ct. 2292 (2016).....1

Constitutional Provisions

U.S. Const., amend. VIII ..... passim

U.S. Const., amend. XIV 11

Va. Declaration of Rights § 9 (1776) 4

Other Authorities

1 Wm. & Mary. Sess. 2, ch 2 (Dec. 1689) 3

Currie, David, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986) 10

Dazio, Stefanie, *Union: LA Officer Gets Typhoid Fever, 5 Others Show Symptoms*, AP, May 30, 2019, available at https://www.apnews.com/e6c4a34980c549deada4f1f981cedb80 12

English Declaration of Rights (1688) 3

Granucci, Anthony F., Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Calif. L. Rev. 839 (1969) 5

Henry, Patrick, Speech at the Virginia Ratifying Convention, 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854) 5

Massachusetts Ratifying Convention, 2 J. Elliot, Debates on the Federal Constitution 111 (2d ed. 1854) 5

Perry, R. & Cooper, J., eds., Sources of Our Liberties (1959) 3

Schwoerer, L., Declaration of Rights, 1689 (1981) 3

Stinneford, John F., The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739 (2008) 5

Tinoco, Matt, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist, Jan. 22, 2019, 2:08 PM, available at https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php 11

Rules

Rule 10(a).....8

Rule 37.2(a),.....1

Rule 37.6.....1

INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the central idea of federalism, namely, that the states are the repository of the general police power to advance the health, safety, welfare and morals of the people, subject only to the explicit prohibitions of the federal Constitution. That police power is undermined when the courts give overly-broad constructions to generic constitutional language. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing similarly overly-broad construction of constitutional text that intruded on the police powers of the states, including *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *County of Maricopa v. Lopez-Valenzuela*, 135 S. Ct. 2046 (2015); *Town of Greece, New York v. Galloway*, 134 S. Ct. 1811 (2014); and *Horne v. Isaacson*, 134 S. Ct. 905 (2014).

---

[1] Pursuant to Rule 37.2(a), all parties were notified of and have consented to the filing of this brief. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than amici, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

SUMMARY OF ARGUMENT

As originally understood, the Eighth Amendment's Cruel and Unusual Punishment Clause addressed only the *method* of punishment, barring only those methods that were both "cruel *and* unusual," such as "tortures," "racks and gibbets." It did not address whether a particular otherwise-permissible punishment was proportionate to the crime, or "impose substantive limits on what can be made criminal." Those were additional glosses added by this Court in *Robinson v. California*, 370 U.S. 660 (1962), more than a century and a half after the Eighth Amendment was adopted.

But even this Court's holding in *Robinson* dealt only with statutes that criminalized status, not conduct. Statutes prohibiting conduct do not run afoul of the Eighth Amendment. *Powell v. Texas*, 392 U.S. 514 (1968). Here, plaintiffs were not subject to Boise's misdemeanor ban on camping on public property because of their homeless *status*, but because of their conduct that violated Boise's generally applicable law. The decision below those goes well beyond the status/conduct distinction drawn in *Powell*, in conflict both with this Court's decisions and with the decisions of several circuit and state courts.

Moreover, the expansive gloss given to the Eighth Amendment by the Ninth Circuit below constitutes a significant intrusion into the police powers of the states, in an area that has been almost exclusive within the preserve of State authority.

Finally, in order for State and local governments to exercise their long-standing police power authority to deal with the basic health and safety concerns

raised by an expanding homeless population, the Ninth Circuit's decision effectively imposes on them an affirmative obligation for massive public expenditure on homeless shelters, contrary to this Court's decision in *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989).

For all these reasons, the petition for writ of certiorari should be granted, and the decision of the Ninth Circuit reversed.

REASONS WHY REVIEW SHOULD BE GRANTED

I. The Ninth Circuit's Holding that the Eighth Amendment Covers Municipal Ordinances Against Disorderly Conduct and Public Camping Is Contrary to the Original Public Meaning of "Cruel and Unusual Punishment."

The Eighth Amendment to the Constitution is derived from the English Declaration of Rights of 1688. The Declaration of Rights' prohibition of "cruell and unusuall punishments," enacted in February 1689 and assented to by the Crown in December 1689, was the antecedent of the text of the Eighth Amendment. 1 Wm. & Mary. Sess. 2, ch 2 (Dec. 1689). See R. Perry & J. Cooper, eds., Sources of Our Liberties 222-223 (1959); L. Schwoerer, Declaration of Rights, 1689, pp. 279, 295-298 (1981).)

History shows that the "cruell and unusuall punishments" provision of the English Declaration of Rights was enacted to prevent abuses such as those of the infamous Lord Chief Justice Jeffreys of the King's

Bench during the Stuart reign of James II. *See Harmelin v. Michigan*, 501 U.S. 957, 966-973 (1991). The admonition in the Declaration of Rights was motivated by Jeffreys' treatment of those involved with the unsuccessful rebellion of the Duke of Monmouth, and Titus Oates, a Protestant cleric and convicted perjurer. The punishments imposed upon the Monmouth rebels, the trials of whom history has recorded as the "Bloody Assizes," included "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968. Oates was sentenced by the King's Bench to be stripped of his Canonical Habits, stand in the pillory annually at certain times and places, be whipped by the "common hangman" "from Aldgate to Newgate," be whipped again from "Newgate to Tyburn," be imprisoned for life, and pay a fine of "1000 marks upon each indictment." *Id*. at 970 (citing *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1314 (K. B. 1685)). Four years later, and several months after the Declaration of Rights, Oates unsuccessfully petitioned the House of Lords to set aside his sentence as illegal. The House of Commons eventually passed a bill to annul Oates' sentence, and issued a report asserting, among other things, that his criminal sentence was the sort of "cruell and unusuall punishment" that the Parliament had complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 971-72.

In 1791, the new federal Bill of Rights included the prohibition of "cruel and unusual punishments" as previously provided in Virginia's state bill of rights. U.S. Const., amend. VIII; Va. Declaration of Rights § 9 (1776). The meaning of "cruell and unusuall punishment" in the Eighth Amendment necessarily referred to what it meant to the Americans who adopted the

Amendment in the Bill of Rights. *Harmelin*, 501 U.S. at 975. "

"Expressions in the first Congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment," and this view was accepted by state and federal jurists at the time. Anthony F. Granucci, Nor Cruel and Unusual Punishments Inflicted: The Original Meaning, 57 Calif. L. Rev. 839, 842 (1969).

When the Eighth Amendment was drafted, and the several states ratified it, the original public meaning of the Cruel and Unusual Punishments Clause was to "proscribe … methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). Such punishments as "tortures," "racks and gibbets" is what was prohibited. *Harmelin*, 501 U.S. at 979-80 (quoting Patrick Henry, Speech at the Virginia Ratifying Convention, 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854); and Massachusetts Ratifying Convention, 2 Elliot's Debates, at 111). Moreover, even punishments that might be considered cruel would pass constitutional muster unless they were also unusual (as in, not frequently or widely put into practice). John F. Stinneford, The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739 (2008), *see also Stanford v. Kentucky*, 492 U.S. 361, 378 (1969). Misdemeanor convictions (and the minor punishments at issue here—"time served," "one additional day in jail," and "a $25 fine," Pet.App. 40a) are certainly far removed from the "cruel and unusual punishments" that were prohibited by the Eighth Amendment as originally understood.

II. The Ninth Circuit's Holding Goes Well Beyond This Court's Holding in *Robinson* That Criminalization of Mere Status Can Violate the Eighth Amendment, and Conflicts with the Decisions of Several Other Circuit and State Courts.

This Court has held that the Eighth Amendment's Cruel and Unusual Punishment Clause limits not only the types of punishment that may be imposed, but also punishments that are grossly disproportionate to the severity of the crime and even "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). That third category, first articulated in *Robinson v. California*, 370 U.S. 660 (1962), was aimed at statutes that made mere "status" a crime (such as the *status* of being a drug addict or alcoholic), not the "antisocial or disorderly behavior resulting from" that status. *Id.* at 666. And it was precisely that distinction that led this Court in *Powell* to uphold a Texas statute that criminalized public drunkenness, as distinct from the status of being an alcoholic. 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.

Powell, 392 U.S. at 532 (plurality opinion).

Justice White agreed, noting that Powell was not convicted "for being drunk," but "for the different crime of being drunk in a public place." *Id.* at 549

(White, J., concurring in the judgment). Although Justice White also speculated that, for chronic alcoholics who were homeless, the ban on public drunkenness might be "*in effect* a law which bans [the act of getting drunk] for which they *may* not be convicted under the Eighth Amendment," *id.* at 551 (emphasis added), that is classic *dicta.* The Court below treated it as a holding, however, and one which is contrary to the actual holding of the case. Whether Justice White's *dicta* should displace the actual holding in *Powell* (and therefore whether the "status" holding in Robinson should be expanded even further and the limitation on that holding contained in *Ingraham* and the plurality opinion in *Powell* be discarded), is an issue that should be resolved by this Court.

As the dissent from denial of rehearing en banc noted, the Ninth Circuit's decision below is also in conflict with the decisions of several other Circuit Courts, which have faithfully followed this Court's distinction between "status" and "conduct." Pet.App. 9a-10a (citing, *e.g.*, *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc) ("there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct"); *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his status as an alcoholic but for his conduct"); and *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions"). A panel of the Fourth Circuit likewise followed that distinction. *Manning v.*

Caldwell, 900 F.3d 139, 153 (4th Cir. 2018). And although the panel decision was vacated and remanded by the *en banc* Court on the ground that the Virginia law at issue—banning possession of alcohol by a habitual drunkard—actually targeted the alcoholic's status,[2] even the en banc court recognized that "A state undoubtedly has the power to prosecute individuals, even those suffering from illnesses, for breaking laws that apply to the general population." *Manning v. Caldwell*, 930 F.3d 264, 284 (4th Cir. 2019) (en banc).

Perhaps most troubling, the decision by the Ninth Circuit below is also in conflict with a decision of the Supreme Court of California—a State within the Ninth Circuit's jurisdiction—that *upheld* a public camping ban just like the one at issue here against an Eighth Amendment challenge by "homeless residents." *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995). "The ordinance permits punishment for proscribed conduct, not punishment for status," that Court held. *Id.* at 1166. The Ninth Circuit has thus "decided an important question in a way that conflicts with a decision of a state court of last resort" on an important matter of federal constitutional law that should be resolved by this Court. Rule 10(a).

III. The Ninth Circuit's Decision Severely Intrudes Upon the States' Police Powers

The most basic duty of every municipality and state is to protect public health and safety. *Metropolitan Life. Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). To apply the Eighth Amendment prohibition

---

[2] The en banc court also held that the phrase, "habitual drunkard," was unconstitutionally vague. *Manning v. Caldwell*, 930 F.3d 264, 278 (4th Cir. 2019) (en banc).

against cruel and unusual punishment to prohibit enforcement of reasonable municipal ordinances to regulate public camping and disorderly conduct would necessarily cause other reasonable ordinances to be challenged, and negated, under the same reasoning.

There is currently a public health and environmental crisis in our cities due to the proliferation of campers on city streets. The cities being forced to allow the behavior of camping on city streets, and the concomitant dumping of raw human waste and other dangerous sewage such as narcotics needles onto the streets, endangers other citizens. Medieval diseases once thought eradicated in our country are reappearing. It begs the question of whether citizens victimized by the blight caused by public campers have any rights to be considered in the equation. Surely, all of the degradation in the physical environment, water quality (the raw sewage from public campers runs directly into the waterways and beaches used and enjoyed by all citizens), and safety and security of the public areas needs to be considered. To disallow municipalities from enforcing the anti-public camping ordinances would usurp the fundamental duties of local and state governments to protect the health and safety of its citizens.

"Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 536 (2012). The tradition of the Court in deferring to state legislatures and local policy makers in making and

implementing important policy decisions is longstanding. *Ewing v. O'Connor*, 538 U.S. 11, 24 (2003), citing *Weems v. U.S.*, 217 U.S. 349, 379 (1910). The definition of crimes and how such crimes are punished turn on state law and "this Court awards great deference to such determinations." *Overton v Bazzetta*, 539 U.S. 126, 140 (2003).

The Ninth Circuit's expansive interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause to countermand state and local policy judgments on matters that have historically been within the exclusive authority of the States likewise warrants this Court's review.

IV. The Eighth Amendment Cannot Be Used To Impose Unconstitutional Affirmative Obligations On Municipalities.

The Constitution is a charter of negative liberties and does not impose affirmative obligations on government. *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989). *See* David Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864 (1986).

A ruling that forbids enforcement of reasonable ordinances to protect the health and safety of all citizens unless and until there are enough spare beds to house all "involuntarily" homeless persons within a municipality impermissibly burdens local governments. The court's homeless housing provision edict is not supported by the law because the Eighth Amendment has no application. Moreover, the Constitution does not permit the Court to dictate these types of policies to local and state governments. The financial burden

placed on the localities, along with the practical considerations of compliance, go beyond the scope of what type of obligations are enforceable under the Constitution.

Government inaction is not actionable. *City of Canton v. Harris*, 489 U.S. 378, 394-395 (1989) (O'Connor, concurring in part and dissenting in part). The Due Process Clause of the Fourteenth Amendment is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. Its language cannot be said to impose an affirmative obligation on the state. "Nor does history support such an expansive reading of the constitutional text…. The Framers were content to leave the extent of governmental obligation … to the democratic political process." *Deshaney*, 489 U.S. at 195-96.

To comply with the homeless housing provision edict, a count would have to be conducted each night of the homeless. Consider the scope and near impossibility of such a task in a city the size of Los Angeles.[3] Consider the proliferation of litigation should any city so burdened miscount and issue citations under the false impression that there were adequate shelter beds available on any one night. Consider the impact on many cities now, who have given up and just stopped enforcing their anti-public camping ordinances for fear of running afoul of the law. Many of their public areas have become uninhabitable, both

---

[3] Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist, Jan. 22, 2019, 2:08 PM, https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php.

for the unfortunate souls who are camping in public, and for the rest of the public.[4] The court exceeds its jurisdiction (and creates a conflict with several other circuits) when it presumes to prescribe to every city in nine diverse states in the western United States, as well as in Guam and the Northern Marianas Islands, how to manage their indigent housing programs. *NFIB*, 567 U.S. at 535.

CONCLUSION

For the foregoing reasons, the Court should grant review and reverse the decision below.

September 2019

Respectfully submitted,

CAROL M. MATHEIS
P. O. Box 2074
Newport Beach, CA 92659
(949) 455-9410
matheislaw@live.com

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
The Claremont Institute's
Center for Constitutional
Jurisprudence
c/o Fowler School of Law
Chapman University
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

[4] Stefanie Dazio, *Union: LA Officer Gets Typhoid Fever, 5 Others Show Symptoms*, AP, May 30, 2019, https://www.apnews.com/e6c4a34980c549deada4f1f981cedb80