No. 19-247

IN THE
Supreme Court of the United States

CITY OF BOISE,

Petitioner,

v.

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

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

THEODORE B. OLSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

THEANE D. EVANGELIS
Counsel of Record
BRADLEY J. HAMBURGER
JOSEPH TARTAKOVSKY
SAMUEL ECKMAN
WILLIAM F. COLE
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

REPLY BRIEF FOR PETITIONER

The City of Boise, like many municipalities, is confronting a homelessness crisis of epidemic proportions. To combat this crisis, Boise has adopted a multi-pronged strategy that includes the construction of housing for the homeless, the expansion of social services, and the enforcement of ordinances prohibiting camping on public property—where many of Boise's most vulnerable residents find themselves falling victim to crime and disease, isolated from medical services, exposed to the elements, and assaulted (and in one case murdered) by others living on the streets.

In the decision below, however, the Ninth Circuit held that the Eighth Amendment renders Boise powerless to prohibit public camping—no matter the danger to the public at large or to the homeless—unless it provides "adequate," "indoor" shelter for every unhoused person in the "jurisdiction." Pet. App. 62a & n.8. This conclusion was premised on its erroneous interpretation of *Powell v. Texas*, 392 U.S. 514 (1968), which rejected an Eighth Amendment challenge to a law regulating public drunkenness. Although the plurality in *Powell* held that the Eighth Amendment prohibits only laws regulating status, the Ninth Circuit relied on Justice White's concurrence and the views of the *Powell* dissent to conclude that the Eighth Amendment bars laws regulating "sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." Pet. App. 61a–62a.

The First and Seventh Circuits have declined to accord controlling weight to Justice White's *Powell* concurrence, and the Eleventh Circuit and the

California Supreme Court have rejected similar challenges to public-camping ordinances. Plaintiffs attempt to distinguish these cases only by ignoring their central holdings and mischaracterizing the decision below.

Despite its sweeping consequences, Plaintiffs insist the Ninth Circuit's decision is narrow and "does no more than prohibit the imposition of criminal penalties against homeless individuals who engage in 'the simple act of sleeping outside' when 'no alternative shelter is available to them.'" Opp. 2. But the Ninth Circuit did much more—it squarely held "'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" Pet. App. 61a. As Justice Marshall warned, such a rule has no "limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of criminal law, throughout the country." *Powell*, 392 U.S. at 533 (plurality op.).

Plaintiffs also ignore the twenty *amicus* briefs on behalf of seven states and 45 counties, cities, and local service providers—as well as eight organizations, including the National League of Cities, that collectively represent tens of thousands of cities, towns, and counties across the country—all of which confirm the widespread impact of the decision. In communities throughout the Ninth Circuit, governments are already abandoning efforts to address homelessness rather than face potentially massive liability. The forgotten victims are those

vulnerable individuals left to live and die on the streets. There is no time to wait.

The Court should grant review and reverse the decision below.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT AND CREATES A CONFLICT AMONG THE LOWER COURTS.

No decision of this Court or any other federal court of appeals or state supreme court has ever invalidated on Eighth Amendment grounds a generally applicable law regulating conduct. Plaintiffs insist that those courts that have rejected similar Eighth Amendment challenges either did not "suggest that the Eighth Amendment is *categorically* inapplicable to laws that purport to criminalize 'conduct,'" Opp. 17 (emphasis added), or involved distinguishable facts. But Plaintiffs' attempt to reconcile the Ninth Circuit's decision with the decisions of these other courts does not withstand scrutiny.

A. This Court Has Never Extended The Eighth Amendment To Laws Targeting Conduct.

Although this Court has recognized that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such," it has warned that this "limitation [is] one to be applied sparingly." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). The Court has only considered these substantive limits on two occasions, and each time it held that the Eighth Amendment prohibits only laws regulating *status*.

Plaintiffs do not seriously contend that *Robinson v. California*, 370 U.S. 660 (1962), which struck down

a statute that "ma[de] the 'status' of narcotic addiction a criminal offense," *id.* at 666, supports the Ninth Circuit's decision. Rather, they maintain that "[w]hile *Robinson* recognizes that status crimes violate the Eighth Amendment, nothing in that opinion *limits* the scope of the Eighth Amendment to such crimes" because the Court did not "purport to draw a bright-line distinction between crimes that penalize status and those that penalize innocent 'conduct' that is an unavoidable by-product of a person's status." Opp. 17 (emphasis in original).

But *Robinson did* draw such a distinction. The Court emphasized that "[a] State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders." 370 U.S. at 664. Crucially, however, the statute there "[wa]s not one which punishe[d] a person for *the use* of narcotics," but rather "ma[de] the '*status*' of narcotic addiction a criminal offense." *Id.* at 666 (emphases added).

And in *Powell*, which rejected an Eighth Amendment challenge to a statute that prohibited public intoxication, a plurality of the Court "concluded that *Robinson* did not apply to conduct." Opp. 16. Despite acknowledging this, Plaintiffs rely on the four-Justice dissent and Justice White's concurrence to argue that "five Justices in *Powell* would have held that an individual cannot be criminally punished for conduct that is impossible to avoid." Opp. 18. But Justice White's agreement with the dissent on this issue was dicta, *see* Pet. 17–18, and in any event, under *Marks v. United States*, 430 U.S. 188, 193 (1977), the views of dissenting Justices cannot be considered in divining the holding of a divided court.

In fact, the Ninth Circuit's reading of *Powell* creates another circuit split, as numerous circuit courts applying *Marks* have rejected the relevance of dissenting opinions in interpreting a divided court's holding. *See, e.g.*, *Gibson v. American Cyanamid Co.*, 760 F.3d 600, 620 (7th Cir. 2014); *United States v. Anderson*, 771 F.3d 1064, 1068 n.2 (8th Cir. 2014); *United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991).

Plaintiffs cite two cases that they claim support the Ninth Circuit's reading of *Powell*, Opp. 18, but both are easily distinguished. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the Court rejected the relevance of Justice Rehnquist's opinion in *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), noting that the "opinion commanded only four votes" whereas "a majority of the Court," including a four-Justice dissent, disagreed. Opp. 17. But in *Moses H. Cone*, the Court only rejected an argument that an opinion that lacks a majority could modify binding precedent—it did not endorse the proposition that the views of a dissent could create binding precedent.

In *United States v. Jacobsen*, 466 U.S. 109 (1984), the Court cited a two-Justice opinion and a four-Justice dissent in *Walter v. United States*, 447 U.S. 649 (1980), describing when the Government's investigation of contraband following a private search constitutes a new search for Fourth Amendment purposes. But unlike here, the only other opinion was *also* joined by only two Justices (Justice Marshall, who cast the deciding vote, did so without opinion), and that opinion endorsed a broader view of the Fourth Amendment. Thus, *Jacobsen* merely adopted

the narrower of two opinions supporting the Court's holding, as required by *Marks*.

At minimum, the fractured opinion in *Powell* has left unsettled an important question of federal law. This alone merits review.

B. The Decision Below Creates A Conflict Among The Lower Courts.

Review is also warranted because the Ninth Circuit's decision conflicts with decisions of other courts of appeals and the California Supreme Court both on the threshold question whether the Eighth Amendment prohibits laws regulating conduct, and the question whether laws proscribing public camping violate the Eighth Amendment.

1. The decision below creates a three-way split respecting whether the Eighth Amendment prohibits laws regulating conduct. The First and Seventh Circuits have held that it does not. *United States v. Sirois*, 898 F.3d 134 (1st Cir. 2018); *United States v. Black*, 116 F.3d 198 (7th Cir. 1997). The Fourth Circuit has held that it does, but only when the law targets those for whom the conduct is involuntary. *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc). The Ninth Circuit stands alone in holding that purportedly involuntary conduct cannot be regulated under the Eighth Amendment.

Plaintiffs attempt to distinguish the first set of cases on the ground that they involved "the situation where an individual claims he cannot comply with a law because he has an internal compulsion to violate it," whereas the decision below is "limited … to those who are penalized for activity that is simply the 'universal and unavoidable consequence[] of being human.'" Opp. 22. But the First and Seventh Circuits

reached their conclusions because they declined to recognize as controlling Justice White's concurrence in *Powell*. *See Sirois*, 898 F.3d at 138 ("Justice White's *Powell* concurrence … has yet to gain any apparent relevant traction."); *Black*, 116 F.3d at 201 n.2 ("Defendant's principal reliance is on the concurring opinion of Justice White in *Powell v. Texas*. However, since no other Justice joined in that opinion, it need not be discussed further."). Here, by contrast, the Ninth Circuit's decision hinged on Justice White's concurrence (along with the views of the *Powell* dissent). Pet. App. 61a–62a. If this case were decided in the First or Seventh Circuits, a different result would have obtained.

Plaintiffs' effort to reconcile the decision below with the Fourth Circuit's decision in *Manning* is also unavailing. While the Fourth Circuit—like the Ninth Circuit, but unlike the First and Seventh Circuits—held that "Justice White's opinion constitutes the holding of the Court" in *Powell*, it read that opinion as prohibiting only laws that "singled [defendants] out for special punishment for otherwise lawful conduct that is compelled by their illness." *Manning*, 930 F.3d at 280–81 nn.13 & 14. Boise's ordinances, however, prohibit *all* public camping.[1] Thus, even if this case were decided in the Fourth Circuit, the outcome still would have been different.

---

[1] While Plaintiffs claim the *Manning* majority agreed with the Ninth Circuit's decision, Opp. 24, it agreed only that Justice White's opinion in *Powell* was controlling, and did not pass on whether the Ninth Circuit correctly interpreted that opinion. *See Manning*, 930 F.3d at 282 n.17.

2. The Ninth Circuit's decision also conflicts with decisions rejecting Eighth Amendment challenges to materially identical laws regulating public camping.

In *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), the Eleventh Circuit upheld a statute providing that "[c]amping is prohibited on all public property." *Id.* at 1356. The court recognized that "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not," and citing the *Powell* plurality, concluded that the law "target[ed] conduct, and does not provide punishment based on a person's status." *Id.* at 1361–62. Plaintiffs respond that "if the Eleventh Circuit intended such a sweeping rule, it would have had no need to 'distinguish[]'" district court cases "on the grounds that 'the lack of sufficient homeless shelter space in those cases … made sleeping in public involuntary conduct.'" Opp. 21. But the court drew this distinction in response to the argument that *Robinson* and *Powell* should be *extended* to involuntary conduct, concluding that "*even if* we followed the reasoning of the district courts in [those cases] this case is clearly distinguishable." 232 F.3d at 1362 (emphasis added).

Plaintiffs' attempt to distinguish *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), on the ground that it "involved *only* a 'facial challenge' to ordinances barring camping and storage on public property," Opp. 19 (emphasis in original), also fails. *Tobe* stressed that "[n]o authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless," and cited the *Powell* plurality in concluding that "the Supreme Court has not held that the Eighth Amendment prohibits

punishment of acts derivative of a person's status." 892 P.2d at 1166. Consequently, if an as-applied challenge were brought under the facts presented here, that challenge would be rejected under the rule articulated in *Tobe*.

II. AS THE TWENTY *AMICUS* BRIEFS SHOW, THE NINTH CIRCUIT'S DECISION IS CRIPPLING THE ABILITY OF LOCAL GOVERNMENTS TO PROTECT PUBLIC HEALTH AND SAFETY.

The Ninth Circuit's decision has already frustrated efforts to curb the growing epidemic of public camping in the Western United States, which poses serious threats to the health and safety of the public at large, as well as those who live on the streets. This paralysis will continue unless this Court intervenes.

Plaintiffs brush these concerns aside as "dramatically overstated" and "highly speculative," emphasizing that "the decision below prohibits a city from enforcing its ordinances in one—and only one—situation: where it punishes a homeless person for sleeping, lying or sitting outside when he has no place else to go." Opp. 25. But this ignores the practical realities faced by those charged with enforcing public-camping ordinances, which render the Ninth Circuit's attempts to narrow its unprecedented rule wholly illusory.

As *amici* explain, it is "impossible as a practical matter to issue camping citations without risking running afoul of *Martin*." IMLA Br. 18–19. For example, there is no reliable way to determine whether a particular individual has access to shelter through, say, a friend or relative. And "most jurisdictions cannot practically determine how many homeless individuals reside within their geographical

jurisdiction on a daily basis" because doing so would require "dedicating cost-prohibitive staffing resources to conduct daily counts." *Id.* at 19.

The implications of the Ninth Circuit's decision are apparent from municipalities' responses to it. "[T]he majority of Oregon cities are not enforcing ordinances prohibiting camping on city property" in the wake of the decision. League of Oregon Cities Br. 4. The City of Aberdeen, Washington "halted enforcement of its public camping ordinance" to "comply with *Martin* limitations." City of Aberdeen, Washington Br. 8. And the Orange County Sheriff's Department "has advised *amicus* San Clemente that its officers would not enforce the City's public camping ordinance against individuals who had been evicted from the San Clemente campsite, claiming that such enforcement is barred by the decision below." Seven Cities in Orange County Br. 11.

Those municipalities that have not ceased enforcing their public-camping ordinances have found themselves hauled into court. One court found that the Ninth Circuit's decision may extend not just to "criminal sanctions" but to "civil penalties" imposed under anti-camping laws. *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019). Another found that it forbids even "move-along orders" or "warnings." *Blake v. City of Grants Pass*, 2019 WL 3717800, *5 (D. Or. Aug. 7, 2019).

However narrow the Ninth Circuit may have intended its decision to be, it has in practice established a constitutional right to camp in public within the Ninth Circuit—a jurisdiction that encompasses nine states, two territories, and more than 1,600 municipalities. And however well-intentioned, the decision has hurt the very people it is

designed to help. As *amici* note, for example, Los Angeles has "largely abandoned" the Bridge to Home program, which "encourage[s] communities to accept shelter housing in their neighborhood, with the inducement of being protected from the ills of permanent encampments," after "threats of litigation." Maryrose Courtney Br. 21.

III. This Case Presents An Ideal Vehicle For Resolving The Question Presented.

Finally, Plaintiffs attempt to avoid review by suggesting that this case is an inappropriate vehicle. *See* Opp. 31. Nothing could be further from the truth.

First, Plaintiffs contend that Boise "is not well placed to bring th[is] challenge" because it "amended its law in 2014 to forbid the enforcement of its anti-camping" ordinances "where there is no available shelter." Opp. 31. But Boise law defines "available shelter" differently than the Ninth Circuit did in interpreting the Eighth Amendment. Pet. App. 123a–24a. Where Boise's Shelter Protocol is satisfied, as was the case here, shelter is "available" under Boise's ordinances. Thus, Plaintiffs are wrong to suggest that the decision below prohibits only what "already is supposed to be prohibited under Boise's current law," Opp. 2; if that were the case, the Ninth Circuit would have affirmed the district court's judgment in Boise's favor.

Second, Plaintiffs warn that this case requires "a highly fact-intensive, preliminary jurisdictional inquiry" respecting Plaintiffs' standing. Opp. 32. But the Court *always* has a threshold duty to confirm its jurisdiction, and Plaintiffs provide no reason to think this inquiry is any more complicated here. Moreover,

the Ninth Circuit held that Plaintiffs had standing, and no party has challenged that holding.

Third, Plaintiffs argue that "the interlocutory posture of this case counsels against review," and that "the Court should await a final judgment reflecting a fully developed factual record." Opp. 33. But this case presents a question of pure law: "Does the enforcement of generally applicable laws regulating public camping and sleeping constitute 'cruel and unusual punishment' prohibited by the Eighth Amendment of the Constitution?" Pet. i. There is no reason to await factual findings to answer that question. In fact, if this Court reverses the decision below, there will be no need for any factual findings.

The decision below has upended the efforts of public officials to manage a growing crisis. The consequences are nothing short of life and death for the tragically large number of people trapped on the streets. Now is the time to resolve this question of exceptional public importance.

CONCLUSION

The Court should grant review and reverse the Ninth Circuit's decision.

Respectfully submitted.

THEODORE B. OLSON
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
tolson@gibsondunn.com

THEANE D. EVANGELIS
Counsel of Record
BRADLEY J. HAMBURGER
JOSEPH TARTAKOVSKY
SAMUEL ECKMAN
WILLIAM F. COLE
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Petitioner

November 13, 2019