No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON, ET AL.,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION OF SHERIFFS AND POLICE CHIEFS IN SUPPORT OF PETITIONER

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United States v. Harriss,
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Wash. Rev. Code § 36.28A.440 2

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Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

Casey Garth Jarvis,
Homelessness: Critical Solutions to a Dire Problem: Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation,
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Elisha Meyer,
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Esther Bower,
'Not a Safe Place': Police Say Crime is up 58% Near Camp Hope, Business Owners Overwhelmed with Damage,
KXLY.COM (Apr. 11, 2022) 10, 11

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Franque Thompson,
Death at Seattle Encampment Raises Questions About Addressing Homelessness in Region, FOX13 SEATTLE (Mar. 15, 2023) 10

Joseph Tartakovsky,
Judicial Interventionism: How Court Rulings Change How Cities Enforce "Quality of Life" Laws, NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY, Encounter Books, N.Y. (2021) 24

Kerry Jackson,
Postcards from the Epicenter: Just How Bad Is Homelessness in California? NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY, Encounter Books, N.Y. (2021) 12

Kirk Johnson,
Seattle Underbelly Exposed as Homeless Camp Violence Flares, N.Y TIMES (Mar. 1, 2016) 10

Lauren Dunton et al., (Abt Associates),
Exploring Homelessness Among People Living in Encampments and Associated Cost: City Approaches to Encampments and What They Cost, U.S. Dep't of Housing & Urban Dev. (2020) 6, 7, 8, 9, 17

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Peter Talbot,
Man Killed in Tacoma Homeless Encampment Shooting Identified by Medical Examiner, THE NEWS TRIBUNE (July 26, 2023) 11

Risa Goluboff,
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Sean E. Goodison, et al.,
The Law Enforcement Response to Homelessness: Identifying High-Priority Needs to Improve Law Enforcement Strategies for Addressing Homelessness, RAND SOCIAL & ECON. WELL-BEING (2020) .. 14-16

Sean E. Goodison, et al.,
The Law Enforcement Response to Homelessness: Identifying High-Priority Needs to Improve Law Enforcement Strategies for Addressing Homelessness: Synopsis, RAND SOCIAL & ECON. WELL-BEING (2020) 13

St. Michael's Hospital,
85 Percent of Homeless People Have Chronic Health Conditions, SCIENCE DAILY (Aug. 24, 2011) 12

TABLE OF AUTHORITIES – Continued

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TACOMA WEEKLY,
City's Homeless Plan Appears to be Working (Aug. 4, 2023) 11

Tammy Mutasa,
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Vianna Davila & Jonathan Martin,
Rare Infectious Diseases are Rising at an 'Alarming' Rate in Seattle's Homeless Population, Concerning Health Officials, THE SEATTLE TIMES (Mar. 15, 2018) 12

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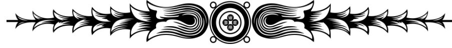
Status of Fact-Finding Year 2 Revised – December 23, 2022: Pathways to Housing Security (2022) 8



INTEREST OF THE AMICI CURIAE[1]

Formed in 1963, the Washington Association of Sheriffs and Police Chiefs ("WASPC") is a non-profit association representing management personnel from Washington State law enforcement agencies, including county sheriffs, city and town police chiefs, executives of the Washington State Patrol and Department of Corrections, and representatives of federal and tribal law enforcement agencies. WASPC's mission is to foster collaboration among law enforcement executives to enhance public safety across Washington. WASPC accredits law enforcement agencies and develops industry best practices and standards for the state.

Sheriffs and chiefs of police are the primary officials responsible for law enforcement and safety in Washington State. Chiefs of police are the primary law enforcement officers in Washington cities and towns and sheriffs are the constitutionally designated elected officials who serve as the chief law enforcement officers for each of Washington's 39 counties. *See* Wash. Rev. Code §§ 35.23.021; 36.16.030.

WASPC is specifically recognized by Washington State as a "combination of units of local government,"

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[1] In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. In accordance with Rule 37.2, counsel for *amicus* notified counsel of record for the parties of Washington Association of Sheriffs and Police Chief's intention to file this *amicus* brief via email on September 14, 2023.

with various duties including assistance in "developing and implementing . . . local law and justice plan[s]." Wash. Rev. Code §§ 36.28A.010, 020. WASPC also administers various grant programs to aid Washington State in combatting specific types of crime, including gang crime, graffiti, and other statewide problem areas. *See* Wash. Rev. Code §§ 36.28A.200, 210, 240. WASPC is tasked with developing and implementing a "mental health field response grant program" to "assist local law enforcement agencies to establish and expand mental health field response capabilities." Wash. Rev. Code § 36.28A.440.

The crisis of homelessness and proliferation of tent encampments across Washington streets presents both a policy challenge for local legislators and a practical public safety challenge for WASPC's members. The propensity for litter, drug use, disease, and criminal activity surrounding these encampments has made daily engagements with encampment residents a typical task for Washington law enforcement. The Ninth Circuit's rulings in *Martin v. City of Boise*[2] and the matter before this Court on the City of Grants Pass' Petition take policymaking authority away from local governments and law enforcement agencies entirely, instead creating a new, unprecedented constitutional "right to public camping." This judicial policymaking freezes things as they are and forbids local governments and their law enforcement officers from acting to keep their communities healthy and their streets safe.

The Ninth Circuit's decision has harmed the ability of WASPC's members to carry out their basic

[2] 920 F.3d 584 (9th Cir. 2019).

law enforcement functions, and has increased risks to the basic safety of WASPC officers and citizens under their protection. Thus, WASPC submits the following *amicus curiae* brief to this Court for its consideration and respectfully requests that this Court grant petitioner City of Grants Pass's pending Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

Petitioner City of Grants Pass has exhaustively briefed the Ninth Circuit's erroneous Eighth Amendment analysis and unprecedented expansion of the criminalization of "status" analysis from *Robinson v. California*[3] and the *Powell v. Texas*[4] dissent. Rather than repeat Petitioner's arguments here, WASPC wishes to draw this Court's attention to the real life consequences of the Ninth Circuit's rulings and the history of local public camping and homelessness regulation.

(1) The Ninth Circuit's rulings in this case and in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018) *rehearing en banc denied by* 920 F.3d 584 (2019) have created a dramatic public health crisis across Washington State. As six circuit judges dissenting from the denial of rehearing en banc recognized even in 2019, *Martin*'s ruling immediately "beg[an] wreaking havoc on local governments, residents, and businesses throughout our circuit" by forbidding "laws restricting

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[3] 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

[4] 392 U.S. 514, 88 S. Ct. 2145, 20 L. Ed. 2d 1254 (1968).

public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions." *Martin*, 920 F.3d at 590 (Smith, J., dissenting). The Ninth Circuit's decision in this case cements and expands the problems originating with *Martin*.

(2) Local jurisdictions across the United States have regulated homelessness since long before the drafting of the Constitution far more harshly and inhumanely than they do today. This Court has since correctly overturned the eighteenth century's overbroad "vagrancy" laws as void for vagueness, but has never held that those laws ran afoul of the Eighth Amendment prohibition on cruel and unusual punishment. Local governments' more modern efforts to protect their communities from the unchecked spread of encampments across public streets and parks present a specific, targeted effort to enhance public safety without criminalizing basic existence in the manner of the early vagrancy laws. Because the original intent of the Eighth Amendment did not even prohibit contemporary vagrancy laws, it cannot possibly prohibit regulation of public camping.

ARGUMENT

I. THE NINTH CIRCUIT'S ERRONEOUS INTERPRETATION OF *ROBINSON* AND *POWELL* THREATENS TO CRIPPLE THE ABILITY OF WASHINGTON LEGISLATORS AND LAW ENFORCEMENT PERSONNEL TO ADDRESS A SERIOUS PUBLIC HEALTH CRISIS

The case now before this Court presented an opportunity for the Ninth Circuit to spell out the limitations of its earlier *Martin* ruling and at least allow local governments to regulate public camping through civil citations. Instead, after inviting the enormous expansion of public camping through its first wrong decision, the Ninth Circuit compounded its error, holding that "*Martin* applies to civil citations" and may serve as a vehicle for class litigation. *Johnson v. City of Grants Pass*, 72 F.4th 868, 896 (9th Cir. 2023).

The predictable (and predicted by the dissenting judges) result of *Martin* and *Johnson* is an explosion of tent cities (referred to generally throughout this brief as "encampments") in public parks and streets all across the State of Washington.[5] These encampments have correspondingly presented a new public safety threat to Washington communities, transforming the daily lives and basic duties of WASPC's members

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[5] WASPC believes that the problems Washington faces as a result of *Martin* and *Johnson* apply across the entire Ninth Circuit, as illustrated by the Petition for Writ of Certiorari and other *amici*. However, WASPC views its role as *amicus curiae* to be to draw this Court's attention to impacts felt in its home jurisdiction of Washington State and, thus, limits the scope of its briefing accordingly.

tasked with keeping their communities safe and healthy. Precincts across Washington spend thousands of dollars and significant time responding to repeated concerned emergency calls relating to encampments and relocating those encampments from place to place. Due to the Ninth Circuit's rulings, basic steps including arrests, and now also civil citations, have been removed from the law enforcement toolkit entirely in this context—even where law enforcement has the full backing of the local or State government to take action and move encampments off public streets and property. As a result, WASPC's members are severely limited, even when responding to repeated emergency calls all emanating from the same problematic locations.

As a study commissioned by the United States Department of Housing and Urban Development ("HUD") found, "[e]ncampments have implications for the health, safety, and well-being of the people who use them—as well as for the surrounding communities—with possible adverse effects on public health and safety, environmental quality, economic vitality, and the allocation of public resources."[6] Specific "public health and safety hazards to encampment residents and to surrounding neighborhoods and businesses" include "human waste, used needles, rodents, disease, and criminal activity (primarily drug use and prostitution)."[7] "Encampments also can cause negative

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[6] U.S. Dep't of Housing & Urban Dev., *Exploring Homelessness Among People Living in Encampments and Associated Cost: City Approaches to Encampments and What They Cost* at ES1 (2020)

[7] *Id.* at 18.

impacts on the natural environment" polluting "waterways and soil."[8] The growth of homeless encampments, combined with the propensity for filth, drug use, and lawlessness emanating from these encampments, had already created a public health crisis in Washington before the Ninth Circuit's *Martin* ruling. That decision—and now the *Grants Pass* decision—have crippled the State's ability to respond to this crisis effectively.

1. Washington State Faces an Unprecedented Crisis of Homelessness.

Before the Ninth Circuit's *Martin* decision, homelessness was already a public health and safety challenge in Washington. Since that ruling, the proliferation of encampments on Washington public property has spiraled out of control.

In 2021, the Washington Legislature found that "affordable housing, housing instability, and homelessness [were] persistent and increasing problems throughout the state" and that the "number of unsheltered homeless encampments in greenbelts, under bridges, and on our streets is a visible reminder that the current system is not working."[9] At that time, the Legislature funded a an "examination" of the root causes of homelessness, intending to "[a]ddress the root causes of the problem" and "clearly assign responsibilities of state and local government to address those cases," as well as "support local control and provision of services at the local level to address specific com-

[8] *Id.*

[9] 2021 Wash. Laws, ch. 214 § 6(1)(a).

munity needs, recognizing each community must play a part in the solution."[10]

At the Legislature's direction, the William D. Ruckelshaus Center, a joint effort of the University of Washington and Washington State University, engaged in a "multi-year effort of fact-finding and stakeholder discussions to explore the nature and scope of housing instability and homelessness in Washington with the ultimate purpose of identifying options and recommendations for a strategy to improve services and outcomes and develop paths to permanent housing solutions."[11]

In December, 2022, that commissioned study found that: "For nearly a decade, Washington State has seen a steady increase in the number of persons and households experiencing homelessness."[12] "According to the most recent national [point in time] count data, there are more than half a million individuals experiencing homelessness in the United States. In terms of absolute numbers, Washington ranks third, outpaced only by California and Texas." *Id.*[13] Specifically, the homeless population in Washington increased 16% between 2020 and 2022, from 22,923 to 25,452 individuals.[14]

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[10] *Id.* § 6(1)(c).

[11] William D. Ruckelshaus Center, *Pathways to Housing Security: Year 2 Report Revised – December 23, 2022* at iv (2022).

[12] William D. Ruckelshaus Center, *Status of Fact-Finding Year 2 Revised – December 23, 2022: Pathways to Housing Security* (2022) at 4.

[13] *Id.*; *See also generally* Dep't of Housing & Urban Dev., *supra* n.6 (summarizing detailed statistics documenting the recent growth in numbers of homeless individuals in major American cities).

[14] William D. Ruckelshaus Center, *supra* n.12 at 5.

Nationwide, the Department of Housing and Urban Development estimated in 2020 that the "number of people experiencing unsheltered homelessness, defined . . . as living in a place not meant for human habitation, ha[d] grown to more than 200,000."[15] HUD Report 2020. Similarly, "[a]s of 2019, homeless encampments were appearing in numbers not seen in almost a century."[16]

As outlined further below, this increase has ripple effects throughout communities, including a corresponding increase in law enforcement's role responding to encampment-related emergency calls.

2. Encampments Present Serious Risks to Public Safety.

Concrete examples of the serious public safety threat caused by unregulated encampments fill local news reports across Washington.

"Disturbing, violent crime in and around Seattle's homeless camps continues to be a growing problem with business owners and neighbors saying they feel under siege."[17] Seattle Mayor Bruce Harrell has noted that "[t]here is unfortunately criminal activity, and often these conditions lends itself to more criminal activity."[18]

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[15] Dep't of Housing & Urban Dev., *supra* n.6 at Foreword.

[16] *Id.* at 1.

[17] Tammy Mutasa, *Growing Crime Rate at Seattle's Homeless Camps Prompts Anxiety, Demands for Solutions*, KOMO NEWS (May 20, 2022).

[18] *Id.* (quoting Seattle Mayor Bruce Harrell).

"Seattle police say in the first part of [2022], more than 42 percent of the shootings and shots fired calls they received citywide were linked to encampments," reflecting "more than double the rate in 2021 when 20 percent occurred at camps."[19] "Crime data shows [sic] there were 612 shootings or shots fired for all last year, up from 437 in 2020. Seattle police say the gun crimes tied to homeless camps jumped 122 percent during that span."[20] Another recent article noted a recent death of a woman at a Seattle encampment as an "example of a broken support system."[21]

In 2016, well before *Martin*'s exacerbation of the problem, the NEW YORK TIMES observed that police and fire crews had "responded to trouble in [a particular large Seattle encampment] more than 820 times in the last five years, including 70 violent incidents, 500 emergency medical calls and 250 fires," including multiple shootings.[22]

In April 2022, "[t]he Spokane Police Department sa[id] crime is up 58% compared to the same time [in 2021] within a quarter-mile of" a homeless camp."[23]

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19 *Id.*

20 *Id.*

21 Franque Thompson, *Death at Seattle Encampment Raises Questions About Addressing Homelessness in Region*, FOX13 SEATTLE (Mar. 15, 2023).

22 Kirk Johnson, *Seattle Underbelly Exposed as Homeless Camp Violence Flares*, N.Y TIMES (Mar. 1, 2016).

23 Esther Bower, *'Not a Safe Place': Police Say Crime is up 58% Near Camp Hope, Business Owners Overwhelmed with Damage*, KXLY.COM (Apr. 11, 2022).

Spokane Police reported 854 incidents in one specific homeless camp area in four months.[24]

Tacoma law enforcement removed "more than 1.03 million pounds of garbage and debris" and removed 62 encampments under Tacoma's "buffer zone" legislation threatened by the Ninth Circuit's decision.[25]

Some local jurisdictions have discussed encampment regulation, but have specifically been unable to take legislative action, citing the recent Ninth Circuit decisions.[26]

By its misinterpretation of *Robinson*, the Ninth Circuit has tied local legislator's hands and demanded that municipalities and counties throughout Washington and the entire Ninth Circuit must stand back and allow these high-crime density encampments to fester. Many of the adverse impacts of the encampments affect the homeless individuals themselves residing in them.

3. Unchecked Encampments Allow for the Spread of Infectious Diseases in Washington Communities.

Where action to clean up or remove the encampments has become unlawful, an enormous uptick in

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24 *Id.* Spokane is Washington's second-largest city.

25 TACOMA WEEKLY, *City's Homeless Plan Appears to be Working* (Aug. 4, 2023); *see also* Peter Talbot, *Man Killed in Tacoma Homeless Encampment Shooting Identified by Medical Examiner*, THE NEWS TRIBUNE (July 26, 2023) (describing a recent shooting homicide at a Tacoma encampment where the "defendant allegedly believed [the victim] owed him oxycodone"). Tacoma is Washington's third-largest city.

26 Elisha Meyer, *Call for Higher Enforcement Contributes to Delay in Homeless Camping Vote*, KITSAP DAILY NEWS (Sep. 12, 2023).

infectious diseases is often the result. Public health officials in Seattle investigated "outbreaks of Group A Streptococcus, shigella, and a rare group of infections transmitted by body lice" among homeless persons in the city in 2018.[27] A 2011 study estimated that 85% of homeless persons "have at least one chronic health condition and more than half have a mental health problem." "85 percent of Homeless People Have Chronic Health Conditions."[28]

One writer has observed that afflictions rampant in homeless encampments "include cardiorespiratory diseases, tuberculosis, skin problems and infections, HIV/AIDS, bronchitis, pneumonia, nutritional deficiencies, and drug dependency."[29]

These diseases present yet another public harm inevitably flowing from the Ninth Circuit's rulings.

4. The Court's Decision Has Hamstrung Washington Law Enforcement's Central Role in Policing Encampments.

Instead of allowing for a legislative solution to a policy problem, the Ninth Circuit has created a new "right to homelessness" arising from the Eighth Amendment, depriving local governments and law enforcement from effectively addressing the problems

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[27] Vianna Davila & Jonathan Martin, *Rare Infectious Diseases are Rising at an 'Alarming' Rate in Seattle's Homeless Population, Concerning Health Officials*, THE SEATTLE TIMES (Mar. 15, 2018).

[28] St. Michael's Hospital, *85 Percent of Homeless People Have Chronic Health Conditions*, SCIENCE DAILY (Aug. 24, 2011).

[29] Kerry Jackson, *Postcards from the Epicenter* at 5 in NO WAY HOME: THE CRISIS OF HOMELESSNESS AND HOW TO FIX IT WITH INTELLIGENCE AND HUMANITY (Encounter Books, N.Y. 2021).

outlined above. Instead, without access to typical public safety tools, local law enforcement officers spend hours every day patrolling encampments and trying to reduce crime by their presence, unable to make arrests, clear tents and refuse, or effect any longer-term solutions. Thousands of dollars and law enforcement hours are spent moving encampment sites from one location to another, only to move them again the following week or month after new criminal complaints or emergency calls. Under the Ninth Circuit decision, legislators and law enforcement officers are significantly restricted in meeting this challenge.

As policy analysts have recognized, law enforcement officers "must balance the lack of tools and resources to respond in a meaningful way with pressure from the community and business leaders to 'do something' about homelessness, while also respecting the legal rights afforded to [persons experiencing homelessness]."[30]

In a study intended to evaluate and improve law enforcement strategies for addressing homelessness, the Priority Criminal Justice Needs Initiative (a project of the Rand Corporation) identified numerous difficulties law enforcement officers face when dealing with homeless encampments. That list includes, as illustrative examples, the "significant impact on officer health and wellness," the "nature of the environment in homeless encampments (*e.g.*, needles, weapons, waste)" as a health hazard, and the inconsistent policy

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[30] Sean E. Goodison, et al., *The Law Enforcement Response to Homelessness: Identifying High-Priority Needs to Improve Law Enforcement Strategies for Addressing Homelessness: Synopsis*, RAND SOCIAL & ECON. WELL-BEING (2020).

approaches local jurisdictions often demand of law enforcement officers.[31] Washington law enforcement officers encounter all these problems on a daily basis in their responses to the ongoing crisis outlined in the above sections.

One major challenge facing law enforcement officers (and policymakers) in addressing homelessness is that many homeless persons "are 'resistant' to services that are offered to them (they consistently choose to decline services or opt not to engage with available services intended to address their needs)."[32] Panel members from the Rand Corporation study proposed "assessing involuntary commitment power . . . or legislative changes to make treatment enrollment mandatory in mental health courts."[33] The Ninth Circuit's ruling—by applying the precedent from *Robinson* and *Powell*, rendering any legislative corrective action of public camping unconstitutional, entirely removes any and all coercive options from legislative toolkits. If any degree of civil coercion—as the City of Grants Pass attempted to implement—is too much "punishment" for camping on public property, then local governments lose the ability to compel transient persons to leave encampments and obtain necessary services. The Ninth Circuit's decision effectively usurps the policymaking role of local governments.

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[31] Sean E. Goodison, et al., *The Law Enforcement Response to Homelessness: Identifying High-Priority Needs to Improve Law Enforcement Strategies for Addressing Homelessness* at 9, RAND SOCIAL & ECON. WELL-BEING (2020).

[32] *Id.* at 13.

[33] *Id.*

The Rand Study further called out the proliferation of drug use in encampments, observing that "methamphetamine use" specifically "has become a major challenge among populations" of persons experiencing homelessness.[34] Some Rand panel members "reported intelligence regarding extensive gang activity and other crime within homeless encampments in their communities," even though many crimes in these communities go unreported.[35] "Experts were concerned that low-level crimes, such as public disturbances or trespassing violations, are being overlooked by officers, who have few options beyond issuing citations or making arrests when referral to treatment or other services might be more effective to address the problem."[36] Under the Ninth Circuit's ruling, even citations and arrests are now essentially off the table. The study went on:

> When officers transport individuals to jail or to a hospital, detentions are typically short and lack the services necessary to address the needs of [persons experiencing homelessness], so individuals encounter the officers again. The experts explained that this can lead to significant frustration among officers, and, in some cases, might result in lower arrest rates when officers see no appreciable outcomes for their efforts.[37]

This has been exactly the experience of numerous WASPC members. Unable to even make basic arrests

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[34] *Id.* at 13.

[35] *Id.*

[36] *Id.* at 13-14.

[37] *Id.* at 14.

for public camping, law enforcement is now even more limited than under the conditions underlying the Rand study. Instead of being "frustrated" by seeing recently-arrested individuals immediately back on the street, having availed themselves of no available services, officers can no longer even make arrests in the first place.

Law enforcement engagement with these encampments remains highly necessary, whatever steps policy-makers attempt to address them. "[S]ervice providers often are unwilling to enter unfamiliar encampments without law enforcement because of the possibility of gang activity, traps, or weapons hidden in the area, making the security and robustness of officer health even more important to successful outcomes."[38]

Though acknowledging the limitations of police and need for additional avenues and services, Rand "panel members agreed that any solution to homelessness must involve law enforcement," given in part law enforcement's "unique position[] to engage [persons experiencing homelessness] and connect them with services."[39] Rand specifically called out *Martin*, as well as laws seeking to implement similar arrest bans in other jurisdictions, as highlighting the challenges facing law enforcement in dealing with homelessness.[40]

Local responses to encampments are expensive as well. HUD estimated that various cities participating in its study spent between $1,672 and $6,208 per

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38 *Id.*

39 *Id.*

40 *Id.* at 15.

unsheltered individual per year.[41] Tacoma (Washington's third largest city) specifically spent $3,905,000 on encampment responses in fiscal year 2019—approximately $6,208 per individual homeless person.[42]

II. REGULATION AND MANAGEMENT OF HOMELESS INDIVIDUALS HAS BEEN A CORE ROLE OF LOCAL GOVERNMENT SINCE THE ORIGINAL DRAFTING OF THE UNITED STATES CONSTITUTION.

Relevant in analyzing any constitutional provision is the provision's historical context, often including the "actions of the First Congress" as "persuasive evidence of what the Constitution means." *Harmelin v. Michigan*, 501 U.S. 957, 980, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Scalia, J., concurring); *see Marsh v. Chambers*, 463 U.S. 783, 786-88, 103 S. Ct. 3330, 77 L. Ed. 2d 1019 (1983) (relying on colonial traditions and actions of the First Congress to interpret the First Amendment).

Where a particular punishment "was accepted by the framers" as "a common sanction in every State" at the time of the Eighth Amendment's ratification, this Court has noted that the intent cannot have been to proscribe that punishment. *Gregg v. Georgia*, 428 U.S. 153, 177, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976) (Plurality Opinion). At that time, as summarized below, "vagrancy" laws existed in every jurisdiction across the United States.

WASPC does not propose that any local jurisdiction attempt to recreate the "world of hardship and conflict" that "overlook[ed] and marginalize[d] the poor" by

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[41] Dep't of Housing & Urban Dev., *supra* n.6 at ES4.

[42] *Id.* at ES3.

revitalization of historical vagrancy laws.[43] This Court has since referred to "vagrancy" laws as "archaic" and allowing for "punish[ment] for no more than vindicating affronts to police authority." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161, 166-67, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). However, an exploration of the history of those laws, as contrasted with the more benign public safety regulations at issue in this case, informs the proper reading of the Eighth Amendment's Cruel and Unusual Punishments Clause as applied to the latter.

As the dissenting judges in *Martin v. City of Boise* recognized, "[t]he text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of Rights of 1689," arising after the Glorious Revolution and ousting of King James II. 920 F.3d 584, 599-600 (9th Cir. 2019) (Bennett, J., dissenting from denial of rehearing en banc); *see also Harmelin v. Michigan*, 501 U.S. 957, 966, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991) (Scalia, J., concurring) (analyzing the Eighth Amendment's origins and noting its identical language to the 1689 English Bill of Rights). "[W]hen the framers drafted and the several states ratified the Eighth Amendment, the original meaning of the Cruel and Unusual Punishments Clause was 'to proscribe . . . methods of punishment.'" *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)).

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[43] *See* Ruth Wallis Herndon, UNWELCOME AMERICANS: LIVING ON THE MARGIN IN EARLY NEW ENGLAND at 26 (Univ. of Penn. Press, PA 2001).

At the time of the U.S. Constitution's ratification in 1789, "vagrancy" laws across all states harshly limited the movement of impoverished or homeless individuals. "The criminalization of vagrancy dates back to the fourteenth century."[44] "By 1650, vagrancy was against the law in all the colonies and 'New York was the only political subdivision to offer houses of correction, work and almshouses.'"[45] "These vagrancy laws were similar to their English equivalents because their aim was to punish a broad spectrum of individuals in an effort to punish potential criminal or undesirable conduct. Official sanctioning of hostilities toward vagrants and homeless was established in the Articles of Confederation" which "excluded poverty stricken individuals from the right to travel to or out of any state and exempted them from the privileges and immunities guaranteed to all citizens."[46] These laws were extremely broad in scope, effectively criminalizing basic existence for impoverished individuals and often seeking to foist the cost and responsibility for putting up persons designated "transients"

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[44] Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem: Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407, 413 (2008); *see also City of Chicago v. Morales*, 527 U.S. 41, 103, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999) (Thomas, J., dissenting) ("Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest.").

[45] Jarvis, *supra* n.44 at 415.

[46] *Id.* (internal citation omitted).

onto other communities.[47] (describing early American practice of "warning out" whereby local jurisdictions would remove unwanted impoverished individuals).

After the Civil War, as homelessness in the United States exploded, "[v]agrancy legislation was aimed at crime prevention and held to be a legitimate exercise of a state's police powers."[48] Following the Great Depression, legislatures continued to forbid and courts continued to routinely apply "vagrancy" laws. In 1947, the D.C. Circuit wrote that,

> [a] vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life. Hence the statute denounces and makes punishable being in a condition of vagrancy rather than, as contended by the appellant, the particulars of conduct enumerated in the statute as evidencing or characterizing such condition.

Dist. of Columbia v. Hunt, 163 F.2d 833, 835-36 (D.C. Cir. 1947).[49]

As recently as 1965, the Washington Supreme Court held that "[i]t cannot be doubted that it is within the police power of the legislature to define who are vagrants and to prescribe punishment for those who

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[47] Herndon, *supra* n.43 at 4-10 (describing early American practice of "warning out" whereby local jurisdictions would remove unwanted impoverished individuals).

[48] Jarvis, *supra* n.44 at 416.

[49] *See also* Risa Goluboff, *The Forgotten Law That Gave Police Nearly Unlimited Power*, TIME (Feb. 1, 2016) ("[I]n 1949, vagrancy was a crime in every state and the District of Columbia.").

shall come within the meaning of such enactments which are generally regarded as regulatory measures to prevent crime." *Washington v. Finrow*, 66 Wn.2d 818, 820, 405 P.2d 600 (1965).

Starting shortly after the Great Depression, however, this Court began to recognize the dehumanizing assumptions underlying "the theory of the Elizabethan poor laws," noting that that that theory "no longer fits the facts." *Edwards v. California*, 314 U.S. 160, 174, 62 S. Ct. 164, 86 L. Ed. 119 (1941). In *Edwards*, applying the Dormant Commerce Clause, this Court prohibited California from closing its doors to the impacts of the Great Depression and criminalizing "bringing into the State any indigent person who is not a resident." *See id.* at 170-71. The "social phenomenon of large-sale interstate migration" was clearly "a matter of national concern," subject only to Congressional regulation. *Id.* at 175. In addressing California's effort to keep out persons it designated "paupers," the Court recognized that, "[w]hatever may have been the notion . . . prevailing [in 1836[50]], we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous." *Id.* at 177.

Squarely presented with the constitutionality of a typical vagrancy statute in 1972, this Court struck it down as unconstitutionally vague, noting that "[t]he conditions which spawned these laws may be gone,

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[50] In 1836, this Court decided *City of New York v. Miln*, 36 U.S. 102, 142, 11 Pet. 102, 9 L. Ed. 648 (1836), which had referenced the necessity for states to "provide precautionary measures against the moral pestilence of paupers."

but the archaic classifications remain." *Papachristou*, 405 U.S. at 162. The statute at issue in that case read as follows:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court, shall be punished as provided for Class D offenses.

405 U.S. at 156 n.1.

Papachristou observed that the problem with the old vagrancy statutes was that they "'fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,'" and they "encourage[d] arbitrary and erratic arrests and convictions." 405 U.S. at 162 (quoting *United States v. Harriss*, 347 U.S. 612, 617, 74 S. Ct. 808, 98 L. Ed. 989 (1954)). The ordinance "ma[de] criminal activities which by modern standards are normally innocent," such as "[n]ightwalking," or "habitually living upon the

earnings of [a defendant's] wives or minor children." *Id.* at 163. The vagrancy law "forbade "activities [that were] historically part of the amenities of life as we have known them." *Id.* at 164.

The *Edwards-Papachristou* line of cases never touched in any way on the Eighth Amendment and never evaluated whether the Elizabethan-style "vagrancy" laws constituted cruel and unusual punishment. No court for two centuries—until the Ninth Circuit's recent decisions—considered that the provisions of the Eighth Amendment were so elastic as to afford a constitutional right to establish or reside in homeless encampments on public property.

As fleshed out in detail in Petitioner's briefing, the Ninth Circuit's analysis relies exclusively on the singular *Robinson*[51] case, which had nothing to do with homelessness, vagrancy, or any associated conduct. Neither *Martin* nor the decision in this case cite to or reference *Edwards* or *Papachristou*. That is because Boise's and Grants Pass's straightforward public safety ordinances no longer associate poverty with "moral pestilence" and no longer criminalize "look[ing] suspicious to the police" or being an "undesirable." *Edwards*, 314 U.S. at 177; *Papachristou*, 405 U.S. at 171. Instead, these jurisdictions have sought to prevent the catastrophic consequences of unregulated encampment proliferation outlined *supra*.

The Boise ordinances made it a misdemeanor to use city "streets, sidewalks, parks, or public places as a camping place" and sleeping in public places without permission. *Martin*, 920 F.3d at 603-04. The Grants

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[51] 370 U.S. 660, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962).

Pass ordinance authorized issuance of a fine for "sleep-[ing] on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety." *Johnson*, 72 F.4th at 876. These ordinances do not seek to exclude the homeless or impoverished from entering the jurisdiction; nor do they fail to alert what conduct they render unlawful. These ordinances represent specific, tailored, local solutions to the public health and safety crisis created by encampments taking over public parks and streets. These public camping bans "are essentially prophylactic."[52] "The point of anti-camping laws was to clarify that habitation in public is simply disallowed—a clear enforceable rule—instead of resorting to the old methods of harassing the home-less by enforcing trifles like littering or destroying vegetation or loitering."[53]

Every state for nearly two hundred years promul-gated and enforced some version of the inhumane Elizabethan vagrancy laws. Those laws were in place in 1789 at the time of the Eighth Amendment's ratification. Those laws were in place in 1865 at the time of the Fourteenth Amendment's ratification. And those laws were in place in 1962 when this Court first incorporated Eighth Amendment protections against the States in *Robinson* itself. Those laws are no longer in place because they ascribe "moral pestilence" to poverty and prohibit "the amenities of life as we have known them." *Papachristou*, 405 U.S. at 164. The ordinances at issue in this case—prohibiting unper-mitted public camping to promote public safety—

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[52] Joseph Tartakovsky, *Judicial Interventionism: How Court Rulings Change How Cities Enforce "Quality of Life" Laws* at 63.

[53] *Id.*

avert the moral and constitutional problems with these old vagrancy laws, which themselves have never been successfully challenged under the Eighth Amendment challenge since 1789. Where criminal punishment for the conduct prohibited in the Florida ordinance struck down by *Papachristou* was not facially cruel and unusual, it is difficult to see how a civil citation for public camping could be.

CONCLUSION

This Court should accept review and determine whether Grants Pass and communities throughout the Ninth Circuit may constitutionally protect their streets and public parks from the public health nightmare the Ninth Circuit has invited in its unprecedented interpretation of the Eighth Amendment.

Respectfully submitted,

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