No. 23-175

In The Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN,
On Behalf of Themselves and
All Others Similarly Situated,

Respondents.

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

BRIEF OF AMICUS CURIAE DISTRICT ATTORNEY OF SACRAMENTO COUNTY IN SUPPORT OF PETITIONER CITY OF GRANTS PASS

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STATEMENT OF INTEREST[1]

The Sacramento County District Attorney has a significant interest in this case. Sacramento County is a jurisdiction of over 1.5 million people. The District Attorney is the chief criminal prosecutor, filing over 20,000 criminal cases annually, and civil matters concerning environmental and consumer protection.

This case presents issues common to many prosecutors in California and nationwide. It is well known that homelessness is often intertwined with other complex issues, including mental health, addiction, refuse, public health, violence, and trauma. California has the largest number of homeless individuals in the country. The homeless population in Sacramento County on estimate exceeds 9,000, eclipsing the amount in San Francisco and other large urban areas.

The central issue in this case—whether and how a state or municipality may prohibit homeless individuals from camping or sleeping on public property—affects the tools available to public officials in managing the complex and nuanced problems associated with homelessness and homeless encampments. A secondary issue is whether class action civil litigation is appropriate for challenging such ordinances. As chief public prosecutor in a jurisdiction experiencing a

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[1] Under Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and no person other than amicus curiae, its members or its counsel made any monetary contribution intended to be used in the preparation or submission of this brief.

homeless crisis, amicus is experienced in such matters, and believes his views and input can be helpful to this Court in its consideration of this case.

SUMMARY OF ARGUMENT

In the case now before this Court, *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), and its earlier case of *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit invalidated local ordinances making it a misdemeanor for a person to camp on public property, when the person is homeless, and has no other place to shelter. The Ninth Circuit based its holding on two decisions by this Court regarding the application of the Eighth Amendment's Cruel and Unusual Punishment Clause ("the Clause"): *Robinson v. California*, 370 U.S. 660 (1962) and *Powell v. Texas*, 392 U.S. 514 (1968).

In *Martin*, and now in the case at bar, the Ninth Circuit misapplied *Marks v. United States*, 430 US. 188 (1977). First, to derive from *Powell* the principle that the Clause prohibited making an act a crime under the Clause when the act was derivative of a condition or status, the Ninth Circuit impermissibly combined a concurrence with a dissent.

Second, the Ninth Circuit bypassed the true holding of *Powell*, which requires a showing and record demonstrating a defendant's action is indeed involuntary. The *Martin* court failed to make any substantive determination or provide any guidance regarding an

individualized evaluation of voluntariness. Instead, it adopted a simplistic formula related to the number of available shelter beds compared to the number of homeless. This approach does not conform to *Powell*, does not comport with reality, and can be misleadingly both overinclusive and underinclusive.

In *Johnson*, the Ninth Circuit further compounded its error by affirming certification of the case as a class action. The district court had adopted a class definition which avoided any discussion of voluntariness. The Ninth Circuit papered over this deficiency by redefining voluntariness for purposes of the class definition without remanding for the district court to reconsider class membership in light of this change. In redefining voluntariness, the Ninth Circuit created a so-called "fail safe class, " which is improper and undercuts the objectives of class action litigation.

If one could derive an application of the Clause from *Robinson* and *Powell* to the area of homelessness, it could only be in the nature of a criminal defense. Such an application, familiar and well suited to criminal law, would necessarily focus on individualized fact-findings to assess voluntariness, rather than bypassing this issue entirely as the Ninth Circuit did.

ARGUMENT

I. Introduction

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), the Ninth Circuit dramatically expanded the reach of the Clause. But the Ninth Circuit reached this result by erroneously cobbling together a concurrence and a dissent from *Powell* and citing principally to a previous Ninth Circuit opinion, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), that had never become law.

Critically, in creating this expansion, the Ninth Circuit avoided the central focus of the precedents upon which it purported to base its ruling in both cases: voluntariness. The court instead seized upon a simple equation to determine whether enforcement of anti-sleeping and anti-camping ordinances against homeless individuals violated the Clause: comparing the number of available shelter beds with the total homeless population. This approach presumes that every homeless individual would accept any bed, an oversimplification which does not reflect the concerns as laid out in *Powell*. Moreover, it does not conform with reality.

Determining whether and to what extent a person is involuntarily homeless involves a fact-specific inquiry that is inherently individual. In some cases, the determination may be straightforward, in others, dismayingly complex. But the difficult work of making

this determination should not be circumvented by overbroad rules built on faulty assumptions. As the plurality in *Powell* and the concurring opinion of Justice White in that case explained, if such a rule exists, the individual hoping to invoke it would need to make a prerequisite showing sufficient to overcome our commonsense notions of free will and personal responsibility.

Martin and *Johnson* have resulted in a new body of law premised not on parsing the complicated question of voluntariness, but on avoiding the issue in lieu of oversimplification. This Court should acknowledge the complexity of the issue in its interpretation of the Clause and reverse the Ninth Circuit's approach.

II. The Ninth Circuit Failed to Adhere to Supreme Court Precedent When It Interpreted the Clause.

This Court has explained how to interpret split opinions wherein there is no majority. In *Marks v. United States*, 430 U.S. 188 (1977), this Court stated that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as *that position taken by those Members who concurred in the judgments on the narrowest grounds*. . . .'" *Id*. at 193 (emphasis added). The *Marks* rule has guided lower courts in the sometimes delicate task of divining precedential value from opinions without a five-Justice majority.

The *Marks* rule, though intuitive at first blush, "is more easily stated than applied[.]" *Nichols v. United States*, 511 U.S. 738, 745 (1994). Accordingly, this Court has stated that it is not always "useful to pursue the Marks inquiry to the utmost logical possibility." *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003). The alternative to a *Marks* analysis is to accept a plurality of this Court as nonbinding persuasive authority. *See Texas v. Brown*, 460 U.S. 730, 737 (1983).

As discussed below, the Ninth Circuit misapplied *Marks* by failing to consider only the Justices who "concurred in the judgments" in *Powell*. *See Marks*, 430 U.S. at 193. The Ninth Circuit further failed to derive the "narrowest grounds" from *Powell*. *See id*. Even if this Court were to regard the opinions in *Powell v. Texas* as merely persuasive, the result would be the same. A court cannot in good conscience bypass the fact intensive and individualized inquiry that a finding of involuntariness necessarily entails.

a. The Ninth Circuit in *Martin* and *Johnson* Improperly Applied *Marks*.

The jurisprudence of this Court on the application of the Clause to challenge a criminal statute flows from two cases.

In *Robinson v. California*, 370 U.S. 660 (1962), this Court considered a California statute which made it a crime to be addicted to narcotics. Under the statute, no act by the defendant was required to establish a violation. The status or condition of being a narcotics addict

alone was a crime. This Court held that the Clause prohibits the criminalization of just a status or condition. *Id*. at 665–67. Thus, the statute violated the Clause and was unconstitutional.

Six years later, in *Powell v. Texas*, 392 U.S. 514 (1968), the Court revisited the issue. *Powell* involved a Texas statute making it a crime for a person to "get drunk or be found in a state of intoxication in any public place[.]" *Powell*, 392 U.S. at 516–17. This statute might have implicated the *status* of being an alcoholic in some instances, but it also clearly prohibited the *act* of being in a public place while drunk. When the defendant appealed his conviction under the Texas statute to this Court, five justices voted to affirm the conviction; however, no opinion commanded five votes.

Justice Thurgood Marshall wrote for the four-Justice plurality which affirmed Powell's conviction. The defendant argued he was being punished for his status as an alcoholic, prohibited under *Robinson*. But Justice Marshall distinguished *Robinson* by noting that the Texas statute prohibited not the condition or status of being an alcoholic, but the act of being intoxicated while in public. *Powell*, 392 U.S. at 532 (plurality opinion). Ultimately, Justice Marshall followed *Robinson*, and, in a pointed effort to avoid proclaiming a "constitutional doctrine of criminal responsibility," left the more extended questions of what criminal law should sanction or excuse to the states. *Id*. at 534, 536.

Justice White, in a solo opinion, concurred in the judgment, but did not join Justice Marshall's plurality.

Justice White endorsed an extension of *Robinson*, reasoning that if it is unconstitutional to punish someone for being a drug addict or an alcoholic, it could not be constitutional to punish an addict for the act of using drugs, or an alcoholic for drinking liquor. *Powell*, 392 U.S. at 548–49 (White, J., concurring). But Justice White went on to state that the statute punished not just intoxication, but also the act of being present in a public place while intoxicated. Justice White observed that the record did not establish the defendant had been unable to confine his intoxication to someplace that was not public. *Id.* at 549–54. He wrote that the court need not decide the circumstances that would implicate the Clause, because although Powell had shown "that he was to some degree compelled to drink," he had "made no showing that he was unable to stay off the streets[.]" *Id*. at 553–54. Thus, Powell had failed to establish that the act for which he was convicted violated the Clause. *Id*.

Justice Fortas, in a four-vote dissenting opinion, observed that the trial judge had found the defendant was a chronic alcoholic, under a compulsion to drink that he could not control, even in public. *Powell*, 392 U.S. at 568 (Fortas, J., dissenting). Justice Fortas took the position that if the compulsion to be in public while intoxicated was the result of the condition of alcoholism, the Clause prohibited punishment under *Robinson*. *Id.* at 569–70. Justice Fortas interpreted *Robinson* as standing for the principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id*. at 567. The

dissent, which only commanded four votes, never became law.

This Court has not expanded the principles addressed in *Powell*. When other courts waded into these waters in the subsequent years, none derived precedent by combining Justice White's concurrence with Justice Fortas' dissent. *See*, *e.g.*, *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995); *see also Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). The notion first appeared in the Federal Courts of Appeals when the Ninth Circuit utilized this combination in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). *Jones* ended in settlement, and accordingly never became precedent. But the Ninth Circuit resurrected it in 2019 with *Martin v. City of Boise*.

In *Martin*, in the different context of homelessness and public camping, the Ninth Circuit revived its analysis of *Robinson* and *Powell* as originally laid out in *Jones*. The court considered municipal ordinances of the City of Boise which made it a misdemeanor to camp or reside on public property (including streets, sidewalks, parks, or other public places). *Martin*, 920 F.3d at 603–04. The plaintiffs sought to prohibit the enforcement of these ordinances, contending that being homeless was an involuntary condition or status, and thus enforcement was prohibited under the Clause. *Id*. at 603, 606. Looking to *Powell*, the Ninth Circuit combined elements of Justice White's concurrence with elements of Justice Fortas' dissent, concluding: "[t]hus, five Justices gleaned from *Robinson* the

principle that '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.'" *Id*. at 616. The *Martin* court did not cite any authority for adopting an analysis which combined votes from a concurrence and a dissent and did not cite *Marks* at all. *Id*.

Four years later, in *Johnson v. City of Grants Pass*, 72 F.4th 868, the Ninth Circuit connected *Martin*'s analysis of *Powell* explicitly to *Marks*. Repeating the views of Justice White (concurrence) and Justice Fortas (dissent) in *Powell*, the Court explained:

> Pursuant to [*Marks*] . . . , the narrowest position which gained the support of five justices is treated as the holding of the Court. In identifying that position, *Martin* held: "five Justices [in *Powell*] gleaned from *Robinson* the principle that '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.'" 72 F.4th at 893.

Thus, the Ninth Circuit claimed to derive precedential value from *Powell*.

i. The Ninth Circuit Failed to Confine Its Interpretation of *Marks* to the Justices Who Concurred in the Judgment.

The initial flaw in the Ninth Circuit's analysis and holding is that it misstates and misapplies the rule

from *Marks*. While the Ninth Circuit quoted most of the *Marks* rule, the requirement that the narrowest grounds be among "those Members who *concurred in the judgments*" is notably absent. *Marks*, 430 U.S. at 193. In *Martin* and *Johnson*, the Ninth Circuit did not craft its rule from opinions of the members who concurred in the judgment in *Powell*. Justice White did concur in the judgment, but Justice Fortas and those who joined his opinion did not. Thus, the Justice Fortas dissent does not qualify for use to discern the holding in *Powell*. The Ninth Circuit ignored this rule expressly stated in *Marks*.

This Court has repeatedly relied on *Marks* and applied its rule without ever suggesting that rule may extend to combining concurrences and dissents.

Romano v. Oklahoma, 512 U.S. 1 (1994), looking to prior precedent, explained that the holding in an earlier case was not that which was stated by the plurality, but rather that which was stated by a concurrence on more limited grounds. 512 U.S. at 8–9. In *O'Dell v. Netherland*, 521 U.S. 151 (1997), this Court looked to prior authority and, citing *Marks*, relied on Justice White's concurrence in an earlier case, since his opinion, "provid[ed] . . . the narrowest grounds of decision *among the Justices whose votes were necessary to the judgment*." 521 U.S. at 160 (emphasis added). In *Panetti v. Quarterman*, 551 U.S. 930 (2007), this Court cited *Marks* for the holding from a previous case, finding that a plurality opinion with a broader rationale was limited as a holding by a concurrence with a narrower rationale, the concurrence thus establishing the

holding of the Court. 551 U.S. at 949. In *Glossip v. Gross*, 576 U.S. 863 (2015), this Court cited *Marks* for a holding from a previous case, concluding that a plurality opinion affirming with three votes stated the holding of the Court, when a concurring opinion would have affirmed on broader grounds than the plurality. 576 U.S. at 879 n.2.

This Court has also discussed the *Marks* rule, without finding the need to apply it in the specific case then at hand. *See*, *e.g.*, *Grutter*, 539 U.S. at 321, 325; *see also Hughes v. United States*, 584 U.S. 675, 680 (2018). But at no point in these cases or in any other has this Court stated the *Marks* analysis might authorize combining together a concurrence and dissent.

In fact, in *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988), this Court addressed an analysis where an attempt was made to fashion a prior precedent by combining a concurrence and a dissent. In that case, Justice White in dissent sought to demonstrate the rule adopted by the majority was not well supported by earlier precedent, but the precedent he was citing for his argument combined opinions of four other justices in an earlier case, and three of the justices in that earlier case had been dissenting justices. *Id*. at 775–76, 783 (White, J., dissenting). The *Lakewood* majority noted that such an analysis "does not square with our settled jurisprudence," citing *Marks* for the proposition that when no single rationale commands a majority, "the holding of the Court may be viewed as that position taken by *those Members who concurred in the judgmen[t] on the narrowest grounds*."

486 U.S. at 764 n.9 (majority opinion) (emphasis added).

The *Martin* and *Johnson* courts misapplied *Marks* and failed to follow these authorities. Instead, the Ninth Circuit proclaimed a new rule from the Clause by cobbling together a concurrence with a dissent.

ii. The Ninth Circuit Failed to Correctly Interpret the Narrowest Grounds from the Opinions in *Powell*.

Another fault in the Ninth Circuit's reasoning is the failure to ascertain the "narrowest grounds" from *Powell* regarding the Clause. *See Marks*, 430 U.S. at 193. What can be gleaned from *Powell* is not a "wide-ranging new constitutional principle." *Powell*, 392 U.S. at 521. Notably, none of the Justices in *Powell* asserted definitively that no such rule could ever be drawn from the Clause. Rather, the grounds upon which Marshall's plurality and Justice White agreed were more practical: as to the defendant Powell, no constitutional proclamation could be reached on the thin record and insufficient fact-finding before the Court.

Justice Marshall, writing for the four-justice plurality, noted in no uncertain terms that the record was wanting. Justice Marshall rejected the trial court's findings of fact as to the defendant as a "transparent[]" attempt to bring the case within the scope of *Robinson*. *Powell*, 392 U.S. at 521 (plurality opinion). He emphasized that they were inadequate to formulate the basis of a "wide-ranging new constitutional principle." *Id.*

Marshall observed the record told the Court "very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself." *Id.* at 521–22. He noted the trial did not reflect the "sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Id.* at 522. The trial involved only four witnesses in total, and the State had put on only one. *Id.* For these reasons, "the record in [the] case [was] utterly inadequate." *Id*. at 521.

Beyond the poorly developed factual record, Marshall lamented the shortcomings of defining alcoholism in the medical community. He noted the inclusion of alcohol under the category "disease" gave little insight in and of itself, and debate within the medical community "rages" about how or to what extent alcoholism is "biochemical, physiological or psychological[.]" *Id.* Marshall noted that the Court's "assessment of the deterrent effect of criminal sanctions for public drunkenness" was likewise "impede[d]" by "[i]gnorance." *Id.* at 530. The Court did not have the information it needed to reach a conclusion that could have yielded a new rule from the Clause.

Marshall implied better fact-finding might yield the constitutional principle to which he referred. He acknowledged the possibility of a "constitutional defense," which might require that the invoker prove both a "'loss of control' once an individual has commenced to drink and 'inability to abstain' from

drinking in the first place." *Id.* at 524–25. When Marshall rejected the dissent's pronouncement about the Clause, he did so as a matter of process. Marshall's plurality opinion should be read not as a straightforward embrace of *Robinson*, but as an acknowledgement that, without the proper factual foundation and guidance, the Court could not challenge or expand the framework *Robinson* created.

Justice White had similar concerns. To be sure, White was closer to a constitutional pronouncement than the plurality was—but his reasons for concurring mirror much of the plurality's reasoning. Preliminarily, Justice White narrowed any potential application of the Clause down to a small subset of alcoholics: inebriated, chronic alcoholics who were involuntarily in public. *Powell*, 392 U.S. at 549–50 (White, J., concurring). His reasoning focused on "the chronic alcoholic with an irresistible urge to consume alcohol" who either "becomes so drunk that he loses the power to know where he is or to direct his movements" or otherwise cannot avoid being in public. *Id*. White was careful not to overinclude: his logic could not be applied to non-chronic drunks, or drunks who could have stayed out of public.

White did not leap from this deliberate circumscription to a broad pronouncement about the Clause. Before any potential defendant could identify themselves as a part of this narrow group of involuntary chronic alcoholics who could not help but be in public, they would need to make a "showing . . . that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible." *Id.* at 551.

This showing, according to White, was a "prerequisite[]" to the potential invocation of the clause. *Id.* at 552. White emphasized that substantiating such a claim was no mean feat given that such a showing "is contrary to common sense and to common knowledge." *Id.* at 449. Powell—or any individual claiming to be a drunk, chronic alcoholic involuntarily in public—would need to overcome the commonsense notion that despite the near universal presumption that human beings control their actions, Powell was among the rare few who, given their circumstances, could not.

Ultimately, Powell failed to meet this rigorous standard. White asserted that "[n]o facts" in the record support the conclusion that "Powell appeared in public due to 'a compulsion symptomatic of the disease of chronic alcoholism.'" *Id*. at 449 n.1. Perhaps "a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible[,]" but Powell had failed to make it. *Id.* at 551. Without the facts, there could be no constitutional pronouncement.

Whether Justice White presented a "ground" on which to derive binding precedent at all is uncertain. White pondered that "I would think a showing could be made" that some chronic alcoholics could not resist being drunk in public. *Id.* at 551. He refused to pronounce a bright line rule, stating it is "possible" such alcoholics exist, and assuming they do, invocation of the Clause might be "possible." *Id.* at 551–52. Considering his noncommittal conclusion and informal tone, his concurrence is perhaps best taken as dicta.

What can be gleaned from Justice White's concurrence, if anything concrete, is not the principle 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." *Martin*, 920 F.3d at 616. For White, piercing this issue and arriving at the constitutional question beneath requires precise fact-finding. If a constitutional protection exists at all, it can only exist if our commonsense notions of volition are overcome with convincing proof. White indicated only that this might be possible, were the record more complete.

The *Martin* court never acknowledged the plurality's or Justice White's concerns about making this showing. Instead, it boldly asserted that "[t]he four dissenting Justices adopted a position consistent with that taken by Justice White," including "that the defendant, 'once intoxicated, . . . could not prevent himself from appearing in public places.' " *Martin*, 920 F.3d at 616. But White's concurrence can only be read for the incompatible position that the record was insufficient to achieve this very finding. Indeed, the Ninth Circuit later acknowledged as much in *Johnson*, stating "the reason for Justice White's concurrence was that he felt Powell failed to prove his status as an alcoholic compelled him to violate the law by appearing in public." *Johnson*, 72 F.4th at 892. The Ninth Circuit correctly interpreted White's conclusion only after it had embraced its opposite.

Skipping over these inconsistencies, the *Martin* court declared "[t]hus, five Justices gleaned from

Robinson the principle that '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.'" *Martin*, 920 F.3d at 616. For this groundbreaking proposition, the Ninth Circuit did not cite the *Powell* plurality, Justice White's concurrence, or even Justice Fortas' dissent. The Ninth Circuit cited itself—the opinion in *Jones* which, due to settlement, never became precedent at all.

Marks and common sense compel a different interpretation of *Powell*: if a constitutional defense exists, it could only exist upon fact-finding sufficient to show involuntariness. This fact-finding would have to be extensive—enough to overcome our commonsense notions of volition. Marshall explained that Powell would have had to prove both an "'inability to abstain'" and "loss of control'" after he had started drinking to "make out a constitutional defense, should one be recognized." *Powell*, 392 U.S. at 524–25 (plurality opinion). White met Marshall on this point, holding that these findings were "prerequisites to the possible invocation of the Eighth Amendment." *Id*. at 552 (White, J., concurring). Both the plurality and White agreed that the showing had not been made, and that therefore the right, if it existed, could not be pronounced. And in the 55 years since *Powell*, this Court has never gone farther than Marshall and White did.

Even if this Court did not apply *Marks* to *Powell* and considered the opinions for the various Justices merely persuasive, this Court should reach the same result as argued above: individualized fact-finding is a

prerequisite to a constitutional pronouncement about the Clause. The rationales of Marshall and White cannot be gainsaid; exploring the contours of an individual's ability to control themselves and their situation is an onerous task. Meaningful, extensive fact-finding is the only way to reach a satisfactory conclusion.

As discussed below, the *Martin* court's refusal to acknowledge the need for factual exploration of an individual's circumstances has created a compounding problem.

b. The *Martin* Court Bypassed the Requisite Individualized Inquiry.

After ignoring concerns raised by the *Powell* plurality and Justice White's concurrence about the rigor required to evaluate voluntariness, the Ninth Circuit in *Martin* and *Johnson* compounded the problem. Rather than delving into the difficult question of what the law is prepared to recognize as voluntary or involuntary in the context of homelessness, or even acknowledging how complicated and individual the question is, the Ninth Circuit skirted the issue. It reduced the problem to a simple formula: total homeless people per a Point In Time ("PIT") count minus open shelter beds. *Johnson*, 72 F.4th at 886 (citing *Martin*, 920 F.3d at 604). As opposed to a meaningful exploration of individual circumstances, this "shelter bed arithmetic" ignores the complexities belabored in *Powell*. It is an oversimplification that prevents the in depth fact-finding five Justices in *Powell* called for. Moreover, it rests

on faulty presumptions that are not reflected in reality. Accordingly, this Court should disapprove of the shelter bed arithmetic relied upon in *Martin* and reverse for the fact-finding necessary to determine whether or to what extent the plaintiffs were voluntarily homeless.

From the *Martin* court's interpretation of the Clause came its holding to the facts at bar: "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin*, 920 F.3d at 616; *Johnson*, 72 F.4th at 892.

Aware that this holding broke new ground, the *Martin* court reassured prospective critics that their "holding is a narrow one." *Martin*, 920 F.3d at 617. This "narrowness" might have meant it was limited by thorough fact-finding as presumed by the *Powell* plurality and Justice White. The *Martin* court could have required the district court to tease out what it meant to be involuntarily homeless by examining each plaintiff and their circumstances. Indeed, the *Martin* court acknowledged, albeit in a footnote, that voluntariness was essential to the logic of their holding:

> Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.

Martin, 920 F.3d at 617 n.8.

The court made no further attempt to define voluntariness, likely due to how profoundly complicated the causes of involuntary homelessness are. For any given individual, the reasons for becoming and staying homeless are necessarily multifaceted, from physical to mental disability, addiction, misfortune, or the desire for personal freedom and unwillingness to commit to the employment opportunities available to them. No doubt some of the causes are broad and societal, such as rising cost of housing, lack of economic opportunity, or membership in a marginalized community. But how any of these factors apply to a given person cannot be definitively pronounced without individual inquiry.

Nor did the *Martin* court risk drawing any analogy to *Powell* or *Robinson* for guidance as to the depth or nature of the fact-finding necessary to evaluate voluntariness or the lack thereof. Indeed, no logical analogy can be drawn. *Robinson* dealt with addiction to habit-forming narcotics which it likened to biological illness. *Robinson*, 370 U.S. at 661–67. *Powell* explored alcoholism, whether it was categorizable as a disease, and what that could mean for criminal law. Justice White, for his part, discussed Powell's affliction in biological terms, referring to "the chronic alcoholic with an irresistible urge to consume alcohol[.]" *Powell*, 392 U.S. at 549 (White, J., concurring). While addiction to drugs and alcohol might play a significant role in the lives of homeless people or as a root cause of involuntary homelessness, the *Martin* court did not intimate that homelessness was caused by an irresistible biological urge. Unfortunately, a comparison between addiction,

as complicated as it may be, and homelessness serves only to highlight that homelessness is even more complex.

Rather than engage with these intricacies and call for more rigorous fact-finding regarding the unique situations of the plaintiffs, the *Martin* court adopted something simpler: shelter bed arithmetic. "'[S]o long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'" *Martin*, 920 F.3d at 617. Relying on an admittedly inaccurate PIT count of the homeless population, *Martin* subtracted the number of available beds from the result of the PIT count, bypassing the question of voluntariness entirely.

The shelter bed arithmetic does not correspond with reality. The fact is, some homeless individuals would not take a bed if offered. San Francisco reported that at least 60% of ostensibly homeless individuals who are offered shelter refuse the bed, either because they have access to shelter or other reasons. *Coalition on Homelessness, et al. v. City and County of San Francisco*, Case No. 4:22-cv-05502-DMR, Opp'n to Pls.' Mot. for Prelim. Inj., at 21 (November 15, 2022); *2023 Report: San Francisco Encampment Teams Helped More People into Shelter*, San Francisco Government (January 11, 2024), https://www.sf.gov/news/2023-report-san-francisco-encampment-teams-helped-more-people-shelter. Perhaps these figures would be more or less in a given jurisdiction, but the reality is that some

number, perhaps a large number, of homeless individuals fall outside of *Martin*'s shelter bed arithmetic. One study documented some reasons for rejecting shelter, including problems with other residents, unwillingness to follow shelter rules, or preference for being outdoors. Elizabeth Talbert & Matthew Record, *Unsheltered Des Moines Study: Perceptions of Service Delivery and Resources Amongst Des Moines-Area Persons Experiencing Unsheltered Homelessness*, Drake University 23, 24 (2022). Needless to say, the inquiry is complex.

Does rejecting an offer of shelter render these homeless individuals "voluntarily" homeless? To hold water, the shelter bed arithmetic requires that *all* homeless people are involuntarily so, and that *each* of them would occupy a bed if offered. This is not the reality. As such, *Martin* is internally contradictory. On the one hand, *Martin* claims that its holding does not apply to individuals who have access to shelter but choose not to use it. *Martin*, 920 F.3d at 617 n.8. On the other hand, per *Martin*, one can subtract open shelter beds from the total homeless population on the assumption that every homeless person would choose shelter if they could. But if some of the homeless population refuses open beds, the logic degrades.

The incoherence of the shelter bed arithmetic is further illustrated by a comparison to *Powell*—a comparison *Martin* notably avoided. Applied to drunk chronic alcoholics found involuntarily in public, the logic of the shelter bed arithmetic would mean counting *all* inebriated people in public and *presuming* that

they were all chronic alcoholics. *See Powell*, 392 U.S. at 549. *Powell* is unsusceptible to any such interpretation.

Moreover, the *Martin* court's rule is both overinclusive and underinclusive. It is overinclusive in that, as discussed, it assumes every homeless person is involuntarily so. But it is underinclusive in that it relies on the rules of the shelters to govern the concept of voluntariness. For example, a homeless person who works odd hours and therefore cannot meet the shelter's required entrance and exit times to get a bed would be considered, under the shelter bed arithmetic, as *voluntarily* homeless. This would be so even if this person had nowhere to go and would readily accept a bed if they could. The shelter bed arithmetic would fail the population it was designed to serve, whereas individualized fact-finding would not.

Finally, the *Martin* court's assurance their holding was "narrow," whether made in earnest or otherwise, is empirically inaccurate. For example, in *Mahoney v. City of Sacramento*, the district court's interpretation of *Martin* did not stop at prohibiting criminal prosecution of homeless people for "sitting, lying, and sleeping in public" when they have nowhere else to go. 2020 WL 616302 *1, 3 (E.D. Cal. 2020). Rather, the district court held "individuals may not be subjected to criminal penalties for engaging in involuntary, life-sustaining actions on public property" and Sacramento could not penalize homeless individuals for urinating and defecating in public. *Id*. at *3. In *Warren v. City of Chico*, the district court was called to evaluate whether

city-provided land was adequate "shelter," a complicated issue never contemplated before *Martin*. 2021 WL 2894648 *1, 3–4 (E.D. Cal. 2021). As stated above, in *Coalition on Homelessness v. City and County of San Francisco*, the city contends that numerous homeless persons at encampments reject offers of shelter. Case No. 4:22-cv-05502-DMR, Opp'n to Pls.' Mot. for Prelim. Inj., at 21 (November 15, 2022). Despite claims of "narrowness," *Martin*, pioneering as it was, opened new frontiers of law.

III. In *Johnson v. Grants Pass*, the Ninth Circuit Compounded the Error in *Martin* of Bypassing an Individualized Inquiry into Voluntariness and Created an Impermissible Class.

a. The Ninth Circuit Failed to Make Individualized Inquiries into the Plaintiffs and Expanded the Misuse of the Shelter Bed Arithmetic.

The Ninth Circuit had the opportunity to limit the worst aspects of *Martin* in *Johnson v. Grants Pass*. In *Johnson*, the district court evaded any discussion of voluntariness and, instead, wholly relied on shelter bed arithmetic to resolve the issue. The district court declined to explore, or even address, the alleged involuntariness of the plaintiffs' homelessness with individualized fact-finding in contravention of both *Powell* and *Martin*. Rather than correcting the district court's error and using the opportunity to limit the application of *Martin*'s shelter bed arithmetic to bypass

an evaluation of voluntariness, the Ninth Circuit in *Johnson* endorsed the district court's misguided approach. In so doing, it departed even farther from *Powell* and any meaningful exploration of individual circumstances.

The district court order granting class certification defined the class as: "[a]ll involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside the city limits to avoid harassment and punishment by Defendant as addressed in this lawsuit." *Blake v. City of Grants Pass*, 2019 WL 3717800 *1, 3 (D. Or. 2019). Relying exclusively on *Martin*'s shelter bed arithmetic, the district court defined "involuntary" homelessness, for purposes of the class definition, as occurring when "there is a greater number of homeless individuals in [a jurisdiction] than beds available [in shelters.]." *Id.* at *5. It concluded all homeless individuals in Grants Pass were involuntarily homeless solely because a PIT count reflected a greater number of homeless individuals than total shelter beds within the city. *Id*. at *3.

The district court conducted no individualized inquiry into the complicated question of voluntariness required by *Powell*. However, the district court did not just fail to follow *Powell*, it departed even farther from *Powell* than *Martin* did. *Martin* mentioned, albeit briefly, that voluntariness was essential to the shelter bed arithmetic. The district court did not so much as acknowledge that point. It made clear that it had no intention of examining voluntariness when it admonished counsel for the City of Grants Pass for

questioning whether the named plaintiffs were involuntarily homeless. The district court wrote in the class certification order that "[n]ot only are these personal attacks on Plaintiffs' situations insensitive, they reveal that Defendant may misunderstand the nature of modern homelessness." *Blake*, 2019 WL 3717800 at *6. The district court ultimately suppressed the entire issue.

The district court's refusal to engage with the topic of voluntariness was also evident in the opening paragraph of the class certification order. It states plaintiff Debra Blake has been homeless in Grants Pass for eight to ten years and "currently lives in temporary transitional housing," while plaintiff John Logan has been *intermittently* homeless for ten years and sleeps on a mattress in a storage room belonging to his in-home care clients four or five nights a week. *Id*. at *1 (emphasis added). Even this minimal background information should have been enough to prompt the district court to dig deeper as to the individual situations of the named plaintiffs.[2] Why have both plaintiffs been homeless for such a lengthy time? Do they have physical, mental, or emotional health issues related to their ongoing homelessness? What other housing options, if any, are available to them? These are only a few of the questions essential to determining involuntariness pursuant to *Powell*. But they were never asked.

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[2] The attached appendix of photographs depicting various encampments inhabited by homeless individuals within the City of Sacramento illustrates this point, as there are aspects of each that could indicate voluntariness.

The Ninth Circuit endorsed the district court's approach, and in so doing departed even farther from *Powell*'s call for individualized fact-finding than *Martin* had. As noted by Circuit Judge Collins in dissent, the district court's use of shelter bed arithmetic as the sole determinative factor of involuntariness misconstrued the narrow holding in *Martin*, which explicitly stated the Eighth Amendment precludes criminal liability only when "the homeless plaintiffs *do not have a single place* where they can lawfully be. . . ." *Martin*, 920 F.3d at 617 (emphasis added) (cited by *Johnson*, 72 F.4th at 900 (Collins, J., dissenting)). The Ninth Circuit missed an opportunity to limit over-reliance on shelter bed arithmetic, and instead aggravated the issue.

In an apparent effort to both comply with *Martin* and uphold the district court's grant of class certification, the *Johnson* majority refashioned the class definition to exclude those with viable options for shelter. The majority in *Johnson* stated: "[i]ndividuals who have shelter or the means to acquire their own shelter simply are never class members." 72 F.4th at 887–88. The majority further reinforces this notion in a footnote, reasoning that if a person has access to temporary shelter, he or she "is not involuntarily homeless unless and until they no longer have access to shelter." *Id*. at 888 n.24.

The *Johnson* majority side stepped the improper expansion of *Martin* by simply changing the class definition and papering over the district court's overreliance on the shelter bed arithmetic. The problem, however, is that while the majority's class definition is

co-extensive with concepts of involuntariness in *Martin*, the class as defined and certified by the district court was not. The class as certified by the district court includes individuals, like plaintiff Blake who was living in temporary shelter when the class was certified, who are not involuntarily homeless under *Martin*'s criteria and who should not be part of the class. But membership was not guided by any factual inquiry into or analysis of the nuanced, contextual, and highly individualized reasons why a person becomes and remains homeless. The only condition potentially precluding class membership under the district court's definition was shelter bed arithmetic.

In failing to acknowledge the district court misconstrued *Martin* and, as a result, failed to address involuntariness in any meaningful way, the Ninth Circuit permitted expansion of the supposedly narrow holding in *Martin*. The Ninth Circuit should have decertified the class and remanded the case for reconsideration of class membership according to the individualized fact-finding required by *Powell*.

b. The Ninth Circuit Created an Impermissible Fail-Safe Class.

The importance of the class definition is axiomatic. The objectives and principles underlying the class action mechanism, including fairness, efficiency, and resolution of claims that may not have otherwise been brought, are diminished without a clear, precise understanding of who is part of a putative class and who is

not. Before a class may be certified pursuant to Rule 23, "the class definition must be sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member of the proposed class." *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537–38 (6th Cir. 2012). A class "must be susceptible of precise definition. There can be no class action if the proposed class is 'amorphous' or 'imprecise.'" *Id.* at 538 (citing 5 James W. Moore et al., *Moore's Federal Practice* § 23.21[1] (Matthew Bender 3d ed. 1997)).

It is within this context that the notion of a "fail-safe" class arises. Though this Court has never directly addressed this principle, the concept has been broadly recognized by others. A fail-safe class is "one that is defined so that whether a person qualifies as a member depends on whether the person has a valid claim." *Messner v. Northshore University HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012). Stated another way, a fail-safe class includes "*only* those who are *entitled* to relief." *Young*, 693 F.3d at 538. Defining a class in this manner is impermissible, as it undercuts the objectives (e.g. finality and efficiency) of litigating claims on a class-wide basis. *See Randleman v. Fidelity Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011) ("Either the class members win, or, by virtue of losing, they are not in the class, and therefore, not bound by the judgment."). As the Ninth Circuit aptly stated in one unpublished opinion:

> The fail-safe appellation is simply a way of labeling the obvious problems that exist when

> the class itself is defined in a way that precludes membership unless the liability of the defendant is established. *When the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class*. This is palpably unfair to the defendant, and is also unmanageable—for example, to whom should the class notice be sent?

Kamar v. Radioshack Corp., 375 Fed. Appx. 734, 736 (9th Cir. 2010) (emphasis added).

By taking the unnecessary step of redefining the class, rather than directing the district court to correct its misapplication of *Martin*, the Ninth Circuit here created the "obvious problems" described above.

Under *Martin*, the Clause protects only individuals who are *involuntarily* homeless from criminal enforcement of anti-camping and anti-sleeping laws. *Johnson*, 72 F.4th at 887–88. As explained above, *Johnson* changed the class definition as it relates to involuntariness to make it consistent with *Martin*.

As it relates to homelessness and the Eighth Amendment, the notion of involuntariness is more than just a class label or means of identifying individuals with viable claims. A homeless plaintiff *cannot prevail* on an Eighth Amendment claim for imposition of criminal liability related to sleeping, sitting, or lying on public property unless he or she is involuntarily homeless, because laws prohibiting these behaviors only violate the Clause when enforced against

individuals who do not "have a *single place* where they can lawfully be." *Martin*, 920 F.3d at 617. The class definition, as modified in *Johnson*, limits the class exclusively to individuals who are entitled to relief because they are involuntarily homeless and who, by virtue of that entitlement, will prevail on the merits because laws criminalizing sleeping and camping on public property are only unconstitutional as applied to individuals who are involuntarily homeless. Persons who cannot prevail because they are not involuntarily homeless simply fall outside of the class definition and are not bound by any judgment rendered on a classwide basis. This is precisely what a fail-safe class looks like.

The Ninth Circuit, in redefining "involuntary" for purposes of class certification, shifted the determinative factor for liability into the class definition. This is improper. *See Olean Wholesale Grocery Coop v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc) ("A court may not . . . create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct."). The district court, while misguided in applying *Martin*, did not create a fail-safe class because the class definition was based on shelter bed arithmetic rather than the factor determinative of liability. Presumably, based on the district court's class definition, a homeless individual could be a member of the class based on shelter bed arithmetic, but later lose on the merits if the challenged ordinances are not unconstitutional as applied to this individual because he or she is not involuntarily

homeless. A loss on the merits is impossible under the *Johnson* court's modified class definition. The Ninth Circuit thus created an impermissible fail-safe class.

c. The Individualized Inquiry Necessary to Determine Whether a Person is Involuntarily Homeless Presents Challenges for Class Treatment of Claims under the Clause.

It is undisputed that the root causes of homelessness are complicated and nuanced. To draw an accurate conclusion about whether someone is involuntarily homeless necessarily requires a factually intensive inquiry into the circumstances rendering that person without shelter. This is a highly individualized assessment, both because *Powell* requires this approach and because the underlying issues and experiences that have resulted in or contributed to a person becoming homeless vary. Accordingly, class treatment of homeless persons like the plaintiffs in *Martin* and *Johnson* may never be practicable.

In his *Johnson* dissent, Circuit Judge Collins correctly assessed the erroneous analysis of the Rule 23 requirements by the district court and majority. In different ways, both disregarded any substantive assessment of involuntariness, as *Powell* demanded. Only by avoiding this individualized and fact specific inquiry could the district court and majority conclude the putative class satisfied the requirements of commonality and typicality necessary for class certification. While it

is difficult to say whether Eighth Amendment claims by homeless persons would ever be suitable for class treatment because of the highly individualized assessment of voluntariness required for such claims, it certainly was not proper in *Johnson* without individualized fact-finding.

IV. If Protection under the Clause Exists, it Could Exist Only with Individualized Fact-finding Akin to an Affirmative Defense.

As discussed above, *see supra* section II.a.ii., *Powell*'s actual holding was that, when venturing into the question of what protection the Clause bestows, before any "wide-ranging new constitutional principle" could be pronounced, this Court needed the facts. *Powell*, 392 U.S. at 521 (Marshall, J., plurality), 552–54 (White, J., concurring). The Court would need specifics about the potential invoker's personal circumstances in order to evaluate if they were sufficient to overcome common sense notions of free choice and free will. As to Leroy Powell, the Court did not know enough about him, his alcoholism, or its effects on his ability to control himself, to decide whether the Clause could grant protection to someone like him at all. *Id.* at 521–22, 526, 535, 536 (Marshall, J., plurality), 552–54 (White, J., concurring).

The *Martin* court avoided this difficult determination with the shelter bed arithmetic. *Johnson* compounded the error by allowing the shelter bed arithmetic to subsume any notion that voluntariness

should be explored. The Ninth Circuit was unwilling to take on the difficult task of determining the contours of what the law recognized as voluntary or involuntary.

The fact-finding required for a showing of involuntariness, if it amounts to a constitutional right, could only be practically understood as an affirmative defense brought by an individual. Indeed, Powell had presented his chronic alcoholism as a defense to the charge. *Powell*, 392 U.S. at 517, 521. The plurality and White's concurrence both discuss a possible defense and the showing that Powell was required, but failed, to make. *Id*. at 525, 552–53.

To be sure, this Court has never pronounced such a defense exists. But comparing a hypothetical defense against the impracticality of the shelter bed arithmetic is informative. It reveals what individualized fact-finding might look like, and underscores how far the Ninth Circuit drifted from it.

A defense presented at trial would be subject to the rigors of the adversarial process, such as constitutional protections, the strictures of the evidence code, and burdens of proof. It would generate the sort of individualized fact-finding the *Powell* plurality and White had demanded.

Moreover, the criminal justice system is already accustomed to evaluating defenses that police the boundary between free will, culpability, and legal excuse. For example, in California, various defenses to criminal charges recognize that, in some circumstances and for some individuals, our commonsense

notions of what a "choice" is and what free will demands or allows are suspended. Impairment defenses, such as unconsciousness, recognize that when a defendant is not in control of their body they cannot be held criminally responsible for their actions. *Judicial Council of California Criminal Jury Instructions*, hereafter Cal. Crim. No. 3425. The defense of necessity applies when a defendant "had no adequate legal alternative"—no choice—but to break the law in an emergency. Cal. Crim. No. 3403. The defense of coercion protects a defendant who broke the law out of fear associated with sexual violence and the like, and therefore did not possess true voluntary choice. Cal. Crim. No. 3414. Self-defense precludes liability when force was necessary—e.g. when the defendant had no choice but to resort to violence to defend their life or the life of another. Cal. Crim. No. 3470.

The precise contours of this hypothetical defense—if it were recognized—are less important than the greater point that the question of voluntariness must be subject to individualized fact-finding. Some of these defenses put the burden on the defense, most put it on the People. Some must be proved by a preponderance of the evidence; others must be negated beyond a reasonable doubt. In any case, casting the right as a personal defense would allow the question of voluntariness to be fully explored, as it was not in *Powell*, rather than avoided, as it was in *Martin* and *Johnson*.

CONCLUSION

The issues of homelessness and its causes are profoundly complicated. Oversimplifications are tempting but ultimately detrimental. The *Powell* plurality and White's concurrence reflect the difficulties the Court faces when making determinations about free will and criminal liability. The Court did not then pronounce a wide ranging new constitutional right, and this Court has never plied the waters beyond it. The principle to be gleaned from *Powell* is that in such complex social matters, a court needs a thorough exploration of facts before it can meaningfully address these challenging questions.

In this regard, Justice Marshall in *Powell*, writing of "essential considerations of federalism" and our country's unique system of entrusting to individual states authority to make their own rules, wrote:

> We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. . . . This process of adjustment has always been thought to be the province of the States. 392 U.S. at 535-536.

The wisdom of Justice Marshall rings true decades later.

This Court should not let the overinclusive, simplistic methods in *Martin* and *Johnson* stand.

Respectfully submitted,

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