

In the Supreme Court of the United States

CITY OF GRANTS PASS,

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 FOR THE STATE OF CALIFORNIA
AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY**

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INTERESTS OF AMICUS CURIAE

This case concerns Ninth Circuit precedent that affects the ability of States and local governments to respond to unhoused persons sleeping in public places, including by clearing encampments or enforcing laws against public camping or sleeping. *See Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019); Pet. App. 13a. That precedent, invoked repeatedly in lawsuits challenging local policies, has been construed as narrowing the range of strategies available to government officials in addressing the homelessness crisis in California and throughout the Ninth Circuit. The State of California therefore has a significant interest in how this case is decided.

The Attorney General of California is committed to developing creative, compassionate, and effective solutions to the homelessness crisis in our State. At every level of government, the response to this crisis should reflect empathy and support for those who are unhoused—without ignoring the serious public health and safety concerns that can sometimes result from encampments in public spaces and other aspects of the homelessness crisis. At the state level, the Attorney General has prioritized strategies to increase the availability of affordable housing and to ensure that unhoused individuals and families can access housing and other services without facing discrimination. The Attorney General has repeatedly stepped in to ensure the proper enforcement of state laws aimed at increasing housing supply and affordability.

As the chief law officer of California, the Attorney General also routinely defends against Eighth Amendment claims in the context of both civil and criminal litigation. The Attorney General is therefore cognizant of the harms that can result from an unduly

expansive interpretation of the Eighth Amendment or other constitutional guarantees. And he recognizes the critical importance of preserving the sovereign authority of the States to choose from a range of permissible responses to local health and safety concerns that can arise from encampments and other aspects of the homelessness crisis.

INTRODUCTION AND SUMMARY OF ARGUMENT

Homelessness is a longstanding problem that has become a crisis in California and many other States. It affects a diverse population of Americans: young and old; families and individuals; members of every race, ethnicity, and creed; people in rural, suburban, and urban areas. The causes of this crisis are varied and complex, including not just mental health challenges and addiction, but also shortages of housing supply, the high costs of living, and insufficient or under-enforced tenant protections. States and local governments are on the front lines of addressing these problems and providing resources and support to unhoused persons. We also bear the primary responsibility for responding promptly and effectively when encampments and other aspects of our modern homelessness crisis create a threat to public health, safety, and civic order.

The Constitution establishes the baseline of rights that must be afforded to all Americans, including those of us who are unhoused. Consistent with this Court's longstanding precedent, the Constitution does not allow the government to punish people for the status of being homeless. Nor should it allow the government to effectively punish the status of being homeless by making it a crime in all events for someone with no other options to sleep outside on public

property at night. At the same time, our Constitution recognizes that States have broad sovereign power to respond to pressing matters of local concern in ways that do not offend constitutional rights. That authority is no less vital in the context of homelessness. This Court should recognize that state and local governments retain substantial authority to respond to the homelessness crisis, including by imposing reasonable restrictions on when, where, and how public property may be used for sleeping or camping.

ARGUMENT

I. THE CRISIS OF HOMELESSNESS REQUIRES A BALANCED AND THOUGHTFUL RESPONSE

A. The Population of Americans Who Are Unhoused Is Large and Diverse

The number of unhoused people in the United States is enormous and growing. U.S. Dep’t of Hous. & Urb. Dev., *The 2023 Annual Homelessness Assessment Report to Congress 2* (2023) (Annual Homelessness Report).¹ On a given night in 2023, approximately 653,000 people—about the same as the total population of Boston or Las Vegas—were without “a fixed, regular, and adequate nighttime residence.” *Id.* at 2, 4. Since federal reporting began in 2007, that number has increased by 13 percent. *Id.* at 2. The current number is the highest on record. *Id.*

Around 28 percent of the Nation’s unhoused population—over 181,000 people—live in California. Annual Homelessness Report, *supra*, at 16. The size of California’s unhoused population has increased dramatically in recent decades: it grew by about 30 percent from 2007 to 2023. *Id.* at 17.

¹ <http://tinyurl.com/5ynpvtv3>.

The unhoused population is not monolithic. It includes adults who live by themselves, families with children, unaccompanied youth, veterans, and the elderly. Annual Homelessness Report, *supra*, at 2-3, 28. It includes people experiencing homelessness for the first time and those enduring chronic homelessness. *Id.* at 3, 37.² In California, the fastest-growing group of unhoused people are seniors, many of whom experienced homelessness for the first time after turning 50. Ibarra, *The Fastest-Growing Homeless Population? Seniors*, CalMatters (Feb. 10, 2023).³

Disparities in access to education, housing, jobs, and health services have influenced the demographic characteristics of the unhoused population in California. Davalos & Kimberlin, Cal. Budget & Pol’y Ctr., *Who Is Experiencing Homelessness in California?* (2023).⁴ Consistent with national trends, people who identify as Black, American Indian or Alaska Native, or Pacific Islander are overrepresented in California’s unhoused population. *Id.*; Annual Homelessness Report, *supra*, at 2. The percentage of unhoused Californians who identify as Latino also has increased disproportionately in recent years. Davalos & Kimberlin, *supra*; Angst, *Fact vs. Opinion: Here’s What*

² The concept of “chronic homelessness” may be tied to duration as well as other factors. The federal definition of “chronic homelessness” requires (1) experiencing homelessness for a period of one year or more, or for at least four periods in the last three years that total more than 12 months, and (2) having a disability. Annual Homelessness Report, *supra*, at 4.

³ <http://tinyurl.com/4dn35vtk>.

⁴ <http://tinyurl.com/7fyah8>.

You Need to Know About Homelessness in San Francisco, S.F. Chron. (Dec. 30, 2023).⁵

A large proportion of California's unhoused population lives with mental illness and substance use disorder, and many have endured physical and sexual violence. Kushel et al., U.C.S.F. Benioff Homelessness & Hous. Initiative, *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness* 5 (2023).⁶ But the causal relationship between these struggles and homelessness does not run in only one direction: many who do not have access to adequate shelter may, for example, begin abusing substances to cope with that trauma. *Id.* at 8; U.C.L.A. Lewis Ctr. for Reg'l Pol'y Stud., *Homelessness Is a Housing Problem with Gregg Colburn* (Nov. 29, 2023).⁷

Individuals experience being homeless in different ways. Most significantly, some are able to stay in shelters or other temporary housing while others are not. Annual Homelessness Report, *supra*, at 2. On a given night in California, around 32 percent of the homeless population is sheltered in temporary accommodations or transitional housing. *Id.* at 99.⁸ The remaining 68 percent of California's unhoused population is unshel-

⁵ <http://tinyurl.com/mkvdrjde>.

⁶ <http://tinyurl.com/5c3wnzup>.

⁷ <http://tinyurl.com/2s35w5uh>.

⁸ Although that percentage reflects the proportion of individuals who stay in shelters, it does not necessarily mean that every available shelter bed is in use, in part because homeless people sometimes refuse offers of shelter. Larson, *Half of San Francisco's Homeless Residents Refused Shelters: City Data*, KRON4 (Aug. 4, 2023), <http://tinyurl.com/35hzn2wa>.

tered, meaning they sleep at night in places not ordinarily used for sleeping—including cars, abandoned buildings, sidewalks, parks, and bus stations. *Id.* at 5, 10, 99. Some sleep alone in public places, without any physical structures (like tents or shacks) or connections to services. *Id.* at 7. Others stay in encampments, which generally refer to groups of people living semi-permanently in tents or other temporary structures in a public space. Dunton et al., U.S. Dep’t of Hous. & Urb. Dev., *Exploring Homelessness Among People Living in Encampments and Associated Cost: City Approaches to Encampments and What They Cost* 4 (2020).⁹ The percentage of unsheltered individuals in California’s homeless population is far greater than the national rate (around 40 percent) and has increased in recent years as pandemic-related resources expired. Annual Homelessness Report, *supra*, at 2, 37, 99.

Although there are substantial unhoused populations in suburban and rural parts of California, most unhoused individuals live in major cities. Paluch & Herrera, *Homeless Populations Are Rising Around California*, Pub. Pol’y Inst. of Cal. Blog (Feb. 21, 2023).¹⁰ Over 75,000 unhoused people live in Los Angeles County, a number that continues to grow despite considerable “[e]fforts to house people” and “hundreds of millions of dollars spent on shelter, permanent housing and outreach.” Smith & Vives, *Homelessness Continues to Soar, Jumping 9% in L.A. County, 10% in the City*, L.A. Times (June 29, 2023).¹¹ Almost three-quarters of that total number are

⁹ <http://tinyurl.com/2p8rdupk>.

¹⁰ <http://tinyurl.com/37cmrujp>.

¹¹ <http://tinyurl.com/25rhrszej>.

unsheltered and live in cars, in tents, or on the streets. *Id.* San Francisco is home to about 8,000 unhoused individuals, of which about half are unsheltered. Angst, *supra*. While the number of unhoused individuals overall has slightly decreased in San Francisco in recent years, there have been increases in specific neighborhoods, including the Tenderloin District. *Id.*

B. The Causes of Homelessness Are Not Straightforward

The causes of homelessness in California and across the United States are not simple or isolated. They include the high costs of rent and home ownership, lack of adequate income, a limited supply of affordable housing, violence and abuse, and mental and physical health challenges. Annual Homelessness Report, *supra*, at 23, 37, 52; Kushel et al., *supra*, at 5-6, 36; Streeter, Stanford Inst. for Econ. Pol’y Rsch., *Homelessness in California: Causes and Policy Considerations* 2-3 (2022).¹² Many other complex factors also play a part, including the nature and availability of alternative housing options, Streeter, *supra*, at 4-6; natural disasters and the pandemic, Annual Homelessness Report, *supra*, at 11-14, 23, 52; and policies affecting specific populations, like immigrants, veterans, or individuals with disabilities, *id.* at 23, 52, 64-76, 77-87.

Geographic variations in the size of the unhoused population across different regions also shed light on the causes of homelessness. Traditionally, factors like weather, generosity of public assistance, drug use, and poverty were blamed for high rates of homelessness in particular areas. U.C.L.A. Lewis Ctr. for Reg’l Pol’y

¹² <http://tinyurl.com/mw3wfyw4>.

Stud., *supra*. But recent research indicates that housing market conditions—especially the absolute cost of rental housing and the availability of rental vacancies—are more strongly correlated with rates of homelessness at the city and county level. *Id.* Attempts to increase housing supply and affordability can be hindered by restrictive zoning standards, which are often entrenched by local opposition to affordable housing or development. Streeter, *supra*, at 3. Building new housing units can also be challenging because the process for creating development plans and obtaining legal and regulatory approvals has historically been long and uncertain. *Id.* at 3-4; *but see infra* p. 9 (describing state-level initiatives to address those obstacles).

C. California and Its Local Governments Are Committed to Addressing This Crisis and Helping Those Without a Home

These complicated dynamics do not lend themselves to simple solutions, but California has remained committed to understanding and tackling the causes of the homelessness crisis. At the statewide level, the Housing Justice Team at the California Department of Justice has worked with state agencies and other partners to target systemic causes of homelessness, including by enforcing state laws aimed at increasing housing supply. *See generally* Cal. Dep’t of Just. Off. of the Att’y Gen., *Housing*.¹³ When the City of San Bernardino failed to adopt a housing plan that complied with state requirements, for example, the State secured a settlement providing for the planned development of over 8,000 additional housing units,

¹³ <http://tinyurl.com/yekjz3sk> (last visited Feb. 27, 2024).

along with updates to zoning and density regulations.¹⁴ When local officials in the Town of Woodside claimed that the entire town was exempt from a state housing law as a mountain lion sanctuary, the Attorney General again acted to enforce compliance with housing supply and affordability requirements.¹⁵ The Attorney General also supported the City of Livermore in defending its approval of an affordable housing project against a legal challenge brought by local opponents.¹⁶ And the State has adopted new legislation to encourage and streamline local approvals for affordable housing projects. *E.g.*, Cal. Gov't Code §§ 65912.100 *et seq.*, 65913.4.

California has also taken steps to ensure that shelter or housing is available for those who are unhoused or at risk of being unhoused. For instance, the Attorney General represented a state housing agency in a successful lawsuit challenging the City of Anaheim's effort to block a local nonprofit from creating transi-

¹⁴ Cal. Dep't of Just. Off. of the Att'y Gen., *Attorney General Bonta, Newsom Administration Announce Settlement with City of San Bernardino for Violating State's Housing Element Law* (Aug. 29, 2023), <http://tinyurl.com/3zx4cn5t>.

¹⁵ Cal. Dep't of Just. Off. of the Att'y Gen., *Attorney General Bonta: Memorandum Declaring Woodside a Mountain Lion Sanctuary Does Not Exempt Town from State Housing Laws* (Feb. 6, 2022), <http://tinyurl.com/m9vdwthk>.

¹⁶ Cal. Dep't of Just. Off. of the Att'y Gen., *Attorney General Bonta Urges Court to Expedite Review of CEQA Lawsuit Jeopardizing New Affordable Housing Project in Livermore* (Aug. 9, 2022), <http://tinyurl.com/4mf8r2z5>.

tional housing for women with mental health disabilities.¹⁷ The Attorney General also sued a real estate investment company for unlawfully evicting tenants from properties purchased at foreclosure sales.¹⁸ That suit ultimately led to a judgment that included \$2.75 million in restitution for tenants, plus an injunction to reform the company's business model.¹⁹

In addition, California provides direct support to the unhoused population. For example, the State offers funding for counties and Tribes to support unhoused families with children through rental assistance, security deposit assistance, utility payments, and conflict mediation with landlords or neighbors. Cal. Welf. & Inst. Code § 16523.1. And California's Homekey Program has invested over \$3 billion to develop affordable housing units, including by funding projects to convert underused hotels and motels into housing for people experiencing homelessness.²⁰

¹⁷ Cal. Dep't of Hous. & Cmty. Dev., *Court Agrees Anaheim Violated State Law. Decision Is a Big Win for Fair Housing in California* (Feb. 2, 2024), <http://tinyurl.com/48n47pkb>.

¹⁸ Cal. Dep't of Just. Off. of the Att'y Gen., *Attorney General Bonta Announces Judgment Against Real Estate Investment Company for Unlawfully Evicting Tenants from Foreclosed Properties* (Dec. 8, 2021), <http://tinyurl.com/r4thehye>.

¹⁹ *Id.*

²⁰ Cal. Dep't of Hous. & Cmty. Dev., *Homekey*, <http://tinyurl.com/sx6jnnz4> (last visited Feb. 27, 2024); Cal. Dep't of Hous. & Cmty. Dev., *Homekey: Awards Dashboard*, <http://tinyurl.com/2kvd4bka> (last visited Feb. 27, 2024); U.C. Berkeley Turner Ctr. For Hous. Innovation, *California's Homekey Program: Unlocking Housing Opportunities for People Experiencing Homelessness 2* (2022), <http://tinyurl.com/yybhdk4h>. The Attorney General has defended the Homekey Program in litigation, such as by advocating in support of a Marin County project

At the municipal level, cities across California have worked to prevent people from losing their homes and to connect those without homes to shelter and supportive services. Between 2017 and 2023, for example, Los Angeles provided permanent housing to 98,905 people and interim housing to 137,656 people. L.A. Cnty. Homeless Initiative, *Quarterly Report #27* at 18, 21 (Oct. 10, 2023).²¹ San Francisco added more than 3,000 long-term affordable housing units and placed more than 7,000 homeless people in housing and shelter between 2020 and 2022. City & Cnty. of S.F., *Homelessness Recovery Plan*.²² San Francisco also provides outreach, case management, medical and mental health services, and other support to unsheltered individuals. S.F. Dep't of Homelessness & Supportive Hous., *Outreach*.²³ San Diego has similarly focused on developing innovative ways to provide care and services to those who are unhoused. San Diego Cnty. Dist. Att'y, *Blueprint for Mental Health Reform: A Strategic New Approach Addressing the Intersection of Mental Health, Homelessness and Criminal Justice in San Diego County* 3-4 (2019).²⁴

to convert a former nursing home into permanent housing for unhoused individuals with disabilities. See Cal. Dep't of Just. Off. of the Att'y Gen., *Attorney General Bonta Files Brief in Defense of Homekey Program-Funded Project Providing Housing for Marin County Residents Experiencing Homelessness* (Oct. 11, 2022), <http://tinyurl.com/3c8k57wd>.

²¹ <http://tinyurl.com/mtdnsmur>.

²² <http://tinyurl.com/4uumykar> (last visited Feb. 27, 2024).

²³ <http://tinyurl.com/5n6ppvyd> (last visited Feb. 27, 2024).

²⁴ <http://tinyurl.com/ypp7ffx3>.

D. Encampments and Other Aspects of the Homelessness Crisis Can Present Risks to Public Health and Safety

Despite these efforts, homelessness persists in California and throughout the Nation. This continuing crisis presents challenges for state and local officials who are responsible for protecting the health and safety of our communities. Those without shelter often sleep or stay in public places designed for other uses—like parks, playgrounds, plazas, and pedestrian or vehicle thoroughfares—whether alone or as part of a group or encampment. Annual Homelessness Report, *supra*, at 5-7, 10; Dunton et al., *supra*, at 7-9. In some circumstances, their presence causes minimal or no harm. See, e.g., Hart, *This Neighborhood in Sonoma Fought—Then Embraced—a Tent City for Homeless People*, L.A. Times (Apr. 8, 2021).²⁵ In other circumstances, however, encampments and certain other aspects of the modern homelessness crisis can present substantial hazards—both to those who are unsheltered and to others who live in the surrounding community.

For instance, people living in encampments face a heightened risk of disease associated with living outside without bathrooms or wash basins. Gorman, *Medieval Diseases Are Infecting California’s Homeless*, The Atlantic (Mar. 8, 2019).²⁶ Efforts to prepare food and create heat sources in those settings can lead to deadly fires. In 2020 alone, seven unhoused individuals died in fires in Los Angeles. Smith et al., *24 Fires*

²⁵ <http://tinyurl.com/3ypfrh>.

²⁶ <http://tinyurl.com/46t9ck78>.

a Day: Surge in Flames at L.A. Homeless Encampments a Growing Crisis, L.A. Times (May 12, 2021).²⁷ Exposure to storms, flooding, and other outdoor conditions can imperil those who are unhoused as well as first responders. In November 2022, for example, a severe storm in Southern California swept away a homeless encampment in Ontario, killing three people. Wiley et al., *Massive Storm Poses Lethal Danger for Homeless People. California Is Scrambling to Help*, L.A. Times (Jan. 4, 2023).²⁸ Unhoused people are also disproportionately likely to be victims of crime. Vankin, *Homelessness and Crime: California's Hot-Button Political Issues Are Even More Complex than You Think*, Cal. Local (June 17, 2022).²⁹ And the abuse of drugs like fentanyl and methamphetamine presents a severe health and safety threat and sometimes causes deadly overdoses. See, e.g., Fagan & Leonard, *It's Not Just Fentanyl. How 'Speedballs' Are Making S.F.'s Drug Overdose Crisis Even Worse*, S.F. Chron. (Dec. 11, 2023).³⁰

The homelessness crisis can also harm our public spaces or make them unusable for their intended purpose. Encampments, in particular, can generate unmanaged trash in parks and plazas, including human waste and used needles. Dunton et al., *supra*, at 18. This can create rodent infestations and other serious public-health problems for the unhoused pop-

²⁷ <http://tinyurl.com/msafupjh>.

²⁸ <http://tinyurl.com/bdhwy69y>.

²⁹ <http://tinyurl.com/549s7pf9>.

³⁰ <http://tinyurl.com/3ynra3zu>.

ulation and surrounding communities. *See, e.g.*, Nguyen, *‘They’re Everywhere’: Rats Plague San Jose’s Largest Homeless Camp*, San José Spotlight (Feb. 16, 2022).³¹ For example, the presence of unmanaged trash in encampments can contaminate food and water and lead to the resurgence of infectious diseases like Hepatitis A and typhus. *See, e.g., id.*; Gorman, *supra*. Unsheltered individuals, as well as their temporary structures and belongings, can also block access to sidewalks, homes, or businesses—especially for persons with disabilities, families with children, or older individuals. *See, e.g.*, Mae, *Downtown San Diego Homeless Encampments Impacting Students Who Walk to School*, KPBS (May 31, 2023);³² Lam, *Sacramento Faces Class-Action Disability Lawsuit over Homeless Camps Blocking Sidewalks*, Cap. Pub. Radio (Feb. 16, 2023).³³ These effects can materially undermine public and private efforts to support local residents and businesses—and to build stronger, more productive, and more vibrant communities.

As discussed at greater length by other amici, government officials have pursued a variety of strategies for addressing these concerns. Some cities have established approved encampments on public property with security, services, and other resources; others have sought to impose geographic and time-limited bans on public sleeping; and others have worked to clear and clean particularly dangerous encampments after providing notice and reminders to those who lived there. *See, e.g.*, Hart, *supra*; Cal. Governor Newsom Cert. Br. 5-7.

³¹ <http://tinyurl.com/ms4bxxj2>.

³² <http://tinyurl.com/5ezv2ejh>.

³³ <http://tinyurl.com/mrxpd7tf>.

II. THE CONSTITUTION CONSTRAINS GOVERNMENT RESPONSES TO HOMELESSNESS IN SOME WAYS BUT PRESERVES SUBSTANTIAL FLEXIBILITY

The Constitution imposes important limits on how the elected branches of government may respond to homelessness. But a proper understanding of those limits underscores the broad discretion of States and local officials to adopt sensible policy solutions to the homelessness crisis that are aimed at protecting the health and safety of all members of our communities—including those among us who currently lack housing.

A. Governments May Not Punish the Status of Being Homeless

Although the “primary purpose” of the prohibition on cruel and unusual punishment is “directed at the method or kind of punishment imposed for the violation of criminal statutes,” this Court has long recognized that the Eighth Amendment also “imposes substantive limits on what can be made criminal and punished as such.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); see *Gregg v. Georgia*, 428 U.S. 153, 172 (1976).

The State of California is well aware of those limits, which this Court first recognized in *Robinson v. California*, 370 U.S. 660 (1962). That case considered a California law that “ma[de] the ‘status’ of narcotic addiction a criminal offense.” *Id.* at 666; see *id.* at 660 n.1 (“No person shall use, or be under the influence of, or be addicted to the use of narcotics . . .”). The Court recognized “that narcotic addiction is an illness . . . which may be contracted innocently or involuntarily.” *Id.* at 667. “[A] state law which imprisons a person thus afflicted as a criminal . . . inflicts a cruel and unusual punishment in violation of” the Constitution. *Id.* To be sure, the sanction of “imprisonment for

ninety days [was] not, in the abstract, a punishment which [was] either cruel or unusual.” *Id.* But the question could not “be considered in the abstract.” *Id.* For certain purported “crimes,” as little as “one day in prison would be a cruel and unusual punishment.” *Id.*; *see, e.g., id.* (discussing “the ‘crime’ of having a common cold”); *see also Powell v. Texas*, 392 U.S. 514, 532-534 (1968) (plurality opinion) (discussing *Robinson*).

Like addiction, homelessness is a status that all too often comes about innocently or involuntarily, whether as the result of a lack of affordable housing or other factors. *See supra* pp. 7-8. Although any individual’s experience of homelessness may be short-lived or soon-resolved, our society often treats homelessness as a status. *See supra* pp. 3-4. And laws at every level of government recognize the status of homelessness as one that may entitle an individual to particular services or benefits. *See, e.g.,* 42 U.S.C. § 11302 (defining “homeless,” “homeless individual,” and “homeless person” for federal homelessness assistance programs); Cal. Welf. & Inst. Code § 16523.1 (housing-related support for “eligible families experiencing homelessness”); Palo Alto Mun. Code § 18.42.160 (providing safe parking areas for “homeless persons” living in vehicles).

It should be beyond dispute that, just as the government may not punish the status of being addicted to narcotics, *see Robinson*, 370 U.S. at 666-667, it may not punish the status of being homeless. The principle that a person’s status may not be the basis for criminal sanction has been an established part of this Court’s Eighth Amendment precedent for more than six decades. *See id.* And even if the Eighth Amendment were viewed more narrowly, *cf. Pet. Br.* 16-24, a law criminalizing the status of being homeless would

surely encounter other constitutional difficulties. *See generally* Dubin, *Mens Rea Reconsidered*, 18 Stan. L. Rev. 322, 393 (1966) (discussing *Robinson* and observing that “[t]he better, more candid view would nonetheless seem to be that those principles are *due process* guarantees”); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 649 (1966) (observing that some aspects of *Robinson*’s reasoning have “definite overtones of substantive due process”).

It would be no less problematic for a city to effectively punish the status of being homeless by making it a crime in all events for someone with no other options to sleep outside at night. Human beings need to sleep. For some members of our society, sleeping outside is unfortunately the only available option. A law or ordinance that punished that basic and essential human activity, or that proscribed even so much as the use of a blanket to keep warm while sleeping outside, would effectively and impermissibly criminalize the status of being homeless. *Cf.* Pet. App. 178a-179a.

That conclusion should follow naturally from the Court’s opinion in *Robinson*, regardless of how one construes this Court’s splintered decision in *Powell*. *See Robinson*, 370 U.S. at 666-667. Even apart from the Eighth Amendment, moreover, a flat criminal prohibition on sleeping at night in all public spaces—with no exceptions for those who lack any alternatives—could create other constitutional concerns. For example, a human being’s ability to lie down and sleep on the ground *somewhere* when no shelter is available might qualify as one of those few “rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition,’ and ‘implicit in the concept of

ordered liberty.” *Washington v. Glucksberg*, 521 U.S. 702, 720-721 (1997) (citations omitted).³⁴ Depending on the circumstances, moreover, the “enforcement of laws that prevent homeless individuals who have no place to go from sleeping” might also unconstitutionally “burden[] their right to travel.” *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992). Although not squarely presented in this case, those doctrines underscore the important constitutional interests at stake here.

B. States and Local Governments Retain Broad Authority to Respond to the Homelessness Crisis

Notwithstanding these constitutional limitations, as with other matters of “grave concern” to our society, *Robinson*, 370 U.S. at 667, States and local governments retain “broad power” (*id.* at 664) to respond to the homelessness crisis. The “protection of the lives, limbs, health, comfort, and quiet of all persons” are “primarily, and historically . . . matters of local concern.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (alteration omitted). And the States have “great latitude under their police powers” to address those concerns. *Id.*; *see generally* U.S. Const. amend. X. Indeed,

³⁴ *See* Morse Earle, *Home Life in Colonial Days* 1-2 (1898) (when earliest colonial settlers in Pennsylvania, New York, Massachusetts, and other States had difficulty building houses, they slept in makeshift shelters such as “caves . . . dug in the side of a hill”); Ronda, *Lewis and Clark Among the Indians* 227-228 (2d ed. 2002) (Lewis and Clark set up camp near a riverbank and slept under “leaky” shelters made of “brush”); Diary of Appleton Milo Harmon Vol. 1, in *Trails of Hope: Overland Diaries and Letters, 1846-1869*, at 26 (Utah Acad. Libr. Consortium 2002), <http://tinyurl.com/3v68kpxk> (diary of 1840s Mormon pioneer describing lying “down to sleep alone” at night in “a grove of timber”).

even as this Court struck down the state law in *Robinson* making it a criminal offense for a person to be a narcotic addict, it emphasized that “the range of valid choice which a State might make” in addressing addiction and other local concerns “is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for [a court] to decide.” 370 U.S. at 665.

That is equally true in the context of the homelessness crisis. Recognizing that people with no home and no other options must be able to sleep *somewhere* at night without fear of criminal prosecution does not mean that they may sleep wherever they prefer, in whatever manner they choose, or at any time of day. That much should not be controversial: even the court of appeals below has recognized that the Constitution does not require cities to “allow anyone who wishes to sit, lie, or sleep on the streets” to do so “at any time and at any place.” Pet. App. 18a (quoting *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019)). Any other rule would be untenable. Considerations of public safety and civic order compel local governments to adopt policies regulating the time, place, and manner of public sleeping—such as by punishing the obstruction of streets or sidewalks, or restricting sleeping near a school or playground.

For similar reasons, cities retain authority to restrict the erection of tents, other structures, and encampments in public places. No doubt, such encampments sometimes offer a sense of stability and community to people experiencing homelessness. But the sad reality is that encampments can be dangerous for those who live in and around them. They can threaten public health and safety by increasing the risk of fire, pollution, disease transmission, and crime.

See supra pp. 12-14. Nothing in the Constitution bars cities and States from choosing to address those hazards by establishing a fair and orderly process to clear encampments from particular areas, so long as the people displaced from those encampments have some alternative place to sleep at night.³⁵

And when a person does have access to shelter but voluntarily chooses to forgo it, sleeping outside is no longer an involuntary and unavoidable consequence of their homeless status. *See supra* pp. 16-17. There is no sound basis for concluding that the Constitution prohibits municipal authorities from taking enforcement actions against a person who refuses a bona fide offer of shelter and then also refuses to vacate a public space where sleeping is prohibited.

Nor does the Constitution require cities to have enough shelter beds to account for *every* unhoused individual within their jurisdiction before city officials may enforce a restriction on sleeping outside against *any* single individual in that jurisdiction. Because “the Eighth Amendment places limits on the steps a government may take against an individual,” *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 275 (1989), the proper focus of any constitutional inquiry should be whether the individual subject to enforcement has an alternative place to sleep. A contrary approach could “effectively requir[e]” cities “to allow the use of [their] public parks as homeless encampments,” Pet. App. 95a (Collins, J., dissenting)—even if they have secured shelter beds and

³⁵ *See, e.g., Gomes v. Cnty. of Kauai*, 481 F. Supp. 3d 1104, 1109 (D. Haw. 2020); *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019); *Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019).

offered them to some (or even most) of their unhoused residents.

Homelessness presents a complex and heartbreaking crisis, in California and across the Nation. The responsibility for addressing that crisis lies with the elected branches of government—and principally those at the state and local level. Those politically accountable officials must continue to invest in strategies that target the root causes of homelessness and reflect empathy and compassion for our fellow Americans who lack a home, while also preserving safe and sanitary streets and public spaces. The courts have a role to play as well: in safeguarding the liberties protected by our Constitution, including the basic right of homeless people not to be punished for their status. But that role must be carried out in a way that respects the “broad power” of States and local governments to select from the “wide” range “of valid choice[s]” (*Robinson*, 370 U.S. at 664, 665) about how best to protect the health and safety of their residents and to preserve order on their streets and sidewalks and in their parks and plazas.

CONCLUSION

This Court should decide the case in a way that respects the basic constitutional rights of people who are unhoused—including their right not to be criminally punished for sleeping outdoors when they have nowhere else to go—while also preserving the sovereign authority of the States and their local governments to adopt a range of valid policies in response to this crisis.

Respectfully submitted,

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