No. 23-175

# In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
*Petitioner,*

*v.*

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

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

## BRIEF OF THE PACIFIC RESEARCH INSTITUTE AS *AMICUS CURIAE* SUPPORTING PETITIONER

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Pacific Research Institute (PRI) is a nonprofit nonpartisan 501(c)(3) organization that champions freedom, opportunity, and personal responsibility by advancing free market policy solutions to the issues that impact the daily lives of all Americans. It shows how free interaction among consumers, businesses, and voluntary associations is more effective than government action at providing the important results we all seek—good schools, quality health care, a clean environment, and economic growth. Founded in 1979 and with offices in Pasadena and Sacramento, PRI is supported by private contributions. Its activities include publications, public events, media commentary, invited legislative testimony, and community outreach.

PRI is interested in this case both as a matter of constitutional principle and because it is concerned about the harms that would flow to the public, to the homeless themselves, and to California towns and businesses if the Ninth Circuit's misguided effort to constitutionalize complex social and economic problems is allowed to stand. The problem of homelessness and balancing the rights and responsibilities of all citizens and their governments are best dealt with by the political branches and private institutions. Federal judges in general, and the

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus*, its members, and counsel, made a monetary contribution to the brief's preparation or submission.

Ninth Circuit majority in particular, are neither authorized nor competent to make policy in this area.

## SUMMARY

*Amicus* agrees with Petitioner, Pet. Br. 2-3, 12-13, 16-28, that the text, history, and traditions of the Eighth Amendment provide no support for declaring ordinary and quite mild criminal punishments to be cruel and unusual. *Amicus* also agrees that discrete unlawful actions may be punished, even when taken under the pressures of a condition such as alcoholism or circumstances such as homelessness. *Id*. at 4-5, 13. Citizens and local governments have the right to preserve public spaces for common use, not subject to functional adverse possession by homeless persons blocking common use by others. Id.

*Amicus* writes separately to raise two supplemental points.

1. Even if the Court were to look beyond the intrinsic nature of the punishments duly provided by law, and consider the proportionality of such ordinary and otherwise permissible punishments as applied to homeless persons having few immediate or appealing shelter alternatives in a particular jurisdiction, the history of anti-vagrancy laws in the States rebuts any suggestion that punishing such circumstance-driven vagrancy is cruel and unusual.

As recounted recently by Judge Bumatay in *Coalition on Homelessness* v. *City and County of San Francisco*, 90 F.4th 975, 982-89 (9th Cir. 2024) (Bumatay, J., dissenting), and earlier in a different context by Justice Thomas in *City of Chicago* v. *Morales*, 527 U.S. 41, 102-106 (1999) (THOMAS, J.,

dissenting), anti-vagrancy laws come with a long historical pedigree spanning periods before, during, and after the Adoption of the Bill of Rights and the Fourteenth Amendment. *Amicus* elaborates on and supplements those analyses with a survey of the many vagrancy laws that existed during the historically relevant time periods.

The long history of prohibiting and punishing vagrancy (which encompasses unlawful camping or sleeping on the streets by the homeless), is a definitive rebuttal of any claim that such punishment is constitutionally unusual and strong evidence that it was not viewed as cruel within the original public understanding of that term. The constitutional text, history, and tradition of anti-vagrancy laws co-existing with prohibitions on cruel and unusual punishment are more than sufficient for this Court to conclude that the Eight Amendment does not prohibit the ordinary and relatively mild punishments for vagrancy at issue in this case.

Furthermore, the fact that homeless vagrants of all eras were often the unlucky victims of economic or other circumstances likewise rebuts any notion that the "involuntary" or "unavoidable" resort to sleeping and camping in the streets and parks somehow converts a generally permissible restriction into a cruel and unusual punishment as applied. Rather, responsibility for one's actions, even if taken in the face of adverse circumstances, remained the rule. And the punishments and other burdens placed upon such vagrants were often far more severe than the mild penalties at issue here yet were not denounced as cruel and unusual.

2. *Amicus* also writes to highlight the complex and multi-faceted nature of the homelessness problem, especially in California. The complexity extends to issues surrounding the circumstantial pressures facing the homeless, the difficult choices they must face and make, and the policy-driven lines surrounding individual responsibility and agency, the consequences for those thought to have partially limited agency, and the proper decisionmakers for drawing such lines.

While there are no easy solutions to homelessness, and multiple perspectives on how to balance the competing rights and interests of different parts of society regarding the use of public spaces, two things seem apparent: First, using narrowly confined notions of involuntary behavior or unavoidable choices as the touchstone for deeming even the mildest punishment to be disproportionately cruel and unusual is an overly simplistic approach to a complex social problem. Constitutionalizing such simplistic rules can only hurt, rather than help, in finding solutions to the problem. Second, whatever the difficulties of state and local governments in addressing such complex problems, inserting the unmoored policymaking of the federal judiciary into the mix is not the answer, either from a constitutional or a policy-making perspective.

The disconnect and internal inconsistency of the Ninth Circuit's approach to determining whether sleeping or camping in public spaces is voluntary or unavoidable highlight the general lack of judicial competence to meddle in this complicated area without clear and concrete guidance from the constitutional text. To the extent judges have a role in

the issues raised by this case, it is the role delegated to them by statute or via common-law doctrines such as mens rea, necessity, insanity, and sentencing considerations in individual criminal cases. Those are the means of addressing true problems with genuinely involuntary conduct or claims that violation of a particular law at a particular time was justified by supervening circumstance. To instead constitutionalize ever-malleable and subjective notions of voluntariness or necessity via the Eighth Amendment in lieu of those flexible and variable common law concepts goes against the text and history of that Amendment and ignores this Court's appropriate aversion to federal judicial policymaking.

## ARGUMENT

### I. The History and Tradition Surrounding the Eighth Amendment Demonstrates that Restricting the Use of Public Spaces by Vagrants or the Homeless Was Not Considered Cruel and Unusual Punishment.

Petitioner amply discusses the text and history of the Eighth Amendment as it relates to the nature and severity of punishments in general. Pet. Br. 2-3, 12-13, 16-28. *Amicus* further notes, however, that the claims in this case go more to whether *any punishment at all* is permissible for so-called "involuntary" sleeping or camping in public spaces within a particular jurisdiction. That issue might be better conceptualized as a proportionality question: Is any and all punishment disproportional for conduct one cannot control? But see Pet. Br. 28 (proportionality claim not raised by plaintiffs). *Amicus* thus writes to add that

regardless of how the question is framed, the history of anti-vagrancy laws around the time of the Founding and later demonstrate that prohibitions and punishments for the vagrant behavior at issue in this case, even where driven by force of circumstance, was quite common, was often more severe, and would not have been deemed cruel under the common understanding of the Eighth Amendment and its analogues.

As Judge Bumatay recently wrote in *Coalition on Homelessness*, 90 F.4th at 987-88 (Bumatay, J., dissenting), the long history of anti-vagrancy laws in England and the United States refutes any notion that ordinary punishments for vagrancy, including the behaviors at issue here, were cruel and unusual as those terms were understood.

Even after the enactment of the English Declaration of Rights prohibiting "cruell and unusuall" punishments, anti-vagrancy laws enacted by local governments were enforced by punishment. See *Coalition on Homelessness,* 90 F.4th at 987-988 (Bumatay, J., dissenting) (citing C.J. Ribton-Truner, *A History of Vagrants and Vagrancy and Beggars and Begging* 173-203 (1887)). And restriction and punishment of vagrancy were also fixtures of early American law. *Id.* at 987 (Bumatay, J., dissenting) (citing *City of Chicago* v. *Morales*, 527 U.S. 41, 103 (1999) (THOMAS, J., dissenting)).

A survey of state anti-vagrancy laws from around the time of the Founding and the Fourteenth Amendment confirm those conclusions. For example, at the time the Eighth Amendment was enacted, fourteen states were granted statehood. All except

Vermont had laws prohibiting vagrancy per the collection of state laws closest to 1791 (ranging from 1759 to 1800).[2] These laws provided various punishments for vagrancy, including fines, imprisonment, forced labor, whipping, and sending vagrants back to their last place of settlement. And while some of those specific punishments would undoubtedly be considered cruel by modern standards, and would certainly be unusual today, they nonetheless establish that there was no general prohibition on punishment for vagrancy and no limitation that would reach the far milder penalties now common for unlawfully sleeping or camping in many public spaces.

To aid the Court with the details, if necessary, the early laws in the States are as follows:

> *Connecticut*. *Acts and Laws of the State of Connecticut, in America* 104 (Hartford, Conn., Elisha Babcock 1786) (vagrants sent back to their last settlement; return vagrants whipped ten stripes and then again sent back), available at https://tinyurl.com/39kn3jm2.
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> *Delaware*. *Laws of the State of Delaware: 1700-1797*, at 134-138 (1797) (defining a vagrant as a beggar who travels without a license, imposing charges and taxes upon them, and imprisoning

[2] These laws were accessed as scanned copies uploaded to LLMC Digital (www.llmc.com) and via the Internet Archive (https://archive.org/) where noted; see also *City of Chicago* v. *Morales*, 527 U.S. at 103 n.2 (THOMAS, J., dissenting) (citing early state laws punishing vagrancy reprinted in compilations by J. Cushing).

vagrants who did not pay the charges and taxes), https://tinyurl.com/2srwptak.

*Georgia.* Robert & George Watkins, *A Digest of the Laws of the State of Georgia,* No. 391, 376-377 (Philadelphia, Pa., R. Aitken 1800) (vagrant who is loitering and unable to provide security jailed until either security is provided or court binds the vagrant to one year of service with wages given to the county; absent such service, vagrant subject to no more than thirty-nine lashes at the whipping pole), available at https://digitalcommons.law.uga.edu/ga_code/11/.

*Maryland*. *The Laws of Maryland Since 1763,* ch. XXIX, 35-36 (Annapolis, Md., Frederick Green 1787) (vagrants and idle persons without employment shall be taken to the poor house and kept for no more than three months of hard labor), available at https://tinyurl.com/y5asecwz.

*Massachusetts*. *Acts and Laws, of His Majesty's Province of the Massachusetts-Bay in New England*, chs. V & XIII, 20-21, 99 (Boston, S. Kneeland 1759) (requiring that idle persons be employed; penalties for unemployed loitering including imprisonment, up to ten lashes, and hard labor; requiring counties to maintain a house of corrections for vagrants and idle persons), available at https://tinyurl.com/5eu68esb.

*New Hampshire.* 5 *Laws of New Hampshire, 1784-1792,* at 690 (Henry Harrison Metcalf ed., Rumford Press 1916) (idle persons must be committed to the poor house or to prison, with punishments including hard labor, wearing fetters

or shackles during conferment, or whipping no more than thirty-nine times), available at https://tinyurl.com/2uaf734h.

*New Jersey*. William Patterson, *The Laws of the State of New Jersey,* ch. XXXIII, 35-36 (New Brunswick, N.J., Abraham Blauvelt 1800) (vagrants to be apprehended and sent back to their last place of settlement; returning vagrant subject to no more than twenty bare-back lashes), https://tinyurl.com/25krcx58.

*New York*. *Laws of the State of New-York, 1777-1789*, ch. LXV, 128-129 (Samuel Jones & Richard Varick eds., Hugh Gaine 1789) (vagrants arrested and required to post bail; failure to post bail subjected vagrant to corporal punishment not exceeding thirty-nine lashes in one day and then confinement to house of labor for up to six months of hard labor and then transfer back to their last place of settlement; additional punishment and labor for return vagrants).

*North Carolina*. James Iredell, *Laws of North Carolina,* ch. XXXIII, 508-509 (Edenton, N.C., Hodge & Wills 1791) (vagrant subject to arrest and demand for security; jail for up to ten days absent such security, and escalating imprisonment, charges for costs, forced labor, and up to thirty-nine lashes).

*Pennsylvania. A Supplement to the Several Acts of the Assembly of this Province for the Relief of the Poor, A Compilation of the Poor Laws of the State of Pennsylvania, 1700–1788*, at 13-21 (Philadelphia, Pa., Zachariah Poulson, Jr. 1788)

(providing additional punishments for vagrants, including being removed to the place of their last settlement and sending the vagrant to workhouses to remain without bail for ten days), available at https://tinyurl.com/37n996vc.

*Rhode Island*. *The Public Laws of the State of Rhode-Island and Providence Plantations, 1775–1865,* at 463-464 (Providence, R.I., Miller & Hutchens 1822) (vagrants who fail to depart after being so ordered committed to a work-house for a period not to exceed one month), available at https://tinyurl.com/2vecyytz.

*South Carolina*. John Faucheraud Grimke, *The Public Laws of the State of South-Carolina, 1790*, Nos. 1081 & 1491, 431-433 (Philadelphia, Pa., R. Aiken & Son 1790) (vagrants and idle persons to be kept in the poor house, detained and punished, sold for labor for up to a year, or absent sale, subjected to between ten and thirty-nine lashes), available at https://tinyurl.com/ypuc8ww6.

*Virginia*. *A Collection of All Such Acts of the General Assembly of Virginia, 1794,* ch. CII, 180-186 (Richmond, Va., Samuel Pleasants, Jun. & Harry Pace 1803) (vagrant, defined as one who is loitering without means for employment, would be employed for labor not exceeding three months), available at https://tinyurl.com/yxcm7tmz.

*Vermont*. At the time Vermont became a state, it did not prohibit vagrancy. *Statutes of the State of Vermont* (Bennington, Vt., Anthony Haswell 1791), available at https://tinyurl.com/37hnrfca.

As the above descriptions show, many early States subjected vagrants to far more onerous punishments than the limited penalties imposed by Petitioner in this case for a limited class of conduct that is deemed to misuse public spaces. And many of those States did so in the face of their own prohibitions on cruel and unusual punishment. See *Coalition on Homelessness*, 90 F.4th at 988 (Bumatay, J., dissenting) ("anti-vagrancy legislation, and the associated punishments, have coexisted with English, colonial, State, and federal prohibitions on 'cruel and unusual punishments' for centuries."); *id*. at 985 (at the time of the Founding, "many States had adopted bans on 'cruel and unusual' or 'cruel or unusual' punishments in their constitutions.") (citing Va. Declaration of Rights § 9 (1776); Del. Declaration of Rights § 16 (1776); Md. Declaration of Rights art. XXII (1776); N.C. Declaration of Rights art. X (1776); Mass. Const. pt. I, art. XXVI (1780); N.H. Bill of Rights art. XXXIII (1783)).

Even many decades later, around the time of the adoption of the Fourteenth Amendment and incorporation of the Eight Amendment as against the States, States continued to punish vagrancy at varying levels of severity without any suggestion that such punishments were considered cruel or unusual as applied to persons who were vagrant by force of circumstance. *Coalition on Homelessness*, 90 F.4th at 988 (Bumatay, J., dissenting) (laws "criminalizing vagrancy * * * lasted well through the ratification of

the Fourteenth Amendment.") (citing *Morales*, 527 U.S. at 103-104 & n.3 (THOMAS, J., dissenting)).[3]

After the passing of the 14th Amendment, there was no significant shift in how vagrants were treated. Vagrants were still fined, imprisoned, and forced to labor. Some States, however, did eliminate whippings as punishment, opting instead for fines or imprisonment. See, *e.g.*, S.C. CODE ANN. ch. XXIII § 384 (1893) (Vagrancy); MICH. COMP. LAWS ch. 155 § 1 (1897) (Disorderly Persons).[4]

Under a proper constitutional analysis focusing on the text of the Constitution and the history and tradition that gave meaning to the words at the time they were adopted, *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2129-2130 (2022), the Ninth Circuit in this case got it wrong. The history and tradition of punishing vagrancy, regardless of the

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[3] Among the many later laws defining and punishing vagrants are: Vagrants, NEB. REV. STAT. Part 3, ch. 30 § 355 (1866) (defining vagrants as "idle" people without "visible means of support" who "wander abroad" or "occupy public places for the purpose of begging and receiving alms."); Crimes and Punishments, N.C. REV. STAT. ch. 34 § 43 (1855) (punishing vagrancy); An Act for the Restraint of Idle and Disorderly Persons, TENN. REV. STAT. ch. XXII § 2 (1809) (same); Vagrants, ARK. REV. STAT. ch. 154 (1837) (same); Tramps, MAINE REV. STAT. tit. 11, ch. 128 §§ 18-19 (1883) (same); Vagrants, IOWA CODE, tit. XXV, ch. 208 § 3319 (1851) (same); An Act for the Punishment of Idle and Disorderly Persons, MICH. COMP. LAWS § 1 (1833); GA. PENAL CODE ch. 232 § 22 (1850) (same).

[4] That whippings came to be seen as cruel, and grew to be unusual forms of punishment, is a good illustration of a potential Eighth Amendment analysis of the *means* of punishment itself, rather than of the permissibility *vel non* of more ordinary punishment.

unfortunate circumstances that caused it, was not considered improper, disproportional, or otherwise cruel and unusual. Rather, it was and remains a common means of addressing a common problem. As such, it did not and does not violate the Eighth Amendment.

## II. Homelessness Is a Complex Problem that Cannot Be Addressed by Arbitrary Judicial Rules Purporting to Define Involuntary and Unavoidable Choices.

The causes and consequences of homelessness, and the potential solutions, are complicated, often unpredictable, and require the balancing of interests as between the rights of the majority of citizens of States and localities and the rights of individuals who find themselves in difficult circumstances. But to try to reduce such complexities to simplistic dichotomies between voluntary and involuntary conduct or avoidable and unavoidable choices neither helps address the problems of homelessness nor is within the competence of the federal judiciary. Rather, the problems are best grappled with by the political branches or, where required to address individual issues of volition and necessity, by common-law doctrines more suited to such matters individually.

Regarding the complexity of the problem of homelessness in *Amicus*'s home state of California, many PRI scholars have highlighted the difficulties the State faces and the difficulties with the ever-evolving attempts at legislative solutions. For example, part of the problem is geographic and political, with high housing costs contributing to

people being unable to afford housing. Steven Greenhut & Wayne Winegarden, *Giving Housing Supply a Boost: How to Improve Affordability and Reduce Homelessness* 10 (2024). (homelessness is "a multi-pronged problem driven to a large degree by addiction and mental-health issues. But regions with higher-cost housing have much higher levels of homelessness because a lack of cheaper housing leaves people on the economic margins with nowhere to go. Homelessness is a social problem that's compounded—often dramatically so—by exorbitant housing prices.").

Likewise adding to the problem are decisions like *Martin* v. *Boise*, 920 F.3d 584 (9th Cir. 2019), which PRI scholars noted "[i]n practice * * * is creating a right to sleep on the street * * *. The result creates an effective subsidy for being homeless. Homeless individuals suffering with mental health issues or substance abuse problems are now able to subsist over the long-term. While subsisting is possible, living on the streets imposes unacceptably high costs on both the homeless and the broader community." Steven Greenhut & Wayne Winegarden, *Giving Housing Supply a Boost* 40 (2024).

A resistance to available housing also compounds efforts to determine whether remaining on the street is voluntary or involuntary, or otherwise avoidable. Many homeless say they would reject offers of certain types of housing they find distasteful, or lacking in privacy or safety, or that involve sobriety or other

restrictions.[5] Distinguishing on a daily basis between the housing resistant and the "involuntarily" homeless, under the sword of a federal injunction, is complicated and difficult, to say the least.

Taking these complexities and trying to tease out some subset of persons deemed "involuntarily" homeless or "unavoidably" required to sleep or camp in a particular public space borders on the impossible. Genuinely involuntary action–such as when one is bound and gagged, drugged unconscious, or having a seizure–is one thing, but the eventual constrained outcome resulting from multiple choices, often between undesirable options in all events, is not involuntary in the same way.

Given the many variables leading up to a decision to sleep on the streets in a particular jurisdiction, determining what is and is not "voluntary" behavior and whether the lack of alternative shelter could or could not be avoided is far from a one-size-fits-all problem. The many and varied choices that precede and are involved in any given moment of lacking shelter belies an ordinary or sensible reading of

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[5] See, *e.g.*, Jason M. Ward et al., Rand Corp., *Recent Trends Among the Unsheltered in Three Los Angeles Neighborhoods: An Interim Report on the Los Angeles Longitudinal Enumeration and Demographic Survey (LA LEADS) Project* 2, 8-9 (2022), https://www.rand.org/pubs/research_reports/RRA1890-1.html; Kenneth Schrupp, *Focus Homeless Aid on Transformation, then Affordability*, Pac. Rsch. Inst. (June 16, 2023) ("Apart from its cost to taxpayers, free housing has little impact on homeless individuals' lifestyles. Many homeless people outright refuse offers of free housing under the Los Angeles mayor's new programs, despite growing availability. So-called 'housing resistant' individuals do not want to comply with any rules or limitations on their behavior."), https://tinyurl.com/4bzyrndu.

involuntary behavior. Choices between indoor shelter or privacy, freedom to use drugs, freedom to have a pet, and other countervailing factors may make sense from the perspective of the homeless person preferring to camp rather than seek restrictive shelter, but they nonetheless remain choices, not involuntary behavior.

Drawing lines between voluntary but difficult choices that may result in punishment, and involuntary or unavoidable choices that may be excused, is a job for the political branches or for common law judges hearing individual cases, not for federal judges imposing their own untethered views of fairness and equity via injunction.

Various aspects of the Ninth Circuit's evolving jurisprudence in this area illustrate that point. For example, limiting an inquiry to the housing or camping options available within a particular jurisdiction makes no sense and can in fact incentivize the problem it purports to address. A homeless person within the confines of Town X might not have a shelter option within that town, but might have a variety of options elsewhere. A camping ground outside of town, perhaps, or a different jurisdiction with a larger supply of shelter and housing. Or even a different State entirely if there is a lower cost of living, family, or medical treatment available elsewhere.[6]

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[6] The single-jurisdiction emphasis of the Ninth Circuit also creates the bizarre incentive for homeless persons who may understandably dislike the housing options available to them to instead gravitate toward jurisdictions that have more desirable outdoor space but otherwise limited housing options. Santa Barbara is one example, and others surely abound. The Ninth

To confine the voluntariness inquiry to a single moment in a single narrow jurisdiction simply ignores the many choices that led any individual to that place and time, and the alternative choices available beyond the artificial constraints imposed by the Ninth Circuit's approach. Neither generalized concepts of voluntariness nor Eighth Amendment concepts of cruelty offer any guidance as to where to draw the line on what choices are truly available, how far back or forward to go, and hence what degree of individual responsibility can be required for the various past, present, and future choices faced by a homeless person.

Similarly, evaluating the "suitability" of available shelter spaces based on whether they allow various types of discretionary behavior or provide accommodations suited to the liking of federal judges does not align with either voluntariness or with notions of cruel and unusual punishment. One would think that any shelter option equal to or better than sleeping on the street should count, though making such normative judgments is inevitably subjective.

The same problem arises with the exclusion of religiously affiliated shelter space merely because such spaces "might" raise an Establishment Clause free exercise problem. Pet. Br. 8-9, 46. Generally one does not strike down an otherwise valid law based on mere speculation that a person might have religious

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Circuit's emphasis on housing choices within a jurisdiction thus not only ignores the predicate choice to enter or remain in a jurisdiction but incentivizes the choice of such jurisdiction for those who might not otherwise be deemed "involuntarily" homelessness were they to have stayed or gone elsewhere.

objections to an available alternative to violating the law or that the state is actively establishing the religious views of a charitable organization. To automatically assume that because there *might* be valid religious objections to or perceived endorsement of particular housing such objections must be assumed to be universal is error on multiple fronts. And it requires federal courts to micro-manage the degree of religious activity that would trigger exclusion. Is it a voluntary prayer before meals? A religiously driven separation of the sexes? Something more? Or less?

These questions are not asked for this Court to answer here, but to highlight the intrinsic problems with the Ninth Circuit's approach, the lack of Eighth Amendment text, history, or tradition that would facilitate making such choices as the touchstone of "cruelty" or "disproportionality, and hence the need to return such standardless balancing back to the decisionmakers best suited for such political or common-law activities.

Responding to incentives—even harsh ones—is still a voluntary act and cannot be treated as the same as a physical or mental illness that removes choice entirely. Indeed, the law already deals with the latter in a variety of ways, including insanity defenses, mens rea generally, and other defenses dealing with capacity. If the "involuntary" homeless indeed lacked the capacity to take care of themselves, then presumably they could be civilly committed as posing a danger to themselves or others.

Furthermore, if the notion of economic duress was the hook for denying the voluntariness or avoidability of a given action, that would open up a host of related

problems and it would become cruel and unusual to punish thieves, trespassers, or other criminals who were driven to their crimes by such duress. In some circumstances, the common law might indeed make that call—a necessity defense might be available, for example. But it does not do so in every instance, and the difficult lines to be drawn or balances to be struck are not the work of broad constitutional provisions. Rather, they are best addressed by legislatures balancing the rights and interests of all citizens, and by courts and juries applying longstanding common-law or statutory rules to individual cases where such defenses are raised.

## CONCLUSION

The Eighth Amendment does not prohibit States and localities from restricting camping on public streets and lands and imposing minor punishments for violations of those restriction. To the extent enforcement might seem unfair in individual circumstances that involve a genuine lack of volition or control over one's behavior there are common law doctrines to address those circumstances and to find other means of protecting the public from those who cannot stop themselves from violating the law. But the Eighth Amendment is not an open invitation for federal judges to impose their own policy preferences about the balance between circumstance and choice, individual rights versus the rights or all others to use public space, or the nature and scope of government's obligation to house the poor. Complex problems like homelessness require political balancing and solutions, not constitutionalized edicts divorced from constitutional text, history, and tradition.

Respectfully submitted,

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