No. 23-175

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

ARGUMENT 3

A. *Robinson* Does Not Support The Ninth Circuit's Rule 4

1. The City's ordinances do not violate *Robinson*'s narrow holding regarding pure status crimes 4

2. The Court should reject requests to extend *Robinson* 9

3. If *Robinson* did categorically bar punishment for status-linked conduct, it should be overruled 17

B. Respondents' Rule Is Unworkable And Harms Both The Homeless And The General Public 18

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

Boyd v. *San Rafael*,
2023 WL 6960368 (N.D. Cal. Oct. 19, 2023) 19

Bucklew v. *Precythe*,
587 U.S. 119 (2019).....3

Clark v. *Community for Creative Non-Violence*,
468 U.S. 288 (1984).....5

Coates v. *Cincinnati*,
402 U.S. 611 (1971).....20

DeShaney v. *Winnebago County Dept. of Social Servs.*,
489 U.S. 189 (1989).....16

Edwards v. *California*,
314 U.S. 160 (1941).....14

Enmund v. *Florida*,
458 U.S. 782 (1982).....10

Gibbons v. *Ogden*,
22 U.S. (9 Wheat.) 1 (1824).....5

Graham v. *Florida*,
560 U.S. 48 (2010).....10, 20, 21

Halo Electronics, Inc. v. *Pulse Electronics, Inc.*,
579 U.S. 93 (2016).....13

Harmelin v. *Michigan*,
501 U.S. 957 (1991).....11

Ingraham v. *Wright*,
430 U.S. 651 (1977).....9, 17

Janus v. *State, County, and Municipal Employees*,
585 U.S. 878 (2018).....16

Jones v. *Los Angeles*,
444 F.3d 1118 (9th Cir. 2006).....22

Jones v. *Mississippi*,
593 U.S. 98 (2021).....17

Kahler v. *Kansas*,
140 S. Ct. 1021 (2020).....8, 15, 24

Kennedy v. *Louisiana*,
554 U.S. 407 (2008).....12

Knick v. *Township of Scott*,
588 U.S. 180 (2019).....9

Martin v. *Boise*,
920 F.3d 584 (9th Cir. 2019).....2, 9

Miller v. *Alabama*,
567 U.S. 460 (2012).....9

Montgomery v. *Louisiana*,
577 U.S. 190 (2016).....10

People v. *Forbes*,
19 How. Pr. 457 (N.Y. 1860).....16

Pervear v. *Commonwealth*,
72 U.S. (5 Wall.) 475 (1867).....12

Powell v. *Texas*,
392 U.S. 514 (1968).....1, 4, 5, 8, 11, 20, 21, 24

Quarles v. *United States*,
139 S. Ct. 1872 (2019).....5

Robinson v. *California*,
370 U.S. 660 (1962) 2, 4, 5, 6

Roper v. *Simmons*,
543 U.S. 551 (2005) 12

Rummel v. *Estelle*,
445 U.S. 263 (1980) 10

Taylor v. *United States*,
495 U.S. 575 (1990) 12

United States v. *Cooley*,
593 U.S. 345 (2021) 18

Constitutional Provisions

U.S. Const. Amend. VIII 1

Statutes

18 U.S.C. § 2252 14

21 U.S.C. § 844 14

13 Anne ch. 26, § 21 (1713) 15

Act of Feb. 11, 1794, ch. 8,
1794 Mass. Laws 347-348 16

Act of Feb. 21, 1767, ch. 555, § 1,
1767 Pa. Laws 268-269 15

Grants Pass Municipal Code § 5.61.010 5

Grants Pass Municipal Code § 5.61.030 ..... 5, 6

Regulations

24 C.F.R. § 582.5 6

36 C.F.R. § 7.96 5

70 Fed. Reg. 48,586 (2005) 22

Other Authorities

Brief for the United States in *Gregg* v. *Georgia*, O.T. 1975, No. 74-6257 5

Brief for the United States in *Kahler* v. *Kansas*, O.T. 2019, No. 18-6135 4

Compl., *Roe* v. *City and County of San Francisco*, No. 24-cv-1562 (N.D. Cal. Mar. 14, 2024).....22

Congressional Research Service, *Federal Land Ownership: Overview and Data* 6 (Feb. 21, 2020) 22

2 Hugo Grotius, *On the Law of War and Peace* (1625) (F. Kelsey ed. 1925).....15

Rollin M. Perkins, *The Vagrancy Concept*, 9 Hastings L.J. 237 (1958).....15, 16

Heidi Rivera, *Paying for Van Life*, Yahoo! Finance (Feb. 20, 2023).....7

1 Thomas Rutherforth, *Institutes of Natural Law* (1754).....15

U.S. Census Bureau, *Annual Estimates of the Resident Population for Incorporated Places in the United States* (May 2023) 12

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Respondents offer a result in search of a rationale. They claim (Br. 26) that the Cruel and Unusual Punishments Clause—a provision self-evidently concerned with methods of punishment—imposes a "substantive limitation" on where and when governments can prohibit public camping. But in defending the Ninth Circuit's unprecedented conclusion that the Eighth Amendment forbids commonplace public-camping ordinances, respondents jettison its reasoning and offer new theories lacking any basis in the Constitution or this Court's decisions.

The Ninth Circuit fused Justice Fortas's dissent in *Powell* v. *Texas*, 392 U.S. 514 (1968), with dicta in Justice White's concurrence to fashion a novel Eighth

Amendment rule that bars any punishment of "involuntary conduct if it is an unavoidable consequence of one's status." Pet. App. 52a; *Martin* v. *Boise*, 920 F.3d 584, 616-617 (9th Cir. 2019). Respondents do not defend that unprincipled approach to precedent.

Respondents (and the United States) stake everything on *Robinson* v. *California*, 370 U.S. 660 (1962), which invalidated a statute that made being an addict a crime. But *Robinson* expressly confined its holding to laws punishing *status* alone—not laws regulating *conduct*, like the public-camping ordinances here. Respondents attempt to rewrite *Robinson* as categorically prohibiting any punishment of status-linked conduct. They also try to recast *Robinson*'s rationale in the language of proportionality, evolving standards of decency, and the common law's treatment of vagrancy. But whatever label they apply to it, *Robinson* remains this Court's only Eighth Amendment decision addressing not a punishment's mode or severity, but what can be made a crime in the first place. The Court need not overrule *Robinson* here because this case does not involve a status crime, but there is no basis to extend its outlier reasoning any further.

Respondents' rule would undermine settled doctrine, require courts to micromanage homelessness policy across the country, and upend traditional principles of criminal responsibility. For the past five years, *Martin* has tied the hands of public officials in responding to the homelessness crisis and tasked federal judges with making difficult decisions on complex policy issues. The Eighth Amendment supplies no workable standards to determine who is "involuntarily" homeless, what shelter is "accessible," or when public-camping prohibitions qualify as "time, place, and manner restrictions." Resp. Br. 16, 18, 25. This

uncertainty has spawned sweeping injunctions, endless litigation, and public encampments throughout the Ninth Circuit.

Respondents ask this Court to constitutionalize one view on a contested, controversial policy question: whether government provision of housing should precede efforts to keep public spaces open, safe, and clean for the general public. But the Eighth Amendment has nothing to say about that debate. The Cruel and Unusual Punishments Clause neither forbids nor requires enforcement of public-camping laws—a policy choice reserved for the people and their representatives. The Clause simply prohibits cruel and unusual punishments. Because fines for public camping and jail terms for criminal trespass do not qualify, this Court should reverse.

ARGUMENT

Respondents never try to square the Ninth Circuit's ruling or their position with "the Constitution's original understanding." *Bucklew* v. *Precythe*, 587 U.S. 119, 131 (2019). For good reason: The Eighth Amendment's text, history, and tradition refute respondents' rule. Pet. Br. 16-29. That is why respondents shun "'the Constitution's original meaning'" and dismiss the Cruel and Unusual Punishments Clause's focus on "method[s] of punishment" as obsolete. Br. 44, 48.

Having abandoned the Ninth Circuit's peculiar reading of *Powell*, respondents now defend the judgment on the alternative ground that *Robinson* itself established a broad rule banning punishment of status-linked conduct. But *Robinson* did no such thing. And adopting respondents' expansion of *Robinson* would be profoundly unworkable and harmful, as the Ninth Circuit's experience shows.

A. *Robinson* Does Not Support The Ninth Circuit's Rule

Respondents' position now hinges on reading *Robinson* to bar any punishment for public camping when such conduct is supposedly inseparable from the status of involuntary homelessness. Br. 18-26; accord U.S. Br. 17-25. Because the City's ordinances do not punish a status, *Robinson* has no application here. The Court can say as much and leave the continuing vitality of *Robinson* for another day. But if *Robinson* meant what respondents say, the Court should revisit it here.

1. The City's ordinances do not violate *Robinson*'s narrow holding regarding pure status crimes

a. *Robinson* drew a bright line between conduct (drug use) and status (drug addiction). 370 U.S. at 664-666. The Court confirmed that line in *Powell*, which declined to expand *Robinson* to reach conduct (public intoxication) stemming from a status (alcoholism). 392 U.S. at 532-533 (plurality opinion). As the United States has explained elsewhere, "*Robinson* has no application" unless a defendant is "convicted of a 'status' crime." Brief for the United States in *Kahler* v. *Kansas*, O.T. 2019, No. 18-6135, p. 31 (U.S. *Kahler* Br.). "'[T]he entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing'"; "*Robinson* 'does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, involuntary or "occasioned by compulsion."'" *Id.* at 31-32 (quoting *Powell*,

392 U.S. at 532-533); accord, *e.g.*, Brief for the United States in *Gregg* v. *Georgia*, O.T. 1975, No. 74-6257, p. 28.

The City's ordinances are constitutional under *Robinson* because they regulate conduct, not "'status.'" 370 U.S. at 666. That conduct is "occupy[ing] a campsite" on public property. Grants Pass Municipal Code § 5.61.030. A "campsite" is "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof." § 5.61.010. The federal government has defined "camping" in similar terms. 36 C.F.R. § 7.96(i)(1) (App., *infra*, 3a-4a). And "camping" on public property is "conduct." *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *id.* at 300 (Burger, C.J., concurring).

Respondents argue (Br. 21) that the City's ordinances do not punish "'conduct'" because they apply to "occupying"—*i.e.*, being present in—identified spaces. But many statutes punish the conduct of being present in a place. "[Q]uarantine and health laws" punish entering a public space while sick, *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 205 (1824), not the status of being sick. Burglary laws punish the "continuous activity" of remaining in a place unlawfully after a lawful entry, *Quarles* v. *United States*, 139 S. Ct. 1872, 1877 (2019), not the status of "existing" (Resp. Br. 20) in a building. The City's ordinances likewise address the conduct—or "*actus reus*"—of occupying a campsite on public property "on a particular occasion," not the "mere status" of homelessness. *Powell*, 392 U.S. at 532-533 (plurality opinion).

Respondents rejoin (Br. 18) that, because the City prohibits camping on all public property within city limits, its ordinances effectively forbid a homeless person's "continued physical existence in the community." The United States similarly asserts (Br. 13-14) that the ordinances "effectively criminaliz[e] the status of homelessness" by barring the specified conduct throughout the City. But the repeated "effectively" qualifier gives the game away. U.S. Br. 13-14, 19-21, 23, 28. Prohibiting particular conduct in all places is not the same thing as prohibiting a status. *Robinson* itself made clear that a State could prohibit drug use everywhere, 370 U.S. at 664-667, even though that would leave "nowhere" for a person "living with a status" of addiction to use drugs lawfully, Resp. Br. 18.

Respondents also misunderstand *Robinson* in arguing (Br. 21) that the City's ordinances make them "continuously guilty" of public camping. The addict in *Robinson* automatically violated the statute "whether or not he * * * ever used or possessed any narcotics within the State, and whether or not he [was] guilty of any antisocial behavior there." 370 U.S. at 666. In contrast, a person violates the City's ordinances only when "occupy[ing] a campsite" on public property. § 5.61.030. Respondent Gloria Johnson does not violate the ordinances when parking her van at her friend's house. J.A. 9-10. Many other people who are homeless—for example, because they "lac[k] a fixed, regular, and adequate nighttime residence," 24 C.F.R. § 582.5 (App., *infra*, 1a)—find alternatives to camping on public property. *E.g.*, Chicago Coalition Br. 13. A homeless person violates the public-camping ordinances only when engaging in the proscribed conduct—not at all times based purely on the purported status of lacking permanent shelter.

In short, because the City's ordinances regulate conduct, they do not implicate *Robinson* at all.

b. Neither respondents nor the United States defends the Ninth Circuit's rationale: that the *Powell* dissent and dicta in a concurrence establish that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." Pet. App. 52a; see Resp. Br. 22; U.S. Br. 24-25. Instead, both disregard *Robinson*'s clear language confining its holding to pure status crimes and assert that *Robinson* prohibits punishment for some conduct after all: conduct "inseparable from" a status. U.S. Br. 25; Resp. Br. 19-21. They read *Robinson* to preclude punishing a "status" that "is defined by the very behavior being singled out for punishment." Resp. Br. 1 (quoting U.S. Br. 15). And they argue that the Eighth Amendment bars punishment where a person with a status finds it "impossible to avoid violating the law." Resp. Br. 24; accord U.S. Br. 25.

This attempt to define the status *as* the conduct is wrong and would render *Robinson* incoherent. The City's ordinances regulate discrete acts of camping that are unlawful whether a person is involuntarily unsheltered, has instead turned down shelter offers (as most do in Portland, San Francisco, and Seattle, see Oregon Cities Br. 5; Local Government Legal Center Br. 28-29), or has chosen to live in a van (as three million Americans do, Heidi Rivera, *Paying for Van Life*, Yahoo! Finance (Feb. 20, 2023), https://tinyurl.com/yj4344mt). Not every homeless person camps on public property continuously, and not every person camping is homeless. Homelessness and public camping are *not* "opposite sides of the same coin." Resp. Br. 22 (quoting U.S. Br. 25).

Tellingly, respondents' and the United States' attempts to broaden *Robinson* echo views expressed in separate opinions that did not carry the day in *Powell*. Respondents insist that their conduct is "unavoidable and innocent," Br. 29; Justice Fortas similarly asserted that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," 392 U.S. at 567 (dissenting opinion). Respondents contend that public-camping laws criminalize "existing in the community without shelter access," Br. 20; Justice Fortas also tried to recast public-intoxication laws as targeting "the mere *condition* of being intoxicated in public," 392 U.S. at 559. And the United States asserts that the "act" of public camping is "inseparable from the status of being homeless," Br. 20, evoking Justice White's dictum that, "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics," it cannot "constitutionally be a crime to yield to such a compulsion," 392 U.S. at 548 (concurring opinion).

The *Powell* plurality correctly declined to extend *Robinson* beyond pure status crimes and refused to hold that "certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary.'" 392 U.S. at 533. Such a rule lacks "any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law." *Id.* at 533-534. Expanding *Robinson* also would have magnified its conflict with the Eighth Amendment itself. *Infra*, p. 17. And this Court has since repeatedly invoked the restrained approach of the *Powell* plurality, not Justice White's concurrence or Justice Fortas's dissent. *E.g.*, *Kahler* v. *Kansas*,

140 S. Ct. 1021, 1028 (2020). This is not the case to change course.

2. The Court should reject requests to extend *Robinson*

Unable to shoehorn their rule into *Robinson*'s holding, respondents try to backfill *Robinson* with new, broader rationales. They portray *Robinson* as a pseudo-proportionality decision, gesture at evolving standards of decency with a flawed survey of municipal laws, and resort to hyperbolic comparisons to banishment. They also invoke doctrines that sound in due process, not the Eighth Amendment. The creativity of these various new theories confirms that respondents offer a "rule in search of a justification." *Knick* v. *Township of Scott*, 588 U.S. 180, 204 (2019).

a. Respondents primarily try (Br. 27) to broaden *Robinson* as "rest[ing] on consideration of proportionality." Neither the Ninth Circuit nor the United States shares that view. *Martin*, 920 F.3d at 615; U.S. Br. 17. *Robinson* did not apply any recognizable proportionality principle. And this Court has distinguished *Robinson* from challenges to a punishment's proportionality. *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977).

This case implicates neither strain of the Court's proportionality precedents. Pet. Br. 23. First, this Court has recognized "categorical bars to the death penalty and life without parole" for certain offenses or offenders. *Miller* v. *Alabama*, 567 U.S. 460, 482 (2012). This case, by contrast, concerns modest fines and short jail terms, which have never been subject to the "distinctive set of legal rules" for the "most severe penalties." *Id.* at 474-475. Second, this Court generally treats the length of imprisonment as "purely a

matter of legislative prerogative," *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980), subject to a "'narrow proportionality principle'" that "'forbids only extreme sentences that are "grossly disproportionate" to the crime,'" *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010). Respondents never attempt to meet that high bar. Modest fines for violations, plus 30-day jail terms for repeat violators who commit criminal trespass, readily withstand such deferential review. Pet. Br. 28. To be clear, challenges to the fines' amount are better analyzed under the Excessive Fines Clause—which the Ninth Circuit did not resolve, Pet. Br. 29; Pet. App. 56a; Cert. Reply 10-11—but they pass muster either way.

Instead of attempting to show that these punishments for public camping and criminal trespass violate the narrow proportionality principle, respondents assert that "*Robinson* establishes that there are some circumstances in which *any* punishment is unconstitutionally disproportionate." Br. 28 (emphasis added). But that statement underscores that *Robinson* did something fundamentally different from the Court's proportionality cases. For example, respondents stress (Br. 27-29) *Enmund* v. *Florida*, 458 U.S. 782 (1982), where this Court forbade one method of punishment (the death penalty) for felony murderers who neither killed nor intended to kill the victim. *Id.* at 800-801. Respondents also cite (Br. 27) *Miller*'s restriction on life-without-parole sentences for juvenile murderers. But the Court later held that governments could remedy *Miller* violations by resentencing all such offenders to a different sentence: life with possibility of parole. *Montgomery* v. *Louisiana*, 577 U.S. 190, 212 (2016). Each decision invalidated one method of punishment for the offense but left intact the legislative prerogative to impose another punishment in its place.

The City should prevail whether the Eighth Amendment authorizes no proportionality review, *Harmelin* v. *Michigan*, 501 U.S. 957, 966-994 (1991) (opinion of Scalia, J.), or gross-proportionality review, *id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment). But respondents can prevail only if this Court extends *Robinson* and adopts a new, categorical approach to proportionality that treats certain conduct-based offenses as protected from *any* punishment. An Eighth Amendment rule that turns on whether conduct is "blameless" (Resp. Br. 29) would make the federal judiciary "the ultimate arbiter of the standards of criminal responsibility"—the exact result the *Powell* plurality rejected. 392 U.S. at 533.

b. Respondents also argue (Br. 38) that "modern standards of decency" require cities to designate at least some areas of public land for camping. But a decent society sees "no compassion in stepping over people in the streets" and "no dignity in allowing people to die in dangerous, fire-prone encampments." Newsom Br. 4. A decent society uses all tools at its disposal to intervene when people are perishing on the streets from untreated addiction and mental illness. L.A. Chamber Br. 6. And a decent society does not require those in wheelchairs to choose between navigating through unsanitary, unsafe sidewalks (if not blocked by encampments) or through busy, unsafe streets—risking harm and harassment either way. Tozer Br. 11-14.

Respondents argue the Eighth Amendment overrides these standards of decency because the City's public-camping ordinances supposedly are unusually broad. Respondents cite their own "survey" of "the 200 American cities with populations closest to that of

Grants Pass," Br. 40, out of nearly 20,000 total localities, U.S. Census Bureau, *Annual Estimates of the Resident Population for Incorporated Places in the United States* (May 2023), https://tinyurl.com/279jakyr. Having reviewed cherry-picked municipal codes for one percent of the country, respondents report that "81.5 percent of similarly sized jurisdictions" impose narrower bans on public camping than Grants Pass does. Br. 40.

In comparing *offenses* rather than *punishments* across jurisdictions, respondents commit a category error. This Court sometimes considers the punishments other jurisdictions authorize for particular offenses. *E.g.*, *Roper* v. *Simmons*, 543 U.S. 551, 564 (2005). Even that approach has drawn criticism. *E.g.*, *Kennedy* v. *Louisiana*, 554 U.S. 407, 454-459 (2008) (Alito, J., dissenting). But respondents' local-law analysis does something else altogether: survey the substantive scope of criminal prohibitions across purported peer jurisdictions.

The Cruel and Unusual Punishments Clause does not turn on how a government defines the elements of a crime like burglary, forgery, or public camping. Cf. *Taylor* v. *United States*, 495 U.S. 575, 598 (1990). "[T]he Eighth Amendment is concerned with 'cruel and unusual *punishments*'—not with substantive liability." U.S. *Kahler* Br. 30. Death and life in prison thus remain the usual punishments for murder even when a State defines insanity in an unusual way. And the critical details missing from respondents' appendix—the punishments in their selected jurisdictions, see App., *infra*, 5a-82a—confirm that fines and jail terms are the "usual mode" for punishing public camping and criminal trespass. *Pervear* v. *Commonwealth*, 72 U.S. (5 Wall.) 475, 480 (1867).

Respondents' municipal-law survey is also flawed on its own terms. Inflating their count of cities with supposedly narrower restrictions, respondents include (Br. 41) municipalities that "bar sleeping in parks or on sidewalks but not on other public lands." But respondents never say what "other public lands" they have in mind. Surely municipalities do not allow people to sleep in the streets themselves—or inside government buildings like courthouses. Respondents also inflate (Br. 41) their figure with cities that "limit sleeping at night but permit it during the day." They thus appear to maintain that the Eighth Amendment creates a right to camp on public property during the day but not at night. Respondents' own account reveals that cities across the country regulate public camping in much the same way as Grants Pass. See Western Regional Advocacy Br. 7 n.15 (reporting that 37% have citywide bans).

c. Respondents also analogize public-camping laws to "banish[ing]" the homeless. Br. 23; cf. U.S. Br. 21. But the punishments here are fines and jail terms, not exile. Fines and jail terms do not become banishment merely because someone cannot conform his conduct to the law. For example, both respondents have remained in Grants Pass for years despite having no home. J.A. 42-45.

Respondents cite an "isolated snippe[t] of legislative history," *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 108 (2016), from a 2013 town hall where a now-former city councilmember suggested that stepping up enforcement could encourage people engaging in anti-social behavior to "move on down the road," J.A. 114. But many others spoke at that town hall about "find[ing] a balance between providing the help [homeless] people need and not

enabling the aggressive negative behavior" among a small group. J.A. 112; see J.A. 114-115. And the only citywide policy is "to provide law enforcement services to all members of the community while protecting the rights, dignity and private property of the homeless." J.A. 152. The City's enforcement was correspondingly moderate: Grants Pass generally issued fewer than 100 citations per year from 2013 to 2018. Pet. App. 17a n.4.

In support of their banishment analogy, respondents and the United States cite only inapposite cases involving discrimination against nonresidents under the dormant Commerce Clause and the right to travel. *E.g.*, *Edwards* v. *California*, 314 U.S. 160, 173-174 (1941). The City's prohibitions on public camping apply to everyone. So do many other prohibitions, but that hardly means that violators must "leave the community." Resp. Br. 32. A person with a compulsion to use fentanyl or collect child pornography cannot remain anywhere in the United States without facing fines and jail terms for his conduct. 21 U.S.C. § 844(a); 18 U.S.C. § 2252. But no one would argue that federal law "banishes" fentanyl addicts and pedophiles from the United States.

Predictions of a "banishment race" among cities are baseless. Resp. Br. 33. *Martin* has governed in the Ninth Circuit only since 2018. Yet respondents identify no banishment race before then. And they disclaim any race outside the Ninth Circuit by asserting that most jurisdictions allow public camping to some degree. Br. 38-43. Meanwhile, this Court can see the track record under *Martin* in the Ninth Circuit—sprawling encampments, rising deaths, and widespread harms to the community, as localities are forced to surrender their public spaces. *Infra*, pp. 20-23.

d. Finally, respondents invoke Founding-era doctrines that sound in due process. But they dismissed their due-process claim. J.A. 188. They also come nowhere close to establishing "a rule of criminal responsibility" that "is so old and venerable" that no government can "ever choos[e] another." *Kahler*, 140 S. Ct. at 1028. And their abridged historical account is flawed.

Respondents first quote (Br. 24) a treatise describing Grotius's assertion that "what is unavoidable is no crime." 1 Thomas Rutherforth, *Institutes of Natural Law* 434 (1754). Rutherforth admittedly could not "imagine what crimes [Grotius] had in mind" and suggested the necessity defense, *ibid.*, which Oregon recognizes, Pet. Br. 41. Any argument about the adequacy of that necessity defense should be addressed under the *Kahler* framework. The underlying passage also supports the City: Grotius stated that governments *can* punish "actions which are not inevitable to human nature itself, but to a particular person at a particular time." 2 Hugo Grotius, *On the Law of War and Peace* 488-489 (1625) (F. Kelsey ed. 1925). Public camping is not inevitable to humanity writ large, even if "breathing" would be. Resp. Br. 21.

Respondents are wrong to argue that Founding-era laws prohibited public camping by only the "able-bodied." Br. 34. Although vagrancy laws compelled the able-bodied to work, they separately regulated "plac[ing oneself] to beg in Streets[,] Highways[,] or Passages" with or without "some bodily Infirmity." 13 Anne ch. 26, § 21 (1713); see, *e.g.*, Act of Feb. 21, 1767, ch. 555, § 1, 1767 Pa. Laws 268-269. Such prohibitions made "no distinction * * * between the impotent and the sturdy." Rollin M. Perkins, *The Vagrancy Concept*, 9 Hastings L.J. 237, 245 (1958). As a

court noted shortly before the Fourteenth Amendment's ratification, New York's vagrancy prohibition, which forbade people to "'place themselves in the streets, highways, or other public places to beg,'" applied to a defendant "whether such condition is his misfortune or his fault." *People* v. *Forbes*, 19 How. Pr. 457, 458, 460 (N.Y. 1860).

Respondents' interpretation of the Eighth Amendment also does not map onto vagrancy or poor laws. They expand their rule to anyone who "cannot afford or access shelter," Br. 35, even though only the physically infirm were exempt from some forms of vagrancy, see Perkins, *supra*, at 245. They do not limit their rule to "legally settled" people who meet property-based residency requirements. Br. 36-37; see Act of Feb. 11, 1794, ch. 8, 1794 Mass. Laws 347-348. They do not argue that the Eighth Amendment allows vagrants to be whipped or forced to labor. Stinneford Br. 8-12. And they disclaim the notion that Founding-era poor laws create "a legal obligation to provide care," Br. 37, presumably because this Court has steadfastly refused to read the Constitution to secure an "affirmative right to governmental aid," *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196 (1989).

Respondents' historical detour does not uncover "any accepted founding-era practice that even remotely resembles" the Ninth Circuit's rule protecting purportedly involuntary public camping. *Janus* v. *State, County, and Municipal Employees*, 585 U.S. 878, 905 (2018). Despite their passing feint toward original meaning, respondents never argue that modern-day public-camping regulations should mirror Founding-era vagrancy laws. This Court should not accept respondents' "halfway originalism." *Id.* at 903.

3. If *Robinson* did categorically bar punishment for status-linked conduct, it should be overruled

Because respondents' whole case now rests on *Robinson*, the Court can reverse on the basis that *Robinson* does not apply to laws like the City's ordinances that regulate conduct and say no more. See *Jones* v. *Mississippi*, 593 U.S. 98, 118 (2021). But if respondents and the United States are correct that *Robinson* bars any punishment for status-linked conduct, then the Court should overturn it.

Robinson was wrongly decided under the Eighth Amendment and lacks any pretense of fidelity to the Amendment's original meaning. Pet. Br. 38-40. *Robinson* also is a class-of-one decision—the only case that "impose[d] substantive limits on what can be made criminal"—that stands apart from all other decisions assessing only the punishment's mode or severity. *Ingraham*, 430 U.S. at 667. *Powell* closed the door on extending *Robinson* to status-linked conduct, and this Court has never reopened it. Yet the Ninth Circuit walked through that door based on the separate *Powell* opinions and foisted on courts and governments unworkable standards that have exacerbated the homelessness crisis. See *infra*, pp. 18-20. Respondents never articulate any legitimate reliance interests in an expansive interpretation of *Robinson* that went undiscovered for decades.

Although the Court need not address the continuing validity of *Robinson* here because respondents' broad reading is wrong, *stare decisis* could not sustain an interpretation of the Eighth Amendment that invalidates the City's public-camping laws.

B. Respondents' Rule Is Unworkable And Harms Both The Homeless And The General Public

1. As years of experience in the Ninth Circuit amply show, respondents' rule forces courts and governments to grapple with fraught questions to which the Eighth Amendment offers no answers.

Nothing in the Amendment tells courts how to determine whether a person is "'homeless and involuntarily unsheltered.'" Resp. Br. 25 n.6. Government officials would be equally adrift. Respondents never explain how police officers on the ground could make that determination. They vaguely suggest that officers could "inquir[e] about an individual's options for shelter." *Ibid.* But that requires officers either to take answers at face value or to conduct a fact-intensive investigation before clearing an encampment. Cf. *United States* v. *Cooley*, 593 U.S. 345, 353 (2021). Respondents also propose that cities "affirmatively offe[r] shelter before enforcement." Br. 25 n.6. Amici have ably explained the impossibility of tracking available shelter beds and denials of past shelter offers. *E.g.*, San Clemente Br. 16-19. And when a person turns down a shelter bed that then goes to someone else or is removed from a shelter for misconduct, is he involuntarily homeless days later if no beds are open at that moment?

The Eighth Amendment likewise provides no guideposts for determining whether shelter is "accessible." Resp. Br. 18. Although respondents avoid the issue, their amici take aim at pet restrictions, curfews, gender-segregated facilities, and substance-use bans. *E.g.*, Western Regional Advocacy Br. 23-24; Emory Br. 3-4. Respondents also do not defend the Ninth Circuit's *Lemon*-infused disregard of empty beds at

Gospel Rescue Mission in Grants Pass. Pet. Br. 46. They assert only that Grants Pass has no "homeless shelters" because Gospel Rescue Mission is a "transitional housing program." Br. 4. Respondents' rule apparently forbids enforcement of public-camping ordinances when transitional housing programs have empty beds, but not when shelters do.

Nor does the Eighth Amendment shed light on the contours of the "limited right" the Ninth Circuit posited "to protection against the elements." Pet. App. 55a. Respondents argue (Br. 13) that the climate of Grants Pass requires a "blanket." But they do not explain why a local-climate-based interpretation of the Eighth Amendment would not protect "tents or other forms of temporary shelter" in, for example, a North Dakota winter. Public Health Br. 3. And photographs in amicus briefs show public spaces overrun with makeshift structures, tents, tarps, and debris—not blankets. *E.g.*, Phoenix Br. 23-25.

Respondents never detail which "time, place, and manner restrictions" survive their rule or what standards a court reviewing a law would apply. Br. 16. The Ninth Circuit recently affirmed a classwide injunction against San Francisco, which is a "time, place, or manner" jurisdiction. San Francisco Br. 2, 21. San Rafael permitted 200-square-foot encampments with a 200-foot buffer separating one another, but a court held that *Martin* requires cities to "allow 400 square-foot encampments, housing up to four people," with only "a 100-foot buffer between campsites." *Boyd* v. *San Rafael*, 2023 WL 6960368, at *1-2 (N.D. Cal. Oct. 19, 2023). Respondents would turn federal judges into "homelessness policy czars" responsible for micromanaging encampments. Pet. App. 156a (opinion of M. Smith, J.).

Respondents' view of the Eighth Amendment also would cast doubt on criminal laws that could easily be recharacterized as attempts to criminalize status-linked conduct, such as bans on drug use, public intoxication, or possession of child pornography. Pet. Br. 48-49. Although respondents insist their rule would extend only to sleeping or camping in public, they never explain why their posited protection of "inescapable human activities" would not reach defecating in public or stealing food and "a blanket to survive." Br. 20-21. Respondents offer only "limitation by fiat," not by the Eighth Amendment or even their own rule's logic. *Powell*, 392 U.S. at 534 (plurality opinion).

2. Respondents also have no answer to the practical harms caused by their rule. Although they argue (Br. 31-34) that bans on public camping serve no penological purpose, they ignore legitimate deterrent and rehabilitative functions. Respondents also are wrong that governments can accomplish the same objectives by designating at least some public land for unrestricted public camping, as the catastrophic consequences of *Martin* demonstrate. More fundamentally, the Eighth Amendment does not constitutionalize this public-policy debate.

a. Public-camping regulations perform a deterrent function that promotes public safety. See *Graham*, 560 U.S. at 71. The City has an obligation to keep public spaces safe, clean, and open to the entire community. Cf. *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971). And the City has a duty to deter camping that increases risks of fires, disease, and environmental contamination. *E.g.*, San Francisco Br. 24; Idaho Br. 6-7.

Although respondents depict the homeless as lacking agency to seek alternatives to public camping,

our "legal system" is "generally predicated upon a different set of assumptions" about "'free will.'" *Powell*, 392 U.S. at 526 (plurality opinion). Those assumptions also are grounded in reality. Austin and Colorado Springs saw increases in public camping when loosening restrictions and decreases upon reinvigorating their bans, as more people accepted services. Manhattan Institute Br. 5, 9. In Grants Pass since the classwide injunction, shelter utilization has fallen 40%, and beds remain empty. Gospel Rescue Br. 4-5.

Enforcing restrictions on public camping also rehabilitates the service-resistant population camping in public. J.A. 115; see *Graham*, 560 U.S. at 71. Studies have found that 78% of the unsheltered homeless struggle with substantial mental-health issues, 75% with substance abuse, and a majority with both. Manhattan Institute Br. 3-4. In their brief, respondents gloss over how untreated mental-health conditions and drug addiction make camping in public dangerous for both the homeless and the general public. *E.g.*, San Diego Br. 18; Neighbors Br. 8-9. Pairing enforcement with outreach for social services—as the City's policies do, J.A. 158-163—is more likely to break "the cycle of homelessness" (Resp. Br. 31) than permitting service-resistant people to languish on the streets. *E.g.*, Manhattan Institute Br. 6.

b. Respondents insist (Br. 18) that their rule is narrow and applies only when a person has "nowhere else to go." Behind that refrain is the implication that governments must designate *somewhere* camping restrictions will not be enforced whenever they lack resources to house everyone—which is true of almost every city, big or small. *E.g.*, San Francisco Br. 2; San Clemente Br. 5.

Cities in the Ninth Circuit have seen the harmful consequences of encampment zones. Los Angeles stopped enforcing public-sleeping laws in Skid Row after settling the claims in *Jones* v. *Los Angeles*, 444 F.3d 1118 (9th Cir. 2006). Los Angeles City Br. 3. Phoenix allowed camping in the "Zone" before "criminal activity" and "public health hazards" spurred the city to clear the encampments. Phoenix Br. 2, 19. And a recent complaint against San Francisco's non-enforcement policy in the Tenderloin details how encampment zones destroy local businesses and residents' quality of life. *Roe* v. *City and County of San Francisco*, No. 24-cv-1562 (N.D. Cal. Mar. 14, 2024).

The federal government is far from immune from these harmful effects. Almost one third of the country (and more than half of Oregon) is federal land. Congressional Research Service, *Federal Land Ownership: Overview and Data* 6, 8 (Feb. 21, 2020), https://tinyurl.com/ycywz7m9. The United States prohibits public camping on many federal lands and regularly clears encampments, including near the White House. U.S. Br. 7 n.2. In fact, the district court below noted that nearby federal campgrounds did not count as an alternative place to camp because federal law prohibits "using th[at] land for 'residential purposes.'" Pet. App. 180a (quoting 70 Fed. Reg. 48,586 (2005)).

The United States suggests that its rule is only a "narrow limitation on [its] ability to regulate the use of public property." Br. 23. But the United States also does not purport to have set aside federal land for such encampments or to have made shelter available on lands it administers. The United States cannot have it both ways: Either the Eighth Amendment curtails every government's ability to enforce public-camping laws and compels the dedication of public land for

camping, or it does not. The City seeks only the ability to keep public property safe—just as the federal government claims for itself.

c. This case reflects deep disagreements about the "varied" causes of the homelessness crisis. U.S. Br. 2. Amici blame housing costs, zoning policy, deinstitutionalization policies for the mentally ill, substance use, natural disasters, unwillingness to work, family breakdown, domestic violence, domestic-violence restraining orders, and more. *E.g.*, Chesa Boudin Br. 4-9; Local Government Legal Center Br. 8; California Br.7; Los Angeles City Br. 19-20; Sacramento Br. 21; National Coalition for Men Br. 8-10.

This case also reflects deep disagreements about the solutions to the homelessness crisis. Some amici advocate more federal, state, and local funding for temporary shelter and more permanent supportive housing, *e.g.*, Rep. Bush Br. 16-19, while others point out that public housing already nearly doubled from 2007 to 2023 and that housing-first approaches do not address the root causes of homelessness, *e.g.*, Local Government Legal Center Br. 9-11; Cicero Br. 5. Some amici identify a role for mandatory mental-health treatment, *e.g.*, California Counties Br. 20, while others argue that treatment should always be voluntary and paired with housing, *e.g.*, Local Progress Impact Br. 1. And many amici defend the enforcement of public-camping laws as a critical backstop that diverts people into shelters, substance-abuse treatment, or mental-health services, *e.g.*, Local Government Legal Center Br. 11, while others argue public-camping laws should never be enforced, *e.g.*, Western Regional Advocacy Br. 32-34.

This case does not require this Court to pick a side. A proactive response to the homelessness crisis

"demand[s] hard choices among values, in a context replete with uncertainty." *Kahler*, 140 S. Ct. at 1037. Choosing a "'constitutional rule'" in place of democratic governance would "'freeze'" the ongoing dialogue among the various stakeholders who have participated in this case. *Ibid.* (quoting *Powell*, 392 U.S. at 536-537 (plurality opinion)). In ratifying the Eighth Amendment, the Framers did not require governments to adopt housing-first or no-barrier-shelter policies. Neither did they require the enforcement of public-camping ordinances. They left that policy decision, like most, to the people and their representatives.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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