No. _________

IN THE

Supreme Court of the United States

CITY OF BOISE,

Petitioner,

v.

ROBERT MARTIN, LAWRENCE LEE SMITH, ROBERT ANDERSON, JANET F. BELL, PAMELA S. HAWKES, AND BASIL E. HUMPHREY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Like many cities and towns across the country, the City of Boise, Idaho regulates camping and sleeping in public spaces to ensure that these areas remain safe, accessible, and sanitary for the continued use of residents, visitors, and wildlife. In this case, the Ninth Circuit held that Boise's enforcement of such laws constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment of the Constitution when "'there is a greater number of homeless individuals in [the jurisdiction] than the number of available beds [in shelters].'" In the Ninth Circuit's view, under this Court's decisions in *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), a "state may not 'criminalize conduct that is an unavoidable consequence of being homeless.'"

The Ninth Circuit's decision elicited multiple dissents from the denial of rehearing en banc, including a six-judge dissent emphasizing that other courts, including the Fourth, Seventh, and Eleventh Circuits, as well as the California Supreme Court, "have routinely upheld state laws regulating acts that were allegedly compelled or involuntary," and warning that the decision will "prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination."

The question presented is:

Does the enforcement of generally applicable laws regulating public camping and sleeping constitute "cruel and unusual punishment" prohibited by the Eighth Amendment of the Constitution?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that the City of Boise, Idaho is a municipal corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

RULE 14.1(b)(iii) STATEMENT

- *Martin v. City of Boise*, No. 15-35845 (9th Cir.) (amended opinion issued, judgment entered, and petition for rehearing en banc denied Apr. 1, 2019; mandate issued Apr. 9, 2019).
- *Martin v. City of Boise*, No. 1:09-cv-00540-REB (memorandum of decision issued and final judgment entered Sept. 25, 2015).
- *Bell v. City of Boise*, No. 11-35674 (opinion issued and judgment entered Mar. 7, 2013; mandate issued Apr. 1, 2013).

There are no additional proceedings in any court that are directly related to this case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner City of Boise, Idaho respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Ninth Circuit and its order denying the City of Boise's petition for rehearing or rehearing en banc are published at 920 F.3d 584. Pet. App. 1a–68a. The district court's orders are available at 993 F. Supp. 2d 1237 (D. Idaho 2014), and 2015 WL 5708586 (D. Idaho Sept. 28, 2015). *Id.* at 69a–122a.

JURISDICTION

The Ninth Circuit issued its opinion on September 4, 2018, and issued an amended opinion and order denying rehearing or rehearing en banc on April 1, 2019. On June 4, 2019, Justice Kagan extended the time to file a petition for a writ of certiorari to and including August 29, 2019. *See* No. 18A1264. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Relevant statutory provisions are reproduced in the appendix to the petition. Pet. App. 123a–25a.

STATEMENT

The "primary purpose" of the Eighth Amendment's Cruel and Unusual Punishment Clause "has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Powell v. Texas*, 392 U.S. 514, 531–32 (1968) (plurality op.). Although the Clause "imposes substantive limits on what can be made criminal and punished as such," these limits are "to be applied sparingly." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). In fact, this Court has only ever found a single statute to violate this aspect of the Cruel and Unusual Punishment Clause. That statute was notable in that it "ma[de] the '*status*' of narcotic addiction a criminal offense." *Robinson v. California*, 370 U.S. 660, 666 (1962) (emphasis added).

The Ninth Circuit's decision in this case vastly expands the "sparingly applied" limits imposed by the Cruel and Unusual Punishment Clause on "what can be made criminal" through its holding "'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" Pet. App. 61a. The Ninth Circuit then applied this principle—distilled from the four-Justice dissent in *Powell* and a single-Justice opinion concurring in the result—to Boise's ordinances prohibiting camping and sleeping in public spaces, concluding that enforcement of these commonplace ordinances constitutes cruel and unusual punishment if "'there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters].'" *Id.* at 62a (alterations in original).

This Court has never before declared a law unenforceable on the ground that the Eighth

Amendment exempts from regulation purportedly "involuntary" acts. On the contrary, it declined to do so more than half a century ago. Writing for a plurality of the Court, Justice Marshall explained that "[t]raditional common-law concepts of personal accountability and essential considerations of federalism" preclude such an interpretation of the Eighth Amendment. *Powell*, 392 U.S. at 535 (plurality op.). Otherwise, there would be no "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, throughout the country." *Id.* at 533.

In addition to contradicting this Court's precedent, the decision below also creates a conflict among the lower courts. Every other federal appellate court or state supreme court to consider whether public-camping ordinances violate the Cruel and Unusual Punishment Clause has answered in the negative. *See Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995). Meanwhile, at least three other circuit courts—including the First, Fourth, and Seventh Circuits—have rejected the principle, embodied in the Ninth Circuit's ruling, that the Eighth Amendment exempts "involuntary" conduct from generally applicable criminal laws.

The consequences of the Ninth Circuit's erroneous decision have already been—and will continue to be—far-reaching and catastrophic. The creation of a de facto constitutional right to live on sidewalks and in parks will cripple the ability of more than 1,600 municipalities in the Ninth Circuit to maintain the

health and safety of their communities. Public encampments, now protected by the Constitution under the Ninth Circuit's decision, have spawned crime and violence, incubated disease, and created environmental hazards that threaten the lives and well-being both of those living on the streets and the public at large. The expansive rationale adopted by the Ninth Circuit also imperils a whole host of other laws regulating public health and safety, including laws prohibiting public defecation and urination. Pet. App. 19a–20a.

The constitutional rule adopted by the Ninth Circuit is both nonsensical in theory and unworkable in practice. As a result, in the wake of the decision below, many municipalities have abandoned efforts to contain the threats to public health and safety posed by encampments rather than face litigation and potential civil liability.

Stripped by the Ninth Circuit of their traditional police powers, state and local governments now struggle to connect those living anonymously and transiently in sprawling encampments with resources available to help them. These resources are substantial: Boise has raised millions of dollars to construct new shelters for homeless individuals, and Los Angeles voters recently approved more than $1.5 billion to construct supportive housing and expand services for communities in need. Meanwhile, encampments provide a captive and concentrated market for drug dealers and gangs who prey on the vulnerable. It is thus no surprise that nearly 1,000 homeless people died on the streets last year in Los Angeles County alone.

This Court should grant review and reverse the Ninth Circuit's decision in order to bring uniformity

to Eighth Amendment jurisprudence and to confirm that it is the prerogative of state and local governments—not federal courts—to regulate conduct affecting public health and safety.

1. Like many cities and towns across the country, the City of Boise, Idaho regulates the public's ability to camp or sleep overnight in its outdoor spaces, including parks, trails, and sidewalks. Pet. App. 123a–25a. Such regulations are critical tools that allow Boise to maintain its public spaces and to ensure that these areas remain safe, accessible, and sanitary for the continued use of residents, visitors, and wildlife. *Id.* at 129a. Restrictions on public camping and sleeping in these spaces are necessary because many of Boise's parks and open spaces, which are adjacent to rivers, streams, and mountains, lack the services and facilities—such as toilets and trash collection systems—that are essential to support secure and hygienic overnight lodging. *Id*.

The restrictions on public camping and sleeping are also essential components of Boise's effort to address, and preempt, the proliferation of dangerous encampments. Pet. App. 144a. These encampments, which are often breeding grounds for crime, violence, and disease, pose grave threats to public health and safety. *Id*. For example, in 2014 a large encampment took root in a City-owned skate park frequented by Boise's youth. *Id*. The encampment produced trash, rotting food, and human waste. *Id.* at 147a–48a. It also yielded a surge in citations for drug and alcohol offenses, as well as a number of physical assaults among campers. *Id*. at 144a. This violence culminated in a murder perpetrated by one camper who stomped, kicked, and punched another to death. *Id*.

Boise has adopted two ordinances related to public camping to fulfill its public health and safety duties. First, the "Camping Ordinance" makes it a misdemeanor "for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time." Boise, Idaho, City Code § 7-3A-2(A) (renumbering Boise, Idaho, City Code § 9-10-02); Pet. App. 124a–25a. "Camping" is defined to include "the use of public property as a temporary or permanent place of dwelling, lodging or residence, or as a living accommodation at any time between sunset and sunrise, or as a sojourn." Pet. App. 124a. Second, the "Disorderly Conduct Ordinance" prohibits "[a]ny person" from "[o]ccupying, lodging or sleeping in any building, structure or place, whether public or private … without the permission of the owner or person entitled to possession or in control thereof." Boise, Idaho, City Code § 5-2-3(A)(1) (renumbering Boise, Idaho, City Code § 6-01-05); Pet. App. 123a–24a.

Recognizing the homelessness crisis afflicting the City, Boise has, for nearly a decade, maintained a policy of not issuing a citation under these ordinances to any individual who is camping or sleeping in a public space when there is no available overnight shelter for that individual. Pet. App. 132a, 137a. To implement this policy, the Boise Police Department has worked with the City's three principal emergency shelters to develop a system whereby a shelter will notify the Police Department if it has become full by 11 p.m. on any night. *Id.* at 132a–34a. This "Shelter Protocol" was formalized in 2014, when the City Council amended the Camping and Disorderly Conduct Ordinances to include provisions declaring that "[l]aw enforcement officers shall not enforce this [ordinance] when the individual is on public property

and there is no available overnight shelter." Boise, Idaho, City Code §§ 5-2-3(B)(1), 7-3A-2(B); Pet. App. 123a–24a, 124a–25a.

2. Plaintiffs are six individuals who were cited and/or convicted under the Camping and Disorderly Conduct Ordinances between 2007 and 2009. As a result, they were fined between $25 and $75 and sentenced to between 1 and 90 days in jail, although all of the Plaintiffs, with one exception, were given credit for time served.

On October 22, 2009, Plaintiffs filed a Complaint against the City alleging that the Camping and Disorderly Conduct Ordinances violated the Eighth Amendment's Cruel and Unusual Punishment Clause. All six Plaintiffs sought retrospective money damages, and two Plaintiffs also sought prospective declaratory and injunctive relief.

After an initial round of litigation in both the district court and at the Ninth Circuit, Boise moved for summary judgment, arguing that the "favorable-termination" rule of *Heck v. Humphrey*, 512 U.S. 477 (1994)—which forbids a plaintiff from collaterally attacking a conviction or sentence through a § 1983 action, *id.* at 487—barred Plaintiffs' claims. The district court agreed in part, holding that Plaintiffs' claims for money damages and injunctive relief were barred under *Heck*, but that their claims for prospective declaratory and injunctive relief could proceed because those claims arose not under § 1983, but the Declaratory Judgment Act. Pet. App. 101a–03a.

Plaintiffs filed an amended complaint on July 31, 2014, elaborating on their claims for prospective declaratory and injunctive relief. The district court granted Boise's motion for summary judgment,

holding that Plaintiffs lacked standing to pursue their claims for prospective relief because (1) Boise had amended the ordinances to provide that it would not cite any individual for public camping if no shelter bed was available, *and* (2) no Plaintiff had "shown that he cannot or will not stay in one or more of the available shelters if there is space available, or that he has a disability that prevents him from accessing shelter space." Pet. App. 71a. Accordingly, the court held that Plaintiffs did not demonstrate an "actual or imminent threat" that they would be cited under either ordinance. *Id.* at 71a–72a.

3. The Ninth Circuit reversed the district court's orders in substantial part and remanded for further proceedings.

First, the panel held that Plaintiffs had standing to bring their claims for prospective relief. Although the ordinances provided that they would not be enforced when shelters are full, the court concluded that some shelters may be "practically [un]available" even if they have open beds. Pet. App. 65a. For example, two of Boise's shelters limit the duration of an individual's stay, such that Plaintiffs may be unable to secure a bed even if the shelter is not full. *Id.* at 47a. Similarly, those shelters may turn away individuals even when they have open beds if those individuals arrive outside of scheduled check-in times or leave voluntarily and attempt to immediately return. *Id.* at 47a–48a. Further, those shelters have a "religious atmosphere" that includes "Christian messaging on the shelter's intake form" and "Christian iconography on the shelter walls," such that, in the panel's view, an individual cannot be expected to accept a bed there in order to avoid citation. *Id.* at 47a. As a result, the panel found "a

genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when [the third shelter] is full and they have been denied entry to [the other two] facilit[ies] for reasons other than shelter capacity." *Id.* at 49a.

Second, the Ninth Circuit agreed with the district court that most Plaintiffs' claims for retrospective relief were barred under *Heck*. But the court then held, over the dissent of Judge Owens, that "*Heck* has no application to plaintiffs' requests for prospective injunctive relief." Pet. App. 58a.

After disposing of these issues, the Ninth Circuit turned to the merits of Plaintiffs' Eighth Amendment claim. The Ninth Circuit explained that the Cruel and Unusual Punishment Clause "places substantive limits on what the government may criminalize" and cited this Court's decision in *Robinson*, 370 U.S. at 660, which struck down a statute outlawing the "status" of being a narcotics addict. Pet. App. 59a–60a. But because *Robinson* "did not explain at length the principles underpinning its holding," the court turned to *Powell*, 392 U.S. at 514, which considered whether a statute proscribing public drunkenness violated the Eighth Amendment. Pet. App. 60a. The Ninth Circuit acknowledged that Justice Marshall, writing for a four-Justice plurality, held that it did not because the statute "made criminal not alcoholism but *conduct*"—even though that conduct may in some sense be "'involuntary'" for chronic alcoholics. *Id*. at 60a–61a.

Nevertheless, the Ninth Circuit held that *Powell* compelled a finding for Plaintiffs. In doing so, it looked to Justice White's concurrence, which states that, with respect to at least some people, "'a showing

could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible,'" in which case "'th[e] statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment.'" Pet. App. 61a. Because "[t]he four dissenting Justices adopted a position consistent with that taken by Justice White," the Ninth Circuit concluded that "five Justices gleaned … the principle that 'the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" *Id*.

Concluding that the amalgamated views of the dissenting Justices and Justice White constituted the true holding of *Powell*, the Ninth Circuit held that "'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'" Pet. App. 62a (alterations in original).

The Ninth Circuit claimed that its decision was "narrow" because it does not "'dictate to the City that it must provide sufficient shelter for the homeless.'" Pet. App. 62a. The court also claimed that its holding would not extend to "individuals who *do* have access to adequate temporary shelter … but who choose not to use it," or to "an ordinance barring the obstruction of public rights of way or the erection of certain structures," but it offered no guidance on how these provisos may be operationalized in day-to-day law enforcement. *Id.* at 62a–63a & n.8 (emphasis added). For example, the court suggested that a shelter with "Christian messaging on [its] intake form" or "Christian iconography on [its] walls" would not be

"adequate" for a nonbeliever, *id.* at 47a, but did not explain how police officers in practice could make those fact-intensive determinations about shelters' religious messaging and homeless persons' religious beliefs.

4. The Ninth Circuit denied rehearing en banc over two separate dissents. The first dissent, authored by Judge Milan Smith and joined by five other judges, explained that the panel's attempt to "metamorphosize[] the *Powell* dissent into the majority opinion … defies logic" as well as this Court's decision in *Marks v. United States*, 430 U.S. 188 (1977). Pet. App. 9a. It then explained that the "panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts" that have rejected Eighth Amendment challenges to laws banning similar purportedly involuntary conduct. *Id.* at 12a.

Judge Smith's dissent emphasized the disastrous consequences of the court's decision, which "leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety." Pet. App. 15a–16a. Judge Smith said that this choice is illusory. "Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day." *Id.* at 16a. But performing a daily count would be "impossible": even with thousands of volunteers devoting countless hours, it still takes *three days* to perform an annual count in Los Angeles—and even then "not everybody really gets counted." *Id*.

Nor are the effects of the panel's sweeping decision limited to ordinances regulating public camping and sleeping. As Judge Smith emphasized, by categorically "holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination." Pet. App. 19a.

A second dissent from the denial of rehearing en banc, authored by Judge Bennett and joined by four other judges, argued that "except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize." Pet. App. 26a. Drawing from the sources cited in Justice Scalia's concurring opinion in *Harmelin v. Michigan*, 501 U.S. 957 (1991), Judge Bennett concluded that "[a]t common law and at the founding," the Cruel and Unusual Punishment Clause was only "a limit on the types of punishments that government could inflict following a criminal conviction." Pet. App. 34a. The panel's extension of that Clause "to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point." *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's decision is irreconcilable with this Court's precedent, which has never held that the Eighth Amendment categorically exempts from regulation purportedly "involuntary" conduct. It also creates a conflict among the lower courts. The California Supreme Court and the Eleventh Circuit

have upheld similar public-camping ordinances against Eighth Amendment challenges, and the First, Fourth, and Seventh Circuits have rejected arguments that the Eighth Amendment exempts purportedly involuntary conduct from generally applicable criminal laws.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENT.

The Ninth Circuit held that laws barring public camping and sleeping are unconstitutional insofar as they apply to "any 'conduct [that] is involuntary and inseparable from status.'" Pet. App. 62a. But this Court has never held that the Constitution exempts from generally applicable criminal laws any conduct that is purportedly involuntary—and it has certainly never struck down a law on that basis. On the contrary, this Court's caselaw confirms that the authority of state and local governments to enforce laws promoting public health, safety, and welfare is not contingent upon inquiries into the voluntariness of the regulated conduct.

In *Robinson v. California*, 370 U.S. 660 (1962), the Court considered the constitutionality of a California law providing that "[n]o person shall … be addicted to the use of narcotics." *Id.* at 660 n.1. The Court emphasized that the statute "[wa]s not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration," but rather "ma[de] the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'" *Id.* at 666. Analogizing narcotics addiction to "an illness which may be contracted innocently or

involuntarily," the Court "h[e]ld that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." *Id.* at 667.

Six years later, the Court considered whether to extend *Robinson* to cases involving purportedly involuntary conduct, but declined to do so. In *Powell v. Texas*, 392 U.S. 514 (1968), the defendant had been convicted for violating a state law proscribing public drunkenness. *Id.* at 517. The trial court found the defendant was a chronic alcoholic who was unable "to resist the constant, excessive consumption of alcohol" and was drunk in public not "by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." *Id.* at 521. Likening his case to *Robinson*, the defendant argued that because his conduct was not volitional and flowed from his disease, "to punish him criminally for that conduct would be cruel and unusual." *Id.* at 517.

The Court disagreed and affirmed the defendant's conviction, but no opinion garnered a majority. Writing for a four-Justice plurality, Justice Marshall described *Robinson*'s holding as turning on a distinction between status and conduct:

> The 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, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of

> whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

392 U.S. at 533 (plurality op.). Because the statute in *Powell* "ha[d] not sought to punish a mere status," but rather "imposed upon [the defendant] a criminal sanction for public behavior which may create substantial health and safety hazards, both for [the defendant] and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community," *id.* at 532, the statute did not contravene *Robinson*.

In reaching this conclusion, Justice Marshall warned of the practical implications that would attend a broader reading of *Robinson*, emphasizing that "the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility." *Id.* at 534. For example, "[i]f [the defendant] cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a 'compulsion' to kill." *Id.* Even if it were possible to distinguish among particular categories of behavior, the courts are ill-suited to the task. As Justice Marshall explained, "unless *Robinson* is so viewed it is difficult to see 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 standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id.* at 533. Such a result would be irreconcilable with "[t]raditional common-

law concepts of personal accountability and essential considerations of federalism." *Id.* at 535.

Justice Black wrote a concurring opinion in which Justice Harlan joined. He agreed with the plurality that *Robinson* was "explicitly limited … to the situation where no conduct of any kind is involved." *Id.* at 542 (Black, J., concurring). According to Justice Black, the "revolutionary doctrine of constitutional law" advocated by the defendant would "significantly limit the States in their efforts to deal with a widespread and important social problem" and would take the Court "far beyond the realm of problems for which we are in a position to know what we are talking about." *Id.* at 537–38. Justice Black thus declined to "depart[] from … the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." *Id.* at 548.

The Ninth Circuit's decision cannot be reconciled with *Robinson* or the plurality or concurring opinions in *Powell*. Boise's ordinances are generally applicable laws that regulate conduct, not status. Such laws undoubtedly serve compelling public interests, including the maintenance of public health and safety—not just for the public at large, but for those living on the streets, as well. And the decision below presents precisely the practical difficulties Justice Marshall feared, thrusting federal courts into a new role as "the ultimate arbiter of standards of criminal responsibility," while upending long-established concepts of "personal accountability and essential considerations of federalism." *Powell*, 392 U.S. at 533, 535 (plurality op.).

The Ninth Circuit, however, refused to follow the plurality opinion in *Powell*, and instead located its

novel constitutional rule in Justice White's opinion concurring in the result in *Powell*, which provided the fifth vote to uphold the defendant's conviction. In that opinion, Justice White appeared to agree with the view of *Robinson* articulated in Justice Fortas's four-Justice dissent, reasoning that "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 548 (White, J., concurring in the result) (citation omitted); *see also id.* at 567 (Fortas, J., dissenting). According to the Ninth Circuit, these "five Justices gleaned from *Robinson* the principle that 'the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" Pet. App. 61a. It was this principle, the Ninth Circuit concluded, that provided the governing rule under the Eighth Amendment. *Id.* at 62a.

Even if the Ninth Circuit was correct to derive a sweeping rule of constitutional law from a position adopted by a *dissent*, the court still erred because Justice White's purported support for the dissent's view of *Robinson* was irrelevant to his disposition of the case. As Justice White explained, "[w]hether or not [the defendant] established that he could not have resisted becoming drunk …, nothing in the record indicates that he could not have done his drinking *in private*." *Powell*, 392 U.S. at 552–53 (White, J., concurring in the result) (emphasis added). Thus, irrespective of Justice White's discussion of the broader implications of *Robinson*, "[f]or purposes of" *Powell* itself, it was "necessary to say only that [the defendant] showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing

that he was unable to stay off the streets on the night in question." *Id.* at 554–55.

This Court has never suggested that Justice White's single-Justice concurring opinion in *Powell* provides a rule of constitutional dimension under the Cruel and Unusual Punishment Clause. On the contrary, "*Powell* turned out to be the end of the Court's flirtation with the possibility of a constitutional criminal law doctrine." Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 Cal. L. Rev. 943, 966 (1999). That flirtation ended where it began—with the power to regulate conduct, including purportedly involuntary conduct, reposed in state and local authorities. Thus, "*Robinson*, though of great theoretical interest, has no practical importance today" because "[n]othing has come of it, and th[is] Court has not gone on to find a 'voluntary act' principle in the Constitution." Peter W. Low, *Criminal Law* 361 (1990). As Professor Kadish has explained, although "[t]he *Robinson* decision could plausibly have been seen as a vital opening toward establishing lack of self-control as a constitutional bar to punishment," "[j]ust a half dozen years later the Court closed the door … reject[ing] the broader reading of *Robinson* that one could not be punished for what is beyond one's power of control." Kadish, *Fifty Years of Criminal Law*, 87 Cal. L. Rev. at 965–66.

The Ninth Circuit's decision in this case reopens the door this Court closed more than half a century ago. That decision is not only inconsistent with this Court's precedent, but presents the intolerable practical consequences foreseen by Justice Marshall.

II. THE NINTH CIRCUIT'S DECISION CREATES A CONFLICT AMONG THE LOWER COURTS.

The Ninth Circuit's decision also creates a conflict among the lower courts. Every other federal appellate court or state supreme court to consider the constitutionality of public-camping laws against Eighth Amendment challenges has upheld the laws. Moreover, the Ninth Circuit's interpretation of *Robinson* and *Powell* creates a three-way split on the broader question whether involuntary conduct can ever be punished consistent with the Cruel and Unusual Punishment Clause.

A. The California Supreme Court and the Eleventh Circuit have upheld laws virtually identical to Boise's ordinances against virtually identical attacks under the Cruel and Unusual Punishment Clause. If this case were before either of those courts, the outcome would have been different.

In *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), the California Supreme Court upheld an ordinance making it "'unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in … any street [or] any public parking lot or public area.'" *Id.* at 1150. As the court explained, "[t]he ordinance permits punishment for proscribed conduct, not punishment for status," *id.* at 1166, and thus does not contravene the Eighth Amendment. Although the California Court of Appeal had held that the ordinance "imposed punishment for the 'involuntary status of being homeless,'" *id.*, the California Supreme Court emphasized that "[n]o authority [wa]s cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or … is punishment for poverty," and recognized that

this "Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status," *id*. And although *Tobe* involved a facial challenge, subsequent decisions have applied it to as-applied challenges, as well. *See Allen v. City of Sacramento*, 183 Cal. Rptr. 3d 654, 670–71 (Cal. Ct. App. 2015) ("Sacramento's ordinance punishes the act of camping, occupying camp facilities, and using camp paraphernalia, not homelessness. … Because the Eighth Amendment does not prohibit the punishment of acts, plaintiffs' challenge based on cruel and unusual punishment lacks merit" (citations omitted)).

The Eleventh Circuit reached a similar result in *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), where it considered the constitutionality of a city ordinance providing that "[c]amping is prohibited on all public property, except as may be specifically authorized by the appropriate governmental authority." *Id.* at 1356. As the court explained, "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not." *Id.* at 1361. Under this framework, the court "h[e]ld that [the ordinance] does not violate the Eighth Amendment." *Id.* at 1362.

The Ninth Circuit acknowledged the holding in *Joel*, but attempted to distinguish that case on the ground that, there, "the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space." Pet. App. 63a–64a n.9. But this was not the basis for the Eleventh Circuit's holding. Rather, the Eleventh Circuit relied on the fact that the ordinance "target[ed] conduct, and d[id] not provide criminal

punishment based on a person's status"—expressly citing Justice Marshall's plurality opinion in *Powell*. *Joel*, 232 F.3d at 1362. The court raised the availability of shelter only in explaining why the position adopted by certain district courts, which had held that involuntary conduct could not be punished under the Eighth Amendment, would not help the challenger under the facts presented: "*[E]ven if* we followed the reasoning of the district courts in *Pottinger* and *Johnson* this case is clearly distinguishable" because "[t]he ordinance in question here does not criminalize involuntary behavior" insofar as "the availability of shelter space means that Joel had an opportunity to comply with the ordinance." *Id.* (emphasis added).

In short, every other appellate court to consider challenges to public-camping laws under the Cruel and Unusual Punishment Clause has upheld the laws. The Ninth Circuit is the only court to reach a contrary conclusion. This, standing alone, warrants the Court's review.

B. The Ninth Circuit's unprecedented interpretation of the Eighth Amendment also conflicts with decisions from the First, Fourth, and Seventh Circuits, which together with the Ninth Circuit have now adopted three different conclusions regarding whether involuntariness can ever serve as a basis for an exemption from generally applicable laws.

1. At least two circuits have rejected the argument that purportedly "involuntary" conduct is exempt from generally applicable criminal laws.

The First Circuit in *United States v. Sirois*, 898 F.3d 134 (1st Cir. 2018), considered whether the Eighth Amendment "precludes incarceration for [the defendant's] use of illegal drugs because that use is

compelled by his addiction, which is a disease." *Id.* at 137. Although the defendant relied on Justice White's concurrence in *Powell*, the First Circuit reasoned that "Justice White's *Powell* concurrence is both good news and bad news for [the defendant]." *Id.* at 138. While that opinion "express[es] skepticism that the compulsive use of narcotics can even be a crime," "it is only a concurring opinion" and, "[e]ven worse, it is one that has yet to gain any apparent relevant traction, as [the defendant] is unable to point us to any federal court of appeals case in the fifty years since the Court decided *Powell* and *Robinson* that has either interpreted those cases to hold that the Eighth Amendment proscribes criminal punishment for conduct that results from narcotic addiction, or has extended their reasoning to this effect." *Id.* Ultimately, the First Circuit concluded that "[w]hatever *Powell* holds, it does not clearly establish a prohibition on punishing an individual, even an addict, for possessing or using narcotics." *Id.*

The Seventh Circuit has reached a similar conclusion. In *United States v. Black*, 116 F.3d 198 (7th Cir. 1997), that court rejected the defendant's argument that his child-pornography conviction violated the Cruel and Unusual Punishment Clause "because as a pedophile or ephebophile he [wa]s compelled to collect, receive and distribute child pornography" as "'a pathological symptom of [his] pedophilia and/or ephebophilia.'" *Id.* at 201 (alteration in original). Although the "[d]efendant's principal reliance [wa]s on the concurring opinion of Justice White in *Powell*," the court explained that "since no other Justice joined in that opinion, it need not be discussed further." *Id.* at 201 n.2. It then upheld the conviction, reasoning that "*Robinson* is simply inapposite on its face because the statutes

involved here do not criminalize the statuses of pedophile or ephebophile" but rather the "conduct of receiving, possessing and distributing child pornography." *Id.* at 201; *see also United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) ("As in *Powell*, Stenson was not punished for his status as an alcoholic but for his conduct. Therefore, his claim for cruel and unusual punishment fails.").

2. The en banc Fourth Circuit, on the other hand, recently held that involuntary conduct may be exempt from punishment under the Cruel and Unusual Punishment Clause, but only when the law at issue is *not* a generally applicable law, but rather one that targets individuals for whom the proscribed conduct is involuntary.

In *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc), the Fourth Circuit considered a Virginia law that permitted state courts to issue "civil interdiction order[s] 'prohibiting the sale of alcoholic beverages … until further ordered' to a person who 'has been convicted of driving … while intoxicated or has shown himself to be an habitual drunkard.'" *Id.* at 268 (omissions in original). "Once declared an 'habitual drunkard,' an interdicted person is subject to incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public." *Id.* at 269.

After concluding that the term "habitual drunkard" was unconstitutionally vague, *id.* at 277–78, the Fourth Circuit held in the alternative that the law violated the Eighth Amendment. As the court emphasized, however, "[w]hat matters under the Eighth Amendment is that Plaintiffs allege that the Commonwealth has singled them out for special punishment for otherwise lawful conduct that is

compelled by their illness." *Id.* at 281 n.14. The court conceded that "[a] state undoubtedly has the power to prosecute individuals, even those suffering from illnesses, for breaking laws that apply to the general population … because such laws—even when enforced against sick people—reflect a state's considered judgment that some actions are *so dangerous* or contrary to the public welfare that they should lead to criminal liability *for everyone* who commits them." *Id.* at 284–85 (emphases in original). But it held that "[w]hat the Eighth Amendment cannot tolerate is the targeted criminalization of *otherwise legal* behavior that is an involuntary manifestation of an illness." *Id.* at 285 (emphasis in original).[1]

Even this narrower interpretation of Justice White's concurrence in *Powell* sparked an impassioned, six-judge dissent authored by Judge Wilkinson, who excoriated the majority for "f[inding]—in the Eighth Amendment's prohibition on 'cruel and unusual' punishments, of all places—constitutional protection for any act that is alleged to be 'non-volitional.'" *Id.* at 286–87 (Wilkinson, J., dissenting). The dissent characterized the decision as "an assault upon the constitutional, democratic, and common law foundations of American civil and criminal law, and most importantly, to the judge's place within it." *Id.* at 287. And in adopting this view, the court "discarded any pretense of a workable limiting principle, expanded the Eighth Amendment

[1] Virginia has announced that it will not petition for certiorari from the Fourth Circuit's decision. *See Virginia Won't Appeal Ruling Tossing 'Habitual Drunkard' Law* (Wash. Post. Aug. 2, 2019), https://www.washingtonpost.com/national/virginia-wont-appeal-ruling-tossing-habitual-drunkard-law/2019/08/02/b932e504-b552-11e9-acc8-1d847bacca73_story.html.

beyond any discernible limits, and overturned sixty years of controlling Supreme Court precedent." *Id*. This "new theory of the Eighth Amendment," Judge Wilkinson warned, "will foreclose a state's ability to take reasonable steps to protect its citizens from serious and long recognized harms." *Id*.

But the disagreements between the majority and the dissent are immaterial for present purposes because Boise's ordinances survive even under the majority's rule. Unlike the civil-interdiction regime at issue in *Manning*, the ordinances here are generally applicable criminal laws that do not target a specific subset of the population based on their involuntary conduct: it is illegal for *anyone* to camp on the City's sidewalks and in its parks. And because the Fourth Circuit made clear that its "holding neither creates nor supports the notion of a nonvolitional defense against generally applicable crimes," *id.* at 285 (majority op.), the ordinances here would have been upheld by that court.

3. The Ninth Circuit stands alone in holding "'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" Pet. App. 61a. Unlike the First and Seventh Circuits, the Ninth Circuit has abandoned the act-status distinction adopted in *Robinson* and by the *Powell* plurality in favor of a broader voluntariness principle attributed to Justice White's concurrence in *Powell*. And unlike the Fourth Circuit, the Ninth Circuit has held that it is irrelevant whether the law at issue is one of general application or rather one that targets a specific subset of the population.

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If this case were decided in any of the jurisdictions discussed above, Boise's ordinances would have been upheld. But because the Ninth Circuit has adopted an unprecedented approach to the Cruel and Unusual Punishment Clause that departs from other courts with respect to public-camping laws specifically, and involuntary conduct generally, Boise—and all other municipal governments in the nine States and two territories in the Ninth Circuit—now finds itself powerless to enforce laws that fall within the core of its police power. This Court should grant certiorari to restore uniformity to Eighth Amendment jurisprudence. And, as explained below, it should especially do so given the calamitous consequences that will follow if the decision below is allowed to stand.

III. THE NINTH CIRCUIT'S DECISION UNDERMINES THE ABILITY OF STATE AND LOCAL GOVERNMENTS TO PROTECT PUBLIC HEALTH AND SAFETY AND IS UNWORKABLE IN PRACTICE.

Although the Ninth Circuit's decision purports to be "narrow," Pet. App. 62a, its far-reaching consequences are already being felt across the country. As Judge Smith correctly predicted, the panel's opinion "has begun wreaking havoc on local governments, residents, and businesses" and, if not reversed, "will soon prevent local governments from enforcing a host of … public health and safety laws." *Id.* at 6a.

A. The Decision Below Paralyzes State And Local Governments' Ability To Protect Public Health And Safety.

Under the Ninth Circuit's decision, state and local governments may not enforce public-camping laws against *any* individual unless and until they provide adequate shelter space to house *all* individuals. Yet in virtually every city of considerable size—such as Los Angeles, San Francisco, Portland, and Seattle—this will prove an impossible task because the number of homeless individuals vastly surpasses the current supply of housing and emergency shelter. In Los Angeles County, for example, there are nearly 22,000 shelter beds available, but the homeless population approaches 60,000.[2] The practical effect of the Ninth Circuit's decision, then, is to create a de facto constitutional right to live on public sidewalks and in public parks.

The Ninth Circuit's decision is understandably causing alarm in communities across the West. Its all-or-nothing rule undercuts local governments' ability to safeguard public health and safety and ensures that homeless encampments will proliferate throughout our cities and towns. These encampments pose grave threats not only to the health and safety of the general public, but also to the safety and physical, mental, and emotional well-being of the vulnerable populations who reside—and are often trapped—in them.

The homeless living on city streets are a frequent target of violent crime. An encampment in Boise

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[2] 2019 Greater L.A. Homelessness Count Presentation, L.A. Homeless Servs. Auth. 6–7 (2019).

created an increase in crime and violence, including drug and alcohol offenses, physical assaults, and even a homicide. Pet. App. 143a–44a, 147a–48a. Boise is not alone. Crimes against the homeless in Los Angeles spiked between 2017 and 2018: robbery increased by 89%, larceny by 86%, and rape by 71%.[3] This is to say nothing of the agonies suffered by often helpless homeless individuals who suffer from untreated physical, mental, and emotional conditions.[4] Such individuals are dying in record numbers—in 2018 alone, 918 homeless individuals in Los Angeles County, 210 in Orange County, and 194 in King County (which includes Seattle) died on the streets.[5]

Criminals not only prey on these homeless populations, but also hide among them. In Seattle, police recently confiscated "over $20,000 in cash, nearly a pound of crack cocaine, heroin, methamphetamine, marijuana, pills," as well as

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[3] Commander Dominic H. Choi, L.A. Police Dep't, *The Los Angeles Police Department's 2018 4th Quarter Report on Homelessness* 2 (2019).

[4] Eric Johnson, *Komo News Special: Seattle is Dying* (KOMO News Mar. 14, 2019), https://komonews.com/news/local/komo-news-special-seattle-is-dying.

[5] King Cnty. Med. Examiner, *2018 Annual Summary of Deaths Among Individuals Presumed to be Homeless and Investigated by the King County Medical Examiner's Office* 1 (2019); Orange Cnty. Sheriff's Dept., *Coroner Division Homeless Mortality Report 2014–2018* 7 (2019); Anna Gorman & Harriet Blair Rowan, *The Homeless Are Dying in Record Numbers on the Streets of Los Angeles* (U.S. News & World Report Apr. 23, 2019), https://www.usnews.com/news/healthiest-communities/articles/2019-04-23/homeless-dying-in-record-numbers-on-the-streets-of-los-angeles.

firearms, other weapons, and stolen goods from a drug ring run in part out of tents in encampments.[6] In Los Angeles, gangs engage in sex trafficking and "hid[e] in plain sight" in tents on "Skid Row"—a locale where "more than a quarter" of women have reported being sexually assaulted—in order to "prey on many who live [t]here looking for services and help."[7]

The encampments now protected by the Ninth Circuit's decision have also contributed to a growing public health crisis by serving as incubators for diseases such as typhus, typhoid fever, and tuberculosis.[8] In Los Angeles, mountains of trash, rotting food, and human waste around encampments have contributed to a rodent infestation that, in turn, has precipitated a sharp rise in flea-borne typhus—up from 18 cases in 2009 to 174 in 2018.[9] In Seattle,

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[6] *Seattle police bust drug rings in homeless camps* (KOMO News May 15, 2019), https://komonews.com/news/local/seattle-police-bust-drug-rings-in-homeless-camps.

[7] Lolita Lopez & Phil Dreschler, *Gangs of LA on Skid Row* (NBC Los Angeles Feb. 19, 2018), https://www.nbclosangeles.com/news/local/Gangs-of-LA-on-Skid-Row-474531353.html; Gale Holland, *Attacked, abused and often forgotten: Women now make up 1 in 3 homeless people in L.A. County* (L.A. Times Oct. 28, 2016), https://www.latimes.com/projects/la-me-homeless-women/.

[8] Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless* (The Atlantic Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/.

[9] Cal. Dep't of Pub., Health, *Human Flea-Borne Typhus Cases in Cal.* 1 (2019); Dakota Smith & David Zahniser, *Filth from homeless camps is luring rats to L.A. City Hall, report says* (L.A. Times June 3, 2019), https://www.latimes.com/local/lanow/la-

"crowded conditions with poor hygiene and sanitation" have contributed to "outbreaks of Group A Streptococcus, shigella, and a rare group of infections transmitted by body lice."[10] And Portland has seen an uptick in HIV among the homeless, which has been attributed to "the rise of cheap accessible methamphetamine and heroin, and an increase in people who use the drugs to manage life on the streets."[11] An outbreak of hepatitis A that infected more than 500 Californians originated in an encampment in San Diego, where it killed 19 people, most of whom were homeless.[12]

Encampments also pose significant environmental hazards. The devastating Skirball fire that ripped through parts of Los Angeles in December 2017, burning roughly 400 acres, started as a cooking fire at

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me-ln-rats-homelessness-city-hall-fleas-report-20190603-story.html.

[10] Vianna Davila & Jonathan Martin, *Rare infectious diseases are rising at an 'alarming' rate in Seattle's homeless population, concerning health officials* (Seattle Times Mar. 15, 2018), https://www.seattletimes.com/seattle-news/homeless/infectious-disease-oubreaks-in-seattle-homeless-people-concern-health-officials/.

[11] Molly Harbarger, *Spike in Multnomah County HIV cases tied to drug use* (Oregonian June 20, 2019), https://www.oregonlive.com/health/2019/06/spike-in-multnomah-county-hiv-cases-tied-to-drug-use.html.

[12] Scott Wilson, *Hepatitis A outbreak among homeless a byproduct of California's housing crunch* (Wash. Post Oct. 25, 2017), https://www.washingtonpost.com/national/hepatitis-a-outbreak-among-homeless-a-byproduct-of-californias-housing-crunch/2017/10/25/e9038a62-acf9-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.26e72d4fdd04.

an encampment near the Bel-Air neighborhood.[13] In Orange County, a February 2018 clean-up of a two-mile-long encampment that had hosted more than 700 people uncovered "404 tons of debris, 13,950 needles, and 5,279 pounds of waste," including human waste, propane, and pesticides.[14] The clean-up site was "part of a flood control channel" where debris could have easily contaminated the water supply. And in San Francisco, hundreds of thousands of used needles litter the city's streets—"164,264 needles [were recovered] in August [2018] alone."[15] Along with these syringes, so much human waste has accumulated on the streets that the city has established a "proactive human waste" unit to clean it up daily, appropriating over $830,977 to tackle the city's "feces problem."[16]

Cities and towns across the Ninth Circuit have been sensitive to the problems afflicting their growing

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[13] Jennifer Medina, *Los Angeles Fires Started in Homeless Encampment, Officials Say* (N.Y. Times Dec. 12, 2017), https://www.nytimes.com/2017/12/12/us/california-fire-homeless.html.

[14] Anh Do, *'Eye-popping' number of hypodermic needles, pounds of waste cleared from Orange County riverbed homeless encampment* (L.A. Times Mar. 10, 2018), https://www.latimes.com/local/lanow/la-me-ln-riverbed-debris-20180310-story.html.

[15] Thomas Fuller, *Life on the Dirtiest Block in San Francisco* (N.Y. Times Oct. 8, 2018), https://www.nytimes.com/2018/10/08/us/san-francisco-dirtiest-street-london-breed.html.

[16] *Id.*; Aria Bendix, *San Francisco has a 'Poop Patrol' to deal with its feces problem, and workers make more than $184,000 a year in salary and benefits* (Bus. Insider Aug. 24, 2018), https://www.businessinsider.com/san-francisco-poop-patrol-employees-make-184000-a-year-2018-8.

homeless populations and have acted in publicly minded ways to address these issues, including by dedicating vast sums to build shelters and working with service organizations to ensure homeless individuals have access to the care they need.[17] Yet the Ninth Circuit's decision ensures that these conditions will persist—and worsen—in each of the Ninth Circuit's more than 1,600 municipalities unless and until those cities can provide enough beds to shelter every person within their boundaries. But nothing in the Constitution or this Court's precedent requires cities to surrender their streets, sidewalks, parks, riverbeds, and other public areas to vast encampments and thereby abdicate their duty to provide clean, safe, and accessible public spaces to *all* residents. On the contrary, this Court has long recognized that the heartland of local governments' police power includes "such reasonable regulations … as will protect the public health and the public safety." *Jacobson v. Mass.*, 197 U.S. 11, 25 (1905). And there is simply nothing to "justify a court in interfering with so salutary a power and one so necessary to the public health." *Hutchinson v. City of Valdosta*, 227 U.S 303, 308 (1913).

B. The Ninth Circuit's Decision Is Unworkable And Nonsensical.

Through its sweeping interpretation of the Eighth Amendment, the Ninth Circuit has arrogated to federal courts the power to oversee the use of city streets, parks, and other public areas. Even if that

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[17] *Tracking HHH*, L.A. Office of the Mayor, https://www.lamayor.org/HomelessnessTrackingHHH (describing Los Angeles' $1.2 billion bond measure aimed at building 10,000 units of housing); *About*, New Path Community Housing, http://www.newpathboise.org/.

were proper (it is not), the rule imposed by the Ninth Circuit for carrying out the traditional functions of city councils and town halls is ill-defined and unworkable in practice, raising more questions than it answers. Indeed, in the wake of the decision below, cities such as Portland, Oregon and Thousand Oaks, California have given up even trying to enforce their public-camping laws in light of the unworkable administrative morass created by the Ninth Circuit.[18]

To take one example, the Ninth Circuit's decision bars the enforcement of laws against public camping or sleeping unless shelter is "practically available." Pet. App. 65a. But the court gives virtually no guidance as to what that term means. The decision assumes that the only relevant form of shelter is a formal service provider with beds that are deemed acceptable by the individual. But what about other forms of shelter, such as the home of a friend or relative? The court also held that some shelters, despite having beds available, may not be "practically available" because the shelter has certain rules or features by which individuals may be unwilling to abide, such as check-in times, limitations on the duration of one's stay, restrictions on ingress and egress, or religious "messaging on the shelter's intake form" and "iconography on the shelter walls." *Id.* at 47a. If so, what other attributes may render a

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[18] *Code change is just first step to help homeless* (Thousand Oaks Acorn July 18, 2019), https://www.toacorn.com/articles/code-change-is-just-first-step-to-help-homeless/; Maggie Vespa, *Portland police will not cite homeless for sleeping on streets, citing court ruling* (KGW 8 Sept. 7, 2018), https://www.kgw.com/article/news/local/homeless/portland-police-will-not-cite-homeless-for-sleeping-on-streets-citing-court-ruling/283-591977968.

shelter unfit? The Ninth Circuit does not say, leaving the details of its novel scheme to be resolved through endless litigation in federal courts instead of through local democratic deliberation. The court's silence leaves cities and counties paralyzed, unable or unwilling to act out of fear of substantial liability.

Similarly, the Ninth Circuit's decision provides no guidance on the methods a jurisdiction should use to ascertain the number of beds available for homeless individuals on a given night. For instance, how often must such counts be performed—nightly, monthly, annually, or at some other interval? And who should count as "hav[ing] access to adequate temporary shelter"? Pet. App. 62a n.8. Here, for example, one Plaintiff conceded that he had a job and money, and camped only because he "do[es]n't like to pay rent" and "shelters suck." *Id.* at 140a. Another Plaintiff was cited while visiting his family in Boise. *Id.* at 40a–41a. Should these individuals be included in calculating the number of shelter beds a city must provide before enforcing laws regulating public camping and sleeping? The court is again silent, exposing cities who do attempt to comply with the court's newfound framework subject to lawsuits seeking substantial monetary and other relief. *Id.* at 17a.

More fundamentally, the Ninth Circuit's holding simply does not make sense. Under the all-or-nothing rule adopted below, a city may not enforce laws regulating public camping or sleeping against *any*body unless shelter is "practically available" to *every*body. But why should the inability of a large city such as Los Angeles to provide shelter for each of the more than 60,000 homeless individuals within its

borders prevent it from requiring *any* individual to accept available shelter?

While the Ninth Circuit claims that its decision is a "narrow" one, limited to laws regulating public camping or sleeping, it will not remain so for long. As Judge Smith accurately observed, the "logic of the panel's opinion reaches even further in scope," imperiling "laws that prohibit public defecation and urination" and rendering cities "powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods." Pet. App. 19a. One district court has already applied the Ninth Circuit's logic to invalidate a statutory scheme requiring sex offenders to secure a "qualifying host site" before serving a term of supervised release. *Murphy v. Raoul,* 380 F. Supp. 3d 731, 763–65 (N.D. Ill. 2019). Similar decisions are sure to follow without this Court's intervention.

CONCLUSION

The Ninth Circuit's decision misapplies and radically expands this Court's precedent, creates conflicts with five other circuit or state supreme courts, and stretches the Eighth Amendment beyond recognition. In doing so, it eliminates the ability of state and local governments to protect the health and safety of their residents. And it is already having devastating consequences. This Court should grant review, reverse the Ninth Circuit's decision, and restore the traditional police powers of cities and States to regulate these critical local issues.

Respectfully submitted.

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August 22, 2019