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

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

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STATEMENT OF INTEREST[1]

The Sacramento County District Attorney has a significant interest in this case. Sacramento County is a jurisdiction of over 1.5 million people. The District Attorney is the chief criminal prosecutor for the jurisdiction, and files over 20,000 criminal cases per year in addition to civil matters in the areas of environmental and consumer protection.

The existence and increase in the number of homeless persons and the associated issues, dangers, and difficulties are critical to the everyday lives of Sacramentans. California has the largest number of homeless people in the country and Sacramento is no exception. With a county-wide homeless population most recently estimated at over 9,000, Sacramento's number of homeless individuals exceeds the rate in many large urban areas, including San Francisco.

The tools that Sacramento's public officials may use to manage the ongoing problems associated with homeless populations and homeless encampments are affected by the issue at the heart of this case—whether and to what extent California or Sacramento may prohibit public camping or sleeping on or in public

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[1] Pursuant to Supreme Court Rule 37.2, amicus gave counsel of record for each party written notice of the intention of amicus to file this brief at least 10 days in advance of the filing. Under Rule 37.6, amicus states that this brief was not authored in whole or in part by counsel for any party, and no person other than amicus curiae, its members or its counsel made any monetary contribution intended to be used in the preparation or submission of this brief.

property. As the chief public prosecutor in Sacramento, amicus is experienced in such matters. This experience will be helpful to the Court in its consideration of this case.

SUMMARY OF ARGUMENT

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit scrutinized a ban on sleeping and camping in public under the Cruel and Unusual Punishment Clause of the Eighth Amendment ("the Clause"). The Ninth Circuit returned to two cases from nearly half a century before to pronounce a new rule:

> [T]he Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.

Martin, 920 F.3d at 616. Three years later, the case at bar followed. The Ninth Circuit in *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) expanded *Martin* to allow a plaintiff, on the mere assertion that they are homeless or might be in the future, to form a class and strike down municipal ordinances designed to protect public space, public safety, and public health.

Amicus curiae argues as follows:

First, the Ninth Circuit ignored Supreme Court precedent regarding how to interpret a holding of the Court. In *Martin* and *Johnson*, the Ninth Circuit improperly fashioned a new rule about the Clause from

segments of two non-majority opinions in *Powell v. State of Tex.*, 392 U.S. 514 (1968). The Ninth Circuit combined a concurrence by a single justice with a dissent by four justices to pronounce a new rule about the Clause and greatly expand the holding of *Robinson v. California*, 370 U.S. 660 (1962). To accomplish this, the Ninth Circuit ignored the dictate of this court in *Marks v. United States*, 430 U.S. 188, 193 (1977), which explained that the holding of the Court is the combination of the Justices "who concurred in the judgments on the narrowest grounds."

Second, perhaps unsurprisingly, the Ninth Circuit's new rule has created a split with other courts, notably the California Supreme Court and the Eleventh Circuit. While the authors of *Johnson* claim their holding is compatible with these courts, their interpretation of the Clause and resulting Constitutional pronouncement is not.

Third, through their inventive interpretation of *Powell*, the Ninth Circuit thrust the federal judiciary into a realm they are ill-equipped to navigate. Ultimately, the Legislative and Executive branches will be responsible for the multifaceted solutions necessary to combat homelessness. Similarly, the rule announced by the Ninth Circuit runs contrary to fundamental principles of federalism, which would leave to the states and their subdivisions the decision-making authority about how to best manage, through criminal sanctions and other means, the inherently local problems they face. The rule from the Ninth Circuit would deprive local officials of one means for managing the myriad

causes and effects of homelessness. Where many methods will be necessary to solve a problem, to remove one from atop a federal bench is poor public policy.

This Court should grant certiorari to clarify the holdings of *Robinson* and *Powell* and to return this great social challenge to the Executive and Legislative Branches where it belongs.

ARGUMENT

I. Introduction

In *Robinson v. California*, the Supreme Court interpreted the Clause to prohibit punishment based on a person's status. Four years later, in *Powell v. State of Texas*, the Court revisited the Clause. Justice Marshall wrote for a four-Justice plurality, which endorsed *Robinson*'s holding that the Clause permitted punishment of conduct but prohibited punishment of status. Justice White did not join Justice Marshall's opinion but concurred in the judgment. The resulting judgment upheld the Texas law. This interpretation of the Clause went effectively untouched for 47 years.

In 2019, the Ninth Circuit interpreted a new rule from these authorities. Instead of accepting the two opinions in *Powell* that "concurred in the judgments on the narrowest grounds," *see Marks*, 430 U.S. at 193, the Ninth Circuit combined Justice White's concurrence with the dissent by Justice Fortas, bypassing the

plurality opinion entirely. In so doing, the Ninth Circuit pronounced a new rule:

> [T]he Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.

Johnson, 72 F.4th at 892 (citing *Martin*, 920 F.3d at 616).

II. The Ninth Circuit Improperly Combined a Concurrence with a Dissent.

In *Robinson*, the Court held that a California statute which made it a crime to be addicted to the use of narcotics violated the Clause. *Robinson*, 370 U.S. at 666. Under the statute, a person could be punished for the mere status of being a narcotics addict without any showing that the defendant had possessed or used narcotics in the state. *Id*. at 665-66. *Robinson* held that the Clause prohibits the criminalization of a status or condition alone. *Id*. at 666.

Six years later, *Powell* limited the *Robinson* rule and its application of the Clause to strike down a state enactment. *Powell* involved a Texas statute that made it a crime for a person to "get drunk or be found in a state of intoxication in any public place[.]" *Powell*, 392 U.S. at 516-17. This statute might have implicated the *status* of being an alcoholic, but it also clearly prohibited the *act* of being in a public place while drunk. The defendant's conviction under this statute was affirmed by the Texas courts. On appeal, five justices of this

Court voted to affirm the conviction, though no opinion commanded five votes. The resulting judgment upheld the Texas statute under the Clause.

Justice Thurgood Marshall, writing the lead plurality opinion with four votes, noted that the defendant was attempting to bring his case under the rule of *Robinson*. But Justice Marshall wrote that in *Robinson* the state had "sought to punish a mere status," while in *Powell* the state had "imposed upon [the defendant] a criminal sanction for public behavior which may create substantial health and safety hazards," to wit "for being in public while drunk on a particular occasion." *Id*. at 532. He went on to invoke "essential considerations of federalism," stating:

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

Id. at 535-36.

Concurring in the result without joining Justice Marshall's opinion, Justice White wrote that, "[f]or some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. . . . The Eighth Amendment *might* also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him

to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Id*. at 551-52 (White, J., concurring) (emphasis added). White went on to say that the court need not decide the circumstances that would implicate the Clause, because on the record in the case, Powell had shown "that he was to some degree compelled to drink . . . [but] made no showing that he was unable to stay off the streets[.]" Thus, he had not shown that the act for which he was convicted violated the Clause. *Id*. at 553-54 (White, J., concurring).

It is noteworthy that White's language, couched in terms of "possible," "might," and so on, demonstrate that even in the context of White's contentions, his musings were dicta. *See id*. at 552-53 (White, J. concurring).

Justice Fortas, writing for four votes in dissent, wrote that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, . . . could not prevent himself from appearing in public places." *Id*. at 567 (Fortas, J., dissenting).

The quoted language from these two non-majority opinions in *Powell*, one concurring and one dissenting, are what the Ninth Circuit cobbled together to create the means of conveyance to arrive at its holding in *Martin*. Citing the above quoted language from the White and Fortas opinions, the Ninth Circuit concluded that in *Powell* "five Justices gleaned from

Robinson the principle that 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" *Martin*, 920 F.3d at 616.

But the fatal flaw in the Ninth Circuit's reasoning is that, in combining fragments from both a dissent and a concurrence to elevate this hidden holding from *Powell*, it ran afoul of the rule announced by this Court in *Marks v. United States*, 430 U.S. 188 (1977).

In *Marks*, reversing a conviction for obscene materials, this Court articulated how courts ought to divine a holding from a divided opinion:

> When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who *concurred in the judgments on the narrowest grounds*[.]

Marks, 430 U.S. at 193 (quotations omitted, emphasis added).

The dissenting opinion of Justice Fortas does not qualify for being used in this fashion, since it did not concur in the judgment. The opinion of Justice White does qualify, but only in combination with Justice Marshall's opinion because those two opinions formed the positions of the Justices who concurred in the judgment.

In short, the Ninth Circuit has reached its new rule by means of a conveyance that violates the pronouncements of this Court. The combination of a concurrence with a dissent was illegitimate.

III. The Ninth Circuit's New Rule Created a Split.

After *Martin* and *Johnson*, many Ninth Circuit judges called for rehearing en banc and an opportunity to address the Ninth Circuit's new rule. In *Johnson*, rehearing en banc was denied by just one vote.

In various opinions and concurrences, the thin majority proclaimed that, among other things, there is no conflict between courts on their interpretation of the Clause. The Ninth Circuit seemed to suggest that any court would have discovered this rule buried in Justice Fortas's dissent. To demonstrate the lack of conflict between *Martin* and *Johnson* and other courts, the Ninth Circuit cited the California Supreme Court in *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995), and the Eleventh Circuit in *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). The Ninth Circuit used these cases to show that their interpretation of the Clause was not a product of creativity, but inevitability.

The California Supreme Court and the Eleventh Circuit examined the Clause through *Robinson* and *Powell* under similar facts and neither reached the Ninth Circuit's new rule. *Martin* and *Johnson* created a split between courts that this Court must resolve.

a. *Tobe v. Santa Ana*

In *Tobe*, the California Supreme Court rejected a constitutional challenge to two municipal ordinances prohibiting camping and storage of personal property in public places in the city of Santa Ana. *Tobe*, 9 Cal. 4th at 1080. The lower Court of Appeal had invalidated the ordinances in question because they imposed punishment for the "involuntary status of being homeless" in violation of the Clause. *Id*. at 1104. The California Supreme Court turned to *Robinson* and *Powell*.

First, under *Robinson*, the California Supreme Court interpreted the Clause as prohibiting the criminalization of status but permitting the punishment of conduct. *Id*. at 1105.

Then, the court turned to *Powell*. In contrast to the Ninth Circuit's combination of the concurrence and dissent, the California Supreme Court observed that the *Powell* plurality had "reaffirmed" the holding from *Robinson* that the Clause prohibited punishment for status but not of conduct. *Id*. *Tobe* quoted Justice Marshall's embrace of *Robinson*:

> 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."

Id.

The California Supreme Court then concluded that the ordinance in question "permit[ted] punishment for proscribed conduct, not punishment for status." *Id*. at 1106. In so doing, the court applied *Robinson* and the *Powell* plurality together, and recognized the Clause's distinction between prohibited punishment for status and permissible punishment for conduct. Had the court refracted *Robinson* through the *dissent* in *Powell* as the Ninth Circuit did, the California Supreme Court could not have interpreted the Clause to the same result.

Tobe gave no indication that the *Powell* dissent had precedential value. Indeed, *Tobe* observed that "[n]o authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or, as the Court of Appeal also concluded, is punishment for poverty." *Id*. at 1105. *Tobe* cited approvingly to the district court in *Joyce v. City & County of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994), which itself noted that "the Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status." *Id*. The Ninth Circuit's combination of *Powell*'s concurrence and dissent is nowhere to be found.

Judge Silver, in the majority opinion in *Johnson*, appeared to rebut the contention that *Martin* and

Johnson conflict with *Tobe*. Judge Silver observed that the *Tobe* court "was not resolving whether an 'involuntarily homeless person who involuntarily camps on public property may be convicted or punished under the ordinance.'" *Johnson*, 72 F.4th at 922 (9th Cir. 2023) (citing *Tobe*, 9 Cal. 4th at 1104 n.19.). *Tobe* noted that this challenge might have been raised as an as-applied challenge but held that no such challenge was perfected by the plaintiffs. *Tobe*, 9 Cal. 4th at 1104, n.19.

What Judge Silver's reasoning avoided was that the California Supreme Court's reading of *Robinson* and *Powell* fundamentally conflicts with the Ninth Circuit's. Again, the California Supreme Court read *Robinson* and the *Powell* plurality together; *Tobe* did not interpret *Powell* as expanding *Robinson* to encompass involuntary acts that are unavoidable consequences of one's status or being. Judge Silver relied on the flawed logic that because *Tobe*'s holding on its facts was not incompatible with the holdings in *Martin* and *Johnson*, that therefore *Tobe*'s interpretation of the Clause was compatible with *Martin* and *Johnson*. But *Tobe*'s interpretation of the Clause through *Robinson* and *Powell* left no room for the Ninth Circuit's new rule. The notion that *Tobe* read *Robinson* and *Powell* in the same manner that the Ninth Circuit did is unfounded.

b. *Joel v. City of Orlando*

The Eleventh Circuit in *Joel* also examined how the Clause applies to ordinances prohibiting camping on the street.

Like *Tobe*, *Joel* read *Robinson* together with the plurality in *Powell*. When evaluating how the Clause might be applied to the ordinances in question, *Joel* cited principally to *Robinson*'s holding that the Clause prohibits the punishment of a status rather than the commission of an act. *Joel*, 232 F.3d at 1361. *Joel* went on to cite the plurality in *Powell* for the proposition that the "statute punishing public intoxication is constitutionally permissible because it punishes an act, 'being in public while drunk on a particular occasion,' not a status, 'being a chronic alcoholic.'" *Id*. at 1362 (citing Powell, 392 U.S. at 532). Just as the California Supreme Court had done, *Joel* read the *Powell* plurality as reaffirming the holding from *Robinson*. The notion that *Robinson* could be extended through Fortas's dissent in *Powell* is utterly absent.

The Eleventh Circuit unambiguously endorsed the *Powell* plurality when it applied *Robinson*'s status versus act dichotomy to the plaintiff's argument. Addressing the plaintiff's contention that because "the vast majority of people arrested for violating the ordinance were homeless," law enforcement officers could "discriminate against homeless persons in the enforcement of the ordinance[,]" the *Joel* court employed the logic of the *Powell* plurality:

> To illustrate with an analogy, the fact that the vast majority of people arrested for violating laws against public intoxication are alcoholics would not by itself show that those laws were being applied in a discriminatory fashion against those who suffer from alcoholism.

Id. at 1362 n.5. Under the Ninth Circuit's rule, this analogy is impossible. The logic of *Martin* and *Johnson* would lead to the conclusion that arresting an alcoholic for public drunkenness would be unconstitutional because being drunk in public is an unavoidable consequence of the status of being an alcoholic. Yet the *Joel* court evaluated the same authority and came to the opposite result.

That this analogy comes in a footnote or that it falls under the "Due Process" section of the opinion is of no moment. It is undeniable that *Joel* processed this analogy through the Clause and through the plurality in *Powell*. For this analogy, *Joel* cited exclusively to the plurality in *Powell*, which itself referred only to the Clause and makes no mention of due process. The Ninth Circuit's extension of *Robinson* through the *Powell* dissent stands in conflict.

Again, Judge Silver's concurrence endeavors to create the appearance that *Martin* and *Johnson* do not conflict with *Joel*. Judge Silver observed *Joel*'s recognition that the City of Orlando "presented unrefuted evidence that . . . a large homeless shelter . . . never reached its maximum capacity and that no individual has been turned away because there was no space available or for failure to pay the one dollar nightly fee." *Johnson*, 72 F.4th at 921 (citing *Joel*, 232 F.3d at 1362). Judge Silver seemed to argue—though did not say explicitly—that this factual holding proved that *Joel* and the Ninth Circuit's new rule were in harmony.

But Judge Silver wrenched this quote from its context. Judge Silver neglected to mention that this language appeared as *Joel* engaged in "even if" reasoning under the *hypothetical scenario* in which the plaintiff's interpretation of the Clause was correct. The *Joel* court reasoned that "even if we followed the reasoning of the district courts" upon which the plaintiff relied for his interpretation of the Clause, "this case is clearly distinguishable." *Joel*, 232 F.3d at 1362. *Joel* did not accept the plaintiff's interpretation of the Clause; indeed, the Eleventh Circuit's analysis of *Robinson* and *Powell* shows that the court rejected it. Rather, *Joel* assumed the plaintiff's interpretation *arguendo* in order to demonstrate that the plaintiff's case failed on its own terms. Judge Silver's failure to include this context created the false impression that the Eleventh Circuit had interpreted the Clause in the same way that the Ninth Circuit had.

In short, the Ninth Circuit's creative combination of a concurrence and a dissent to manufacture a new Constitutional rule has created a conflict of law that this Court must resolve.

IV. The Ninth Circuit's New Rule Violates the Separation of Powers and Essential Considerations of Federalism.

It can be no surprise that the Ninth Circuit's flawed approach resulted in profound ramifications. Beyond creating a split with other courts, the Ninth Circuit propelled the federal judiciary into uncharted

waters. The Ninth Circuit's new rule thrusts the courts into a hotly debated national problem implicating a wide variety of interlocking issues. The complexities involved in both the causes and effects of homelessness require carefully tailored, multifaceted solutions that courts are poorly equipped to manage. The Legislative and Executive Branches are best suited to addressing such issues. The Ninth Circuit's new rule deprives administrative and legislative officials of one tool essential to the multifaceted approach that homeless encampments require. Only these branches have the wherewithal to evaluate, allocate, and implement the solutions necessary to a given situation.

Similarly, it violates essential considerations of federalism to prohibit state and local authorities from addressing local problems with all of their geographic, demographic, and cultural idiosyncrasies. *Martin* and *Johnson* impose a federal, judicial requirement across the many states within the Ninth Circuit. How these problems play out, and what solutions may be effective, will differ depending on local conditions—different in Boise than in Sacramento, and different in Grants Pass than in Los Angeles. It is poor public policy for federal courts to exert their influence over processes that will overwhelmingly burden municipal and state resources.

Homeless encampments produce myriad problems for a community. For example:

- Trash, Refuse, and Waste: The state of California, from September 2021 to August 2022, in

clearing an average of 100 encampments *each month* from state property (a total of 1,262 sites), removed 1,213 tons of trash, enough to fill 22 Olympic-size swimming pools. Office of Governor Gavin Newsom, *California Clears More Than 1,250 Homeless Encampments in 12 Months*, published August 26, 2022. In San Francisco in 2018, human feces on city streets were reported over 28,000 times; in the first quarter of 2019, the number was 6,676 times, a roughly comparable figure when annualized. Adam Andrzejewski, *Mapping San Francisco's Human Waste Challenge*, Forbes, April 15, 2019, published online at https://www.forbes.com/sites/adamandrzejewski/2019/04/15/mapping-san-franciscos-human-waste-challenge-132562-case-reports-since-2008/?sh=1f5b43695ea5. The city resorted to establishing a "Poop Patrol" of five full-time employees to pick up and clean up the human feces on city streets. *Id*.

- Public Health: Hepatitis A, typhus, and shigella are all making appearances and on the rise in homeless communities, " . . . where lack of medical care and unhygienic conditions have served as a breeding ground for so-called 'medieval' diseases—diseases that typically don't pose a threat to the general American population in the 21st century." Brian Mastroianni, *Outbreaks of 'Medieval' Diseases Are Becoming More Common in Cities*, Healthline, April 2, 2019, published online at https://www.healthline.com/health-news/why-medieval-diseases-are-hitting-cities-hard. Homeless encampments which put persons in close contact

with human feces, and close proximity to each other and disease-carrying animals such as rats, combined with higher rates of substance abuse and mental illness, are all cited as contributing factors that make the homeless population particularly vulnerable to such diseases. *Id*. *See also* CBS Colorado, *Vandalism, Damage, Rat Infestation Left Behind After Homeless Encampment Cleared From Lincoln Park*, CBS Colorado (CBS4), August 6, 2020, published online at https://www.cbsnews.com/colorado/news/lincoln-park-homeless-camp-state-capitol-rates-vandalism/.

- Drug Use and Associated Problems: When Santa Ana cleaned up homeless encampments on the Santa Ana River trail, in addition to removing 404 tons of debris and 5,279 pounds of waste, the public works crews found and removed an astonishing 13,950 hypodermic needles. Anh Do, '*Eye-popping' number of hypodermic needles, pounds of waste cleared from Orange County riverbed homeless encampment*, Los Angeles Times, March 10, 2018, published online at https://www.latimes.com/local/lanow/la-me-ln-riverbed-debris-20180310-story.html. Similarly, when the Echo Park Lake homeless encampment was cleared in Los Angeles in 2021, 300 pounds of needles and other drug paraphernalia were removed in addition to 35 tons of debris and 723 pounds of biological waste. Sam Quinones, *Skid Row Nation: How L.A.'s Homelessness Crisis Response Spread Across the Country*, Los Angeles Magazine, October 22, 2022, published online at

https://lamag.com/news/skid-row-nation-how-l-a-s-homelessness-crisis-response-spread-across-the-country. Also in Los Angeles, from April 2020 to March 2021, deaths among the homeless increased 56%. The primary cause was not Covid-19, but drug overdoses. Christian Martinez et al., *L.A. County homeless deaths surged 56% in pandemic's first year. Overdoses are largely to blame.* Los Angeles Times, April 22, 2022, published online at https://www.latimes.com/california/story/2022-04-22/la-county-homeless-deaths-surge-pandemic-overdoses.

- Non-drug Crime: Beyond drug offenses, homeless populations are far more likely to be both perpetrators and victims of crime. A two-year study by the San Diego District Attorney's Office found dramatically higher rates for both perpetrator and victim among the homeless. CBS 8 Staff, *DA: Homeless more likely to be crime victims and perpetrators in San Diego County*, CBS 8, March 21, 2022, published online at https://www.cbs8.com/article/news/crime/da-homeless-more-likely-crime-victims-and-perpetrators-sd-county/509-c01ca175-004b-483e-93b1-1b2c66afd5f1.

- Blocking Sidewalks: Homeless encampments often block sidewalks, making the navigation of public space problematic for ordinary citizens, and unsafe or impossible for blind or disabled citizens. The result has been a suit by disabled residents against both the city and county of Sacramento for failing to keep sidewalks clear, in violation of the Americans with Disabilities Act. Sam Stanton,

Sacramento sued by disabled residents over homeless camps, tents blocking sidewalks, Sacramento Bee, February 8, 2023; *Hood, et al. v. City of Sacramento, et al.*, No. 2:23-cv-00232-KJM-CKD (E.D. Cal. Feb. 7, 2023).

- Impact on Private Businesses: Business owners struggle when homeless encampments impinge on their property or make the area around the business unsafe. Carlos Granda, *Business owners struggle to deal with homeless encampments they say bring crime, hurt bottom line*, Eyewitness News ABC 7, March 22, 2023, published online at https://abc7.com/lincoln-heights-homeless-encampment-los-angeles-city-council/12988239/. *See also*, Stephanie Lin, *Businesses voice concern over growing homeless encampment on Lathrop Way in Sacramento*, KCRA 3, July 28, 2021, published online at https://www.kcra.com/article/businesses-voice-concern-growing-homeless-encampment-lathrop-way-sacramento/37148885.

- Fires: One of the greatest public dangers associated with homeless encampments is fire. By 2021, the Los Angeles Fire Department was responding to 24 homeless encampment fires per day, making up more than half of the fires the department responded to. Douglas Smith, et al., *24 fires a day: Surge in flames at L.A. homeless encampments a growing crisis*, Los Angeles Times, May 12, 2021, published online at https://www.latimes.com/california/story/2021-05-12/surge-in-fires-at-la-homeless-encampments-growing-crisis. In 2022, the city of Portland similarly found that nearly

> one-half of the fires in the city were from homeless encampments. Natalie O'Neill, *Blazes That Begin in Homeless Camps Now Account for Nearly Half the Fires in Portland*, Nov. 2, 2022, Willamette Week. In Sacramento, during a six-month period in 2023, fires started in homeless encampments threatened homes, spread to one home, and burned in tunnels under the downtown area. *See* Ashley Sharp, *Back-to-back homeless encampment fires threaten South Land Park Homes*, July 11, 2023, published online at https://www.cbsnews.com/sacramento/news/sac-fires-land-park-concerns-homeless/; Brady Halbleib, *Two fires set in abandoned corridors under K Street Wednesday*, April 19, 2023, published online at https://www.cbsnews.com/sacramento/news/two-fires-set-in-abandoned-corridors-underneath-k-street-wednesday/; KCRA TV, *Homeless fires continue to plague Sacramento firefighter resources*, Feb. 15, 2023, published online at https://www.kcra.com/article/sacramento-county-homeless-fires-remain-issue/42932341.

The examples above are by no means exhaustive. Nor should these examples be taken to imply that these problems are limited to large metropolitan areas. Less than four weeks before the filing of this brief, the Wall Street Journal reported on the struggles of Missoula, Montana (population 78,000) in dealing with homeless encampments. The problems cited are familiar: garbage, litter, feces, rotting food, vandalism, breaking into small businesses, cutting down trees,

and the destruction of irrigation systems. Jim Carlton, *A Montana Town Faces a Homelessness Problem Similar to San Francisco and L.A.*, Wall Street Journal, September 2, 2023. Sacramento County has sparsely populated rural areas, suburban sprawl, and a dense urban core. The problems brought by homeless encampments will affect each of these areas in unpredictable ways. Sacramento officials should be allowed to tailor their response to these challenges per the unique needs of each community without the interference of a federal court.

One of the homeless advocates cited in the above resources, Bob Erlenbusch, executive director of the Sacramento Regional Coalition to End Homelessness, said in discussing the problem of homeless encampment fires, "[T]his is a complex issue and will likely need a complex mix of strategies to tackle." *See* KCRA TV, *Homeless fires continue to plague Sacramento firefighter resources.* Most thoughtful persons contemplating the problem of homelessness would agree that these issues are profoundly complicated. Depriving state and local governments of one critical strategy, one "tool in the toolbox," is poor policy.

Justice Marshall, in the plurality in *Powell*, wisely expounded on the principles that should govern judicial intervention here:

> [B]efore we condemn the present practice [of criminal sanctions] across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these

> unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. . . .
>
> [U]nless *Robinson* is so viewed [as being strictly narrow in its application] 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 the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country. . . .
>
> But formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation [by states and localities], and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Powell, 392 U.S. at 530, 533, 536-37 (plurality opinion).

Of course, Justice Marshall was discussing the complexities surrounding alcohol-based offenses. In the present case, one might substitute "law and social

scientists" for "law and psychiatry." But his observations about the limits of the capacity of the court and the principles of federalism ring just as true.

CONCLUSION

The Ninth Circuit neglected this Court's precedent when it combined a concurrence with a dissent. The resulting split in authority must be remedied. The Ninth Circuit's new rule goes too far as a matter of stare decisis, separation of powers, and fundamental principles of federalism. Amicus respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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