No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

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 IN OPPOSITION

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QUESTION PRESENTED

In an effort to push its homeless residents into neighboring jurisdictions, the City of Grants Pass, Oregon, began aggressively enforcing a set of ordinances that make it unlawful to sleep anywhere on public property with so much as a blanket to survive cold nights, even if shelter is unavailable.

The question presented is whether the ordinances transgress the Eighth Amendment's "substantive limits on what can be made criminal and punished as such," *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), by effectively punishing the City's involuntarily homeless residents for their existence within city limits.

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INTRODUCTION

In 2013, the City of Grants Pass, Oregon, decided that the solution to its "vagrancy problem" was to drive its homeless residents into neighboring jurisdictions by making it impossible for them to live in Grants Pass without facing civil and criminal penalties. City leaders adopted a plan to aggressively enforce a set of ordinances that make it illegal to sleep anywhere in public at any time with so much as a blanket to survive cold nights. "[T]he point," the city council president explained, was "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." ER 368.

Because there are no homeless shelters in Grants Pass and the two privately operated housing programs in town serve only a small fraction of the City's homeless population, most of the City's involuntarily homeless residents have nowhere to sleep but outside. Given the universal biological necessity of sleeping and of using a blanket to survive in cold weather, the City's enforcement of its ordinances meant that its homeless residents could not remain within city limits without facing punishment. The City had, in other words, "criminalized their existence in Grants Pass." Pet. App. 208a.

The Ninth Circuit correctly concluded that the City's efforts to punish involuntarily homeless persons for simply existing in Grants Pass transgress the Eighth Amendment's "substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). As *Robinson v. California*, 370 U.S. 660 (1962), explains, the Cruel and Unusual Punishments Clause prohibits punishing

people for having an involuntary status, and the logic of *Robinson* necessarily includes unavoidable biological reactions to such a status: If "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," *id.* at 667, the same must be true for symptoms like coughing or sneezing. Whatever disagreement the Justices had in *Powell v. Texas*, 392 U.S. 514 (1968), over that principle's application to harmful compulsive behavior arising from addiction, it certainly prohibits jurisdictions from punishing people for universal biological necessities like sleeping and using a blanket to survive cold temperatures when they have no choice but to be outside.

The City's purported circuit splits are based on false premises. The first is that the Ninth Circuit recognized "a constitutional right to encamp on public property." Pet. 16 (internal quotation marks omitted). To the contrary, the panel emphasized that the district court's injunction left the City free to "ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns." Pet. App. 23a–24a (internal quotation marks and alterations omitted). The panel held only that the Eighth Amendment prohibits the City from punishing homeless persons for engaging in the unavoidable biological function of sleeping with the minimal bedding necessary to survive cold nights when shelter is unavailable. *Id.* at 48a & n.28, 57a. None of the decisions cited in the petition disagree.

The second false premise is that the Ninth Circuit's holding forecloses the criminalization of "all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that could be characterized as involuntary or compulsive." Pet. 29–30. The City does not identify any decision relying on Ninth Circuit precedent for the proposition that the Eighth Amendment forecloses punishment for harmful compulsive behavior, and for good reason: Unlike the addiction-related conduct that divided the *Powell* Court, sleeping is not a harmful compulsion, but rather a universal and unavoidable consequence of being human.

The City's exceptional importance argument similarly turns on the false claim that the decision below deprives cities of the ability to dismantle homeless encampments. Again, the panel explicitly recognized the right of jurisdictions to clear encampments and to criminalize the use of tents on public property. Indeed, Grants Pass itself has continued to actively dismantle encampments throughout this litigation, as it is free to do under the district court's injunction and the decision below. The district court decisions cited by the City and its amici confirm the same.

In short, in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial mandate. The City and its amici's claims to the contrary are nothing more than an exercise in political expediency. For years, political leaders have chosen to tolerate encampments as an alternative to meaningfully addressing the western region's severe housing shortage. As the homelessness crisis has es-

calated, these amici have faced intense public backlash for their failed policies, and it is easier to blame the courts than to take responsibility for finding a solution.

Finally, the petition suffers from numerous vehicle problems. First, this Court's resolution of the question presented would have no bearing on the legal rights of the parties. The district court granted summary judgment to respondents not only under the Cruel and Unusual Punishments Clause, but also on the independent ground that the ordinances violate the Excessive Fines Clause by imposing monetary sanctions grossly disproportionate to the severity of the offense. The City has not and cannot seek this Court's review of the Excessive Fines Clause ruling because it forfeited that issue on appeal.

Second, before the City filed its petition for certiorari, a new Oregon statute went into effect that restrains municipalities from criminalizing homelessness by punishing people for involuntarily sleeping and staying warm outside. Although it would be premature to say that the statute moots this litigation, as no court has yet had an opportunity to decide how it would apply to the City's ordinances, it would be a waste of this Court's resources to further review a local enforcement scheme that the state legislature has rejected.

Third, the Ninth Circuit directed the district court to narrow its injunction on remand, making it unclear what injunction this Court would review if it granted certiorari now.

Finally, while this case was on appeal, the only named plaintiff with standing to challenge one of the ordinances passed away. The Ninth Circuit thus vacated the district court's grant of summary judgment as to that ordinance and remanded for the substitution of a new class representative. Accordingly, if the Court grants review now, it may not be able to resolve the question presented as to the entire constellation of relevant ordinances.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

Like many west coast cities, Grants Pass has experienced a population explosion in the past 20 years, growing from 23,000 residents in 2000 to 38,000 in 2020. Pet. App. 165a, 167a. The development of affordable housing in Grants Pass has not kept up with the population growth. *Id.* Grants Pass has a vacancy rate of one percent, and rental units that cost less than $1,000 a month "are virtually unheard of." *Id.* at 167a. As a result, hundreds of Grants Pass residents have become homeless. *See id.* at 167a–168a. A 2019 point-in-time count in Grants Pass counted 602 homeless people and another 1,045 individuals that were "precariously housed." *Id.*

In March 2013, the Grants Pass City Council held a public meeting to "identify solutions to current vagrancy problems." *Id.* at 168a. Participants focused on strategies for pushing homeless residents into neighboring jurisdictions and "leaving them there." *Id.* at 17a. The Public Safety Director noted that officers "had at times tried buying [homeless persons] a bus

ticket" out of town, but they later "returned to Grants Pass with a request from the other location to not send them there." ER 368. The council president proposed instead "mak[ing] it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." *Id.*

City leaders thus decided to aggressively enforce a set of ordinances that make it impossible for involuntarily homeless people to exist within city limits without facing civil and criminal penalties. Pet. App. 17a, 42a–55a. Two "anti-camping" ordinances prohibit "occupy[ing] a campsite" on "any … publicly-owned property" at any time, with "campsite" defined expansively as "any place where bedding, sleeping bag, or other material used for bedding purposes … is placed … for the purpose of maintaining a temporary place to live." *Id.* at 221a–222a. The ordinances also prohibit sleeping in a car in a parking lot for two or more consecutive hours between midnight and 6:00 am. *Id.* at 223a. And an "anti-sleeping" ordinance prohibits sleeping "on public sidewalks, streets, or alleyways at any time" or "in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk." *Id.* at 221a–222a.

These ordinances collectively "prohibit individuals from sleeping in any public space in Grants Pass while using any type of item that falls into the category of 'bedding' or is used as 'bedding'"—language that extends far beyond "camping" to prohibit sleeping with so much as a blanket or "a bundled up item of clothing as a pillow." *Id.* at 177a–178a.

Grants Pass does not have any shelters where a homeless person can show up and stay for the night.

Id. at 169a–170a; SER 20–21, 46–49. The only transitional housing program in the City is run by a religious organization that has the capacity to serve a maximum of 138 people, who are required, among other things, to participate in chapel services twice a day. Pet. App. 21a, 169a, 179a–180a. There is one other 18-bed facility that serves only unaccompanied minors aged 10–17. *Id.* at 22a.[1] The lack of shelter space in Grants Pass combined with the City's enforcement of its anti-homeless ordinances meant that the City's involuntarily homeless residents could not survive within city limits without facing punishment when they succumbed to sleep using any sort of makeshift pillow or blanket to stay warm. *Id.* at 178a, 182a–183a. The City had, in other words, "criminalized their existence in Grants Pass." *Id.* at 208a.

II. District Court Proceedings

In October 2018, respondents filed this suit on behalf of themselves and all other involuntarily homeless persons in Grants Pass, seeking to enjoin the City from punishing them for the biological necessity of sleeping outside with as little as a blanket to survive the cold, when shelter is unavailable. *See* ER 412–14. As relevant here, respondents alleged that the City's imposition of civil and criminal penalties under these

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[1] From February to March 2020, a non-profit organization briefly opened a "warming center" that held up to 40 individuals on nights when the temperature was either below 30 degrees or below 32 degrees with snow, which amounted to 16 days. *See* Pet. App. 22a. The center did not have beds, and it turned people away almost every night. *Id.*; ER 195–96. The center did not open at all during the winter of 2020-2021. Pet. App. 22a.

circumstances violates the Eighth Amendment's prohibitions on cruel and unusual punishment and excessive fines. *See* Pet. App. 19a.

Following class certification and extensive discovery, the parties filed cross-motions for summary judgment. The evidentiary record included an analysis of 615 citations and 541 incident reports issued pursuant to the challenged ordinances. *Id.* at 175a; SER 129–31. It also established that class members were, on a daily and nightly basis, awakened, threatened with punishment, moved along, cited, fined, and prosecuted for criminal trespass for simply lying down or sleeping outside in Grants Pass. SER 6–21; ER 198–204, 361–66, 380–411.

The district court granted summary judgment to respondents on their Eighth Amendment claims. Pet. App. 163a–164a. The court first held that the City's "policy and practice of punishing homelessness" violates the Cruel and Unusual Punishments Clause. *Id.* at 176a. The court relied on *Martin v. Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which held that the government cannot, consistent with the Eighth Amendment, punish involuntarily homeless persons for sleeping outside when it is physically impossible for them to avoid doing so. Pet. App. 176a.

The district court rejected the City's claim that the Cruel and Unusual Punishments Clause is inapplicable because the ordinances punish "violations" rather than crimes. *Id.* at 183a. Citing *Austin v. United States*, 509 U.S. 602 (1993), and *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the court observed that this Court has repeatedly rejected the notion that the

Eighth Amendment is limited to criminal punishments. Pet. App. 183a–185a. Rather, the Eighth Amendment "cuts across the division between the civil and the criminal law." *Id.* at 183a (quoting *Austin*, 509 U.S. at 610). Moreover, the court noted, the City's enforcement scheme does involve criminal punishment: Repeat violations result in arrest and prosecution for criminal trespass. *Id.* at 186a–187a.

The district court also held that the City's enforcement of the ordinances violates the Eighth Amendment's Excessive Fines Clause. *Id.* at 187a–191a. The court began by identifying the "two-step inquiry in analyzing an excessive fines claim: (1) is the fine punitive, and if so, (2) is it excessive?" *Id.* at 187a (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The evidentiary record established that the fines are punitive because they serve "no remedial purpose" and are "intended to deter homeless individuals from residing in Grants Pass." *Id.* at 189a. The ordinances also describe the fines as "punishment." *Id.* (citing GPMC 1.36.010(c)).

The record likewise established that the fines are excessive. The two camping ordinances carry a presumptive fine of $295, and the fine for illegal sleeping is $75. *Id.* at 188a. When unpaid, the fines increase to $537.60 and $160 respectively. *Id.* The court found these fines "grossly disproportionate to the gravity of the offense." *Id.* at 190a (internal quotation marks omitted). Moreover, given that class members "do not have enough money to obtain shelter," they "likely cannot pay these fines." *Id.* When the fines remain unpaid, class members face collection efforts and damaged credit, "mak[ing] it even more difficult for them to find housing." *Id.*

The district court further noted this Court's recognition in the cruel and unusual punishment context that "'even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.'" *Id.* (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)). In other words, the district court explained, "[a]ny fine is excessive if it is imposed on the basis of status and not conduct." *Id.* Here, the conduct for which the class members face punishment—"sleep[ing] outside beneath a blanket because they cannot find shelter"—is "inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish." *Id.*

The court concluded by emphasizing what it had *not* held: "The holding in this case does not say that Grants Pass must allow homeless camps to be set up at all times in public parks." *Id.* at 199a. To the contrary, "[t]he City may implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belonging[s] packed up." *Id.* The City may also "ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep." *Id.* at 199a–200a. And the City may "limit[] the amount of bedding type materials allowed per individual in public places." *Id.* at 200a. Moreover, the court noted, its holding did not limit the City's "ability to enforce laws that actually further public health and safety, such as laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence." *Id.* In short, the City "retain[ed] a large

toolbox for regulating public space without violating the Eight[h] Amendment." *Id.*

The district court then issued a permanent injunction that, as relevant here, enjoined the City from enforcing the "anti-camping" ordinances against class members in city parks at night. The order permitted the City to enforce the ordinances during daytime hours so long as a warning is given twenty-four hours in advance. ER 4–6. Although the order declared the "anti-sleeping" ordinance unconstitutional under the Eighth Amendment, the injunction did not contain any language enjoining that ordinance. *Id.*

III. Court Of Appeals Proceedings

The Ninth Circuit affirmed in part and vacated in part. Pet. App. 13a–58a.

The court of appeals first rejected the City's challenge to the district court's class certification determination. *Id.* at 34a–42a. The panel noted, however, that one of the three class representatives, Debra Blake, had died while the appeal was pending, a development of "possib[le] … jurisdictional significance" because Blake was the only class representative with standing to challenge the anti-sleeping ordinance. *Id.* at 30a–32a. Although it is well established that a class representative may pursue the live claims of a properly certified class even if her own claims become moot, the panel could not find any cases applying that precedent in a situation where "the death of a representative causes a class to be unrepresented as to part (but not all) of a claim." *Id.* at 33a. The panel thus deemed it appropriate to vacate summary judgment

as to the anti-sleeping ordinance and remand "to determine whether a substitute representative is available as to that challenge alone." *Id.* at 34a.

The panel then addressed the City's merits arguments. Like the district court, the panel found *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), directly on point. *Martin*, it explained, relied on *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), for the proposition that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." Pet. App. 52a. Although the City argued that its ordinances are distinguishable because they permit involuntarily homeless persons to sleep outside if they do not use a blanket, the panel observed that in a city as cold as Grants Pass, the "rudimentary protection of bedding" to avoid freezing "is not volitional; it is a life-preserving imperative." *Id.* at 48a n.28.

The panel agreed with the City, however, that the ordinances are permissible to the extent that they prohibit conduct beyond having the minimal protections necessary to survive outside. *Id.* at 55a. The panel observed that the record did not establish that the ordinance's "fire, stove, and structure prohibitions" deprived respondents of their "limited right to protection against the elements." *Id.* And, it held, the ordinances should be enforceable "when a shelter bed is available." *Id.* The panel thus ordered the district court on remand to "craft a narrower injunction" recognizing these limitations on respondents' rights. *Id.*

The panel noted that although the district court had also concluded that the fines imposed under the

ordinances violate the Eighth Amendment's Excessive Fines Clause, the City "present[ed] no meaningful argument on appeal regarding the excessive fines issue." *Id.* at 56a. The panel also found it unnecessary to reach the issue, as it had already largely upheld the injunction as necessary under the Cruel and Unusual Punishments Clause. *Id.*

Judge Collins dissented from the panel decision, explaining that in his view *Martin* requires an individual inquiry into the involuntariness of each homeless person's lack of shelter, and that in any event, *Martin* was wrongly decided. *Id.* at 59a–95a.

The Ninth Circuit denied the City's petition for rehearing en banc by a 14-13 vote, with several judges authoring statements and dissents respecting the denial. *Id.* at 96a–162a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Aligns With This Court's Precedent.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. *Ingraham v. Wright*, 430 U.S. 651 (1977), explains that this prohibition "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667 (citations omitted).

The Ninth Circuit correctly held that the City's anti-homeless ordinances implicate the third category: By rendering it unlawful to sleep anywhere on public property with so much as a blanket to survive the cold, the ordinances effectively punish the City's involuntarily homeless residents for their existence in Grants Pass, transgressing the Cruel and Unusual Punishments Clause's substantive limits. In so holding, the Ninth Circuit relied on its earlier decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which in turn relied on *Robinson v. California*, 370 U.S. 660 (1962).

Robinson struck down a California statute that made it a crime to "be addicted to the use of narcotics," reasoning that it "would doubtless be universally thought to be an infliction of cruel and unusual punishment" if the government were "to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Id.* at 660, 666 (internal quotation marks omitted). "[N]arcotic addiction," the Court concluded, is "of the same category." *Id.* at 667. The Court acknowledged that the ninety-day sentence imposed by the California law was "not, in the abstract, a punishment which is either cruel or unusual." *Id.* But just as "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," so, too, did the Eighth Amendment prohibit punishing the defendant for having a narcotics addiction. *Id.*

As the Ninth Circuit recognized, *Robinson* stands most obviously for the proposition that the Eighth Amendment prohibits punishing people for having an involuntary status. Being involuntarily homeless is

such a status, and when shelter is unavailable, it is a status that means you have nowhere to exist but outside. "[S]leep[ing] outside beneath a blanket because they cannot find shelter" is thus "inseparable from [respondents'] status as homeless individuals," and "beyond what the City may constitutionally punish." Pet. App. 190a.

The City's primary response is that "original meaning and history" demonstrate that the Cruel and Unusual Punishments Clause circumscribes the criminal process in just one way: It "outlaws only methods of punishment that unnecessarily superadd pain (cruel) and have long fallen out of use (unusual)." Pet. 25 (internal quotation marks and alteration omitted). The City did not even mention this argument before the district court or Ninth Circuit panel, however, let alone present the historical evidence that would be necessary to adjudicate it. Pet. App. 105a (Silver & Gould, JJ., statement regarding denial of rehearing) (noting that the "historical inquiry," which "may require the parties retain experts," was never briefed).

The City, moreover, makes no attempt to reconcile its cramped view of the Eighth Amendment with this Court's statement of the law in *Ingraham*. And its only response to *Robinson* is to dismiss it as a "one-off holding" that should not be "expanded." Pet. 15, 27. But *Robinson*'s reasoning necessarily includes involuntary biological reactions to a status: If "having a common cold" is unpunishable, so too are symptoms like coughing or sneezing.

Five Justices endorsed this reading of *Robinson* in *Powell v. Texas*, 392 U.S. 514 (1968), a case addressing whether the Eighth Amendment prohibited the criminalization of public intoxication where the defendant was an alcoholic. Notably, contrary to the City's position here, every Justice in *Powell* embraced *Robinson*'s holding that the Eighth Amendment proscribes punishment for an involuntary status. Justice Marshall, in an opinion joined by three other Justices, expressed the view that the Eighth Amendment did not, however, prevent the State from punishing the defendant "for being in public while drunk on a particular occasion." *Id.* at 532 (plurality opinion). Justice Marshall reasoned that, unlike in *Robinson*, the State "ha[d] not sought to punish a mere status," and the State had not "attempted to regulate [the defendant's] behavior in the privacy of his own home." *Id.*

In an opinion also joined by three other Justices, Justice Fortas argued that "the essential constitutional defect" with the defendant's conviction was "the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid." *Id.* at 567–68 (Fortas, J., dissenting). He interpreted the trial court's finding to mean that the defendant "was powerless to avoid drinking" and, after taking "his first drink, he had an uncontrollable compulsion to drink to the point of intoxication," at which point "he could not prevent himself from appearing in public places." *Id.* at 568 (internal quotation marks omitted).

Justice White cast the deciding vote. In a lone concurrence, he agreed with Justice Fortas that "the chronic alcoholic with an irresistible urge to consume

alcohol should not be punishable for drinking or for being drunk." *Id.* at 549 (White, J., concurring in the result). To adopt a contrary reading of *Robinson*, he explained, would be "like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." *Id.* at 548. On the facts of the case before the Court, however, Justice White thought that "nothing in the record indicate[d] that [the defendant] could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street." *Id.* at 553. Because the defendant "made no showing that he was unable to stay off the streets on the night in question," Justice White concluded that he "did not show that his conviction offended the Constitution." *Id.* at 554.

Like Justice White and the dissenting Justices in *Powell*, the Ninth Circuit "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." *Martin*, 920 F.3d at 616 (internal quotation marks omitted). And whatever disagreement the Justices had about the application of that principle to harmful compulsive behavior arising from addiction, the Ninth Circuit reasoned that it certainly prohibits jurisdictions from punishing involuntarily homeless persons for the universal biological necessity of sleeping outside when no shelter is available. *Id.* The decision below recognizes that holding's application to the City's infliction of punishment for using a blanket to

survive cold temperatures, also "a life-preserving imperative." Pet. App. 48a n.28.[2]

Indeed, as Judges Silver and Gould observed in their statement regarding the rehearing denial, a contrary view would empower jurisdictions to "avoid *Robinson* by tying 'statuses' to inescapable human activities." *Id.* at 108a–109a. Rather than criminalizing the condition of being addicted to narcotics, for example, California could have "ma[de] it a criminal offense for a person addicted to the use of narcotics to fall asleep." *Id.* at 109a (internal quotation marks omitted). "Reading *Robinson* as allowing such simple evasion is absurd." *Id.*

The City does not contest that its position permits this end run around *Robinson*. Instead, it argues that the Ninth Circuit's holding has its own absurd consequence of foreclosing the criminalization of "all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that could be characterized as involuntary or compulsive." Pet. 29–30.

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[2] The City's argument regarding *Marks v. United States*, 430 U.S. 188 (1977), *see* Pet. 4–5, 28–29, is wrong for the reasons identified by the panel, *see* Pet. App. 49a–52a, and a sideshow in any event. As Judge Collins recognized, even if the City's application of *Marks* were correct, it would at most establish that *Powell* "left open" whether "conduct [that] *has* been shown to be involuntary" is punishable. Pet. App. at 93a–94a. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020), does not help the City, *see* Pet. 28, as it merely cites the *Powell* plurality for the uncontroversial proposition that States play a "paramount role … in setting standards of criminal responsibility," 140 S. Ct. at 1028 (internal quotation marks omitted).

The City does not identify any decision relying on *Martin* or the decision below for the proposition that the Eighth Amendment forecloses punishment for harmful compulsive behavior, and for good reason: Unlike the addiction-related conduct that divided the *Powell* Court, sleeping is not a harmful compulsion, but rather a "universal and unavoidable consequence[] of being human." *Martin*, 920 F.3d at 617 (internal quotation marks omitted). Using a blanket to survive a cold night is likewise a universal necessity for human survival when shelter is unavailable. *See* Pet. App. 47a–48a. City leaders acknowledged as much when they decided to enforce the challenged ordinances for the express purpose of forcing the City's involuntarily homeless residents to leave—i.e., to *stop existing* in Grants Pass. *See supra* pp. 5–6. The Eighth Amendment does not and need not equate laws prohibiting harmful compulsive conduct with the City's efforts to "criminalize[] [its homeless residents'] existence." Pet. App. 208a.

Although the City flags a footnote in *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc), citing *Martin* for the proposition that "the controlling *Powell* opinion … is Justice White's concurrence," Pet. 23, *Manning* does not otherwise cite *Martin* as supporting its holding that the Eighth Amendment limits the criminalization of alcohol consumption by "habitual drunkards."[3] Judge Wilkinson's dissent explicitly

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[3] The panel majority correctly notes in its statement regarding the rehearing denial that Judge O'Scannlain's position, if adopted, would conflict with *Manning*, Pet. App. 113a: If the *(cont'd)*

recognizes the distinction: While the majority's decision to strike down the habitual drunkard law was, in Judge Wilkinson's view, "at odds" with *Robinson*, striking down a law that punishes homeless people for engaging in "essential bodily functions" such as "eat[ing] or sleep[ing]" is "simply a variation of *Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *Manning*, 930 F.3d at 289–90 (Wilkinson, J., dissenting) (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)).

The United States likewise recognized the difference between universal biological necessities and harmful compulsive behaviors in its Statement of Interest in *Martin*: "[T]he knotty concerns raised by the *Powell* plurality" regarding whether addiction-related conduct is truly involuntary are "not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely." Statement of Interest of the United States at 12–13, *Bell v. City of Boise*, No. 1:09-cv-00540-REB (D. Idaho Aug. 6, 2015), ECF No. 276.

Fourth Circuit is right that Virginia's habitual drunkard law transgressed the Eighth Amendment because it criminalized compulsive alcohol consumption, then it is necessarily true that the City's ordinances transgress the Eighth Amendment by criminalizing universal, biologically necessary functioning. But that does not mean that the latter conclusion necessitates the former.

Like a law criminalizing breathing outside by homeless persons, the City's ordinances punish respondents for simply existing within City limits. "It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment." *Id.* at 11 (internal quotation marks and alteration omitted).

II. Neither *Martin* Nor The Decision Below Implicate Any Division Of Authority.

The City does not identify any case in conflict with *Martin* or the decision below.

The City first argues that by recognizing "a constitutional right to encamp on public property," the Ninth Circuit has parted ways with the Eleventh Circuit, the Fifth Circuit, and the California Supreme Court, which "have rejected similar challenges under the Eighth Amendment." Pet. 16–17 (internal quotation marks omitted).

The City's argument fails at the outset because the Ninth Circuit unequivocally *rejected* a right to encamp on public property. *See* Pet. App. 23a–24a (noting with approval that, "consistent with *Martin*," the district court's injunction left the City free to "ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns" (internal quotation marks and alterations omitted)). The panel held only that the Eighth Amendment prohibits the City from punishing involuntarily homeless persons for engaging in the unavoidable biological function of sleeping with "rudimentary forms of pro-

tection" to survive cold nights when shelter is unavailable. *Id.* at 57a. None of the cases cited in the petition are to the contrary.

The City characterizes *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), as rejecting the homeless plaintiff's Eighth Amendment challenge to an anti-sleeping ordinance "because it 'targeted conduct'" rather than "'status.'" Pet. 17 (alteration omitted) (quoting *Joel*, 232 F.3d at 1362). The City omits that the Eleventh Circuit reached that conclusion based on "unrefuted evidence" that a local shelter "ha[d] never reached its maximum capacity," which "distinguish[ed]" the plaintiff's challenge from those where the lack of shelter beds meant that the anti-sleeping ordinance effectively "criminalize[d] involuntary behavior." *Joel*, 232 F.3d at 1362. This is precisely the same line drawn by the Ninth Circuit: Where sleeping outside is not a biological necessity because other options are available, an anti-sleeping ordinance targets only the conduct of choosing to sleep outside rather than in a shelter, and not the status of being involuntarily homeless. *See Martin*, 920 F.3d at 617 & n.8.

As the City acknowledges, *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995), does not address the question presented here—i.e., whether the Eighth Amendment constrains the ability of jurisdictions to punish involuntarily homeless persons for sleeping outside when shelter is unavailable. *See* Pet. 17 (describing *Johnson* as involving "an earlier step of the analysis"). The Fifth Circuit held only that the plaintiffs lacked standing to challenge Dallas's anti-sleeping ordinance because they had not been convicted of violating it. *Johnson*, 61 F.3d at 443–45. The City does not raise the issue of respondents' standing in its

petition, but rather asks this Court to decide only whether its ordinances violate the Eighth Amendment. *See* Pet. i. As such, *Johnson* is not a basis for the Court to grant the petition.

Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995), involved a facial challenge to an ordinance barring camping and storage on public property. Accordingly, the only question addressed by the California Supreme Court was whether "there were *no circumstances* in which the ordinance could be constitutionally applied." *Id.* at 1157 (emphasis added). The court expressly declined to reach whether the ordinance would survive an as-applied challenge by "an involuntarily homeless person who involuntarily camps on public property." *Id.* at 1166 n.19. As respondents challenge the City's ordinances only as applied to involuntarily homeless residents who have nowhere else to sleep, *Tobe* is inapposite.

The City's second purported split "'over how to read the Eighth Amendment,'" Pet. 18 (quoting Pet. App. 130a), is even more illusory. According to the City, "24 courts have held the line at the act/status distinction," purportedly in contrast to *Martin* and the decision below. *Id.* Aside from *Tobe* and *Joel* (distinguished above, *supra* pp. 22–23), all of the City's cases involve allegedly compulsive sexual behavior or addiction, with many holding that the conduct was not in fact involuntary.[4] None hold that a jurisdiction

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[4] *See, e.g.*, *United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (possession of child pornography was not "involuntary or uncontrollable"); *United States v. Moore*, 486 F.2d 1139, 1151 *(cont'd)*

can punish universal biologically necessary "acts" like sleeping or using a blanket to survive in the cold, and none express any disagreement with the Ninth Circuit's application of *Robinson* to strike down such laws.

III. The City's Exceptional Importance Argument Is Unrelated To The Ninth Circuit's Actual Holding.

A. The City's exceptional importance argument turns entirely on the false claim that the Ninth Circuit has deprived cities of the "practical ability" to address the "growth of public encampments," Pet. 6, and the "fires, filth, disease, and fentanyl and meth" that allegedly accompany them, *id.* at 32-33 (internal quotation marks omitted).

Again, *see supra* pp. 21–22, neither *Martin* nor the decision below prevents cities from clearing or otherwise regulating encampments. To the contrary, both decisions explicitly recognize the right of jurisdictions to criminalize the use of tents on public property. *See* Pet. App. 55a n.34 (describing it as "obviously false" that the panel decision limits the City's ability to "'ban the use of tents'"); *Martin*, 920 F.3d at 589 (Berzon, J., concurring in denial of rehearing en banc) ("The opinion clearly states that it is not outlawing ordinances 'barring the obstruction of public rights of way or the erection of certain structures,' such as tents, and that the holding 'in no way dictates to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or

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(D.C. Cir. 1973) (plurality opinion) (drug possession is a "freely willed" act even for people with drug addiction).

sleep on the streets at any time and at any place.'" (alterations and citations omitted)).

Jurisdictions, rather, "remain free to address the complex policy issues regarding homelessness in the way [they] deem fit," including by restricting sleeping to "certain times and in certain places," "ban[ning] the use of tents in public parks, limi[ting] the amount of bedding type materials allowed per individual, and pursu[ing] other options to prevent the erection of encampments that cause public health and safety concerns." Pet. App. 23a–24a, 98a (internal quotation marks omitted).

Indeed, numerous district courts have rejected Eighth Amendment challenges to encampment sweeps, *see id.* at 54a n.33 (collecting cases), and Grants Pass itself has continued to dismantle encampments throughout this litigation, as it is free to do under the district court's injunction and the decision below, *see, e.g.*, City Manager's Weekly Report 7 (Nov. 9, 2023), *available at* https://perma.cc/6JNE-UHQS (twenty-nine encampments cleared the previous week).

The district court decisions cited by the City likewise confirm that jurisdictions retain the power to clear encampments:

San Francisco. The City claims that a district court enjoined San Francisco from "clean[ing] up public encampments" even though it "offer[ed] appropriate shelter to the encampment residents." Pet. 31. This is false. As an initial matter, the record established that, in violation of its own policies, San Francisco was *not* offering shelter before imposing criminal penalties against homeless people for "sitting,

sleeping, or lying outside on public property" when they had no option of sleeping indoors. *See Coal. on Homelessness v. City & County of San Francisco*, 647 F. Supp. 3d 806, 833–37 (N.D. Cal. 2022). Because that practice of making it impossible for homeless persons to exist in San Francisco ran afoul of the Eighth Amendment, the district court entered a narrow preliminary injunction to that effect. *Id.* at 842.

The court explicitly recognized, however, San Francisco's authority to enforce its laws "directed at conduct *beyond* sitting, lying, or sleeping outside." *Id.* at 841 n.19 (emphasis added). The only constitutional constraint on encampment sweeps that the court identified is the Fourth Amendment's requirement that San Francisco comply with its own "bag and tag policy" of storing personal property it seizes during sweeps, *id.* at 837, 842—a modest obligation that the city had already imposed on itself and that in any event had nothing to do with *Martin* or this case. Indeed, San Francisco has conducted massive encampment clearances under the injunction.[5]

Phoenix. Involuntarily homeless residents of Phoenix challenged city ordinances that were "essentially identical to the ordinances at issue in *Martin*,"—i.e., they effectively criminalized sleeping anywhere on public property. *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1124 (D. Ariz. 2022). The district court thus enjoined Phoenix from

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[5] *See* Alexander Hall, *Newsom Trashed for Admitting San Francisco Was Cleaned Up for China Summit*, Fox News (Nov. 13, 2023), https://www.foxnews.com/media/newsom-trashed-admitting-san-francisco-cleaned-up-china-summit-slap-face.

enforcing these anti-sleeping ordinances "against individuals who practically cannot obtain shelter." *Id.* at 1132.

The City's assertion that the district court also enjoined Phoenix from cleaning up a large encampment, Pet. 31–32, is false: Although the court held that the Fourth and Fourteenth Amendments require Phoenix to provide notice before seizing or destroying property (again for reasons unrelated to *Martin* or this case), 646 F. Supp. 3d at 1126, it expressly allowed the city to implement its plan to clean up the encampment (called "The Zone"), citing numerous other cases where courts had rejected Eighth Amendment challenges to encampment sweeps, *id.* at 1127–28. And when local businesses sued Phoenix for nonetheless failing to clean up The Zone, the state court likewise recognized that neither *Martin* nor this case prevented the city from doing so. *Brown v. City of Phoenix*, No. CV 2022-010439, slip op. at 19–20 (Maricopa Cnty. Super. Ct. Mar. 27, 2023), https://perma.cc/NFT2-4F9N. Consistent with these decisions, Phoenix has now eliminated The Zone altogether.[6]

The district court cases cited by amici are equally unhelpful to the City. In *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075 (W.D. Wash. 2019), the district court *rejected* the plaintiffs' challenge to an Aberdeen ordinance allowing encampment sweeps, explaining

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[6] Jack Healy, *Phoenix Encampment Is Gone, but the City's Homeless Crisis Persists*, N.Y. Times (Nov. 4, 2023), https://www.nytimes.com/2023/11/04/us/phoenix-tent-camp-homelessness.html.

that "*Martin* does *not* limit the City's ability to evict homeless individuals from particular places." *Id.* at 1081–82 (emphasis added). The court noted several other district court decisions reaching the same conclusion. *Id.* Moreover, although the court temporarily restrained Aberdeen from enforcing another ordinance that made "camping" punishable on essentially all public property, it did so to give the parties an opportunity to develop an evidentiary record regarding "how the ordinances … actually apply to Plaintiffs." *Id.* at 1083. The court emphasized that *Martin* involved "total homelessness criminalization," and indicated that it would follow other courts in not "stretch[ing] the ruling beyond its context." *Id.* at 1081. The Court subsequently vacated the temporary injunction, *see* Minute Order, *Aitken v. City of Aberdeen*, No. 3:19-cv-05322 (Sept. 13, 2019), ECF No. 70, and the plaintiffs dropped their case, *see* ECF No. 72–73.

Many of amici's other examples similarly illustrate *Martin*'s narrow scope:

- In *Quintero v. City of Santa Cruz*, No. 5:19-cv-01898-EJD, 2019 WL 1924990, at *1 (N.D. Cal. Apr. 30, 2019), the district court *rejected* an Eighth Amendment challenge to encampment sweeps.
- In *Sacramento Homeless Union v. County of Sacramento*, 617 F. Supp. 3d 1179, 1199 (E.D. Cal. 2022), the district court found that *Martin* "ha[d] no bearing" on the plaintiffs' challenge to Sacramento's encampment sweeps.
- In *Boring v. Murillo*, No. LA CV 21-07305-DOC (KES), 2022 WL 14740244, at *6 (C.D. Cal.

Aug. 11, 2022), the district court simply declined to dismiss the complaint at the pleading stage so that the parties could develop the evidentiary record on whether a "geographic limitation" in Santa Barbara's anti-sleeping ordinance "mean[s] the ban does not violate the Eighth Amendment."

- In *Warren v. City of Chico*, No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648, at *3–4 (E.D. Cal. July 8, 2021), the district court enjoined Chico only from enforcing an ordinance imposing criminal penalties on homeless persons for resting anywhere on public property, after concluding that Chico's plan to force its homeless residents to move to an airport tarmac did not solve the Eighth Amendment problem.

Amici's other examples have nothing to do with the Eighth Amendment at all, let alone *Martin* or the decision below. *E.g.*, *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1118 (9th Cir. 2021) (seizure of plaintiff's property likely violated Fourth Amendment); *Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1140–41, 1146 (N.D. Cal. 2021) (enjoining encampment sweep on Fourteenth Amendment grounds during a COVID surge).[7]

In short, in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial mandate under *Martin* or this case. Why, then,

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[7] The City's claim that *Martin* has "'inevitably' extended to 'public defecation and urination,'" Pet. 32, rests on one line of dictum in an unpublished district court decision rejecting the *(cont'd)*

have so many politicians and public officials filed amicus briefs misattributing the encampments in their cities to court decisions?

The answer is simple: Political deflection. For years, western cities forewent investments in shelter capacity, housing, mental-health services, and addiction treatment, in favor of "'tolerant containment'—basically [pushing] the unhoused to certain neighborhoods of squalor such as San Francisco's Tenderloin or Los Angeles' Skid Row, and then selectively prosecuting them for living on the streets."[8]

But as housing costs have skyrocketed across the western region in recent years, so, too, has its homeless population, to a point that is no longer containable or tolerable to voters. The encampments that many amici actively encouraged are now the focus of intense public backlash, and it is easier to blame the

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plaintiffs' challenge to Sacramento's decision to remove a portable toilet from public property, *see Mahoney v. City of Sacramento*, No. 2:20-cv-00258, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020). The district court in this case affirmatively recognized the City's authority "to enforce laws that actually further public health and safety, such as laws restricting … public urination or defecation." Pet. App. 200a. The Ninth Circuit panel majority agreed. *Id.* at 101a–103a (Silver & Gould &, JJ., statement regarding rehearing denial).

[8] Greg Rosalsky, *How California Homelessness Became a Crisis*, NPR (June 8, 2021), https://www.npr.org/sections/money/2021/06/08/1003982733/squalor-behind-the-golden-gate-confronting-californias-homelessness-crisis.

courts than to take responsibility for finding a solution. The two encampment crises cited by the City prove the point:

California Governor Gavin Newsom and San Francisco Mayor London Breed publicly claimed for months that the injunction in *Coalition on Homelessness* prohibited San Francisco from clearing encampments,[9] and they each filed amicus briefs urging this Court to review the decision below on that ground. In mid-November, however, they abruptly switched course and ordered a massive encampment sweep ahead of a visit by President Biden and Chinese President Xi Jingpin. Although Breed claimed that "a recent clarification" from the Ninth Circuit allowed the city to resume its sweeps,[10] all the Ninth Circuit did was *decline* to modify the injunction because the parties *already agreed* in relevant part on its scope. *See* Order, No. 23-15087 (9th Cir. Sept. 5, 2023), Dkt. 88 (noting that "the parties agree[d]" on "the sole issue" raised by the city's motion to modify, namely, "the definition of 'involuntarily homeless'"). Newsom was more candid: "I know folks are saying, 'Oh they're just

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[9] *See, e.g.*, Barnini Chakraborty, *Gavin Newsom Blames Progressive Advocates and Judges for California's Homelessness Crisis*, Wash. Exam'r (Aug. 30, 2023), https://www.washingtonexaminer.com/news/newsom-california-homelessness-democrats-blame-judges.

[10] London Breed, *Injunction Update: Our Path Forward*, Medium (Sept. 25, 2023), https://perma.cc/7Q4B-8RHE.

cleaning up this place because all those fancy leaders are coming to town.' That's true, because it's true."[11]

Meanwhile, in Phoenix, city leaders "transport[ed] homeless people from other locations in Phoenix *into* The Zone," and then refused to address the encampment's dangerous and inhumane conditions on the ground that "its hands are tied by the *Martin* ruling," essentially "exploit[ing] … the rulings in this case and in *Martin*, as excuses for inaction." Goldwater Institute Amicus Br. 11–12, 15. As noted above, Phoenix has now cleared The Zone after a state court rejected the city's claim that *Martin* and the decision below prohibited it from doing so. *Supra* p. 27.

Although the Goldwater Institute's amicus brief is wrong about much, it gets this right: The public handwringing by politicians over this case is largely opportunistic—"a device whereby city officials can excuse" their inaction and distract from their failed policies by claiming that the Ninth Circuit has constrained them far beyond what *Martin* and the decision below actually say. Goldwater Institute Amicus Br. 11. There is no reason for the Court to engage with this political theater.

B. *Martin* and the decision below hold only that jurisdictions cannot punish involuntarily homeless persons for *sleeping* on public property when shelter is unavailable and there is nowhere else to sleep, or for using "the rudimentary protection of bedding" to survive cold nights. Pet. App. 23a–24a, 47a–48a &

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[11] Hall, *supra* note 5.

n.28; *Martin*, 920 F.3d at 604. For all the City's insistence on misdescribing its ordinances as "commonplace restrictions on public camping," Pet. 2, it does not dispute that the ordinances effectively make it biologically impossible for its involuntarily homeless residents to stay in Grants Pass without facing punishment.

As the Ninth Circuit recognized, there is nothing "commonplace" about punishing involuntarily homeless persons for existing. Nor can the City seriously claim that its efforts to do so are necessary "to make progress on the underlying causes of homelessness." *Id.* at 35. Empirical evidence confirms what logic dictates: "[C]riminalization does not reduce the number of people experiencing homelessness."[12] To the contrary, punishing people for involuntarily sleeping outside simply imposes "fines they cannot afford" and "jail time that puts jobs in jeopardy and sends people back out to the streets, where their new criminal records will only make it harder to find housing and jobs."[13]

The City may well want to punish its homeless residents for living in Grants Pass anyway, if only to "make it uncomfortable enough" to force them out of town and into neighboring jurisdictions. ER 368. But what happens when those jurisdictions push them back by imposing an even more "uncomfortable" set of

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[12] Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. Interagency Council on Homelessness (Oct. 26, 2022), https://perma.cc/MMR2-SJNP.

[13] *Id.*

penalties, setting off an escalating banishment race among municipalities across the West Coast? Neither the City nor its amici say.

IV. The Petition Presents Numerous Vehicle Problems.

Finally, even if the Court were interested in reviewing the question presented, the petition suffers from several serious vehicle problems.

First, and most fatally, this Court's resolution of the question presented would have no bearing on the legal rights of the parties. The district court granted summary judgment to respondents on two independently sufficient grounds: (1) the ordinances violate the Cruel and Unusual Punishments Clause by imposing punishment for merely existing outside with nowhere else to go, and (2) the fines imposed under those ordinances violate the Excessive Fines Clause by imposing monetary sanctions grossly disproportionate to the severity of the offense. Pet. App. 176a–191a.

The petition asks this Court to review only the Cruel and Unusual Punishments Clause's application to the ordinances. Pet. i. This is not an oversight. The City cannot seek review of the Excessive Fines Clause ruling because it forfeited that issue on appeal. As the Ninth Circuit observed, "[t]he City present[ed] no meaningful argument on appeal regarding the excessive fines issue." Pet. App. 56a. Accordingly, even if this Court were to reject the Ninth Circuit's application of the Cruel and Unusual Punishments Clause, the injunction would remain intact on grounds the City has not adequately preserved.

Second, on July 1, 2023, before the City filed its petition for certiorari, a new Oregon statute went into effect that restrains municipalities from criminalizing homelessness by punishing people for involuntarily sleeping outside or using a blanket to survive. The statute provides that "[a]ny city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness." Or. Rev. Stat. Ann. § 195.530(2). And it grants persons "experiencing homelessness" a cause of action to "bring suit for injunctive or declaratory relief to challenge the objective reasonableness" of a covered city or county ordinance. *Id.* § 195.530(4). Governor Tina Kotek, who as Speaker of the Oregon House of Representatives was the primary sponsor of the bill, testified, "[t]his bill is the product of a workgroup process to operationalize and affirm the principles" of *Martin* to "ensure that individuals experiencing homelessness are protected from fines or arrests for sleeping or camping on public property when there are no other options."[14]

Although it would be premature to say that the statute moots this litigation, as no court has yet had an opportunity to decide how it would apply to the City's ordinances, it appears likely that the statute

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[14] *Hearing on H.B. 3115 Before the H. Comm. on the Judiciary*, 2021 Reg. Sess. at 4:29 (Or. 2021) (statement of Rep. Tina Kotek), https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021031014&startStreamAt=269#conten,mt (last visited Dec. 4, 2023).

constrains the City's enforcement of its ordinances as much as, if not more than, the injunction in this case.[15] It would be a waste of this Court's resources to review the constitutionality of local ordinances that the state legislature has already rejected.

Third, the Ninth Circuit determined that the district court's injunction was too broad, and thus remanded with instructions to "craft a narrower injunction" that reflects the "limited" nature of respondents' "right to protection against the elements, as well as limitations when a shelter bed is available." Pet. App. 55a. In the absence of a final determination from the lower courts on the scope of the injunction, the case is not ripe for this Court's consideration.

Fourth, Debra Blake, the only named plaintiff with standing to challenge the anti-sleeping ordinance, passed away while this case was on appeal. *Id.* at 30a–34a. The Ninth Circuit explained that her death raised a complicated question about its ability to review the district court's resolution of a claim that no living class representative had standing to pursue. *Id.* at 33a. Because it had no briefing on that issue, the Ninth Circuit vacated the district court's grant of summary judgment as to the anti-sleeping ordinance and remanded for the district court to determine

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[15] In the first challenge brought under the new statute, the state court preliminarily enjoined Portland's anti-camping ordinance on exclusively state law grounds. *See* Order, *Duncan v. City of Portland*, No. 23CV39824 (Multnomah Cnty. Cir. Ct. Nov. 9, 2023); Complaint at 17–19, *id.* (Sept. 29, 2023) (stating only state-law claims).

whether a new class representative could be substituted. *Id.* at 34a. Accordingly, if the Court were to grant certiorari now, it may not be able to resolve the question presented as to the entire constellation of relevant ordinances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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