No. 23-175

# In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON, PETITIONER

*v.*

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

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY**


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## QUESTION PRESENTED

Whether the Ninth Circuit erred in affirming a class-wide injunction against the enforcement of anti-camping ordinances adopted by the City of Grants Pass.

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## INTEREST OF THE UNITED STATES

This case involves claims that a city's ordinances prohibiting camping in public cannot constitutionally be applied to individuals who have no access to indoor shelter. That question implicates several substantial interests of the United States. Under the Violent Crime Control and Law Enforcement Act of 1994, 34 U.S.C. 12601, the Department of Justice is authorized to bring suits to protect the rights of individuals to be free from unconstitutional policing practices. The United States has a strong interest working with state and local governments to address the problem of homelessness and to ensure that all Americans have a safe and stable place to live. See, *e.g.*, 42 U.S.C. 11313. It also has an interest in ensuring that the Nation's cities can respond appropriately and humanely to public health and safety issues

caused by encampments. As the owner of public buildings and land, the United States has an interest in ensuring that public property is protected, accessible, and maintained in a manner suitable for its intended uses. And the United States has an interest in the proper interpretation and application of constitutional provisions governing criminal prosecutions and punishments.

## STATEMENT

### A. The Federal Government's Experience With Homelessness

1. On any given night in the United States, more than six hundred thousand people are likely to be unhoused and thus experiencing homelessness. U.S. Dep't of Hous. & Urban Dev., *The 2023 Annual Homelessness Assessment Report (AHAR) to Congress* 1 (Dec. 2023) (*2023 AHAR*), https://perma.cc/HVN8-VPTX.[1] Those people are as diverse as America itself. They include children and the elderly, single individuals and families, veterans, people of all races and ethnicities, and individuals with disabilities. See *2023 AHAR* 2-3.

The causes of homelessness are varied. Some individuals experiencing homelessness have been affected by local or national economic conditions, including the rising cost of housing relative to income. Others have been displaced by natural disasters. Older adults and people with disabilities, physical health conditions, or behavioral health conditions are more vulnerable to homelessness because they are more likely to have fixed or low incomes, have less ability to avoid evictions, and

[1] The *2023 AHAR* found that in one night in January 2023, roughly 653,100 people experienced homelessness, a 12% increase from the year before.

face greater challenges in navigating the private housing market. And some individuals experience homelessness because of circumstances such as domestic violence, human trafficking, or family rejection.

For many people experiencing homelessness, finding a safe place to sleep can be difficult or impossible. Many federal, state, and local programs aim to help people find permanent housing, but that assistance is frequently inadequate to meet the need. And in many towns and cities, temporary public or private shelters are unable to accommodate all who need a place to stay. Individuals who cannot be accommodated on such evenings have no choice but to sleep in public spaces. In 2023, nearly 40% of homeless individuals slept in unsheltered, public locations—under bridges, in cars, in parks, on the sidewalk, or in abandoned buildings. See *2023 AHAR* at 10.

2. In recent decades, many federal initiatives have been established to address the problem of homelessness. The United States Interagency Council on Homelessness (USICH) is composed of nineteen cabinet secretaries and agency heads and coordinates federal efforts to combat homelessness. See 42 U.S.C. 11312-11313. Among other responsibilities, Congress specifically charged USICH with "develop[ing] constructive alternatives to criminalizing homelessness and laws and policies that prohibit sleeping, feeding, sitting, resting, or lying in public spaces when there are no suitable alternatives." 42 U.S.C. 11313(a)(12).

A substantial body of evidence developed by USICH shows that laws that effectively criminalize the inability to obtain shelter often serve only to exacerbate the problem of homelessness. Incarceration, even for short periods, can disrupt employment, and a criminal record

can make finding future employment more difficult, disqualify individuals from housing opportunities, and lead to debt from fines or other costs that the individual cannot pay, exacerbating cycles of poverty. See USICH, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness* (Oct. 26, 2022), https://perma.cc/DU45-BXPR; Letter from Kristen Clarke, Assistant Att'y Gen., et al., to Att'ys, U.S. Dep't of Justice (Apr. 20, 2023), https://perma.cc/3NTG-LYE5.

Punitive laws aimed at homelessness can also harm the physical, psychological, and socioeconomic wellbeing of individuals experiencing homelessness. Many of those individuals are long-time residents of the relevant locality who had relationships with family, community organizations, and social services in the area before becoming unhoused. See U.S. Dep't of Hous. & Urban Dev., *Exploring Homelessness Among People Living in Encampments and Associated Cost: City Approaches to Encampments and What They Cost* 12-13 (Feb. 2020) (*Exploring Homelessness*), https://perma.cc/Y3DG-6ZYC. For those individuals, homelessness is often caused by local factors such as the high cost of housing, poverty, lack of employment opportunities, and insufficient access to mental health and substance use treatment. Laws criminalizing homelessness do not address those problems. Such laws may also prolong individuals' disconnection from community ties, leading to setbacks in progress toward obtaining permanent housing. See USICH, *ALL IN: The Federal Strategic Plan to Prevent and End Homelessness* 20, 53, 88 (Dec. 2022) (*ALL IN*), https://perma.cc/LJ78-ECGX.

By contrast, connecting individuals experiencing homelessness with housing and other support—including

housing vouchers and rental assistance, permanent supportive housing, case management, and access to mental health care and substance-use treatment—has been shown to decrease recidivism and improve future outcomes. See USICH, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness* (June 2012), https://perma.cc/AJ9G-37VL. In Fiscal Year 2023, Congress allocated $3.633 billion for the Department of Housing and Urban Development (HUD) to spend on Homeless Assistance Grants. In the last three years, HUD programs have served or permanently housed over 1.2 million people. Press Release, HUD, *The U.S. Department of Housing and Urban Development Delivers for the American People* (Jan 11, 2024), https://perma.cc/TK6W-F3GF. In addition, the HUD-Veterans Affairs Supportive Housing Program combines HUD Housing Choice Vouchers with services administered by the U.S. Department of Veterans Affairs. *Ibid.*

HUD also supports moving people into stable housing through programs run at the local level using HUD funding. For example, certain HUD programs can be targeted to help people experiencing homelessness enter the affordable housing and services pipeline, and public housing agencies can adopt preferences to prioritize support for such individuals. And in 2023, HUD awarded communities a first-of-its-kind package of grants and housing vouchers to create housing and services interventions specifically for people experiencing unsheltered homelessness. Press Release, HUD, *HUD Announces $486 Million in Grants and $43 Million for Stability Vouchers to Address Unsheltered and Rural Homelessness* (Apr. 17, 2023), https://perma.cc/S5BQ-G5TJ.

3. At the same time, cities and towns have a strong interest in maintaining their public parks, sidewalks, and other spaces in a clean and safe condition, and in a manner that preserves them for their intended uses. The United States seeks to ensure that its state and local partners can effectively and appropriately protect those interests. And as the country's largest property owner, the United States also has similar interests. In that role, the United States is charged with managing and protecting a diverse array of public spaces, including National Park Service lands, government buildings, and other public lands, some of which are required by law to be managed for historical or conservation purposes, such as wilderness. The United States seeks to preserve the characteristics of these sometimes-vulnerable public spaces while respecting the dignity of homeless individuals who may be present there.

The United States accomplishes those goals through partnerships with state and local governments, and, in some circumstances, through targeted enforcement of restrictions on camping in public spaces. For example, in 1982 the National Park Service (NPS) adopted a regulation prohibiting camping in portions of the National Capital Region. See 47 Fed. Reg. 24,299 (June 4, 1982); 36 C.F.R. 7.96(i). Before the regulation's adoption, camping in urban parks in the National Capital Region, such as the National Mall and Lafayette Park, had resulted in serious degradation of park resources and, on occasion, the inability of other members of the public to use those spaces. See 47 Fed. Reg. at 24,301 ("The regulations banning the use of parks for living accommodations are designed * * * to protect undesignated parks from activities for which they are not suited and the impacts of which they cannot sustain.").

In enforcing that regulation, NPS prioritizes taking action to address activities that create health and safety issues, conflict with parks' civic, recreational, or ecological goals, or otherwise create conditions that negatively affect the public. NPS has, for example, taken action to close encampments of individuals living in tents or other structures, which can "pose public health and safety hazards to encampment residents and to surrounding neighborhoods and businesses" and "cause negative impacts on the natural environment." *Exploring Homelessness* 18.[2]

The United States has an interest in ensuring that the Nation's cities can take appropriate action to prevent and redress the harms associated with encampments. USICH has developed guidance to help cities "successfully address unsheltered homelessness and move people from encampments into housing and support." USICH, *7 Principles for Addressing Encampments* 1 (June 17, 2022), https://perma.cc/WQ3A-NAUQ. Among other things, USICH recommends that cities conduct outreach to encampment residents and accompany closures of encampments with offers of space in shelters or other housing support. *Id.* at 3-4.

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[2] As petitioner notes (Br. 47), in February 2023 the United States Park Police, in conjunction with the District of Columbia Department of Health and Human Services, closed a 70-person encampment at McPherson Square. The decision to close the encampment was made after it was determined that illegal drug activity and a volatile atmosphere at the encampment impeded social services outreach and endangered social services providers, mental health clinicians, homeless individuals, and the public. See Nat'l Park Serv., *Record of Determination for Clearing the Unsheltered Encampment at McPherson Square and Temporary Park Closure for Rehabilitation* (Feb. 13, 2023), https://perma.cc/ZFV8-AQTB.

The United States also undertakes efforts to control access to federal property more generally. For example, the Department of Homeland Security (DHS) is responsible for "protect[ing] the buildings, grounds, and property that are owned, occupied, or secured by the Federal Government." 40 U.S.C. 1315(a). DHS and its sub-agency, the Federal Protective Service, fulfill this mission in collaboration with state and local law enforcement officials, who in turn sometimes rely on the ability to enforce their jurisdictions' laws regulating the use of public spaces.

**B. The Present Controversy**

1. This case concerns ordinances adopted by petitioner the City of Grants Pass, Oregon (the City or Grants Pass). Under those ordinances, individuals are prohibited from sleeping or "[c]amping" on certain public property, including streets, sidewalks, and the City's public parks. Grants Pass Municipal Code § 6.46.090 (2018); see *id.* § 5.61.010(B), 5.61.020(A). The City has two ordinances barring camping, one applicable to public property generally, *id.* § 5.61.030, and the other applicable in city parks, *id.* § 6.46.090. A "'[c]ampsite'" is defined as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed." *Id.* § 5.61.010(B). The effect of the challenged ordinances is to "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.'" Pet. App. 177a.

An individual who violates the City's ordinances is subject to citation and escalating civil fines. See Pet. App. 175a. In addition, repeated violations of regulations on the use of City parks may result in an order excluding the individual from those parks for 30 days.

*Id.* at 16a, 44a. A person who violates such an exclusion order commits criminal trespass, which is punishable under Oregon law by up to 30 days in jail. Or. Rev. Stat. §§ 161.615(3), 164.245 (2017).[3]

2. Respondents are two homeless individuals living in Grants Pass. Pet. App. 19a. In October 2018, respondents filed a putative class action in the United States District Court for the District of Oregon on behalf of themselves and all "involuntarily homeless individuals living in Grants Pass," including "homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by the City." *Id.* at 19a-20a (brackets omitted). Among other claims, respondents alleged that the City's enforcement of the challenged ordinances violated the Eighth Amendment's prohibition on cruel and unusual punishment as interpreted by this Court in *Robinson* v. *California*, 370 U.S. 660 (1962), and *Powell* v. *Texas*, 392 U.S. 514 (1968). Respondents contended that, under *Robinson* and *Powell*, the City could not "criminalize[] their existence in Grants Pass." Pet. App. 208a.

The district court granted respondents' motion for class certification, Pet. App. 206a-220a, and the parties cross-moved for summary judgment. As relevant here, the court granted judgment to respondents on their claim that the City's "policy and practice of punishing

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[3] Because the City's camping ordinances are enforced through civil sanctions in the first instance, there is a question as to whether the Eighth Amendment's Cruel and Unusual Punishments Clause applies to individuals who are subject only to those ordinances (as opposed to a later trespass prosecution following an exclusion order). The court of appeals held that the possibility of eventual criminal prosecution was sufficient to permit an Eighth Amendment claim. See Pet. App. 43a-46a. Because petitioner does not challenge that aspect of the decision below, we do not address it here.

homelessness" violates the Cruel and Unusual Punishments Clause. *Id.* at 176a-187a (emphasis omitted). Reviewing the summary judgment record, the court concluded that under the challenged ordinances, "the only way for homeless people to legally sleep on public property within the City is if they lay on the ground with only the clothing on their backs and without their items near them." *Id.* at 178a. The court further determined that "Grants Pass has far more homeless people than 'practically available' shelter beds," citing evidence that there were 602 homeless individuals residing within the city and "zero emergency shelter beds." *Id.* at 179a. The court permanently enjoined the City from enforcing the challenged ordinances against class members, subject to exceptions. *Id.* at 24a; see J.A. 190-191.

The district court based its order on the Ninth Circuit's decision in *Martin* v. *City of Boise*, 920 F.3d 584, cert. denied, 140 S. Ct. 674 (2019), which the district court interpreted as holding that "so long as there is a greater number of homeless individuals in a city than the number of available beds in shelters," a city cannot punish homeless individuals for "involuntarily sitting, lying, and sleeping in public." Pet. App. 176a (quoting *Martin*, 920 F.3d at 617) (brackets omitted). The court noted that, consistent with its limitation of the class to individuals who are "involuntarily homeless," its injunction does not "'cover individuals who do have access to adequate temporary shelter, whether they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.'" *Id.* at 199a (quoting *Martin*, 920 F.3d at 617 n.8).

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-95a.[4]

a. As relevant here, the court of appeals first upheld the district court's class certification. Pet. App. 34a-42a. The court rejected petitioner's argument that the class fails to satisfy Federal Rule of Civil Procedure 23(a)'s commonality requirement "because some class members might have alternative options for housing." Pet. App. 39a. The court explained that "[p]ursuant to the class definition, the class includes only *involuntarily* homeless persons," such that "[i]ndividuals who have shelter or the means to acquire their own shelter simply are never class members," "unless and until they no longer have access to shelter." *Id.* at 40a-41a & n.24.

On the merits, the court of appeals reaffirmed *Martin*'s holding that, under *Robinson* and *Powell*, "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." Pet. App. 52a. The court rejected the dissent's argument that *Robinson*, *Powell*, and *Martin* require "an individualized showing of involuntariness" that could be made only as a defense in enforcement proceedings or (as in *Martin*) in an individual as-applied challenge. *Id.* at 48a (citation omitted).

The court of appeals declined to decide whether respondents "bear the burden of demonstrating that they

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[4] The court of appeals vacated the injunction insofar as it prohibited enforcement of the City's ordinance banning "sleeping" on public property. Pet. App. 34a. A third named plaintiff, Debra Blake, was the only class representative as to that challenge, but Ms. Blake died during the pendency of the appeal. *Ibid.* The court of appeals directed the district court to consider whether to substitute a different representative as to the "sleeping" ordinance. *Id.* at 30a. Accordingly, that ordinance is not before this Court.

are involuntarily homeless." Pet. App. 52a n.31. It also declined to decide "what showing would be required" to establish involuntariness because it believed that "the record plainly demonstrates" that the individual respondents and many other individuals in Grants Pass are "involuntarily homeless." *Ibid.*; see *id.* at 52a-54a. In reaching that conclusion, the court emphasized that "[i]t is undisputed that there is no secular shelter space available to adults" in Grants Pass and that "[m]any class members, including the class representatives, have sworn they are homeless." *Id.* at 53a. The court declined to require further inquiry into class members' individual circumstances. *Id.* at 52a-53a.

The district court had granted a permanent injunction prohibiting the City from enforcing the challenged ordinances against class members, subject to exceptions. J.A. 190-191. The court of appeals remanded to the district court to "narrow its injunction to the anti-camping ordinances" and to enjoin enforcement of those ordinances "only against involuntarily homeless person[s] for engaging in conduct necessary to protect themselves from the elements when there is no other shelter space available." Pet. App. 57a.

b. Judge Collins dissented. In his view, the majority erred in affirming the district court's decision to certify a class. Pet. App. 78a-88a. He reasoned that "[u]nder *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion." *Id.* at 81a. That question, he explained, cannot "be resolved, on a common basis, 'in one stroke.'" *Ibid.* (quoting *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351 (2011)). He thus

concluded that respondents' proposed class failed to satisfy Rule 23. *Id.* at 81a-83a. And Judge Collins disagreed with the majority's view that those issues could be avoided by defining the class to include only individuals who are "involuntarily homeless." *Id.* at 87a.

Because he would have decertified the class, Judge Collins addressed only respondents' individual claims. He would have held that respondent John Logan lacked standing because he had not shown that the challenged ordinances had been enforced against him in the past or were likely to be enforced against him in the future. Pet. App. 72a-73a. And he would have held that respondent Gloria Johnson's claims failed on the merits because he believed that her declarations provided "no non-conclusory basis for finding that she lacks *any* option" other than violating the ordinances by sleeping in her van within the city limits. *Id.* at 88a; see *id.* at 88a-91a. Finally, Judge Collins explained that although he had "faithfully adhered to *Martin*" in analyzing respondents' claims, he also believed that *Martin* was incorrectly decided. *Id.* at 93a; see *id.* at 93a-95a.

4. The court of appeals denied rehearing en banc by a vote of 14-13, with several judges writing statements or opinions regarding the denial of en banc review. Pet. App. 96a-162a.

## SUMMARY OF ARGUMENT

The court of appeals correctly held that the Eighth Amendment prohibits a local government from effectively criminalizing the status of homelessness by completely barring individuals without access to shelter from residing in the jurisdiction. But the application of that principle to a particular person requires an inquiry into that person's circumstances, and the court erred in

affirming broad injunctive relief without requiring such particularized showings.

I. As applied to an individual who lacks another place to sleep, a local law banning sleeping in public at all times and in all places violates the Eighth Amendment because it effectively criminalizes the status of homelessness.

A. This Court has long held that the Eighth Amendment prevents governments from punishing individuals based on their status. In *Robinson* v. *California*, 370 U.S. 660 (1962), the Court held that a law criminalizing addiction to narcotics violated the Eighth Amendment's Cruel and Unusual Punishments Clause. A plurality of the Court later declined to extend *Robinson* to a law barring public intoxication, *Powell* v. *Texas*, 392 U.S. 514 (1968), and the Court has made clear that the Eighth Amendment generally restricts only punishment, not the permissible substantive scope of the criminal laws, *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977). But the Court has not questioned *Robinson*'s core holding that the government may not criminally punish someone for their mere status.

B. For nearly three decades, the United States has taken the position that laws prohibiting sleeping in public at all times and in all places violate the *Robinson* principle as applied to individuals who have no access to shelter. As applied to those individuals, the laws effectively criminalize the status of homelessness because they make it impossible for someone with that status to reside in the jurisdiction without violating the law.

Petitioner's contrary arguments lack merit. Petitioner argues at length that the original meaning of the Eighth Amendment is limited to restricting modes of punishment. But petitioner does not ask this Court to

overrule *Robinson*'s core holding that the government may not criminalize status. And petitioner errs in suggesting that applying that holding in this context would require extending it to conduct that might in some sense be said to be an "involuntary" result of status, such as an addict's use of drugs. Here, the status is defined by the very behavior being singled out for punishment: As applied to an individual who has nowhere else to sleep, a city ordinance prohibiting sleeping anywhere in public is equivalent to a law making it a crime for homeless individuals to reside in the jurisdiction.

C. Petitioner also overstates the consequences of applying *Robinson*'s narrow rule to laws criminalizing homelessness. Properly understood, *Robinson* leaves governments at all levels free to enact a variety of appropriate restrictions on sleeping in public and other activities performed by homeless individuals, including restrictions necessary to promote public health and safety. Local governments cannot, however, entirely prohibit such individuals from residing in their jurisdictions.

II. Although the court of appeals correctly held that the City's ordinances violate the *Robinson* principle as applied to individuals who lack access to shelter, the court erred in affirming broad injunctive relief without requiring a more particularized inquiry into the circumstances of the individuals to whom those ordinances may be applied. Like plaintiffs challenging the constitutionality of any law, respondents bore the burden of establishing that the City's ordinances cannot constitutionally be applied to them. And under *Robinson*, the required showing is necessarily particularized: A law prohibiting sleeping in public amounts to a prohibition

on status only as applied to those individuals who have nowhere else to sleep.

The court of appeals appeared to conclude that it could avoid that particularized inquiry because the class is limited to individuals who are "involuntarily homeless." But even though that concept was central to the court's decision and expressly incorporated into the injunction it contemplated, the court declined to decide what showing is required to establish that an individual is involuntarily homeless. That was error. And to the extent the court addressed the issue, it further erred by suggesting that a violation of the *Robinson* principle can be established based primarily or exclusively on aggregate statistics such as the number of shelter beds in a jurisdiction or the total homeless population, without a meaningful inquiry into the particular circumstances of the individuals to whom the challenged ordinances may be applied.

This Court should correct the court of appeals' erroneous understanding of the showing required by *Robinson*, vacate the judgment below, and remand for the court to reconsider its holdings—including its class certification, merits, and remedial holdings—in light of the proper constitutional standards.

## ARGUMENT

In *Robinson* v. *California*, 370 U.S. 660 (1962), this Court held that the Eighth Amendment prohibits the government from punishing individuals based on the condition or status of being addicted to drugs. The court of appeals correctly recognized that laws like the City's camping ordinances, which have the practical effect of barring persons without access to indoor shelter from residing within the jurisdiction, violate the *Robinson* principle in certain applications. But the court

erred by failing to require a more particularized inquiry into the circumstances of the individuals to whom the City's ordinances may be applied. This Court should vacate the judgment below and remand for further proceedings.

## I. LAWS PROHIBITING SLEEPING ON PUBLIC PROPERTY VIOLATE THE EIGHTH AMENDMENT IF THEY ARE APPLIED IN A MANNER THAT PREVENTS AN INDIVIDUAL WITHOUT AVAILABLE SHELTER FROM RESIDING IN THE JURISDICTION

### A. This Court Has Held That The Eighth Amendment Prohibits The Imposition Of Punishment Based Solely On A Person's Status

This Court has held that the Eighth Amendment's Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977). The Clause (1) "limits the kinds of punishment that can be imposed on those convicted of crimes," (2) "proscribes punishment grossly disproportionate to the severity of the crime," and (3) "imposes substantive limits on what can be made criminal and punished as such." *Ibid.* This case concerns the third category of limitations.

The Court held that the Eighth Amendment imposes substantive limits in *Robinson* v. *California*, *supra*. There, the Court addressed a state statute criminalizing not only the possession or use of narcotics, but also being addicted to narcotics. Noting that the statute made an addicted person "continuously guilty of this offense, whether or not he ha[d] ever used or possessed any narcotics within the State," the Court found that the statute imposed cruel and unusual punishment, in violation of the Eighth Amendment. 370 U.S. at 666.

The Court explained that just as "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," *id.* at 667, it was cruel and unusual to punish a person for "the 'status' of narcotic addiction," a condition that may be "contracted innocently or involuntarily." *Id.* at 666-667.

Six years later, in *Powell* v. *Texas*, 392 U.S. 514 (1968), the Court considered an Eighth Amendment challenge to a conviction for public intoxication. The petitioner argued that the conduct for which he was convicted was the involuntary result of his status as a chronic alcoholic. *Id.* at 517 (plurality opinion). A four-member plurality reiterated *Robinson*'s prohibition on status-based punishments but declined to extend *Robinson* to protect the charged conduct. The plurality reasoned that the defendant had not been convicted for the "mere status" of being a "chronic alcoholic" but for "public behavior which may create substantial health and safety hazards"—"a far cry" from simple addiction. *Id.* at 532.

Justice White, concurring in the result, suggested that it might be unconstitutional to punish a person for the irresistible actions that result from his alcoholism. *Powell*, 392 U.S. at 548-554. As applied to such individuals, he stated, the Texas statute was "in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk." *Id.* at 551. Nevertheless, Justice White concluded that the record did not support the conclusion that the petitioner's alcoholism compelled him to frequent a public place when intoxicated. *Id.* at 549.

The Court in *Ingraham* subsequently reaffirmed *Robinson*'s recognition of a prohibition on status-based punishments, although it cautioned that the Eighth

Amendment's substantive limitations should be applied "sparingly" given the Amendment's primary focus on methods of punishment. 430 U.S. at 667 (citing *Robinson*, *supra*, and *Powell*, 392 U.S. at 531-532 (plurality opinion)).

### B. Laws That Are Applied In A Manner That Effectively Prevents A Homeless Individual From Residing Within A Jurisdiction Criminalize The Status Of Homelessness

1. The question in this case is whether the Eighth Amendment prohibits Grants Pass from enforcing ordinances barring sleeping in public with any form of bedding against a homeless resident who has nowhere else to sleep. In the view of the United States, the Eighth Amendment as interpreted in *Robinson* prohibits enforcement in those narrow circumstances.

In the decades since *Robinson*, multiple courts have applied the Eighth Amendment to invalidate ordinances that criminalized various aspects of homelessness. See, *e.g.*, *Jones* v. *City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007); *Johnson* v. *City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), rev'd in part and vacated in part on other grounds, 61 F.3d 442 (5th Cir. 1995); *Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992). The United States has likewise long interpreted *Robinson*, to bar enforcement of laws that have the effect of criminalizing the presence or existence of homeless persons within a jurisdiction. See Gov't Amicus Br. 10-24, *Tobe* v. *City of Santa Ana*, 892 P.2d 1145 (Cal. 1995) (No. S038530); Gov't Amicus Br. at 13-31, *Joyce* v. *City & Cnty. of S.F.*, 87 F.3d 1320 (9th Cir. 1996) (Tbl.) (No. 95-16940); Gov't Statement of Interest at 6-16, *Bell* v. *City of Boise*, No. 09-cv-540 (D. Idaho Aug. 6, 2015).

The *Robinson* principle applies here. The only place a homeless person without access to available indoor shelter may sleep is outdoors, in a public space. When people sleep outside, they almost always use a blanket, sleeping bag, or other item to protect them from the weather. In some places and at some times (such as in Grants Pass during the winter, where the temperature can regularly drop below freezing, see Pet. App. 48a n.28), the use of such protection is necessary to avoid death. In that sense, the act of sleeping outdoors while using a protective item like a blanket is inseparable from the status of being homeless—that is, being without an available place of indoor shelter.

As explained above, however, the City's camping ordinances make it unlawful for a person to sleep within a City park or other public place using any form of bedding. Punishing homeless persons who have nowhere else to sleep for sleeping in public with a blanket "effectively punishes them for being homeless." *Pottinger*, 810 F. Supp. at 1564; see *Johnson*, 860 F. Supp. at 350 (because people "do[] not exist without sleeping," criminalizing sleeping in public "punishes the homeless for their status as homeless, a status forcing them to be in public"). Application of the City's camping ordinances to homeless persons thus falls within the principle recognized in *Robinson*.

Although the "status" of being homeless and without access to available indoor shelter is not a condition of body or mind, like addiction in *Robinson*, it is likewise a status or condition rather than a form of conduct. And to an even greater degree than addiction, being homeless and without access to shelter is a status that "may be contracted innocently or involuntarily." *Robinson*, 370 U.S. at 667; see pp. 2-3, *supra*. Accordingly, a city

could not, consistent with *Robinson*, make it a crime to be homeless. And a city also cannot accomplish the same result indirectly through laws that—though formally targeted at conduct such as sleeping outdoors—in practice prohibit residing in the city while homeless.

Indeed, a city's prohibition against sleeping in any public place with any form of bedding is in essence a prohibition against a person without access to indoor shelter continuing to live in the city at all. That is akin to a form of banishment, a measure that is now generally recognized as contrary to our Nation's legal tradition. Cf. *City of Chicago* v. *Morales*, 527 U.S. 41, 53 (1999) (opinion of Stevens, J.) (recognizing that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment"). That consequence further underscores the appropriateness of applying *Robinson* in this context.

We stress the narrow scope of our submission. As we explain further below, our position does not rest on extending *Robinson* to laws regulating conduct that could be said to be involuntary, or even to conduct that could be described as an irresistible consequence of a status such as drug addiction. See pp. 23-25, *infra*. Instead, the position advanced here is limited to laws that effectively criminalize status by prohibiting individuals from residing in a city while homeless.

2. Petitioner's contrary arguments lack merit.

a. Petitioner devotes much of its brief to arguing (Br. 16-29) that as a matter of text and history, the Eighth Amendment limits only punishment, not the permissible substantive scope of the criminal laws. But petitioner does not ask this Court to overrule *Robin-*

*son*'s core holding that the Eighth Amendment prohibits laws criminalizing status. Cf. Pet. Br. 40 (arguing that the Court should overrule *Robinson* only if it were read to establish a "prohibition on punishing purportedly involuntary conduct"). Accordingly, the Court need not revisit *Robinson*'s decision to locate that principle in the Eighth Amendment in this case—and should do so, if at all, only in a future case that would allow the Court to consider whether other constitutional provisions, including the Due Process Clauses of the Fifth and Fourteenth Amendments, would support the same principle. Cf. Low & Johnson Amicus Br. 2-15.[5]

b. Petitioner contends (Br. 37) that the challenged ordinances fall outside *Robinson* because they prohibit "specific acts" rather than "the 'status' of homelessness." But sleeping is a life-sustaining activity that must occur at some time in some place. When alternative sleeping accommodations are available, punishing an individual who nonetheless chooses to sleep in a public place can properly be regarded as a punishment for that conduct. But where there is no other place for a homeless person to sleep, there is no meaningful distinction between punishing the person's sleeping in public and punishing the condition of being homeless or of residing as a homeless person within the city.

As the lower courts recognized, the City's ordinances before this Court do not completely prohibit the act of

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[5] In the district court, respondents pursued additional theories for enjoining enforcement of the challenged ordinances, including a claim that the City's actions violated respondents' due process rights. Respondents dismissed their substantive due process claim with prejudice following the grant of summary judgment on the Eighth Amendment claim, see J.A. 188, and the court of appeals accordingly did not reach that issue.

sleeping in public; rather, they "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' " such as a blanket or "a bundled up item of clothing." Pet. App. 177a-178a. But the ordinances still effectively prohibit residing in the City while homeless: A person is allowed to sleep in public in Grants Pass only if she does not use any materials that are necessary to provide the minimal comfort required for meaningful sleep—and in some weather conditions, are necessary to protect health and even life.

c. Contrary to petitioner's assertions (*e.g.*, Br. 43-44), recognizing that narrow limitation on governments' ability to regulate the use of public property would not entitle a homeless person to perform *any* activity in *any* public space. The Constitution does not prevent the federal government, States, or localities from imposing reasonable time, place, and manner restrictions on sleeping in public and other conduct associated with homelessness. For example, a city might bar individuals from sleeping in dangerous places (such as next to a highway, or in a flood-prone area); in spaces near to public buildings and businesses; or in other areas warranting special consideration for reasons of security, alternative uses, or other public uses or interests. Cf. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding National Park Service's ban on sleeping on national park land in the District of Columbia and its environs as applied to Lafayette Park and the National Mall as a reasonable time, place, or manner restriction on expression). A city could also bar sleeping in certain public parks, or areas of public parks, but not others. Indeed, several district courts

within the Ninth Circuit have held that, notwithstanding the court of appeals' earlier decision in *Martin*, governments "may evict or punish sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep." Pet. App. 54a n.33 (collecting cases).

d. Petitioner also expresses concern (Br. 47-49) that restricting governments' ability to criminalize homelessness itself in the manner the Grants Pass camping ordinances do could permit other individuals charged with different offenses to avoid punishment by asserting that their conduct was compelled by some underlying condition. Petitioner is correct that portions of *Martin* and the decision below appear to embrace an interpretation of the Eighth Amendment that could induce such challenges. See *Martin* v. *City of Boise*, 920 F.3d 584, 616 (9th Cir.) (citing Justice White's *Powell* concurrence and Justice Fortas's *Powell* dissent as establishing 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"), cert. denied, 140 S. Ct. 674 (2019); Pet. App. 50a (reiterating this statement).

Properly understood, however, *Robinson* does not constitutionalize a general defense of compulsion. *Robinson* prohibits only the punishment of a person's status; it does not bar the imposition of punishment for acts simply because they may be linked to, or caused by, a person's status. Indeed, the plurality opinion in *Powell* squarely rejected any reading of *Robinson* that would make the Eighth Amendment "the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Powell*, 392 U.S. at 533 (plurality opinion). And to the extent

the Ninth Circuit suggested that *Marks* v. *United States*, 430 U.S. 188 (1977), required it to treat the combination of Justice Fortas's *Powell* dissent and dicta from Justice White's concurrence as establishing an involuntariness principle, that was error.

Thus, notwithstanding *Robinson*, governments remain free to criminalize acts—even acts that could be said to be involuntary—that may result from a defendant's compulsion or inability to act rationally. See *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020).[6] But that principle is not implicated here. The central point of *Robinson* was that the status of being addicted to narcotics is distinct from the conduct of using narcotics. There is no similar separation between being without available indoor shelter and sleeping in public—they are opposite sides of the same coin. A homeless person sleeps in public not because a defect in his mental processes prevents him from controlling himself and making a rational decision, but because he simply has no choice. His conduct is therefore inseparable from his homeless status.

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[6] In its brief as amicus curiae in *Kahler*, the United States repeated the *Powell* plurality's statement that "'[t]he primary purpose' of the Eighth Amendment 'has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes.'" Gov't Br. at 30-31, *Kahler*, *supra* (No. 18-6135) (quoting *Powell*, 392 U.S. at 531-532 (plurality opinion)) (brackets in original). The United States acknowledged, however, that *Robinson* carves out an exception to that general rule. See *id.* at 31. The United States went on to explain that "*Robinson* ha[d] no application" in Kahler's case because he had been "convicted, not for being mentally ill, but for committing multiple murders," and thus Kahler lacked any plausible claim that the State's actions punished him based on status. *Id*. at 31-32.

### C. The Narrow Rule Advocated By The United States Would Not Prevent Governments From Addressing Health Or Public Safety Concerns Associated With Homelessness

Petitioner asserts (Br. 47) that laws like the City's challenged ordinances "serve important health and safety purposes." Cities and other governments undoubtedly have a legitimate interest in regulating camping, sleeping, and other behaviors in which a homeless person might publicly engage. The City could, for example, permissibly enforce restrictions on the use of fires, stoves, or tents in public spaces. Cf. Pet App. 55a & n.34. Other permissible measures might include taking appropriate actions to close encampments (for example, because of issues relating to disease or crime, see p.7 n.2, *supra*), or prohibiting homeless individuals from congregating in particular locations. But cities do not have a legitimate interest in banishing homeless persons from their jurisdiction entirely. Cf. *Saenz* v. *Roe*, 526 U.S. 489, 499 (1999) (reaffirming that the "purpose of inhibiting the migration by needy persons" is an "impermissible" basis for state legislation).

Here, the evidence demonstrated that there were *no* shelter beds or public spaces in the City where a homeless person could sleep with even rudimentary protection against the elements. Pet. App. 178a. And if homeless residents of the City do not have a single place within the City where they can lawfully be to sleep, they would have no way "peacefully to dwell within the limits" of the place where they reside. *United States* v. *Wheeler*, 254 U.S. 281, 293 (1920).

Indeed, evidence in this case indicates that the challenged ordinances were adopted with the specific goal of severing homeless residents' ties to Grants Pass by

forcing them to move to neighboring towns or "'nearby' federal, state, or [county] land." Pet. App. 180a; see *id.* at 17a. Such efforts by cities to push homeless residents to "move on down the road," C.A. E.R. 368, merely increase the strain on other cities, States, and the federal government. Cf. *Edwards* v. *California*, 314 U.S. 160, 176 (1941) (characterizing California law against importation of "indigent[s]" as "an open invitation to retaliatory measures" that would cause "the burdens upon the transportation of such persons [to] become cumulative"). And if every jurisdiction in the Nation adopted ordinances like those at issue here, there would be nowhere for people without homes to lawfully reside. *Robinson* does not permit laws that would yield that extreme result if universally adopted.[7]

## II. *ROBINSON* REQUIRES A PARTICULARIZED INQUIRY INTO THE CIRCUMSTANCES OF THE INDIVIDUALS TO WHOM THE CITY'S ORDINANCES ARE APPLIED

The court of appeals correctly held that, under *Robinson*, the City "cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping

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[7] Respondents advanced a separate Eighth Amendment claim under the Excessive Fines Clause. The district court granted summary judgment to respondents on that claim, but the Ninth Circuit declined to address it, stating that "[t]he City presents no meaningful argument on appeal regarding the excessive fines issue" and also that "there is no need for [the court] to address" the issue given the primary holding under the Cruel and Unusual Punishments Clause. Pet. App. 56a; see *id.* at 25a. If the Court reverses or vacates the Ninth Circuit's holding under the Cruel and Unusual Punishments Clause, it should remand so that the court of appeals can determine whether the City forfeited its appeal on the excessive fines ground, and if not, can consider it on the merits.

outside with rudimentary protection from the elements, or for sleeping in their car at night," when they have nowhere else to sleep. Pet. App. 57a. The court of appeals erred, however, in failing to require a more particularized inquiry into the circumstances of the individuals subject to the City's ordinances.

A. Under *Robinson*, a local ordinance impermissibly criminalizes homelessness only if it is applied in a way that leaves a homeless individual no way to reside in the municipality without violating the law. As Judge Collins explained, the application of that principle necessarily requires "an individualized inquiry" into the circumstances of "the individuals to whom the challenged ordinances are being applied." Pet. App. 79a. Only when individuals lack another place to sleep "can it be said that an ordinance against sleeping or camping in public, '*as applied to them*, effectively punishes them for something for which they may not be convicted under the Eighth Amendment.'" *Id.* at 79a-80a (quoting *Martin*, 920 F.3d at 617) (brackets omitted).

In undertaking that assessment, law-enforcement officers and courts may consider various factors, including whether individuals have "access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." *Martin*, 920 F.3d at 617, n.8; see Pet. App. 149a (M. Smith, J., dissenting from the denial of rehearing en banc). Absent evidence of that sort, however, it is not possible to determine whether public sleeping by particular individuals "is an 'unavoidable consequence' of their status as homeless persons." Pet. App. 146a.

B. The district court and the court of appeals failed to recognize that *Robinson* requires such particularized

analysis. The district court appeared to conclude that "a person is involuntarily homeless"—and thus cannot be subject to the challenged ordinances—"when 'there is a greater number of homeless individuals in a jurisdiction than beds available in shelters.'" Pet. App. 216a (quoting *Martin*, 920 F.3d at 617). Other district courts within the Ninth Circuit appear to have relied on the same homeless-population-to-beds formula to enjoin efforts to clear encampments or otherwise enforce public camping and sleeping laws—regardless of individual circumstances, the availability of shelter space for a particular individual when encountered, or the reasonableness of the government's prohibitions and enforcement measures. See, *e.g.*, Newsom Cert. Amicus Br. 4-7, 11-12 (collecting cases).

The court of appeals, for its part, initially appeared to adopt a similar population-to-beds rule, stating that "[t]he formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there 'is a greater number of homeless individuals in the jurisdiction than the number of available' shelter spaces." 50 F.4th 787, 795 (brackets and citation omitted). But the court deleted that language on rehearing. See Pet. App. 147a-148a (M. Smith, dissenting from the denial of rehearing en banc). And the court emphasized that because the class is defined to include "only *involuntarily* homeless persons," the class-wide injunction does not apply to individuals who have access to shelter. *Id.* at 40a.

The court of appeals did not, however, attempt to further define the critical term "involuntarily homeless." To the contrary, it expressly declined to decide "what showing would be required" to establish involuntariness, or even whether respondents "bear the burden

of demonstrating that they are involuntarily homeless." Pet. App. 52a n.31. And although the court stated that the record "plainly demonstrates" that respondents and the unnamed class members are involuntarily homeless, it reached that conclusion without requiring any meaningful inquiry into their circumstances. *Ibid.* The court held, for example, that respondent Gloria Johnson's brief declarations stating that she is involuntarily homeless were sufficient to establish that the City's ordinances cannot constitutionally be applied to prevent her from sleeping in her van on city streets despite evidence that she has been able to sleep in other locations, including a store parking lot and a friend's property. *Id.* at 52a-53a; see J.A. 6-10.

Indeed, the court of appeals suggested that such particularized inquiries are improper. It faulted the dissent for questioning Johnson's circumstances. Pet. App. 52a-53a. And it explained at length why it believed the dissent was wrong to interpret *Robinson*, *Powell*, and *Martin* to require "an individualized showing of involuntariness." *Id.* at 48a (citation omitted); see *id.* at 48a-52a. Instead, the court appeared to treat "a shelter-beds deficit, when combined with conclusory allegations of involuntariness, as sufficient for an individual to show that he or she is involuntarily homeless." *Id.* at 148a (M. Smith, dissenting from the denial of rehearing en banc).[8]

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[8] Although respondents and the lower courts have used the term "involuntarily homeless" as shorthand for the relevant constitutional standard, that term is somewhat imprecise. Under *Robinson*, the question is whether an individual has nowhere to sleep except in public, such that a law prohibiting sleeping anywhere in public is tantamount to a law prohibiting the individual from residing in the jurisdiction altogether. An individual with access to a shelter or

C. The court of appeals' decision thus rested on an erroneous understanding of what particular individuals must show in order to establish that the *Robinson* principle precludes the application of laws like the City's anti-camping ordinances in their circumstances. Several of the dissenting judges below argued that the need for particularized inquiries should have precluded the certification of a class because respondents cannot satisfy Rule 23(a)'s commonality requirement or Rule 23(b)(2)'s requirement that the challenged conduct must be "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 360 (2011). See Pet. App. 78a-83a (Collins, J., dissenting); *id.* at 148a-151a (M. Smith, J., dissenting from the denial of rehearing en banc). But petitioner has not sought review of those class-certification issues, which thus are not before the Court.

Quite apart from class certification, however, the court of appeals' erroneous understanding of *Robinson*'s substantive standard directly affected its analysis of the merits. Cf. *Wal-Mart Stores*, 564 U.S. at 351 (noting that class-certification often "entail[s] some overlap with the merits of the plaintiff's underlying claim"). As explained, the *Robinson* principle asks whether enforcement of the challenged ordinances against a particular person constitutes impermissible punishment based on the condition of being without available shelter. That question cannot be answered without an in-

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other temporary housing is still homeless, and might be described as "involuntarily homeless" in the usual sense of those words, but would not have a valid challenge to an anti-camping law under *Robinson*.

quiry tailored to the particular circumstances of the individuals to whom the City seeks to apply the challenged ordinances.[9]

Accordingly, although this Court should uphold the court of appeals' determination that the *Robinson* principle will in some circumstances preclude the application of anti-camping ordinances to individuals who have no access to shelter, it should reject the court's conclusion that *Robinson* can be applied without more particularized inquiries. And having corrected that central legal error, the Court should vacate and remand to allow the court of appeals to reconsider all of the relevant issues in the case—including class certification, the merits, and the nature and appropriate scope of any prospective relief—in light of the correct substantive legal standard.

D. That disposition would alleviate many of the practical concerns that petitioner and its amici have expressed about the effects of the court of appeals' decisions in *Martin* and in this case. Although the United States continues to believe that the fundamental principle recognized in *Martin* is sound, it shares amici's concerns about the broad and burdensome injunctions entered by some district courts in the Ninth Circuit, which may limit cities' ability to respond appropriately and

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[9] Although *Robinson* requires a particularized inquiry, it does not limit homeless persons to asserting an Eighth Amendment claim as an affirmative defense in an enforcement proceeding. Even judges below who believed that *Robinson* cannot be enforced in class actions did not dispute that it could be enforced in actions seeking "individualized injunctive relief, such as precluding a municipality from enforcing a particular criminal provision against a specific person, if past actions by the municipality warrant such equitable relief." Pet. App. 135a (Graber, J., respecting the denial of rehearing en banc).

humanely to encampments and other legitimate public health and safety concerns. See Newsom Cert. Amicus Br. 4-7, 11-12.

A straightforward holding that *Robinson* requires a particularized showing that the challenged ordinance makes it impossible for a homeless individual to reside in the jurisdiction would make clear that the federal government, States, and local governments have substantial latitude to craft measures regulating sleeping or camping in public, including reasonable time, place, and manner restrictions. And it should also make clear that courts may not enter broad injunctions that prohibit cities from enforcing their laws based on shelter-bed counts or other standards that fail to adequately account for the particularized inquiry *Robinson* requires.

## CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded for further proceedings.

Respectfully submitted.

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