No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

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Twenty-five briefs supporting certiorari filed by a diverse array of amici confirm what the 17 judges urging rehearing en banc below made clear: The Ninth Circuit's decision, which extends its Eighth Amendment ruling in *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), is unprincipled, unworkable, and irreconcilable with decisions of this Court, as well as other courts of appeals and state supreme courts. Respondents deny that the Ninth Circuit's decisions have worsened the homelessness crisis, but the experiences of amici—which include 20 States, California's governor, dozens of cities ranging from Phoenix and San Francisco to Seattle and Anchorage, and myriad

community and business groups—prove the real and tangible effects of *Martin*.

The Ninth Circuit squarely held below that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits cities from regulating purportedly "involuntary" public camping, even through civil citations. Respondents' attempts to minimize the scope and impact of that holding, which "inevitably" extends to "public defecation and urination," defy reality. *Martin*, 920 F.3d at 596 (M. Smith, J., dissenting from denial of rehearing en banc). In *Martin*, this Court heard similar assurances that the Ninth Circuit's ruling was narrow and would leave local governments with adequate tools to enforce basic health and safety laws. That was an empty promise, as the unprecedented coalition of amici reflects. The Court should grant review and reject the Ninth Circuit's untenable reading of the Eighth Amendment.

I. THE NINTH CIRCUIT'S DECISION ENTRENCHES A CONFLICT.

A. Respondents attempt to downplay the Ninth Circuit's recognition of a right to "encamp" on public property. Opp. 21. But their objection is semantic. As respondents' own reformulation shows, the decision below holds that "involuntarily homeless persons" have a right to live and sleep on public property with "'rudimentary forms of protection.'" Opp. 21-22. The Ninth Circuit reached that conclusion by embracing "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'" and then affirming a sweeping classwide injunction. Pet. App. 50a, 57a (quoting *Martin*, 920 F.3d at 616). That decision—however respondents

label it—creates a constitutional right to camp on public property.

Respondents' distortion of the decision below cannot mask the direct conflict with *Tobe* v. *City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), and *Joel* v. *City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), which rejected similar challenges to public-camping ordinances. Pet. 17. Respondents argue that those decisions are factually distinguishable because the Eleventh Circuit also mentioned available shelter beds and the California Supreme Court confronted a facial challenge. Opp. 22-23. But neither distinction diminishes the clash with those courts' legal conclusion that the Cruel and Unusual Punishments Clause forbids "punishment for status" simpliciter, *not* for the "proscribed conduct" of public camping. *Tobe*, 892 P.2d at 1166-1167; accord *Joel*, 232 F.3d at 1361-1362; but see Pet. App. 50a.

B. Respondents barely engage with the broader split on the Eighth Amendment's application to involuntary conduct. Seven federal courts of appeals and 17 state courts of last resort have properly interpreted *Robinson* v. *California*, 370 U.S. 660 (1962), to prohibit only pure status crimes; only the Ninth and Fourth Circuits and one state supreme court reject that consensus. Pet. 18-24. Respondents alone refuse to recognize that "sharp split" on the meaning of this Court's precedent, which judges on both sides have long acknowledged. *United States* v. *Moore*, 486 F.2d 1139, 1239 n.178 (D.C. Cir. 1973) (en banc) (Wright, J., dissenting); see Pet. App. 130a-131a (O'Scannlain, J., respecting denial of rehearing en banc).

Respondents' only rejoinder (Opp. 19, 23-24) is that the prohibited conduct in other cases (drug use, public intoxication, sexual assaults, etc.) is more

"harmful" than public camping. But the ultimate question here is *who decides*—the people's representatives or federal judges—whether conduct is sufficiently harmful to warrant prohibition. And even the Ninth Circuit did not embrace respondents' invented distinction. Instead, it relied on decisions involving drug addiction (*Robinson*) and public intoxication (*Powell* v. *Texas*, 392 U.S. 514 (1968)). Pet. App. 47a.

II. THE DECISION BELOW IS WRONG.

Respondents primarily argue (Opp. 13-21) that the Ninth Circuit's expansive interpretation of the Cruel and Unusual Punishments Clause is correct. The Court should consider that important question with the benefit of full merits briefing. In any event, respondents cannot square the decision below with the Constitution and controlling precedent.

A. Respondents never deny that *Martin* and the decision below lack any support in the "text, history, or tradition of the Eighth Amendment." Pet. App. 119a (opinion of O'Scannlain, J.). After all, no serious argument can be made applying these traditional tools of constitutional interpretation that the short jail sentences and fines in *Martin*—let alone the civil citations here—are cruel and unusual modes of punishment. Pet. 24-27.

Respondents try to sidestep first principles by contending that the Eighth Amendment's original meaning, history, and tradition are off-limits because the City did not canvass the "historical evidence" or "'retain experts'" below. Opp. 15 (citation omitted). That is not how preservation (or constitutional interpretation) works. This Court has repeatedly held that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that

claim" and is "not limited to the precise arguments [it] made below." *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) (citations omitted). Respondents' contrary view would undermine inquiry into "original meaning, as demonstrated by its historical derivation," which has long been a touchstone of this Court's decisions construing the Eighth Amendment and other constitutional provisions. *Ingraham* v. *Wright*, 430 U.S. 651, 670 n.39 (1977); see, *e.g.*, *Kennedy* v. *Bremerton School District*, 142 S. Ct. 2407, 2428 (2022).

B. Respondents' merits argument rests on their misreading of three decisions of this Court: *Robinson*, which they ask the Court to extend; the splintered opinions in *Powell*; and a sentence fragment from *Ingraham*. Opp. 14-18. None supports the Ninth Circuit's transformation of the Cruel and Unusual Punishments Clause into a font of judicial power to micromanage municipal housing and land-use policy.

Respondents begin with *Robinson*, which held that States cannot punish "the 'status' of narcotics addiction" but recognized that States may punish drug possession by addicts. 370 U.S. at 664-667. Respondents urge the Court to extend *Robinson*'s status-only holding to include "involuntary" conduct that stems from "a status." Opp. 15. That unwarranted expansion finds no support in the Eighth Amendment's text, history, or tradition. Pet. 25. At this stage, though, what matters is that seven circuits and 17 state supreme courts have refused to extend *Robinson* in this way. Pet. 20-22.

Respondents promptly retreat to *Powell*, claiming that Justice Fortas's dissent and Justice White's concurrence "endorsed" respondents' "reading of *Robinson*." Opp. 16. But the *Court* has only ever applied

Justice Marshall's plurality opinion and Justice Black's concurrence, both of which upheld the "paramount role of the States in setting 'standards of criminal responsibility.'" *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell*, 392 U.S. at 533 (plurality opinion)); see Pet. 27-28. Tellingly, respondents also retreat from the Ninth Circuit's rationale for bypassing the *Powell* plurality opinion: its view that *Marks* v. *United States*, 430 U.S. 188 (1977), requires fidelity to a dissent and dicta in a concurrence. Pet. App. 49a-50a; see, *e.g.*, Pet. 28-29; San Francisco Br. 13-19. Respondents now call the ground on which they prevailed below a "sideshow" because properly applying *Marks* would mean *Powell* "'left open'" the question presented here. Opp. 18 n.2. But without *Powell*, the foundation of respondents' merits argument crumbles.

Finally, respondents repeatedly try (Opp. i, 1, 13, 15) to transform a snippet from *Ingraham* into a broad Eighth Amendment rule, but that decision undermines their position. Respondents quote *Ingraham*'s observation that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." 430 U.S. at 667. But *Ingraham*'s only example was *Robinson*, whose prohibition on pure status crimes doesn't support respondents. *Ibid.* *Ingraham* further underscored that this "limitation," disconnected from the "'primary purpose of the Cruel and Unusual Punishments Clause,'" must "be applied sparingly." *Ibid.* The Ninth Circuit's extension of *Robinson* has been anything but sparing.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Despite more than two dozen amicus briefs, respondents attempt to downplay the stakes, insisting

that the "narrow scope" of the Ninth Circuit's decision will not interfere with cities' efforts to "clea[r] or otherwise regulat[e] encampments." Opp. 24, 28. That prediction should sound familiar: This Court heard the same assurances four years ago, when the *Martin* plaintiffs insisted that any "policy concerns are dramatically overstated" because the decision had "limited practical consequence." Opp. 25-28, No. 19-247. As dozens of amici in this case—including many government officials charged with complying with the Ninth Circuit's decisions—have explained, those assurances proved disastrously wrong.

A. Cities, counties, and States all agree that *Martin* has "wreaked practical havoc in courts and on the ground in municipalities across the Ninth Circuit." San Francisco Br. 6; see, *e.g.*, California Counties Br. 12-14; States Br. 5-11. That decision exacerbated the homelessness crisis, prevented comprehensive and swift responses to encampments, and undermined the "core mandate for every municipality" to "keep its public space safe and accessible to all its residents." Los Angeles Br. 19.

Contrary to respondents' assertion (Opp. 31-32), San Francisco's limited cleanup of encampments in advance of President Xi's visit illustrates the severe burdens the Ninth Circuit's decisions inflict. San Francisco began preparations months in advance merely to clear a part of the South of Market neighborhood.[1] That San Francisco's months-long partial cleanup of a neighborhood made national news is a

[1] David Sjostedt, *San Francisco 'Cleaned Up' Streets Ahead of APEC. But How and What, Exactly, Did It Do?*, S.F. Standard (Nov. 14, 2023), https://tinyurl.com/2ba9ucw4.

disheartening sign of the new normal under *Martin*.[2] And within weeks, the "homeless encampments have returned," as two-thirds of their inhabitants (162 of 244) rejected San Francisco's offers of shelter.[3]

The Ninth Circuit's open-ended standards also foist on local governments frequent actual and potential litigation over such issues as what constitutes adequate shelter, *e.g.*, Los Angeles Br. 14-15, and where and when cities may enforce restrictions, *e.g.*, Phoenix Br. 23. As Governor Newsom observes (Br. 12), the test's opacity puts public officials in a no-win situation where "[a]ny attempt to move unhoused persons out of encampments," or to regulate "the place or manner in which unhoused persons can sleep, will at best subject the community to litigation and at worst result in a broad injunction." Los Angeles likewise reports (Br. 21) that "the chaos of defending lawsuits from both sides over whether or how to enforce public space regulations creates paralysis and diverts limited public resources from the homeless population that needs it most." Absent this Court's intervention, the paralysis will only worsen now that the Ninth Circuit has blessed the routine certification of sweeping *Martin* classes. Pet. 34.

B. The Ninth Circuit's novel framework is also unworkable. For example, *Martin* and the decision below apply to the "involuntarily homeless." Opp. 33. That test inevitably invites confusion for law enforcement and other officials tasked with "determin[ing]

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[2] *E.g.*, Heather Knight, *Before World Leaders Arrive, San Francisco Races to Clean Up*, N.Y. Times (Nov. 10, 2023), https://tinyurl.com/bdfjcpjh.

[3] Sergio Quintana, *Here's What San Francisco's Streets Look Like 3 Weeks After APEC*, NBC Bay Area (Dec. 11, 2023), http://tinyurl.com/3tmt9bpj.

voluntariness on the ground and in the course of interactions with persons experiencing homelessness." San Francisco Br. 11.

Cities also must undertake the "monumentally difficult" task of counting "available shelter beds" and "homeless residents" on a *nightly* basis and making sure officers in the field know the latest count. Los Angeles Br. 13-14. Even then, cities have no good way "to determine whether someone has declined an offer of shelter, let alone document every interaction." San Francisco Br. 11. No wonder cities across the Ninth Circuit have been compelled to "abandon enforcement of a host of laws regulating public health and safety"—precisely as the *Martin* dissenters predicted. 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc).

C. The *Martin* plaintiffs insisted that the burdens and unworkability of the Ninth Circuit's approach that the petitioner there highlighted were "reason for this Court to wait" to grant review until those problems "actually materialize." Opp. 29-31, No. 19-247. Respondents here cannot reprise that response now that *Martin*'s harms have materialized. They instead seek to distract by invoking politics, accusing elected officials of "blam[ing] the courts" for problems they have failed to solve. Opp. 30-31.

Respondents' scapegoating theory is contradicted by the chorus of governmental amici who disagree on much but agree that this Court's intervention is necessary. Amici hale from every State in the Ninth Circuit (plus many others), state and local governments, and both major political parties. These amici hold different policy views on how to address the homelessness crisis—for example, by "lift[ing] impediments" to "creating shelter and housing," Los Angeles Br. 4;

"remov[ing] tents from the sidewalk" to allow for "enhanced cleanings" of encampment areas, Phoenix Br. 15-17; "devoting billions of dollars in funds and resources," San Francisco Br. 1; and setting aside areas of public spaces to be used as outdoor homeless shelters, Chico Br. 16. But they all agree that the Ninth Circuit's decisions stand in the way of solutions to this complex problem and harm the very people they were intended to help. Amici also have put their money where their mouths are. For example, California has "invested more than $15 billion toward homelessness issues." Newsom Br. 9; see also, *e.g.*, Arizona Legislature Br. 19. The crisis has worsened *despite* these efforts, not in the absence of them.

Respondents' narrative is also incoherent. If the crisis of encampments truly were a product of "political expediency" by officials who prefer to blame courts for policy problems, Opp. 3, then amici would have little reason to ask this Court to grant review and reverse the Ninth Circuit's decision, which would eliminate their supposed excuse. The reality is simpler: Public officials have come in droves to this Court not to take part in "[p]olitical theater," Opp. 32, but to seek the return of policy questions the Ninth Circuit wrongly answered under the Eighth Amendment to their rightful place with the people's representatives.

IV. THIS PETITION IS AN IDEAL VEHICLE.

Respondents' supposed vehicle problems (Opp. 34-37) are makeweights and pose no obstacle to review.

A. Respondents contend that the district court's grant of summary judgment under the Eighth Amendment's Excessive Fines Clause is an "independently sufficient groun[d]" for the injunction. Opp. 34. But

the excessive-fines claim was not even a ground for the decision below because the Ninth Circuit did not "resolve whether the fines violate the Excessive Fines clause" and affirmed the injunction solely under the Cruel and Unusual Punishments Clause. Pet. App. 25a-26a, 55a. The excessive-fines claim also was not independent, but instead an afterthought that rose or fell with the *Martin* claim. See *id.* at 56a. A vestigial issue that the Ninth Circuit did not reach is no impediment to reviewing its actual decision.

B. Respondents cite a newly enacted Oregon statute that requires public-camping regulations to "be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness." Opp. 35 (quoting Or. Rev. Stat. Ann. § 195.530(2)). But they do not contend that the new law poses any jurisdictional impediment, expressly declining to argue "that the statute moots this litigation." *Ibid.* Nor have respondents claimed that the Oregon statute justifies vacating the injunction they won below. And the statute's objective-reasonableness standard departs from *Martin*, which puts the City in an "objectively *un*reasonable constitutional straitjacket." Pet. App. 159a-160a (Collins, J., dissenting from denial of rehearing en banc). Because Ninth Circuit precedent sets a higher constitutional floor, Oregon's reasonableness standard is irrelevant.

Respondents also overlook the irony of asserting a vehicle problem when the Oregon statute was a response to *Martin*. Opp. 35. States should serve "as laboratories for devising solutions to difficult legal problems," but the Ninth Circuit has wrongly attempted to constitutionalize one particular policy. *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). *Martin*'s one-size-fits-all rule has hindered legislative efforts in

California, Arizona, Idaho, Montana, and Alaska. Newsom Br. 9-11; Arizona Legislature Br. 19; States Br. 12-16. Given the limits on legislative action imposed by *Martin*, the question presented remains exceptionally important in Oregon and across the Ninth Circuit.

C. Respondents argue (Opp. 36) that this Court should not review the decision below until the district court reconsiders whether to enjoin the City from prohibiting "the use of stoves or fires, as well as the erection of any structures." Pet. App. 55a. But the question presented will determine whether any injunction is warranted at all. And the injunction the Ninth Circuit affirmed—which prevents the City from regulating camping with bedding—cleanly presents the Eighth Amendment question. See *ibid.* Respondents do not dispute this Court's jurisdiction to review an operative injunction that currently restricts the City's ability to regulate camping on public property. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 308, 316-317 (1988) (reviewing permanent injunction that the Ninth Circuit affirmed with "slight modifications"). Nothing would be gained by waiting for the district court to fine-tune the injunction at the margins when a proper reading of the Cruel and Unusual Punishments Clause would preclude injunctive relief altogether.

D. Finally, respondents note (Opp. 36-37) that the Ninth Circuit affirmed the injunction only as to the public-camping ordinances because the named plaintiff with standing to challenge the separate public-sleeping ordinance had since passed away. Pet. App. 30a-34a. But respondents never challenge this Court's jurisdiction to review the constitutionality of the two ordinances that the Ninth Circuit invalidated. The absence of a respondent with standing to challenge

another ordinance is beside the point, particularly because the Ninth Circuit held that the Eighth Amendment applies to public camping and public sleeping in the same way. *Id.* at 46a-48a.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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