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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the enforcement of generally applicable laws regulating camping on public property constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment.

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OPINIONS BELOW

The Ninth Circuit's amended opinion, together with its order denying the City's petition for panel rehearing or rehearing en banc (Pet. App. 1a-162a), is reported at 72 F.4th 868. The district court's order on cross-motions for summary judgment (Pet. App. 163a-205a) is not reported but is available at 2020 WL 4209227. An earlier order of the district court on class certification (Pet. App. 206a-220a) is not reported but is available at 2019 WL 3717800.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2022. A petition for rehearing was denied on July 5, 2023 (Pet. App. 12a). The petition for a writ of certiorari was filed on August 22, 2023, and the petition was granted on January 12, 2024. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Pertinent statutes and ordinances are reproduced in an appendix to this brief. App., *infra*, 1a-6a.

STATEMENT

By its plain terms, the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits certain methods of punishment: those that are "cruel and unusual." But the Ninth Circuit has held that the Clause forbids governments from imposing *any* punishment—not fines, not short jail terms, not anything—for camping on public property when such conduct flows from the purported status of being involuntarily homeless. That holding defies the Eighth Amendment's text and history, as well as this Court's precedent.

The text itself exposes the Ninth Circuit's error in reading the Eighth Amendment to regulate the substantive scope of criminal responsibility. The Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Nothing in that language

immunizes certain conduct from all forms of punishment. The Amendment's three clauses set limits on bail, fines, and punishments. They do not prescribe which conduct governments may deem unlawful in the first place.

History corroborates that account. The Eighth Amendment carried forward language from the English Declaration of Rights, whose drafters recoiled at methods of torture and execution that were all too familiar to enemies of James II but abhorrent even to 17th-century sensibilities. The Framers shared their English forebears' concerns about barbarous punishments, such as "quartering, public dissection, and burning alive." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123 (2019). But the historical record reflects no hint that they sought to constrain Congress's prerogative to determine what conduct should be a crime.

Precedent confirms this focus on methods of punishment. In keeping with the Cruel and Unusual Punishments Clause's text and history, this Court has decided a litany of cases about the mode and severity of various punishments, including execution by firing squad and hard labor in chains. This case is straightforward under the test articulated and applied in those cases: Neither the civil fines imposed by petitioner Grants Pass for violating ordinances regulating camping on public property, nor short jail terms for serial violators, are cruel and unusual. This Court held as much in its first decision interpreting the Clause, *Pervear* v. *Commonwealth*, 72 U.S. (5 Wall.) 475 (1867), which rejected an Eighth Amendment challenge to a fine and a three-month jail term. And these punishments remain universal—nowhere near unusual—in the criminal codes of every State and the federal government.

The Ninth Circuit misread the Eighth Amendment to proscribe any punishment for public camping based on a distortion of this Court's decision in *Robinson* v. *California*, 370 U.S. 660 (1962). There, the Court held that the Eighth Amendment forbids criminalizing the mere "status" of being a drug addict—while making clear that it does not bar punishments for the acts of possessing or using drugs. *Id.* at 666-667. That holding does not apply here because this case concerns generally applicable prohibitions against the act of camping on public property—not any status crime. Given that public streets and parks "have immemorially been held in trust for the use of the public," *Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.), governments have the power—and indeed the obligation—to regulate the use of public property for the health, safety, enjoyment, and general welfare of the entire citizenry. This Court has therefore recognized that governments are "free to prevent people from blocking sidewalks, obstructing traffic," and interfering with the official and recreational purposes of public spaces. *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971).

Despite local governments' fundamental police power to preserve public spaces for all to use and enjoy, the Ninth Circuit stretched *Robinson*'s narrow holding that the Clause forbade punishing a particular status, decoupled from any conduct, into a sweeping constitutional rule that prohibits any punishment for purportedly involuntary acts that flow from a status. This rule has no basis in the Eighth Amendment's text, history, or tradition. And the Ninth Circuit could justify this extension only by misreading *Powell* v. *Texas*, 392 U.S. 514 (1968), a decision that has always been understood to mark the end of this Court's brief experiment in finding substantive limits

on the scope of criminal responsibility within the Eighth Amendment's prohibition of cruel and unusual punishments. Even though this Court has repeatedly and recently relied on the reasoning of the *Powell* plurality, *e.g.*, *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020), the Ninth Circuit combined the *Powell* dissent with dicta in a concurrence to divine a contrary rule—a doubly flawed approach to interpreting precedent.

Because the Ninth Circuit's approach is untethered from standard constitutional guideposts, its test has already proved unworkable in both theory and practice. The Eighth Amendment does not address whether and when "involuntary" conduct related to status can be punished. And the traditional tools of constitutional interpretation do not enable courts to determine whether camping on public property is truly involuntary, whether available shelters are adequate, or even which shelters to tally. The inability to draw principled, administrable lines has led to sweeping injunctions barring enforcement of basic laws protecting public health and safety, as well as an ever-present threat of litigation whenever a municipality tries to address the spread of encampments. Worse, the Ninth Circuit's mistaken view of the Eighth Amendment logically would immunize numerous other purportedly involuntary acts from prosecution, such as drug use by addicts, public intoxication by alcoholics, and possession of child pornography by pedophiles.

This Court declined to walk down that dangerous path more than 50 years ago in *Powell*. The last five years of the protracted trial run within the Ninth Circuit have confirmed that courts lack the institutional competence to serve as "the ultimate arbiter of the standards of criminal responsibility" with respect to

the exceedingly complex issue of homelessness. *Powell*, 392 U.S. at 533 (plurality opinion). And in stretching the Eighth Amendment, the Ninth Circuit has taken contested questions of social policy away from elected officials and created a paralysis that harms both those living in encampments and the general public. The Court should reject the Ninth Circuit's erroneous extension of *Robinson* and make clear that the Eighth Amendment does not prohibit enforcement of generally applicable camping ordinances.

A. Factual Background

Grants Pass is a small city of 38,000 people in southern Oregon. Pet. App. 13a. Like municipalities across the country, Grants Pass protects public health and safety by regulating the public's ability to camp or sleep in its outdoor spaces, including parks, trails, and sidewalks. *Id.* at 221a-224a.

Grants Pass has adopted three ordinances related to public sleeping and camping. The first prohibits sleeping "on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety." Grants Pass Municipal Code § 5.61.020(A). The second prohibits "[c]amping" on "any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct," § 5.61.030, with a "[c]ampsite" defined as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed," § 5.61.010(B). And the third prohibits camping specifically in the City's parks. § 6.46.090.

The City enforces these ordinances with fines that start at $295, with reductions for violators who plead out and increases for repeat violations. Grants Pass Municipal Code § 1.36.010(I)-(J). If a person has twice

been cited for violating park regulations within a one-year period, city officers have authority to issue an exclusion order barring that person from a city park for 30 days. § 6.46.350. A person who camps in a park after receiving such an order commits criminal trespass, which is punishable by a maximum of 30 days in jail and a $1,250 fine. Or. Rev. Stat. § 164.245; see §§ 161.615(3), 161.635(1)(c).

Before being enjoined in this litigation, the City enforced those ordinances with moderation, generally issuing fewer than 100 citations per year from 2013 to 2018. Pet. App. 17a n.4. Police-department policy also made clear that "[h]omelessness is not a crime" in Grants Pass and that police do "not use homelessness solely as a basis for detention or law enforcement action." J.A. 152. Officers were "encouraged to contact the homeless for purposes of rendering aid [and] support and for community-oriented policing purposes." J.A. 153. They also routinely handed out flyers listing many local resources available to help homeless people. J.A. 165-166; see J.A. 168-174. And when confronting encampments, officers were instructed to inform the City's homeless-liaison officer and not to "immediately remove or destroy" homeless persons' property. J.A. 155.

B. *Martin* v. *Boise*

In *Martin* v. *Boise*, 920 F.3d 584 (9th Cir. 2019), people living on the streets of Boise claimed that the Eighth Amendment forbids fines and short jail stints for public sleeping. *Id.* at 606. The Ninth Circuit agreed that any punishment, no matter how small, for this conduct would be cruel and unusual if the plaintiffs had "no access to alternative shelter." *Id.* at 615.

The Ninth Circuit in *Martin* reasoned 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.'" 920 F.3d at 616. *Martin* drew this principle from this Court's decision in *Robinson* and from the combined reasoning of Justice White's concurrence and Justice Fortas's dissent in *Powell*. *Id.* at 616-617.

Martin applied that rule to hold that Boise could not enforce its public-sleeping ordinance "'so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.'" 920 F.3d at 617 (brackets omitted). In calculating the available beds, the Ninth Circuit excluded open beds in religiously affiliated shelters, citing perceived Establishment Clause concerns. *Id.* at 609-610. The court left open the possibility of enforcement against "individuals who *do* have access to adequate temporary shelter" but "choose not to use it." *Id.* at 617 n.8. The court also reserved decision on cities' ability to prohibit public sleeping "at particular times or in particular locations," but did not elaborate on what restrictions might comport with its interpretation of the Eighth Amendment. *Ibid.*

The Ninth Circuit denied rehearing en banc in *Martin* over two dissents joined by six judges. One dissent canvassed the "text, tradition, and original public meaning" of the Eighth Amendment and found no authority for courts to impose "substantive limits on what conduct a state may criminalize." 920 F.3d at 599-602 (opinion of Bennett, J.). The other dissent explained that *Martin* invalidated the ordinances of "countless, if not all, cities within" the Ninth Circuit and would impose an "overwhelming financial responsibility to provide housing for or count the number of

homeless individuals within their jurisdiction every night" that would force cities to "abandon enforcement of a host of laws regulating public health and safety." *Id.* at 590-594, 599 (opinion of M. Smith, J.).

C. Procedural History

Grants Pass soon faced a copycat *Martin* suit. The original plaintiff, joined by respondents in an amended complaint, claimed that the City's public-sleeping, public-camping, and park-exclusion ordinances violate (as relevant) the Cruel and Unusual Punishments Clause. Pet. App. 19a. They promptly moved to certify a class of "[a]ll involuntarily homeless individuals living in Grants Pass." *Id.* at 20a.

The district court certified the proposed class. Pet. App. 206a-220a. According to the court, the Eighth Amendment claim concerned "city-wide practice[s]" in enforcing the public-sleeping and public-camping ordinances. *Id.* at 214a-215a. The court also asserted that all class members could prove that they were "involuntarily" homeless under *Martin* solely because "[t]here are more homeless individuals than shelter beds in the City of Grants Pass." *Id.* at 216a.

The district court granted summary judgment for respondents on their claim that enforcement of the City's ordinances constitutes cruel and unusual punishment. Pet. App. 163a-205a. The court held that all 602 class members had proved that their camping on public property would be involuntary on the theory that none of the shelter spaces in the vicinity qualified under *Martin*. Specifically, the court did not count 138 beds at Gospel Rescue Mission because of "substantial religious requirements," nearby campgrounds on federal land because they are outside the City's borders, a warming shelter because it is not open all

year, and a sobering center because it lacked beds. *Id.* at 179a-183a. The court subsequently entered a class-wide injunction barring Grants Pass from enforcing its public-camping ordinances during daytime hours without first giving a 24-hour warning, and at nighttime hours entirely. J.A. 190-191.

A divided panel of the Ninth Circuit affirmed the district court's rulings in large part as to the Cruel and Unusual Punishments Clause and remanded for further proceedings. Pet. App. 13a-58a. The majority held that the Clause applied to civil citations that can serve as the predicate for a later prosecution—here, for criminal trespass. *Id.* at 44a-46a. The majority then extended *Martin* from sleeping on public property to camping on public property with "rudimentary forms of protection from the elements." *Id.* at 57a; see *id.* at 47a-48a. The majority agreed with the district court that respondents need not introduce individualized evidence of involuntariness, that "there is no secular shelter space available to adults," and thus that the entire class is involuntarily homeless under the Eighth Amendment. *Id.* at 53a-54a. And the majority remanded with instructions for the district court to reconsider whether its injunction against the public-camping ordinances should extend to "the use of stoves or fires, as well as the erection of any structures." *Id.* at 55a. The majority also vacated summary judgment as to the public-sleeping ordinance because the only plaintiff with Article III standing to challenge that ordinance had passed away while the case was on appeal. *Id.* at 25a n.12. Finally, the majority did not resolve respondents' claim under the Eighth Amendment's Excessive Fines Clause. *Id.* at 56a.

Dissenting, Judge Collins echoed Judge Bennett's dissenting opinion in *Martin*, explaining that the Cruel and Unusual Punishments Clause governs punishments imposed after convictions, not what conduct can be prohibited in the first place. Pet. App. 94a. He also criticized *Martin* for its treatment of *Powell*—specifically, "combining *dicta* in a concurring opinion with a *dissent*," *id.* at 93a—to mint a new constitutional rule that the Eighth Amendment forbids punishment for any act that "is, in some sense, involuntary or occasioned by a compulsion." *Id.* at 95a (quotation marks omitted). And he explained that *Martin*'s reimagining of the Eighth Amendment has had "'dire practical consequences'" for hundreds of cities and millions of people since it was decided. *Ibid.*

The Ninth Circuit denied rehearing en banc over the dissent of 13 active judges (and four senior judges) who joined five opinions. Pet. App. 12a, 117a-162a. For example, Judge O'Scannlain, joined by 14 judges, blamed *Martin* for both "paralyzing local communities from addressing the pressing issue of homelessness, and seizing policymaking authority that our federal system of government leaves to the democratic process." *Id.* at 117a. Judge Milan Smith, joined by eight judges, denounced the "status quo" under *Martin* that "fails both those in the homeless encampments and those near them," as crime, drug use, and disease proliferate. *Id.* at 138a-139a. And Judge Bress, joined by 11 judges, wrote that the Ninth Circuit's "expanding constitutional common law" of the Eighth Amendment "adds enormous and unjustified complication to an already extremely complicated set of circumstances." *Id.* at 161a-162a; see also *id.* at 135a-137a (opinion of Graber, J.); *id.* at 157a-160a (opinion of Collins, J.). The panel majority filed a joint statement defending its decision as "modest," "exceptionally

limited," and compelled by this Court's decision in *Robinson* and the concurrence and dissent in *Powell*. *Id.* at 107a, 116a; see *id.* at 108a-110a.

SUMMARY OF ARGUMENT

A. Fines and short jail terms for camping on public property are not cruel and unusual punishments.

1. The Eighth Amendment regulates methods of punishment. At the Framing, ordinary speakers of English understood a prohibition on "cruel and unusual *punishments*," U.S. Const. Amend. VIII (emphasis added), to target the "infliction imposed in vengeance of a crime," not the crime itself, 2 Samuel Johnson, *A Dictionary of the English Language*, s.v. "punishment" (5th ed. 1773). The English Declaration of Rights—the model for the Eighth Amendment—as well as Founding-era debates and post-ratification commentary evince this same concern with barbarous methods of punishment that fell outside contemporary norms. With a single exception, this Court's decisions have addressed only "'the method or kind of punishment imposed for the violation of criminal statutes,'" not the scope of substantive criminal responsibility. *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977).

2. The punishments at issue here are not cruel and unusual. The City imposes base fines of $295 for violations of its public-camping ordinances. And repeat violators are subject to prosecution for criminal trespass, which is punishable by 30 days in jail and a $1,250 fine. Those punishments are neither "cruel" nor "unusual" in any ordinary sense of those words. For centuries, fines and imprisonment have been the default methods of punishing criminal offenses. This Court so held in *Pervear* v. *Commonwealth*, 72 U.S. (5 Wall.) 475 (1867), which rejected an Eighth

Amendment challenge to a $50 fine and three months at hard labor for bootlegging—"the usual mode adopted in many, perhaps, all of the States" for punishing criminal offenses. *Id.* at 480. Fines and jail terms remain constitutional today because they do not cruelly "superadd terror, pain, or disgrace" to the sentence and, far from having "long fallen out of use," appear in the criminal codes of all 50 States and the federal government. *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123-1124 (2019). In fact, the Eighth Amendment contemplates that fines can be imposed subject to a separate prohibition on excessiveness.

B. The Ninth Circuit committed a fundamental category error in understanding the Cruel and Unusual Punishments Clause to limit the scope of substantive criminal responsibility for the act of public camping. Although the Ninth Circuit asserted that its interpretation was compelled by this Court's decisions in *Robinson* v. *California*, 370 U.S. 660 (1962), and *Powell* v. *Texas*, 392 U.S. 514 (1968), neither decision establishes the principle "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." Pet. App. 50a (quoting *Martin* v. *Boise*, 920 F.3d 584, 616 (9th Cir. 2019)).

1. This Court's decisions do not support the Ninth Circuit's interpretation of the Eighth Amendment. In *Robinson*, the Court held that any punishment for "the 'status' of narcotic addiction" was cruel and unusual. 370 U.S. at 666-667. *Robinson* is in a class by itself: the only decision from this Court ever limiting under the Eighth Amendment what can be criminalized, rather than what the punishment can be. Even so, *Robinson* drew a clear line between status (which cannot be criminalized or punished) and conduct

(which can be). The fractured opinions in *Powell* left that act/status distinction where it stood. The five Justices who voted to reject an alcoholic's Eighth Amendment defense to public intoxication either endorsed *Robinson*'s act/status distinction or reasoned that the Eighth Amendment does not forbid punishment for voluntary acts. No majority rationale carried the day in *Powell*, but this Court has since relied only on Justice Marshall's plurality opinion in describing that case's conclusion. See, *e.g.*, *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020). In combining dicta in Justice White's concurrence with Justice Fortas's dissent, the Ninth Circuit shattered the settled understanding of *Powell*, misapplied the rule of *Marks* v. *United States*, 430 U.S. 188 (1977), and improperly elevated dicta of a single Justice to precedential status.

2. This Court should not extend *Robinson*. That decision, which made no attempt to identify the Eighth Amendment's original meaning or to apply precedent, is the only case in which the Court imposed substantive limits on criminal law under the Cruel and Unusual Punishments Clause. Extending that misguided analytical approach to constitutionalize an Eighth Amendment involuntariness defense would circumvent the constraints of other doctrines, such as due process. Because the Amendment itself does not speak to voluntariness or public camping, judges also have struggled to articulate workable metes and bounds for this unprecedented constitutional rule—with the predictable result being confusion and paralysis. And nothing in the logic of the Ninth Circuit's decisions stops at public camping. Just as *Robinson* prompted challenges to many other laws until *Powell* ended that brief experiment, an affirmance here could lead criminal defendants to claim that their unlawful

acts flowed from a status, such as being a drug addict, an alcoholic, or a pedophile.

ARGUMENT

The Eighth Amendment Does Not Prohibit The Enforcement Of Laws Regulating Camping On Public Property

The Ninth Circuit held that the City could not enforce its prohibitions on public camping when that conduct purportedly involves "an involuntary act or condition" that "is the unavoidable consequence of one's status or being." Pet. App. 50a (quoting *Martin* v. *Boise*, 920 F.3d 584, 616 (9th Cir. 2019)). That decision conflicts with the Eighth Amendment's text, historical practice, and this Court's precedent. Properly understood, the Cruel and Unusual Punishments Clause does not prohibit modest fines and short jail terms, which are neither cruel nor unusual by any established measure, for camping on public property.

The Ninth Circuit reached the opposite conclusion only by extending the prohibition on pure status crimes in *Robinson* v. *California*, 370 U.S. 660 (1962), to conduct-based regulations. This Court should reject that extension, which resurrects a moribund and misguided Eighth Amendment doctrine, overrides fundamental principles of federalism, foists an unworkable standard on courts and governments alike, prevents governments from proactively addressing the serious social policy problems associated with the homelessness crisis, and calls into doubt many other criminal prohibitions.

A. The City's Ordinances Do Not Inflict Cruel And Unusual Punishments

Text, history, and precedent all establish that the Eighth Amendment outlaws cruel and unusual *methods* of punishment. None of these traditional sources of constitutional meaning suggests that the Cruel and Unusual Punishments Clause places certain conduct entirely beyond the government's power to punish. Because the punishments here—fines and jail terms—are neither cruel nor unusual, the Clause does not invalidate the City's regulations of public camping.

1. The Eighth Amendment forbids cruel and unusual methods of punishment

a. Constitutional interpretation starts with the text. See, *e.g.*, *Gamble* v. *United States*, 139 S. Ct. 1960, 1965 (2019). The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. Amend. VIII. Because the Framers drafted the Bill of Rights "'to be understood by the voters,'" this Court looks to the provision's "'normal and ordinary as distinguished from technical meaning.'" *District of Columbia* v. *Heller*, 554 U.S. 570, 576 (2008). The Eighth Amendment's normal and ordinary meaning "provides no substantive limit on what conduct may be punished." Pet. App. 123a (opinion of O'Scannlain, J.).

The Eighth Amendment's reference to "punishments" focuses not on the nature of a criminal offense, but the sentence imposed for it. At the Founding, punishment meant "[a]ny pain or suffering inflicted on a person for a crime or offense," such as "loss of liberty by imprisonment" or "forfeiture of lands and goods." 2 Noah Webster, *An American Dictionary of the*

English Language, s.v. "punishment" (1828) (Webster); see 2 Samuel Johnson, *A Dictionary of the English Language*, s.v. "punishment" (5th ed. 1773) (Johnson) ("Any infliction imposed in vengeance of a crime."). Founding-era decisions also reflect that offenses and punishments are distinct concepts. In its seminal decision recognizing that federal courts lack authority to define new common-law crimes, this Court observed that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

That punishments are "inflicted" further underscores that the Eighth Amendment regulates the sentence as opposed to substantive criminal responsibility. From the Latin for "to strike against," the word "inflicted" means "[l]aid on; applied; as punishment or judgments." 1 Webster, s.v. "inflicted." That ordinary meaning can be seen in the Crimes Act of 1790, ch. 9, 1 Stat. 112, in which the First Congress specified that "the manner of inflicting the punishment of death, shall be by hanging the person convicted by the neck until dead." § 33, 1 Stat. 119.

A punishment is "cruel" if its method inflicts unnecessary "terror, pain, or disgrace." *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1124 (2019); accord *Wilkerson* v. *Utah*, 99 U.S. 130, 135-136 (1879). At ratification, as now, the word "cruel" meant "[p]leased with hurting others; inhuman; hard-hearted; barbarous," 1 Johnson, s.v. "cruel," or "[d]isposed to give pain to others, in body or mind; willing or pleased to torment, vex or afflict; inhuman; destitute of pity, compassion or kindness," 1 Webster, s.v. "cruel." See *Bucklew*, 139 S. Ct. at 1123 (relying on same definitions).

A punishment is "unusual" if its method is not "regularly or customarily employed." *Harmelin* v. *Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.). That understanding follows its ordinary definition as "[n]ot usual; not common; rare." 2 Webster, s.v. "unusual." A method could defy customary practice for one of two reasons. A once-common method might become unusual if the punishment "ha[s] long fallen out of use." *Bucklew*, 139 S. Ct. at 1123. Alternatively, a new method might be unusual when the government "innovate[s] or experiment[s] in criminal punishment." John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. L. Rev. 1739, 1809 (2008).

The reference to "cruel *and* unusual punishments" means that "[t]he punishment must meet both standards to fall within the constitutional prohibition." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (emphases omitted). That is how this Court typically reads "the conjunctive 'and.'" *United States* v. *Palomar-Santiago*, 593 U.S. 321, 326 (2021). And that is how this Court has long interpreted the Eighth Amendment. See, *e.g.*, *Bucklew*, 139 S. Ct. at 1124. For example, an early decision observed that electrocution "might be said to be unusual because it was new," but it was not cruel because New York sought "to devise a more humane method" than the traditional sentence of hanging. *In re Kemmler*, 136 U.S. 436, 447 (1890).

The remainder of the Eighth Amendment highlights an overall concern with authority to detain and punish, not with authority to define criminal offenses. See Pet. App. 123a (opinion of O'Scannlain, J.). Bail, fines, and punishments all "'traditionally have been associated with the criminal process.'" *Browning-*

Ferris Industries of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989). Because words are known by the company they keep, *e.g.*, *United States* v. *Balsys*, 524 U.S. 666, 673 (1998) (*noscitur a sociis*), the grouping of three aspects of criminal process confirms that the Eighth Amendment does not address the substantive question of what conduct could trigger a prosecution that later might implicate questions of bail, fines, and punishments, see *Browning-Ferris*, 492 U.S. at 275.

The Eighth Amendment's textual silence is not an invitation for courts to write their own rules of criminal responsibility on a blank slate. When the Constitution does not address an issue, the Framers left open "a debate reserved for the people and their representatives." *Bucklew*, 139 S. Ct. at 1123. The pro-democracy inference from silence is even stronger here because the Framers knew how to set limits on criminal liability, such as bills of attainder and ex post facto laws, U.S. Const. Art. I, § 9, cl. 3; § 10, cl. 1, and how to place conduct beyond the government's power to regulate, such as free speech and free exercise, Amend. I.

b. The Eighth Amendment's English antecedent, its ratification history, and post-ratification commentary all strengthen the understanding that the Cruel and Unusual Punishments Clause regulates methods of punishment, not substantive criminal responsibility.

The Framers modeled the Eighth Amendment on the English Declaration of Rights, which provides in relevant part that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 Wm. & Mary, sess. 2, ch. 2 (1689). Parliament adopted this provision in the

wake of the Glorious Revolution as a reaction to cruel sentencing practices under King James II. See *Harmelin*, 501 U.S. at 967 (opinion of Scalia, J.). The failed Monmouth rebellion against James II had been followed by the Bloody Assizes—the vicious torture and execution of hundreds for treason. *Id.* at 968. During his reign, the King's Bench also had a penchant for "'inventing' special penalties for the King's enemies * * * that were not authorized by common-law precedent or statute," including an infamous sentence that ordered a Protestant cleric, Titus Oates, to "be 'stript of [his] Canonical Habits'" for perjury and whipped annually in towns across England. *Id.* at 968-970. One or both of these historical events motivated the English Declaration of Rights. See *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977). Either way, the concern was the method of punishment—not Parliament's authority to prohibit particular conduct, such as treason or perjury. See *Martin*, 920 F.3d at 600-601 (Bennett, J., dissenting from denial of rehearing en banc).

At the time of the Founding, a majority of States had adopted their own constitutional provisions restricting punishments, with Virginia's prohibition on "cruel and unusual punishments" most closely following the English model. Va. Declaration of Rights § 9 (1776); see *Harmelin*, 501 U.S. at 966 (Scalia, J.). Patrick Henry invoked Section 9 at the Virginia ratifying convention in criticizing the proposed Constitution for its omission of a parallel provision, which he said would allow Congress to authorize "tortures" and "cruel and barbarous punishment." 3 Jonathan Elliot, *Debates on the Federal Constitution* 447 (2d ed. 1891) (Elliot). At the Massachusetts convention, a delegate similarly argued that, absent a check on "what kind of punishments shall be inflicted on persons convicted of

crimes," Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." 2 Elliot 111. Both critiques targeted the potential for cruel and unusual methods of punishment—a point that Henry drove home when predicting that Congress would be "wise" in its "definition of crimes" but "extremely dangerous to liberty" absent a constitutional check on its authority to invent "punishments." 3 Elliot 447.

James Madison filled this perceived gap by proposing a Bill of Rights that prohibited "cruel and unusual punishments." 1 Annals of Cong. 434 (1789). This provision "received very little debate in Congress." *Weems* v. *United States*, 217 U.S. 349, 368 (1910). One representative objected that the "words 'nor cruel and unusual punishments'" were "too indefinite." 1 Annals of Cong. 754. Another argued that cruel punishments, such as "having [criminals'] ears cut off," were sometimes necessary and that Congress should have the leeway to decide whether to adopt "a more lenient mode of correcting vice and deterring others." *Ibid.* The House committee was unpersuaded and endorsed the Eighth Amendment "by a considerable majority." *Ibid.* Again, the arguments against the Eighth Amendment focused on methods of punishment, not on "the substantive authority of Congress to criminalize acts." *Martin*, 920 F.3d at 602 (opinion of Bennett, J.).

The consensus view that the Eighth Amendment regulates methods of punishment persisted in the following decades. See *Coalition on Homelessness* v. *City and County of San Francisco*, 90 F.4th 975, 986-987

(9th Cir. 2024) (Bumatay, J., dissenting). For example, Justice Story pointed to "violent" and "vindictive" punishments under James II in explaining the genesis of the Eighth Amendment, which he believed "wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1896 (1833). Thomas Cooley suggested that "degrading punishments which in any State had become obsolete," including perhaps "the whipping-post and the pillory," would satisfy the two elements of cruelty and unusualness. Thomas Cooley, *Constitutional Limitations* 329-330 (1868). Other early commentators similarly understood the Eighth Amendment to "outlaw particular *modes* of punishment," *Harmelin*, 501 U.S. at 981 (opinion of Scalia, J.), such as "'the use of the rack or the stake'" and "'[b]reaking on the wheel,'" *Bucklew*, 139 S. Ct. at 1123 (citations omitted).

c. Text and history have informed this Court's recognition that the "'primary purpose'" of the Cruel and Unusual Punishments Clause "'has always been considered, and properly so, to be directed at the *method or kind* of punishment imposed for the violation of criminal statutes.'" *Ingraham*, 430 U.S. at 667 (emphasis added). With the exception of *Robinson* (discussed *infra*, pp. 30-32), the Court's decisions have hewed to that understanding.

Many of this Court's Eighth Amendment decisions concern the death penalty. Some considered whether the Eighth Amendment prohibited execution methods that depart from hanging, which was "the standard method of execution through much of the 19th century." *Glossip* v. *Gross*, 576 U.S. 863, 867 (2015). The

Court first rejected a challenge to the firing squad "as a mode of executing the death penalty." *Wilkerson*, 99 U.S. at 134-135. Later decisions upheld death by electrocution, *Kemmler*, 136 U.S. at 447, and lethal injection, *e.g.*, *Glossip*, 576 U.S. at 868-869. These methods were unusual at their inception but not cruel because such "technological innovations" sought to make executions less painful. *Bucklew*, 139 S. Ct. at 1124-1125. Other decisions have held that the death penalty is categorically cruel and unusual in relation to particular offenses or offenders, but do not forbid other methods of punishment for the same conduct. See, *e.g.*, *Kennedy* v. *Louisiana*, 554 U.S. 407, 438 (2008); *Roper* v. *Simmons*, 543 U.S. 551, 568 (2005).

Other cases address terms of imprisonment as a method of punishment. In the main, this Court has treated "the length of the sentence actually imposed" as "purely a matter of legislative prerogative." *Rummel* v. *Estelle*, 445 U.S. 263, 274 (1980); see, *e.g.*, *Ewing* v. *California*, 538 U.S. 11, 24-25 (2003) (plurality opinion); *Howard* v. *Fleming*, 191 U.S. 126, 135-136 (1903). But the Court has also interpreted the Eighth Amendment to "contai[n] a 'narrow proportionality principle,' that 'does not require strict proportionality between crime and sentence' but rather 'forbids only extreme sentences that are "grossly disproportionate" to the crime.'" *Graham* v. *Florida*, 560 U.S. 48, 59-60 (2010). In addition, the Court has "liken[ed] life-without-parole sentences imposed on juveniles to the death penalty itself" and placed certain categorical restrictions on that method of punishment. *Miller* v. *Alabama*, 567 U.S. 460, 474 (2012). These decisions set boundaries on "the most serious forms of punishment" but do not eliminate the government's power to punish altogether. *Graham*, 560 U.S. at 69.

Another category of cases addresses conditions of confinement. For example, an early decision invalidated a 15-year Philippine sentence to "hard and painful labor" while "chain[ed] night and day" at the wrist and ankle. *Weems*, 217 U.S. at 366. The Court also has held that the government must provide inmates with medical care and safe conditions of confinement, on the theory that the failure to do so "may actually produce physical 'torture or a lingering death.'" *Estelle* v. *Gamble*, 429 U.S. 97, 103 (1976) (quoting *Kemmler*, 136 U.S. at 447). Even so, this Court has made clear that such "'unnecessary and wanton infliction of pain'" come within the term "cruel and unusual *punishment*" only when prison officials deliberately inflict pain as a de facto addition to the sentence. *Wilson* v. *Seiter*, 501 U.S. 294, 298-300 (1991).

Across all of these decisions, this Court has applied the Cruel and Unusual Punishments Clause to the *punishment*—assessing the method either in general or as applied to the particular offense or offender. None of these decisions interprets the Cruel and Unusual Punishments Clause to limit what conduct can be deemed criminal in the first place.

2. Fines and jail terms are not cruel and unusual methods of punishment

Had the Ninth Circuit focused on the method of punishment, the Eighth Amendment analysis would have been straightforward: The punishments at issue here for public camping are neither cruel nor unusual by any established measure. The City enforces its public-camping ordinances through citations, which carry base fines of $295 that can be reduced to $180 for violators who plead out and can reach a maximum of $695 for a violator who has been convicted of the same offense in the past 12 months. Grants Pass

Municipal Code § 1.36.010(I)-(J). After two violations, a person who camps on public property can be subject to prosecution for criminal trespass, which is punishable by a maximum of 30 days in jail and a $1,250 fine. See *supra*, p. 7. The Cruel and Unusual Punishments Clause does not invalidate fines and jail terms—universal punishments imposed by every State and the federal government—for public camping or any other offense.

a. Fines and imprisonment have been unquestioned modes of punishment since well before the Eighth Amendment's ratification. Blackstone named "fine or imprisonment" among the standard punishments under English law. 4 William Blackstone, *Commentaries on the Laws of England* 371-372 (1769). In colonial America, "fines were the drudge-horse of criminal justice, probably the most common form of punishment." *Timbs* v. *Indiana*, 139 S. Ct. 682, 695 (2019) (Thomas, J., concurring in the judgment) (quotation marks omitted). Many low-level offenses in the Colonies also were "punished by commitment to jail, a workhouse, or a house of correction." *District of Columbia* v. *Clawans*, 300 U.S. 617, 624 (1937).

Early congressional statutes reflect this historical tradition. The First Congress imposed fines and terms of imprisonment for a wide range of offenses in the Crimes Act of 1790. Because the First Congress also framed and proposed the Eighth Amendment, this Act suggests that the Framers viewed these methods of punishment as constitutionally unproblematic. *Bucklew*, 139 S. Ct. at 1122; see *Town of Greece* v. *Galloway*, 572 U.S. 565, 576-577 (2014). Congress again authorized fines and terms of imprisonment as standard methods of punishing non-capital offenses in the Crimes Act of 1825, ch. 65, 4 Stat. 115, the first major

piece of federal criminal legislation following the Eighth Amendment's ratification.

This Court's earliest decisions establish that fines and jail terms are not cruel and unusual punishments. In *Pervear* v. *Commonwealth*, 72 U.S. (5 Wall.) 475 (1867), Massachusetts prosecuted a defendant for the "illegal sale and illegal keeping of intoxicating liquors." *Id.* at 476. The defendant claimed that a $50 fine and three months at hard labor were "excessive, cruel, and unusual" under the Eighth Amendment because the Commonwealth had no authority "to enforce morality" on the topic of alcohol. *Id.* at 477-478. The Court rejected the defendant's claim for two independent reasons. First, the Eighth Amendment did not apply to the States at the time, before the Fourteenth Amendment's ratification and modern incorporation doctrine. *Id.* at 479-480 & n.* (citing *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833)). Second, the Court went on to hold that the defendant had no Eighth Amendment defense in any event because the Court "perceive[d] nothing excessive, or cruel, or unusual" about "the fine and punishment in the case before us." *Id.* at 480. Even though the defendant had argued that his conduct should not be subject to punishment at all, the Court explained that the particular penalty of a fine and jail term was "the usual mode adopted in many, perhaps, all of the States" for punishing criminal offenses. *Ibid.*

This Court has continued to recognize that fines and jail terms are neither cruel nor unusual punishments. In *Weems*, the Court observed that *Pervear* had established that there is "nothing excessive, or cruel, or unusual in a fine of $50 and imprisonment at hard labor in the house of correction for three months"—"[a] decision," the Court emphasized, "from

which no one will dissent." 217 U.S. at 369. In *Badders* v. *United States*, 240 U.S. 391 (1916), the Court summarily rejected a challenge under the Cruel and Unusual Punishments Clause to a $7,000 fine for seven counts of mail fraud. *Id.* at 393-394. And in *Trop* v. *Dulles*, 356 U.S. 86 (1958), Chief Justice Warren stated that the government's "power to punish" includes "[f]ines, imprisonment and even execution * * * depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect." *Id.* at 100 (plurality opinion).

Early decisions from state courts likewise rejected claims that fines and jail sentences were cruel and unusual under the Eighth Amendment and its counterparts in state constitutions. In *Commonwealth* v. *Hitchings*, 71 Mass. 482 (1855), for example, the Supreme Judicial Court of Massachusetts held that a ten-dollar fine and a 30-day jail sentence "are clearly not cruel or unusual punishments," but instead "the lightest punishments known to our law." *Id.* at 486. Other courts made short work of similar challenges to fines and jail sentences. See, *e.g.*, *Whitten* v. *State*, 47 Ga. 297, 300-301 (1872) (six-month sentence, from which defendant could be released at any time upon payment of a $250 fine, was not among the "cruel and unusual punishments, such as disgraced the civilization of former ages"); *In re Bayard*, 63 How. Pr. 73, 78 (N.Y. 1881) (one-year sentence is "the ordinary kind of punishment for all minor offenses").

Today, fines and jail terms remain constitutional methods of punishment. The penalties at issue here are not cruel: They entail no "superadd[ition] of terror, pain, or disgrace" beyond the baseline for any other fine or jail sentence. *Bucklew*, 139 S. Ct. at 1124

(quotation marks omitted); cf. *Weems*, 217 U.S. at 381. They also are not unusual: As in 1867, fines and terms of imprisonment remain "the usual mode adopted in many, perhaps, all of the States" for punishing criminal offenses. *Pervear*, 72 U.S. (5 Wall.) at 480. For example, Oregon imposes fines and terms of imprisonment at graduated levels for all classes of felonies and misdemeanors. Or. Rev. Stat. §§ 161.605, 161.615, 161.625, 161.635. Every other State in the Nation authorizes such methods of punishment. See, *e.g.*, Ala. Code §§ 13A-5-6, 13A-5-7, 13A-5-11, 13A-5-12; Wyo. Stat. Ann. §§ 6-10-102, 6-10-103, 6-10-107. Congress, too, has set default maximum fines and terms of imprisonment ranging from $5,000 and five days for infractions to $250,000 and life sentences for Class A felonies. 18 U.S.C. §§ 3571, 3581.

A 30-day jail term also does not implicate any "narrow proportionality principle" forbidding "extreme sentences that are grossly disproportionate to the crime." *Graham*, 560 U.S. at 59-60 (quotation marks omitted). The Court need not address the issue because respondents never claimed that the jail terms at issue are disproportionate, J.A. 51-52, and the Ninth Circuit and district court accordingly never addressed proportionality, see Pet. App. 47a-55a, 176a-187a. In any event, a 30-day jail term for trespass on public property cannot be grossly disproportionate based on "the gravity of the offense and the severity of the sentence." *Graham*, 560 U.S. at 60. The only case where this Court invalidated a punishment for gross disproportionality concerned a life sentence for writing a worthless check where the defendant "was treated more severely than he would have been in any other State." *Solem* v. *Helm*, 463 U.S. 277, 300 (1983); see *id.* at 296-300.

b. Another portion of the Eighth Amendment—the Excessive Fines Clause—confirms that fines are a constitutional method of punishment. In *Bucklew*, this Court held that "[t]he Constitution allows capital punishment," observing that the Fifth Amendment "expressly contemplates that a defendant may be tried for a 'capital' crime and 'deprived of life' as a penalty, so long as proper procedures are followed." 139 S. Ct. at 1122. The inference here is even more direct: The Eighth Amendment itself expressly contemplates that fines may be imposed, so long as they are not excessive. Respondents here raised a separate excessive-fines claim that the Ninth Circuit did not reach. See *supra*, p. 10. If fines were a cruel and unusual method of punishment, the Excessive Fines Clause would be a dead letter.

B. The Ninth Circuit Misinterpreted The Eighth Amendment To Protect Purportedly Involuntary Camping On Public Property

The Ninth Circuit held that the Eighth Amendment invalidates restrictions on public camping. In its view, the Cruel and Unusual Punishments Clause prohibits enforcement of any law where the violation is the result of "an involuntary act or condition" that "is the unavoidable consequence of one's status or being." Pet. App. 50a (quoting *Martin* v. *Boise*, 920 F.3d 584, 616 (9th Cir. 2019)). That categorical rule has nothing to do with the method of punishment imposed, but instead prohibits any punishment at all for the conduct in question.

The Ninth Circuit insisted that this peculiar interpretation of the Cruel and Unusual Punishments Clause was "compel[led]" by this Court's decisions in *Robinson* v. *California*, 370 U.S. 660 (1962), and

Powell v. *Texas*, 392 U.S. 514 (1968). *Martin*, 920 F.3d at 616. But *Robinson* held only that governments cannot punish mere status (in contrast to conduct), and the fractured opinions in *Powell* did not disturb this act/status distinction. The Ninth Circuit's rule thus requires extending *Robinson*'s unorthodox analysis far beyond the Court's holding. That extension must stand or fall on its own terms applying traditional tools of constitutional interpretation. All of those tools refute rather than support the Ninth Circuit's rule.

1. Neither *Robinson* nor *Powell* held that the Eighth Amendment forbids punishment for involuntary conduct

a. *Robinson* involved a California statute providing that "'[n]o person shall * * * be addicted to the use of narcotics'" and mandating a 90-day sentence. 370 U.S. at 660 n.1. At trial, the judge instructed the jury that, even if there was no evidence that the defendant had used illegal drugs, he could be held liable for the "'continuing offense'" of being an addict and "'arrest[ed] at any time before he reforms.'" *Id.* at 662-663. This statute thus "ma[de] the 'status' of narcotic addiction a criminal offense," even absent "proof of the actual use of narcotics within the State's jurisdiction." *Id.* at 665-666.

The Court invalidated the statute under the Eighth Amendment. The Court reasoned that "narcotic addiction is an illness" and that "a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment." 370 U.S. at 667. Despite acknowledging that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," the Court

remarked that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Ibid.*

Robinson drew a bright line between punishment for mere status and punishment for conduct. The statute at issue there prohibited "'be[ing] addicted'" to narcotics independent of their use and possession. 370 U.S. at 660 n.1. So although *Robinson* held that punishment for "the 'status' of narcotic addiction" was cruel and unusual, the Court explained that California *could* punish addicts for engaging in drug-related acts—"for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." *Id.* at 666; see *id.* at 664-665. Justice Douglas wrote separately to emphasize that an addict's "acts of transgression" justify "punitive measures" even though he did "not see how under our system *being an addict* can be punished as a crime." *Id.* at 674 (concurring opinion). Justice Harlan also remarked that addiction that manifests as "use or possession of narcotics * * * may surely be reached by the State's criminal law." *Id.* at 678 (concurring opinion).

Only Justice White suggested that the Court's opinion might "cast serious doubt upon the power of any State to forbid the use of narcotics." 370 U.S. at 689 (dissenting opinion). But he did not interpret the decision as taking this step or believe that the Court would actually "forbid the application of the criminal laws to the use of narcotics under any circumstances." *Ibid.* He warned only that "the States, as well as the Federal Government, * * * will have to await a final answer in another case." *Ibid.*

b. The Court has revisited *Robinson* only once. More than 50 years ago, Leroy Powell urged the Court

to extend *Robinson* from status crimes to involuntary conduct that flows from status. *Powell*, 392 U.S. at 517 (plurality opinion). He argued that his alcoholism compelled his public intoxication and that any punishment (including his $20 fine) would be cruel and unusual under the Eighth Amendment. *Ibid.*

Justice Marshall, writing for a four-Justice plurality, rejected an involuntariness defense premised on the Eighth Amendment. Because the "primary purpose" of the Cruel and Unusual Punishments Clause "has always been considered, and properly so, to be directed at the method or kind of punishment," Powell had invoked the status exception articulated in *Robinson*. 392 U.S. at 531-532. But Powell did not fall within that exception because he "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion." *Id.* at 532. *Robinson*, Justice Marshall explained, stands for the proposition that "criminal penalties may be inflicted only if the accused has committed some act" that "society has an interest in preventing"—in "historical common law terms, has committed some *actus reus.*" *Id.* at 533. As the plurality noted, *Robinson* had not confronted the distinct "question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Ibid.*

The plurality also rejected Powell's attempt to extend *Robinson* from status crimes to involuntary conduct related to status. As applied to status crimes involving no conduct, *Robinson* brought "this Court but a very small way into the substantive criminal law." 392 U.S. at 533. But "were *Robinson* to be extended to" conduct, the plurality explained, the decision would lack "any limiting principle that would serve to

prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id.* at 533-534. Such an extension, Justice Marshall observed, also would override "[t]raditional common-law concepts of personal accountability and essential considerations of federalism," "write into the Constitution formulas" that are unworkable, and be "impossible to confine" to any particular context. *Id.* at 534, 537.

Justice Black, joined by Justice Harlan, concurred to underscore that *Robinson* (an opinion Justice Black joined) "explicitly limited [its] holding to the situation where no conduct of any kind is involved." *Powell*, 392 U.S. at 542. Accepting Powell's argument "would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision." *Ibid.* Justices Black and Harlan adhered to the "sound" and historically grounded distinction between "pure status crimes" and "crimes that require the State to prove that the defendant actually committed some proscribed act." *Id.* at 542-544. Holding that involuntary acts flowing from a status cannot be punished, Justice Black cautioned, "would have a revolutionary impact on the criminal law, and any possible limits proposed of the rule would be wholly illusory." *Id.* at 544.

Justice White, who concurred only in the result, sidestepped the question whether to extend *Robinson* given *Powell*'s facts. Initially, he suggested that the Eighth Amendment would protect public drunkenness when alcoholics "have no place else to go and no place else to be when they are drinking." *Powell*, 392 U.S. at 551. But he found this admittedly "novel

construction" of the Amendment "unnecessary to pursue at this point" because Powell had not proved that his alcoholism made him "unable to stay off the streets on the night in question." *Id.* at 552-554 & n.4.

Justice Fortas penned a four-Justice dissent advancing the theory that *Robinson* immunizes a person from punishment for "being in a condition he is powerless to change." *Powell*, 392 U.S. at 567. He acknowledged that "every State of the Union" prohibited public intoxication. *Id.* at 563. But Justice Fortas criticized the supposed "'futility of using penal sanctions to solve'" alcoholism or deter public intoxication effectively enough to justify the "tremendous burden upon the police" of enforcing these laws. *Id.* at 563-565. And he read *Robinson*, "despite its subtlety," to establish the principle that any punishment is cruel and unusual when a defendant "was powerless to choose not to violate the law." *Id.* at 567. Although Justice Fortas acknowledged that "the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1689 were initially directed to the type and degree of punishment inflicted," he thought that "medical and sociological data" about alcoholism "compel[led] the conclusion" that the Cruel and Unusual Punishments Clause protects public intoxication by alcoholics. *Id.* at 569-570.

c. *Powell* neither overruled *Robinson*'s act/status distinction nor extended *Robinson*'s holding to bar punishment for involuntary conduct. Although no rationale commanded a majority, the case's result was to reject an expansion of *Robinson*'s rule. The Court's judgment affirmed Powell's conviction for public intoxication despite his Eighth Amendment defense. 392 U.S. at 537 (plurality opinion).

Subsequent decisions leave no doubt that the *Powell* plurality embodies the correct statement of constitutional principles. In case after case, this Court has relied on Justice Marshall's plurality opinion and Justice Black's concurrence. See, *e.g.*, *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020); *Clark* v. *Arizona*, 548 U.S. 735, 768 n.38 (2006); *Montana* v. *Egelhoff*, 518 U.S. 37, 56 (1996) (plurality opinion); *id.* at 58 (Ginsburg, J., concurring in the judgment); *Jones* v. *United States*, 463 U.S. 354, 365 n.13 (1983); *Ingraham*, 430 U.S. at 659, 667, 670 n.39; *Marshall* v. *United States*, 414 U.S. 417, 427-428 (1974). No majority opinion has cited Justice White's concurrence or Justice Fortas's dissent.

This Court's decision in *Marks* v. *United States*, 430 U.S. 188 (1977), bolsters the conclusion that *Powell* did not undermine the act/status distinction in *Robinson*. *Marks* states that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193. In *Powell*, five Justices concurred in the judgment: the four who joined the plurality opinion applying the act/status distinction, 392 U.S. at 532, and Justice White, who voted to affirm on the ground that the Eighth Amendment does not protect voluntary conduct, *id.* at 553-554. The "lowest common denominator" supporting the judgment, *Nichols* v. *United States*, 511 U.S. 738, 745 (1994), was that *Robinson* does not bar punishment for voluntary acts, *Martin*, 920 F.3d at 591 (M. Smith, J., dissenting from denial of rehearing en banc). That holding in no way disturbed *Robinson*'s act/status distinction. Pet. App. 126a-127a (opinion of O'Scannlain, J.); *Manning* v. *Caldwell*, 930 F.3d 264,

290 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting).

Rather than identifying the "'position taken by those Members who concurred in the judgments on the narrowest grounds,'" *Marks*, 430 U.S. at 193, the Ninth Circuit combined dicta in Justice White's concurrence with Justice Fortas's dissent, thereby elevating the position of the Justices who *dissented* from the judgment while advancing the *broadest* reading of *Robinson*, Pet. App. 49a-50a. Both halves of that analysis are mistaken.

Under *Marks*, the Ninth Circuit should not have counted the dissenting Justices in determining the narrowest ground for the result *Powell* reached. Dissents, by definition, do not "concu[r] in the judgmen[t]." *Marks*, 430 U.S. at 193. And "'comments in [a] dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.'" *Georgia* v. *Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020). The Ninth Circuit nevertheless seized on such comments and "metamorphosize[d] the *Powell* dissent into the majority opinion." *Martin*, 920 F.3d at 591 (opinion of M. Smith, J.).

The Ninth Circuit also erred in giving precedential weight to Justice White's statements that the Eighth Amendment might protect involuntary conduct, which were dicta that he found "unnecessary to pursue at th[at] point" because the defendant had not proved that his public intoxication was actually involuntary. 392 U.S. at 553-554. This Court has long explained that dicta in *majority* opinions do not establish binding precedent. *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (Marshall, C.J.); see, *e.g.*, *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U.S. 701, 737 (2007). Surely, then, dicta in

a *concurring* opinion have no more sway over future courts. In combining Justice White's dicta with Justice Fortas's dissent, the Ninth Circuit was looking for precedent in all the wrong places.

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The ordinances here are constitutional under *Robinson*, which *Powell* did not disturb. The City's generally applicable public-camping ordinances do not prohibit the "status" of homelessness. The ordinances instead prohibit specific acts: "No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct." Grants Pass Municipal Code § 5.61.030; see § 6.46.090 (same for parks). The City also defines "campsite" solely in terms of conduct: "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof." § 5.61.010.

These generally applicable, conduct-based prohibitions do not implicate *Robinson*'s rule against status crimes, as the majority's and concurrences' repeated qualifications make clear. 370 U.S. at 667-668; *id.* at 674 (Douglas, J., concurring); *id.* at 678 (Harlan, J., concurring). In the words of the *Powell* plurality, the City's ordinances apply only once a person has "committed some *actus reus*" that "society has an interest in preventing," 392 U.S. at 533—namely, "occupy[ing] a campsite" on public property, § 5.61.030. *Robinson* therefore does not invalidate these regulations.

2. The Court should not extend *Robinson* beyond status crimes

Because *Robinson* does not forbid all punishment for purportedly involuntary conduct that is the by-product of a status, respondents bear but cannot carry the burden of justifying such a prohibition on its own merit. The Ninth Circuit's expansion of *Robinson* also undermines federalism, circumvents constraints of other constitutional provisions, has proved unworkable in practice, and would sweep across all areas of criminal law. This Court should again decline to extend *Robinson*, as the *Powell* plurality did.

a. From the start, *Robinson* was an outlier in reasoning and result. The decision did not address the Eighth Amendment's text, history, or tradition. 370 U.S. at 666-668. The Court's silence on these traditional sources of constitutional meaning marked a departure from its earlier decisions interpreting the Cruel and Unusual Punishments Clause. *E.g.*, *Wilkerson*, 99 U.S. at 134-137. Instead, *Robinson* relied principally on medical studies about addiction. 370 U.S. at 667 n.9. Even Justice White observed in *Robinson* that the case involved an "application of 'cruel and unusual punishment' so novel that [he] suspect[ed] the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty." *Id.* at 689 (dissenting opinion).

The majority opinion in *Robinson* cited only one Eighth Amendment decision, *Louisiana ex rel. Francis* v. *Resweber*, 329 U.S. 459 (1947), where this Court upheld Louisiana's ability to execute an inmate for murder after an initial botched electrocution because the second attempt would involve no "unnecessary pain" beyond that inherent in any death. *Id.* at 463

(plurality opinion); see *id.* at 470-471 (Frankfurter, J., concurring). *Robinson* could have cited *Resweber* only for the proposition that the Fourteenth Amendment incorporates the Eighth Amendment against the States. 370 U.S. at 666; see *id.* at 675 (Douglas, J., concurring); see also *Resweber*, 329 U.S. at 463 (plurality opinion). *Robinson* did not identify any precedent for interpreting the Cruel and Unusual Punishments Clause to place substantive limits on the definition of a criminal offense.

Robinson also adopted an argument that no party made. Robinson briefed the question of status crimes only under the Due Process and Equal Protection Clauses. See Brief for Appellant in *Robinson* v. *California*, O.T. 1961, No. 61-554, pp. 10-14. In addressing the Eighth Amendment, Robinson focused on the method of punishment and argued only that forcing an addict to go "cold turkey" in a jail cell entailed "intense mental and physical torment" on par with "the burning of witches at the stake." *Id.* at 30. And some have argued since *Robinson* that any prohibition on status crimes would have a more sensible footing in the Due Process Clause given the longstanding principle that a crime requires "some *actus reus*" and cannot hinge merely on a status or mental propensity to commit an offense. *Powell*, 392 U.S. at 533 (plurality opinion); see, *e.g.*, Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 Va. L. Rev. 2051, 2064 n.43 (2015); Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles*: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment*," 98 J. Crim. L. & Criminology 429, 484-487 (2008).

Robinson has remained an aberration under the Eighth Amendment. This Court's approach to

recognizing "substantive limits on what can be made criminal and punished as such" has been so "sparin[g]," *Ingraham*, 430 U.S. at 667, that no decision has repeated or expanded its analysis in the 60 years that *Robinson* has been on the books. Although the Court need not reconsider *Robinson* here because this case does not involve a status crime, there is no sound basis to extend its reasoning *further* given its incompatibility with the Eighth Amendment's original meaning and this Court's other decisions.

The Court would have occasion to revisit *Robinson* only if it (like the panel majority) were to construe that decision as establishing an Eighth Amendment prohibition on punishing purportedly involuntary conduct. Pet. App. 108a-110a (Silver and Gould, JJ., concurring in denial of rehearing en banc). If *Robinson* actually adopted that expansive view, the Court should overrule it. Such an interpretation of the Eighth Amendment would be "egregiously wrong." *Ramos* v. *Louisiana*, 140 S. Ct. 1390, 1413-1415 (2020) (Kavanaugh, J., concurring in part). That reading of *Robinson* also would "abando[n] its reasoning," which was expressly limited to status crimes. *Janus* v. *State, County and Municipal Employees*, 138 S. Ct. 2448, 2486 (2018). And it would give an outsized scope to *Robinson*—a "legal last-man-standing" for imposing substantive limits under the Eighth Amendment. *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446, 458 (2015). That analytical approach has been "nonexistent in practice" for six decades and thus could not have created any legitimate reliance interests. *Edwards* v. *Vannoy*, 593 U.S. 255, 272 (2021).

b. The Ninth Circuit's extension of *Robinson* also undermines "essential considerations of federalism." *Powell*, 392 U.S. at 535 (plurality opinion). The

Constitution's division of labor allows legislatures to decide questions of criminal responsibility in the first instance, subject to narrow constitutional backstops. See *supra*, p. 19. The Ninth Circuit's interpretation of the Eighth Amendment scuttles that allocation of responsibility. Using the Eighth Amendment as a vehicle to constitutionalize protection for involuntary conduct presents all the dangers of judicial policymaking, but without the corresponding guardrails limiting courts' recognition of rights under the Due Process Clause.

This case involves the fundamental police power that all States possess to preserve public sidewalks, parks, schoolgrounds, and other spaces for the use and enjoyment of the general public, free from obstruction, harassment, and inconvenience. States Cert. Br. 12-13. And in our system of federalism, States are entrusted to make policy judgments about whether and when to excuse trespass on public property from criminal responsibility. Oregon, for example, recognizes a "necessity" defense to illegal camping, but only upon a greater showing of necessity than the Ninth Circuit requires and after considering harms the Ninth Circuit ignores. *State* v. *Barrett*, 460 P.3d 93, 96 (Or. App. 2020); see Or. Rev. Stat. § 161.200.

Any argument that the Constitution forbids punishing purportedly involuntary conduct would sound more in due process. This case presents no such issue because respondents dismissed their substantive-due-process claim with prejudice. J.A. 188. But had respondents pressed such a claim, they would have faced a daunting standard. This Court has interpreted the Due Process Clause to forbid state criminal laws that "offen[d] some principle of justice so rooted in the traditions and conscience of our people as to be ranked

as fundamental." *Medina* v. *California*, 505 U.S. 437, 445 (1992) (quoting *Patterson* v. *New York*, 432 U.S. 197, 201-202 (1977)). Because this Court does not lightly manufacture constitutional defenses, challengers have a heavy burden to prove that "a rule of criminal responsibility is so old and venerable—so entrenched in the central values of our legal system—as to prevent a State from ever choosing another." *Kahler*, 140 S. Ct. at 1028; see also *Egelhoff*, 518 U.S. at 43-44 (plurality opinion).

Neither the Ninth Circuit nor respondents have ever attempted to identify an old, venerable, and entrenched prohibition on "punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." Pet. App. 50a (quoting *Martin*, 920 F.3d at 616). And the City is aware of no "'historical practice,'" *Kahler*, 140 S. Ct. at 1027, that authorizes courts to override the people's representatives' "tough compromises between the goals of the criminal law and principles of personal accountability," Low & Johnson, *supra*, at 2063. Through its novel use of the Eighth Amendment, the Ninth Circuit bypassed the limitations this Court applied in *Kahler* on judicial imposition of a one-size-fits-all rule under the Constitution.

Nor could respondents argue that a right to camp on public property is "'deeply rooted in this Nation's history and tradition,'" as required to entrench a right in the Due Process Clause and thereby remove an issue from the democratic process. *Washington* v. *Glucksberg*, 521 U.S. 702, 720-721 (1997). From the Founding, state and local governments have restricted sleeping and camping on public property to protect public health and safety, keep public thoroughfares clear, and safeguard official and

recreational uses. See *Chicago* v. *Morales*, 527 U.S. 41, 104 & nn.2-4 (1999) (Thomas, J., dissenting); *Coalition on Homelessness*, 90 F.4th at 987-989 (Bumatay, J., dissenting). One early statute, for instance, punished "all persons * * * placing themselves in streets, highways, or other roads, to beg" with up to one month in jail. Act of Feb. 21, 1767, ch. 555, § 1, 1767 Pa. Laws 268-269. The federal government exercises this same prerogative to preserve public spaces for public use. See, *e.g.*, 18 U.S.C. § 1863; *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (upholding National Park Service regulation banning public camping in Lafayette Park). These laws of course must adequately define the prohibited conduct. *Papachristou* v. *Jacksonville*, 405 U.S. 156, 162 (1972). But the Court has never suggested that the Constitution secures a right to camp on public property.

c. The Ninth Circuit's decisions have proved practically unworkable. Because nothing in the Eighth Amendment speaks to whether and when the government can prohibit public camping, the traditional toolkit of constitutional interpretation does not guide courts in expounding a voluntariness principle. The lack of constitutional foundation has thrust federal courts into the inappropriate role of legislating homelessness policy and yielded a host of complex rules that micromanage local governments on that pressing issue. Federal judges have neither the authority nor the competence to craft elaborate municipal codes under the banner of the Eighth Amendment.

i. Defining involuntariness—the threshold question under *Martin*—raises fundamental moral and policy questions that the Cruel and Unusual Punishments Clause does not answer. Because "ideas of free

will and responsibility" always "deman[d] hard choices among values, in a context replete with uncertainty," the articulation of such doctrines are "a project for state governance, not constitutional law." *Kahler*, 140 S. Ct. at 1037. Legislatures can choose, for example, among different conceptions of insanity relating to the defendant's moral capacity, cognitive capacity, impulse control, and mental health. See *id.* at 1036; *Clark*, 548 U.S. at 749; *Leland* v. *Oregon*, 343 U.S. 790, 800-801 (1952). A voluntariness standard likewise subsumes issues of morality, cognitive ability, impulsivity, and mental illness. *Powell*, 392 U.S. at 534-535 (plurality opinion). And "the Constitution 'does not mandate adoption of any one penological theory,'" which means that the people's representatives can consider "a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation," in defining criminal offenses and affixing punishments. *Ewing*, 538 U.S. at 25 (plurality opinion).

Courts also have no discernible standards by which to judge involuntariness. As predicted shortly after *Robinson*, any extension of that decision to involuntary conduct "would require a complex factual determination of the subjective motives of the person as well as his capacity to control his conduct." *Hutcherson* v. *United States*, 345 F.2d 964, 970 (D.C. Cir. 1965) (Burger, J., concurring). One need look no further than the separate opinions in *Powell*. While Justices White and Fortas disagreed with each other about whether the defendant had proved his public intoxication was involuntary, neither pointed to anything in the Eighth Amendment that dictates either conception of voluntariness. 392 U.S. at 552-553 (White, J., concurring in the result); *id.* at 568 & n.31 (Fortas, J., dissenting).

ii. Given the lack of clear judicial standards, the voluntariness standard has "handcuffed local jurisdictions as they tr[y] to respond to the homelessness crisis." Pet. App. 142 (opinion of M. Smith, J.). City officials are not able to "determine voluntariness on the ground and in the course of interactions with persons experiencing homelessness." San Francisco Cert. Br. 11. They do not know whether the person has previously turned down a shelter offer, *ibid.*, refuses to look for shelter because (like one respondent here) her Rottweiler would not be able to stay with her, J.A. 14-15, or has been removed from a shelter "for inability or refusal to abide by even minimal behavioral rules," LA Alliance Cert. Br. 12. And even if governments could reliably determine voluntariness, they lack the resources to undertake the "monumentally difficult" task of counting "available shelter beds" and "homeless residents" on a nightly basis. Los Angeles Cert. Br. 14. The resulting paralysis has prevented cities from addressing encampments that present serious dangers to both those living in them and the general public. See Newsom Cert. Br. 11.

Moreover, homelessness is not administrable as a "status" in the sense that this Court used the term in *Robinson*, which compared drug addiction to "an illness which may be contracted innocently or involuntarily." 370 U.S. at 667. Homelessness is not an immutable characteristic or static diagnosis. See *Tobe* v. *Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995); *Joyce* v. *City and County of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994). Rather, it is a complex constellation of individualized social, economic, geographic, and other factors. Pet. App. 140a (opinion of M. Smith, J.). Nor does any agreed-upon definition exist. For example, federal law provides at least three different definitions of homelessness, depending on the context.

42 U.S.C. § 11434a(2); 24 C.F.R. § 582.5; 24 C.F.R. § 578.7(c)(2)(i). The Eighth Amendment, in contrast, does not provide even one.

Still other questions are left unanswered by traditional Eighth Amendment principles. For example, the Ninth Circuit has arbitrarily limited the relevant shelters to those within each city's limits. Pet. App. 21a-23a. As Judge Collins noted, there is no reason why an inquiry into a person's ability "to avoid violating the law must be artificially constrained to only those particular options that suit the [person's] geographic or other preferences." *Id.* at 91a (dissenting opinion). Nor does the Eighth Amendment provide any insight into what forms of shelter are "adequate." *Martin*, 920 F.3d at 617 n.8; see Phoenix Cert. Br. 22-23. Governments have heard claims that shelter is inadequate because a person cannot bring her pets, must follow a curfew, or must sleep in sex-separated quarters. International Municipal Lawyers Assn. Cert. Br. 22; see, *e.g.*, Chico Cert. Br. 19; League of Oregon Cities Cert. Br. 4-5; Phoenix Cert. Br. 18-19. Adding to the complexity, the Ninth Circuit has imported the *Lemon* test into the Eighth Amendment, ignoring available beds in religious shelters to avoid perceived establishment concerns. *Martin*, 920 F.3d at 610 (citing *Inouye* v. *Kemna*, 504 F.3d 705, 712-713 (9th Cir. 2007) (in turn citing *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971))).

iii. The consequences have been predictable, if tragic: "practical havoc in courts and on the ground in municipalities across the Ninth Circuit." San Francisco Cert. Br. 6. As the *Martin* dissenters predicted, public officials have been compelled to "abandon enforcement of a host of laws regulating public health and safety." 920 F.3d at 594 (opinion of M. Smith, J.).

Major cities have come under sweeping classwide injunctions. San Francisco Cert. Br. 10; Phoenix Cert. Br. 23. Encampments have multiplied unchecked throughout the West because generally applicable restrictions on public camping no longer play their critical deterrent role, resulting in spikes in violent crime, drug overdoses, disease, fires, and hazardous waste. Pet. App. 139a (opinion of M. Smith, J.); see, *e.g.*, Newsom Cert. Br. 8-10. And the Ninth Circuit's decision to impose one policy approach—affirmative government assistance with housing-first programs and low-barrier shelters—above all other policy solutions has been counterproductive, as supposedly "inadequate" shelter beds remain empty and more people languish on the streets given "the high rate of shelter offers that are declined." International Municipal Lawyers Assn. Cert. Br. 22. This "is a status quo that fails both those in the homeless encampments and those near them." Pet. App. 139a (opinion of M. Smith, J.).

A proper interpretation of the Eighth Amendment would return traditional police powers to state and local governments within the Ninth Circuit. See *supra*, p. 41. At all levels of government, officials have determined that restrictions on public camping serve important health and safety purposes. See, *e.g.*, National Park Service, *Record of Determination for Clearing the Unsheltered Encampment at McPherson Square and Temporary Park Closure for Rehabilitation* (Feb. 13, 2023), http://tinyurl.com/2s45d7ma. The City does not ask this Court to create any new authority, but only to restore standard tools that governments routinely use across the rest of the country to preserve public spaces for the entire community.

d. The Ninth Circuit's rule casts doubt on numerous other prohibitions. As commentators have recognized,

overly broad readings of *Robinson* "could provide the basis for constitutionalizing the entire field of criminal responsibility." Erik Luna, "The Story of *Robinson*: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes," in *Criminal Law Stories* 47, 67 (2013). That holds true for the notion 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. Nothing in the Amendment's text, history, or tradition would cabin this principle to public camping. Any decision resolving to go this far but no further would be "limitation by fiat," *Powell*, 392 U.S. at 534 (plurality opinion), not by the Eighth Amendment itself.

For starters, the logic of *Martin* covers any and all "'universal and unavoidable consequences of being human.'" 920 F.3d at 617. This rule "inevitably" extends to "public defecation and urination." *Id.* at 596 (opinion of M. Smith, J.); see *Mahoney* v. *Sacramento*, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020). Without an effective way to deter this conduct, biohazards litter public spaces and contaminate water systems across the West. See States Cert Br. 8.

The Ninth Circuit's rule also contains no logical stopping point. After *Robinson*, some asserted that addiction should excuse defendants of any criminal responsibility for not only drug use, but also "armed robbery or trafficking in drugs" to fund one's addiction. *United States* v. *Moore*, 486 F.2d 1139, 1260 (D.C. Cir. 1973) (en banc) (Bazelon, C.J., concurring in part and dissenting in part). Others argued that public intoxication by alcoholics was beyond the government's power to punish. *Powell*, 392 U.S. at 567-568 (Fortas, J., dissenting). And defendants with compulsive

sexual disorders asserted protection for possession of child pornography, *United States* v. *Black*, 116 F.3d 198, 201 (7th Cir. 1997), and even sexual assaults, *State* v. *Little*, 261 N.W.2d 847, 851-852 (Neb. 1978). A proper interpretation of the Eighth Amendment heads off such claims at the pass.

CONCLUSION

The homelessness crisis is a significant challenge for communities large and small throughout the Nation. But "[n]ot every challenge we face is constitutional in character." Pet. App. 162a (opinion of Bress, J.). And the solution is not to stretch the Eighth Amendment beyond its limits and place the federal courts in charge of this pressing social problem. Enforcement of generally applicable laws regulating camping on public property through modest punishments is neither cruel nor unusual. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

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City of Grants Pass Municipal Code § 1.36.010. Violation—Penalty

* * *

I. WRITTEN WARNINGS AND PRIOR OFFENSES: The Base Fine and the amount of any reductions shall be increased:

1. By $200 if the person issuing the citation notes on the citation that the defendant was warned of the violation in writing not less than 2 days prior to issuance of the citation and the person issuing the citation notes that on the citation.

2. By $400 if the defendant has been convicted for the same offense within the previous 12 months and the person issuing the citation notes that on the citation.

J. BASE FINE FOR VIOLATIONS OF THE GRANTS PASS DEVELOPMENT CODE AND MUNICIPAL CODE: Except for those misdemeanors noted in Chapter 5.57—Regulation of City Parks and Public Property, violations noted in Subsections K herein, and except for violations of Chapter 6.04—"Restricted Parking", which have specific parking penalties, the Base Fine for 5.57.040 (Vandalism) 5.57.050 (Dumping Refuse or Debris in Parks or Public Spaces) 5.57.060 (Offensive Littering; Violation) 5.57.070 (Water Pollution; Violation) 5.57.100 (Public Urination and Defecation; Violation) 5.57.110 (Public Indecency; Violation) 5.57.160 (Releasing Animals into City Parks or Public Spaces; Violation) 5.57.170 (Molesting Animals in City Parks or Public Spaces; Violation) or any other violation of the provisions of the Municipal Code (including the provisions of the Grants Pass Development Code) shall be $295

(this includes state and county assessments). Upon a plea of guilty to a 1st offense for the particular violation, the penalty may be reduced by Court personnel to $180 (this includes state and county assessments). Upon a plea of guilty to a 2nd offense for the same violation, the penalty may be reduced by Court personnel to $225 (this includes state and county assessments). The Base Fine and any penalty reduction shall be increased a provided in Subsection I. (Ord 5369 § 02, 2006; Ord. 5555 § 16, 2012, Ord. 23-5859)

* * *

City of Grants Pass Municipal Code § 5.61.010. Definitions

Unless the context requires otherwise the following definitions apply to Chapter 5.61.

A. "To Camp" means to set up or to remain in or at a campsite.

B. "Campsite" means any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

City of Grants Pass Municipal Code § 5.61.020. Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited

A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.

B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.

C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

City of Grants Pass Municipal Code § 5.61.030. Camping Prohibited

No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct, unless (i) otherwise specifically authorized by this Code, (ii) by a formal declaration of the City Manager in emergency circumstances, or (iii) upon Council resolution, the Council may exempt a special event from the prohibitions of this section, if the Council finds such exemption to be in the public interest and consistent with Council goals and notices and in accordance with conditions imposed by the Community Services Director. Any conditions imposed will include a condition requiring that the applicant provide evidence of adequate insurance coverage and agree to indemnify the City for any liability, damage or expense incurred by the City as a result of activities of the applicant. Any findings by the Council shall specify the exact dates and location covered by the exemption. (Ord. 5475 §7, 2009)

City of Grants Pass Municipal Code § 5.61.050. Removal of Campsite on Public Property (Ord. 19-5752)

Upon discovery of a campsite on public property, removal of the campsite by the Police Department may occur under the following circumstances:

A. Prior to removing the campsite, the City shall post a notice, 24-hours in advance.

B. At the time a 24-hour notice is posted, the City shall inform a local agency (delivering social services to homeless individuals) of the location of the campsite.

C. After the 24-hour notice period has passed, the Police Department is authorized to remove the campsite and all personal property related thereto.

City of Grants Pass Municipal Code § 6.46.090. Camping in Parks

A. It is unlawful for any person to camp, as defined in GPMC Title 5 within the boundaries of the City parks. (Ord. 19-5752, 2019)

B. Overnight parking of vehicles shall be unlawful. For the purposes of this section, anyone who parks or leaves a vehicle parked for two consecutive hours or who remains within one of the parks as herein defined in this section for two consecutive hours, without permission from the City Council, between the hours of midnight and 6:00 a.m. shall be considered in violation of this Chapter. (Ord. 3869 § 11, 1972)

City of Grants Pass Municipal Code § 6.46.350. Temporary Exclusion from City Park Properties

An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from all City Park properties for a period of 30 days, if within a one-year period the individual:

A. Is issued 2 or more citations for violating regulations related to City Park properties, or

B. Is issued one or more citations for violating any state law(s) while on City Park property.

(Ord. 5381 § 18, 2006)

Or. Rev. Stat. § 161.615. Sentences for Misdemeanors

Sentences for misdemeanors shall be for a definite term. The court shall fix the term of imprisonment within the following maximum limitations:

(1) For a Class A misdemeanor, 364 days.

(2) For a Class B misdemeanor, 6 months.

(3) For a Class C misdemeanor, 30 days.

(4) For an unclassified misdemeanor, as provided in the statute defining the crime.

Or. Rev. Stat. § 161.635. Misdemeanors; Fines

(1) A sentence to pay a fine for a misdemeanor shall be a sentence to pay an amount, fixed by the court, not exceeding:

(a) $6,250 for a Class A misdemeanor.

(b) $2,500 for a Class B misdemeanor.

(c) $1,250 for a Class C misdemeanor.

(2) A sentence to pay a fine for an unclassified misdemeanor shall be a sentence to pay an amount, fixed by the court, as provided in the statute defining the crime.

(3) If a person has gained money or property through the commission of a misdemeanor, then upon conviction thereof the court, instead of imposing the fine authorized for the offense under this section, may sentence the defendant to pay an amount fixed by the court, not exceeding double the amount of the defendant's gain from the commission of the offense. In that event, ORS 161.625(4) and (5) apply.

(4) This section does not apply to corporations.

Or. Rev. Stat. § 164.245. Criminal Trespass in the Second Degree

(1) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in a motor vehicle or in or upon premises.

(2) Criminal trespass in the second degree is a Class C misdemeanor.