No. 19-247

In The Supreme Court of the United States

CITY OF BOISE,

Petitioner,

v.

ROBERT MARTIN, LAWRENCE LEE SMITH, ROBERT ANDERSON, JANET F. BELL, PAMELA S. HAWKES, AND BASIL E. HUMPHREY,

Respondents.

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

BRIEF OF STATES OF IDAHO, ALASKA, INDIANA, LOUISIANA, NEBRASKA, SOUTH DAKOTA, AND TEXAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE* STATES[1]

The States of Idaho, Alaska, Indiana, Louisiana, Nebraska, South Dakota, and Texas respectfully submit this brief as *amici curiae* in support of the petitioner.

The interest of the *amici curiae* rests on the fundamental principle enshrined in the Tenth Amendment to the U.S. Constitution that the states have comprehensive rights in fashioning their rules for the betterment of the health, safety, and general welfare of their inhabitants. The broad latitude of the states, necessary to deal with difficult legal problems and rapidly developing issues, has been likened to a laboratory of democracy. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015); *Oregon v. Ice*, 555 U.S. 160, 171 (2009); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Homelessness is a complex issue that challenges states and local governments. States and local governments have attempted a myriad of solutions. With its decision in this case, the Ninth Circuit severely cabins the ability of local governments and states to address this ongoing and difficult dilemma. The Ninth Circuit's decision prevents states from enforcing necessary public health and safety laws prohibiting sleeping and camping in certain circumstances, and it has also raised the specter of unconstitutionality over a wide

[1] Per Supreme Court Rule 37.2(a), counsel of record for all parties received timely notice of *amici curiae*'s intention to file this brief and have filed written blanket consents.

range of vital criminal laws, including the basic law of trespass.

States' rights under the Tenth Amendment exist in balance with the substantive limitations on criminal law imposed by the Cruel and Unusual Punishment Clause of the Eighth Amendment. The U.S. Supreme Court set the balance in *Robinson v. California*, 370 U.S. 660 (1962), holding that criminal penalties may not be imposed based on an individual's *status*. *Id.* at 666-67. But states may prohibit *conduct*. By holding that criminal penalties also may not be imposed for *involuntary conduct derivative* of an individual's *status*, the Ninth Circuit swung a wrecking ball through states' rights under the Tenth Amendment to protect public health and safety and to fashion their criminal laws. If the Ninth Circuit's decision stands, many important state laws and regulations could be deemed unconstitutional if the conduct prohibited is found to be the involuntary product of a compulsion stemming from an individual's status, including prohibitions on: (1) homeless individuals camping on highways, rest areas, public memorials, state capitol grounds, and certain recreational areas; (2) other "biologically compelled" acts such as public urination, defecation and public sex acts; and (3) criminal acts such as murder, trespass, drug use, and child sex abuse.

Concerns about this slippery slope are not new. Five U.S. Supreme Court Justices expressed these very concerns in the foundational cases underpinning the Ninth Circuit's decision. *See Robinson*, 370 U.S. at 689 (White, J., dissenting) (the decision "cast[s] serious

doubt upon the power of any State to forbid the use of narcotics under the threat of criminal punishment"); *Powell v. Texas*, 392 U.S. 514, 534 (1968) (plurality) (if a chronic alcoholic cannot be convicted of drinking in public, "it is difficult to see how a State can convict an individual for murder, if that individual . . . suffers from a 'compulsion' to kill . . . "); *Powell*, 392 U.S. at 545 (Black, J., with Harlan, J., concurring) ("[E]ven if [the Court] were to limit any holding in this field to 'compulsions' that are 'symptomatic' of a 'disease,' . . . the sweep of that holding would still be startling."). And courts have indeed warded off attempts by criminal defendants to escape liability by arguing their conduct was the product of a compulsion by maintaining the line the U.S. Supreme Court set in *Robinson*. Yet the Ninth Circuit swept all this aside in favor of substituting its judgment for that of states and local governments.

The effects of the Ninth Circuit's decision are not confined to its circuit. Its interpretation of the Eighth Amendment has the potential to impact the authority of every state in the nation. For example, the Fourth Circuit, sitting *en banc*, recently departed from other federal courts of appeals to hold that states may not impose criminal penalties in certain circumstances for conduct derivative of an individual's status. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 282 n.17 (4th Cir. 2019) (*en banc*) (favorably citing the Ninth Circuit's *Martin* decision in support of its conclusion).

Given the immediate grave effects of the Ninth Circuit's decision and the potential for it to upend the states' ability to create and enforce their most foundational public health and safety laws, the *amici* states have a clear interest in this matter. The Court should grant the City of Boise's petition for certiorari.

SUMMARY OF THE ARGUMENT

In *Martin v. City of Boise*, the Ninth Circuit addressed a lawsuit filed by certain homeless individuals arguing that citations issued to them pursuant to two city ordinances were unconstitutional under the Cruel and Unusual Punishment Clause of the Eighth Amendment. One ordinance made it a misdemeanor to camp on any streets, sidewalks, parks or public places (elementary bedding, such as a blanket, could trigger enforcement), Pet. App. 35a, 64a, and the other banned "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof," *id.* (quoting Boise City Code § 6-01-05). Both of these ordinances applied equally to anyone in violation of them.

Even though the case went to the Ninth Circuit following summary judgment on a procedural issue, the Ninth Circuit ruled on the merits, holding "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property" based on its

conclusion that the Eighth Amendment prohibited the imposition of sanctions for involuntary conduct stemming from an individual's status. Pet. App. 62a. The Ninth Circuit mandated a two-part analysis to determine whether camping laws could be enforced against a homeless individual: (1) does the number of homeless individuals in the jurisdiction exceed the number of shelter beds; and (2) is shelter "practically available" to the individual. Pet. App. 62a-65a.

This Court should grant certiorari for the reasons stated by the City of Boise in its Petition for Certiorari and to appropriately limit the Ninth Circuit's decision from impermissibly infringing upon states' core public safety rights under the Tenth Amendment. The decision has serious consequences for the rights and authority of the states to develop and enforce laws necessary for the health and welfare of their populations, both as to laws prohibiting camping and as to laws prohibiting criminal acts such as murder, child sex abuse, and rape.

In a post-*Martin* world, states are effectively prohibited from enforcing important camping laws, such as laws prohibiting camping in rest areas, along highways, and on significant state properties, as to individuals who are homeless.[2] While the Ninth Circuit suggested that its analysis would leave governments able to enforce their camping laws in certain

[2] Though beyond the scope of this brief, it is worth noting that the Ninth Circuit's decision calls federal prohibitions on camping at places like the National Mall and Memorial Parks into question. *See* 36 C.F.R. § 2.10(b)(10).

situations, enforcement is simply not possible in practice, especially not by states. The inability to enforce these laws has grave consequences, putting states' residents at risk in rest areas, along highways, and on the grounds of important state structures, such as memorials, universities and capitol buildings. The inability to enforce these laws also poses environmental hazards and hinders the ability of state officials to maintain state infrastructure. Further, the inability to enforce these laws risks decreasing public access to important public buildings.

The Ninth Circuit's decision has also called into question many other criminal laws that democratically-elected state lawmakers have deemed necessary to protect public health and safety. Clearly, the Ninth Circuit's decision implicates laws prohibiting conduct by individuals who are homeless that may be considered "biologically compelled," such as public urination and defecation, theft of food, water, and clothing to protect against the elements, and public use of drugs and alcohol if the individual is addicted to such substances. But it also calls into question such fundamental prohibitions as laws imposing criminal penalties for murder, child sex abuse, child pornography, domestic violence, stalking, drug use, and rape for any criminal defendant who argues that his conduct was the product of a compulsion.

Criminal defendants have recognized this for years. For over five decades, criminal defendants have attempted to invoke *Robinson* and/or *Powell* as defenses to criminal charges on the argument that their

acts were compelled. But the Ninth Circuit swept these concerns away to constitutionalize an area of state control. Even worse, the Ninth Circuit's action on this issue is unnecessary—state common laws already address the concerns that underpin the Ninth Circuit's decision without intruding on states' rights.

For these reasons, *amici* states respectfully request that this Court grant the City of Boise's petition for certiorari.

ARGUMENT

A. The Ninth Circuit's decision has grave implications on the rights of states to enforce their laws.

The Ninth Circuit's decision has serious consequences for the states. As discussed below: (1) it prevents states from enforcing important camping laws that are necessary to protect people from dangerous situations, avert environmental hazards, protect natural resources and protect public access to significant state properties; and (2) it raises the specter of unconstitutionality over a wide-range of state criminal laws, including laws which prohibit such abhorrent acts as murder, rape, and child sex abuse.

1. The Ninth Circuit's decision prevents states from enforcing camping laws, putting the health and safety of their residents at risk.

The Ninth Circuit's decision prevents affected states from enforcing their various camping laws against individuals who contend they have no other place to sleep despite the importance of those laws to the public health and welfare. There are a myriad of state laws, regulations and rules around the country that could be unenforceable under the Ninth Circuit's analysis.[3] In its decision, the Ninth Circuit held that

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[3] *See* Ala. Admin. Code r. 160-X-2-.01 (prohibiting overnight camping in certain areas); Local Rule of the Super. Ct., Cty. of San Benito, Cal. 2.13(c) (prohibiting camping on the courthouse plaza); Cal. Code Regs. tit. 14, § 4302 ("No person shall use or be present in any portion of a unit under control of the Department of Parks and Recreation for which a use fee has been established by the Department, without paying such fee, with the exception of units which require payment of fees upon exit."); Conn. Agencies Regs. § 13b-29-4 (prohibiting camping in any Department of Transportation designated commuter parking facility); Ga. Code Ann. § 32-6-6(b) (prohibiting using any portion of the road of the state highway system or property owned by a state entity for camping); Idaho Code § 67-1613 (prohibiting camping on or in certain state-owned or leased property or facilities except in areas designated as recreational camping ground, area or facility); IDAPA 26.01.20.200.01 (camping on Parks and Recreation lands is permitted in designated areas only); 605 Ill. Comp. Stat. Ann. 5/9-124 (prohibiting camping on the side of public highways); Md. Code Regs. 11.04.07.11 (prohibiting camping and overnight parking at welcome centers, rest areas, scenic overlooks, roadside picnic areas and other public use areas within interstate and state highway rights-of-way); Minn. R. 6100.1250 (prohibiting camping in forest campgrounds and state parks outside of designated areas); Neb. Rev. Stat. Ann. § 2-3292(2) (prohibiting camping on

"the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter" as this would "criminalize conduct that is an unavoidable consequence of being homeless[.]" Pet. App. 62a (citation omitted). The Ninth Circuit attempted to narrow its holding, writing "[w]e hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'" Pet. App. 62a (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)). Even so, in order to enforce the sleeping and camping laws, "sleeping space" must be "*practically available* in any shelter" to the specific homeless individual. Pet. App. 65a (emphasis added).

In other words, in order to enforce camping laws under the Ninth Circuit's holding, the enforcing entity

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recreation land not so designated); N.J. Stat. Ann. § 17:15B-1.12(a) (prohibiting camping at the New Jersey World War II Memorial); Ohio Admin. Code 1501:47-4-02 (prohibiting camping upon scenic river lands except in designated areas or with prior approval); S.C. Code Ann. § 10-1-35(B)(1), (2), (5) (prohibiting camping on State House grounds); S.D. Codified Laws § 31-7-15 (prohibiting camping at "any rest area established by the department within and adjacent to the national system of interstate highways in South Dakota"); Tenn. Code Ann. § 39-14-414(d) (prohibiting knowingly camping on state-owned lands outside of designated areas); Utah Code Ann. § 65A-3-1(2)(h), (3)(b) (prohibiting camping on certain state lands except in designated areas); Wyo. Stat. Ann. § 36-2-107(b)(v) (prohibiting camping overnight on state land except in certain areas).

must know three variables to a certainty: (1) exactly how many homeless individuals are within the applicable area on a given night; (2) exactly how many and the types of shelter beds are available in the applicable area on a given night; and (3) all of the considerations that may render a shelter bed unavailable to a specific homeless individual on that given night. Pet. App. 62a, 65a. The Ninth Circuit's decision precludes affected states from enforcing a camping law as to a homeless individual if any of these variables cannot be established. But these variables are virtually unknowable in practice. The analysis the Ninth Circuit mandated inflicts an impenetrable bureaucracy upon the states.

With regard to the first variable, experts agree it is not possible to obtain an exact count of the number of homeless individuals present in a given jurisdiction on a given night. *See* Pet. App. 36a-37a; *and see id*. at n.1. And for states, what is the applicable area? Is it the number of homeless people within the entire state? Is it the number of homeless people within a given radius of the individual against whom the law is being enforced? Does it matter if the homeless individual is near a large municipality versus a smaller municipality or unincorporated area? The Ninth Circuit did not answer these questions.

As to the second variable, it is also extremely difficult, if not impossible, to know the exact number of shelter beds available in an applicable area on a given

night.[4] Shelters may be privately run, have discretion to determine when they are full, and may report availability consistent with their own policies, rather than reporting the exact number of empty beds. *See* Pet. App. 41a-42a. And, again, for states, does the state look to the availability of shelter beds state-wide? In a particular county? Do the shelter beds the state must look to differ depending on the homeless individual's proximity to a significant population center? The Ninth Circuit also did not answer these questions.

And, with regard to the third variable, it is virtually impossible in a nighttime interaction for a law enforcement official to know whether shelter is "practically available" to a given individual on a given night. Arguably, shelter might not be practically available if, for example, the individual has disabilities that preclude use of a shelter, is transgender, is a single father with a small child, has violated shelter policy, possesses excessive property or prohibited pets, has a work

[4] The fact that the number of homeless individuals exceed the number of shelter beds in a jurisdiction does not prove that a particular homeless individual had no choice other than to sleep in public on a given night. There are many reasons why a particular homeless individual may choose to sleep on the streets, even if a shelter bed is available to him or her. *See Why Some Homeless Choose The Streets Over Shelters* (Talk of the Nation, NPR News radio broadcast Dec. 6, 2012), https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters (accessed Sept. 5, 2019); *and see* Pet. for Cert. at 8-11. In other words, the Ninth Circuit removed the burden from the homeless individual to establish his conduct was involuntary and derivative of his status, forming constitutional law into a strict liability regime.

schedule that prevents him from arriving at the shelter by the required time or requires him to leave too early in the morning, has exhausted his stay at a shelter, or objects to the religious message of the shelter. *See* Pet. App. 47a-48a. And what if a state is seeking to enforce camping duration limits in a state park as to a homeless individual? What if an individual cannot go to a shelter, but has access to enough money to afford a campsite for the night? Is shelter unavailable to such individual if they must travel to a designated campsite? What if they must forgo a meal to pay for that travel? What if the campground is full or they can't afford a campsite? Are they constitutionally authorized to sleep on the nearby public beach? The Ninth Circuit also did not answer these questions.

If any one of the above variables is not known to a certainty or the state decides one of these unanswered questions incorrectly, a state could face a lawsuit and damages. These considerations effectively render states unable to enforce their camping laws.

The inability to enforce these public health and safety laws has serious consequences for the states. For example, some states have laws or regulations prohibiting camping at rest areas or on public highways.[5]

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[5] *See*, *e.g.*, Ga. Code Ann. § 32-6-6(b) (prohibiting using any portion of the road of the state highway system or property owned by a state entity for camping); 605 Ill. Comp. Stat. Ann. 5/9-124 (prohibiting camping on any public highway); Neb. Rev. Stat. § 39-312 (prohibiting camping on any state or county public highway, roadside area, park or other property acquired for highway or roadside park purposes except at designated campsites); Or. Admin. R. 734-020-0095(1) (prohibiting staying overnight or

These laws prevent dangerous encounters with fast-moving cars, protect people from sleeping in places where they are at increased risk of being the victims of a crime, prevent the creation of environmental hazards, prevent wildfires, and ensure the ability of state highway departments to maintain the state highway system. *See* Sofia Santana, *Highway rest areas no place to let your guard down*, SUN-SENTINEL (May 30, 2008), https://www.sun-sentinel.com/news/crime/sfl-530publicsafety-story.html (discussing the crimes committed at Florida rest areas and the safety hazards of sleeping at rest areas); OR. DEP'T OF TRANSP., CAMPING ALONG STATE HIGHWAYS (Dec. 2018), https://www.oregon.gov/ODOT/Documents/Camping-Fact-Sheet.pdf ("Camping along state highways is unsafe for campers and highway users. Illegal camping can also create environmental hazards, cause wildfires and interfere with the ODOT's ability to safely maintain the state highway system[.]"). If the state is not able to enforce these laws, public health and welfare are put at risk.

As another example, some states prohibit camping on certain state properties, such as memorials, university grounds, and the grounds around state capitol

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camping on the right-of-way of any state highway, except at rest areas); Md. Code Regs. 11.04.07.11 (prohibiting camping and overnight parking at welcome centers, rest areas, scenic overlooks, roadside picnic areas and other public use areas within interstate and state highway rights-of-way); 19 Vt. Stat. Ann. § 1106 ("A person shall not use any part of a public highway right-of-way, a public rest area associated with a public highway, or any public land not so designated . . . as an overnight camping area for the purpose of overnight camping.").

buildings.[6] Again, such laws protect the public health and safety, as well as the dignity and public value of those areas. *See* 2012 Idaho Sess. Laws 35 (finding in support of Idaho Code § 67-1613 that the Capitol Building and the Capitol Mall, as well as other state-owned and leased grounds and facilities require unobstructed grounds and convenient access to ensure the health and safety of all citizens, including touring visitors and school children, and that they must be maintained to high aesthetic standards); N.J. Stat. Ann. § 17:15B-1.12(a) (prohibiting camping at the New Jersey World War II Memorial to protect the condition of the Memorial, to ensure the grounds are open for access by all members of the public and to facilitate security); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (concluding that a regulation prohibiting camping on federal park lands outside of designated campgrounds was supported by a substantial government interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence" in response to a First Amendment challenge).

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[6] *See*, *e.g.*, Local Rule of the Super. Ct., Cty. of San Benito, Cal. 2.13(c) (prohibiting camping on the courthouse plaza); Idaho Code § 67-1613 (prohibiting camping on or in certain state-owned or leased property except in areas designated as recreational camping ground); N.J. Stat. Ann. § 17:15B-1.12(a) (prohibiting camping at the New Jersey World War II Memorial); Wisc. Admin. Code § UWS 18.07(4) (prohibiting camping on University of Wisconsin lands except in designated areas).

Further, many states prohibit camping on public recreation-type lands except in designated areas.[7] Such laws are important to preserve the value of recreation areas. If people were able to camp anywhere and everywhere within those areas, they would damage the natural resources, contaminate water supplies like rivers and streams, scare off wildlife, hinder the enjoyment of those natural areas by others, and potentially put other users at risk. Such laws "conserve, protect, develop, and manage the natural resources" for the benefit of everyone. Neb. Rev. Stat. Ann. § 2-3201; *see also* W. Va. Code R. §§ 58-32-1.1, 58-32-2.3 (the rule prohibiting camping in West Virginia State Parks, State Forests and certain other areas "is necessary to provide for public health, safety and welfare; to protect state property; and to assure state recreational area guests of a safe, beneficial and enjoyable experience."). The Ninth Circuit's decision leaves states unable to protect those interests.

These specific concerns are in addition to the general public health and welfare concerns associated with individuals camping in areas that are not

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[7] *See* Ala. Admin. Code r. 160-X-2-.01 (prohibiting overnight camping in certain areas); IDAPA 26.01.20.200.01 (camping on Parks and Recreation lands only permitted in designated areas); Neb. Rev. Stat. Ann. § 37-305 (prohibiting camping on commission lands not designated for such); Tenn. Code Ann. § 39-14-414(d) (prohibiting knowingly camping on state-owned lands outside designated areas); Utah Code Ann. § 65A-3-1(2)(h), (3)(b) (prohibiting camping on certain state lands except in designated areas); Wyo. Stat. Ann. § 36-2-107(b)(v) (prohibiting camping on state land except in certain areas).

designed or intended for such use. *See* Emily Mieure & Tom Hallberg, *Homeless camps growing concern in Jackson meadow*, LARAMIE BOOMERANG, 2019 WLNR 24478235 (Aug. 1, 2019) ("You've got propane bottles, groceries, jugs of urine. . . . Trash, human waste, food, and so on."); *see also* Pet. for Cert. at 27-32. The Ninth Circuit's decision carries with it grave consequences to state authority to protect the public health and welfare just within the context of camping laws.

2. The Ninth Circuit's decision has far-ranging implications for the states' criminal justice systems.

If states cannot enforce statutes or regulations prohibiting a homeless individual's "biologically compelled" acts, such as sleeping in public, it follows that such individuals could also be immune from criminal liability for similar conduct resulting from the "unavoidable consequences of being human," *see* Pet. App. 62a (citation omitted), or that he is "powerless to avoid," *Jones*, 444 F.3d at 1133 (citation omitted). These acts could include such things as: (1) public urination or defecation; (2) public sex acts, including masturbation, intercourse, and indecent exposure; (3) stealing food or storing food leading to rodent infestation; (4) stealing clothing; (5) bathing and washing clothing in public waterways; (6) public use of illicit drugs or alcohol if an individual is addicted to such substances while homeless; (7) littering, including used needles; and (8) storing personal effects on public property.

More broadly, with regard to the states' criminal laws, it is troubling that the Ninth Circuit expanded the Cruel and Unusual Punishment Clause beyond the concept of disease.[8] The Ninth Circuit expanded the protections of the Eighth Amendment to the status of being "human," a significant expansion that could have far-reaching implications on the concept of criminal responsibility. There can be no doubt that all criminals are human. Thus, the willingness of courts to find an individual's conduct voluntary is the only safeguard to prevent the Ninth Circuit's conclusion that governments may not impose criminal penalties for involuntary conduct derivative of an individual's status from swallowing the concept of criminal responsibility altogether.

In light of the ever expanding array of theories arguing that many, if not all, of the actions humans take are not actually voluntary, this safeguard is worryingly weak. "In recent years social scientists have come to support the thesis that the anti-social actions of many individuals are to a large extent heavily influenced, or even determined by, elements in their backgrounds beyond their control." *Smith v. Follette*, 445 F.2d 955, 961 (2d Cir. 1971). "[I]f every criminal act which was the result in some degree of a socially developed compulsion was beyond society's control, the interests and safety of the public would be seriously threatened." *Id.*; *see also* Stephen Cave, *There's No Such Thing as Free*

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[8] *Robinson* and *Powell* addressed the status of having a disease. *Robinson*, 370 U.S. at 667 (narcotic addiction); *Powell*, 392 U.S. at 522 (chronic alcoholism).

Will, THE ATLANTIC (June 2016), https://www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing-as-free-will/480750/ (accessed Sept. 5, 2019) ("The number of court cases . . . that use evidence from neuroscience has more than doubled in the past decade—mostly in the context of defendants arguing that their brain made them do it.").

The states' concerns regarding the impact of a prohibition on imposing criminal penalties for involuntary conduct are not new. Even when the discussion was limited to involuntary conduct stemming from disease, U.S. Supreme Court Justices expressed grave concerns. As Justice Black wrote in his concurrence in *Powell*, "[i]f the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a 'compulsion,' in the complex, psychological meaning of that term." *Powell*, 392 U.S. at 544 (Black and Harlan, JJ., concurring).

> Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for 'being' in possession of drugs or, for that matter, for 'being' guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation[.]

Id. at 545. "[C]hild molesters could challenge their convictions on the basis that their criminal acts were the product of uncontrollable pedophilic urges and therefore beyond the purview of criminal law." *Manning v. Caldwell*, 900 F.3d 139, 148 (4th Cir. 2018), *reh'g en banc granted, opinion vacated*, 741 F. App'x 937 (4th Cir. 2018), and *on reh'g en banc sub nom. Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (citing *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997)). Similarly, stalkers, rapists, and domestic abusers could claim constitutional exemption from criminal responsibility. *See id*.

In fact, for over five decades, criminal defendants have attempted to use *Robinson* and/or *Powell* to avoid consequences on the theory that their acts were compelled. Federal courts have used the rule that states may impose criminal penalties for conduct, as opposed to status, to reject such Eighth Amendment challenges. *See United States v. Sirois*, 898 F.3d 134, 138 (1st Cir. 2018) (*Powell* "does not clearly establish a prohibition on punishing an individual, even an addict, for possessing or using narcotics." (Citation omitted.)); *Follette*, 445 F.2d at 961 (narcotic addicts may be punished for the affirmative illegal act of possessing narcotics); *United States v. Moore*, 486 F.2d 1139, 1153, 1195-98 (D.C. Cir. 1973) (*en banc*) (three judges saw no legitimate Eighth Amendment problem of "compulsion" to a conviction for possessing heroin); *Joshua v. Adams*, 231 F. App'x 592, 594 (9th Cir. 2007) (unpublished) (rejecting defendant's contention that his schizophrenia protected him from criminal liability for an offense

separate and distinct from his "status" as a schizophrenic); *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (unpublished) (upholding criminal punishment for conduct that the defendant attributed to alcoholism because, "[u]nder *Powell*, punishment for unlawful conduct resulting from alcoholism is permissible" (citation omitted)). Yet the Ninth Circuit has taken it upon itself to open that Pandora's Box, leaving little recourse for the states to address conduct they find undesirable.

Ultimately, the Ninth Circuit's reasoning poses a grave threat to the states' systems of criminal justice. It causes an impermissible shift in the power structure between the various branches of government in defining and enforcing laws that affect public health and safety. The result: courts will be permitted "to couch [their] own moral beliefs in constitutional terms and to substitute [their] own judgment as to the morality of the criminal law for that of the states." *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009). But such judgments require the difficult and careful balancing for which democratically-elected legislators are best suited.

Even worse, the Ninth Circuit created a federal constitutional answer for a problem that already has a state law solution. The Ninth Circuit's concerns are already addressed (and are best addressed) by the states' common laws. "The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of

the criminal law and changing religious, moral, philosophical, and medical views of the nature of man." *Powell*, 392 U.S. at 536. These "process[es] of adjustment [have] always been thought to be the province of the States." *Id.*

As one treatise has recognized, "[t]he defense of necessity seems particularly suited to homeless people who are arrested for . . . sleeping in public areas." 2 Crim. Prac. Manual, *Necessity—Homelessness* § 42:19 (June 2019). In fact, this defense has already been acknowledged by a California court as appropriate for a homeless individual charged with having violated an ordinance banning camping in public parks. *See In re Eichorn*, 69 Cal. App. 4th 382, 391, 81 Cal. Rptr. 2d 535, 540 (Cal. Ct. App. 1998) (citation omitted) (holding that a homeless individual was entitled to a jury instruction on the defense of necessity to charges that he violated a camping ordinance).

The Ninth Circuit has unnecessarily and impermissibly hindered the states from performing "their role as laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring) (citations omitted). If the decision is allowed to stand, states will be prevented from enforcing laws vital to the health and wellbeing of their populations. This Court should take action to correct the Ninth Circuit's overreach.

B. The Ninth Circuit's ruling infringed on the rights of states under the Tenth Amendment.

Under the Tenth Amendment to the U. S. Constitution, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "[T]he bulk of authority to legislate on what may be compendiously described as criminal justice . . . is under our system the responsibility of the individual States." *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958), *overruled on other grounds by Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964). "Because these are 'primarily, and historically, . . . matter[s] of local concern,' the 'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (citations omitted). "The choice of this form of federal arrangement was the product of a jealous concern lest federal power encroach upon the proper domain of the States and upon the rights of the people." *Knapp*, 357 U.S. at 375.

At the same time, the Eighth Amendment to the U.S. Constitution prohibits states from inflicting cruel and unusual punishments. U.S. CONST. amend. VIII. While the primary purpose of the Cruel and Unusual Punishment Clause is to address the method or kind of punishment that may be imposed for violations of criminal statutes, the clause also places substantive

limits, "to be applied sparingly," on what the government may criminalize. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

When assessing the constitutionality of a law or punishment under the Eighth Amendment, "[c]aution is necessary lest [the] Court become, 'under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.'" *Gregg v. Georgia*, 428 U.S. 153, 176 (1976) (joint opinion of Stewart, Powell and Stevens, JJ.) (quoting *Powell*, 392 U.S. at 533). This is true both because of principles of federalism and because a court decision finding unconstitutionality "cannot be reversed short of a constitutional amendment." *Id*.

In its 1962 decision in *Robinson*, the Court established the balance between the states' rights under the Tenth Amendment and the prohibition on inflicting cruel and unusual punishments as to states' substantive laws: states may not impose criminal penalties based on an individual's *status*. 370 U.S. at 666-67 (holding a California statute that imposed criminal sanctions solely for the status of being addicted to narcotics within the state, without any proof of actual possession or use of narcotics or even of any "irregular behavior" within the jurisdiction, was a cruel and unusual punishment in violation of the Eighth Amendment).

The Court revisited *Robinson* in 1968 with *Powell*, analyzing whether an alcoholic individual convicted of

violating a Texas statute by being drunk in public had been subjected to cruel and unusual punishment. 392 U.S. at 517. The Court, in a 4-1-4 plurality, upheld the conviction. *See id*. at 537. With *Powell*, the Court was offered the opportunity to expand *Robinson* to hold that the Eighth Amendment precludes imposing criminal sanctions for involuntary conduct derivative of an individual's status. While the four person dissent would have taken this approach, a majority of the Court declined to do so. *Powell*, 392 U.S. at 533, 553-54 (White, J., concurring), 567 (Fortas, J., with Douglas, Brennan, and Stewart, JJ., dissenting).

With its decision, the Ninth Circuit took the step that a majority of the Court *declined* to take in *Powell*, ignoring the balance the Court had already struck between the states' authority and responsibility over their laws to protect the health and safety of their populations and the constitutional prohibition on imposing cruel and unusual punishments.

The Ninth Circuit has gone too far, infringing on the rights of the states, via their democratically-elected legislatures, to protect the public health and safety, including establishing and maintaining their systems of criminal justice. If the Ninth Circuit's decision is allowed to stand, states will be prevented from enforcing public health and safety rules, including camping and criminal laws, vital to the health and wellbeing of their populations.

CONCLUSION

The City of Boise's petition for certiorari should be granted.

Respectfully submitted,

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