No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON, *et al.*, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE SOUTHERN POVERTY LAW CENTER *ET AL.* IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICI CURIAE

Amicus the Southern Poverty Law Center (SPLC)[1] is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. One of the SPLC's goals is to eradicate poverty by expanding access to economic opportunity and eliminating racial economic inequality. The SPLC works to end the criminalization of homelessness across the U.S. Deep South through litigation, policy, and research. *See, e.g.*, Gina Azito Thompson, *Sheltering Injustice: A Call for Georgia to Stop Criminalizing People Experiencing Homelessness, S. Poverty Law Ctr.* (2023), https://www.splcenter.org/sheltering-injustice-report.

Amicus Southern Legal Counsel (SLC) is a nonprofit public interest law firm dedicated to the ideal of equal justice for all that works statewide in Florida as part of the civil legal aid system. SLC has litigated numerous constitutional challenges to the criminalization of homelessness, including *McArdle v. City of Ocala,* 519 F. Supp. 3d 1045 (M.D. Fla. 2021) (city's lodging ordinance violated the Eighth Amendment).

Amicus Florida Justice Institute (FJI) is a nonprofit public interest law firm that uses impact litigation and advocacy to improve the lives of Florida's poor and

1. Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no party or its counsel authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of the brief. Nor did any person other than *amici curiae* make such a monetary contribution.

disenfranchised residents, while focusing on criminal justice reform, homelessness and poverty, disability access, and other civil rights issues. FJI has litigated numerous cases on behalf of people experiencing homelessness involving claims that their existence has been criminalized, including as co-counsel during the monitoring phase of the consent decree entered in *Pottinger v. City of Miami,* 810 F. Supp. 1551 (S.D. Fla. 1992), that prohibited the city from arresting people for life-sustaining activity in public spaces.

Amicus Florida Legal Services (FLS) is a statewide legal services organization dedicated to advancing economic, social, and racial justice and removing barriers that undermine and restrict equal access to justice and basic human needs. FLS helps poor, vulnerable, and hard to reach people experiencing housing insecurity and homelessness.

Amicus Community Justice Project (CJP) is a Miami, Florida, based group of movement lawyers, artists, and researchers providing innovative legal and strategic support to social justice movements fighting for racial justice and human rights, with a focus on housing justice. CJP represents base-building organizations defending the rights of tenants and the rights of people who are houseless. CJP advocates against excessive policing, including in the context of houselessness, tenants' rights, and access to public spaces.

Amicus Legal Aid Society of Palm Beach County (LASPBC) is a nonprofit public interest law firm dedicated to serving the legal needs of the Palm Beach County, Florida, community for over 75 years. LASPBC

advocates for low-income tenants and individuals facing homelessness through legal assistance, representation, and educational programs. LASPBC has litigated cases in state and federal court to enforce the Fair Housing Act on behalf of Palm Beach County tenants and homeless individuals.

Amicus Florida Housing Umbrella Group (HUG) is an unincorporated statewide association of approximately 250 lawyers, legal professionals, advocates, faculty, and researchers employed by legal services and civil legal aid organizations, universities, and nonprofits. Founded in the 1980s, HUG has appeared as amicus in numerous federal and state court cases on issues of housing and homelessness. HUG members provide free civil legal services, representing people at risk of losing housing or experiencing homelessness.

SUMMARY OF ARGUMENT

Amici, nonprofit poverty law organizations that provide free legal assistance to individuals experiencing poverty and homelessness in Florida, file this brief to aid the Court in its resolution of the applicability of *Robinson v. California*, 370 U.S. 660 (1962), to ordinances that punish individuals for the status of homelessness. The Ninth Circuit properly applied *Robinson* to find an Eighth Amendment violation occurs when the government punishes people experiencing homelessness for sleeping outdoors anywhere on public property at any time, when there are no indoor alternatives. Contrary to petitioner's arguments (Br. 5), *Robinson*'s ban on status crimes is workable, as decades of its application by Florida governments and Eleventh Circuit courts demonstrate.

Florida's experience is relevant, as the state has the third largest total population of individuals experiencing homelessness and the second largest unsheltered population in the U.S. *See* U.S. Dep't of Hous. & Urb. Dev., *2023 Annual Housing Assessment Report to Congress*, 18 (2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf.

The types of prohibitions at issue (hereinafter "sleeping/camping ordinances") are not "generally applicable prohibitions against the act of camping on public property" (*contra* Pet. Br. 4); they are punishment for the universal human need to sleep, something only people who are homeless and involuntarily unsheltered are forced to do in public places. Petitioner cannot reasonably rely on the history of vagrancy laws (Br. 42–43) to justify its sleeping/camping ordinances. Vagrancy laws differ substantially in form from modern sleeping/camping ordinances. *See, e.g.*, Resp. Br. 34–38. Any similarities only further delegitimize these ordinances. *Contra* Pet. Br. 42–43. Vagrancy laws are incompatible with the rule of law, *see Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972), and this Court has repeatedly disavowed their historical use—in the U.S. South especially—to punish people on the basis of poverty and race. So too, the sleeping/camping ordinances here unlawfully target and punish socially stigmatized people based on their status. Under *Robinson*, they are cruel and unusual punishment.

ARGUMENT

I. *Robinson*'s prohibition against status crimes squarely applies to laws like petitioner's that punish people for the status of homelessness.

The Ninth Circuit properly applied the constitutional prohibition against status crimes in *Robinson* to strike down sleeping/camping ordinances that punished people for being homeless in violation of the Eighth Amendment. *See Robinson*, 370 U.S. at 666 (holding that criminalizing status of addiction violates the Eighth Amendment because "in the light of contemporary knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment"); *see also Powell v. Texas*, 392 U.S. 514, 533 (1968) (plurality opinion) (reaffirming *Robinson*'s holding that under the Eighth Amendment, "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus"). The Ninth Circuit properly restrained the City of Boise from enforcing its sleeping/camping ordinances against homeless individuals who did not have access to shelter because doing so would punish them for the status of homelessness in violation of the Eighth Amendment. *Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019) (en banc), *cert. denied*, 140 S. Ct. 674 (2019). The Ninth Circuit reiterated this principle in *Johnson v. City of Grants Pass* when it affirmed the district court's ruling that petitioner's sleeping/camping ordinances[2] violate the

2. The sleeping/camping ordinances before the Court are Grants Pass Municipal Code §§ 5.61.010, 5.61.030, and 6.46.090. Pet. App. 15a–17a, 24a, 221a–224a.

Eighth Amendment by prohibiting homeless individuals from sleeping outside with blankets or other bedding, even when there is nowhere else in the city for them to sleep. Pet. App. 57a. These decisions were correct applications of *Robinson*.

Petitioner's assertion (Br. 37) that its ordinances prohibit the "specific act[]" of "'occupy[ing] a campsite' on public property" obfuscates their function and disregards the basic science of sleep. First, the ordinances do not implicate a constitutional "right to camp." *Contra* Pet. Br. 42. Whatever petitioner may label them, in reality the ordinances ban merely sleeping beneath a blanket on the ground. Pet. App. 46a–47a. In other words, the ordinances implicate the right for a human being to simply exist. *Cf. Bailey v. Alabama*, 219 U.S. 219, 238, 244 (1911) (holding that an Alabama law framed "in terms . . . to punish fraud" in fact established unconstitutional involuntary servitude, and admonishing that "[w]hat the state may not do directly it may not do indirectly").

Second, sleeping—with or without rudimentary bedding—is no actus reus. Humans only exist either in a state of sleep or wakefulness; sleeping, like waking, is being, not doing. Furthermore, sleep is as inherently innocent, life-sustaining, and innate as breathing. No government has an interest in prohibiting sleep, any more than it could forbid people to breathe.

As discussed in more detail below, petitioner's sleeping/camping ordinances do not target criminal conduct but—like illegitimate vagrancy laws before them—target poverty. *See Crime*, Black's Law Dictionary (11th ed. 2019) (defining "status crime" as "a crime of

which a person is guilty by being in a certain condition or of a specific character"). Like the statute struck down in *Robinson* that made narcotics addiction a continuous crime, petitioner's ordinances make people experiencing homelessness "continuously guilty" every day that they are forced to sleep outside. *See Robinson*, 370 U.S. at 666. It is impossible for homeless and involuntarily unsheltered individuals to conform their sleeping "conduct" to the law by choosing not to sleep. *Cf. Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) ("Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human."), *vacated per settlement*, 505 F.3d 1006 (9th Cir. 2007). For them, the ordinances effectively criminalize living within city bounds. *See* Resp. Br. 29–30 (a person who remains in Grants Pass after being issued an exclusion order for "unlawful camping" faces unlimited trespass arrests). Compliance is only possible for people who have access to indoor shelter. The Ninth Circuit correctly held that petitioner's sleeping/camping ordinances create an impermissible status crime.

II. Courts have the capacity to apply *Robinson* and administer workable legal standards to ensure that the government does not unlawfully punish people for the status of homelessness.

Petitioner is incorrect (Br. 5) that "the Ninth Circuit's . . . test has already proved unworkable in both theory and practice." Courts and governments in the Eleventh Circuit have proved just the opposite: courts, in three cases discussed below that were examined by the Ninth Circuit in *Martin* and *Johnson*, have successfully applied *Robinson* in similar contexts. These cases demonstrate

that, contrary to petitioner's claims (Br. 43–45), the "involuntariness" and shelter availability standards are workable in practice. Furthermore, petitioner's claim (*id.* at 14) that *Johnson* "calls into doubt many other criminal prohibitions" contradicts decades of decisions illustrating that this narrow application of *Robinson* does not disturb substantive criminal law and will not create mayhem in the lower courts.

A. *Pottinger v. City of Miami*

In 1988, Michael Pottinger, Peter Carter, Berry Young, and other similarly situated persons experiencing homelessness sued the City of Miami, Florida, alleging constitutional violations relating to arrests for harmless, involuntary, and life-sustaining acts such as sleeping. *Pottinger v. City of Miami* (*Pottinger I*), 810 F. Supp. 1551, 1553–54 (S.D. Fla. 1992). The court certified a class. *Pottinger v. City of Miami*, 720 F. Supp. 955, 960 (S.D. Fla. 1989); *see also* Pet. App. 36a n.20. After a bench trial, U.S. District Court Judge Atkins entered an order holding that "the City's practice of arresting homeless individuals for performing inoffensive conduct in public when they have no place to go is cruel and unusual in violation of the eighth amendment." *Pottinger I*, 810 F. Supp. at 1583.

The court's well-reasoned opinion applied *Robinson* to the facts adduced at trial. Miami's "laudable attempts" to address homelessness, the court observed, had been hindered by "an escalating number of homeless people." *Id.* at 1558. To explain the causes of homelessness, the court relied on the testimony of expert witnesses, concluding that "homelessness is due to various economic, physical or psychological factors that are beyond the homeless

individual's control." *Id.* at 1563 ("[P]eople rarely choose to be homeless.").

Applying *Robinson* to these facts, the court held:

> Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless . . . . As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct.

Id. at 1564–65. The court directed the creation of two or more arrest-free zones where the city would be enjoined from arresting individuals experiencing homelessness for such involuntary, innocent conduct. *Id.* at 1584. *Pottinger*, rendered 25 years before *Martin*, has been followed by localities in Florida that conformed their ordinances and police practices with this basic rule of law.[3] Indeed, *Martin* cited *Pottinger I* approvingly, observing "[w]e are not alone in reaching this conclusion" that "as long

3. For instance, a former law enforcement official reported conforming police policies in Broward County, Florida, with *Pottinger I* to ensure that homelessness is not a crime. Decl. of Robert R. Pusins ¶¶ 1–6, *McArdle v. City of Ocala*, 519 F. Supp. 3d 1045 (M.D. Fla. 2021) (No. 5:19-cv-00461), ECF No. 108-18.

as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." 920 F.3d at 617.

In 1998, following two appeals and court-ordered mediation, *Pottinger v. City of Miami*, 40 F.3d 1155 (11th Cir. 1994) & 76 F.3d 1154 (11th Cir. 1996), the parties entered into a landmark settlement agreement that protected the rights of people experiencing homelessness, Settlement Agreement, *Pottinger I*, *supra* (No. 1:88-cv-02406), ECF No. 382. The agreement created, among other reforms, a law enforcement protocol that prohibited police from arresting individuals experiencing homelessness for specified "life sustaining" misdemeanors if shelter was unavailable; if shelter was available and accepted upon offer, the police agreed to transport and not arrest the person. *Id*. at 8–11.

By 2019, the district court, as affirmed by the Eleventh Circuit, found that the consent decree's core purpose of stopping the criminalization of homelessness had been achieved. *See Pottinger v. City of Miami* (*Pottinger II*), 359 F. Supp. 3d 1177, 1195 (S.D. Fla. 2019), *aff'd sub nom. Peery v. City of Miami*, 977 F.3d 1061 (11th Cir. 2020). Over the objection of class counsel, the court dissolved the decree, finding evidence that Miami had reformed police procedures and "no longer arrest[ed] . . . the homeless for being homeless." *Peery*, 977 F.3d at 1076 (citation omitted). The court also found that Miami had directed resources, including dedicated tax revenue, to programs that "provide shelter, medical care, and other services" for people experiencing homelessness. *Id*. "Because the City has a strong system in place to address homelessness,"

the court reasoned, "it is unlikely to revert to arresting or mistreating the homeless." *Id.*

Petitioner complains that *Martin* and *Johnson* have tied their hands; however, the City of Miami demonstrated that substantial progress can be made on homelessness without criminalizing people who have no choice but to sleep outside. Far from creating a ballooning crisis of homelessness, the court found that the *Pottinger I* consent decree, and the related increase in access to services, reduced homelessness by 90% while also decreasing arrests. *Pottinger II*, 359 F. Supp. 3d at 1180, 1182–83. Further, as the court observed, "both sides agree that arresting the homeless is never a solution because, apart from the constitutional impediments, it is expensive, not rehabilitating, inhumane, and not the way to deal with the 'chronic' homeless, who suffer from mental illnesses and substance abuse addiction." *Id.* at 1180–81.

B. *Joel v. City of Orlando*

James Joel, a person experiencing homelessness, was arrested by the City of Orlando, Florida, for violating an ordinance prohibiting "'camping' on public property," defined to include "sleeping out-of-doors." *Joel v. City of Orlando*, 232 F.3d 1353, 1355 (11th Cir. 2000), *cert. denied*, 532 U.S. 978 (2001). Police enforcement protocol required "some indication of actual camping," beyond sleeping, to make an arrest, though that could be as little as someone sleeping "atop and/or covered by materials" or "when awakened volunteer[ing] that he has no other place to live." *Id.* at 1356. Significantly, the protocol directed officers to advise homeless individuals of alternative shelter, and the undisputed evidence showed that shelter

was in fact available: the local shelter had "never reached its maximum capacity" or turned anyone away for lack of space or inability to pay. *Id.* at 1356–57.

Applying *Robinson* to the undisputed facts on summary judgment, the court rejected Joel's argument that Orlando's camping ordinance punished him for the status of being homeless. The court distinguished *Pottinger I* on the facts: there, the court had "explicitly relied on the lack of sufficient homeless shelter space" to find that "sleeping in public [was] involuntary conduct for those who could not get in a shelter." *Id.* at 1362. *Joel* held that the Orlando ordinance, by contrast, permissibly reached only voluntary conduct because of "the availability of shelter space," which gave Joel "an opportunity to comply with the ordinance." *Id.*

Robinson, as applied in *Joel*, was workable: the court considered whether shelter was available and found that it always was. Joel was therefore not punished for his status, but for the conduct of camping outside when he had available alternatives. The availability of alternatives to Joel was pivotal to the Eighth Amendment analysis by the Eleventh Circuit and determinative of the outcome. *See* Pet. App. 110a–111a; *see also Martin*, 920 F.3d at 617 n.9.

C. *McArdle v. City of Ocala*

In 2019, Patrick McArdle, Courtney Ramsey, and Anthony Cummings, sued the City of Ocala, Florida, challenging the constitutionality of its "open lodging" ordinance. *See McArdle*, 519 F. Supp. 3d at 1048. The ordinance made "rest while awake or sleep" a crime when, like in *Joel*, at least one indicator of lodging was present,

including simply being homeless or sleeping with bedding. *Id.* at 1048–49. The court found that all of the following unambiguously fit under the definition of lodging: "using bags of belongings as a pillow, sleeping on a park bench with belongings, sleeping in a covered alcove, sleeping using clothing as a pillow, sleeping with blankets and sleeping bags, sleeping wrapped in blankets, sleeping with a backpack as a pillow, and sleeping on top of a pair of jeans." *Id*. at 1053.

In total, the plaintiffs had been arrested and convicted for violating the ordinance 18 times. *Id.* at 1049 ("On some of those occasions, Plaintiffs were arrested for sleeping outdoors and, upon being awoken, advised that they were homeless."). An Assistant Professor of Medicine at the University of Miami School of Medicine who had treated hundreds of homeless patients explained the medical requirement of sleep for all human beings. Decl. of Dr. Armen Henderson ¶ 2, *McArdle*, *supra* (No. 5:19-cv-00461), ECF No. 108-10 ("Sleep is a non-voluntary, physiologic requirement necessary for normal neurocognitive and metabolic functioning."). Dr. Henderson further explained that blankets are necessary for thermoregulation of the human body: "In cooler conditions (50F and below while awake and higher when asleep), blankets are necessary to keep core temperature above 96F. Hypothermia is possible even in moderate temperatures without adequate body coverings. Blankets trap heat and are the most efficient means for maintaining body temperature." *Id*. ¶ 4.

Like in Grants Pass, the undisputed facts established that the lodging ordinance applied at all times on all public property in the city. Pls.' Mot. Summ. J. & Permanent Inj. at 8 ¶¶ 20–21, *McArdle*, *supra* (No. 5:19-cv-00461), ECF

No. 108. Over five years, the city convicted 264 unique homeless individuals of the crime of open lodging 406 times. These individuals spent 5,393 days in jail and were assessed $301,067.00 in fees and fines. *Id.* at Ex. 6, at 1, ECF No. 108-6. The evidence demonstrated that shelter was not available or was otherwise inaccessible. *McArdle*, 519 F. Supp. 3d at 1049. Unlike in *Joel*, the police did not inquire into shelter availability before making an arrest. *Id.* at 1052.

Applying *Robinson*, U.S. District Court Judge Moody held that the city's open lodging ordinance unlawfully punished the plaintiffs for their status of homelessness. In doing so, the court reconciled *Martin* and *Joel*, finding that their holdings turned on the availability of shelter space:

> The Court notes that if the ordinance is only enforced after making an inquiry of the availability of shelter space, then it only punishes the individual's conduct for failing to comply with the ordinance. If no such inquiry is made and the individual is arrested for merely sleeping outside and identifying themselves as homeless, then the ordinance unlawfully punishes the individual based on their homeless status.

Id. at 1052; *see also* Pet. App. 110a–111a; *Martin*, 920 F.3d at 617 n.9. The court entered an injunction, prohibiting the city from enforcing its open lodging ordinance against someone who is homeless "prior to inquiring about the availability of shelter space." *McArdle*, 519 F. Supp. 3d at 1056. *Johnson* referenced *McArdle* as providing an example of the practicality of determining

"involuntariness" at the time of enforcement. Pet. App. 40a n.23, 52a n.31.

D. *Robinson* has not prevented governments in Florida or any other state from addressing homelessness.

The reasons offered by petitioner (Br. 5–6, 45–47) and some of its *amici* for overturning *Johnson* and *Martin* are primarily grounded in concerns about large encampments. *See, e.g.*, Brentwood Cmty. Council Amicus Br. 6 (warning that "[w]ithout regulation of encampments" a public health crisis results); Venice Community Stakeholders Ass'n Amicus Br. 7–9 (decrying "large encampments on world famous Venice Beach"); City of Chico Amicus Cert. Br. 3 (asserting the "proliferation of homeless encampments" threatens public health). But sleeping/camping ordinances like petitioner's that apply to as few as one person and to protection as minimal as a blanket are not about large encampments. As the district court in *Johnson* reiterated, this is simply not a case about the time, place, or manner in which camps are allowed. Pet. App. 57a (court's decision, like *Martin*, was narrowly limited to principle that it is unconstitutional to punish someone for sleeping somewhere in public when they have nowhere to go). Although issues related to encampments are unquestionably important, none of those issues is properly addressed here.

Petitioner (Br. 47) and some of its *amici* blame *Robinson*'s prohibition against status crimes, and the limited application of that doctrine to sleeping/camping laws, for supposedly increased crime and disease on the streets of this country. *See, e.g.*, Brentwood Cmty. Council

Amicus Br. 13–14 (implying that without the ability to arrest people who have nowhere to sleep but outside, local governments are "confus[ed]" about their ability to enact public health and safety regulations); Venice Cmty. Stakeholders Ass'n Amicus Br. 17; L.A. Chamber of Com. Amicus Br. 16. But the courts are not to blame for policy failures that created the housing and homelessness conditions in our country today. As the Florida examples of *Pottinger*, *Joel*, and *McArdle* show, Eighth Amendment doctrine does not constrain petitioner's and its *amici*'s policy choices to address homelessness. Nor does it restrain them from enforcing common-sense health and safety regulations or arresting people for the litany of crimes that are already prohibited by law.

The impact of such rhetoric is to scare the public by classifying an entire group of people based on unfounded accusations of their inherent criminality—rhetoric that was also once used to justify vagrancy laws and has since been soundly rejected. *See Papachristou*, 405 U.S. at 171 ("The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment.").

E. *Robinson* has not created mayhem in lower courts.

Petitioner complains (Br. 43–44) that *Robinson*, as applied to the status of homelessness, is unworkable and will create confusion in the lower courts. Petitioner is wrong. There is no crisis caused by the application of *Robinson* to people who are involuntarily sleeping outside, nor will it disrupt criminal law at large.

First, this Court should reject arguments raised by petitioner and some of its *amici* that the shelter availability test is unworkable because governments can neither shelter everybody nor determine who is "choosing" to sleep outside. *See* Pet. Br. 43 ("Courts also have no discernible standards by which to judge involuntariness."); *see, e.g.*, City of Chico Amicus Br. 18–20 (discussing difficulties of counting homeless individuals and available beds and deciding whether individuals are "voluntarily" homeless).[4] But these protests ring hollow. Objections to "workability" ultimately reveal a deeper motivation: governments defend sleeping laws because, like vagrancy laws before them, they are expedient. Affirming the Ninth Circuit's finding that these sleeping/camping ordinances are unlawful status offenses will only reinforce the rule of law, not undermine it as petitioner and its *amici* claim.

Second, this Court should reject petitioner's argument (Br. 47–49) that affirming the Ninth Circuit's decision would allow people to evade criminal responsibility for all manner of crimes. The Ninth Circuit's logic, it argues, will lead to the decriminalization of armed robbery, drug trafficking, sexual assault, and possession of child pornography if a person is diagnosed with a drug or sexual addiction. *Id.* Their slippery slope arguments should not replace legal and factual analysis. "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." Robert Bork, *The Tempting of*

4. If *amicus* City of Chico cannot even navigate its own shelter system, it is hard to imagine a person experiencing homelessness doing so. Regardless, the solution is not for the City of Chico to enlist the courts to punish people for being unable to navigate an inadequate shelter system.

America: The Political Seduction of the Law 169 (1990). As Judge O'Scannlain explained twenty years ago, "[i]n our system of government, courts base decisions not on dramatic Hollywood fantasies . . . but on concretely particularized facts developed in the cauldron of the adversary process and reduced to an assessable record." *United States v. Kincade*, 379 F.3d 813, 838 (9th Cir. 2004) (en banc). The case before the Court should be decided based on facts in the record, not fear of hypothetical future cases.

Regardless, drug trafficking, armed robbery, sexual assault, and child pornography are far afield from sleeping. In rejecting arguments to extend *Robinson* to drug possession or sexual abuse, courts have concluded that "while addiction may be a 'compelling propensity to use narcotics,' it is not necessarily an irresistible urge to have them." *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973); *see also United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (defendant's possession of child pornography was not "involuntary or uncontrollable"). By contrast, sleeping in public if shelter is unavailable is unavoidable. Even if the law prohibits sleeping, a person cannot comply. *See Pottinger I*, 810 F. Supp. at 1565 (it is "impossible" to resist the need to sleep). Because sleeping is a harmless biological imperative, it is distinguishable from the slippery slope of unchecked criminality that petitioner conjures in its brief.

III. The history of vagrancy laws does not justify the modern use of sleeping/camping ordinances to punish people experiencing homelessness.

Petitioner contends that there is a history in this country, dating to the founding era, of prohibiting sleeping/camping in public. Br. 42–43 (citing *Chicago v. Morales*, 527 U.S. 41, 104 & nn.2–4 (1999) (Thomas, J., dissenting); *Coal. on Homelessness v. City of San Francisco*, 90 F.4th 975, 987–989 (9th Cir. 2024) (Bumatay, J., dissenting)). Petitioner's reliance on the history of "archaic" vagrancy laws, *see Papachristou*, 405 U.S. at 162, does not support a finding that there is a tradition of banning sleeping/camping in public for several reasons. First, this Court has struck down vagrancy laws as unconstitutional, a rule finding universal application among the lower courts after *Papachristou*. Second, this Court has explicitly rejected the pernicious history underpinning vagrancy laws that imposed status-based punishment on the basis of poverty and race. Finally, sleeping/camping ordinances, of the kind at issue in this case, are not generally applicable ordinances that existed at the time of the founding of this country. Indeed, they are a relatively modern invention for policing homelessness. Vagrancy laws differ substantially in form from the sleeping/camping ordinances at issue here (Resp. Br. 34–38). In function, however, both are a convenient tool for those in political power to punish people not for what they do, but for who they are. And neither has a place in a constitutional system governed by the rule of law. *See Edwards v. California*, 314 U.S. 160, 176–77 (1941) (rejecting nineteenth-century formulations of the police power that permitted states to exclude "paupers" and "vagabonds" as a "moral pestilence." (citation omitted)).

A. Courts have repeatedly found that vagrancy laws are unconstitutional status crimes under the Fourteenth and Eighth Amendments.

In 1972, this Court struck down a vagrancy law from the City of Jacksonville, Florida, that criminalized a grab-bag of statuses, including "rogues and vagabonds," "habitual loafers," "persons wandering or strolling around from place to place without any lawful purpose or object," and "persons able to work but habitually living upon the earnings of their wives or minor children"—or, as the Court summarized, "poor people, nonconformists, dissenters, idlers." *Papachristou*, 405 U.S. at 156 n.1, 170. This Court specifically discussed and rejected the historical justifications for vagrancy laws. It unequivocally concluded that vagrancy laws "teach that the scales of justice are so tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together." *Papachristou*, 405 U.S. at 171; *see also Lazarus v. Faircloth*, 301 F. Supp. 266, 271 (S.D. Fla. 1969) (facially invalidating Florida vagrancy law), *vacated sub nom. Shevin v. Lazarus*, 401 U.S. 987 (1971) (vacated on *Younger* grounds); *Smith v. Florida*, 405 U.S. 172, 173 (1972) (vacating and remanding Florida Supreme Court decision upholding Florida's vagrancy statute for reconsideration in light of *Papachristou*).

Although *Papachristou* was decided on due process grounds, other courts have overturned vagrancy laws because they punish status, relying on *Robinson*. *See, e.g.*, *Pottinger I*, 810 F. Supp. at 1562; *Goldman v. Knecht*, 295 F. Supp. 897, 908 (D. Colo. 1969) (three-judge court)

(invalidating statute punishing "idleness or indigency coupled with being able-bodied"); *Wheeler v. Goodman*, 306 F. Supp. 58, 63 (W.D.N.C. 1969) (three-judge court) ("Idleness and poverty should not be treated as a criminal offense."), *vacated*, 401 U.S. 987 (1971) (vacated on *Younger* grounds); *Smith v. Hill*, 285 F. Supp. 556, 558 (E.D.N.C. 1968) (invalidating vagrancy statute on multiple constitutional grounds, including that it "creates a crime of the status of indigency").

B. This Court has explicitly rejected this country's history of using vagrancy laws as a tool of racial and economic subjugation.

During the founding era, U.S. vagrancy laws served as the criminal enforcement mechanism behind early U.S. poor laws, which rendered poor people "petty criminals" and "poverty [] a crime."[5] *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. Rich. L. Rev. 111, 160, 164 (1997); *see also Crime*, *Black's Law Dictionary* (11th ed. 2019) ("vagrancy" exemplifies a "status crime"). It was only

5. The colonial-era Pennsylvania statute petitioner cites (Br. 42–43), is one such vagrancy law. The law made it a status crime to belong to a class of "idle and disorderly persons," a class limited to poor people—those who lacked "wherewith to maintain themselves and their families" or "no visible means of subsistence" or who would "beg" or "gather alms"—and people who had returned after being "legally removed" from a jurisdiction. Act of Feb. 21, 1767, ch. 555, § 1, 1767 Pa. Laws 268–69. Contrary to petitioner's suggestion (Br. 42), the statute did not restrict "sleeping and camping on public property" generally. Moreover, the statute exempted "involuntary" vagrancy. Resp. Br. 35.

poor people—not the affluent—who could be convicted as vagrants for failing to work, or even failing to work "hard enough." Quigley, *supra*, at 165, 169; *see also Cody v. State*, 45 S.E. 622, 622 (Ga. 1903) (affirming a vagrancy conviction of person who, owning no property and earning only "small sums" that "were insufficient to support her," lived in a "general state of idleness"). Unlike the sleeping/camping ordinances here, however, founding-era poor laws created an affirmative obligation on local governments to provide relief for poor people. *See* Quigley, *supra*, at 114; *see also* Resp. Br. 34–36. The vagrancy regime's criminalization of people who lived in "idle" poverty—people "who failed to remain in their prescribed place in the economic order"—persisted into the mid-twentieth century. Risa Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s*, 15–17, 81–86 (2016); *see also, e.g.*, *City of New Orleans v. Postek*, 158 So. 553, 555 (La. 1934) (defining the "usual . . . classes of vagrants," including "the stereotype class of idle persons, without visible means of support, and who live without employment").

In a series of decisions spanning the past eighty years, this Court no longer allows states to reserve special penalties for people because they are experiencing poverty. *See, e.g.*, *Edwards*, 314 U.S. at 174–175, 177 (rejecting theory of Elizabethan poor laws in striking down prohibitions against transporting indigent persons into state); *Williams v. Illinois*, 399 U.S. 235, 240–241 (1970) (holding that although there is ancient historical precedent to support jailing someone for nonpayment of a fine, the equal protection clause does not authorize it); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (striking down one-year residency requirement for welfare assistance because

its purpose—to deter migration of persons experiencing poverty—like its historical antecedents, was no longer constitutionally permissible), *overruled on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974).

Other illegal aspects of colonial-era vagrancy laws, such as involuntary servitude, were similarly rejected. *See, e.g.*, *Pollock v. Williams*, 322 U.S. 4, 17 (1944) (invalidating Florida contract labor law as unconstitutional involuntary servitude, reasoning that the Thirteenth Amendment as implemented by the Anti-Peonage Act of 1867 was intended "not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States"); *United States v. Reynolds*, 235 U.S. 133, 149 (1914) (Alabama criminal surety law violated Thirteenth Amendment and Anti-Peonage Act); *Bailey*, 219 U.S. at 244–245 (same as to Alabama contract labor law, even though the law was framed as punishment for "fraud").

Vagrancy laws were crucial to maintaining white supremacy in the U.S. South from emancipation through the civil rights era, until *Papachristou*. "[B]road proscriptions on 'vagrancy' and other dubious offenses" were passed immediately after the Civil War ended as part of "Black Codes" designed "to subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs v. Indiana*, 139 S. Ct. 682, 688–89 (2019); *see also City of Memphis v. Greene*, 451 U.S. 100, 131 n.5 (1981) (White, J., concurring) (vagrancy and related labor laws could be framed in "a hundred ways" to force Black people into "some species of serfdom, peonage, or some other form of compulsory labor" (quoting S. Exec. Doc. No. 2, 39th Cong., 1st Sess. 35 (1865)).

After the repeal of Black Codes, with the passage of the Civil Rights Act of 1866, *see Greene*, 451 U.S. at 132–33, Southern states resorted to disproportionately enforcing antebellum vagrancy statutes—ostensibly race-neutral—against Black people. *See* Goluboff, *supra*, at 116; *see also, e.g.*, *Hicks v. State*, 76 Ga. 326, 328 (1886) ("[T]he law of vagrancy should be rigidly enforced, against the colored population especially, because many of them do lead idle and vagrant lives[.]"). Then, in tandem with Jim Crow segregation laws, all but one of the former Confederate states adopted new vagrancy laws from 1893 to 1909. William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. Hist. 31, 48, 50 (1976).

Just as this Court has rejected the history of vagrancy laws, it has also rejected the racial discrimination that such laws facilitated for over a century after emancipation. *See, e.g.*, *Timbs*, 139 S. Ct. at 688–89 (denouncing the Black Codes' use of vagrancy laws and excessive fines to coerce involuntary labor). For example, vagrancy laws were used to punish civil rights protestors in the sit-in cases. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 197–200 (1970) (Brennan, J., concurring in part and dissenting in part); *see also* Goluboff, *supra,* at 123 (relating how police officers "threatened and arrested movement activists with vagrancy or loitering arrests" for participating in movement organizing, including sit-ins, boycotts, integration of swimming pools, voter registration, "or even when they just walked down the street"). As this Court observed, "[t]he Black Codes were a substitute for slavery; segregation was a substitute for the Black Codes; the discrimination in [] sit-in cases is a relic of slavery." *Bell v. Maryland*, 378 U.S. 226, 247–48 (1964) (Douglas, J.,

concurring in part). This Court should decline petitioner's invitation to revive the system of racial and economic subordination that vagrancy laws facilitated.

C. Sleeping/camping ordinances, by design and application, are not generally applicable and instead target only people experiencing homelessness.

Vagrancy laws have largely disappeared after *Papachristou*, and their history of enforcement in this country should not be seriously considered as justification for punishing people who are experiencing homelessness today. Far from being generally applicable, modern sleeping/camping ordinances target homeless people directly either facially, by specifically referencing homelessness in the text, or by criminalizing innate biological processes like sleeping or resting that are inherent to the human condition. Sleeping/camping ordinances are not designed to alleviate unsheltered homelessness; rather, they punish people solely because they are involuntarily unsheltered.

Petitioner invokes (Br. 43) vagrancy law to justify its sleeping/camping ordinances. *See* Goluboff, *supra*, at 341 (describing how "neo-vagrancy type justifications" for "quality-of-life" policing emerged after "vagrancy law's downfall" in *Papachristou*). The *Johnson* judges dissenting from the denial of rehearing en banc likewise analogized the Grants Pass ordinance to "traditional anti-vagrancy regulations." Pet. App. 122a (O'Scannlain, J., dissenting from denial of rehearing en banc); *cf. Jones*, 444 F.3d at 1137 (analogizing vagrancy laws to criminalization of siting, lying down, or sleeping). The City

of Chico compares its own anti-camping ban to an 1887 state anti-vagrancy law, California Penal Code section 647, both of which it is currently enjoined from enforcing. City of Chico Amicus Br. 7, 12–13. These comparisons only serve to further delegitimize petitioner's justifications for sleeping/camping ordinances. They reveal that sleeping/camping ordinances function, like vagrancy laws before them, as a shortcut in criminal law to punish people deemed undesirable.

In Florida, the first published state court decision addressing the constitutionality of a sleeping ordinance came the year after *Papachristou* was decided. Drawing a direct comparison to vagrancy legislation, a state appeals court struck down an ordinance banning sleeping in public places from the City of St. Petersburg, Florida, enacted in 1955, on vagueness grounds. *State v. Penley*, 276 So. 2d 180, 181 (Fla. 2d DCA 1973) ("We find that there is marked similarity between this ordinance and most vagrancy legislation in that both provide for punishment of unoffending behavior."). Another decision followed in 1984, striking down, on vagueness grounds, an ordinance from the City of Daytona Beach, Florida, prohibiting lodging or sleeping in a vehicle. *City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 470 (Fla. 4th DCA 1984) (comparing vagrancy law struck down in *Lazarus* because both "criminalize[] conduct which is beyond the reach of the city's police power inasmuch as conduct 'in no way impinges on the rights or interests of others.'" (quoting *Lazarus*, 301 F. Supp. at 272)). The Eleventh Circuit, in 1987, addressed a city ordinance that prohibited lodging and sleeping in motor vehicles. *See Hershey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987). On procedural due process vagueness grounds, the court upheld the

ordinance, but only after striking the prohibition against "sleeping," finding that "the ordinance—after severance—gives proper and precise notice of the conduct prohibited: a person may not, in fact, remain on public property and use his motor vehicle as a living accommodation there." *Id.* at 940. The Eleventh Circuit did not address any claim that this interpretation of the ordinance, which only applied to people who were living in their vehicles, violated any other constitutional doctrine such as the Eighth Amendment's prohibition against status crimes. Thus, to avoid vagueness challenges (because sleep itself is inherently innocent and outside government's police powers to prohibit), legislators enacted ordinances specifically targeted at people who were living outside. *See, e.g.*, *Joel*, 232 F.3d at 1356 (enforcement criteria adopted in response to local court rulings holding that a person must do more than sleep to be arrested).

The Ninth Circuit's decision in *Martin* and *Johnson* saw these types of sleeping/camping ordinances for what they were: newfound ways to punish people for poverty. In *Martin*, the camping ordinance criminalized using "any of the streets, sidewalks, parks or public places as a camping place at any time." *Martin*, 920 F.3d at 603 (citation omitted). The ordinance defined "camping" broadly to include "the laying down of bedding for the purpose of sleeping." *Id.* at 618 (citation omitted). The court relied on a well-developed record to find that the ordinance was being enforced against individuals who used minimal blankets or bedding and had nowhere else to go; therefore, they were penalized for their housing status. *Martin,* 920 F.3d at 609–610.

The ordinances at issue in *Johnson* are nearly identical to those in *Martin.* Individuals are prohibited from sleeping or "[c]amping" on public property. *See* Pet. App. 221a–223a. Petitioner claims (Br. 37) that the ordinance's definition of a campsite is "solely in terms of conduct" because it is "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed" (Pet. App. 221a). Petitioner and its *amici* claim that using minimal bedding or blankets—essential to survival in cold or even moderate temperatures—is conduct that is somehow discernible and severable from sleeping. The Ninth Circuit in *Johnson* correctly rejected that argument and this transparent attempt to evade the core holding in *Martin*. *See id.* at 47a–48a.

Ordinances outside of the Ninth Circuit reveal the same underlying intent to target homeless people. For example, in *McArdle*, the City's ordinance facially referenced homelessness, *McArdle*, 519 F. Supp. 3d at 1048, as did the enforcement criteria in *Joel*, 232 F.3d at 1356. The legislative history reflected that Ocala did so because it wanted to distinguish between a person who is "enjoying a nice day and is sitting on a park bench and dozes off" and someone who has "indicia of living" in public. Pls.' Resp. to Def.'s Mot. Summ. J. at 6–7, *McArdle*, *supra* (No. 5:19-cv-00461), ECF No. 120. Ocala's definition of lodging explicitly names the same insidious intent behind similar laws in Boise, Grants Pass, and beyond: to criminalize sleep not because it is harmful, but because it substitutes as a proxy for a person's housing status when no other shelter is available.

Tennessee, Georgia, and Florida recently enacted legislation restricting sleeping/camping in public.

Although these statutes differ from the Grants Pass ordinances (Resp. Br. 41–42), none are generally applicable camping regulations. Tennessee makes it a felony to camp statewide on public property overnight, unless in a designated camping area. Camping is defined to include, *inter alia*, "[s]leeping or making preparations to sleep, including laying down a sleeping bag, blanket, or other material used for bedding." T.C.A. § 39-14-414(b)(2) (effective July 1, 2022); *see also* O.C.G.A. § 36-60-31 (effective July 1, 2023) (Georgia statute preempting local discretion on enforcement of "the enforcement of any order or ordinance prohibiting unauthorized public camping, sleeping, or obstruction of sidewalks."). A new Florida statute, H.B. 1365 (Fla. 2024) (to be codified at Fla. Stat. § 125.0231) (effective Oct. 1, 2024), preempts municipalities from allowing "public camping or sleeping" on any public property, *id.* §1(b)(2), unless it is designated to be a government-operated camp, *id.* § 1(b)(3). Florida defines "public camping or sleeping" to include, *inter alia*, "lodging or residing overnight without a tent or other temporary shelter." *Id.* § 1(b)1.b. The bill provides an exception for individuals in their vehicles at places where a vehicle "may lawfully be," and camping for recreational purposes. *Id.* § 1(b)2.b. All of these statewide bills are directed at homelessness.

Petitioner claims (Br. 43) that it seeks generally applicable ways of regulating "public space and public use" similar to the federal government's camping prohibitions in *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984). But *Clark*, which upheld on First Amendment grounds National Park Service regulations limiting recreational camping to designated areas, is inapposite. *See* 468 U.S. at 298. The ordinances in *Martin* and *Johnson* are not regulating recreational camping in a park

where it is otherwise permissible; they are prohibiting the existence of homeless people themselves in all public places throughout entire cities 24 hours a day, 7 days a week.

Further, like vagrancy laws before them, sleeping/camping ordinances also have discriminatory impacts on the basis of race. Nationally, Black Americans make up 13 percent of the overall population, but more than 37 percent of the total homeless population and 50 percent of all families experiencing homelessness. U.S. Dep't of Hous. & Urb. Dev., *supra*, at 2. This general trend holds true in Florida. For example, Black residents of Miami make up 18 percent of the overall population but more than 57 percent of the total homeless population and 66 percent of all families experiencing homelessness. Homeless Trust Miami-Dade Cty., *Miami-Dade Racial Disparity Among Persons Experiencing Homelessness* 2 (2020), https://www.homelesstrust.org/resources-homeless/library/racial-disparity-highlights.pdf. These racial disparities are caused by a long history of racial discrimination, segregation, and economic inequality. *See generally* George R. Carter, *From Exclusion to Destitution, Race Affordable Housing and Homelessness*, 13 Cityscape 33 (2011), www.huduser.gov/portal/periodicals/cityscpe/vol13num1/cityscape_march2011_from_exclusion.pdf. Enforcement of these sleeping/camping bans will undoubtedly perpetuate over-criminalization of Black Americans, who are already overrepresented in America's jails and prisons. Leah Wang, *Updated Data and Charts: Incarceration Stats by Race, Ethnicity, and Gender for All 50 States and D.C.*, Prison Policy Initiative (2023), https://www.prisonpolicy.org/blog/2023/09/27/updated_race_data/. By design and by effect, sleeping/camping

ordinances single out people who do not have housing or shelter for punishment, resulting in disproportionate impacts on the basis of race.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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