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 LOCAL GOVERNMENT LEGAL CENTER, THE NATIONAL ASSOCIATION OF COUNTIES, NATIONAL LEAGUE OF CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NORTH DAKOTA LEAGUE OF CITIES, CITIES OF ALBUQUERQUE, ANAHEIM, ANCHORAGE, COLORADO SPRINGS, HENDERSON, LAKE OSWEGO, LAS VEGAS, REDONDO BEACH, SACRAMENTO, SEATTLE, AND TOPEKA, THE CITY AND COUNTY OF HONOLULU, AND LOUISVILLE-JEFFERSON COUNTY METRO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The Local Government Legal Center ("LGLC") is a coalition of national local government organizations formed in 2023 to educate local governments on pending Supreme Court proceedings and to advocate for local governments in appropriate cases. The National Association of Counties, the National League of Cities, and the International Municipal Lawyers Association are the founding members of the LGLC.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments and represents more than 19,000 cities and towns in the United States. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

Established in 1935, the International Municipal Lawyers Association ("IMLA") is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoints of local

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae state that no counsel for any party authored this brief in whole or in part, and no outside entity made any monetary contribution to fund the preparation or submission of this brief.

governments around the county on legal issues before state and federal appellate courts.

The North Dakota League of Cities ("NDLC") is comprised of 355 member cities and was formed in 1912 to support municipal governance throughout the state through information sharing, education, and legal advocacy.

The Cities of Albuquerque, Anaheim, Anchorage, Colorado Springs, Henderson, Lake Oswego, Las Vegas, Redondo Beach, Sacramento, Seattle, and Topeka, the City and County of Honolulu, and Louisville-Jefferson County Metro, are local governments of different sizes from all over the country whose communities are significantly affected by the homelessness crisis. Each of these entities is committed to solutions that appropriately balance compassion with efficacy while also protecting the livelihood of local businesses and residents.

Homelessness is complex at both the societal and individual levels. Effective sustainable solutions will require compromise to meet this increasingly nuanced contemporary challenge. Solutions will be expensive, they will take time, and there will be intense disagreement along the way about what methods work best and which philosophies make the most sense.

The Ninth Circuit's novel application of the Eighth Amendment is untenable. The holding stations federal courts at the center of every town for the purpose of deciding when and where local authorities may enforce basic regulations against public camping. The rule has no limiting principle, constitutionalizes a policy judgment in a complex social arena, and turns

federal judges into townhall chancellors. Amici support reversing this extraordinary incursion into local autonomy.

SUMMARY OF ARGUMENT

Homelessness is complicated. The constitutional question presented in this case is not. The Ninth Circuit liberated the Eighth Amendment from its text and purpose, setting federal courts free to wander about deciding when local governments may use their police power to enforce basic regulations against living in public spaces. This unilateral judicial action amounts to an ongoing federal audit of how local authorities enforce generally applicable facially valid laws. The Ninth Circuit justified this extraordinary derogation of federalism by relying on the substantive limits on criminal responsibility that have, until now, been slumbering in the Constitution.

This novel interpretation of the Eighth Amendment is legally wrong, and the devised remedy is harmful. Safe parks and functioning arterials are the circulatory system essential to any vibrant locality. Local policymakers have always been tasked with keeping these municipal passageways open. In the context of homelessness this may require compromise, and result in encampments being tolerated for a time before authorities need them to disperse. The Ninth Circuit, however, imposed a constitutional prerequisite to this basic exercise of the police power: local governments must first provide an alternative place to go before telling someone they cannot stay where they are.

That rule is a rigid policy judgment. Imposing a requirement that local governments offer temporary shelter as an antecedent to enforcement has substantial financial implications and encourages jurisdictions to mass produce a form of shelter that most people do not want and that most advocates say does not work. In addition to creating practical problems for local governments, this unprincipled rule is also legally unsupportable. Supervising local enforcement of facially valid public camping regulations runs counter to the notions of comity and respect that underpin our dual sovereign system. The pretense that enforcement is equivalent to punishment has no support in this Court's cases. Subjecting individual jurisdictions to litigation and federal injunctions that effectively mandate the construction of shelter space is practically counterproductive and constitutionally unjustifiable.

Homelessness is a serious social and economic issue impacting communities across the country. Voters in many places prefer compassionate responses and local governments continue to increase investments in housing and other supportive services. At the same time, encampments have devastated surrounding neighborhoods and businesses. Many affected community members are not prepared to accept that kind of social harm indefinitely and turn to their local governments for immediate relief. One tool that governments use to address the imminent health and environmental hazards created by encampments are public order regulations like anti-camping ordinances. Laws like these are neither new nor unusual.

Navigating the situational social friction created by encampments needs to be left in the hands of locally elected representatives who are sensitive to the needs, priorities, and resources of the region. These tough decisions involve philosophical compromises and fiscal tradeoffs; a balancing act the Constitution leaves to local governments to perform.

ARGUMENT

I. LOCAL GOVERNMENTS ARE ON THE FRONT LINES ADDRESSING HOMELESSNESS.

Everyone agrees that "homelessness is a serious issue 'caused by a complex mix of economic, mental-health, and substance-abuse factors.'" *Johnson v. City of Grants Pass*, 72 F.4th 868, 923 (9th Cir. 2023) (statement regarding denial of reh'g) (quoting M. Smith, J., *id.* at 935, dissenting from denial of reh'g)). The dispute lies in finding an agreeable response.

At the local level, long-term solutions to these underlying issues need to be balanced with responding to the environmental and public health harms that encampments can cause to the surrounding area. These harmful impacts are evident and well-documented. Solid waste, for example, is "an inevitable result of most homeless encampments."[2] In a recent removal prompted by community complaints after a shooting, 210,000 pounds of debris were removed from a 38-resident encampment located on

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[2] Wash. State Dep't of Ecology, *$4 Million for Homeless Encampments Cleanup*, No. 20-07-002 (Jan. 2020), https://apps.ecology.wa.gov/publications/documents/2007002.pdf .

land beside the interstate just blocks away from the University of Washington campus.[3] Encampments located near places like daycares upset parents who are concerned about exposing their children to these heightened health hazards and potential for violence.[4] Encampments also present an existential risk to nearby businesses by deterring the formerly reliable stream of customers,[5] and impede access to sidewalks by disabled persons.

These community members bring their valid concerns to local authorities and demand solutions. Other community members also voice strong opposition to any type of removal action unless each person is immediately placed in housing.[6] Local

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[3] Jeremy Harris, *200K pounds of debris removed from encampments along I-5 in Seattle's U-District*, KOMO News (Feb. 22, 2024), https://komonews.com/news/local/homeless-encampments-interstate-5-univeristy-district-seattle-king-county-homelessness-crisis-treatment-housing-shelter-services-fencing-washington-state-department-of-transportation-funding-governor-jay-inslee-legislators-house-senate-wsdot-proposal-spd.

[4] KIRO 7 News Staff, *Mount Baker preschool begs Seattle to remove nearby encampment*, KIRO 7 (Feb. 8, 2024), https://www.kiro7.com/news/local/mount-baker-preschool-begs-seattle-remove-nearby-encampment/KIDDQBBJGZFUPFPAVARQLPFQM4/.

[5] Eli Saslow, *A Once Despairing Sandwich Shop Owner Sees 'a Miracle'*, N.Y. Times (Dec. 26, 2023), https://www.nytimes.com/2023/12/26/us/phoenix-homeless-encampment-zone.html.

[6] Claire Rush, *Cities crack down on homeless encampments. Advocates say that's not the answer*, KGW 8 (Nov. 28, 2023), https://www.kgw.com/article/news/local/homeless/cities-crack-down-homeless-encampments-advocates-protest/283-a3a40ddb-9d0a-4845-83e5-dd0486d4ee44.

leaders caught in this tension are tasked with doing the hard work of democracy that requires juggling limited budgets and different views to find the right recipe of compassion, stewardship, safety, and accountability. These political processes often reach different decisions in our diverse nation.

While local governments are tasked with navigating these imminent community health and safety concerns, homelessness is a much larger national issue. The U.S. Department of Housing and Urban Development ("HUD") conducted its first national point-in-time count in 2007 to estimate how many people were experiencing homelessness on a given night.[7] That year, HUD estimated that 647,258 people were experiencing homelessness (391,401 sheltered, 255,857 unsheltered). *Id.* at 10. Almost two decades later, the 2023 estimated total was 653,104 people (396,494 sheltered, 256,610 unsheltered). *Id.* Notably, this total population increased by 12% from 2022. *Id.* at 12. Although these total population estimates are similar, the population itself is not static as each year an average of 908,530 people become homeless while 900,895 people exit homelessness to housing.[8]

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[7] U.S. Dep't of Housing and Urban Dev., *2023 Annual Homelessness Assessment Report to Congress*, 12 (Dec. 2023) [hereinafter "AHAR"], https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf.

[8] U.S. Interagency Council on Homelessness, *ALL IN: The Federal Strategic Plan to Prevent and End Homelessness*, 61 (Dec. 2022), [hereinafter "ALL IN"], https://www.usich.gov/sites/default/files/document/All_In.pdf.

In contrast with this relatively flat national trend, some parts of the country have seen homeless populations spike since 2007. California, for example, experienced an increase of 42,413 people (+30.5%) during this period. New York increased by 40,599 (+64.9%) people, with 29,022 added from 2022-23 alone. Washington (+19.9%), Massachusetts (+26.5%), and Oregon (+14.5%) round out the top five states with the largest increases from 2007 to 2023.[9] Conversely, other states such as Florida and Texas have generally trended downwards over this same this period.

Determining the reasons for these disparate trends is tricky when there are so many factors that can affect whether someone is housed. Tangible issues like low wages, high rent, domestic violence, natural disasters, mental health, and substance abuse can all play a role, but federal agencies also attribute homelessness to deeper problems such as systemic racism and discriminatory housing practices.[10] Further complicating these individual and social factors is the current national shortage of available affordable housing, with some estimates ranging as high as a 7.3M home deficit.[11] This housing market is particularly squeezed in metropolitan regions with limited land and high costs of living, and cities everywhere struggle to match supply to demand as

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[9] AHAR, *supra* n. 7, at 17.

[10] ALL IN, *supra* n. 8, at 15-16.

[11] National Low Income Housing Coalition, *The Gap: A Shortage of Affordable Homes*, 7 (Mar. 2023), https://nlihc.org/sites/default/files/gap/Gap-Report_2023.pdf.

83% of the nation's population is now concentrated in urban areas.[12]

Although more public housing does not cure this overall deficit in the housing stock, many communities in the country agree that it plays an important role in any compassionate response to homelessness and accordingly have worked hard to create more. At the national level, HUD reports the total number of year-round beds (i.e., emergency shelter, transitional housing, permanent housing) rose from 611,169 in 2007 to 1,112,545 in 2023, with 662,978 of those beds in permanent housing.[13]

In many of the hardest hit cities, however, homeless populations have continued to rise faster than shelter and housing options can be constructed. In Seattle, for example, the estimated homeless population increased from 7,902 in 2007 to 14,149 in 2023,[14] while the total number of year-round beds doubled from 9,668 to 19,809, and the number of

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[12] Center for Sustainable Systems, Univ. of Mich., *U.S. Cities Factsheet*, No. CSS09-06 (Aug. 2023), https://css.umich.edu/sites/default/files/2023-10/U.S.%20Cities_CSS09-06_0.pdf.

[13] *See* AHAR, *supra* n. 7, at 89-91.

[14] HUD Continuum of Care ("CoC") Homeless Populations, WA-500 (2007), https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_WA-500-2007_WA_2007.pdf; *see also*, HUD CoC Homeless Populations, WA-500 (2023), https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_WA-500-2023_WA_2023.pdf. NOTE: The homeless populations estimated by the annual point-in-time count do not include formerly homeless people residing in permanent supportive housing. *See* AHAR, *supra* n. 7, at 6.

permanent supportive housing beds almost tripled from 2,775 to 7,251.[15] At the other end of the West Coast, the homeless population in Los Angeles increased from 47,862 in 2007 to 71,320 in 2023,[16] while the total number of year-round beds tripled from 19,335 to 59,112, and the number of permanent supportive housing beds almost quadrupled from 6,870 to 24,172.[17]

There are many ways to interpret these data and many potential reasons for these trends. No matter the potential explanations, it is indisputable that in some areas homeless populations have increased at much higher rates than the national average even as local governments have multiplied the regional supply of public housing options. This simply illustrates the point that homelessness is behaviorally complex, the product of many different social factors, and probably

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[15] HUD CoC Housing Inventory, WA-500 (2007), https://files.hudexchange.info/reports/published/CoC_HIC_CoC_WA-500-2007_WA_2007.pdf; *see also*, HUD CoC Housing Inventory, WA-500 (2023), https://files.hudexchange.info/reports/published/CoC_HIC_CoC_WA-500-2023_WA_2023.pdf.

[16] HUD CoC Homeless Populations, CA-600 (2007), https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_CA-600-2007_CA_2007.pdf; *see also,* HUD CoC Homeless Populations, CA-600 (2023), https://files.hudexchange.info/reports/published/CoC_PopSub_CoC_CA-600-2023_CA_2023.pdf.

[17] HUD CoC Housing Inventory, CA-600 (2007), https://files.hudexchange.info/reports/published/CoC_HIC_CoC_CA-600-2007_CA_2007.pdf; *see also*, HUD CoC Housing Inventory, CA-600 (2023), https://files.hudexchange.info/reports/published/CoC_HIC_CoC_CA-600-2023_CA_2023.pdf.

not amenable to simple one-dimensional solutions. Just building more shelter beds and public housing options is almost certainly not the answer by itself.

Local governments take different approaches to homelessness but regulations like public camping ordinances are common and used in many places. The jurisdictions where most homeless individuals reside do not use this type of police power to criminalize homelessness. Instead, these regulations provide the statutory authority that officials need to clear problematic encampments that pose significant health and safety risks. They are necessary tools for keeping certain areas in the community free from encampments, such as downtown economic zones and areas near schools and children's baseball fields. Citations, whether civil or criminal, can also be used to as way to encourage cited individuals to address underlying factors like substance abuse or mental illness by participating in treatment-based diversion programs.

Navigating these considerations and reaching the right compromises is a difficult task that requires nuance and sensitivity. As the nation looks for the way out of the current housing shortage and homelessness crisis, "we must preserve for our localities the ability to make tough policy choices unobstructed by court-created mandates that lack any sound basis in law." *Johnson* 72 F.4th at 945 (Bress, J.) (dissenting from denial of reh'g). Local jurisdictions welcome federal assistance in addressing homelessness. But that help should come from a political branch of government, not the judiciary.

II. THE EIGHTH AMENDMENT DOES NOT AUTHORIZE FEDERAL COURTS TO AUDIT HOW LOCAL GOVERNMENTS ENFORCE VALID LAWS.

A town's authority to keep its sidewalks clear and parks open is not ordinarily a controversial notion. Without this authority it is not really a town at all, but just a group of people haphazardly living close to each other. This preeminent function of local governance has always been recognized by this Court. As Justice Harlan wrote more than a century ago, "the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights." *Patterson v. State of Kentucky*, 97 U.S. 501, 504 (1878). Thus, "of all the powers of local government, the police power is 'one of the least limitable.'" *Lambert v. California*, 355 U.S. 225, 228 (1957) (quoting *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909)).

Taking steps to stop people from living in common spaces is at the bedrock of this "least limitable" authority. The Ninth Circuit, however, decided that this fundamental power must yield to the Eighth Amendment's "substantive limits on what can be made criminal" and, to eliminate any potential for a violation, created a prophylactic rule prohibiting enforcement of public camping regulations "when there is no shelter space available." *Johnson*, 72 F.4th at 896. Although obfuscated as amended, "[t]he original majority opinion made clear that the beds-versus population 'formula' is all that matters." *Id.* at 938 (M. Smith, J., dissenting from denial of reh'g). From this approach, whenever the estimated homeless population in a jurisdiction exceeds the

number of shelter beds, federal courts must continuously supervise local governments who try to use the police power to regulate conduct like public camping.

The principal issue with this misinterpretation of the Eighth Amendment is how the rule is applied. Local governments should not need to seek permission from the federal judiciary before enforcing valid laws prohibiting camping in public spaces. The rule lacks any legal or factual basis justifying this sharp departure from federalism principles and stretches the meaning of "punishment" to encompass pre-conviction enforcement actions at the street level. The Eighth Amendment does not provide a basis to prospectively impose substantive limits on state criminal law in this manner.

A. The Ninth Circuit's Rule Usurps Local Functions and Undermines Federalism.

Regulating behaviors like erecting tents on public land has always been within the scope and substance of the local police power. *See Coal. on Homelessness v. City & Cty. of San Francisco*, 90 F.4th 975, 987-89 (9th Cir. 2024) (Bumatay, J., dissenting). Camping bans and park restrictions are precisely the sort of "regulations [designed] to preserve order, to promote freedom of communication, and to facilitate the transaction of business in crowded communities." *Chicago, B. & Q. Ry. Co. v. Illinois*, 200 U.S. 561, 593 (1906) (quotation omitted). Local authority is at its highest when used to promote "the safety, health, morals, comfort and welfare" of the people within the jurisdiction. *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901) (quotation omitted).

Whether the ordinance pertains to camping, or to loitering, or to vagrancy, laws regulating these types of public behavior "have been a fixture of Anglo-American law at least since the time of the Norman Conquest." *Chicago v. Morales*, 527 U.S. 41, 103 (1999) (Thomas, J., dissenting). This custom continues. Local ordinances addressing this type of conduct (and camping specifically) remain commonplace in this country.[18] Traditionally, the limitations this Court has placed on this category of laws have been procedural rather than substantive. *E.g., Papachristou v. Jacksonville*, 405 U.S. 156, 170-71 (1972).

With respect to public camping regulations specifically, this Court highlighted the government interests justifying them in a free speech case. In *Clark v. Community for Creative Non-Violence*, the National Park Service granted an advocacy group's application to erect a short-term symbolic tent city in Lafayette Park "to call attention to the plight of the homeless," but denied the group's request for a special use permit that would have allowed demonstrators to sleep there overnight. 468 U.S. 288, 289 (1984). Agreeing that "sleeping" was conduct and assuming that it was also expressive, this Court had "very little

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[18] *E.g.,* Anaheim, Cal., Code § 11.10.30 (camping in public areas prohibited); Colorado Springs, Colo., Code § 9.6.110 (camping); D.C. Code § 24-121 (tents, trailer camps, and other temporary abodes); Denver, Colo., Code § 38-86.2 (camping); Honolulu, Haw., Code § 10-1.2(a)(13) (camping in public parks); Las Vegas, Nev., Code § 10.86.010 (camping, lodging, and similar activities); Sacramento, Cal., Code § 12.52 *et seq*. (camping); Seattle, Wash., Code § 18.12.250 (camping in public parks); Topeka, Kan., Code § 9.45.340-.400 (camping).

trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here." *Id*. at 295. The "substantial interest" in maintaining attractive parks was sufficient:

> To permit camping – using these areas as living accommodations – would be totally inimical to these purposes, as would be readily understood by those who have frequented the National Parks across the country and observed the unfortunate consequence of the activities of those who refuse to confine their camping to designated areas.

Id. at 296.

This Court has always respected the counterbalanced governance central to our dual sovereign system and has hesitated to place federal courts in a supervisory role over how local authority is exercised. On many occasions this Court has reiterated "the normal principles of equity, comity and federalism that should inform the judgment of federal courts when asked to oversee state law enforcement authorities." *Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983); *see also, Riverside v. McLaughlin*, 500 U.S. 44, 53 (1991) (acknowledging "proper deference to the demands of federalism").

The Ninth Circuit displayed no restraint and assumed the reins of local police power by prospectively enforcing the new constitutional rule that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." *Johnson*, 72 F.4th at 893. For cities like San

Francisco, this becomes a perpetual process of seeking "the permission of a federal judge" and appealing the disagreements that will inevitably arise in the district court. *Coal. on Homelessness*, 90 F.4th at 982 (Bumatay, J., dissenting). Additional appeals will, evidently, be needed to resolve questions like whether encampment resolutions that are "limited [in] geographic scope" or "time-limited [in] nature" violate the district court's injunction. *Id.* at 977 (panel majority). The San Francisco case clearly illustrates the type of continuing hands-on federal involvement contemplated by the Ninth Circuit.

As this appellate ping pong makes clear, the type of injunction at issue here amounts to "nothing less than an ongoing federal audit" of the enforcement of "seemingly valid state laws." *See O'Shea v. Littleton*, 414 U.S. 488, 500 (1974). However, other than quick standing analyses, *see Martin v. Boise,* 920 F.3d 584, 608-10 (9th Cir. 2019), *see also, Johnson*, 72 F.4th at 881-83, the Ninth Circuit ignored the imperative for "courts of equity to exercise discretion" when asked to interject "federal courts in the administration of the criminal law." *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). The "crude population-level inquiry" used to predict the involuntariness of future conduct, *Johnson*, 72 F.4th at 936 (M. Smith, J., dissenting from denial of reh'g), is incongruent with this Court's descriptions of the type of "extraordinary circumstance" where a federal court may order "injunctive relief against state criminal prosecutions." *Younger v. Harris*, 401 U.S. 37, 53 (1971). If abstention principles keep federal courts from interfering with an

ongoing state prosecution, the same should be true for the underlying enforcement action that gave rise to it.

Setting aside capital cases, in the Eighth Amendment context this Court has only ever authorized such sweeping class-wide injunctive relief as a last-resort necessity to redress unconstitutional conditions of confinement. *See, e.g., Brown v. Plata*, 563 U.S. 493 (2011). That post-conviction context is entirely different. The injunction was pursuant to a specific Act of Congress, *see* 18 U.S.C. § 3626, and after conviction the State owes an affirmative duty to prisoners because "[t]o incarcerate, society takes from [them] the means to provide for their own needs." *Brown*, 563 U.S. at 510. The Ninth Circuit's rule turns that reasoning inside out: "to incarcerate, society must first offer a person the means to provide for their own needs."

Even in that post-conviction context, Justice Scalia pointed out that these sorts of structural injunctions are dangerous because they "turn[] judges into long-term administrators of complex social institutions . . . to play a role essentially indistinguishable from the role ordinarily played by executive officials." *Id.* at 555 (Scalia, J., dissenting). Those words are an apt description of the injunctive regime at issue in this case. The Ninth Circuit's rule takes control of governance from local authorities and turns federal courts into "homeless policy czars" deciding when basic public camping regulations may be enforced. *Johnson*, 72 F.4th at 943 (M. Smith, J., dissenting from denial of reh'g). This departure from federalism principles is not supported by the Eighth Amendment.

B. The Cruel and Unusual Punishment Clause Does Not Apply to Street Level Enforcement.

According to the Ninth Circuit, "the Cruel and Unusual Punishment Clause bars *enforcement* of the anti-camping ordinances." *Johnson*, 72 F.4th at 880 (emphasis added). Under this rule, even "threatening to enforce" camping ordinances can constitute unconstitutional punishment. *See Coal. on Homelessness v. City & Cty. of San Francisco*, No. 23-15087, 2024 WL 125340, *1 (9th Cir. Jan. 11, 2024) (mem. op.). That conflicts with this Court's numerous statements that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process." *E.g., Ingraham v. Wright*, 430 U.S. 651, 671 n. 40 (1977). The Ninth Circuit sidestepped this problem by explaining in a footnote that when "plaintiffs are raising challenges to the 'substantive limits on what can be made criminal,' *Ingraham* does not prohibit a challenge before a criminal conviction." *Johnson*, 72 F.4th at 889 n. 26.

As many of the dissenting judges have noted, extending the Clause "to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point." *Martin*, 920 F.3d at 603 (Bennet, J., dissenting from denial of reh'g). In the pretrial context, this Court has consistently held that when "there has been no formal adjudication of guilt . . . the Eighth Amendment has no application." *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983); *see also,*

e.g., Bell v. Wolfish, 441 U.S. 520, 535 n. 16 (1979) ("[t]he Court of Appeals properly relied on the Due Process Clause rather than the Eighth Amendment in considering the claims of pretrial detainees").

Attaching the Eighth Amendment right to pre-enforcement actions could only ever be justified where the challenged law on its face permitted an unconstitutional punishment. *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977) (regarding the death penalty for non-homicide offense). That is not the situation for the facially valid ordinances in this case that only contemplate the possibility of a jail sentence after a person is issued two successive civil violations, followed by a park exclusion order, followed by a trespass charge for violating that order. *See Johnson*, 72 F.4th at 890 ("[i]mposing a few extra steps . . . does not cure the anti-camping ordinances' Eighth Amendment infirmity"); *compare, id.* at 933 (Graber, J., respecting denial of reh'g) ("the Eighth Amendment does not prohibit all civil remedies that could, in theory lead to" criminal prosecution).

In addition to being attenuated from the initial civil violations, a conviction for criminal trespass in the second degree does not carry a mandatory jail sentence under Oregon law. *See Johnson*, 72 F.4th at 890; *and see,* Or. Rev. Stat. § 161.615(3) (maximum jail sentence for a class C misdemeanor is 30 days with no minimum term). This Court has explained that "[t]here is a clear line between sentences of imprisonment and sentences involving no deprivation of liberty." *Solem v. Helm*, 463 U.S. 277, 294 n. 18 (1983) (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972)). It is entirely possible that even the cases that

eventually result in a criminal charge will not also result in a jail sentence. Indeed, many jurisdictions use citations like these as a means of compelling individuals to participate in diversion programs designed to connect participants with supportive services. *See* Andrew I. Lief, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. Pa. L. Rev. 1971, 1989-90 n. 125 (2021).[19]

No opinion from this Court supports the theory that facially valid criminal laws may be enjoined because someone *might* eventually receive an unconstitutional sentence. Although they feel punitive in the colloquial sense of the word, arrests, threats to arrest, and pretrial detention on bail are not properly categorized as punishment under this Court's cases. *See also, United States v. Salerno*, 481 U.S. 739, 746-47 (1987). The Ninth Circuit's contrary conclusion is a "step too far" and requires a "double leap in logic" that has no legal basis. *Johnson*, 72 F.4th at 933 (Graber, J., respecting denial of reh'g).

C. *Robinson* Should Not Be Interpreted as Imposing Substantive Limits on Local Criminal Laws.

The legal error central to this case is the Ninth Circuit's interpretation of *Robinson v. California*, 370 U.S. 660 (1962). In *Martin* the court "gleaned from

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[19] Some communities have taken innovative approaches in implementing different types of community court, including using "mobile courts" to help reach homeless participants where they are located. *See, e.g.,* City of Boulder, Colo., *Community Court*, https://bouldercolorado.gov/services/community-court (last viewed Feb. 28, 2024).

Robinson the principle that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequences of one's status or being." 920 F.3d at 616 (quotation removed). Reinforcing this questionable premise, the Ninth Circuit placed extraordinary emphasis on dicta from *Ingraham* regarding the "substantive limits on what can be made criminal and punished as such." *See id*. at 613-14. Starting from that narrow view, the court has had no problem concluding that "*Robinson* limits the reach of criminal law." *See Johnson*, 72 F.4th at 921 (statement regarding denial of reh'g).

This Court has, in passing, described the holding of *Robinson* that way. *See e.g., Rhodes v. Champman*, 452 U.S. 337, 346 n. 12 (1981); *Ingraham*, 430 U.S. at 667. This Court has not, however, ever applied *Robinson* that way. Interpreting *Robinson* as imposing "substantive limits on what can be made criminal" is a ticking time bomb that invites future federal incursions on state law. Amici respectfully suggest that, rather than treating *Robinson* as a one-off outlier case susceptible to permitting substantive limitations on criminal law, a more parsimonious understanding of the opinion is as the extreme example of disproportionate sentencing.

Many members of this Court have described *Robinson* as an excessive sentencing case. Justice Stevens, for example, explained that while the jail sentence in *Robinson* was not cruel or unusual "in the abstract," it was held to "be excessive" when used to penalize the status of narcotic addiction. *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). Justice Powell similarly explained in *Solem*, *supra,* that the "90-day

sentence [in *Robinson*] was found to be excessive." 463 U.S. at 287; *see also, Harmelin v. Michigan*, 501 U.S. 957, 1012 (1991) (White, J., dissenting) (discussing *Robinson* along with other proportionality cases).

Justice Thurgood Marshall endorsed this interpretation, explaining that in *Powell* and *Robinson* "[t]he analysis in both cases was the same; only the conclusion as to whether or not the punishment was excessive differed." *Furman v. Georgia*, 408 U.S. 238, 328 (1972) (Thurgood Marshall, J., concurring); *see also, Carmona v. Ward*, 439 U.S. 1091, 1094-95 (1979) (Thurgood Marshall, J., dissenting from denial of certiorari) (citing *Robinson* to demonstrate that "this Court has invalidated punishments that were disproportionate to the nature of the offense charged").

From this perspective, the holdings in *Robinson* and *Powell* are more easily reconciled. The mandatory jail sentence in *Robinson* was unconstitutionally excessive because instead of being imposed for "the use of narcotics" or "antisocial or disorderly behavior" it criminalized "an illness which may be contracted innocently" and permitted a person "to be continuously guilty" of the offense anywhere in the State. 370 U.S. at 666-67. The complete absence of any actus reus allowed this Court to hold that any penalty would be disproportionate to statutory elements of the crime.

By contrast, in *Powell v. Texas* a plurality of justices explained that the "primary purpose" of the Clause has always been properly considered "to be directed at the method or kind of punishment imposed." 392 U.S. 514, 531-32 (1968). Examining "the

nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed." *Id.* From that starting place, five justices agreed that the fine imposed for the purportedly involuntary conduct in that case was not unconstitutional. Recognizing the case could present a slippery slope, the plurality explained that *Robinson* did not control the outcome because "there is a substantial definitional distinction between a 'status' . . . and a 'condition,'" and when this line is blurred it becomes "difficult to see any limiting principle" that would prevent the federal judiciary from becoming "the ultimate arbiter of the standards of criminal responsibility." *Id.* at 533.

Reading *Robinson* as the extreme example of disproportionate sentencing is a cleaner fit within this Court's jurisprudence than interpreting it to mean that there are "substantive limits" on state criminal laws hibernating within the recesses of the Eighth Amendment. If a penal statute is facially valid, then the constitutionality of a particular penal sentence can only be analyzed by looking at the individual characteristics of the defendant and the factual basis for the conviction. As this Court has explained, the "inherent nature of our federal system and the need for individualized sentencing decisions result in a wide range of constitutional sentences" and "no single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment." *Solem*, 463 U.S. at 290 n. 17.

The Ninth Circuit's determination that *any* penal sentence for *any* individual within a diverse class would be *per se* unconstitutional is legally

unjustifiable. Homelessness is too impermanent to be considered a status like addiction. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166-67 (Cal. 1995). As noted in the previous section, approximately 900,000 people become housed each year. This tends to show "the efficacy of acts of social intervention to change the condition of those currently homeless." *Joyce v. City & Cty. of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994). Additionally, individual facts like whether someone has previously "declined offers of temporary housing" are critical. *Id.* at 938 (M. Smith, J., dissenting from denial of reh'g). "It blinks reality to say that the district court could, 'in one stroke,' resolve the constitutionality of the public-camping ban as applied to each of the" class members here. *Id.* at 939 (quoting panel op., *id.* at 811).

By enjoining even threats to enforce the applicable ordinances, the Ninth Circuit's rule guarantees that no individualized inquiry or sentencing proceeding will occur. This "federal constitutional prohibition on the criminalization of purportedly nonvolitional conduct," *Johnson*, 72 F.4th at 928 (O'Scannlain, J., respecting denial of reh'g), also displaces common law trial defenses that might otherwise apply to the charged violation. *See, e.g., In re Eichorn*, 69 Cal. App. 4th 382, 391 (1998) (granting writ because petitioner "is entitled to raise a necessity defense to charges he violated the camping ordinance"). New federal rules defining "the purposes of the criminal law [and] the ideas of free will and responsibility" should be rejected because crafting those definitions is "a project for state governance, not constitutional law." *E.g., Kahler v. Kansas*, 589 U.S. ___, 140 S. Ct. 1021, 1037 (2020).

Instead of interpreting *Robinson* as creating malleable limitations on substantive criminal law, that case should be read simply as the far-end of this Court's proportionality jurisprudence. This view provides an appropriate resting place for *Robinson*, while removing the danger of future courts similarly pushing this corner of the constitutional envelope.

III. THE NINTH CIRCUIT'S RULE IS A POLICY JUDGMENT.

The rule created below dictates that local authorities may only stop people from living in public spaces if the government first provides them with an alternative place to go. That concept is not supported by the Eighth Amendment or any other constitutional principle. Instead, this is a policy judgment that federal courts are not engineered or equipped to administer.

That policy can have substantial financial implications for local governments. It can also incentivize overwhelmed jurisdictions to concentrate public resources on temporary shelter beds even if policymakers would prefer to invest in more permanent solutions. Homelessness is complicated, caused in part by national economic forces, and local leaders struggling to preserve the livelihood of their communities need the authority to impose reasonable regulations designed to further legitimate public interests.

A. Providing Shelter and Other Public Housing Options is Costly.

Building and maintaining shelter space is expensive. Although numbers can vary widely by

region, the national average cost for shelter beds has been estimated to be around $16,000 per unit per year.[20] In small and large jurisdictions alike, finding the funding to provide a multitude of shelter beds can be difficult and can require compromising other parts of the local budget.

Take the City of Grants Pass. Relying on this $16,000 per unit per year estimate, the annual cost to Grants Pass of providing shelter for the 50 to 600 homeless persons in the jurisdiction might be anywhere from $800,000 to $9.6M. When this action was commenced in 2018 Grants Pass had an annual budget of just over $133M.[21] Using some quick napkin math, the Ninth Circuit's rule effectively obligates the City to dedicate up to 7.2% of its annual budget to shelter services. Alternatively, of course, Grants Pass might choose to save the money by foregoing enforcement of its camping regulations.

Some jurisdictions simply do not have the fiscal flexibility to accommodate new inroads to the budget like this. And even in areas committed to providing shelter, fluctuations in the local homeless population can strain the social safety net to its breaking point. For example, New York City is a jurisdiction that

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[20] Dennis P. Culhane & Seongho An, *Estimated Revenue of the Nonprofit Homeless Shelter Industry in the United States: Implications for a More Comprehensive Approach to Unmet Shelter Demand*, 32 Housing Policy Debate 823, 830-33 tbl. 4 (2022) (relying on 2015 HUD Housing Inventory Count data).

[21] City of Grants Pass, Ore., *Adopted Operating & Capital Budget Fiscal Year 2017-18*, 25, (2018), https://www.grantspassoregon.gov/DocumentCenter/View/10828/Complete-Adopted-Budget-FY18?bidId=.

implemented a right-to-shelter policy decades ago, but the recent influx of tens of thousands of unhoused immigrants has pushed the city to the financial brink.[22] The cost is estimated to be several billion dollars and counting.[23] Across the country, Denver is confronting a similar situation and reaching similarly dire financial straits.[24] Regions that are less affected by this recent trend have still scrambled to match unhoused immigrants with shelter options, and have needed to confront the budgetary realities created by these unplanned expenditures.[25]

The impulse to provide shelter to those who do not have it is compassionate, and the humanitarian responses taken by these local governments are commendable. It is also likely, however, that some of these places may soon reach financial impasses that

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[22] Andy Newman, *A Record 100,000 People in New York Homeless Shelters*, N.Y. Times (June 28, 2023), https://www.nytimes.com/2023/06/28/nyregion/nyc-homeless-shelter-population.html; *see also,* Dave Davies, *How NYC is coping with 175,000 migrants from the Southern border*, Fresh Air on NPR (Feb. 15, 2024), https://www.npr.org/2024/02/15/1231712535/how-nyc-is-coping-with-175-000-migrants-from-the-southern-border.

[23] Grace Ashford and Claire Fahy, *$2.4 Billion Is Not Enough for New York's Migrant Crisis, Adams Says*, N.Y. Times (Feb. 6, 2024), https://www.nytimes.com/2024/02/06/nyregion/adams-albany-migrant-crisis.html.

[24] Miriam Jordan, *Big Burden of Migrant Influx Strains Denver*, N.Y. Times (Feb. 12, 2024 updated Feb. 15, 2024), https://www.nytimes.com/2024/02/12/us/denver-colorado-migrants.html.

[25] Gustavo Sagrero Álvarez, *Seattle steps in to foot bill for migrants living in hotel*, KUOW: NPR Network (Jan. 31, 2024), https://www.kuow.org/stories/seattle-steps-in-to-foot-the-bill-for-migrants-living-in-a-hotel.

necessitate hard choices and re-examination of fiscal priorities. As this Court has recognized, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970). Local governments need the breathing room to adapt policies and spending to meet community needs, and sometimes on short notice. Striking a balance between local resources and priorities is inherently a political process. Federal courts should not be putting a thumb on those scales.

B. Not Every Jurisdiction Believes that Temporary Shelter Beds are a Viable Solution to Homelessness.

The Ninth Circuit's rule is also a *bad* policy judgment because it encourages overwhelmed jurisdictions to narrowly focus on building up a large supply of temporary shelter beds. This incentivizes a race to the bottom denominator of housing options. Temporary shelter beds are generally unappealing, and offers are frequently declined. In cities like Seattle, for example, these offers are accepted less than half of the time.[26] San Francisco reports similar

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[26] *See* Seattle Human Services, *Quarterly Report* (Dec. 8, 2023), https://clerk.seattle.gov/~cfpics/cf_322689q3.pdf (Q3: 1,830 shelter offers, 587 accepted); *and see,* Seattle Human Services, *Quarterly Report* (Aug. 2, 2023), https://clerk.seattle.gov/~cfpics/cf_322689q2.pdf (Q2: 1,333 shelter offers, 554 accepted); *and see,* Seattle Human Services, *Quarterly Report* (June 29, 2023), https://clerk.seattle.gov/~cfpics/cf_322689q1.pdf (Q1: 1,352 shelter offers, 616 accepted).

numbers.[27] Commonly stated reasons include congregate sleeping, past negative experiences, vehicle related issues, and preferring to wait for a more permanent option like a tiny house to become available. In contrast to offers of temporary shelter, offers for more permanent options like prepaid motel rooms or tiny homes are almost always accepted.[28]

Declining offers of temporary shelter is not a new phenomenon.[29] Often times the people who are most likely to refuse an offer are also those who have been homeless the longest. Scholars explain that this may be because chronically homeless individuals are familiar with what the offer entails and know this short-term relief will not be a long-term housing option. *See e.g.,* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 Cal. L. Rev. 559, 583 (2021). Many commentators therefore suggest that government resources are better used investing in permanent housing options instead. *Id*.

Emphasizing permanent housing over temporary shelter beds is also a key component of the Housing First model. This approach endorses the philosophy

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[27] *See* City of San Francisco, *Healthy Streets Data and Information*, https://sf.gov/data/healthy-streets-data-and-information#-data-and-information, (last visited Feb. 25, 2024).

[28] Daniel Wu, *When a homeless encampment was cleared, no one went to a shelter. The reasons are complicated*, Seattle Times (Aug. 19, 2021), https://www.seattletimes.com/seattle-news/homeless/when-a-homeless-encampment-was-cleared-no-one-went-to-shelter-the-reasons-why-are-complicated/

[29] *E.g.,* Ari Shapiro, *Why Some Homeless Choose The Streets Over Shelters*, Talk of the Nation on NPR (Dec. 6, 2012), https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters.

that "[w]hen a person is housed, they have a platform to address all their needs, no matter how complex."[30] Federal agencies encourage Housing First and report that it provides greater long-term housing stability at lower overall costs than treatment first models.[31]

Many states and local governments throughout the country also strongly support the Housing First model. Seattle was one of the first cities to embrace this approach over two decades ago,[32] and this remains the model endorsed by the King County Regional Housing Authority today.[33] California passed legislation formally adopting Housing First as the required model for all state housing programs in 2016. *See* 2016 Cal. Stat. c 847. Hawaii did the same in 2010. *See* 2010 Haw. Sess. Laws c 212, §2.

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[30] ALL IN, *supra* n. 8, at 42.

[31] *See* HUD Office of Policy Development & Research, *Housing First Works*, Evidence Matters (Spring/Summer 2023), https://www.huduser.gov/portal/periodicals/em/spring-summer-23/highlight2.html.

[32] *See* Kim Horner, *Seattle's 1811 Eastlake Project Puts Housing First, Saves Lives & Money*, The Carter Center (Nov. 4, 2009), https://www.cartercenter.org/health/mental_health/fellowships/archive/documents/seattle_horner.html; *see also, The South King County Housing First Pilot: Innovations & Lessons Learned*, Building Changes: End Homelessness Together (May 2010), https://www.hud.gov/sites/documents/DOC_10137.PDF.

[33] King County Regional Housing Authority, *Our Approach* https://kcrha.org/about/our-approach/ (last visited Feb. 25, 2024); *see also,* King County Regional Housing Authority, *Five-Year Plan: 2023-2028*, 27 (2023), https://kcrha.org/wp-content/uploads/2023/06/FINAL-KCRHA-Five-Year-Plan-6.1.23.pdf, (explaining approach to creating new housing options).

While these are among the many regions where homelessness has continued to increase, other jurisdictions have realized tremendous success using Housing First. Houston, for example, is often held out as the gold standard,[34] successfully reducing overall homelessness by 53% since switching to Housing First in 2011.[35] Similarly, in 2005 Utah became the first state to formally adopt Housing First, and reported reducing chronic homelessness by 90% over the next ten years.[36] That success has also, however, at times drawn criticism due to fiscal concerns as the annual costs have multiplied. "The problem, according to auditors, is that these communities are costly to build and often become long-term homes for those who stay there."[37]

There are many regional differences between these jurisdictions, and many potential reasons for these

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[34] Michael Kimmelman, *How Houston Moved 25,000 People From the Streets Into Homes of Their Own*, N.Y. Times (June 14, 2022), https://www.nytimes.com/2022/06/14/headway/houston-homeless-people.html.

[35] City of Houston Housing & Community Development Dep't, *Supportive Services: Our Role in Ending Homelessness*, https://houstontx.gov/housing/supportive-services.html, (last visited Feb. 25, 2024).

[36] *See* HUD Office of Policy Development & Research, *Salt Lake City Housing Authority Serves Residents Experiencing Homelessness*, Edge: An Online Magazine (Sept. 20, 2022), https://www.huduser.gov/portal/pdredge/pdr-edge-inpractice-092022.html.

[37] Bethany Rodgers, *Utah's 'housing first' model is keeping people off the streets. So why are auditors worried?* Salt Lake Tribune (Nov. 16, 2021), https://www.sltrib.com/news/politics/2021/11/16/utahs-housing-first-model/.

disparate outcomes. New permanent housing options are expensive and time consuming to build, particularly in high-density urban areas.[38] Local governments that have made substantial investments aligning with Housing First policies should be permitted to continue these policy decisions without sacrificing the authority to enforce the basic regulations that are needed to keep the community functioning as a collective.

The Ninth Circuit's rigid all-or-nothing constitutional formula creates the danger of encouraging overwhelmed jurisdictions to think about shifting resources back to short-term temporary shelter options even if they do not believe this approach will be effective in the long run.

C. Local Policymakers Need to Preserve the Health and Safety of Their Communities.

Many communities throughout the country have made housing and homeless services a top local priority. Local governments have backed up these commitments with funding, and spending in some areas is at levels that would have been unthinkable twenty years ago. In 2024 Seattle will invest $339M in affordable housing and $109M in homeless outreach and shelter.[39] Los Angeles is set to spend $1.3B on

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[38] Joshua McNichols, *Seattle's first affordable housing high-rise tower in 50 years welcomes its first residents*, KUOW: NPR Network (May 5, 2023), https://www.kuow.org/stories/seattle-s-first-affordable-housing-high-rise-in-50-years-welcomes-its-first-residents.

[39] Callie Craighead, *Mayor Harrell signs City of Seattle's 2024 Budget into Law,* Office of the Mayor (Dec. 1, 2023),

homelessness this year, a tenth of its annual budget.[40] San Francisco, in line with recent years, has allocated $713.3M this annum for homelessness and supportive housing.[41] It might seem obvious that, in jurisdictions like these, incarcerating someone for violating local camping regulations is not the ultimate goal.

These jurisdictions do, however, want to remain attractive places to live and do business. Spending in these amounts can be locally controversial even if perfect outcomes are achieved, but when these expenditures are coupled with surrendering public spaces to encampments local friction can become combustible. As summarized recently by a state auditor, communities "are growing more frustrated and concerned as the number of people living on the streets and in encampments continues to grow, even as government spends more on programs to address homelessness."[42] These localities need the breathing room to juggle the dynamic complexities and immediate social harms that are often presented with homelessness.

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https://harrell.seattle.gov/2023/12/01/mayor-harrell-signs-city-of-seattles-2024-budget-into-law/.

[40] City of Los Angeles, *Budget Summary FY 2023-2024*, 4 (2023), https://cao.lacity.org/budget23-24/2023-24Budget_Summary.pdf.

[41] City of San Francisco, Dep't of Homelessness & Supportive Housing, *HSH Budget* (*FY 2023-24)*, https://hsh.sfgov.org/about/budget/, (last visited Feb. 26, 2024).

[42] Wash. State Auditor, *Contracted Homeless Services: Improving how local governments prioritize services and manage provider performance*, No. 103130, 3 (Nov. 15, 2022), https://sao.wa.gov/sites/default/files/audit_reports/PA_Contracted_Homeless_Services_ar-1031310.pdf.

The current crisis is also a contemporary iteration of historical cycles. "Homelessness in the United States has surged and receded throughout our nation's history."[43] There is no doubt that our country is confronting a complicated homelessness crisis that is exacerbated by a national shortage of available affordable housing. Although of course not guaranteed, history indicates that the affordable housing deficit will likely stabilize in time. Indeed, this issue is in the spotlight of townhalls and state legislatures throughout the nation. Moreover, the American economy continues to outperform expectations, and unemployment has been at record lows.[44] These positive indicators signal some hope that the supply of affordable housing in this country will catch up to the demand.

Resolving the questions presented by homelessness is hard work. Indeed, "[t]he very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *See Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). Local governments need flexibility and should not be placed in the "constitutional straitjacket" imposed by the Ninth Circuit's rule. *Id*.

There will be times when even the localities that are the most committed to humanitarian responses will need to make decisions that not everyone will be happy about. Sometimes this will involve telling

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[43] ALL IN, *supra* n. 8, at 15.

[44] Samantha Delouya, *2022 had the lowest total unemployment rate ever*, CNN (Dec. 20, 2023), https://www.cnn.com/2023/12/20/economy/lowest-unemployment-rate-year-2022/.

people that they may not camp in the park, the planting strip next to a road, or the sidewalk. Sometimes local authorities will be able to provide an alternative place to go. Other times they will not. In either case, the Eighth Amendment does not have anything to say about it.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below.

Respectfully submitted,

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