No. 23-175

In The Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN,
on Behalf of Themselves and All Others Similarly Situated,

Respondents.

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

BRIEF OF IDAHO, MONTANA AND 18 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

RAÚL R. LABRADOR
Attorney General
THEODORE J. WOLD
Solicitor General
JOSHUA N. TURNER
Chief Deputy Solicitor General
Counsel of Record

IDAHO OFFICE OF THE ATTORNEY GENERAL
700 W. Jefferson St.
Suite 210
Boise, ID 83720
(208) 334-2400
josh.turner@ag.idaho.gov

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
BRENT MEAD
Deputy Solicitor General
PETER M. TORSTENSEN, JR.
Assistant Solicitor General

MONTANA DEPARTMENT OF JUSTICE
215 N. Sanders
Third Floor
Helena, MT 59620
(406) 444-2026
christian.corrigan@mt.gov

Counsel for Amicus States of Idaho and Montana

[Additional Counsel Listed On Inside Cover]

STEVE MARSHALL
Attorney General
State of Alabama

TREG R. TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

THEODORE E. ROKITA
Attorney General
State of Indiana

KRIS W. KOBACH
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW H. WRIGLEY
Attorney General
State of North Dakota

GENTNER F. DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

JASON MIYARES
Attorney General
Commonwealth of Virginia

PATRICK MORRISEY
Attorney General
State of West Virginia

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

INTERESTS OF *AMICI CURIAE*

Families can no longer walk the streets of Portland, San Francisco, and Seattle in safety. The pungent smell of urine and human feces fills the air. Hypodermic needles used for narcotics cover the ground. And rats carrying diseases that were once thought eradicated scurry from encampments to nearby businesses and homes. These cities used to be beacons of the West, but their sidewalks are now too dangerous to visit.

The States of Idaho, Montana, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia, and West Virginia (*Amici* States)[1] are entrusted with protecting their citizens' health and safety. Their core sovereign functions involve defining crimes and enforcing a criminal code within their borders. But the Ninth Circuit believes that the Eighth Amendment prohibits states from enforcing laws that prevent public spaces from becoming homeless encampments. The Constitution does no such thing. It commits to states broad and general powers to provide for their citizens' welfare, including by preventing the public health crises stirred by homeless encampments.

For over 65 million Americans and over 40% of the Nation's land mass, the Ninth Circuit's decision is now the controlling law in federal courts. The Ninth Circuit has had at least two opportunities to correct its erroneous Eighth Amendment interpretation but has

---

[1] Pursuant to Rule 37.2, *Amici* States provided timely notice of this brief to all parties.

refused. Its entrenched holdings need this Court's correction so that state and local governments can meet the challenges their communities face.

Granting certiorari will also allow this Court to course-correct its errant Eighth Amendment holdings. The Ninth Circuit relied on this Court's "evolving standards of decency" jurisprudence, and this case is the unfortunate fruit of that standardless approach. Until the Court grounds the Eighth Amendment in the Constitution's text, history, and structure, states will continue to be on the receiving end of federal overreach. And their citizens will be forced to live with the consequences of states' eroded ability to address matters of local concern. Certiorari is warranted.

SUMMARY OF THE ARGUMENT

In 2018, the Ninth Circuit discovered an Eighth Amendment right to sleep, camp, and defecate in public spaces. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019). The panel below went further and held the Eighth Amendment even prevents civil fines for "engaging in involuntary, unavoidable life sustaining acts." *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2023). While homelessness has surged in the years that followed, state and local government efforts to address their community concerns have been thwarted—time and again. All the while, their citizens suffer.

The Ninth Circuit's holdings are wrong on at least two levels. First, the Constitution nowhere strips states of their right to regulate use of public spaces. It empowers states and guarantees an inviolable sovereignty meant to address local issues like homelessness. Second, the Ninth Circuit relied on this Court's "evolving standards of decency" jurisprudence, which lacks textual, historical, or structural support. The Court should put that troublesome jurisprudence to bed once and for all.

REASONS FOR GRANTING CERTIORARI

This case presents compelling reasons to grant certiorari. Four separate opinions from Judges O'Scannlain, Collins, M. Smith, and Bress—joined by a host of their colleagues—ably dismantle the Ninth Circuit's legal analysis. Those opinions describe the Ninth Circuit's holding as "deeply flawed,"[2] "egregiously wrong,"[3] "clearly wrong,"[4] "untenable,"[5] "dubious,"[6] "deeply damaging,"[7] and a "startling misapplication of Supreme

---

[2] *Grants Pass*, 72 F.4th at 943 (Collins, J., dissenting from denial of rehearing en banc).

[3] *Id*.

[4] *Id*. at 945 (Bress, J., dissenting from denial of rehearing en banc).

[5] *Id*. at 925 (O'Scannlain, J., respecting the denial of rehearing en banc).

[6] *Id*.

[7] *Id*.

Court precedent,"[8] an "inventive, judge-made novelty,"[9] "a strange and sweeping mandate,"[10] and an "objectively unreasonable constitutional straitjacket."[11] The Court will be hard-pressed to find a decision more flogged by members of its own court.

Amici States share the concerns raised in the opinions dissenting from denial of rehearing. The excellent legal analysis need not be repeated here, and *Amici* States instead commend the Court's close attention to each of those opinions. The States write now to highlight particular problems that the Ninth Circuit's holding poses for state and local governments. Those problems have worsened in the few years since the Ninth Circuit divined a personal right to camp in cities, and they have shown no signs of relenting.

The Ninth Circuit is not going to fix the mess it made for much of the country. This Court's intervention is needed.

---

[8] *Id*. at 929

[9] *Id*. at 930

[10] *Id*. at 925

[11] *Id*. at 944 (Collins, J., dissenting from denial of rehearing en banc).

I. The West Has Suffered For Five Years Under *Martin*'s Regime, And The Ninth Circuit's Doubling Down Leaves State And Local Governments Powerless To Help.

When the Ninth Circuit decided *Martin v. City of Boise* in 2018, it claimed its holding was "a narrow one" that left local governments latitude to regulate public encampments. 920 F.3d at 617. Judges dissenting from denial of rehearing en banc in *Martin* were not reassured. And unfortunately, their "fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws" has come to pass. *Id.* at 596 (M. Smith, J., dissenting from denial of rehearing en banc). Western States have been hogtied and repeatedly prevented from addressing the serious issues public encampments inflict on their communities. The Ninth Circuit's five-year experiment needs to be stopped.

State and local governments in the Ninth Circuit have tried various ways to address public encampments. These efforts are regularly met with litigation and shut down by federal courts. For example, the City of Chico sought to enforce its anti-camping ordinance by "construct[ing] an outdoor temporary shelter facility at the Chico Municipal Airport that accommodate[d] all 571 of the City's homeless persons." *Warren v. City of Chico*, 2021 WL 2894648, at *3 (E.D. Cal. July 8, 2021). The district court understood *Martin* to require "indoor" beds—not shelter beds—before the City could enforce its anti-camping prohibitions, so it enjoined Chico's ordinance. *Id.* at *3-4.

The City of Santa Barbara limited its anti-camping ordinance to downtown areas and made it enforceable only between 7:00 a.m. and 2:00 a.m. *Boring v. Murillo*, 2022 WL 14740244, at *6 (C.D. Cal. Aug. 11, 2022). But it was still sued to stop enforcement of the more modest limitations. *Id.* And even though nothing prevented individuals from sleeping or camping in other areas of Santa Barbara, the court held that the plaintiffs stated a plausible Eighth Amendment claim under *Martin*. *Id.* The City's ordinance remains under litigation today.

The City of Phoenix directed its officers to make individualized assessments before citing individuals under its anti-camping ordinances, but that did not stop a court from enjoining enforcement of the ordinances wholesale. *Fund for Empowerment v. City of Phoenix*, 2022 WL 18213522, at *3 (D. Ariz. Dec. 16, 2022). The Court held that the ordinances likely failed under *Martin* and *Grants Pass* because "the unsheltered in the city outnumber the available bed spaces." *Id.* The Ninth Circuit's purportedly "narrow" holding has instead taken on a broad application: all jurisdictions must demonstrate that available bed space outnumbers homeless persons before even thinking about enforcing an anti-camping ordinance.

The impact of that approach has had far-reaching consequences. Dense population centers are not the only places suffering serious health and safety concerns. Smaller towns like Missoula, Montana are now facing encampments throughout their public spaces. As of August, Missoula had 60 separate encampments across

its 400 acres of public parks.[12] Missoula does not have enough beds to meet *Martin*'s metrics, so it cannot enforce its decades-old anti-camping ordinance.[13] And it cannot respond to resident concerns that "parks have become dirty and unsafe."[14] Missoula must instead be content to clean "unsalvageable" vehicles "full of human waste" and "debris such as mattresses, couches, and tables" clogging the city's irrigation and waterways.[15]

The increase in public encampments has led to surging public health and safety issues. Medieval diseases like typhus, shigella, and trench fever are spreading in public encampments.[16] Rats and fleas plague these spaces and spread diseases to people and pets.[17] They also infest nearby public buildings, placing all who enter at risk.[18]

---

[12] *See* Jim Carlton, *A Montana Town Faces a Homelessness Problem Similar to San Francisco and L.A.*, WALL ST. J. (Sept. 2, 2023) (https://tinyurl.com/35uc952k).

[13] *Id.*

[14] *Id.*

[15] City of Missoula, Urban Camping Update Week Ending August 11, 2023; August 25, 2023 (https://tinyurl.com/yfubacw2).

[16] *See* Jack Davis, *Medieval Diseases Running Rampant Throughout California's Homeless Population*, W. J. (Mar. 11, 2019) (https://tinyurl.com/auamzem5).

[17] *Id.*; *see also* Tran Nguyen, *'They're everywhere': Rats plague San Jose's largest homeless camp*, SAN JOSÉ SPOTLIGHT (Feb. 16, 2022) (https://tinyurl.com/4vfus4y7).

[18] *See*, *e.g.*, David Zahniser & Emily Alpert Reyes, *With L.A. City Hall infested by rats, one councilman cites homeless crisis*, L.A. TIMES (Feb. 8, 2019) (https://tinyurl.com/46f5bujn).

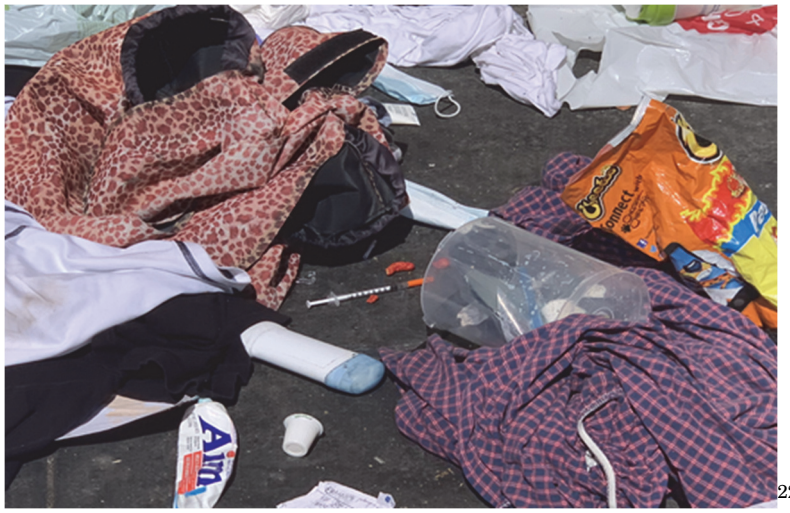
Encampments in cities also inevitably lead to human fecal matter smearing sidewalks, paths, and playgrounds.[19] The human waste is even polluting water sources.[20] And children walking to school and volunteer clean-up crews are increasingly exposed to discarded needles, condoms, and feminine products.[21] These and other biohazards litter public spaces. The following pictures are a snapshot of the crisis the Ninth Circuit largely roped off from state and local government regulation:

---

[19] *See*, *e.g.*, City & Cnty. of S.F. Office of the Controller, Street & Sidewalk Maintenance Standards Calendar Year 2022 Annual Report 10 (2023) (https://tinyurl.com/5465yw7v) (finding that "[f]eces was another notable observed hazard, on approximately 50% of street segments in Key Commercial Areas"); Jade Cunningham, *'It's in desperate need of TLC': Feces, trash, drug paraphernalia litter north Phoenix park*, 12 NEWS (Apr. 14, 2023) (https://tinyurl.com/4xxv35sa).

[20] Anna Almendrala, *Fecal Bacteria In California's Waterways Increases With Homeless Crisis*, CAL. HEALTHLINE (Jan. 6, 2020) (https://tinyurl.com/39nxpemf).

[21] Alexis Rivas et al., *Human Feces, Other Biohazards on San Diego Sidewalks Cost City Nearly $1 Million Every Year*, 7 SAN DIEGO (Nov. 26, 2021) (https://tinyurl.com/2p96wx9v).



[22]

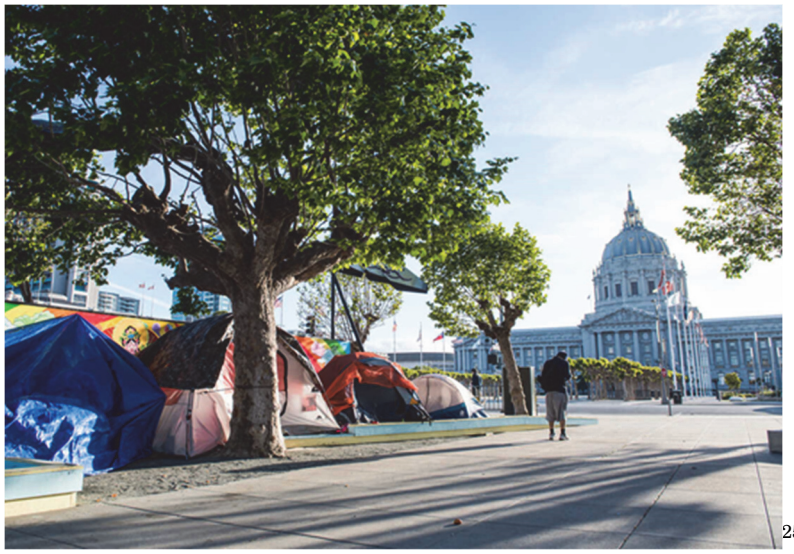
[23]

---

[22] Alexis Rivas et al., *Human Feces, Other Biohazards on San Diego Sidewalks Cost City Nearly $1 Million Every Year*, 7 SAN DIEGO (Nov. 26, 2021) (https://tinyurl.com/2p96wx9v).

[23] Julie Sabatier, *New rules aimed at homeless encampments in Portland could undermine trust, according to researcher*, OR. PUB. BROAD. (May 21, 2021) (https://tinyurl.com/5n7kuckp).

 [24]

 [25]

[24] Nick Bowman, *Mayor Durkan again at odds with Seattle council over homeless camps*, MY NW. (May 20, 2020) (https://tinyurl.com/4d5366uu).

[25] Joe Rodriguez, *San Francisco Shifts From Trashing Homeless Camps To Sanctioning Them Amid COVID-19*, NPR (May 14, 2020) (https://tinyurl.com/3rfmn7hw).

 [26]

Homelessness can be hard to look at. It is a stark reminder of our society's shortcomings. But as the pictures illustrate, the Ninth Circuit's approach has only worsened the problem, while forcing communities "to surrender the use of many of their public spaces (including sidewalks) to homeless encampments." *Grants Pass*, 72 F.4th at 932 (O'Scannlain, J., respecting the denial of rehearing en banc). Once safe and thriving communities now "must live by the criminal violence, narcotics activity, and dangerous diseases that plague the homeless encampments." *Id.* Communities should not be forced to live under these conditions. Nor should the "threat to the public welfare . . . be taken lightly." *Id.*

---

[26] Phil Matier & Andy Ross, *SF mayor plans crackdown on homeless camps*, S.F. CHRON. (Apr. 8, 2016) (https://tinyurl.com/5n6v9s6v).

Amici States understand that the issues presented by homelessness are not susceptible to easy answers. What the underlying causes are and how to address them have been difficult to decipher. But the complexity of these issues underscores the need for states and local governments to be empowered to address them.

II. The Constitution Commits Criminal Law And Land-Use Policy To State And Local Governments, Not Federal Courts.

States and localities play a central role in our system of government. They have "numerous and indefinite" powers that "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45 (James Madison). The federal government plays a different role. Its powers are "few and defined" and concern national matters. *Id.* That principle of federalism "is a defining feature of our Nation's constitutional blueprint." *See Sossamon v. Texas*, 563 U.S. 277, 283 (2011). Its demands are simple but important: the federal government does not get to tell states how to provide for the health, safety, and welfare of their citizens. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

The Constitution codifies the states' reserved police powers in the Tenth Amendment—a clear demarcation that would seem difficult to ignore. But the

Ninth Circuit managed to do just that. And worse, it turned federal judges into local land commissioners. Because two federal judges decided decentralized government was no longer working very well, 40% of the country is now forced to recognize a constitutional right to camp on public property. That decision improperly snatches sovereignty over criminal lawmaking and property from states.

The states' sovereign power to administer a criminal code is at the core of their sovereign interests. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985). "From the beginning of our country, criminal law enforcement has been primarily a responsibility of the States." *Shinn v. Shinn*, 142 S. Ct. 1718, 1730 (2022); *see also Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) ("States possess primary authority for defining and enforcing the criminal law."). Ratification did not change that. "The power to convict and punish criminals lies at the heart of the States' residuary and inviolable sovereignty." *Shinn*, 142 S. Ct. at 1730.

The Ninth Circuit's blurring of the lines between a person's act and their status threatens to erode—if not eliminate—states' ability to enforce a criminal code. Involuntary acts, the Ninth Circuit reasons, are protected from any criminal punishment (and apparently civil fines now too) under the Eighth Amendment. *Grants Pass*, 72 F.4th at 891 (equating "involuntary conduct" and "status"). The "sweep of that holding [is] startling." *See Powell v. Texas*, 392 U.S. 514, 545 (1968) (Harlan, J., concurring).

Under the Ninth Circuit's interpretation of the Eighth Amendment, a drug user cannot be punished so long as he is addicted to drugs. *Id.* (Harlan, J., concurring). And "[a] wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease." *Id.* (Harlan, J., concurring). This radical view renders "States powerless to punish any conduct that could be shown to result from a 'compulsion,' in the complex, psychological meaning of that term." *Id.* at 544 (Harlan, J., concurring). This Court has never accepted that approach. *See United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc) (explaining that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct). For good reason: "if every criminal act which was the result in some degree of a socially developed compulsion was beyond society's control, the interests and safety of the public would be seriously threatened." *Smith v. Follette*, 445 F.2d 955, 961 (2d Cir. 1971).

In one case only, this Court held that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (citing *Robinson v. California*, 370 U.S. 660 (1962)). It has since emphasized that "limitation as one to be applied sparingly." *Id.* And other than in *Robinson*, the Court has never used the Eighth Amendment as a limit on *what* states may punish as opposed to *how* states may punish. A chief reason for the Court's refusal to extend *Robinson* is the "paramount role of the States in

setting 'standards of criminal responsibility.'" *Kahler v. Kansas*, 140 S. Ct. 1021, 1028 (2020). The Ninth Circuit's holding not only tells states what they may criminally sanction, but it also has the effect of imposing on states a particular test of criminal responsibility, which this Court has rejected. *See Leland v. Oregon*, 343 U.S. 790 (1952).

States also possess primary authority over the land within their boundaries. "The right to control the ownership of land rests in sovereign governments and, in the United States, it rests with the individual states in the absence of federal action by treaty or otherwise." *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 428 n.3 (1948). They hold public lands in trust for the people. To this end, the People have committed to states "nearly the whole charge of interior regulation." *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1868). Just as "it is not for the courts to say how [federal land] shall be administered," it is also not their place to say how state land shall be administered. *See Light v. United States*, 220 U.S. 523, 537 (1911). But the Ninth Circuit's decision improperly meddles in this area and makes federal judges overseers of state land.

When it comes to public encampments, states have significant land interests. States regulate public encampments to protect natural resources, prevent wildfires, preserve the value of recreation, and maintain an area's dignity and public value. *See, e.g.*, N.J. Stat. Ann. § 17:15B-1.12(a) (prohibiting camping at the New Jersey World War II Memorial to protect the condition of the Memorial, to ensure the grounds are open

for access by all members of the public and to facilitate security); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (concluding that a regulation prohibiting camping on federal park lands outside of designated campgrounds was supported by a substantial government interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence"); Neb. Rev. Stat. Ann. § 2-3201 (regulating camping to "conserve, protect, develop, and manage the natural resources"); W. Va. Code R. §§ 58-32-1.1, 58-32-2.3 (regulating camping "is necessary to provide for public health, safety and welfare; to protect state property; and to assure state recreational area guests of a safe, beneficial and enjoyable experience."). The Ninth Circuit's decision leaves states unable to protect those interests.

It is no exaggeration that the Ninth Circuit's logic is "an assault upon the constitutional, democratic, and common law foundations of American civil and criminal law." *Manning v. Caldwell for Roanoke*, 930 F.3d 264, 305 (4th Cir. 2019) (Wilkinson, J., dissenting specially). The Court should take action.

III. The Ninth Circuit's Decision Is An Outgrowth Of The Evolving Standards Of Decency Jurisprudence, Which Is Not Textual, Historical, Or Logical.

The Ninth Circuit's decision goes far beyond this Court's Eighth Amendment holdings. That much is clear. But it is also true that the Ninth Circuit's decision is the progeny of this Court's precedents—and one that should surprise no one. When this Court subjected the Eighth Amendment's meaning to "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion), it engrafted increase, instability, and subjectivity to the text. Now, every case presents a fresh opportunity for state law to fall before the Eighth Amendment's "evolving" morality.

So while the Ninth Circuit may have jumped the gun today, there is no telling what tomorrow holds. As this Court has instructed, courts *must* constantly revisit whether state penal judgments are cruel and unusual. *See Roper v. Simmons*, 543 U.S. 551, 561 (2005) (affirming "the necessity" of "the evolving standards of decency" test to determine which punishments violate the Eighth Amendment). Such an indeterminate standard is no standard at all.

The Court's Eighth Amendment jurisprudence is a problematic outlier, and its forward march "has no discernible end point." *Miller v. Alabama*, 567 U.S. 460, 501 (2012) (Roberts, C.J., dissenting). It has caused

much mischief already and will continue to do so until corrected. *Glossip v. Gross*, 576 U.S. 863, 899 (2015) (Scalia, J., concurring). Courts should not be tasked with judging the changing winds of society's evolving morals. Their job is to declare what the law says—not what they think society would like it to say. This case confirms the need for this Court to ground the Eighth Amendment's meaning in text, structure, and history. Doing so will protect the sovereign role states have over the health, safety, and welfare of their communities. And it will bring harmony to the Court's constitutional interpretive framework. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019).

A. The evolving standards of decency jurisprudence came out of Warren Court dicta and has been promoted to the substantive test for Eighth Amendment meaning.

The story of the Court's Eighth Amendment jurisprudence begins like other novel constitutional announcements. A plurality of the Warren Court unnecessarily "waxed historical" about the Eighth Amendment, *see United States v. Grant*, 9 F.4th 186, 202 (3d Cir. 2021) (Hardiman, J., concurring), and declared for the first time that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101 (plurality). That stray line of dicta was later repurposed as the Amendment's governing standard. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A closer

look at *Trop* confirms the impropriety of propagating the evolving standards of decency jurisprudence.

In 1958, this Court considered whether American Private Albert Trop lost his national citizenship because he was convicted by a military court of desertion "in time of war." *Trop*, 356 U.S. at 88 n.1. The Second Circuit rejected Trop's due process challenge to his expatriation. *Trop v. Dulles*, 239 F.2d 527, 529 (2d Cir. 1956). With Judge Learned Hand writing for the majority, the court explained that "[w]e have not considered, and do not consider, whether under the circumstances at bar 'expatriation' was, or was not, a 'cruel and unusual' punishment under the Eighth Amendment." *Id*. The reason was because Trop "did not suggest anything of the kind in his complaint, or upon the motion for summary judgment; Judge Inch did not mention it in disposing of the motion, nor did the plaintiff do so in argument." *Id.* at 529-30.

In a 4-1-4 decision, this Court reversed. Chief Justice Warren explained that under the holding of *Perez v. Brownell*, "citizenship is not subject to the general powers of the National Government and therefore cannot be divested in the exercise of those powers." *Trop*, 356 U.S. at 92. On that "ground alone," the Court reversed. *Id.* at 93.

But Chief Justice Warren did not stop there. He took up an unrelated and unpreserved Eighth Amendment question. And he did so even though "the words of the Amendment are not precise" and the Court had

"had little occasion to give precise content to the Eighth Amendment." *Id.* at 100-01. What should have been a clear instance of constitutional avoidance, *see Steamship Co. v. Emigration Comm'rs*, 113 U.S. 33, 39 (1885), was instead embraced as an invitation to develop the Eighth Amendment.

In interpreting the Amendment, the plurality barely addressed the text. It questioned whether there was any difference between the words "cruel" and "unusual" but quickly noted that "precise distinctions between cruelty and unusualness do not seem to have been drawn" in prior decisions. *Trop*, 356 U.S. at 100 n.32. Without further textual hang-up, the plurality concluded that because the Amendment's "scope is not static," it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. On that understanding, the plurality found "that use of denationalization as a punishment is barred by the Eighth Amendment." *Id.* The Amendment's prohibition reaches beyond "physical mistreatment" and "primitive torture," the plurality explained—it also reaches forms of punishment that destroy an accused's "political existence." *Id.*

The "evolving standards of decency . . . phrase went unmentioned in [this] Court for ten years after *Trop*, until it surfaced in a footnote in a death-penalty case," after which "it was then quoted only in passing in seven death-penalty cases in the 1970s." *Grant*, 9 F.4th at 202-03 (Hardiman, J., concurring). In 1976, the Court looked to the "idealistic" phrase and held that "punishments which are incompatible with 'the

evolving standards of decency that mark the progress of a maturing society' " violate the Eighth Amendment. *Estelle*, 429 U.S. at 102. Although the *Trop* plurality had merely said that the Eighth Amendment "must draw its meaning" from the evolving standards of decency, the Court in *Estelle* turned "*Trop*'s dicta [in]to a constitutional test." *Grant*, 9 F.4th at 203 (Hardiman, J., concurring).

In the following years, the test has been "a standard bearer for the view that the Constitution's meaning changes over time." *Id*. It is "bad wine of a recent vintage," *id.* at 201, and it "has caused more mischief . . . than any other that comes to mind." *Glossip*, 576 U.S. at 899 (Scalia, J., concurring).

B. The evolving standards of decency jurisprudence is a lawless standard that has no regard for any of this Court's Eighth Amendment precedents.

Chief Justice Warren may not have intended his homiletic words to become a barometer for constitutionally permissible punishments. But they have. And they have been used to overturn precedent after precedent and to justify the ballooning reach of the Eighth Amendment. The test's track record shows that its ambitions know no bounds. It stands ready for its next call "to shap[e] the societal consensus of tomorrow." *Miller*, 567 U.S. at 509 (Thomas, J., dissenting).

A few cases suffice to show the test's character. Start with *Estelle*. Before that case, the Court understood

the Eighth Amendment to prohibit the government from *acting* cruelly and unusually. But *Estelle* used the evolving standards test to extend the Eighth Amendment to prohibit the government from *failing* to act. 429 U.S. at 104. That extension lacked constitutional grounding, and the Court later had to "stabilize *Estelle*'s flimsy foundation." *Trozzi v. Lake Cnty., Ohio*, 29 F.4th 745, 751 (6th Cir. 2022) (citing *Farmer v. Brennan*, 511 U.S. 825, 829 (1994)).

The test picked up steam at the turn of the 21st century. In 2002, the Court considered whether the Eighth Amendment prohibited executing a man with mental disabilities and held that it did. *See Atkins v. Virginia*, 536 U.S. 304 (2002). That decision overturned the Court's holding from just thirteen years prior, when the Court addressed the very same question and held the opposite. *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). Perhaps *Penry*'s short-lived holding should not have come as a surprise, given that the Court noted in its closing sentences that "a national consensus against execution of the mentally retarded may someday emerge reflecting the 'evolving standards of decency that mark the progress of a maturing society.' " *Id.* In the 13 years between the two decisions, the Court found that the American consensus shifted and consolidated around condemnation of executing such persons. *Atkins*, 536 U.S. at 315-17. The so-called "national consensus" the Court relied on for its 180 was that 18 of the 38 states with capital punishment in some way excused mentally incompetent persons. *Id.* at 343 (Scalia, J., dissenting) ("How is it possible that agreement

among 47% of the death penalty jurisdictions amounts to 'consensus'?"). As the Court saw it, determining consensus depended more on "the consistency of the direction of change" than on actual numbers. *Id.* at 315.

Soon after *Atkins*, the Court again used the evolving standards test to overturn another of its 1989 decisions. *See Roper*, 543 U.S. 551. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court held that the Eighth Amendment did not prohibit capital punishment for juvenile murderers. *Id.* at 380. In 2005, the Court held just the opposite in a 5-4 decision. The "national consensus" on which the Court relied was the same as in *Atkins*: 18 of 38 states with the death penalty excluded juveniles from its sanction. *Roper*, 543 U.S. at 552-53.

The pace quickened following *Roper*. In 2008, the Court found that a national consensus formed against executing child rapists. *Kennedy v. Louisiana*, 554 U.S. 407, 446 (2008). In 2010, the Court held that life-without-parole sentences for non-homicide juvenile offenders violated the Eighth Amendment. *Graham v. Florida*, 560 U.S. 48, 82 (2010). In 2012, the Court held that mandatory life-without-parole sentences for juveniles—even those convicted of murder—violated the Eighth Amendment. *Miller*, 567 U.S. at 479. And in 2014, the Court held that the Eighth Amendment requires states to consider an IQ test's standard error of measurement for death-row inmates. *Hall*, 572 U.S. at 724. Each of these decisions were 5-vote majorities with sharp dissents.

As this case shows, the evolving standards of decency jurisprudence has creeped beyond death-penalty and life-without-parole cases. The Ninth Circuit has also found that the Eighth Amendment guaranteed a prisoner the right to "gender confirmation surgery." *Edmo v. Corizon, Inc.*, 935 F.3d 757, 797 (9th Cir. 2019). And the Fifth Circuit found "a national consensus against punishing felons by permanently barring them from the ballot box." *Hopkins v. Sec'y of State Delbert Hosemann*, 76 F.4th 378, 407 (5th Cir. 2023).

Any expectation that the evolving standards of decency jurisprudence is just a modest method to address modern punishments is now naïve. The standard has lost any tie to "objective factors." *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion). Eighth Amendment jurisprudence instead is laced with uncertainty, merely reflecting "the subjective views of individual Justices." *Id.* Our constitution made the law king, and the rule of law means that "bedrock principles"—not "the proclivities of individuals"—govern. *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986). The evolving standards of decency jurisprudence is contrary to basic legal norms: it lacks notice and predictability; it invites arbitrariness and cannot be applied consistently; and it undermines the integrity of the judicial process. It is time this Court do something about it.

C. The evolving standards of decency jurisprudence cannot be squared with the text, structure, and history of the Eighth Amendment.

The Court can, and should, normalize its Eighth Amendment jurisprudence. Instead of requiring judges to act as sociologists and tempting them to exercise their own will, the Court should return to declaring what the law *is*. *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The text and object of the Eighth Amendment stand against the evolving standards of decency approach.

All agree that the Eighth Amendment is not a "static" command. *See Gregg v. Georgia*, 428 U.S. 153, 173 (1976); *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting); *Bucklew*, 139 S. Ct. at 1135. It of course prohibits more than the methods of torture rejected in 1791, like "embowelling alive, beheading, and quartering." 4 William Blackstone, Commentaries 376 (Joseph Chitty ed. 1826). But pinning an "evolving" standards approach to the Amendment is not the only way to protect it from becoming "little more than a dead letter today." *Roper*, 543 U.S. at 589 (O'Connor, J., dissenting).

First, the Court has already signaled an interpretive course-correction. In *Bucklew*, the Court explained that the Eighth Amendment must be interpreted according to its "original and historical understanding." *Bucklew*, 139 S. Ct. at 1122. That is also the "standard" approach the Court applies when interpreting constitutional text. *Dobbs v. Jackson Women's Health Org.*,

142 S. Ct. 2228, 2271 (2022). Under that approach, the Amendment forbids "tortures and other barbarous methods of punishment." *Estelle*, 429 U.S. at 102 (cleaned up). As one early commentator explained, the Amendment prohibits "the use of the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion." James Bayard, A Brief Exposition of the Constitution of the United States 154 (2d ed. 1840).

The text itself came straight from the English Bill of Rights of 1689, which stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 1 W. & M., Sess. 2, c. 2; 8 ENGLISH HISTORICAL DOCUMENTS, 1660-1714, p. 122 (Andrew Browning ed. 1953). The purpose was to protect "against punishments unauthorized by statute and beyond the jurisdiction of the sentencing court, as well as those disproportionate to the offense involved." *Gregg*, 428 U.S. at 169. Similar provisions were in Virginia's Constitution of 1776, the constitutions of seven other states, and the Northwest Ordinance. *Furman v. Georgia*, 408 U.S. 238, 243-44 (1972) (Douglas, J., concurring). The history of those enactments confirms that "the evil the Eighth Amendment targets is intentional infliction of gratuitous pain." *Baze v. Rees*, 553 U.S. 35, 102 (2008) (Thomas, J., concurring). The Amendment is "directed to *modes of punishment*"—it does not limit "the substantive authority of legislatures to prohibit 'acts' like those at issue here, and 'certainly not before conviction.'" *Grants*

Pass, 72 F.4th at 927 (O'Scannlain, J., respecting denial of rehearing en banc) (emphasis in original).

Second, the original and historical understanding does not proscribe only those punishments thought cruel and unusual at ratification. The evolving standards of decency approach attempts to address the fact that society's understanding may mature and develop about what constitutes a cruel and unusual punishment. But it errs by cutting the tie between law and judgment. In its most modest application, the approach suffers from majoritarianism, which is exactly what the Bill of Rights protects against. In its recent, broader applications, it substitutes "judicial preferences" about all aspects of penological policy for the will of the People. *Grant*, 9 F.4th at 205. That is not how the rule of law works.

Law "is a rule: not a transient sudden order from a superior, to, or concerning, a particular person; but something permanent, uniform, and universal." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 58 n.5 (1961) (quoting Daniel Webster). The "permanent, uniform, and universal" nature of law reflects the "being" and "becoming" attributes built into the Constitution. *See* Jeffrey C. Tuomala, The Casebook Companion pt. 1, ch. 5, at 10 (September 12, 2023) (on file with author); *see also McCulloch v. Maryland*, 17 U.S. 316, 407 (1819) (explaining that the Constitution lacks "the prolixity of a legal code" and its "nature" instead "requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from

the nature of the objects themselves"). In this way, the law allows for new applications, but it does so by remaining faithful to constitutional text and embedded principles.

With the Eighth Amendment, the text and object of the Amendment contemplate punishments existing and not yet imagined at the time of the founding. Some amount of deduction from "its great outlines" may be required. *See McCulloch*, 17 U.S. at 407. And society's present understanding of "decency" may be evidence of what is cruel and unusual—it also may not be. *See Miller*, 567 U.S. at 510 (2012) (Alito, J., dissenting) ("Is it true that our society is inexorably evolving in the direction of greater and greater decency? Who says so, and how did this particular philosophy of history find its way into our fundamental law?"). Redirecting judges from a targeted inquiry guided by fixed principles and commissioning them to make vague determinations about society's evolving sense of decency is contrary to the very premise of civil society: punishment for crimes has been removed from the hands of the few and committed to society—judges are no exception. Ultimately the text, structure, and history must control the analysis. Faithfully applied, that approach protects against both ancient and modern cruel and unusual punishments. *See Baze*, 553 U.S. at 102 (Thomas, J., concurring).

It is long overdue for the Court to remove the evolving standards of decency test from its Eighth Amendment jurisprudence. The Court should grant certiorari here and do so.

CONCLUSION

For the reasons stated, this Court should grant certiorari and reverse the decision below.

Respectfully Submitted,

RAÚL R. LABRADOR
Attorney General
THEODORE J. WOLD
Solicitor General
JOSHUA N. TURNER
Chief Deputy
Solicitor General
Counsel of Record

IDAHO OFFICE OF THE
ATTORNEY GENERAL
700 W. Jefferson St.
Suite 210
Boise, ID 83720
(208) 334-2400
josh.turner@ag.idaho.gov

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
BRENT MEAD
Deputy Solicitor General
PETER M. TORSTENSEN, JR.
Assistant Solicitor General

MONTANA DEPARTMENT
OF JUSTICE
215 N. Sanders
Third Floor
Helena, MT 59620
(406) 444-2026
christian.corrigan@mt.gov

Counsel for Amicus States of Idaho and Montana

September 25, 2023

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG R. TAYLOR
Attorney General
State of Alaska

TIM GRIFFIN
Attorney General
State of Arkansas

ASHLEY MOODY
Attorney General
State of Florida

THEODORE E. ROKITA
Attorney General
State of Indiana

KRIS W. KOBACH
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

LYNN FITCH
Attorney General
State of Mississippi

ANDREW BAILEY
Attorney General
State of Missouri

MICHAEL T. HILGERS
Attorney General
State of Nebraska

DREW H. WRIGLEY
Attorney General
State of North Dakota

GENTNER F. DRUMMOND
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

MARTY JACKLEY
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

JASON MIYARES
Attorney General
Commonwealth of Virginia

PATRICK MORRISEY
Attorney General
State of West Virginia