

**In The  
Supreme Court of the United States**

—◆—  
CITY OF GRANTS PASS,

*Petitioner,*

v.

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

*Respondents.*

—◆—  
**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

—◆—  
**BRIEF OF IDAHO, MONTANA AND  
22 OTHER STATES AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONER**

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**INTERESTS OF *AMICI CURIAE***

Homelessness is a hard problem, both for the people experiencing it and for the communities where they live. On the one hand, many homeless people suffer from poverty, addiction, or mental or physical illnesses that are not ultimately their fault. On the other hand, homeless people camped on public property can subject each other and the rest of the public to serious harms: crimes against persons and property; urine, feces, and used needles on playgrounds and sidewalks; infestations of rats and other vermin; and the spread of hygiene-preventable diseases like typhus, shigella, and trench fever.

*Amici* are Idaho, Montana, and 22 other sovereign States responsible for protecting the health and safety of all their citizens, both homeless and housed. Their sovereign duties also include defining crimes and enforcing a criminal code within their borders. They do not always approve of each other's policies on homelessness, much less the broader set of policies other States choose to pursue in their criminal codes. But they all agree these choices are theirs to make—not the federal government's, and certainly not the federal courts'.

The Ninth Circuit disagrees, holding that homeless persons have an Eighth Amendment right to camp on public property unless adequate shelter is available elsewhere. This holding has turned courts into homelessness czars, entitled to dictate how much shelter State and local governments must provide if they want

to retain their power to prohibit camping on public property.

Four separate opinions below from Judges O’Scannlain, Collins, M. Smith, and Bress regarding denial of rehearing—joined in total by 15 active and senior judges—describe the Ninth Circuit’s holding as “deeply flawed,”<sup>1</sup> “egregiously wrong,”<sup>2</sup> “clearly wrong,”<sup>3</sup> “untenable,”<sup>4</sup> “dubious,”<sup>5</sup> “deeply damaging,”<sup>6</sup> a “startling misapplication of Supreme Court precedent,”<sup>7</sup> an “inventive, judge-made novelty,”<sup>8</sup> “a strange and sweeping mandate,”<sup>9</sup> and an “objectively unreasonable constitutional straitjacket.”<sup>10</sup>

*Amici* States share the dissenters’ concerns and write to highlight the ways the decision below infringes their sovereign authority over homelessness policy and criminal law.




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<sup>1</sup> *Johnson v. City of Grants Pass*, 72 F.4th 868, 943 (9th Cir. 2023) (Collins, J., dissenting from denial of rehearing en banc).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 945 (Bress, J., dissenting from denial of rehearing en banc).

<sup>4</sup> *Id.* at 925 (O’Scannlain, J., respecting the denial of rehearing en banc).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 929

<sup>8</sup> *Id.* at 930

<sup>9</sup> *Id.* at 925

<sup>10</sup> *Id.* at 944 (Collins, J., dissenting from denial of rehearing en banc).

### SUMMARY OF THE ARGUMENT

In 2018’s *Martin v. City of Boise*, the Ninth Circuit put every city and county in the circuit to a choice: either provide enough shelter beds to accommodate every homeless person in its jurisdiction or lose the power to enforce criminal laws against sleeping on public property. 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh’g*, 920 F.3d 584 (9th Cir. 2019). In *Grants Pass*, the Ninth Circuit doubled down on *Martin* and insisted again that, unless a community provides adequate shelter, the Eighth Amendment bars any punishment based on “engaging in involuntary, unavoidable life sustaining acts” like sleeping on public property. *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2023).

Since *Martin*, homelessness has grown worse across the country, and especially in the Ninth Circuit, where more than 1 in 1,000 people are now homeless and most States have seen homelessness rise at least 25% in five years. The problem is especially vivid in large cities like San Francisco and Seattle, where news reports regularly publish pictures of tents crammed into parks or sidewalks. But homelessness also afflicts small towns: Missoula, a metropolitan area of just over 100,000, recently had 60 homeless encampments in its public parks.

Addressing these problems falls within the States’ general police power, which the Ninth Circuit has restricted without any real basis in the Eighth Amendment. The Ninth Circuit cannot solve homelessness,

and it should not try. It is States and localities that have the local knowledge needed to address the problem, and it is States and localities that ultimately bear the costs of homelessness and of homeless policy. It should be States and localities that make the decisions.

While *Martin* and *Grants Pass* expressly address sleeping in public, the Ninth Circuit’s new doctrine cannot be limited to those cases’ facts. The Circuit’s rationale (if adopted here) would set the federal courts on a path that this Court has wisely eschewed throughout the sixty years since it decided *Robinson v. California*, 370 U.S. 660 (1962)—a path of using the Eighth Amendment to supersede State doctrines about necessity, duress, insanity, and *mens rea* whenever a criminal defendant’s conduct was “biologically compelled” or in some sense “involuntary.” The Circuit’s rationale would “freeze” the law of criminal responsibility into “a rigid constitutional mold.” *Kahler v. Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell v. Texas*, 392 U.S. 514, 535–36 (1968) (plurality op.)).

The Court should stop that trend before it begins and make clear that States—not federal courts—are ultimately responsible both for homeless policy and for protecting their communities’ common good through criminal law.



## ARGUMENT

### I. **Affirming *Grants Pass* Would Exacerbate a Growing Homelessness Problem and Hobble State and Local Policy Responses.**

Homelessness is on the rise. In 2023, the Department of Housing and Urban Development reported the highest number of “people experiencing homelessness” since it began tracking the metric in 2007.<sup>11</sup> The numbers are particularly bleak for Western States: in every state within the Ninth Circuit, at least 1 out of 1,000 people is homeless, with homeless individuals sleeping outdoors at higher rates than in any other part of the country.<sup>12</sup>

And the problem has worsened since the Ninth Circuit decided *Martin*. After a decade of steady decline, nationwide homelessness rates have risen every year since 2018—including especially the long-term homelessness rate.<sup>13</sup> States in the Ninth Circuit have been a driving force behind that surge—every State in the Circuit save one has seen its homeless population increase since 2018, and 6 of the 9 States have seen an increase of more than 25%.<sup>14</sup>

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<sup>11</sup> U.S. DEP’T OF HOUS. AND URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS at 10 (2023) (<http://tinyurl.com/5yme3vty>).

<sup>12</sup> *Id.* at 16–17.

<sup>13</sup> *Id.* at 10, 82.

<sup>14</sup> U.S. DEP’T OF HOUS. AND URB. DEV., 2007-2023 POINT-IN-TIME ESTIMATES BY STATE (<http://tinyurl.com/48sceefw>) (follow “2007—2023 Point-in-Time Estimates by State” hyperlink, select

The societal repercussions of these trends are impossible to ignore. 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.<sup>15</sup> Rats and fleas plague these spaces and spread diseases to people and pets.<sup>16</sup> They also infest nearby public buildings, placing all who enter at risk.<sup>17</sup>

Encampments in cities also inevitably lead to human fecal matter smearing sidewalks, paths, and playgrounds.<sup>18</sup> In some places, the human waste is polluting rivers and streams.<sup>19</sup> And children walking to

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the “Change” sheet in the document, and see data in column “F”) (last visited Feb. 21, 2024).

<sup>15</sup> See Jack Davis, *Medieval Diseases Running Rampant Throughout California’s Homeless Population*, W. J. (Mar. 11, 2019) (<https://tinyurl.com/auamzem5>).

<sup>16</sup> *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>).

<sup>17</sup> 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>).

<sup>18</sup> 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>).

<sup>19</sup> Anna Almendrala, *Fecal Bacteria In California’s Waterways Increases With Homeless Crisis*, CAL. HEALTHLINE (Jan. 6, 2020) (<https://tinyurl.com/39npxpemf>).

school and volunteer clean-up crews are increasingly exposed to discarded needles, condoms, and feminine products.<sup>20</sup> These and other biohazards litter public spaces.

Dense population centers are not the only places suffering serious health and safety concerns; the problems have spread to smaller towns like Missoula, Montana. As of August 2023, Missoula had 60 separate encampments across its 400 acres of public parks.<sup>21</sup> Missoula does not have enough shelter beds to meet *Martin's* metrics, so it cannot enforce its decades-old anti-camping ordinance.<sup>22</sup> And it cannot respond to resident concerns that “parks have become dirty and unsafe.”<sup>23</sup> 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.<sup>24</sup>

The following pictures are a snapshot of the emergency that the Ninth Circuit has insulated from State and local government regulation:

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<sup>20</sup> 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>).

<sup>21</sup> 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>).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> City of Missoula, *Urban Camping Update Week Ending August 11, 2023; August 25, 2023* (<https://tinyurl.com/yfubacw2>).



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<sup>25</sup> 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>).

<sup>26</sup> 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>).





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<sup>27</sup> Nick Bowman, *Mayor Durkan again at odds with Seattle council over homeless camps*, MY NW. (May 20, 2020) (<https://tinyurl.com/4d5366uu>).

<sup>28</sup> Joe Rodriguez, *San Francisco Shifts From Trashing Homeless Camps To Sanctioning Them Amid COVID-19*, NPR (May 14, 2020) (<https://tinyurl.com/3rfmn7hw>).



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Homelessness can be hard to look at. It is a stark reminder of our society’s shortcomings. But the Ninth Circuit’s approach has only aggravated the problem by 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). Many communities now “must live by the criminal violence, narcotics activity, and dangerous diseases that plague the homeless encampments.” *Id.* That “threat to the public welfare” should not “be taken lightly.” *Id.*

This reality was predictable when the Ninth Circuit decided *Martin*. At the time, the Ninth Circuit claimed its holding was “a narrow one” that left local

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<sup>29</sup> Phil Matier & Andy Ross, *SF mayor plans crackdown on homeless camps*, S.F. CHRON. (Apr. 8, 2016) (<https://tinyurl.com/5n6v9s6v>).

governments latitude to regulate public encampments. 920 F.3d at 617. Judges dissenting from denial of rehearing en banc were not reassured. And unfortunately, their “fear that the panel’s decision [would] 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).

State and local governments in the Ninth Circuit have attempted a variety of solutions to address the problems that public encampments inflict on their communities. But thanks to *Martin*, these efforts are often met with litigation and shut down by federal courts. For example, the City of Chico in California 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*’s bed-count rule to require “indoor” beds—not outdoor shelter—and enjoined Chico from enforcing its anti-camping ordinance. *Id.* at \*3–4.

The City of Santa Barbara limited its anti-camping ordinance to downtown areas and made it unenforceable between 2:00 a.m. and 7:00 a.m. every day. *Boring v. Murillo*, 2022 WL 14740244, at \*6 (C.D. Cal. Aug. 11, 2022). But even though nothing prevented individuals from sleeping or camping in areas of Santa Barbara other than downtown, the City was sued, and the district court held that the plaintiffs had stated a

plausible Eighth Amendment claim under *Martin*. *Id.* The City’s ordinance remained under litigation when this brief went to press.

The City of Phoenix directed its officers not to issue camping citations without first assessing each individual’s shelter options, but that precaution was also inadequate—the district court enjoined 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.*

\* \* \*

*Amici* States understand that the issues presented by homelessness are not susceptible to easy answers. The underlying causes are usually difficult to decipher, and the best solutions surely vary by locality. But the complexity of these issues underscores the need for States and local governments to have the freedom to address them in their own ways. As five years’ experience under the *Martin* regime show, that will not be possible if this Court ratifies the Ninth Circuit’s assumption of veto power over States’ and localities’ homeless policy.

## **II. Affirming *Grants Pass* Would Impinge on the States' Sovereign Prerogatives.**

As sovereigns, States have the power and responsibility to address societal maladies like homelessness. Respect for the proper role for States in our “federalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society” and “allows for more innovation and experimentation in government.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). In this case, respect for States’ role will permit them and their cities to adapt their policies to their climates, communities, and the specific needs of their homeless populations—the sort of adaptation that the Ninth Circuit is ill-suited to implement.

Despite States’ superior capacity for policymaking, the Ninth Circuit has adopted an approach that impinges on States’ sovereign prerogative without any persuasive justification. The better way to solve these local problems is to allow States to address them in a local way.

### **A. States Have the Unique Power and Obligation to Regulate Homelessness, Including Through Criminal Law.**

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).

Unlike the federal government, States possess a general police power that allows them to enact “regulations which promote the public health, morals, and safety,” as well as “those which promote the public convenience or the general prosperity.” *Eubank v. City of Richmond*, 226 U.S. 137, 142–43 (1912). This power is a core aspect of a State’s sovereignty—“the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.” *Id.* The Founders entrusted the States with this expansive power to govern matters that “touch on citizens’ daily lives” because States are “closer to the governed” and therefore “more local and more accountable than a distant federal bureaucracy.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

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). States hold public lands in trust for the People and have been given “nearly the whole charge of interior regulation.” *Lane Cnty. v. Oregon*, 74 U.S. 71, 76 (1868). By contrast, federal courts may not even “say how [federal land] shall be administered,” much less state land. *See Light v. United States*, 220 U.S. 523, 537 (1911).

In exercising these powers, States have the near-exclusive ability to enact and enforce a criminal code—a power that 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). Ratification did not change that. U.S. CONST. amend. X. Rather, the Founders’ design gave States “the paramount role . . . in setting ‘standards of criminal responsibility’ and deciding “when a person should be held criminally accountable for ‘his antisocial deeds.’” *Kahler v. Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell v. Texas*, 392 U.S. 514, 533, 535–36 (1968) (plurality op.)).

These quintessential State powers vest States and localities with a singular responsibility to address the problems associated with homelessness occurring in their jurisdictions. As explained, homelessness has a profound impact on local health and safety, both for the homeless and for the rest of their communities. And homeless encampments normally arise on public land that the States have the duty to use and preserve for the public good. Indeed, States often regulate encampments to protect natural resources, prevent wildfires, preserve the value of recreation, and maintain an area’s dignity and public value.<sup>30</sup>

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<sup>30</sup> *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); Neb. Rev. Stat. Ann. § 2-3201 (regulating camping to “conserve,

States should be able to pursue these competing interests with their full set of policy tools. This includes shelter and other aid, which States already spend large sums to provide, but also criminal prohibitions on conduct they deem socially harmful. By requiring States to provide shelter to the Ninth Circuit’s satisfaction before enforcing their criminal prohibitions, the *Martin* and *Grants Pass* decisions unconstitutionally limit States’ power to “function as political entities in their own right.” *Bond v. United States*, 564 U.S. 211, 221 (2011). Those decisions “upset the usual constitutional balance of federal and state powers” by placing the authority to set local homelessness policy in the hands of a federal government that was never meant to hold it. *Gregory*, 501 U.S. at 460.

Since the Founding, States have been able to criminalize “wandering about the streets without a house” and similar conduct that *Grants Pass* and *Martin* now constitutionally protect.<sup>31</sup> Many States and localities

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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”); *see also 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”).

<sup>31</sup> Kristin O’Brassill-Kulfan, *Illicit Mobilities and Wandering Lives: Indigent Transiency in the Mid-Atlantic, 1816-1850* at



have considered criminal provisions to be necessary in addition to more humanitarian efforts like providing money, jobs, and housing to the homeless—measures with an equally long historical pedigree.<sup>32</sup> If the Ninth Circuit’s approach is affirmed, States will be deprived of a valuable tool to combat the public harms associated with homelessness, one they have wielded for as long as they have existed as sovereigns.

**B. *Martin* and *Grants Pass* Threaten States’ Authority over Criminal Law Generally.**

*Martin* and *Grants Pass* are built on this Court’s decision in *Robinson v. California*, which 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)). But the Court has since warned that *Robinson*’s “limitation [is] one to be applied sparingly.” *Id.* And the Court has followed its own advice: to this day, *Robinson* remains the Court’s only Eighth Amendment case limiting *what* States may punish rather than *how*.

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33–58 (2016) (Ph.D. dissertation, University of Leicester) (<http://tinyurl.com/45ne9293>). The very law at issue in *Martin* was enacted more than a century ago. Hayley Harding, *U.S. Supreme Court will not take up Boise’s controversial homeless camping case*, IDAHO STATESMAN (Dec. 16, 2019) (<http://tinyurl.com/mspm2ywd>).

<sup>32</sup> See generally William P. Quigley, *Rumblings of Reform: Northern Poor Relief Legislation in Antebellum America, 1820–1860*, 26 *Cap. U. L. Rev.* 739 (1997).

A key reason for the Court’s refusal to extend *Robinson* is the “paramount role of the States in setting ‘standards of criminal responsibility.’” *Kahler*, 140 S. Ct. at 1028. It is precisely this role that *Martin* and *Grants Pass* usurp, and the usurpation, once made, will not easily limit itself to homelessness.

*Martin* and *Grants Pass* begin with *Robinson*’s holding that States may not criminalize a mere status, like the state of being addicted to narcotics. *Martin*, 920 F.3d at 615–16. Then they stretch *Robinson* beyond status crimes to prohibit penalizing actions that are “the unavoidable consequence of one’s status or being”—a prohibition they find in a concurrence and four dissenters in *Powell v. Texas*. *Id.* at 616.

*Martin* intended this prohibition to stop with a “narrow” holding that it is “unconstitutional to punish simply sleeping *somewhere* in public if one has nowhere else to do so.” *Id.* at 590 (Berzon, J., concurring in denial of rehearing en banc). And yet already in *Grants Pass* the prohibition stretches further, covering sleepers’ use of blankets and other “conduct necessary to protect themselves from the elements when there is no shelter space available.” 72 F.4th at 896 (cleaned up).

*Grants Pass*, too, insists its holding is “narrow,” and insists it does not establish a right to use a tent. *Id.* at 895 n.34. But it does not explain how a State would be able to prohibit tents if a district court found them “necessary” to “protect [sleepers] from the

elements.” *Id.* at 896. In colder climates, even fires or camp stoves might sometimes be “necessary.”

And *Martin*’s principle will keep stretching. Its next logical application is urination and defecation, which are “biologically compelled” no less than sleep is. *Martin*, 920 F.3d at 617 (discussing necessity of rest). On this point, too, the *Grants Pass* majority insists it did not reach the question, but again it offers no principled grounds for drawing a distinction. See *Grants Pass*, 72 F.4th at 917 (Silver, J., and Gould, J., joint statement regarding denial of rehearing).

Biology also compels all people to eat, and some to steal food. Martin R. Gardner, *Rethinking Robinson v. California in the Wake of Jones v. Los Angeles: Avoiding the Demise of the Criminal Law by Attending to Punishment*, 98 J. Crim. L. & Criminology 429, 459 (2008). According to the four *Powell* dissenters on whom *Martin* and *Grants Pass* rely, biology compels alcoholics to be drunk in public. *Martin*, 920 F.3d at 616–17. Following the logic further, biology might also compel addicts to seek drugs, in dangerous or violent ways if alternatives are not available, and it may compel mentally ill people to engage in all sorts of behaviors that States universally prohibit. *Martin* and *Grants Pass* try to head off this parade of consequences by emphasizing how “involuntary” and “unavoidable” it is for the homeless to sleep in public if there is nowhere else to go. *Id.*; *Grants Pass*, 72 F.4th at 890–91. But they fail to appreciate how many human activities might be described as involuntary and unavoidable: as Justice Harlan warned fifty years ago, even some sex offenders can

attempt to present their conduct as “*not voluntary* but part of the pattern of a disease.” *Powell*, 392 U.S. at 540 (Harlan, J., concurring) (emphasis added).

Like homelessness itself, deciding where to draw the line of criminal responsibility is a hard problem. It involves assessing enormous amounts of sociological and psychological research—research that contains “perennial gaps” and “uncertainties.” *Kahler*, 140 S. Ct. at 1028. “Even as some puzzles get resolved, others emerge,” causing “differing opinions about how far, and in what ways, mental illness,” for example, “should excuse criminal conduct.” *Id.*

It is a hard problem, but not a new problem. It has provoked centuries of legislative and judicial debates, and those debates have created “the many ‘interlocking and overlapping concepts’” that criminal law uses to determine culpability, including “[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress.” *Id.* (citations omitted). These doctrines evolve slowly, state by state, in response to the “evolving aims of the criminal law” and the “changing religious, moral, philosophical, and medical views of the nature of man.” *Id.*

But *Martin* and *Grants Pass* ignore all that and try to build a new constitutional law of criminal responsibility out of nothing more than *Robinson* and the *Powell* dissent. *Grants Pass* even attempts the job on a *class* basis, abandoning criminal law’s long-honored emphasis on *individual* responsibility.

This Court has never endorsed, invited, or even contemplated such hegemonic application of the Eighth Amendment. *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). Instead, it has rightly “hesitated to reduce ‘experimentation, and freeze [the] dialogue between law and psychiatry into a rigid constitutional mold.’” *Kahler*, 140 S. Ct. at 1028 (quoting *Powell*, 392 U.S. at 536–37 (plurality op.) (alteration in original)).

If *Martin* and *Grants Pass* are overruled, then States may determine, case by case, the circumstances under which homeless people may be punished for conduct arising from their homelessness. States can test whether common-law defenses like duress and necessity protect people who camp in parks because they literally cannot do otherwise. They can also assess how such doctrines apply to people who choose to camp outdoors because they have pets, dislike shelters’ curfews, or want to use drugs or alcohol. *Cf.* Amicus Br. of Freddy Brown, et al. at 8–9 (Sept. 11, 2023). State courts could adjust the doctrines over time to suit their evolving communities, and State legislatures would be able to step in as they see fit.

In short, the States would govern themselves. *Cf.* *Murphy v. NCAA*, 584 U.S. 453, 470 (2018) (States retained “a residuary and inviolable sovereignty” at the Founding) (quoting THE FEDERALIST NO. 39 (James Madison)).

But if *Martin* and *Grants Pass* are not corrected or cabined, then States will be governed by “rigid constitutional formulas” that prevent such growth and adaptation. *Kahler*, 140 S. Ct. at 1028 (quoting *Powell*, 392 U.S. at 536–37 (plurality op.) (cleaned up)). They will find themselves unable to punish allegedly involuntary sleeping on public property and may ultimately be left “powerless to punish any conduct that could be shown to result from a ‘compulsion,’ in the complex, psychological meaning of that term.” *Powell*, 392 U.S. at 544 (Harlan, J., concurring).

Indeed, if *Martin* and *Grants Pass* are followed to their logical conclusions, then “every criminal act which was the result in some degree of a socially developed compulsion [could be] beyond society’s control, [and] the interests and safety of the public would be seriously threatened.” *Smith v. Follette*, 445 F.2d 955, 961 (2d Cir. 1971). As Judge Wilkinson observed when his court applied *Robinson* and *Powell* to protect alcoholics, this broad interpretation of the Eighth Amendment would amount to “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).

This Court should not make the same mistake. As it has said before, “doctrines of criminal responsibility must remain the province of the States.” *Kahler*, 140 S. Ct. at 1028 (quoting *Powell*, 392 U.S. at 534, 536 (plurality op.) (cleaned up)). States must therefore be permitted to decide whether and how criminal responsibility will attach to conduct associated with

homelessness. State and local lawmakers know these individuals, know what local programs and efforts are available to help them, and have a personal investment in remedying the consequences of homelessness in their communities. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536. Unlike federal judges, they and their communities bear the cost of their policies and the costs of any failure.

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## CONCLUSION

Addressing homelessness is States' and cities' job. *Amici* respectfully ask the Court to let them do it.

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