

No. 23-175

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

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CITY OF GRANTS PASS, OREGON,

*Petitioner,*

v.

GLORIA JOHNSON ET AL., ON BEHALF OF  
THEMSELVES AND ALL OTHERS SIMILARLY  
SITUATED,

*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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BRIEF OF AMICI CURIAE CENTER FOR  
CONSTITUTIONAL RIGHTS, TRANSGENDER  
LAW CENTER, NATIONAL CENTER FOR  
LESBIAN RIGHTS, MAKE THE ROAD NEW YORK  
ET AL. IN SUPPORT OF RESPONDENTS

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## INTERESTS OF AMICI CURIAE

The **Center for Constitutional Rights** (“CCR”) is a national, non-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has a long history of litigating cases on behalf of those with the fewest protections and least access to legal resources, including LGBTQI+ communities impacted by discrimination. CCR is counsel for amici curiae.<sup>1</sup>

Amici curiae are the Center for Constitutional Rights, the Transgender Law Center, the National Center for Lesbian Rights, Make the Road New York, and 42 other non-profit and grassroots organizations from across the country dedicated to eradicating discrimination against people who are lesbian, gay, bisexual, transgender (“trans”), non-binary, queer, intersex, two spirit, gender non-conforming, or gender diverse (hereinafter “LGBTQI+”), as well as the criminalization of poverty. Amici collectively have operations in 11 states and the District of Columbia, including New York, California, Massachusetts, Michigan, Minnesota, Georgia, Texas, Louisiana, Virginia, New Mexico and Florida. Given their missions and mandates, amici have strong interests in the outcome of this case. Amici also are uniquely positioned to aid the Court in understanding how laws

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, counsel for amici certify that they authored this brief in its entirety and that no party or its counsel, nor any other person or entity other than counsel for amici, made a monetary contribution to fund the preparation or submission of this brief.



criminalizing involuntary homelessness will cause significant and widespread harm, including to LGBTQI+ people who already experience disproportionate rates of homelessness due to their experiences of sex discrimination. Amici are listed in the Appendix.

## SUMMARY OF ARGUMENT

This is not a case about regulating homeless encampments. Instead, given the breadth of the challenged municipal ordinances, this case presents a critical issue about the criminalization of poverty: whether people experiencing involuntary homelessness in a city with no shelter beds can be punished with fines, fees, and criminal penalties if they sleep in public areas with rudimentary protection from the elements such as pillows and blankets—the unavoidable consequence of being without a home. In a country experiencing record rates of homelessness due to an affordable housing crisis and rising costs occasioned by public policy failures,<sup>2</sup> the answer should be obvious. While policy solutions are needed to resolve our homelessness crisis, they cannot violate the constitutional rights of those surviving under the pressing weight of poverty.

The Eighth Amendment applies to a range of penalties and limits the conduct that can be criminalized in the first place. Enforcing the municipal ordinances at issue would constitute cruel

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<sup>2</sup> Jennifer Ludden, *Homelessness in the U.S. hit a record high last year as pandemic aid ran out*, NPR (Dec. 15, 2023), <https://www.npr.org/homelessness-affordable-housing-crisis-rent-assistance>.

and unusual punishment for three reasons: (1) status crimes are categorically cruel and unusual under *Robinson v. California*, 370 U.S. 660 (1962) and this Court’s Eighth Amendment jurisprudence; (2) local governments cannot circumvent *Robinson* through multistep civil and criminal statutory schemes that punish someone for an aspect of their status; and (3) criminalizing poverty conflicts with contemporary standards of decency. When analyzing what penalties can be imposed under the Eighth Amendment, this Court has stressed that “the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.”<sup>3</sup> The lack of penological justification in this case cannot be more glaring. As legislators in Grants Pass have openly acknowledged, the aim of the ordinances is to banish poor people within city limits—i.e. “to make it uncomfortable enough for [unhoused persons] in our city so [sic] they will want to move on down the road.”<sup>4</sup> A desire to make life as unpleasant as possible for people who already lack a safe place to sleep at night lacks a legitimate penological justification and “results in the gratuitous infliction of suffering” condemned by this Court.

Although Petitioner and its amici assert that affirming the lower court’s holding would leave local and state officials helpless to address homelessness,<sup>5</sup> these assertions are wrong. Affirmance only prevents officials from violating the constitutional rights of those experiencing homelessness through a scheme of financial and criminal punishment. Local and state

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<sup>3</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

<sup>4</sup> Pet. App. 17a.

<sup>5</sup> Pet’r’s Br. 45.

officials can still address homelessness through policy choices that do not punish individuals for their involuntary status contrary to *Robinson*, which is entitled to *stare decisis*. This case does not extend *Robinson* beyond its narrow holding, and falls squarely within the judicially manageable limits on criminalization of homeless individuals created by *Robinson* and its progeny *Powell v. Texas*, 392 U.S. 514 (1968).

For the LGBTQI+ community in particular, whom amici represent, the impact of ordinances like the ones at bar are dire. Members of the LGBTQI+ community already experience homelessness at staggering rates due to discrimination in education, employment, and housing, among others—fueling a pernicious cycle of poverty, homelessness, and incarceration. It does not have to be this way. The heightened societal challenges faced by LGBTQI+ community members experiencing homelessness should not be exacerbated by policy choices which violate their constitutional right to not be criminalized on the basis of their status as homeless individuals.

Accordingly, amici respectfully request that this Court affirm the Ninth Circuit’s decision that “it is an Eighth Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep,” Pet. App. 19a (citation omitted), consistent with the Court’s sound jurisprudence and contemporary standards of decency.

## BACKGROUND

### I. Background on the Ordinances

This case originated after five ordinances were enacted as part of the Grants Pass Municipal Code (“GPMC”): an “anti-sleeping” ordinance (GPMC § 5.61.020); two “anti-camping” ordinances (GPMC § 5.61.030 and GPMC § 6.46.090); a “park exclusion” ordinance (GPMC § 6.46.350); and a “park exclusion appeals” ordinance (GPMC § 6.46.355). Together, these ordinances criminalize people who have the status of being involuntarily homeless by subjecting them to fines, arrest, and criminal punishment.

The anti-camping ordinances (“ordinances”) solely at issue here criminalize sleeping in public with “bedding, sleeping bag, or other material used for bedding purposes,” GPMC § 5.61.010, a necessity for people who are homeless without indoor shelter. Involuntarily homeless people with vehicles similarly cannot park overnight in a park to sleep, even though sleep is an involuntary human function. GPMC § 6.46.090. Moreover, if individuals receive two anti-camping citations or more in a year, the park-exclusion ordinance allows police to banish them from “all city parks for 30 days.” Pet. App. 16a (citing GPMC § 6.46.350(A)). Anyone found in a Grants Pass park during this 30-day period can then be prosecuted for criminal trespass. Pet. App. 16a–17a. Thus, Grants Pass can arrest, fine, jail, and effectively banish people from public property simply because they are involuntarily homeless.

Accordingly, this case does not concern the legality of homeless encampments. Instead, it determines whether it is constitutional to punish people for involuntary homelessness—specifically for sleeping outdoors with minimal protection to survive the cold weather in Grants Pass.

## II. Background on LGBTQI+ Homelessness

### A. Rates of Homelessness Among LGBTQI+ People

The question presented to the Court is of special concern to amici because LGBTQI+ people frequently experience involuntary homelessness due to the numerous ways their lives are impacted by sex discrimination and bias. Specifically, sex discrimination against LGBTQI+ people in domains such as education, employment and housing, and the economic precarity that results, has fueled epidemic rates of homelessness and housing insecurity among community members.

Nationwide, LGBTQI+ people experience homelessness at vastly disproportionate rates to their population size.<sup>6</sup> Trans people are eight times more likely to have a recent experience of homelessness

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<sup>6</sup> See Bianca D.M. Wilson et al., UCLA Sch. of L. Williams Inst., *Homelessness Among LGBT Adults in the U.S.* (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf> (collecting statistics); Brodie Fraser et al., *LGBTIQ+ Homelessness: A Review of the Literature*, 16 Int'l J. of Env't Rsch. & Pub. Health 2677 (2019); *LGBTQ+ Youth Homelessness*, Nat'l Network for Youth, <https://nn4youth.org/lgbtq-homeless-youth/> (last visited Mar. 28, 2024).

than their straight, cisgender counterparts.<sup>7</sup> Rates of homelessness are also astronomical among LGBTQI+ youth. Despite being less than ten percent of the population, LGBTQI+ youth make up forty percent of all homeless youth in the United States and sixty-five percent of all youth experiencing chronic homelessness (defined as four or more episodes of homelessness lasting twelve months or longer).<sup>8</sup> LGBTQI+ youth are also 120 percent more likely to experience homelessness than their straight, cisgender peers, with rates of homelessness being highest among LGBTQI+ youth of color.<sup>9</sup>

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<sup>7</sup> Wilson, *supra* note 6 (reporting); *see also* Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 19 Univ. of St. Thomas L. J. 276, 294 (2023) (also noting that rates of transgender homelessness have increased year after year).

<sup>8</sup> C. Price et al. (eds.), True Colors United & Nat'l LGBTQ Task Force, *At the Intersections: A Collaborative Resource on LGBTQ Youth Homelessness* 18, 22, 30, 32, 56, 77 (2019), <https://truecolorsunited.org/wp-content/uploads/2019-At-the-Intersections-True-Colors-United.pdf> (collecting data); Markie Flores, *LGBTQ Youth Homelessness and Discrimination in the Child Welfare System*, 13 Poverty L. Conf. & Symp. 1, 4 (2020) (discussing chronic homelessness rates); Cameron K. Ormiston, *LGBTQ Youth Homelessness: Why We Need to Protect Our LGBTQ Youth*, 9 LGBT Health 217 (2022) (same); Nat'l Network for Youth, *supra* note 6 (same).

<sup>9</sup> Christianna Silva, *LGBT Youth are 120% More Likely to be Homeless than Straight People, Study Shows*, Newsweek (Nov. 30, 2017), <https://www.newsweek.com/lgbtyouth-homeless-study-727595>; M.H. Morton et al., Chapin Hall at Univ. of Chicago., *Missed Opportunities: LGBTQ Youth Homelessness in America* 3, 7–8 (2018), <https://www.chapinhall.org/wp-content/uploads/VoYC-LGBTQ-Brief-FINAL.pdf>. LGBTQI+ youth also experience enormous amounts of vulnerability while navigating homelessness relative to other youth, including greater levels of physical violence, sexual abuse, mental illness,

## B. The Systemic Causes of LGBTQI+ Homelessness

### 1. Family Rejection

The first driver of homelessness among LGBTQI+ people is family rejection, or being kicked out of family homes.<sup>10</sup> Although family rejection is an endemic issue across the LGBTQI+ community, for trans people the problem is especially distressing: half of trans people surveyed nationwide experienced familial rejection, while forty percent of those respondents (and seventy-four percent who were kicked out of their homes) went on to experience homelessness as a result.<sup>11</sup> Elijah Nichols, a 23-year-old trans youth, is one such person. They first became homeless after being kicked out by their family due to

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suicidality, and homicide. Ezie, *supra* note 7, at 295 (collecting citations).

<sup>10</sup> For literature explaining the correlation between family rejection and LGBTQI+ homelessness, see generally Fraser, *supra* note 6; Samuel Ritholtz, *Is Queer-and-Trans Youth Homelessness a Form of Displacement? A Queer Epistemological Review of Refugee Studies' Theoretical Borders*, 46 *Ethnic & Racial Stud.* 1854, 1854–76 (2023); Jonah P. DeChants et al., “I Just Want to Move Forward”: *Themes of Resilience Among LGBTQ Young Adults Experiencing Family Rejection and Housing Insecurity*, 139 *Child. & Youth Servs. Rev.* 106552 (2022); Juline A. Koken, David S. Bimbi & Jeffrey T. Parsons, *Experiences of Familial Acceptance–Rejection Among Transwomen of Color*, 23 *J. of Fam. Psych.* 853, 853–60 (2009).

<sup>11</sup> Sandy E. James et al., Nat’l Ctr. for Transgender Equal., Report of the 2015 U.S. Transgender Survey 65, 73, 75–76 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (reporting on findings of 2015 nationwide survey).

anti-LGBTQI+ bias, and experienced homelessness again after losing their job in college.<sup>12</sup>

## 2. Anti-LGBTQI+ Discrimination and Harassment in Schools

A second driver of homelessness among LGBTQI+ people is discrimination in the domain of education. More than half of all LGBTQI+ students surveyed have experienced some form of sex discrimination or harassment at school.<sup>13</sup> Rates of discrimination and harassment in schools were even higher among trans people, with seventy-seven percent reporting incidents of some form of sex discrimination, including incidents of verbal harassment (fifty-four percent) and physical assault (twenty-four percent).<sup>14</sup> Yet, instead of receiving support when their attendance or academic performance drops due to school safety issues or when they are involved in fights with bullies, LGBTQI+ students often find themselves facing school discipline.<sup>15</sup>

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<sup>12</sup> Materials on file with counsel for amici.

<sup>13</sup> GLSEN, The 2021 National School Climate Survey 7 (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Executive-Summary-EN.pdf>.

<sup>14</sup> James, *supra* note 11, at 130–38 (noting even higher incidents among trans youth of color); *see also* Jack K. Day, Amaya Perez-Brumer & Stephen T. Russell, *Safe Schools? Transgender Youth's School Experiences and Perceptions of School Climate*, 47 *J. of Youth & Adolescence* 1731, 1731–42 (2018) (also collecting data).

<sup>15</sup> Shannon D. Snapp, Jack K. Day & Stephen T. Russell, *School Pushout: The Role of Supportive Strategies Versus Punitive Practices for LGBT Youth of Color*, 32 *J. of Rsch. on Adolescence* 1470, 1471 (2022); Neal A. Palmer, Emily A. Greytak & Joseph G. Kosciw, GLSEN, Educational Exclusion:



Educational discrimination reduces the rates of educational attainment among LGBTQI+ people, reduces their job prospects and salaries, and plunges them into poverty at disproportionate rates, with trans people of color among the most harmed.<sup>16</sup>

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Drop Out, Push Out, and the School-to-Prison Pipeline among LGBTQ Youth 11–13, 27, 36 (2016), [https://www.glsen.org/sites/default/files/2020-04/Educational%20Exclusion\\_Report\\_6-28-16\\_v4\\_WEB\\_READY\\_PDF.pdf](https://www.glsen.org/sites/default/files/2020-04/Educational%20Exclusion_Report_6-28-16_v4_WEB_READY_PDF.pdf)

(noting, *inter alia*, that 45.2% of trans students surveyed reported a past experience of school discipline, and that 53.6% of students who missed school due to safety concerns were disciplined); James, *supra* note 11, at 11, 132 (noting that 36% percent of survey participants reported being disciplined for fighting their bullies while 6% were ultimately expelled from school).

Trans people’s experiences of harassment in schools are likely to worsen in coming years due to numerous state laws seeking to ban trans youth and students from participating in public life. This includes bans on participation in school sports, bans on gender-congruent restroom and locker room use, and laws prohibiting or restricting gender-affirming healthcare to trans people. *See, e.g.*, Ileana Garnand, ‘*Young People Are Being Harmed: The Effect Of Anti-Trans Legislation*,’ Ctr. for Pub. Integrity (June 6, 2023), <https://publicintegrity.org/inequality-poverty-opportunity/young-people-harmed-anti-trans-legislation/>; Amy Novotney, ‘*The Young People Feel It: A Look at the Mental Health Impact of Antitrans Legislation*,’ Am. Psych. Ass’n (June 29, 2023), <https://www.apa.org/topics/lgbtq/mental-health-anti-transgender-legislation>; Christy Mallory & Elana Redfield, UCLA Sch. of L. Williams Inst., *The Impact of 2023 Legislation on Transgender Youth* (2023), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Legislation-Summary-Oct-2023.pdf>.

<sup>16</sup> *See, e.g.*, Ezie, *supra* note 7, at 282–83; Judith Siers-Poisson, *The Complexity of LGBT Poverty in the United States*, Univ. of Wis.–Madison Inst. for Rsch. on Poverty (June 2021), <https://www.irp.wisc.edu/resource/the-complexity-of-lgbt-poverty-in-the-united-states/>; M.V. Lee Badgett, Laura E. Durso

### 3. Employment Discrimination Against LGBTQI+ Employees and Applicants

A third driver of homelessness among LGBTQI+ people is their experience of rampant employment discrimination.<sup>17</sup> Although this Court clarified that sex discrimination for purposes of Title VII of the Civil Rights Act of 1964 encompasses discrimination against LGBTQI+ persons in *Bostock v. Clayton County*, 590 U.S. 644 (2020), employment discrimination against LGBTQI+ people remains rampant.<sup>18</sup> A nationwide survey conducted two years

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& Alyssa Schneebaum, UCLA Sch. of L. Williams Inst., New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Poverty-LGB-Jun-2013.pdf>.

<sup>17</sup> Ezie, *supra* note 7, at 285–87.

<sup>18</sup> See, e.g., Brad Sears et al., UCLA Sch. of L. Williams Inst., LGBT People’s Experiences of Workplace Discrimination and Harassment 1, 1–2, 12–13, 26 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf> (reporting that employment discrimination against LGBTQI+ people remains “persistent and widespread” post-*Bostock*); Noah Jennings, *Analysis: LGBT Discrimination Claims Have Risen Since Bostock*, Bloomberg Law (June 21, 2023), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-lgbt-discrimination-claims-have-risen-since-bostock>; Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, Ctr. for Am. Progress (Jan. 12, 2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/> (additional reporting). See also Brief of Transgender Law Center, Center for Constitutional Rights et al. as Amicus Curiae Supporting Respondent Aimee Stephens at 29–32, *R.G. & G.R. Harris Funeral Homes, Inc., v. Equal Emp. Opportunity Comm’n & Aimee Stephens*, 590 U.S. 644 (2020) (No. 18-107), 2019 WL

after *Bostock* found that 70 percent of trans respondents, and 50 percent of LGBTQI+ respondents overall, were subjected to employment discrimination or harassment in the previous year.<sup>19</sup> Even when trans people secure employment, workplace harassment often makes it difficult for them to remain on the job, contributing to high unemployment rates.<sup>20</sup>

The challenges that LGBTQI+ people face finding decent work have fueled a homelessness epidemic by lowering their household incomes and increasing their economic precarity.<sup>21</sup> Trans people of color face even greater harm, as they experience poverty at rates four times higher than the general population, and are five times more likely to meet the threshold for extreme poverty in the United States, defined as having a household income less than \$10,000 per year.<sup>22</sup> The challenges that trans people face accessing healthcare, regardless of their employment status, further exacerbates their financial hardship.<sup>23</sup>

#### **4. Housing Discrimination and Insecurity**

A fourth and equally significant factor contributing to LGBTQI+ homelessness is housing

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3023275, at \*29–32 (collecting stories of discrimination against trans employees and job applicants prior to *Bostock*).

<sup>19</sup> Medina & Mahowald, *supra* note 18.

<sup>20</sup> *See, e.g.*, Ezie, *supra* note 7, at 285–87, 293.

<sup>21</sup> Medina & Mahowald, *supra* note 18 (reporting that LGBTQI+ households surveyed reported lower household incomes relative to non-LGBTQI+ households).

<sup>22</sup> Ezie, *supra* note 7, at 293–94 (collecting citations).

<sup>23</sup> Ezie, *supra* note 7, at 288–90 (discussing at length).

discrimination, which nearly 30 percent of LGBTQI+ adults have experienced.<sup>24</sup> Yet, like most forms of anti-LGBTQI+ discrimination, rates of housing discrimination are even more pronounced among trans people of color, with nearly half of Black trans women reporting incidents of housing discrimination, followed by just under 40 percent of trans women who are Indigenous, multiracial, or Latinx.<sup>25</sup> This is precisely the type of discrimination that contributed to Angela Miens, a 44-year-old multiracial Indigenous trans woman, becoming homeless.<sup>26</sup> Ms. Miens has endured homelessness at least six times and continues to face housing discrimination that has kept her in a cycle of homelessness that she feels she has no power over.<sup>27</sup>

### **C. Shelter Conditions for Homeless LGBTQI+ Persons**

Further compounding matters, emergency shelter is in short supply because homeless shelters are frequently hostile and unwelcoming to LGBTQI+ people, or openly refuse to serve them.<sup>28</sup> In the rare

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<sup>24</sup> Ezie, *supra* note 7, at 288; Medina & Mahowald, *supra* note 18.

<sup>25</sup> James, *supra* note 11, at 180 (noting that thirty-nine percent of trans women who were Indigenous or multiracial, and thirty-seven percent of trans Latina women reported discrimination).

<sup>26</sup> Materials on file with counsel for amici.

<sup>27</sup> Materials on file with counsel for amici.

<sup>28</sup> *See, e.g.*, Fraser, *supra* note 6; James, *supra* note 11, at 180–82 (noting that six percent of trans people surveyed were turned away from homeless shelters, with rates as high as 30 percent for trans women of color, and nine percent were kicked out after staff discovered they were trans); Kathryn O’Neill, Bianca D.M. Wilson, & Jody L. Herman, UCLA Sch. of L.

instances that LGBTQI+ people are able to secure emergency shelter placements, sex discrimination is widespread.<sup>29</sup> For instance, seventy percent of trans people surveyed in 2015 experienced abuse or mistreatment at homeless shelters—statistics that are borne out by the amici’s own advocacy work supporting trans people experiencing homelessness across the United States.<sup>30</sup>

LGBTQI+ people are frequently driven out of shelters due to the pervasive sex discrimination and harassment they face.<sup>31</sup> Consequently, the majority of trans people experiencing homelessness are unsheltered, which means sleeping in places unfit for human habitation like sidewalks, parks, subways, or cars.<sup>32</sup> Keke Walker, a 32-year-old Black and

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Williams Inst., Homeless Shelter Access Among Transgender Adults 2 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Homeless-Shelter-Nov-2011.pdf>.

<sup>29</sup> See, e.g., Fraser, *supra* note 6.

<sup>30</sup> James, *supra* note 11, at 176, 181–82 (also noting that over 50% of trans people who stayed at homeless shelters were harassed or assaulted).

<sup>31</sup> Ezie, *supra* note 7, at 295–96 (collecting citations).

<sup>32</sup> See Homelessness Rsch. Inst., Nat’l All. to End Homelessness, Transgender Homeless Adults & Unsheltered Homelessness: What the Data Tell Us 1 (2020), <https://endhomelessness.org/wp-content/uploads/2020/07/Trans-Homelessness-Brief-July-2020.pdf>; *Data Snapshot: Trans and Gender Non-Conforming Individuals Experience Unsheltered Homelessness at Higher Rates*, Nat’l All. to End Homelessness (July 14, 2020), <https://endhomelessness.org/resource/data-snapshot-trans-and-gender-non-conforming-individuals-experience-homelessness-at-higher-rates/> (reporting that of those experiencing homelessness, 63% of trans people and 80% of gender non-conforming people are unsheltered, compared to 49% of cisgender people); Samantha Batko, Alyse D. Oneto & Aaron Shroyer, Urb. Inst., Unsheltered Homelessness: Trends,

genderfluid person who has braved homelessness in Oregon and elsewhere, knows this experience all too well, explaining: “I stayed in my car because it felt most safe and accessible to me, even though I have been harassed by police and security when sleeping or parking for more than an hour.”<sup>33</sup> Asked why this case was significant, Ms. Walker explained that “criminalization perpetuates extreme harm and violence towards LGBTQI+ people for something we should ALL have the right and access to, which is shelter,” and creates more barriers for historically marginalized people trying to exit homelessness.<sup>34</sup>

After being denied entry into homeless shelters, Elijah Nicholas had similar experiences to Ms. Walker, stating: “since shelters did not know what to do with me, I am forever grateful for the couches I was able to surf and the benches I was able to find at airports.”<sup>35</sup> Elijah has personal insight into the import of this case as well, explaining that people experiencing homelessness “should not have to choose between a few hours of rest or a sleepless, aimless walk with no end in sight,” a common reality because

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Characteristics, and Homeless Histories 16 (2020), <https://www.urban.org/sites/default/files/publication/103301/unsheltered-homelessness.pdf> (noting that trans people are twice as likely to be unsheltered as sheltered); see also Reed Christian & Anya Mukarji-Connolly, *What’s Home Got to Do with It? Unsheltered Queer Youth*, 10 Scholar & Feminist Online (2012), <https://sfoonline.barnard.edu/whats-home-got-to-do-with-it-unsheltered-queer-youth/> (discussing experiences of unsheltered youth).

<sup>33</sup> Materials on file with counsel for amici.

<sup>34</sup> Materials on file with counsel for amici.

<sup>35</sup> Materials on file with counsel for amici.

“the shelters often available are not safe, of quality, or resourced properly.”<sup>36</sup>

When recounting her experience in emergency shelters, Angela Miens explains: “people staying there threatened me with injury up to death and the staff did nothing about it.”<sup>37</sup> The lack of safe shelter options has caused Ms. Miens to develop post-traumatic stress disorder from the violent assaults she endured and chronic asthma from being outdoors.<sup>38</sup> Unfortunately, Ms. Miens’ story—and that of Elijah Nichols and Ms. Walker—is not unique.

#### **D. The Impact of Policy Decisions**

Policymakers across the country are presently adopting measures that will make the epidemic of homelessness sweeping the LGBTQI+ community even more severe over time. This includes laws restricting trans healthcare access and making schools an even more hostile and unwelcoming environment for trans youth—measures that are guaranteed to further reduce rates of educational attainment and economic participation because of the negative impacts on physical and emotional well-being.<sup>39</sup> It also includes authorizing private

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<sup>36</sup> Materials on file with counsel for amici.

<sup>37</sup> Materials on file with counsel for amici.

<sup>38</sup> Materials on file with counsel for amici.

<sup>39</sup> Ezie, *supra* note 7, 291–93 (discussing the worsening legal climate for trans people across state legislatures and its impacts); Laura Meckler, Hannah Natanson & John D. Harden, *In States with Laws Targeting LGBTQ Issues, School Hate Crimes Quadrupled*, Wash. Post (Mar. 13, 2024), <https://www.washingtonpost.com/education/2024/03/12/school-lgbtq-hate-crimes-incidents/>.

individuals to seek the arrest of trans and intersex people for using affirming public restrooms,<sup>40</sup> which unhoused LGBTQI+ individuals often have no choice but to use. Involuntary homelessness is therefore a veritable crisis in the LGBTQI+ community, and permitting the criminalization of homelessness will only make LGBTQI+ community members more vulnerable to harm.

## ARGUMENT

### **I. The Ninth Circuit Decision Requires Affirmance Because the Ordinances Criminalize the Status of Being Homeless in Violation of Settled Eighth Amendment Precedent**

#### **A. The Eighth Amendment Limits What Can Be Criminalized in the First Instance, Not Merely the Punishments that Can Be Imposed**

Petitioners initially argue that the ordinances cannot violate the Eighth Amendment because fines and fees are neither cruel nor unusual punishments from a historical perspective. Pet'r's Br. 24–29. Petitioners also suggest the ordinances fall outside the Eighth Amendment's primary concern—the method of criminal punishment—and that Respondents must be convicted to lodge claims. *Id.* at 13–15, 16–24. These arguments are wrong.

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<sup>40</sup> See, e.g., Fla. Stat. § 553.865, amended by 2024 Fla. Laws ch. 2024–2 (S.B. 74), 33–34.



The Eighth Amendment imposes three limitations on what can be criminalized and punished: (1) the kinds of punishment imposed for a criminal conviction, (2) the proportionality of a sentence to the severity of the crime; and (3) the kinds of behavior that can be punished in the first place. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). The ordinances implicate the third category, which Petitioners attempt to circumvent by highlighting other Eighth Amendment doctrines. Pet’r’s Br. 13–15. Although judges must sparingly limit what legislatures can criminalize, the Court has viewed status punishments as categorically off-limits. *Ingraham*, 430 U.S. at 667; *Atkins v. Virginia*, 536 U.S. 304, 311 (2002). This is because the founders adopted the Eighth Amendment to limit the “prosecutorial” power of the government. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266–68 (1989) (discussing how Bill of Rights drafters recognized that governments used fines and penalties to incarcerate indigent people).

Here, the ordinances concern the third *Ingraham* category because they target the status of being involuntarily homeless. Arguing that fines are common, or that 30 days is a short jail sentence, does not change this Court’s precedent that categorically prohibits this kind of punishment. *Robinson*, 370 U.S. at 667 (proscribing imprisonment for status crimes for even a single day).

## **B. The Eighth Amendment Also Applies to Laws that Impose a Range of Penalties, Both Civil and Criminal**

Moreover, in cases where the state seeks to criminalize a particular status or conduct, a plaintiff challenging state power need not be convicted. *Martin v. City of Boise*, 902 F.3d 1031, 1045 (9th Cir. 2018), *amended and superseded on other grounds on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019). To bring cognizable claims under the Eighth Amendment, plaintiffs need only show the state has initiated the criminal process—which includes citations or arrest—or that such prosecution is likely. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1128–29 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007); *Boyd v. City of San Rafael*, No. 23-cv-04085-EMC, 2023 WL 6960368, at \*9–\*10 (N.D. Cal. Oct. 19, 2023), *clarified on other grounds*, 2023 WL 7283885 (N.D. Cal. Nov. 2, 2023). When Petitioners stress that Eighth Amendment claims must involve criminal conviction or criminal penalties, they overlook this Court’s recognition that punishment cuts across civil and criminal law. See *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 631 (1988) (“[T]he labels affixed either to the proceeding or to the relief imposed . . . are not controlling and will not be allowed to defeat the applicable protections of federal constitutional law”).

Consequently, Eighth Amendment relief extends to Respondents challenging these ordinances. In Grants Pass, the lack of available shelter inevitably leads homeless residents to engage in the unavoidable human behavior of lying down or sleeping in public.

Thus, Respondents face a likely threat of prosecution in a jurisdiction that has consistently enforced these ordinances. Pet. App. 17a. Furthermore, the ordinances are punishments designed to be so excessive that homeless individuals leave Grants Pass. *Id.* Accordingly, even as civil punishments, the ordinances fall within the sweep of Eighth Amendment protections envisioned in *Atkins*. 536 U.S. at 311 (“The Eighth Amendment succinctly prohibits ‘[e]xcessive’ sanctions.”).

### **C. *Robinson* and *Powell* Create Judicially Manageable Limits on the Criminalization of Homelessness**

Although Petitioner suggests that affirmance will create an unworkable legal regime, this is erroneous. The Court has already limited *Robinson* by distinguishing between a status and a condition, and federal courts have narrowly applied *Robinson* to homelessness without expanding its holding.

The Court prominently prohibited status-based punishments in *Robinson*. There, a man was arrested and sentenced by a jury to 90 days in jail under a state law that criminalized individuals addicted to using narcotics. 370 U.S. at 661–63, 667. However, this law did not require individuals to be using narcotics at the time of their arrest, meaning it could penalize someone for nothing more than their “status” as a narcotics addict. *Id.* at 666–67. The Court reversed, holding that penalizing someone for “an illness which may be contracted innocently or involuntarily” would “be an infliction of cruel and unusual punishment in

violation of the Eighth and Fourteenth Amendments.”  
*Id.*

Six years later, the Court distinguished between criminalizing status and criminalizing conduct in *Powell*. There, the Court considered whether a statute that criminalized public drunkenness violated the Eighth Amendment’s Cruel and Unusual Punishment Clause. Relying on *Robinson*, Mr. Powell argued that he never voluntarily engaged in public intoxication; instead, he was a victim of a compulsion symptomatic of his chronic alcoholism. 392 U.S. at 533. In a fractured decision, a plurality of the Court rejected Mr. Powell’s claim and found that the statute punished him for appearing drunk in public, not for his status as a chronic alcoholic. *Id.* at 532–34. *Robinson* established that a statute punishes status when a person would be “continuously guilty” due to their status and not necessarily through any fault of their own. 370 U.S. at 666–67. *Powell* did not disturb this framing. 392 U.S. at 534.

Together, the Court’s precedents set narrow, manageable limits on the criminalization of status that federal courts—including the Ninth Circuit—have reliably followed. *See, e.g., Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562–63 (S.D. Fla. 1992); *Martin*, 902 F.3d at 1047–48; *Murphy v. Raoul*, 380 F. Supp. 3d 731, 763–64 (N.D. Ill. 2019). Here, the Ninth Circuit correctly applied *Robinson* because involuntarily homeless people in Grants Pass are continuously guilty under the ordinances. Every living being must sufficiently sleep—it is an unavoidable fact of existence. But involuntarily homeless people can

only engage in this life-preserving behavior in public. Thus, in contrast to the defendant in *Powell*, involuntarily homeless people are inherently guilty under these ordinances unless they remain in perpetual motion—clearly an impossibility. *Jones*, 444 F.3d at 1136–37. Similar to *Robinson*, where the Court found it unconstitutional for a person to be convicted based on their status as an “addict,” the Court should affirm the Ninth Circuit’s finding that the law here also violates the Constitution.

**1. *Robinson* is Entitled to Stare Decisis and Should Not Be Overturned**

Perhaps because of its clear applicability, Petitioner suggests this Court should overturn *Robinson*. Pet’r’s Br. 40. However, this case and its lineage are entitled to stare decisis and must remain part of Eighth Amendment jurisprudence. Under the doctrine of stare decisis, courts weigh several factors before overruling precedent, including (1) the age and lineage of the decision; (2) the quality of the court’s reasoning; (3) the effectiveness of the rule and law being established; (4) consistency with other decisions; and (5) reliance on the decision. *Knick v. Township of Scott*, 588 U.S. 180, 203 (2019). Further, the Court may not depart from prior precedent, “even in constitutional cases,” without “special justification.” *Gamble v. United States*, 587 U.S. 678, 691 (2019) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)); accord *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266 (2014) (merely arguing that a “precedent was wrongly decided” is

insufficient). Applying these factors, *Robinson* is entitled to stare decisis.

First, the Court may overturn a case if its age and lineage conflict with other legal decisions. However, *Robinson* suffers from no such defect and has remained a core branch of Eighth Amendment jurisprudence for 62 years. *Robinson*, 370 U.S. at 667. Its prohibition against status punishments remains pertinent today, especially as authorities increasingly criminalize poverty.<sup>41</sup> Moreover, *Robinson* has been cited by this very Court over 60 times, including as recently as last summer, buttressing the durability of its lineage. See, e.g., *Jones v. Hendrix*, 599 U.S. 465, 528 (2023) (Jackson, J., dissenting).

Second, the quality of the *Robinson* Court's reasoning supports its preservation as controlling precedent and is crucial for safeguarding the Eighth Amendment's Cruel and Unusual Punishment Clause. In *Robinson*, the Court arrived at its decision after considering how societal issues such as substance use disorders coincided with historical applications of the Eighth Amendment. 370 U.S. at 666. The Court weighed the impact of criminalizing an illness that could be contracted innocently or involuntarily, particularly when people did not directly engage in illicit behavior in the state, and was careful to cabin its holding to statuses. *Id.* at 667.

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<sup>41</sup> Tristia Bauman, Nat'l L. Ctr. on Homelessness & Poverty, Housing Not Handcuffs 2019: Ending the Criminalization of Homelessness in U.S. Cities (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

Moreover, *Robinson's* consistency with other decisions underscores the validity of its holding, particularly as it concerns principles of justice and equality. In safeguarding the constitutional rights of people addicted to narcotics against status punishments, *Robinson* aligns with other cases that uphold Eighth Amendment protections from excessive sanctions. See *Graham v. Florida*, 560 U.S. 48 (2010) (finding a life-without-parole sentence is grossly disproportionate when applied to individuals under 18 who commit offenses other than homicide); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (forbidding the death penalty for crimes where the victim neither died, nor where their death was unintentional), *modified on denial of reh'g*, 554 U.S. 945 (2008); *Roper v. Simmons*, 543 U.S. 551 (2005) (finding unconstitutional the sentencing of a defendant to death for a crime committed when they were a minor).

Lastly, the reliance on *Robinson* is evident from subsequent cases that used the holding to protect vulnerable and marginalized individuals from cruel and unusual punishment. See *Solem v. Helm*, 463 U.S. 277, 287 (1983) (recognizing constitutional limits to state-sanctioned punishments) (citing *Robinson*, 370 U.S. at 667). Nor are there any special justifications that necessitate reversal. *Gamble*, 587 U.S. at 691. Thus, *Robinson* is entitled to stare decisis and the Court should declare that the ordinances criminalize aspects of a status and therefore violate the Eighth Amendment.

## 2. Enforcing the Ordinances Would Constitute Cruel and Unusual Punishment

Petitioner's assertion that the ordinances do not constitute cruel and unusual punishment under the Eighth Amendment by virtue of the penalties imposed also fails for three reasons.

First, enforcing a law that criminalizes a status is "particularly obnoxious" and can categorically be "called cruel and unusual." *Powell*, 392 U.S. at 543 (Black, J., concurring). The Court has characterized status punishments as in and of themselves "excessive" under the Eighth Amendment, *Atkins*, 536 U.S. at 311, because criminalizing a status "involves punishment for a mere propensity" instead of punishment for a concerted act. *Powell*, 392 U.S. at 543 (Black, J., concurring). That *Robinson* requires no particular length of punishment before its holding applies only underscores this categorical prohibition. *Robinson*, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").

Here, the ordinances violate *Robinson*'s prohibition against status punishments because they criminalize homeless people for an involuntary aspect of their status: sleeping outside with protection from the elements. The general anti-camping ordinance prohibits people from occupying a campsite "in or upon any sidewalk . . . or any other publicly-owned property." GPMC § 5.61.030. However, another ordinance defines a campsite as "any place where bedding, sleeping bag, or other material [is] used for



bedding purposes.” GPMC § 5.61.010(B). Thus, *involuntarily homeless people have no way to escape criminalization under these ordinances*, particularly on cold evenings when bedding is essential. Nor can they sleep in a vehicle: parking overnight in a Grants Pass park is also unlawful, as is parking there for two consecutive hours between midnight and 6 a.m. GPMC § 6.46.090(B).

Violating these ordinances also comes with an unaffordable price tag—\$295—and additional punishments. Pet. App. 16a. Unless a homeless person pleads guilty to these ordinance violations, an unpaid fine jumps to \$537.60. *Id.* Involuntarily homeless people, however, do not have the funds to pay for citations that target them for sleeping with an appropriate amount of bedding. Resp’ts’ Br. 30; Pet. App. 190a. Moreover, if these fines remain unpaid, courts may pursue punishments such as garnishments, extended probation, and property liens.<sup>42</sup>

Second, enforcing these ordinances constitutes cruel and unusual punishment because statutory schemes can run afoul of *Robinson* when they indirectly punish someone for their status as discussed above. *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019), is instructive on this point. There, the Fourth Circuit held that a class of people experiencing alcoholism stated a plausible claim that a series of “interrelated [Virginia state] statutes [operating] as a

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<sup>42</sup> See generally Off. for Access to Just., U.S. Dep’t of Just., Access to Justice Spotlight: Fines & Fees 6, 34–42 (2023), <https://www.justice.gov/d9/2023-11/doj-access-to-justice-spotlight-fines-and-fees.pdf>.

single scheme” punished them for their status in violation of *Robinson*. *Id.* at 268. One of the statutes allowed a state judge to issue a civil order that marked a person as a “habitual drunkard.” *Id.* at 283. Another statute then empowered police to seek the arrest or jail time of anyone branded a “habitual drunkard” for “the mere possession of or attempt to possess alcohol, or for being drunk in public.” *Id.* at 269. Combined, these statutes formed a scheme that “effectively” punished people experiencing alcoholism for a *propensity*, not conduct. *Id.* at 283. Therefore, the Fourth Circuit held, plaintiffs’ *Robinson* argument stated enough of a claim to survive a motion to dismiss. *Id.* at 268.

The ordinances similarly use a two-step process to haunt homeless people for nothing more than an aspect of their status. After all, police can banish them from “all city parks for 30 days” if they receive two or more citations under the ordinances. Pet. App. 16a (citing GPMC § 6.46.350(A)). Anyone found in a Grants Pass park during this 30-day period can then be prosecuted for criminal trespass. Pet. App. 16a–17a.

Finally, precedent encourages courts to interpret punishment schemes in a “flexible and dynamic manner,” *Gregg*, 428 U.S. at 171, with an eye toward the “evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). For the Eighth Amendment to continue recognizing the dignity of humanity, it must “be capable of wider application than the mischief which gave it birth.” *Weems v. United States*, 217 U.S. 349, 373 (1910).

Contemporary standards of decency counsel against the criminalization of poverty, which is in essence the outcome of these ordinances. Over the last two decades, higher numbers of Americans have come to the view that the criminal legal system is not the answer to social problems and safety concerns.<sup>43</sup> Although homelessness is a complex issue that requires complex solutions, the contemporary standards of decency doctrine compels this Court to recognize the ordinances as nothing more than an assault on human dignity. *Trop*, 356 U.S. at 100–01. The Court should embrace contemporary standards and re-affirm that criminalization of an involuntary status is socially unacceptable.

## **II. Petitioner and its Amici’s Remaining Arguments for Reversal are Unpersuasive**

Petitioner and its amici’s remaining arguments are also unpersuasive. First, Petitioner asserts the Ninth Circuit disregarded essential considerations of federalism, which accords “sensitivity to the legitimate interests of both State and National Governments.” *Younger v. Harris*, 401 U.S. 37, 44 (1971); U.S. Const. amend. X. However, maintaining that harmony in the interest of respect does not mean “blind deference” to state actions that violate the Constitution. *Younger*, 401 U.S. at 44 (“The concept does not mean blind deference to ‘States’ Rights’ any

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<sup>43</sup> *New Polling Demonstrates Ongoing Support for Criminal Justice Reform and Policies to Reduce Incarceration*, fwd.us (Mar. 6, 2024), <https://www.fwd.us/news/new-2024-polling-demonstrates-ongoing-support-for-criminal-justice-reform/>.

more than it means centralization of control over every important issue in our National Government and its courts.”).

Rather, if unconstitutional state action is allowed to stand, the supremacy of federal law becomes devoid of meaning. *McCulloch v. Maryland*, 17 U.S. 316, 432 (1819) (“The American people have declared their constitution and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the states.”). The Constitution is the supreme law of the land. U.S. Const. art. VI, cl. 2. And, as the Ninth Circuit correctly held, under the Eighth Amendment of the Constitution, the ordinances violate *Robinson’s* dictate against punishing involuntary status. Far from overreach, the Ninth Circuit decision upholds the supremacy of federal constitutional law *while* empowering Grants Pass and other local and state governments to address homelessness through a bevy of uninterrupted police powers. Resp’ts’ Cert. Opp’n 24–30. Thus, for all of its outcry about federalism, Petitioner and its amici advocate for a ruling that would undermine it.

Petitioner and amici also suggest the Ninth Circuit violated *Marks v. United States*, 430 U.S. 188 (1977), by combining dicta from a concurrence with language from four dissents to incorrectly generate a constitutional rule favoring Respondents. Pet’r’s Br. 35–37. Irrespective of *Marks*, the Ninth Circuit’s decision holds because this case is about criminalizing unavoidable aspects of a status—not conduct—as the Ninth Circuit correctly gleaned from *Robinson* and *Powell*.

In *Powell*, five justices on a divided Court concurred that *Robinson* prohibits states from criminalizing people for a status. *Powell*, 392 U.S. at 533. The fracturing of justices in *Powell* concerned the extension of *Robinson* from status crimes to “harmful compulsive behavior arising from addiction.” Resp’ts’ Cert. Opp’n 17. Although the plurality declined to extend *Robinson* to unlawful conduct produced by this condition, it crucially noted a “substantial . . . distinction” between a status and a condition. *Powell*, 392 U.S. at 533.

Accordingly, the Ninth Circuit did not stray from *Marks*. Instead, it correctly gleaned from *Robinson*, *Powell*, and other courts that states cannot constitutionally apply a statute that would make a person “continuously guilty” due to an unavoidable aspect of their status. Pet. App. 49a. By applying this tenet to an aspect of involuntary homelessness, the Ninth Circuit did not dangerously enlarge *Robinson*. Rather, as discussed *supra* in Section I.C, it followed other courts that have found that homelessness involves involuntary behavior inseparable from that status while maintaining the *Powell* distinction for punishable behavior that flows from a condition such as substance use disorders.

Finally, the Solicitor General’s amicus suggests the courts below should have conducted a particularized inquiry into whether each person in the class was involuntarily homeless. U.S. Br. 28–33. However, the propriety of the class certification decision in this case was not among the questions certified by the Court, and any arguments concerning

the matter were *waived* in Petitioner’s brief to the Court, as the Solicitor General acknowledges. *Id.* at 31; *see also* U.S. Sup. Ct. R. 14(1)(a), 15(2).

If the Court considers this waived issue, the proper inquiry is whether the Ninth Circuit abused its discretion by finding that the district court properly certified a 23(b)(2) class under Rule 23. Fed. R. Civ. P. 23(b)(2); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 369 (2011) (“Absent an error of law or an abuse of discretion, an appellate tribunal has no warrant to upset the District Court’s finding of commonality.”). This inquiry involves a “rigorous analysis” of the record, which the Ninth Circuit correctly assessed for arguments for and against three contested elements of a Rule 23(b)(2) class before concluding that the district court did not err in certifying the class. *Dukes*, 564 U.S. at 351 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982)).

Tellingly, the Solicitor General’s arguments in opposition to class certification foist a standard onto the Ninth Circuit that *Robinson* did not require. There, the majority did not undertake a particularized inquiry into the validity of the defendant’s status; instead it was concerned with the power of the state to potentially punish anyone *for* a status. *Robinson*, 370 U.S. at 667. The *Powell* plurality did not interpret *Robinson* to require such an inquiry either, so none should be inferred here. *Powell*, 392 U.S. at 532–34.

### III. Policy Considerations Also Mandate Affirmance

#### A. Affirmance Will Not Prevent Officials from Making Policy Judgments Concerning How to Respond to Homelessness

Petitioner alleges that Grants Pass and other local and state governments have lost their “fundamental police power” to make “policy judgments” about how to maintain public sidewalks and when to excuse trespass on public property. Pet’r’s Br. 41. However, this argument misconstrues the Ninth Circuit’s holding, which affirmed the state’s authority to regulate *where* the involuntarily homeless may sleep. Pet. App. 57a–58a. Police power cannot run roughshod over Eighth Amendment protections, as other courts nationwide have found. *See, e.g. Gomes v. Cnty. of Kauai*, 481 F. Supp. 3d 1104, 1108-09 (D. Haw. 2020) (banning homeless people from sleeping on all public property implicates the Eighth Amendment); *Pottinger*, 810 F. Supp. at 1554 (cruel and unusual to punish homeless individuals for sitting, sleeping, or eating in public). Jurisdictions subject to *Martin* and the Ninth Circuit’s holding still maintain numerous ways to address homelessness, thus undermining Petitioner’s argument that affirmance would preclude officials from making policy judgments in responding to homelessness.<sup>44</sup>

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<sup>44</sup> For examples of the ways that municipalities have responded to the homelessness crisis without criminal penalties, see, e.g., *Police-Mental Health Collaboration Toolkit: Responding to Homelessness*, U.S. Dep’t of Just. Bureau of Just. Assistance,

## B. Affirmance is Necessary to Prevent Exacerbating the Nationwide Homelessness Crisis

In contrast, however, the downstream effects of a reversal would be severe. A remand would also mean more criminalization, which severs vital connections with support providers and exacerbates the issue of homelessness and its associated health problems and racial disparities.<sup>45</sup> Homelessness not only diverts resources from more pressing matters such as violent crime,<sup>46</sup> but it also impedes diversion from incarceration, with even brief jail stays disrupting housing stability and heightening the risk of job loss.<sup>47</sup> While many express the desire to work, individuals experiencing homelessness encounter obstacles that

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<https://bjao.org/program/pmhc/responding-homelessness> (last visited Mar. 30, 2024) (highlighting U.S. cities that have enacted the Homeless Outreach Teams program that prioritizes diverting unhoused individuals from the justice system and securing resources for those most in need); *id.* (explaining the U.S. Dep't of Hous. & Urb. Dev. Continuum of Care, which offers homeless assistance funds); Katherine Fallon, *Naming Housing as a Human Right is a First Step to Solving the Housing Crisis*, Urb. Inst. (Dec. 8, 2021), <https://housingmatters.urban.org/articles/naming-housing-human-right-first-step-solving-housing-crisis> (discussing organizations working with legislatures to introduce bills that assert a right to housing).

<sup>45</sup> Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. Interagency Council on Homelessness (Oct. 26, 2022), <https://www.usich.gov/news-events/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address>.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



make finding and maintaining employment challenging.<sup>48</sup>

Enforcing anti-homelessness laws is also ineffective because it worsens the problem.<sup>49</sup> Formerly incarcerated individuals face a nearly tenfold higher risk of homelessness compared to the general population, with 52,000 individuals leaving correctional facilities in 2017 and directly entering shelters.<sup>50</sup> Homelessness also increases vulnerability to interactions with the criminal legal system, amplifying the likelihood of arrest and subsequent incarceration,<sup>51</sup> and repeating the harmful cycle of facing significant barriers to permanent housing.<sup>52</sup> This correlation disproportionately affects people of color, particularly Black individuals, who face elevated rates of homelessness both before and after incarceration.<sup>53</sup>

Reversal of the Ninth Circuit's holding would also perpetuate a vicious cycle of criminalization against homeless LGBTQI+ people. Specifically, it would allow states to subject criminal penalties on people who are involuntarily homeless as a direct

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> Brian Nam-Sonenstein, *Seeking Shelter from Mass Incarceration: Fighting Criminalization with Housing First*, Prison Pol'y Initiative (Sept. 11, 2023), <https://www.prisonpolicy.org/blog/2023/09/11/housing-first/>.

<sup>51</sup> *The Undeniable Link Between Incarceration & Homelessness*, Hous. Up (Aug. 23, 2022), <https://housingup.org/2022/08/23/the-undeniable-link-between-incarceration-homelessness/>.

<sup>52</sup> Olivet, *supra* note 45.

<sup>53</sup> Hous. Up, *supra* note 51.

result of sex discrimination. Emphasizing criminalization, instead of offering safe and affordable housing solutions, will compound the hostile nationwide climate facing LGBTQI+ people that already stands poised to exacerbate the LGBTQI+ homelessness crisis.

## CONCLUSION

For all of the aforementioned reasons, amici respectfully request that the Ninth Circuit's decision be affirmed.

Dated: April 3, 2024

Respectfully submitted,

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## APPENDIX IDENTIFYING ALL 46 AMICI

**Bay Area Lawyers for Individual Freedom**, San Francisco, Cal.

**Black & Pink National**, Omaha, Neb.

**Black Alliance for Just Immigration**, Brooklyn, N.Y.

**Black Trans Nation**, Brooklyn, N.Y.

**Center for Community Alternatives**, Syracuse, N.Y.

**The Center for Constitutional Rights**, New York, NY.

**DC LGBTQ+ Community Center**, Washington, D.C.

**Desiree Alliance**, Calabasas, Cal.

**Drug Policy Alliance**, New York, N.Y.

**Equality Federation**, Portland, Or.

**Equality New York**, New York, N.Y.

**Fountain House**, New York, N.Y.

**Free to Be Youth Project**, New York, N.Y.

**GLBTQ Legal Advocates & Defenders**, Boston, Mass.

**GLMA: Health Professionals Advancing LGBTQ+ Equality**, Washington, D.C.

**Harvard LGBTQ+ Advocacy Clinic**, Cambridge, Mass.

**Housing Works, Inc.**, New York, N.Y.

**Human Rights Campaign Foundation**, Washington, D.C.

**If/When/How: Lawyering for Reproductive Justice**, Oakland, Cal.

**LGBT Bar of New York**, New York, N.Y.

**Make the Road New York**, Brooklyn, N.Y.

**National Center for Lesbian Rights**, San Francisco, Cal.

**National Center for Transgender Equality**, Washington, D.C.

**National Trans Bar Association**, San Francisco, Cal.

**National Women's Law Center**, Washington, D.C.

**New York County Defender Services**, New York, N.Y.

**New York Legal Assistance Group**, New York, N.Y.

**New York Transgender Advocacy Group**, New York, N.Y.

**Phoenix Transition Program**, Atlanta, Ga.

**Rainbow Health Minnesota**, Minneapolis, Minn.

**Rights Behind Bars**, Washington, D.C.

**Ruth Ellis Center**, Highland Park, Mich.

**SAGE**, New York, N.Y.

**Sakhi for South Asian Women**, New York, N.Y.

**Sylvia Rivera Law Project**, New York, N.Y.

**Tom Homann LGBTQ+ Law Association**, San Diego, Cal.

**Trans Pride Initiative**, Dallas, Tex.

**Trans Sistas of Color Project**, Detroit, Mich.

**Trans(forming)**, Atlanta, Ga.

**Transgender Assistance Program of Virginia**, Virginia Beach, Va.

**Transgender Law Center**, Oakland, Cal.

**Transgender Legal Defense & Education Fund**, New York, N.Y.

**Transgender Resource Center of New Mexico**, Albuquerque, N.M.

**TransSOCIAL, Inc.**, Miami, Fla.

**Treatment Action Group**, New York, N.Y.

**Women With A Vision**, New Orleans, La.