No. 19-247

IN THE

Supreme Court of the United States

CITY OF BOISE,

Petitioner,

v.

ROBERT MARTIN, LAWRENCE LEE SMITH, ROBERT ANDERSON, JANET F. BELL, PAMELA S. HAWKES, AND BASIL E. HUMPHREY,

Respondents.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Does the Eighth Amendment's Cruel and Unusual Punishment Clause restrict local governments from enforcing generally applicable ordinances criminalizing certain harmful outdoor sleeping and camping practices?

2. Does the favorable-termination requirement established in *Heck v. Humphrey*, 512 U.S. 477 (1994), apply to plaintiffs seeking prospective relief under 42 U.S.C. § 1983 when obtaining relief would necessarily imply the invalidity of their underlying state-law convictions?

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INTRODUCTION

A modern-day shantytown stands a stone's throw from the city center. There is no heat, electricity, or running water. The people there live in camping tents or under plastic tarps, which occasionally catch fire when the propane heaters malfunction. But firetrucks and emergency services cannot reach them: The tents are blocking the roadway. Without intervention, tragedy is inevitable.[1]

Local governments need a full set of tools to address the complex problem of homelessness. Cities, not the courts, are best placed to determine when those tools should be used. Local ordinances that criminalize the act of sleeping and camping in public have always helped cities prevent crime, promote order, and preserve the general quality of urban life. The importance of these laws is underscored when the inability to enforce them further entrenches dangerous, inhumane, and *preventable* living conditions. The Eighth Amendment cannot abridge cities' well-established right to govern themselves – and to protect their most vulnerable residents.

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[1] This description captures the scene at Cooper Court, an encampment in the City of Boise, based on Mayor David Bieter's published account. *See* David H Bieter, *Cooper Court unsafe; allowing it to exist was inhumane,* IDAHO STATESMAN (December 19, 2015), https://www.idahostatesman.com/opinion/readers-opinion/article50750010.html.

STATEMENT OF THE CASE

I. Factual Background

Like many cities across the country, the City of Boise regulates its urban life in part via generally applicable ordinances codified in the Boise City Code. This case concerns two of these laws and the City's right to enforce them.

The first ordinance simply criminalizes camping in City streets, sidewalks, parks, and other public spaces. Boise City Code § 9-10-02. The ordinance defines camping as "use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn," and enumerates commonly understood indicia of camping such as cooking activities and the use of tents. R. at 155.

The second ordinance criminalizes disorderly conduct. R. at 156. The City's definition of "disorderly conduct" includes sleeping in a public or private location without the owner's permission. Boise City Code § 6-01-05(A). A violation of either ordinance is a misdemeanor offense. R. at 121 n.5.

Boise is also like many cities across the country in that it is confronting significant and rising levels of homelessness. R. at 79. On January 1, 2010, recognizing this reality, the Boise Police Department promulgated a Special Order barring its officers from enforcing the sleeping and camping ordinances against individuals found on City property when no overnight space was available in the

City's three shelters.[2] R. at 160. The Special Order was later codified into the ordinances as a formal part of the Boise City Code. R. at 49.

To carry out the Special Order, the Department developed a policy called the Shelter Protocol. R. at 140. Under the Shelter Protocol, personnel from the three shelters – Interfaith Sanctuary, River Life Rescue Mission, and City Light Home – phone the Department at 11:00 p.m. to report if the shelter is full. *Id.* Officers then receive that information via Department-wide email. *Id.* If space is unavailable at any of the shelters, officers do not enforce the ordinances. *Id.*

Moreover, because certain shelters serve only men (River Life), only women and children (City Light), or forbid individuals from staying past a set number of consecutive days (River Life), the Special Order further provides that "to qualify as 'available,' [a] space must take into account sex, marital and familial status, and disabilities," as well as length-of-stay restrictions. R. at 116 n.14. Under this definition, if only the women's shelter has available space, and an individual cannot access that space due to his sex, then the ordinances cannot be enforced against him.

But in fact, there has not been a single night when all three shelters in Boise reported being full for men, women, and families. R. at 115. As one shelter noted on its webpage: "Even in our busiest months, it's our policy to never turn down anyone for food or shelter due to lack of space." R. at 115 n.12.

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[2] The Special Order also clarified that that "sleeping in a public park during park hours is not prohibited" under the ordinances. R. at 160.

II. Procedural History

Respondents are a group of formerly homeless and homeless individuals who have lived or live in the City of Boise. R. at 136. All Respondents were charged at least once under one or both ordinances between 2006 and 2009. R. at 83.

Respondents, most of whom were represented by counsel, failed to challenge or appeal the initial convictions. R. at 97, 124 n.13. All pleaded guilty to violating the ordinances and paid fines between $25 and $75 and/or served between one and 90 days in jail. R. at 97, 122 n.6. With one exception, all Respondents were sentenced to time served. R. at 45.

After choosing to plead guilty during the initial proceedings, Respondents then filed this action for relief in the U.S. District Court for the District of Idaho. R. at 84. Respondents alleged that enforcement of the City's ordinances had the effect of "criminalizing homelessness," constituting cruel and unusual punishment in violation of the Eighth Amendment. Respondents also alleged that the ordinances violated their rights under the Equal Protection and Due Process Clauses. R. at 156. Respondents sought monetary damages for those alleged violations under 42 U.S.C. § 1983. *Id.* Two Respondents, Robert Martin and Robert Anderson, also sought declaratory and injunctive relief under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201–2202. *Id.*

The district court awarded summary judgment to the City. R. at 155. Respondents' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine, which restricts federal courts' ability to hear *de facto* state-court appeals.

R. at 159. Claims for prospective relief were mooted in part and otherwise failed as a matter of law. R. at 160. Respondents had no viable Eighth Amendment claim when "the undisputed facts support a finding that the City of Boise has devised a reasonable system to ensure that the ordinances are not routinely enforced against the homeless when shelter space is unavailable." R. at 161.

On appeal, the Ninth Circuit reversed and remanded. R. at 144. The Ninth Circuit first found that *Rooker-Feldman* was inapplicable and did not bar the claims for retrospective relief. *Id.* The court then held that the claims for prospective relief had not been mooted because the City did not meet its burden to demonstrate that unconstitutional enforcement of the ordinance "could never be expected" to occur. R. at 153. At the time of the decision, the Special Order had not yet been codified into the ordinances. *Id.*

On remand, the district court found that Respondents' § 1983 claims were now barred by the favorable-termination requirement established in *Heck v. Humphrey*, 512 U.S. 477 (1994). The court asked Respondents to file an amended complaint addressing the sole remaining issue: the availability of declaratory judgment under 28 U.S.C. §§ 2201–2202. *Id.*

After the amended complaint was filed, the district court revisited the case and again ruled in favor of the City. R. at 112. Evaluating both the text of the ordinances and their enforcement, the court determined that Martin and Anderson, the Respondents who sought prospective relief, lacked standing because there was

no "actual or imminent threat" that either individual would be cited under the ordinances. R. at 113. Respondents appealed.

The Ninth Circuit affirmed in part and reversed in part. R. at 75. First, the court determined that Respondents Martin and Anderson did have standing. *Id.* Second, the court held that although *Heck v. Humphrey* barred Respondents' claims for retrospective relief, the favorable-termination requirement did not bar the prospective relief claims. R. at 93. In the court's view, the *Heck* bar "serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge." R. at 100. Thus, the favorable-termination requirement did not apply.[3] *Id.*

The court then reached the Eighth Amendment issue on the merits. R. at 104. Determining that the Eighth Amendment "prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being," the Ninth Circuit held that the City could only enforce the ordinances if the number of available shelter beds in the City exceeded the number of homeless individuals. R. at 104 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

The next year, a Ninth Circuit panel denied rehearing *en banc* over two lengthy dissents. In a dissent joined by five other judges, Judge M. Smith argued that the Ninth Circuit had "badly misconstrued" both *Heck v. Humphrey* and

[3] Judge Owens filed a dissent from this part of the opinion and would have applied the *Heck* bar to Respondents' claims for prospective relief. R. at 109.

Eighth Amendment precedent. R. at 11. Judge Smith urged a narrower reading of the Eighth Amendment, expressing concern that the logic of the court's decision would prohibit local governments from enforcing an array of public health and safety laws. R. at 23-25. To illustrate those concerns, Judge Smith ended the dissent by including a photograph of a homeless encampment on a Los Angeles public sidewalk, which depicted a row of tents and lean-tos alongside overturned trash receptacles. R. at 25. Judge Berzon, who authored the initial Ninth Circuit opinion, chastened Judge Owens in a concurrence for including the "unrelated" photograph. R. at 7.

Judge Bennett issued a dissent joined in full or in part by four additional judges. R. at 31. For Judge Bennett, the Ninth Circuit's ruling was flawed because the Eighth Amendment "does not impose substantive limits on what conduct a state may criminalize." *Id.* Using the Eighth Amendment to launch pre-conviction challenges to a state's substantive criminal law strayed too far from its original purpose: prohibiting certain modes of punishment. R. at 38.

This Court granted a writ of certiorari to address two questions: First, whether the City of Boise's generally applicable sleeping and camping ordinances violate the Eighth Amendment's prohibition on cruel and unusual punishment, and second, whether *Heck*'s favorable-termination requirement bars Respondents' § 1983 claims for prospective relief.

SUMMARY OF THE ARGUMENT

I. The Eighth Amendment proscribes the infliction of "cruel and unusual" punishment. U.S. Const. amend. VIII. Generally applicable municipal ordinances that criminalize the harmful conduct of sleeping and camping outdoors do not violate this prohibition because the Eighth Amendment is not the appropriate constitutional instrument to challenge the substantive criminal law. This Court construes the Eighth Amendment narrowly in light of its original meaning and historical derivation. Purpose and history indicate that faithful interpretation of the Cruel and Unusual Punishment Clause proscribes only certain methods of punishment.

Respondents' rely on *Robinson v. California*, 370 U.S. 660 (1962), which proscribes the criminalization of addiction, to argue that the City's ordinances constitute an impermissible criminalization of their status as homeless individuals. But homelessness is not akin to a medical condition, and criminalizing outdoor sleeping and camping is not akin to criminalizing status. Moreover, the City of Boise has a valid interest in criminalizing harmful outdoor sleeping and camping practices. Far from cruel and unusual punishment, the City's ordinances are in fact a compassionate and necessary response to the complex problem of homelessness. Denying the City its right to enforce such laws would render the homeless problem intractable and all but condemn society's most vulnerable individuals to inhumane and preventable squalor.

II. Respondents' claims for prospective relief under § 1983 are barred by the favorable-termination requirement established by this Court in *Heck v. Humphrey*. § 1983 is not a cause of action available to any litigant who seeks to raise a claim. Rather, potential plaintiffs must achieve favorable termination of their underlying convictions when the relief that they are seeking would necessarily impugn those convictions. Because granting prospective relief would taint Respondents' underlying convictions with the stain of unconstitutionality, the favorable-termination requirement bars their claims under § 1983.

This Court has strongly implied that the favorable-termination requirement is universal. Certainly the requirement should not be waived for Respondents, who still are able to obtain favorable termination as a matter of law and willingly foreclosed an avenue to obtain favorable termination. Because Respondents had and then affirmatively relinquished the opportunity to have their Eighth Amendment claims heard in their underlying state-court proceedings, application of the favorable-termination requirement to bar their claims would perpetuate no unfairness. The favorable-termination rule also furthers important considerations regarding finality, consistency, and state-court competence.

ARGUMENT

I. The Eighth Amendment Does Not Prohibit Cities from Criminalizing Harmful Outdoor Sleeping and Camping Practices.

Cities have a well-established right to prevent crime, promote order, and preserve the general quality of urban life. As "political subdivisions of the State,"

Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907), cities are given "broad latitude [to] experiment . . . with possible solutions to problems of vital local concern." *Whalen v. Roe*, 429 U.S. 589, 597 (1977). Absent the most serious constitutional concerns, courts should not interfere with these well-established police powers. *See id.*

Respondents, in seeking to enlist the Eighth Amendment as a tool of local policymaking, ask this Court to ignore settled principles. The Cruel and Unusual Punishment Clause has never been an appropriate constitutional instrument to challenge substantive criminal law. Rather, its intended purpose is narrow: to proscribe certain barbarous methods of punishment. And the consequences of constitutional misinterpretation are not merely to historical fidelity. Wrenching the Eighth Amendment from its proper context would enable federal courts to "becom[e], under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Powell*, 392 U.S. at 533 (1968) (plurality opinion). Such a ruling runs counter to previous Eighth Amendment jurisprudence and would effectively interdict the City of Boise and many others across the country from appropriately and compassionately addressing the complex problem of homelessness.

A. The Court Construes the Eighth Amendment Narrowly in Light of its Original Meaning and History.

"The applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." *Ingraham v. Wright*, 430 U.S. 651, 671 n.39 (1979). Here, neither meaning nor historical

derivation lend credence to Respondents' expansive interpretation of the Cruel and Unusual Punishment Clause. Rather, this Court must appreciate that its drafters' desired effect was narrow: to "proscribe tortures and other barbarous *methods* of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (internal punctuation omitted) (emphasis added).

History supports this limited interpretation. The Cruel and Unusual Punishment Clause came to the Bill of Rights almost verbatim from Section 10 of the English Declaration of Rights of 1689, which forbade "cruell and unusuall Punishments." *Harmelin*, 501 U.S. 957, 966 (1999) (Scalia, J., concurring). Particularly cruel punishments of that era included whipping, beheading, dismemberment, and disembowelment. *Id.* at 968-70 (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 855–856 (1969)). These vicious penalties were frequently levied to persecute political opponents and "not authorized by common-law precedent or statute." *Id.* To check these abuses of power, the English adopted a prohibition on cruel and unusual punishment. *Id.*

The Framers intended their prohibition on cruel and unusual punishments to have a similar effect in guarding against judicial abuses in sentencing. *Id.* at 974; *see also Solem v. Helm*, 463 U.S. 277, 286 (1983) (noting that the Framers' use of language from the Declaration of Rights is "convincing proof" that the Bill of Rights was intended to provide similar protections). But the Eighth Amendment was never

meant to restrict states' ability to circumscribe the substantive criminal law. As Patrick Henry explained at the Virginia Ratifying Convention:

> Congress, from their general powers, may fully go into business of human legislation. . . . They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.

Furman v. Georgia, 408 U.S. 238, 320 (1972) (Douglas, J., concurring) (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)).

Since ratification, this Court has been conservative in interpreting the Eighth Amendment's meaning. Not until 1910 did the Court expand the Cruel and Unusual Punishment Clause beyond the prohibition of particular punishment methods, an interpretation that remains contested. *Compare Weems v. United States*, 217 U.S. 349, 367 (1910) (holding that it is a "precept" of justice that punishments ought be proportional to the offense) *with Harmelin*, 501 U.S. at 965 (Scalia, J., concurring) (finding that the Eighth Amendment contains no proportionality guarantee because the prohibition on cruel and unusual punishment applies solely to methods of punishment).

Nor is the Cruel and Unusual Punishment Clause an appropriate vehicle to challenge the substantive criminal law. The first and only time the Court accepted such a challenge, *Robinson*, involved "a criminal sanction that . . . clearly departed from the traditional foundations of the criminal law": the criminalization of mere status. *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 288 (4th Cir. 2019) (Wilkerson, J., dissenting). *Robinson*'s holding is properly limited to that

extraordinary case. This Court agrees: In the 58 years since *Robinson*, its logic has not been extended to invalidate any other substantive criminal law. And when this Court has invalidated laws that could be considered *Robinson*-style status crimes, its opinions have never made even passing reference to *Robinson* or the Eighth Amendment. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 51 (1999) (holding that a loitering ordinance was unconstitutionally vague); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding that a vagrancy ordinance was unconstitutionally vague).

The Eighth Amendment was not written into the Bill of Rights as a fallback claim for plaintiffs whose traditional constitutional litigation tactics have failed. *See* R. at 161 (holding that the City of Boise's ordinances are neither overbroad nor vague). Both the meaning and historical derivation of the Cruel and Unusual Punishment Clause confirm its focus is to protect against particular forms of punishment. Entertaining Eighth Amendment challenges to substantive criminal law in all but the most extraordinary circumstances would wrench the prohibition on cruel and unusual punishment from its narrow historical context and run counter to the "ancient faith . . . that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow." *Powell*, 392 U.S. at 548 (Black, J., concurring).

B. *Robinson* and *Powell* Do Not Foreclose Cities' Well-Established Right to Criminalize Harmful Public Conduct.

The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667. First, it proscribes certain

methods of punishment. *Id.* Second, it proscribes disproportionate punishment. *Id.* And finally, it may impose substantive limits on what can be criminalized. *Id.* Consistent with the Eighth Amendment's original meaning, the Court has cautioned that any limits on the substantive criminal law should be found "sparingly." *Id.* Indeed, it has identified only one such limit.

In *Robinson*, the Court invalidated a California statute making it a criminal offense for a person "to be addicted to the use of narcotics." *Robinson,* 370 U.S. at 662. Writing for a five-justice majority, Justice Stewart underscored states' broad power to regulate narcotics, but distinguished laws criminalizing purchase and possession from those criminalizing the mere status of addiction. *Id.* at 667. Because a person could be convicted under California's statute without "hav[ing] been guilty of any antisocial behavior there," the law amounted to cruel and unusual punishment. *Id.* at 666.

Six years later, the Court rejected the opportunity to extend *Robinson*. In *Powell*, the appellant argued that his conviction under a Texas public-intoxication statute constituted cruel and unusual punishment because he was an alcoholic. 392 U.S. at 514 (plurality opinion). Citing *Robinson*'s prohibition on the criminalization of mere status, the appellant claimed that his public intoxication was not of his own volition but instead compelled by his status as an alcoholic. *Id.* at 517. The Court was not convinced. Justice Marshall sharply distinguished the Texas statute from the statute in *Robinson*:

> The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the

> privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community.

See id. at 532.

Taken together, *Robinson* and *Powell* affirm the basic common-law principle that criminal penalties cannot be inflicted without the impetus of "some act . . . some behavior [that] society has an interest in preventing." *Id.* at 533. The Ninth Circuit's interpretation – that the two cases prohibit the criminalization of involuntary acts that are the "unavoidable consequence of one's status or being" – misreads *Powell*'s holding, concurrence, and dissent to advance a radical proposition that none of the justices in that case would have accepted. R. at 104. And for good reason, no other court of appeals has accepted it. Laws that criminalize sleeping and camping outdoors do not implicate the same constitutional concerns as laws that criminalize one's status because sleeping and camping outdoors are volitional acts that cities have a substantial interest in preventing. The inability to enforce these laws would render cities powerless to deter harmful conduct and eliminate intolerable living conditions for homeless individuals in their communities.

1. The Ninth Circuit misapplied the *Marks* rule to inappropriately broaden *Powell*'s holding.

Under the rule established in *Marks*, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United*

States, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted). In *Hughes*, this Court found it "unnecessary" to consider the reasoning of the *Marks* rule. *Hughes v. United States*, 138 S. Ct. 1765, 1772 (2018).

In *Powell*, Justice White concurred in the judgement because he believed that the appellant made insufficient showing he was "unable to stay off the streets" on the night he was arrested. 392 U.S. at 554. For Justice White, compulsion was the necessary "prerequisite" to any valid "Eighth Amendment defense." *Id.* at 551 n.3. Thus, for purposes of the *Marks* rule, Justice White and the plurality agree: When an act involves some volitional conduct, its criminalization does not offend the Eighth Amendment.

Here, the Ninth Circuit has misapplied the *Marks* rule by ignoring Justice White's own words. Per his concurrence, Justice White would limit the "Eighth Amendment defense" only to a person who was both compelled to drink and compelled to appear in a public place. *Id.* at 553 n.4. And his choice of terminology – the Eighth Amendment *defense* – suggests a case-by-case inquiry into compulsion rather than a blanket rule granting constitutional immunity even to alcoholics who could feasibly "ma[k]e arrangements to prevent . . . being in public when drunk." *Id.* at 552. *Powell*'s plurality agreed with this case-by-case approach, noting that common-law defenses, not constitutional prohibitions, are traditionally the more appropriate legal remedy for individuals challenging their convictions under the substantive criminal law:

> The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting

> adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.

Id. at 536; *see also In re Eichorn*, 69 Cal. App. 4th 382, 391 (Cal. Ct. App. 1998) (finding that because a homeless litigant was entitled to raise a necessity defense to his conviction under a camping ordinance, enforcing the ordinance did not violate the Eighth Amendment).[4] Because the Ninth Circuit enlisted Justice White to support a blanket constitutional rule he would not have endorsed, the court improperly applied the *Marks* rule and incorrectly construed the case's holding.

2. The Ninth Circuit improperly considered homelessness to be a status within the meaning of *Robinson* and *Powell.*

Even if this Court were to reconsider the *Marks* rule, the Ninth Circuit's interpretation of *Robinson* and *Powell* would still be suspect. Justice Fortas' dissent in *Powell*, on which the Ninth Circuit's interpretation largely relies, argued it would constitute cruel and unusual punishment to enforce the public-intoxication statute against the appellant. 392 U.S. at 559. Justice Fortas cited medical and legal evidence to substantiate that alcoholism was a "disease" that "destroy[s] [one's] will power" to resist the consumption of alcohol and "leads him to appear in public . . . under a compulsion symptomatic of the disease." *Id.* at 559. Similarly, Justice Stewart's majority opinion in *Robinson* likened laws that would criminalize

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[4] Individuals convicted under the ordinances who could not access space due to shelters' religious programming might also establish a First Amendment defense. *See* R. at 52. But all First Amendment claims are not *de facto* Eighth Amendment challenges. How to accommodate objections to certain shelters' religious nature is a separate question and it is not the question before this Court.

addiction with laws that would "make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." 370 U.S. at 666.

Robinson and *Powell* limit their discussion explicitly to medical conditions. Because homelessness is not a disease, their logic is inapplicable. Whereas medical evidence could be marshalled to substantiate the claim that alcoholism was a disease, "no generalization can describe [the] diverse population" of homeless individuals in a given community. *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 59 (Ct. App. 2015). Although it is of course true that most individuals do not choose to be homeless, cities should not be constitutionally required to indulge "street people" who have willingly adopted a transient lifestyle and cannot be distinguished from involuntarily homeless persons. *See, e.g.,* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J. 1165, 1192-93 (1996). Enjoining cities' ability to enforce sleeping and camping ordinances immunizes these bad actors, who are well-positioned on the streets to perpetrate criminal acts against the truly destitute. *See* R. at 188-190 (discussing how gang members may live in homeless encampments to provide cover for gang activity, drug-dealing, trafficking, and sex crimes).

3. The Ninth Circuit's interpretation of *Robinson* and *Powell* has never been acknowledged by this Court and is not shared by any other court of appeals.

Even if homelessness were a cognizable status under *Robinson* and *Powell*, the Ninth Circuit's conclusion that the those cases "prohibit[] the state from punishing an involuntary act or condition if it is the unavoidable consequence of

one's status or being" is untethered to any precedent but its own. *See* R. at 31. This Court's own citations to *Powell* have exclusively been to its plurality, never the concurrence or dissent. *See, e.g., Clark v. Arizona*, 548 U.S. 735, 774-75 (2006); *Montana v. Egelhoff*, 518 U.S. 37, 56 (1996); *Medina v. California*, 505 U.S. 437, 449 (1992); *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983); *Ingraham*, 430 U.S. at 667. And if the Court believed that *Robinson* or *Powell* had the meaning the Ninth Circuit ascribes to them, the Eighth Amendment likely would have been invoked, even in passing, when striking down loitering and vagrancy ordinances in cases such as *Morales* and *Papachristou*. See Section I.A, *infra*.

Moreover, of the seven other circuits that have heard Eighth Amendment challenges to substantive criminal laws, *none* have interpreted *Robinson* and *Powell* to prohibit enforcing generally applicable laws against individuals who claim their violation of those laws was somehow compelled by their status. Recognizing that such logic would absolve not just the publicly intoxicated alcoholic but also the "desperate bank robber for drug money," six circuits have sharply dismissed such challenges to the substantive criminal law. *United States v. Moore*, 486 F.2d 1139, 1146 (D.C. Cir. 1973) (drug possession); s*ee also United States v. Sirois*, 898 F.3d 134, 138 (1st Cir. 2018) (drug possession); *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (public sleeping); *United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (possession of child pornography); *Yanez v. Romero*, 619 F.2d 851, 852 (10th Cir. 1980) (drug possession); *United States v. Collier*, 478 F.2d 268, 273-274 (5th Cir. 1973) (drug distribution).

Last year, in *Manning*, the Fourth Circuit held that *Robinson* and *Powell* prohibit the criminalization of "conduct that is an involuntary manifestation of . . . illness, and that is otherwise legal for the general population." *Manning*, 930 F.3d at 284. This interpretation of the Eighth Amendment, although novel, is of no use to Respondents and in fact only strengthens the City's case. In *Manning*, the court struck down a civil interdiction statute criminalizing the purchase of alcohol for individuals classified as "habitual drunkards." *Id.* at 269. However, the Fourth Circuit explicitly limited its analysis to the status of "illness" and emphasized that its logic would not exempt individuals from prosecution under generally applicable laws, which reflect "a state's considered judgment that some actions are so dangerous or contrary to the public welfare that they should lead to criminal liability *for everyone* who commits them." *Manning v. Caldwell*, 930 F.3d at 284-85 (emphasis in original).

Here, Respondents seek immunity from generally applicable ordinances, not a targeted statute. Indeed, sleeping outside remains illegal for non-homeless individuals in Boise. The Ninth Circuit's analysis neglected to account for the City's considered judgment that public sleeping and camping causes sufficient harm to impose criminal liability on every individual who is in violation of the law. *See* Section I.B.5, *infra*.

4. Criminalizing the voluntary acts of outdoor sleeping and camping is not akin to criminalizing status.

This Court has recognized that *Robinson*'s holding is limited to "pure status crimes, involving no conduct whatever." *Powell*, 392 U.S. at 542 (Black, J.,

concurring). When an ordinance criminalizes something beyond status, it does not run afoul of *Robinson*. *Id.*

In *Joel*, the City of Orlando's camping ordinance survived an Eighth Amendment challenge from a homeless litigant. Because Orlando's shelters had never reached their maximum capacity, the Eleventh Circuit found that the ordinance did not criminalize involuntary behavior. *Joel*, 232 F.3d at 1362. Because it was always possible to comply with the ordinance, the ordinance did not target the status of homelessness but rather the voluntary conduct of foregoing the opportunity to occupy available shelter space. *Id.*; *see also Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1231 (E.D. Cal. 2009) (finding that Sacramento's camping ordinance "does not punish people simply because they are homeless" but instead "targets conduct").

Here, pursuant to the Shelter Protocol, the City of Boise only enforces the sleeping and camping ordinances when overnight shelter beds are available. R. at 160. Because the City only enforces the ordinances when space is available, the ordinances target the volitional acts of choosing to sleep and camp outdoors in defiance of the law, not an "unavoidable consequence of one's being." *Jones*, 444 F.3d at 1135. Moreover, even if the City chose to enforce the ordinances when every shelter space was unavailable, the ordinances would still be constitutionally sound because individuals would be legally entitled to raise a necessity defense against their convictions. *See In re Eichorn*, 69 Cal. App. 4th at 391.

The Ninth Circuit maintains its "narrow" opinion holds only that the City of Boise refrain from enforcing its sleeping and camping ordinances when "there is a greater number of homeless individuals . . . than the number of available beds" in City shelters. R. at 105. It is worth pointing out that Boise's allegedly unconstitutional Shelter Protocol functioned very similarly. *See* R. at 160. Instead of counting the total number of shelter beds, the City examined whether those beds were actually occupied and tied their enforcement to that figure. *Id.*

That the City followed the Shelter Protocol does not concede the Ninth Circuit's logic, but instead underscores the misguided nature of its decision. The difference between the Shelter Protocol and the Ninth Circuit's holding is a public policy disagreement disguised as a matter of constitutional import. Cities have different experiences of homelessness depending on size, geography, and other factors, and should be free to implement particularized law-enforcement strategies that reflect those experiences. In replacing the City's Shelter Protocol with a blunt policy decree for every city in its jurisdiction, the Ninth Circuit overstepped its role as a purely constitutional adjudicator to "enact Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

5. The City of Boise has a valid interest in criminalizing harmful outdoor sleeping and camping practices.

The Eighth Amendment "must be applied with an awareness of the limited role to be played by the courts" because a "heavy burden rests on those who would attack the judgment of the representatives of the people." *Gregg v. Georgia*, 428 U.S. 153, 174 (1976) ("[A].") Courts should defer to cities' judgment regarding

whether to criminalize public sleeping and camping and how to enforce those ordinances. Cities, not courts, are best placed to form those judgments because they have practical experience with the harms these practices cause.

The few lower courts that have invalidated sleeping and camping ordinances under the Eighth Amendment have ignored the harm that outdoor sleeping and camping practices can cause. *See Jones*, 444 F.3d at 1142 (describing such practices as "harmless conduct"); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) ("harmless acts"). Indeed, the Ninth Circuit characterized the City of Boise's ordinances as criminalizing "the simple act of sleeping outside on public property." R. at 106.

This is a mischaracterization. Outdoor sleeping and camping practices are rarely simple: Most often, they are entrenched social maladies that can and do cause significant harm. This Court has itself recognized that allowing outdoor sleeping and camping can run counter to "Government's substantial interest" in maintaining the "attractive and intact condition" of public spaces. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984) (holding that protestors were not entitled to sleep overnight as a form of political protest in a Washington, D.C. national park). Unfortunately, the most potent harms of outdoor sleeping and camping in Boise fall mainly on homeless individuals themselves.

Whether alone or congregated in an encampment, homeless individuals are easy targets for criminals who would do them harm. R. at 188. Street life exposes individuals to harsh elements and increases their risk of illness and death. R. at

187. For example, in June 2019 alone, two homeless individuals were found dead on public streets in the City. Margaret Carmel, *Four members of Boise's homeless community found dead in the past week*, IDAHONEWS (July 1, 2009), https://idahonews.com/news/local/four-members-of-boises-homeless-community-found-dead-in-the-past-week. These fatalities alone should be sufficient to substantiate that the City of Boise has a substantial interest in criminalizing outdoor sleeping and camping.

C. Far from Cruel and Unusual Punishment, the City of Boise's Ordinances are a Compassionate and Necessary Response to the Complex Problem of Homelessness.

Addressing whether particular *methods* of punishment are cruel and unusual, this Court has noted that the Cruel and Unusual Punishment Clause "recognizes the 'evolving standards of decency that mark the progress of a maturing society.'" *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (*quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958)). To ascertain those standards, the Court evaluates "objective evidence" to determine whether a "national consensus" has emerged against a particular punishment. *Id.* at 312-16.

However, the Court has limited that standard to evaluating methods of punishment, not evaluating the substantive criminal law. *See Ingraham*, 430 U.S. at 668 n.36 ("Our Eighth Amendment decisions have referred to 'evolving standards of decency' . . . only in determining whether criminal punishments are 'cruel and unusual' under the Amendment."). Moreover, far from a national consensus against sleeping and camping ordinances, many leading homelessness service providers

believe sleeping and camping ordinances are an important tool in fighting the homelessness problem. R. at 178. As these groups have observed, enjoining cities from enforcing these ordinances would entrench the permanency of encampments whose sordid conditions should offend any standard of decency. *See id.*

Moreover, sleeping and camping ordinances are often most valuable "not as a ground for making an arrest, but as the basis for a verbal warning or request to move along." Ellickson, *supra*, at 1200. As misdemeanors, their conviction entails relatively benign penalties. Under the Ninth Circuit's decision, cities now must either tolerate the inhumane squalor of these encampments or take action against their conditions through other ordinances that may have far more severe penalties. Such a solution would ultimately be far more cruel and unusual than the enforcement of Boise's ordinances.

II. Without Satisfying *Heck*'s Favorable-Termination Requirement, Respondents Cannot Seek Prospective Relief Under 42 U.S.C. § 1983.

The Civil Rights Act of 1871, codified at 42 U.S.C. § 1983, creates a limited cause of action to redress constitutional violations perpetrated "under color of" state law. Often called the Ku Klux Klan Act, the statute was created originally to protect African Americans in Southern states from the Klan's "reign of terror" during Reconstruction. *Virginia v. Black*, 538 U.S. 343, 353 (2003).

Not all plaintiffs are eligible to seek relief under § 1983. To have a viable cause of action, prospective § 1983 litigants must first satisfy the favorable-termination rule established by this Court in *Heck v. Humphrey*. Under this rule, a plaintiff seeking relief that would "necessarily imply the invalidity of his conviction"

must first obtain favorable termination of that conviction. 512 U.S. at 487. If the underlying conviction has not been reversed, expunged, invalidated, or impugned by a writ of habeas corpus, the claim cannot proceed. *Id.* at 489.

Here, application of the favorable-termination rule bars Respondents from seeking prospective relief under § 1983. Respondents have not yet obtained favorable termination, and an injunction declaring the City's ordinances to be unconstitutional would necessarily imply that Respondents' underlying convictions are invalid. Although Respondents may argue that it was difficult or impossible for them to obtain habeas relief, this Court has strongly implied that the favorable-termination requirement applies to all § 1983 plaintiffs, not merely those plaintiffs eligible for habeas. *See id.* at 490 n.10.

Moreover, of the circuits that waive the favorable-termination requirement for certain habeas-ineligible plaintiffs, all but one do so only on the condition that those plaintiffs have otherwise diligently pursued favorable termination. *See, e.g., Cohen v. Longshore*, 621 F.3d 1311, 1317 (10th Cir. 2010). Respondents here instead willfully foreclosed the opportunity to obtain favorable termination by pleading guilty. R. at 97. Finally, universal application of the favorable-termination requirement supports the same important considerations of finality, consistency, and state-court competence that informed this Court's holding in *Heck*.

A. The Favorable-Termination Rule Bars Respondents' Claims Because Judgment in Their Favor Would Necessarily Imply the Invalidity of their Underlying Convictions.

Respondents have no cause of action under § 1983 because obtaining relief would necessarily imply the invalidity of their underlying convictions. *Id.* at 480. Because Respondents' convictions have not been reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus, their claims cannot proceed. *Id.* at 489.

The Ninth Circuit relies on several cases in which this Court found that certain plaintiffs could in fact seek prospective relief under § 1983. R. at 62. In *Edwards*, an inmate sought an injunction requiring prison officials to date-stamp witness statements, arguing the existing procedure encouraged manipulation of records and violated his due process rights. *Edwards v. Balisok*, 520 U.S. 641, 643 (1997). The Court determined that requiring officials to date-stamp the statements did not necessarily imply the prisoner had been wrongfully denied good-time credits due to records that had been manipulated. *Id.* at 648. Thus, the favorable-termination rule did not apply to bar his claim. *Id.*

And in *Wilkinson*, the Court determined that prisoners could seek an injunction compelling the state to comply with various requirements in future parole proceedings. *Wilkinson v. Dotson*, 544 U.S. 74, 82 (2005). Because the injunction would only entitle the prisoners to new parole hearings, the Court found the favorable-termination rule did not apply. *Id.* Because there was no guarantee that the new hearings would conclude in the prisoners' favor, the injunction did not

necessarily imply the invalidity of their underlying convictions or even "spell speedier release." *Id.*

Contrary to the Ninth Circuit's analysis, these cases in fact support application of the favorable-termination rule to Respondents' claims. In *Edwards* and *Wilkinson*, the injunctions merely required the state to adopt new procedural safeguards to protect prisoners' rights. Adopting those safeguards did not necessarily imply that anyone had been wrongfully denied anything. The implementation of new procedures suggested the old procedures were flawed, but it did not suggest that those procedures had reached the wrong result.

Here, an injunction would do more than merely immunize Respondents against future convictions: It would imply, necessarily, that their prior convictions were invalid. When an ordinance is unconstitutional, a city cannot enforce it. *Cf. City of Erie v. Pap's A.M.*, 529 U.S. 277, 278 (2000). Enforcing the ordinances between 2006 and 2009, when Respondents were convicted, would have been unconstitutional because the number of beds in City shelters did not exceed the number of homeless individuals in Boise at that time. R. at 27.

Heck's precise language is particularly relevant here. The favorable-termination requirement is triggered when relief would "necessarily imply" the invalidity of plaintiffs' underlying convictions, not just when relief would explicitly invalidate them. *Heck*, 512 U.S. at 487. Thus, contrary to the Ninth Circuit's interpretation, it is not relevant whether the purpose of the relief sought is backward- or forward-looking. *See* R. at 63. Rather, in determining *Heck*'s

applicability, the pertinent consideration is the effect that obtaining relief would have on the underlying conviction, even when that effect is collateral.

Obtaining declaratory and injunctive relief would, at minimum, taint Respondents' underlying convictions with the stain of unconstitutionality. Thus, per *Heck*, their § 1983 claims are barred in the absence of favorable termination.

B. Respondents Are Not Exempt from the Favorable-Termination Rule Because the Favorable-Termination Rule Applies to All § 1983 Plaintiffs.

In *Heck*, this Court strongly implied that the favorable-termination requirement applies to all § 1983 plaintiffs regardless of habeas eligibility. *Id.* at 490 n.10 ("[T]he principle barring collateral attacks…is not rendered inapplicable by the fortuity that a convicted criminal is no longer incarcerated."). The Ninth Circuit is correct that in *Spencer v. Kemna*, 523 U.S. 1 (1998), five justices stated in dicta that the favorable-termination requirement should be waived for habeas-ineligible plaintiffs. R. at 58. But *Spencer* was not a case about favorable termination, and important policy considerations support universal application of the favorable-termination rule. *See* Section II.D, *infra*.

Nor would it would make sense to limit the favorable-termination requirement to habeas-eligible plaintiffs because habeas is not the only route through which § 1983 plaintiffs can obtain favorable termination. Rather, habeas is among four options presented on equal footing: Plaintiffs also have successfully obtained favorable termination when their convictions have been "reversed on direct appeal," "expunged by executive order," or "declared invalid by a state tribunal."

Heck, 512 at 487. Even habeas-ineligible plaintiffs may still have their convictions expunged by a future executive order or declared invalid by tribunal, two options still presently available to Respondents.

Although the circuits are split on the applicability of the favorable-termination rule to habeas-ineligible plaintiffs, the number of circuits embracing a universal favorable-termination requirement is growing. This year, in *Savory*, the Seventh Circuit held that even a plaintiff's "good-faith but unsuccessful" pursuit of favorable termination does not waive the requirement, overturning a prior opinion to do so. *Savory v. Cannon*, 947 F.3d 409, 426 (7th Cir. 2020). A significant number of circuits similarly hold that the favorable-termination requirement is universal. *See Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007); *Williams v. Consovoy*, 453 F.3d 173, 177 (3rd Cir. 2006); *Randell v. Johnson*, 227 F.3d 300, 301 (5th Cir. 2000); *Figueroa v. Rivera*, 147 F.3d 77, 81 (1st Cir. 1998).

Here, even if Respondents had made a good-faith effort to obtain favorable termination, such a showing would not render their claims cognizable under § 1983. This Court intended that the favorable-termination rule be a universal requirement. *See id.* at 490 n.10. Many courts of appeals agree that this is the proper approach. Because Respondents have not yet satisfied this requirement, their claims for prospective relief under § 1983 are not cognizable.

C. Respondents Are Not Exempt from the Favorable-Termination Rule Because They Did Not Pursue Favorable-Termination of Their Underlying Convictions.

Of the courts of appeals that waive the favorable-termination requirement for habeas-ineligible plaintiffs, the majority do so only when the plaintiffs have either diligently pursued favorable termination or were barred from favorable termination as a matter of law. *See Cohen*, 621 F.3d at 1317; *Wilson v. Johnson*, 535 F.3d 262, 267–68 (4th Cir. 2008); *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 601 (6th Cir. 2007); *Guerrero v. Gates*, 442 F.3d 697, 704-05 (9th Cir. 2006); *Harden v. Pataki*, 320 F.3d 1289, 1298 (11th Cir. 2003); *but see Poventud v. City of New York*, 715 F.3d 57, 60 (2d Cir. 2013), *vacated en banc on other grounds*, 750 F.3d 121 (2d Cir. 2014) (concluding that plaintiffs "asserting the unconstitutionality of [a] conviction or incarceration must have access to a federal remedy").

Most circuits, therefore, would not waive the favorable-termination requirement for Respondents because Respondents neither diligently pursued favorable termination nor were unable to obtain favorable termination as a legal matter. Here, Respondents willfully foreclosed the opportunity to obtain favorable termination by pleading guilty to violating the ordinances and waiving their ability to challenge their convictions on direct appeal, a decision that Respondents made while represented by counsel. R. at 97, 124 n.13. A successful appeal is one of the four viable routes under *Heck* to favorable termination. *See* 512 U.S. at 487. Moreover, it is not impossible for Respondents to obtain favorable termination as a legal matter. Nothing in the record appears to have foreclosed the possibility of

Respondents obtaining favorable termination via either executive expungement or a state tribunal's invalidation of their convictions. *See* Section II.B, *infra*.

D. A Universal Favorable-Termination Rule is Consistent with Important Considerations Regarding Finality, Consistency, and State Courts' Competence.

Applying the favorable-termination requirement to all § 1983 plaintiffs would support the same important considerations that informed the Court's opinion in *Heck*. In *Heck*, the Court expressed "concerns for finality and consistency" and cautioned against "expand[ing] opportunities for collateral attack." 512 U.S. at 485; *see also McDonough v. Smith*, 139 S.Ct. 2149, 2157 (2019) (noting that the favorable-termination requirement "is rooted in pragmatic concerns with avoiding parallel criminal and civil litigation over the same subject matter and the related possibility of conflicting civil and criminal judgments").

This case perfectly illustrates those concerns and why the favorable-termination rule should be applied. Here, obtaining an injunction under § 1983 would result in conflicting civil and criminal judgments, which would undermine the goal of "finality and consistency" articulated in *Heck.* 512 U.S. at 485.

Moreover, § 1983 is a limited cause of action that was not designed to "always and everywhere be available." *Spencer*, 523 U.S. at 17. This Court does not operate under the assumption that plaintiffs have any right to "vindicate . . . federal claims in a federal forum." *San Remo Hotel, L.P. v. City and Cnty. of San Francisco, Cal.* 545 U.S. 323, 342 (2005). Rather, this Court has long recognized that it is state courts' obligation to hear constitutional questions, and that "[u]pon State courts,

equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution . . . whenever those rights are involved in any suit or proceeding before them." *Robb v. Connolly*, 111 U.S. 624, 637-38 (1884) (holding that state courts have jurisdiction to hear habeas claims).

Only a universal favorable-termination requirement is consistent with *Robb*'s powerful exhortation. If Congress intended for § 1983 to be a universal cause of action against every potential constitutional violation, Congress could have codified that intent into the statute. It did not. *Cf. id.* at 638 (noting that if Congress intended to preclude state courts' ability to hear habeas claims, Congress would written the habeas statute to reflect that intent). This Court instead must be guided by its own longstanding recognition of state courts' right and duty to hear constitutional claims unless expressly indicated. *See id.*

Respondents thus cannot argue that application of the federal-termination rule denies them a forum for important constitutional claims. Rather, Respondents denied themselves that forum by failing to raise those Eighth Amendment claims during their underlying state-law criminal proceedings. R. at 124 n.13. Their previous failure to raise those claims does not render § 1983 an appropriate vehicle to hear them now.

CONCLUSION

Cities need a full set of tools to respond to the complex problem of homelessness. Generally applicable ordinances criminalizing harmful outdoor sleeping and camping practices are one such tool, and these laws are constitutionally sound against any Eighth Amendment challenge. Respondents' claims for declaratory and injunctive relief are further thwarted by the favorable-termination requirement established in *Heck v. Humphrey*. This universal requirement serves important considerations and should not be waived for plaintiffs who both can obtain favorable termination as a matter of law and foreclosed an avenue to obtain favorable termination. For the foregoing reasons, the City of Boise requests that this Court REVERSE the Ninth Circuit's judgment.

Dated: February 14, 2020

Respectfully submitted,

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