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 RESPONDENTS

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## QUESTIONS PRESENTED

1. Does the Eighth Amendment's Cruel and Unusual Punishments Clause, which forbids criminalizing a person's involuntary "status," prevent a municipality from prosecuting homeless individuals for sleeping in public even when there is no shelter available?

2. Does *Heck v. Humphrey*, 512 U.S. 447 (1994), which prevents prisoners from bringing § 1983 actions that would imply the invalidity of a past conviction, nevertheless bar the respondents here from seeking purely prospective relief?

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## INTRODUCTION

At the heart of this case is a lack of choice. This Court must decide whether a government can punish its citizens for that mere lack of choice. The men and women in this case all found themselves in the same situation: homeless in Boise, and without any place to sleep but public property. Boise prosecuted and convicted them under municipal ordinances that prohibit sleeping in public, in what these individuals saw as an attempt to drive them out of town.

The Eighth Amendment prevents the criminalization of a person's involuntary status. But Boise enforces broad bans on sleeping in public, even when there is no available shelter, and no other choice. The city's actions make the fact of these men and women's existence in Boise the single reason for their conviction. The Constitution does not permit such a result.

## STATEMENT OF THE CASE

### I. Factual Background

Boise, Idaho, like many cities in America, has more homeless individuals sleeping on its streets than there are open shelter beds, and its homeless population is steadily increasing. R. at 41–42. Boise has repeatedly prosecuted homeless persons, including respondents Robert Martin, Lawrence Lee Smith, Robert Anderson, Janet F. Bell, Pamela S. Hawkes, and Basil E. Humphrey (collectively, Respondents), for no more than sleeping outside. R. at 45–46. Respondents had run afoul of two Boise statutes (collectively, the Sleeping Bans) that criminalized sleeping on public property.

The disorderly conduct ordinance had declared as illegal "occupying, lodging or sleeping" in "any" public place without permission. Boise City Code § 6-01-05; A-1. The camping ordinance had similarly made it illegal to use "any of the streets, sidewalks, parks or public places as a camping place at any time," defining camping as the 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." Boise City Code § 9-10-02; A-1–A-2. The camping ordinance offers that "indicia of camping" can include use of tents or temporary structures, storage of personal belongings, or making a fire or cooking, but does not make the presence of such indicia a requirement for conviction. Boise City Code § 9-10-02; A-2. In 2014, in the midst of this litigation, Boise amended both ordinances: "Law enforcement officers shall not enforce [the Sleeping Bans] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02; A-1–A-2.

There are three emergency shelters in the greater Boise area, all privately run, together providing 354 beds and 92 floor mats for the estimated 867 homeless individuals in Ada County. R. at 41–42, 44. Two of the shelters, one for men and one for women and children, are both operated by the Christian nonprofit Boise Rescue Mission (BRM) and cap the number of nights a person can seek shelter there, except in winter. R. at 43–44. Men are allowed to stay 17 consecutive nights; women are allowed to stay up to 30. R. at 43–44. After someone has used up their allotted nights at a BRM shelter, she can stay longer by joining the Discipleship Program,

an "intensive, Christ-based" recovery program with a strong focus on religious study. R. at 44. The BRM shelters also "may deny shelter" to anyone arriving after 5:30 pm, and "generally deny" anyone arriving after 8:00 pm. R. at 53. The third shelter, the smallest of the three, "frequently has to turn away homeless people seeking shelter" due to capacity issues. R. at 42.

In 2010, after this litigation began, Boise Police Department adopted a policy of not enforcing the Sleeping Bans when there is no "available overnight shelter." R. at 46. The shelters agreed to self-report when they were full, in order to provide notice to police to refrain from enforcing the ordinances. R. at 46. Under the policy—which was not incorporated into the city code but established under the "exclusive authority" of the police department—if there was a space technically available, but an individual had already stayed her allotted nights at that shelter, she would not be cited. R. at 140. However, if she was unable to use the available bed due instead to "voluntary actions," she could be prosecuted. R. at 140–41.

All respondents have been cited and convicted at least once for violating one or both of the Sleeping Bans. R. at 45. At least one of the respondents was prosecuted under the camping ordinance despite a lack of any "indicia" of camping: She was sleeping in a blanket. R. at 70. With one exception, all citations occurred before the Boise Police Department's informal policy took effect; the most recent citation was in 2012. R. at 45–46. In 2014, Boise formally revised the Sleeping Bans to incorporate the informal policy: If no shelter had available space, an individual could not be punished for sleeping in public. R. at 3. But as under the informal

policy, if a shelter bed was open but unavailable to a particular person "due to voluntary actions such as intoxication, drug use, unruly behavior, or violation of shelter rules," she could still be prosecuted. R. at 114; A-1–A-2.

Two respondents, Martin and Anderson, "worry" that they will be prosecuted again under the Sleeping Bans in the future, despite the 2014 amendments. R. at 118. They would not be alone: Boise has "regularly" punished individuals under the ordinances, issuing 175 citations in the first three months of 2015 alone. R at 54. Both Martin and Anderson are uncomfortable with the "the overall religious atmosphere" of the BRM men's shelter, and Anderson was "barred" from the shelter for 30 days in 2007 when "his religious beliefs" prevented him from staying longer by entering the Discipleship Program. R. at 45, 52. Instead, he slept outside for the next several weeks, and was prosecuted under the camping ordinance. R. at 45.

## II. Procedural Background

### A. Boise Changes Its Policies and Laws and Avoids Litigating the Merits of Respondents' Eighth Amendment Claim

Respondents brought this action in 2009, challenging that Boise had violated the Cruel and Unusual Punishments Clause of Eighth Amendment and seeking damages under 42 U.S.C. § 1983. R. at 46. Respondents reasoned that without housing, they had no choice but to be present on the streets of Boise, and therefore enforcement of the Sleeping Bans was criminalizing them "for nothing more than 'being' without a home." R. at 156. Anderson and Martin also sought prospective relief in addition to damages: They asked a court to prevent Boise from prosecuting homeless persons under the ordinances in the future. R. at 46.

The district court, in eleven years, has never reached the merits of Respondents' Eighth Amendment claim. In 2011, a year after Boise Police Department adopted the policy to not enforce the Sleeping Bans on nights when all shelters had self-reported as full, the district court granted summary judgment to the city. R. at 47. The court held Respondents' prospective claims were mooted by Boise's new policy, as it was "undisputed" that homeless persons could sleep in city parks when shelter space was unavailable, making Boise's approach "reasonable and constitutionally sufficient." R. at 160. The district court also held that the claims for damages were barred by the *Rooker-Feldman* doctrine, which procedurally bars "forbidden de facto appeals" of state court judgments. R. at 144. The Ninth Circuit unanimously reversed, holding that *Rooker-Feldman* did not bar Respondents' retrospective claims, and that Boise had not met its "heavy burden of demonstrating" that the new enforcement policy eliminated expectations of allegedly unconstitutional prosecution. R. at 144.

On remand, the district court again granted summary judgment to Boise in 2014, holding that Respondents' claims for both retrospective and prospective relief were barred by *Heck v. Humphrey*, which prohibits § 1983 challenges that would necessarily imply the invalidity of a conviction or confinement. R. at 48. The court concluded that because Respondents had not first vacated or overturned their convictions under the Sleeping Bans, even the requested injunction against future enforcement would imply that the earlier prosecutions were unconstitutional, an outcome forbidden by *Heck*. R. at 48–49. And in 2015 the district court separately

held that Anderson and Martin no longer had standing to prevent future potentially unconstitutional prosecution under the Sleeping Bans. R. at 113. Because Boise in 2014 had amended its ordinances to prevent enforcement when there was no available shelter, the district court decided there was no "credible threat" of future constitutional violation. R. at 49.

### B. The Ninth Circuit Reaches the Merits and Declares the Sleeping Bans Unconstitutional

The Ninth Circuit again reversed in 2018, holding that prosecuting people "for sleeping outside on public property when those people have no home or other shelter" violates the Eighth Amendment. R. at 39. The panel held that while the *Heck* doctrine barred most of Respondents' claims for retrospective relief, it had "no application" to the prospective claims. R. at 55. While the *Heck* line of cases "serves to ensure the finality and validity of previous convictions," it did not "insulate future prosecutions" from a challenge like Martin and Anderson's requested injunction. R. at 63.

Turning "at last" to the merits of Respondents' claims, the Ninth Circuit held that the constitutional ban on criminalizing a person's "status" prohibits Boise from prosecuting homeless individuals for sleeping outside when they have nowhere else to go. R. at 63–64. The panel's "narrow" holding drew from the Ninth Circuit's earlier decision in *Jones v. Los Angeles*, which struck down a similar ban on sleeping in public, though the opinion was later withdrawn after the parties settled. R. at 66–67. Following *Jones*, the court was careful to explain that its holding did not require Boise to "provide sufficient shelter for the homeless," nor did it mean

that a city "can *never* criminalize the act of sleeping outside." R. at 67 (emphasis original) The court held that ordinances criminalizing "the simple act of sleeping outside" when no shelter is "practically available" violates the Eighth Amendment. R. at 68, 70.

The Ninth Circuit denied to rehear the case en banc. Judge Berzon, who concurred in the denial, briefly explained that Boise itself understood the panel's opinion as "narrow" and so "did not initially seek en banc review" before offering mild support for rehearing. R. at 8. Judge Berzon again highlighted the limited scope of the decision, which "clearly" did not prevent cities from prohibiting tent encampments or otherwise addressing the homelessness crisis. R. at 10.

Boise petitioned this Court for review, and this Court granted a writ of certiorari.

## SUMMARY OF THE ARGUMENT

Boise violates the Eighth Amendment in prosecuting homeless individuals for sleeping in public when they have nowhere else to go. As this Court's precedents make clear, the Constitution forbids criminalization of an individual's involuntary "status." Whether a law does this requires a two-part showing: The petitioner must demonstrate that her status is involuntary and that the challenged law does not require affirmative conduct, beyond that involuntary status, for conviction. Boise's Sleeping Bans, as enforced, have unconstitutionally criminalized Respondents' status as involuntarily homeless for three reasons.

First, Respondents have demonstrated that sleeping in public is involuntary. It is undisputed that Boise lacks sufficient shelter space to house all homeless persons in the Boise area. Respondents have also been turned away from technically open beds because they have exhausted their allotted nights at the shelters, refused to participate in required religious programming, or both.

Second, conviction under the Sleeping Bans does not require additional conduct—beyond simply being homeless—for conviction. Unlike other cities that constitutionally prohibit potentially related conduct, such as obstructing public right of way, Boise's ordinances sweep broadly to forbid sleeping in "any" public place, and no respondent was convicted for anything more than sleeping.

Third, Respondents' requested relief and the Ninth Circuit's holding below is narrow and does not prevent Boise—or other cities—from addressing homelessness in other ways, including criminalizing unsafe conduct. Boise cannot prosecute homeless individuals for simply sleeping in public when they have no other options, but Boise is neither constitutionally required to provide housing for all homeless persons nor prohibited from keeping its streets safe.

Additionally, *Heck v. Humphrey*, a case about attacking a conviction outside of the federal habeas corpus process, does not prevent this Court from reaching the merits of the Eighth Amendment argument. 512 U.S. 447 (1994). *Heck* prevents § 1983 actions where success would "necessarily imply" the invalidity of an underlying conviction or confinement. The *Heck* bar does not apply to Respondents' requested relief for three reasons.

First, this Court's holdings specifically permit and invite Respondents' claims for prospective injunctive relief.

Second, *Heck* does not apply because Respondents' claims would not necessarily imply that their convictions under the Sleeping Bans were invalid. Respondents challenge only Boise's future unconstitutional procedures in enforcing the ordinances, a claim which does not undermine the substance of a past punishment. Significantly, Boise materially amended the Sleeping Bans after Respondents had been convicted, so it is unclear how prospective relief could impugn convictions obtained under different law.

Third, Respondents' claims are outside the traditional core of habeas corpus actions that the *Heck* doctrine operates to protect. *Heck* ensures outstanding criminal convictions are properly challenged through habeas corpus, but does not bar Respondents' action, which they could not have brought through habeas corpus because they were never incarcerated after conviction. And Respondents' claims do not challenge the fact or duration of confinement, unlike traditional habeas claims and the types of actions that *Heck* and its progeny concern.

For these reasons, Respondents ask this Court to affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit.

## ARGUMENT

### I. Standard of Review

When reviewing a motion for summary judgment, an appellate court reviews the record in the light most favorable to the nonmoving party—Respondents. *Tolan*

*v. Cotton*, 572 U.S. 650, 656–57 (2014). Summary judgment is properly granted only when there are no disputes of material fact and the moving party—Boise—"is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

## II. Broad Enforcement of the Sleeping Bans Violates the Eighth Amendment of the Constitution.

Boise's prosecution of involuntary homelessness is cruel and unusual punishment. While the Supreme Court has not squarely considered the criminalization of homelessness itself, the Constitution forbids punishing an individual's involuntary "status." *See Robinson v. California*, 370 U.S. 660, 666–67 (1962). The Sleeping Bans violate the Cruel and Unusual Punishments clause for three reasons. First, it is undisputed that the lack of shelter space in Boise made Respondents' presence on the streets involuntary. Second, the Sleeping Bans do not require additional conduct for conviction. Third, Boise's ban is broad, and the challenge is narrow, leaving Boise with many other ways to address homelessness.

### A. The Constitution Forbids Laws that Criminalize A Person's Involuntary Status.

Under *Robinson* and *Powell v. Texas*, 392 U.S. 514 (1968), the Sleeping Bans violate the Eighth Amendment. Criminal laws violate the Constitution when a person demonstrates two elements: first, that the defendant's status is involuntary, and second, that the law does not require affirmative conduct for conviction, beyond that involuntary status. If those elements are met, the law at issue has criminalized status itself, and is unconstitutional. In *Robinson*, this Court struck down a California law that outlawed narcotics addiction. *Robinson*, 370 U.S. at 667. To

criminalize addiction—a medical condition—even if the defendant had "never touched any narcotic drug," was as cruel and unusual as criminalizing the "common cold." *Id.* The Court held it unconstitutional to punish someone's mere status, "whether or not he has been guilty of any antisocial behavior." *Id.* at 666.

In *Powell*, a divided court held that the Constitution prohibited criminalization of status but not criminalization of conduct that was merely related to a person's "condition," distinguishing a ban on public intoxication from the law in *Robinson* in two key ways. *Powell*, 392 U.S. at 534–36. First, the plurality explained that the defendant was convicted not for chronic alcoholism, but for his conduct: the affirmative act of "being drunk in public on a particular occasion." *Id.* at 532. The law was constitutionally sound because it did not criminalize the defendant's "mere status" as an alcoholic. *Id.* Second, the defendant had not shown that his alcoholic status was truly involuntary: In a "crucial distinction," the Court noted that while a "very strong desire to drink" might flow from some compulsion, neither the record nor medical knowledge suggested that the defendant was "utterly unable to control" his drinking, let alone drinking in public. *Id.* at 525, 535.

Based on a different understanding of the underlying facts, Justice White's concurrence and the four-justice dissent went further. Justice White agreed that Texas had constitutionally criminalized conduct and not status, but he argued that drinking was "irresistible" for a chronic alcoholic, and could not itself be punished, just like Robinson's addiction or "running a fever." *Id.* at 549 (White, J., concurring). Significantly, Justice White suggested that the law could not constitutionally apply

to homeless alcoholics, for whom it is "impossible" to resist drinking and "impossible" to avoid being in public. *Id.* at 551. The dissenters agreed with Justice White that the defendant was "powerless" to avoid drinking, but also understood the Eighth Amendment as prohibiting not only status crimes, but also laws punishing conduct that is "a characteristic and involuntary part" of that status. *Id.* at 559–60 (Fortas, J., dissenting). The Texas law violated the Constitution in their eyes because the defendant, as a result of his alcoholic status, "could not prevent himself from appearing in public." *Id.* at 568.

Under *Powell*, laws cannot criminalize involuntary conduct that is inseparable from status, and no court of appeal has concluded otherwise. In *Jones v. Los Angeles*, the Ninth Circuit explained that states could not punish "an involuntary act or condition if it is the unavoidable consequence of one's status or being," so a blanket ban on lying or sleeping in public violated the Cruel and Unusual Punishments Clause. 444 F.3d 1118, 1135 (9th Cir. 2006) *vacated*, 505 F.3d 1006 (9th Cir. 2007).[1] Lying and sleeping were "unavoidable consequences of being human" and acts that, for homeless individuals with nowhere else to go, "could only be done in public," in violation of city law. *Id.* at 1135. Similarly, the Fourth Circuit read *Robinson* and *Powell* as prohibiting laws that criminalize the "involuntary manifestations of [a person's] illness" and require no volitional act

[1] While the *Jones* opinion was vacated after the city settled with the homeless plaintiffs, its reasoning remains relevant, especially on such similar facts. Further, the Ninth Circuit below unanimously rested its holding on this interpretation of the Eighth Amendment and *Powell*, and declined to reconsider that position en banc. R. at 3.

before conviction. *Manning v. Caldwell*, 930 F.3d 264, 283 (4th Cir. 2019) (en banc).[2] The court struck down a Virginia law preventing "habitual drunkards" from possessing or consuming alcohol in public, explaining that the homeless plaintiffs could not prevent themselves from violating state law by drinking in public. *Id.* at 284–85. "What the Eighth Amendment cannot tolerate is the targeted criminalization of *otherwise legal* behavior that is an involuntary manifestation of an illness." *Id.* at 285 (emphasis original).

Even circuits that have rejected Eighth Amendment challenges understand *Robinson* and *Powell* as prohibiting "punishment of involuntary conduct amounting to an illness." *United States v. Tanner*, 1989 WL 128679, 2 (6th Cir. 1989); *see also United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (rejecting Eighth Amendment challenge where the defendant did not show his "conduct was involuntary or uncontrollable"); *Joel v. Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (holding that where public camping was "not involuntary behavior," the Constitution did not forbid criminalizing it.)

### B. Boise's Sleeping Bans Are Unconstitutional Because Respondents' Homelessness Is Involuntary.

Respondents have shown that their homeless status—living on the streets—is involuntary, "bring[ing] this case within the scope of" *Robinson*'s ban on status criminalization. *See Powell*, 392 U.S. at 521; *see also Pottinger v. Miami*, 810 F.

[2] The *Manning* court specifically adopted Justice White's reasoning in *Powell*, but even Virginia, in defense of its law, "concede[d] that Justice White's concurrence" was the "controlling" decision in *Powell*. *Manning*, 930 F.3d at 281.

Supp. 1551, 1562–65 (S.D. Fla. 1992) (holding that homelessness was an involuntary status under *Robinson* where a "lack of adequate housing alternatives" made living on the streets the only option). The involuntary nature of homelessness was significant in *Johnson v. Dallas*, where a ban on sleeping in public was unconstitutional when both an overall lack of shelter beds and specific failures to meet a shelter's eligibility requirements made being in public "involuntary and irremediable" for many homeless persons. 860 F. Supp. 344, 350 (N.D. Tex. 1994) *rev'd on standing grounds*, 61 F.3d. 442 (5th Cir. 1995). As the district court below summarized, Respondents can show their homelessness is involuntary either because there is "insufficient shelter space" or because "living in a shelter is not a viable option." R. at 158.

It is "undisputed" that there is not enough shelter space in Boise. *See Jones*, 444 F.3d at 1132. Judge Smith, dissenting from the denial of en banc review below, conceded that "the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited." R. at 28 (citing U.S. Department of Housing and Urban Development data). Further, the record details the ways in which shelter space—even if theoretically available—has nevertheless been foreclosed to Martin and Anderson, by BRM limiting the number of nights a person may stay at a shelter or requiring participation in religious programming they find "objectionable." R. at 51–54, 115–118. And while the amended Sleeping Bans explain that being turned away from shelter space due to "intoxication, drug use, unruly behavior, or violation of shelter rules" does not make

that shelter "unavailable" and thus shield an individual from enforcement, religious objection is far from analogous conduct. Boise City Code §§ 6-01-05, 9-10-02; A-1–A-2. Of course, the First Amendment forbids Boise, and any government entity, from using the threat of prosecution to coerce participation in religion-based treatment programs. *See Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007) (citing *Lee v. Weisman*, 505 U.S. 557, 587 (1992)).

Significantly, many courts that have *upheld* homeless sleeping bans explicitly did so because the record had not shown that being on the street was, in fact, involuntary. In *Joel*, the Eleventh Circuit held that a camping ban had not been shown to criminalize involuntary behavior because "unrefuted evidence" of available shelter space meant the homeless individual "had an opportunity to comply with the ordinance" by sleeping in a shelter. *Joel*, 232 F.3d at 1362. Similarly, the California Supreme Court declined to strike down a camping ordinance under the Eighth Amendment where it was "far from clear that none [of the plaintiffs] had alternatives . . . to the condition of being homeless[.]" *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1105 (1995). Involuntary status, once demonstrated, cannot be criminalized.

### C. Boise's Sleeping Bans Are Unconstitutional Because They Require No Separate Volitional Act For Conviction.

The Sleeping Bans are unconstitutional because conviction does not require additional conduct beyond the status of homelessness, satisfying the second element of an Eighth Amendment challenge. Cities violate the Constitution when camping bans criminalize homelessness itself, not just separate conduct. *See Jones*, 444 F.3d

at 1137 (explaining that states can and commonly do outlaw conduct "that is not an unavoidable consequence of being homeless, such as panhandling or obstructing public thoroughfares"). In *Jones*, the Ninth Circuit pointed to the breadth of the Los Angeles statute, which permitted conviction "against anyone who merely sits, lies, or sleeps in a public way." *Id.* at 1123. Unlike other cities' camping ordinances that required additional conduct for conviction, like camping in a way that obstructed traffic, or sleeping in a particular zone, the Los Angeles ordinance unconstitutionally criminalized being homeless itself. *See id.* at 1123–24. Also highlighting this distinction, the *Johnson* court struck down a prohibition on sleeping in public, but still upheld challenged provisions "criminalizing the removal of waste from receptacles, coercive solicitation, [and] trespassing." *Johnson*, 860 F. Supp. at 350. The court explained that sleeping in public, like breathing and eating, was an inseparable part of involuntary homelessness that could not be punished. *Id.* However, that homeless status did not "entitle[] one to evade prosecution" for rummaging through trash receptacles or trespassing. *Id.* Similarly, in *Pottinger*, the court held that homeless plaintiffs could not be punished for "otherwise innocent conduct" like eating or sleeping in public, but suggested that city officials could still prosecute plaintiffs "for public drunkenness or any type of conduct that might be harmful to themselves or to others." *Pottinger*, 810 F. Supp. at 1565.

The breadth of Boise's Sleeping Bans—as written and as enforced—violate the Eighth Amendment. Just like the sweeping ban at issue in *Jones*, the disorderly conduct ordinance criminalizes "[o]ccupying, lodging or sleeping in any building,

structure or place, whether public or private" without permission. Boise City Code § 6-01-05(A); A-1; *see Jones*, 444 F.3d at 1123. The camping ordinance cuts no less broadly, prohibiting "camping" in any "streets, sidewalks, parks or public places," in turn defining camping as "the use of public property as a temporary or permanent place of dwelling . . . at any time between sunset and sunrise." Boise City Code § 9-10-02; A-1–A-2. And while the ordinance lists many "indicia" of camping, like using a tent or making a fire, it is undisputed that conviction does not require any of these indicia, as police prosecuted one respondent under the camping ordinance for merely sleeping in a blanket. *See id;* R. at 70. Therefore, conviction for violating the Sleeping Bans requires no more than partaking in "involuntary, life-sustaining activit[y] in public places"—sleeping. *See Pottinger*, 810 F. Supp. 1551. Unlike the statutes upheld in *Johnson*, which prohibited already unlawful conduct such as trespassing, Boise's ordinances do not require affirmative acts beyond those required to "maintain[] human life." *See Johnson*, 860 F. Supp. at 350. Nor does Boise contend that any respondent was prosecuted for anything more. The Sleeping Bans permit conviction solely as a result of an individual's homeless status, "even though he has never . . . been guilty of any irregular behavior," and thus violate the Eighth Amendment. *See Robinson*, 370 U.S. at 667.

### D. The Ninth Circuit's Decision Does Not Prevent Boise From Addressing Homelessness.

Finally, this Court should affirm the Ninth Circuit in declaring Boise's Sleeping Bans unconstitutional because that holding is narrow and does not affect

the myriad other ways that Boise can address the challenges of pervasive homelessness.

Successful Eighth Amendment challenges to status bans are not far reaching: To the contrary, they often deal only with an "individual provision of a particularized local law." *See id.* at 668. The *Robinson* court was careful to explain that its prohibition on punishing addiction would not affect how the "vicious evils of the narcotics traffic . . . may be legitimately attacked," inviting California to try other tactics to combat drug addiction. *Id.* at 667–68. Following that example, courts striking down sleeping bans have made clear that localities can still prosecute other conduct. In *Pottinger*, the court stressed that "any relief granted must not unduly hamper the City's ability to preserve public order;" the decision prevented the city from arresting homeless persons for sleeping, eating, or sitting in just two areas. *Pottinger*, 810 F. Supp. at 1583–84. The "limited" holding in *Jones* "in no way dictate[d]" that Los Angeles had to provide shelter or allow anyone to sleep on the streets "at any time and at any place." *Jones*, 444 F.3d at 1138. Instead, the court prohibited Los Angeles from enforcing its sleeping ban only as long as the number of homeless persons in the city exceeded the number of available beds. *Id.* But in *Joyce*, where the plaintiffs challenged a law enforcement program targeting street crimes, including unauthorized sleeping, the court held that the requested relief would require the city to "altogether cease enforcing the challenged criminal laws," including those addressing graffiti, prostitution, and drug dealing. *Joyce v. City & Cty. of S.F.*, 846 F. Supp. 843, 852 (N.D. Cal. 1994). The *Joyce* court

speculated that even a narrower holding could nevertheless "immunize from punishment" unsafe conduct that the city had significant interest in preventing, like public defecation and aggressive panhandling. *Id.* at 851. The court upheld the enforcement program.

The ban on future enforcement ordered below is limited, narrow, and in no way prevents Boise from enforcing public safety statutes that do not criminalize involuntary homelessness itself. Like *Jones*, the Ninth Circuit explicitly limited its holding, explaining that it would not prevent Boise from citing individuals "who *do* have access" to shelter, nor did the decision even mean that a city with insufficient shelter "can *never* criminalize the act of sleeping outside." R. at 67 n. 8 (emphasis original). And unlike the plaintiffs in *Joyce*, Respondents here challenged only the Sleeping Bans, not a broader law enforcement program targeting street crime. *See Joyce*, 846 F. Supp. at 851. In fact, the panel below specifically noted it could be "constitutionally permissible" to punish further conduct, like obstructing public right of way or building structures, whereas the *Joyce* court explained the city would be unable to prohibit obstruction of sidewalks or other potentially dangerous conduct.[3] R. at 67 n. 8; *Joyce*, 846 F. Supp. at 851. Boise itself understood the Ninth Circuit's holding to be "narrow," presenting "little actual conflict" with enforcement

[3] Judge Smith's doomsday dissent predicts the Ninth Circuit's opinion will result in the legalization of conduct like public defecation and the use of hypodermic needles, which he understands to be just as involuntary as sleeping in public. R. at 25. But as the panel explained, unless and until those acts are somehow shown to be "universal and unavoidable consequences of being human," Judge Smith's fears are exaggerated. R. at 67 n.8 (internal citations omitted).

of city ordinances, especially as prosecuting homeless individuals for sleeping outside was not a primary way the city combatted homelessness, but instead a "last resort." R. at 8.

Further, there is no indication that the Ninth Circuit's holding will destroy the ability of local officials to ensure public safety or lead to constitutionally-protected tent cities, such as those Judge Smith evokes in dissent. R. at 24–26. Even cities that have fewer shelter beds than homeless persons retain significant discretion in "reducing homelessness and its impact," as courts have recognized in the wake of the decision below. R. at 8; *see Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019) (holding that *Martin v. Boise* did not prevent Oakland from requiring homeless persons to "temporarily vacate" their sleeping area). And instead of forcing cities to "throw[] up their hands" and stop enforcing camping bans, the Ninth Circuit's decision requires the significant showing that shelter is truly "unavailable." *See State v. Barrett*, 2020 WL 468015, 4 (Or. App. 2020) (homeless individual had not shown that shelter was unavailable); *Butcher v. Marysville*, 2019 WL 918203, 7 (E.D. Cal. 2019) (same). Nor does this decision permit the kind of "quasi-permanent encampments" that amici The People Concern and Weingart Center Association exhaustively detail. R. at 178. While their expertise and concern is undoubtable, nothing in the Ninth Circuit's ruling "enshrine[s] legal rights to live in encampments." R. at 186. Nothing in the record suggests any of Respondents were living in encampments of any kind. And the Ninth Circuit explicitly proposed that cities can constitutionality prohibit just the

type of quasi-permanent encampment that amici rightly seek to prevent: "Even where shelter is unavailable, an ordinance . . . barring the obstruction of public rights of way or the erection of certain structures," can be constitutional. R. at 67 n. 8. Again, courts have recently and repeatedly held that cities can still constitutionally clear homeless camps. *See Quintero v. Santa Cruz*, 2019 WL 1924990, 3 (N.D. Cal. 2019); *Le Van Hung v. Schaaf*, 2019 WL 1779584, 4–5 (N.D. Cal. 2019); *Miralle v. Oakland*, 2018 WL 6199929, 2 (N.D. Cal. 2018).

Boise's Sleeping Bans, as enforced against Respondents, effectively and unconstitutionally criminalize their involuntary status by punishing them for sleeping in public when they have nowhere else to go. The record shows, first, that Martin and Anderson's lack of shelter is involuntary and second, that they were convicted not for an affirmative act, but for life-sustaining activity inseparable from involuntary homelessness. These two elements demonstrate a successful Eighth Amendment challenge under *Robinson* and *Powell*, which together forbid punishing involuntary acts inseparable from status. Finally, the ordered relief is appropriately restrained: Boise is not required to provide more overnight shelter, nor is Boise prevented from otherwise keeping its streets clean and safe by limiting the method and location of sleeping, or even banning permanent encampments altogether. What Boise cannot now do, without imposing cruel and unusual punishment, is criminalize homeless persons for sleeping in public, "on the false premise they had any choice in the matter." R. at 67.

## III. *Heck* Permits Respondents' Claims for Prospective Relief.

*Heck v. Humphrey*, which Boise contends should prevent this Court from even considering the Eighth Amendment claim, does not apply for three reasons. First, this Court explicitly permits prospective relief, like Respondents' requested injunction against future enforcement of the Sleeping Bans. Second, the prospective relief here would not "necessarily" imply the invalidity of past convictions, because Respondents challenge only the procedures and not the substance of conviction, and those convictions were obtained under different law entirely. Third and finally, *Heck* is about "the core of habeas corpus," whereas this action—where confinement is not even at issue—is not, and so *Heck* has no relevance to this case, as the Ninth Circuit concluded. R. at 63.

*Heck v. Humphrey* concerned a sitting prisoner's end-run around federal habeas corpus relief in pursuit of damages. Heck, convicted of manslaughter and awaiting appeal, sought damages from local law enforcement under § 1983, alleging that his conviction and imprisonment were unconstitutional. 512 U.S. 447, 478–79 (1994). This Court relied on earlier decisions where it had held that a prisoner could not use § 1983 to challenge the "fact or duration of his confinement," reserving habeas corpus as the proper and exclusive remedy. *Id*. at 481 (referencing *Preiser v. Rodriguez*, 411 U.S. 475 (1973). But because Heck wanted damages instead of speedier release from prison, this Court analogized the suit to a tort claim of malicious prosecution, which requires the plaintiff to show favorable termination of the criminal proceeding at issue, in order to avoid parallel litigation. *Heck*, 512 U.S.

at 484. Incorporating the favorable termination requirement to § 1983 suits, this Court explained that because Heck's success in court would "necessarily imply" the invalidity of his conviction, he first needed to prove that his conviction had been reversed, expunged, or invalidated. *Id.* at 486–87. Where Heck or another similar plaintiff failed to show favorable termination of the underlying conviction, the § 1983 suit should be dismissed.

The *Heck* doctrine's procedural bar of § 1983 suits is limited in its application. *Edwards v. Balisok* held that *Heck* prevented a prisoner from seeking declaratory § 1983 relief under certain circumstances: The incarcerated plaintiff could not request a declaration that he was unconstitutionally deprived of good-time credit toward his release when that declaration would imply that his disciplinary hearing was invalid. 520 U.S. 641, 648 (1997). And in *Wilkinson v. Dotson*, this Court explained that *Heck* barred all prisoners' § 1983 actions, regardless of the relief sought (damages, declaratory, or injunctive), only "*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." 544 U.S. 74, 82 (2005) (emphasis original). But where a § 1983 action "will *not* demonstrate the invalidity of any outstanding criminal judgment" against the plaintiff, *Heck* permits the suit. *Heck*, 512 U.S. at 487 (emphasis original). Neither this Court nor any court of appeals has found *Heck* to bar prospective relief that does not necessarily invalidate past punishment, and there is no reason to significantly extend *Heck* here.

### A. This Court Explicitly Permits Respondents' Prospective Challenge

This Court has repeatedly permitted prospective injunctive § 1983 claims under *Heck*. In *Edwards*, though *Heck* barred the plaintiff's challenge to the constitutionality of his disciplinary proceeding, he could still seek an injunction asking prison officials to follow different procedures going forward because that would not question the fact of his confinement. *Edwards*, 520 U.S. at 648–49. *Wolff v. McDonnell*, which predated *Heck*, similarly held that while a prisoner could not use § 1983 to challenge his confinement, the procedural bar would not prevent an "injunction enjoining the prospective enforcement of invalid prison regulations." 418 U.S. 539, 554–55 (1974). And when more squarely considering claims for prospective relief in *Wilkinson*, this Court held that two prisoners could challenge the constitutionality of state parole procedures under § 1983 and seek future compliance with the Constitution. 544 U.S. at 76. Further, this Court has specifically rejected a forward-looking *Heck* bar: Requiring a § 1983 action that "would impugn *an anticipated future conviction*" to first demonstrate favorable termination would obviously be "impractical[]." *Wallace v. Kato*, 549 U.S. 384, 393 (2007) (emphasis original). This line of cases prevents challenges of past punishments that would "necessarily imply the invalidity of confinement or shorten its duration," but claims for prospective relief from future punishment are "distant" from that procedural bar. *Id.* at 82.

The district court's ruling that *Heck* barred the prospective claim misunderstands this Court's precedents. In concluding that a successful injunction

against future unconstitutional enforcement of the ordinances "would demonstrate the invalidity" of Respondents' past convictions, the district court ignored *Edward*'s caution that prospective relief "ordinarily" does not impugn "previous" punishment. R. at 48–49; *see Edwards*, 520 U.S. at 648. The district court did not explain how Respondents' challenge warranted an exception to the ordinary rule. As in *Wilkinson*, where a request for future constitutional compliance was "distant" from a *Heck*-barred challenge to existing confinement, Respondents' claims on appeal are solely forward looking. *See Wilkinson*, 544 U.S. at 82. Requiring a court to speculate about the possibility of Respondents' future prosecution and conviction when considering their requested relief would be a "bizarre extension" of the *Heck* doctrine. *See Wallace*, 549 U.S. at 393.

This Court's holdings specifically permit and invite Respondents' claims for prospective relief. Absent a showing that prospective relief would necessarily imply the invalidity of previous convictions, there is no categorical bar.

### B. *Heck* Does Not Apply Because Respondents' Claims Would Not "Necessarily" Imply the Invalidity of Their Past Convictions.

This Court has been "careful" to "stress the importance of the term 'necessarily'" in the *Heck* context, setting a high bar that Boise cannot meet. *Nelson v. Campbell*, 541 U.S. 637, 647 (2004); *see also Wilkinson*, 544 U.S. at 82 (reiterating that *Heck* prevents a § 1983 suit "*if* success in that action would necessarily demonstrate the invalidity" of past punishment) (emphasis original). But where a successful claim "will *not* demonstrate" an invalid punishment, the action can proceed. *Heck*, 512 U.S. at 487 (emphasis original). Respondents'

prospective claims will not necessarily imply invalidity for two reasons: First, Respondents challenge merely the procedures—not the substance—of a punishment; and second, even if prospective relief cast any doubt on a past conviction, Boise has amended the underlying law, making Respondents' conviction too removed from the requested relief.

*1. Respondents' Procedural Challenge Cannot Invalidate the Substance of Past Punishment.*

This Court has repeatedly permitted § 1983 challenges to "using the wrong procedures, not for reaching the wrong result." *Heck*, 512 U.S. at 482–83 (referencing *Wolff*, 418 U.S. at 553–54); *see Edwards*, 520 U.S. at 648 (explaining challenging prison procedures "[o]rdinarily . . . will not 'necessarily imply' the invalidity of a previous" punishment). In *Wilkinson*, this Court highlighted the difference between a *Heck*-bared "substantive" challenge to the fact or duration of confinement and permissible procedural challenge. *Wilkinson*, 544 U.S. at 83–84. The prisoners' § 1983 attack on parole guidelines would "render invalid the state procedures used to deny parole," but would not invalidate their underlying convictions. *Id.* at 82. Success would not "necessarily spell speedier release"—and thus violate *Heck* by invalidating the duration of confinement—but instead would "at most speed *consideration*" of parole. *Id*. (emphasis original).

Here, Respondents expressly seek "protection against *future* enforcement, . . . not to invalidate any prior conviction"—a permissible challenge to procedure, not to the substance of punishment. R. at 55 (emphasis original). As in *Wilkinson*, where prisoners challenged future state conduct (the procedures by which parole officials

enforced guidelines), Respondents challenge Boise's future conduct in enforcing the Sleeping Bans. *See Wilkinson*, 544 U.S. at 76–77. By not attacking their actual convictions under the ordinances, Respondents confine their challenge to the allegedly unconstitutional process Boise follows in keeping its streets safe by enforcing the Sleeping Bans despite a lack of alternative shelter. The result below highlights this distinction between substance and procedure: The Ninth Circuit holding does not toss out any convictions or mandate substantive policy changes by requiring Boise to build housing, but only alters the procedures municipalities must go through to prohibit sleeping in public, permitting prosecution only when shelter space is "practically available." R. at 70. Significantly, lower courts applying the Ninth Circuit's holding do not view the decision as having substantive effects on ordinances regulating sleeping or on convictions under those laws. Instead, the decision requires a plaintiff to demonstrate the unconstitutional defects of the procedures those cities use. *See*, e.g., *Barrett*, 2020 WL 468015 at 4. Because a successful challenge "*would not necessarily* spell immediate or speedier release" for Respondents or similarly situated plaintiffs, the claim is permitted. *See Wilkinson*, 554 U.S. at 81.

*2. Boise Amended the Sleeping Bans, So Any Conviction Affected Is Distinct From Prospective Relief.*

Even if Boise's future conduct in enforcing the Sleeping Bans could cast any doubt on the constitutionality of past enforcement, the comparison is flawed because the underlying laws have since changed. In 2014, after all respondents were convicted, Boise amended the statutes to prevent prosecution when there is

"no available overnight shelter." R. at 114. This amendment "materially changed" Boise policy, because under prior law homeless individuals could be prosecuted for sleeping in public, regardless of a lack of shelter space—just as Respondents were. R. at 114. The record is silent as to whether Respondents would still have been prosecuted if the amended Sleeping Bans were then in effect. So injunctive relief affecting future enforcement of Boise's current ordinances could not imply—let alone "necessarily imply"—the invalidity of Respondents' convictions, because it is unclear if there would have been a conviction in the first place. Moreover, the revised statutes prevent the very same allegedly unconstitutional conduct that Respondents seek to prohibit: Police officers can no longer cite homeless persons for sleeping in public "when no shelter space is available." R. at 118. To the extent prospective relief could impugn past convictions under the old ordinances, Boise itself has already done so by amendment. Whether or not future enforcement of a "materially" different law can undermine a past conviction, it does not do so here. The gulf between enforcement in 2020 and convictions under a different law in 2007, 2009, and 2012 is too great for *Heck* to apply.

### C. Respondents' Prospective Claims Are Far Removed from the Core of Habeas Corpus, So *Heck* Cannot Apply.

This Court has repeatedly explained that *Heck* ensures convictions are properly challenged through habeas corpus, but actions that are not "within the core of habeas corpus" are still permitted. *See Wilkinson*, 544 U.S. at 82 (quoting *Preiser*, 411 U.S. at 488); *see also Skinner v. Switzer*, 562 U.S. 521, 536 (2011) (holding that claims for evidence that is material to a defendant's guilt are "within

the traditional core" of habeas, and thus *Heck*-bared, while § 1983 requests that "may yield exculpatory, incriminating, or inconclusive" evidence are permitted). Respondents' claims for prospective relief are far removed from the core of habeas corpus, and by extension the *Heck* doctrine, because Respondents were never incarcerated and they do not attack confinement, the central concern of *Heck* and its progeny.

This Court has never categorically applied *Heck* to prevent § 1983 actions where it is "impossible as a matter of law" for the plaintiff to first bring his claim in habeas corpus, such as when the petitioner is no longer in custody. *Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring). While the *Kemna* majority found the petitioner's claim mooted by his release, five justices reasoned that *Heck*'s favorable-termination rule cannot apply to former prisoners who have been released. *See id; Spencer*, 523 U.S. at 25 n.8 (Stevens, J., dissenting). This Court has recognized the question is unsettled, but a majority of circuit courts have held that *Heck* does not automatically bar § 1983 petitioners who are no longer in custody. *See Muhammad v. Close*, 540 U.S. 749, 752 n.2 (2004); *Cohen v. Longshore*, 621 F.3d 1311, 1316–17 (10th Cir. 2010) (following the Second, Fourth, Sixth, Seventh, Ninth, and Eleventh Circuits in permitting a § 1983 claim where the petitioner could never have first obtained habeas relief). Significantly, while the Seventh and Ninth Circuits have found *Heck*'s favorable-termination requirement to apply even after release from custody, both of those cases considered retrospective § 1983 claims squarely challenging the circumstances and substance of the petitioners'

underlying convictions, not claims for prospective relief. *See Savory v. Cannon*, 2020 WL 240447, 6 (7th Cir. 2020); *Lyall v. Los Angeles*, 807 F.3d 1178, 1181 (9th Cir. 2015).

Respondents claims lie far from the traditional core of habeas corpus for two reasons. First, Respondents' were never incarcerated after conviction, only sentenced to time served or fined, making it "impossible as a matter of law" to challenge their convictions through habeas because being "in custody" is a requirement of filing a habeas corpus petition. R. at 45–46; 28 U.S.C. § 2254(a); *see Spencer*, 523 U.S. at 21. Applying *Heck* to bar Respondents' suit for this reason would lead to an unjust and anomalous result: insulating Boise from § 1983 challenges as long as the city first deprives a defendant of an opportunity to bring a claim in habeas corpus. Second, Respondents' claims are not within the core of habeas corpus because they do not directly attack their underlying convictions or confinement, unlike the petitioners in *Savory* and *Lyall*, whose claims were *Heck*-barred even though they were no longer in custody. *See Savory*, 2020 WL 240447 at 6; *Lyall*, 807 F.3d at 1181. And while *Heck* ensures that challenges to "outstanding criminal judgments" are brought using habeas corpus, Respondents explicitly avoid seeking to "invalidate" any outstanding criminal judgment. *Heck*, 512 U.S. at 486; R. at 55. Extending *Heck* to bar Respondents' claims would impose incongruous requirements on prospective § 1983 actions and "needlessly place at risk the rights of those [seeking relief] outside" the core of habeas corpus. *Heck*, 512 U.S. at 500 (Souter, J., concurring).

## CONCLUSION

Boise's enforcement of the Sleeping Bans presented those without shelter a Hobson's choice: leave town, or face prosecution. The Eighth Amendment forbids just that kind of proposition. Boise cannot constitutionally prosecute homeless individuals for their homeless status alone; Respondents have shown that sleeping in public is involuntary and that they were repeatedly cited and convicted for doing no more than sleeping. The Ninth Circuit's narrow decision protects the decency and humanity of homeless individuals by shielding them from punishment when no other shelter is available. It does not force cities to provide housing for all or constitutionalize sprawling encampments. Finally, neither a tortured reading nor a broad expansion of this Court's *Heck* doctrine should prevent consideration of the merits.

Respondents request that this Court affirm the judgment of the U.S. Court of Appeals for the Ninth Circuit and hold that Boise cannot prosecute homeless individuals for sleeping in public when they have no other choice.

Date: February 14, 2020

Respectfully submitted,

/s/ Paul Balmer
PAUL BALMER
Counsel for Respondents

# APPENDIX 1

## Boise City Code Sections

§ 6-01-05: DISORDERLY CONDUCT

A. Violations: Any person who violates the provisions below is guilty of a misdemeanor:
   1. Occupying, lodging or sleeping in any building, structure or place, whether public or private, or in any motor vehicle, without the permission of the owner or person entitled to possession or in control thereof; or
   2. Loitering, prowling or wandering upon the private property of another, without lawful business, permission or invitation by the owner or the lawful occupants thereof; or
   3. Loitering or remaining in or about school grounds or buildings, without having any reason or relationship involving custody of or responsibility for a pupil or student, school authorized functions, activities or use. (1952 Code § 6-01-05)

B. Availability Of Overnight Shelter:
   1. Law enforcement officers shall not enforce subsection A of this section (disorderly conduct) when the individual is on public property and there is no available overnight shelter. The term "available overnight shelter" is a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness, at no charge. If the individual cannot utilize the overnight shelter space due to voluntary actions, such as intoxication, drug use, unruly behavior or violation of shelter rules, the overnight shelter space shall still be considered available.
   2. This section does not affect subsection 7-7A-5E or 7-7A-10A of this Code, which do not prohibit sleeping in a public park during hours of operation. (Ord. 38-14, 9-23-2014)

§ 9-10-02: CAMPING IN PUBLIC PLACES:

A. Prohibitions: It shall be unlawful for any person to use any of the streets, sidewalks, parks or public places as a camping place at any time, or to cause or permit any vehicle to remain in any of said places to the detriment of public travel or convenience; or to cause or permit any livestock of any description to be herded into any of said places during any hours of the day or night; provided, that this section shall not prohibit the operation of a sidewalk cafe pursuant to a permit issued by the City Clerk. The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging or residence, or as a living

accommodation at any time between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

B. Enforcement: Law enforcement officers shall not enforce this camping section when the individual is on public property and there is no available overnight shelter. The term "available overnight shelter" is a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness, at no charge. If the individual cannot utilize the overnight shelter space due to voluntary actions, such as intoxication, drug use, unruly behavior or violation of shelter rules, the overnight shelter space shall still be considered available.

C. Exception: This section does not affect subsection 7-7A-5E or 7-7A-10A of this title, which do not prohibit sleeping in a public park during hours of operation. (Ord. 38-14, 9-23-2014)

**HONOR CODE STATEMENT**

I certify I have complied with all ethical rules for this course in the preparation of this document.

Date: February 14, 2020 Signed: __/s/_Paul Balmer___

PAUL BALMER