Nos. 20-35752, 20-35881

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GLORIA JOHNSON; JOHN LOGAN, individuals on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Oregon
Civil Action No. 1:18-cv-01823-CL
Hon. Mark D. Clarke

PLAINTIFFS-APPELLEES' OPPOSITION TO DEFENDANT-APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION

In 2013, the City of Grants Pass decided that the solution to its "vagrancy problem" was to drive its homeless residents into neighboring jurisdictions by making it impossible for them to live in Grants Pass without risking civil and criminal punishment. Op. 11; *see* E.R. 11 ("[T]he point is to make it uncomfortable enough for them in our city so they will want to move on down the road."). City leaders adopted a plan to aggressively enforce a set of ordinances that made it illegal to rest anywhere in public at any time of the day or night with so much as "a bundled up item of clothing as a pillow." E.R. 19; *see* E.R. 15-17; Op. 11. In 2018, a group of involuntarily homeless Grants Pass residents filed a class action challenging the City's enforcement scheme as unconstitutional as applied to them given the physical impossibility of complying with the ordinances without shelter access.

Applying *Martin v. Boise*, 920 F.3d 584 (9th Cir. 2019), the district court held that because the practical effect of the ordinances was to punish the City's involuntarily homeless population for "engaging in [the] unavoidable human acts" of "sleeping or resting outside," the ordinances ran afoul of the Eighth Amendment. E.R. 17. The district court thus entered a narrow injunction that allows the City's involuntarily homeless residents to sleep outside in certain locations during nighttime hours. E.R. 5. The panel largely affirmed the district court's judgment, but vacated and remanded with respect to one ordinance because the only named plaintiff with standing to challenge that ordinance passed away while the matter was on appeal. Op.

49. The panel also instructed the district court to narrow the injunction even further to make clear that class members are not entitled to rest in public places with anything beyond bedding necessary for survival. Op. 47, 49.

The petition does not identify any basis for en banc review. The City urges otherwise only by mischaracterizing both *Martin* and the panel decision. Throughout its petition, the City asserts that the decisions prohibit municipalities from imposing "*any* punishment for camping in public … unless [a] person has access to adequate shelter," Pet. 7, even though both decisions expressly state the opposite. *See* Op. 17 ("The [district] court's order made clear that … the City could still limit camping or sleeping at certain times and in certain places" and that "the City may still ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns." (internal quotation marks omitted)); *id.* at 47 ("The district court's holding that the City may still 'ban the use of tents in public parks' remains undisturbed by our opinion."); *Martin*, 920 F.3d at 617 n.8 (even in circumstances "where shelter is unavailable," cities may prohibit sleeping outside "at particular times or in particular locations").

To the limited extent the petition challenges what *Martin* and the panel actually held, those arguments fail. The City's claim that the Cruel and Unusual Punishments Clause prohibits only the punishment of status, and not physically unavoidable conduct, is inconsistent with *Robinson v. California*, 370 U.S. 660 (1962), and was

expressly rejected by a majority of the Supreme Court in *Powell v. Texas*, 392 U.S. 514 (1968). And it is well-established that parties need not wait for "an actual arrest, prosecution, or other enforcement action" before "challenging [a] law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Moreover, the "City present[ed] no meaningful argument on appeal" regarding the district court's holding that the ordinances also violate the Excessive Fines Clause. Op. 48. Accordingly, even if the en banc Court were to reject the panel's application of the Cruel and Unusual Punishments Clause, the injunction would remain intact on grounds the City has not adequately contested.

Finally, the petition devotes an entire section to an irrelevant parade of horribles involving homeless *encampments*, which municipalities are free to regulate under the challenged decisions. The City does not and cannot offer any explanation for how vacating the injunction would solve the policy problems it purports to identify. Punishing people for living outside when they have no access to shelter will not stop them from engaging in that involuntary act, and even if the City's banishment-through-punishment strategy accomplishes what the City intended—driving its homeless residents into neighboring jurisdictions by making it impossible for them to live within City limits without facing punishment—what happens when those jurisdictions follow suit? If there is a parade of horribles implicated by this case, it is one where the City is permitted to instigate a banishment contest as each

jurisdiction attempts to drive its homeless population away by making its penalties for existing without shelter more "uncomfortable" than those of its neighbors.

In any event, the Oregon Legislature has now enacted a law that will impose largely the same requirements as the district court's injunction beginning in July 2023. This law is reason alone to deny the petition: it would be a waste of the Court's time to further review a city enforcement scheme that the state legislature has already rejected.

The Court should deny the petition.

ARGUMENT

I. En banc review would be a waste of the Court's resources in the current procedural posture.

As noted *supra* p. 1, the panel vacated the district court's judgment regarding one of the ordinances because Debra Blake—the only class representative with standing to challenge that ordinance—died while this matter was on appeal. Op. 23–27, 49. The panel remanded for the substitution of a new class representative because it was unsure whether Blake's death deprived it of jurisdiction over that claim. *Id.* at 26–27.

At minimum, it would make no sense for the Court to sit en banc before the district court has had an opportunity to cure the potential jurisdictional defect. En banc review now would require the Court either to unnecessarily delve into a complicated but easily fixable jurisdictional issue, or to limit its review to a subset of

plaintiffs' claims, thereby risking the possibility of a second round of en banc proceedings. Neither option would be a good use of the Court's resources. *See Detrich v. Ryan*, 740 F.3d 1237, 1262 (9th Cir. 2013) (en banc) (Watford, J., concurring in the judgment) (conservation of judicial resources "is a particularly important consideration when, as here, we are convened as an en banc court").

II. *Martin* and the panel decision are correct.

A. The challenged decisions do not conflict with Supreme Court precedent or caselaw from other jurisdictions.

According to the City, *Martin* "erased" a distinction drawn in *Robinson v. California*, 370 U.S. 660 (1962), and "reaffirmed" in *Powell v. Texas*, 392 U.S. 514 (1968), between "conduct" (which, the City says, can always be criminalized without offending the Eighth Amendment) and "status" (which cannot). Pet. 7-8. *Robinson* and *Powell* held no such thing. Although *Robinson* struck down a law that criminalized an individual's "status" of drug addiction as violative of the Eighth Amendment, nothing in the decision limits the scope of the Eighth Amendment to the criminalization of status. To the contrary, *Robinson* observes that it would violate the Cruel and Unusual Punishments Clause to criminalize "having a common cold," 370 U.S. at 667, which logically includes symptomatic conduct like coughing or sneezing.

Moreover, five justices *rejected* such a limitation six years later in *Powell*. In *Powell*, the Court fractured over whether *Robinson* extended to the criminalization of public intoxication where the defendant was an alcoholic. Four justices voted to

uphold the defendant's conviction because it targeted conduct rather than status, and four justices voted to reverse the conviction based on evidence that the defendant suffered from alcoholism and was thus incapable of avoiding intoxication. The final justice, Justice White, concluded that the Eighth Amendment imposes some limits on the state's ability to punish individuals for conduct that is "impossible" to avoid, explaining that it would make little sense to read *Robinson* to "forbid[] criminal conviction for being sick with flu or epilepsy but permit[] punishment for running a fever or having a convulsion." 392 U.S. at 548. He nonetheless voted to uphold the conviction because he did not believe the trial evidence established that the defendant's conduct was impossible to avoid. *Id.* at 552. Accordingly, although there were five votes to uphold the conviction, a majority of the Court rejected the position the City advances here—that the Eighth Amendment is categorically inapplicable to laws that criminalize "conduct."[1]

Notably, the United States filed a Statement of Interest in *Martin* endorsing the position this Court ultimately adopted, observing: "It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment." Statement of Interest of the United States at 11, *Bell v. City of Boise*, Doc. 276, No. 1:03-cv-00540-REB (D. Idaho Aug. 6, 2015)

[1] *Kahler v. Kansas*, 140 S. Ct. 1021 (2020), likewise provides no support for the City's conduct/status distinction. It merely cites the *Powell* plurality for the uncontroversial proposition that States play a paramount role in setting "standards of criminal responsibility." *Id.* at 1028.

(internal quotation marks, citation, and alteration omitted). Because "[s]leeping is a life-sustaining activity," the government explained, "[i]f a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless." *Id.* at 12. The government further noted that the "knotty concerns raised by the *Powell* plurality," regarding whether addiction-related conduct is truly involuntary, are "not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely." *Id.* at 12-13.

Neither *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), nor *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), suggests otherwise. In *Joel* there was "unrefuted evidence" of available shelter space, which meant that the case was "distinguishable" from those where an ordinance "criminalizes involuntary behavior." 232 F.3d at 1362. And in *Tobe*, the California Supreme Court held that the challenge to an ordinance barring camping and storage on public property failed only because the plaintiffs could not meet the high bar for a *facial* challenge. 892 P.2d at 1157.

B. The Eighth Amendment is not limited to post-conviction punishment.

The Supreme Court has explained that plaintiffs need not wait for "an actual arrest, prosecution, or other enforcement action" before "challenging [a] law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). "Instead '[i]t is sufficient for

standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff.'" *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1171 (9th Cir. 2018) (quoting *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1154–55 (9th Cir. 2000)).

The City nonetheless argues that it is categorically improper to consider a forward-looking Eighth Amendment claim "based on hypotheticals." Pet. 14. But there is no reason that the Eighth Amendment challenge at issue here—which, like the challenge in *Robinson*, focuses on "the substantive limits of what can be made criminal and punished as such," *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)—should be governed by different standing rules than other constitutional pre-enforcement challenges.

Nor is the ability to mount an Eighth Amendment challenge to the City's criminal enforcement scheme frustrated by the scheme's inclusion of civil penalties. Where, as here, a government "issue[s] civil citations that, later, become criminal offenses," Op. 37, the eventual criminal penalty brings the enforcement scheme within the ambit of the Cruel and Unusual Punishments Clause. *See, e.g.*, *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc). In any event, the district court also held that enforcement of the civil ordinances violates the Eighth Amendment's Excessive Fines Clause, E.R. 26-29, and there is no question that the Excessive Fines Clause applies to civil penalties, *see Timbs v. Indiana*, 139 S. Ct. 682,

690 (2019). Because the City "present[ed] no meaningful argument on appeal regarding the excessive fines issue," Op. 48, an en banc decision regarding the Cruel and Unusual Punishments Clause—the sole clause at issue in the rehearing petition—would do little to resolve this case or the scope of the injunction.

C. The panel did not reduce *Martin* to a mathematical formula.

Martin held that, "so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public." 920 F.3d at 617 (internal quotation marks, citation, and alterations omitted). Both *Martin* and the panel decision make clear, however, that individuals are not involuntarily homeless if they "have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free." *Id.* at 617 n.8; Op. 8 n.2.

The City argues that the panel decision "strip[s] *Martin* down to a single measure: whether the number of homeless people exceeds the number of sufficiently secular shelter beds." Pet. 16 (internal quotation marks and citation omitted). The panel, however, repeatedly distinguished between voluntarily and involuntarily homeless individuals. *See* Op. 32–33 ("Individuals who have shelter or the means to acquire their own shelter simply are never class members."); *see also id.* at 33 n.24.

Nor did the panel hold that individualized evidence of involuntariness is irrelevant when determining whether the City can enforce the challenged ordinances

against a particular homeless individual. The City selectively quotes from the panel opinion to suggest that the panel absolved the named plaintiffs of any obligation to prove that they were unable to afford or find alternative shelter. *See* Pet. 15–16 (quoting Op. 45). But the quoted passage merely rejected Judge Collins's argument in dissent that plaintiff Gloria Johnson, in order to show that she was involuntarily homeless, should be required to "leave the City to camp illegally on federal or state lands, provide the court an accounting of her finances and employment history, and indicate with specificity where she lived before she lost her job and her home." Op. 44–45. As the panel explained, it was undisputed that Johnson was involuntarily homeless; indeed, "at least 13 class members submitted declarations to the district court indicating that they are involuntarily homeless," *id.* at 28 n.19, and "the City has not contested those declarations," *id.* at 45.

D. This case involves the routine application of class certification principles.

The City argues that the class lacks commonality "because there's no classwide answer to the question whether each person's conduct was (or would be) involuntary under *Martin*." Pet. 16–17. The City misunderstands Rule 23(a)(2). To satisfy commonality, there does not need to be a classwide answer to the question whether individual class members are in fact class members; instead, there needs to be at least one question common to the class, *as that class is defined*. *See Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) ("So long as there is 'even a single common

question,' a would-be class can satisfy the commonality requirement of Rule 23(a)(2)." (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 359 (2011))). Here, the class members are involuntarily homeless individuals whose claims depend on the common contention that enforcement of the challenged ordinances violates the Eighth Amendment.

The City reiterates the argument, made by Judge Collins in dissent, that a class of involuntarily homeless individuals is an impermissible "fail-safe class." Pet. 17. As an initial matter, whether a class is fail-safe is a question of ascertainability. *See Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1124 n.3 (9th Cir. 2017). This Circuit has not expressly imposed an ascertainability requirement on *any* type of class, *see id.* at 1125 n.4, and even the circuits that have adopted an ascertainability requirement for some types of classes have generally held that the requirement does not apply, or applies with less force, to Rule 23(b)(2) classes. *See* 1 Newberg and Rubenstein on Class Actions § 3:7 (6th ed.). In any event, a fail-safe class is one where "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc) (internal quotation marks and citation omitted). Here, the class is defined in terms that are independent of the merits: even if plaintiffs had lost on their Eighth Amendment claims based on one of the City's doctrinal arguments described above, it would have remained the case that they are

involuntarily homeless, and they would have been bound by the judgment against them.[2]

E. There is nothing unusual about the scope of relief awarded here.

The City characterizes the judgment in this case as a "sweeping classwide injunction[]" that will require local governments to "abandon enforcement of a host of laws regulating public health and safety." Pet. 18 (internal quotation marks and citation omitted). The injunction, however, simply prevents the City from enforcing specific aspects of ordinances that would leave involuntarily homeless individuals without a single legal place to exist within city limits. The City is otherwise free to enforce the ordinances, including limiting the locations where involuntarily homeless people rest, moving people along in the morning, prohibiting the use of tents, and sweeping any encampments that pop up. *See* Op. 17.

The City also can fully enforce its ordinances against individuals who are not involuntarily homeless. The City seems to view individualized enforcement as an impossible task. Pet. 16. But in determining whether someone is involuntarily homeless, law enforcement officers are free to ask questions or use any of the other standard tools in their investigative arsenal. They just cannot assume, in the absence

[2] The City's example of "a Fourth Amendment class of 'unreasonably' searched people," Pet. 17, is inapt because unreasonably searched people have by definition had their Fourth Amendment rights violated. A more appropriate analogy would be a Fourth Amendment class of people searched without a warrant; such a class would not be fail-safe because warrantless searches do not necessarily violate the Fourth Amendment.

of evidence to the contrary, that a particular homeless individual is able to afford or find alternative shelter. *See Martin*, 920 F.3d at 617 ("the government cannot criminalize indigent, homeless people for sleeping outdoors" if "*they had [no] choice in the matter*") (emphasis added).

III. The City's policy arguments are non sequiturs.

The petition ends with a long list of horrors the City attributes to homeless encampments. Pet. 18-22. But nothing in the panel decision or *Martin* even arguably prevents cities from strictly regulating encampments and the harms the City associates with them. The only conceivable connection is that one of the enjoined ordinances purports to prohibit "camping." E.R. 15. As the district court explained, however, that ordinance is so expansive that a homeless person risks punishment "as a 'camper' if he so much as uses a bundled up item of clothing as a pillow." E.R. 19.

"The [district] court's order made clear that … the City could still limit camping or sleeping at certain times and in certain places" and that "the City may still ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns." Op. 17. Indeed, the City has actively removed encampments over the almost two and a half years that the injunction has been in effect. *See, e.g.*, City Manager's Weekly Report, Dec. 30, 2022, p. 5, https://perma.cc/3EMZ-PW23 (identifying 13 "camps posted" by police the

last week of December 2022); Or. Rev. Stat. § 195.505(3) (2021) (requiring law enforcement officials to "post a written notice" "at least 72 hours before removing homeless individuals from an established camping site"). And the panel decision instructed the district court to narrow the injunction even further to make clear that class members are not entitled to rest in public places with anything beyond the minimal bedding necessary to survive. Op. 47, 49.

Likewise, not only has *Martin* not "contribut[ed] to the growth of encampments across the West," Pet. 18, but "[o]ne post-*Martin* trend is for urban cities to increase the frequency and severity of sweeps." Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 Calif. L. Rev. 559, 590–91 (2021). In jurisdictions where encampments exist without interference, that is a policy choice, not a constitutional imperative under *Martin*. Indeed, the increase in encampments pre-dates *Martin* by years. *See* Chris Herring, *The New Logics of Homeless Seclusion: Homeless Encampments in America's West Coast Cities*, 13 City & Community 285, 285-86 (2014). More recently, the COVID pandemic led many jurisdictions to tolerate encampments as a practical alternative to dangerous congregate indoor shelters, consistent with guidance that clearing encampments would spread COVID and harm public health.[3]

[3] *See* Ctrs. for Disease Control & Prevention, *Interim Guidance on People Experiencing Unsheltered Homelessness*, https://perma.cc/2B8C-QW74 (Feb. 10, 2022); Cal. Dep't of Transp., Memorandum: Unsheltered Encampments – COVID-19 Project Effects (2020), https://dot.ca.gov/-/media/dot-media/programs/construction/documents/policies-procedures-publications/cpd/cpd20-17.pdf.

Martin leaves the full range of encampment responses available to cities, including the City's prohibition on encampments and other cities' encouragement of them.

The City also asserts that "the practical logic of *Martin*'s reasoning … hasn't stopped at camping but has inevitably swept in other activities, including urination, defecation, and even drug use." Pet. 22. The City's only support for this assertion, however, is the *Martin* dissent's *prediction* that "the panel's decision will inevitably result" in these extensions. 920 F.3d at 596 (M. Smith, J., dissenting from denial of rehearing). The City does not provide a single citation suggesting this has actually happened.

Finally, the City asserts that the injunction has in fact been a "great[] burden" on its homeless residents because they would be better off not being homeless, and that the more "compassionate response" would be to allow the City to execute its plan to punish involuntarily homeless people for surviving outside. Pet. 22. The City's claim that it seeks to penalize the plaintiffs for their own good is as nonsensical as it is audacious. Punishing an involuntary act does not stop a person from engaging in that act: telling a person they cannot sleep, breathe, or engage in other life-sustaining activities will not stop them from doing those things.[4] Rather, punishing people for involuntarily sleeping outside simply imposes "fines they cannot afford and

[4] Empirical evidence confirms what logic dictates: "criminalization does not reduce the number of people experiencing homelessness." USICH, https://www.usich.gov/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address-homelessness (emphasis omitted).

[] jail time that puts jobs in jeopardy and sends people back out to the streets, where their new criminal records will only make it harder to find housing and jobs." Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, United States Interagency Council on Homelessness (Oct. 26, 2022), https://www.usich.gov/news/collaborate-dont-criminalize-how-communities-can-effectively-and-humanely-address-homelessness.

While the City is able to name several meaningful strategies for addressing involuntary homelessness—"investments in shelter capacity, housing, mental-health services, and addiction treatment," Pet. 22—it has thus far refused to pursue them. *See, e.g.*, Shawn Hall, *After a marathon meeting, Elks building is off the table*, Grass Pass Daily Courier (Nov. 3, 2022) (describing the city council's rejection of a homeless shelter proposal). Instead, the City continues to insist on its authority to simply drive homeless residents into neighboring jurisdictions by punishing their survival within city limits. E.R. 11. And what happens when those jurisdictions push them back by imposing an even more "uncomfortable" set of penalties? The City cannot seriously contend that its ability to instigate a banishment contest is "critical" to "managing the homelessness crisis." Pet. 22.

The Oregon Legislature recently recognized as much, enacting legislation that imposes largely the same requirements as the injunction in this case. Under a new law, which will go into effect in July 2023, Oregon cities are prohibited from enforcing laws that unduly restrict "the acts of sitting, lying, sleeping or keeping warm

and dry outdoors on public property … with regards to persons experiencing homelessness." Or. Rev. Stat. § 195.530(2) (2021). And as the plaintiffs did here, involuntarily homeless people may prospectively challenge city laws that violate this provision. Or. Rev. Stat. § 195.530(4) (2021). This law is reason alone to deny the petition: it would be a waste of the Court's resources to further review a local enforcement scheme that the state legislature has now outlawed.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for rehearing and rehearing en banc.

Dated: January 10, 2023

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) Nos. 20-35752, 20-35881

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[x] Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words:** 4,164 **.**
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[ ] In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Edward Johnson **Date** January 10, 2023
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