No. 23-175

In The Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

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

BRIEF FOR CITY AND COUNTY OF SAN FRANCISCO AND MAYOR BREED AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae City and County of San Francisco ("San Francisco" or the "City") and Mayor London Breed have experienced firsthand the harms caused by the decision below in *Johnson* v. *City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023). Like so many other cities across the country, San Francisco is wrestling with an overwhelming homelessness crisis. The City has responded by devoting billions of dollars in funds and resources to provide a range of social services for individuals experiencing homelessness. San Francisco seeks to balance its commitment to a compassionate, services-first approach with its responsibility to ensure that sidewalks and public spaces are safe and accessible for residents, visitors, and local businesses.

Since December 2022, the Northern District of California's application of the decision below has undermined the City's balanced effort to provide services to persons experiencing homelessness while also protecting the health, safety, and welfare of all its residents. See *Coal. on Homelessness* v. *City & Cnty. of San Francisco*, 647 F. Supp. 3d 806 (N.D. Cal. 2022), aff'd, 90 F.4th 975 (9th Cir. 2024), and aff'd in part, remanded in part, No. 23-15087, 2024 WL 125340 (9th Cir. Jan. 11, 2024). Drawing on the Ninth Circuit's misapplication of the Eighth Amendment in *Johnson*, the district court has enjoined San Francisco from

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[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than *amici* contributed monetarily to its preparation or submission.

enforcing six state and local laws that limit the time, place, or manner in which individuals can sleep and erect tents on, or otherwise obstruct access to, public property, including a state law that allows San Francisco officials to address public nuisances. Relying on the original panel opinion below, the district court found plaintiffs were likely to establish San Francisco violates the Eighth Amendment when "homeless individuals [are ordered] to vacate encampments and 'move along'" whenever the City "does not have adequate available shelter for its homeless residents." *Id.* at 833. On this basis, the district court set the preliminary injunction to "remain effective as long as there are more homeless individuals in San Francisco than there are shelter beds available." *Id*. at 842. It would cost San Francisco an extraordinary $1.45 billion – or more than one third of San Francisco's general fund – to provide housing for all individuals experiencing homelessness within San Francisco, even assuming all such individuals would accept such offers. Under present Ninth Circuit law, the City thus runs the risk that a court would find a violation of the Eighth Amendment every time the City vacates an encampment.

The City appealed the preliminary injunction, and the Ninth Circuit remanded in part, but the Court largely left the injunction in place, pointing to *Johnson*'s status as controlling circuit precedent. See *Coal. on Homelessness* v. *City & Cnty. of San Francisco*, 90 F.4th 975, 979 (9th Cir. 2024) (acknowledging the City of Grants Pass's "petition for certiorari with the U.S. Supreme Court" but that "[i]n the meantime, we

remain bound by . . . *Johnson*, as does the district court").

As a result of the Ninth Circuit's decision in *Johnson* and the district court's application of it, the City has been unable to implement the considered policy decisions of its Mayor and local legislature; unable to enforce the will of San Francisco voters; unable to allow conscientious City employees to do their jobs; and unable to protect its public spaces. This judicial intervention has harmed both San Francisco's housed and unhoused populations by causing obstructed and inaccessible sidewalks, unsafe encampments, and fewer unhoused people to accept services.

San Francisco's injunction, like others entered against municipalities within the Ninth Circuit, is based on the misapplication of the Eighth Amendment in the decision below. That legal error has resulted in confusion among the district courts, a lack of judicially administrable standards, and sweeping injunctions that have no foundation in the law. San Francisco thus has a substantial interest in the question of whether the Ninth Circuit's decision below comports with this Court's precedents.

SUMMARY OF ARGUMENT

This case concerns enforcement of generally applicable laws regulating "camping" – from the use of cooking stoves and the building of fires to the erection of tents, lean-tos, and shacks in and on public sidewalks,

streets, parks, and right of ways. To the extent the City of Grants Pass contends that its municipal camping restrictions on using and erecting such devices and structures does not run afoul of the Eighth Amendment's prohibition on cruel and unusual punishments, San Francisco agrees. Limitations of these kinds do not, and have never, constituted cruel and unusual punishments under the Eighth Amendment.

However, as to whether a municipality may effectively criminalize the existence of unhoused individuals in their jurisdiction by prohibiting the ability to sleep – a biological necessity – *at all times*, under *all circumstances*, and in *all public spaces*, this Court's precedents suggest doing so could violate the Cruel and Unusual Punishments Clause of the Eight Amendment. Under *Robinson* v. *State of California*, 370 U.S. 660 (1962), a municipality may not criminalize a person's status or mere existence within that jurisdiction. Thus, under the Eighth Amendment, jurisdictions may not make it a crime to be homeless. Likewise, a local municipality may not prohibit sleeping – a biological necessity – in all public spaces at all times and under all conditions, if there is no alternative space available in the jurisdiction for unhoused people to sleep. Under those limited circumstances, an unhoused person would have no reasonable ability to conform their conduct to the law, so such a prohibition would effectively punish a person because of their unhoused status.

That narrow and commonsense requirement would be a functional floor on the limit of governmental power – but it would also be the functional ceiling.

The Eighth Amendment does not otherwise restrict local jurisdictions' powers to address the variety of public health, safety, and welfare issues stemming from the ongoing homelessness crisis. It does not require municipalities to provide shelter for all unhoused persons within their jurisdictions before enforcing public safety ordinances. Nor does it require cities to allow unchecked tent encampments or lodging on public property, especially where encampments block access to businesses, schools, sidewalks, and accessible routes required under the Americans with Disabilities Act, 42 U.S.C. §§ 12101, *et seq*.[2] The Eighth Amendment does not prohibit restrictions on using stoves or setting fires in public spaces, particularly where those activities have caused millions of dollars in damage to both public and private property.[3] And it does not prevent local jurisdictions from enforcing time, place, or manner restrictions on sleeping in certain public spaces or at certain times, including but not limited to in front of schools, libraries, courts, hospitals, and doctor's offices.[4] When properly applied, the Eighth Amendment

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[2] Zak Sos, *San Francisco parents fume over encampment blocking sidewalk near school*, KTVU (Aug. 12, 2022), https://www.ktvu.com/news/san-francisco-parents-fume-over-encampment-blocking-sidewalk-near-school [https://perma.cc/62P8-CQJK].

[3] Josh Koehn & David Sjostedt, *Homeless encampment fires in San Francisco doubled over 5 years, causing millions in damage*, S.F. Standard (Feb. 7, 2024), https://sfstandard.com/2024/02/07/san-francisco-homeless-encampment-fires/ [https://perma.cc/CPV4-BT6L].

[4] George Kelly & Joel Umanzor, *San Francisco homeless man camped outside a school with 'free fentanyl' sign is*

does not strip local governments of their ability to address health, safety, and welfare issues arising from encampments in public places, nor prohibit restrictions on how anyone – unhoused or not – may use and occupy public property.[5]

The Ninth Circuit's decision below erred in misconstruing the proper scope of the Eighth Amendment. Instead of recognizing a narrow limit on prohibiting the existence of unhoused individuals in a given jurisdiction, the Ninth Circuit and its lower courts have repeatedly misapplied and overextended the Eighth Amendment, effectively constitutionalizing a wide swath of local policy questions concerning how best to address the homelessness crisis.

Although not constitutionally required to do so, San Francisco employs a compassionate, services-first approach when responding to the needs of individuals experiencing homelessness. In recent years, San Francisco has spent billions of dollars providing shelter and housing to unhoused persons, including over $672 million during the past fiscal year. But the City cannot feasibly provide shelter for, and address the specific

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convicted pedophile, S.F. Standard (Oct. 22, 2023), https://sfstandard.com/2023/10/18/san-francisco-homeless-fentanyl-drugs-school-pedophile/ [https://perma.cc/LKN8-53Z4].

[5] For example, San Francisco received over 43,600 calls complaining of issues arising from encampments between January 1, 2022, and June 22, 2023. See Adriana Rezal, *S.F. 311 received more than a million calls since start of 2022. Here are the most common complaints*, S.F. Chronicle (July 3, 2023), https://www.sfchronicle.com/bayarea/article/311-service-hotline-complaints-18166457.php.

needs of, every unhoused individual. At a minimum, San Francisco would need an additional $1.45 billion to provide housing for all individuals experiencing homelessness within the City, assuming every unhoused individual would accept such an offer of housing – which the City knows, based on its experience, is far from true. Combined, such an expenditure would total more than a third of San Francisco's general fund budget, an allocation that is simply unrealistic, particularly at a time when San Francisco has a projected $728 million budget deficit. And the enormous $1.45 billion cost to provide shelter would not account for the additional substantial cost to San Francisco of providing the services many of those individuals would need to support a successful transition to more permanent shelter or housing, including treatment for the mental health and substance use disorders that often afflict persons experiencing homelessness.

San Francisco's inability to provide shelter to all unhoused individuals does not warrant judicial restrictions on the City's ability to maintain the safety and accessibility of its public spaces. But that is what the Ninth Circuit and its lower courts have done. Following *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), and the decision below in *Johnson*, 72 F.4th at 890, the U.S. District Court for the Northern District of California has adopted rulings based on the Ninth Circuit's misapplication of this Court's Eighth Amendment precedents. These rulings have severely constrained San Francisco's ability to address the homelessness crisis. San Francisco uses enforcement

of its laws prohibiting camping, lodging, and sleeping at designated times and in certain (but by no means all) public spaces as one important tool among others to encourage individuals experiencing homelessness to accept services and to help ensure safe and accessible sidewalks and public spaces. By restricting San Francisco from enforcing its laws that preserve public spaces for the use of all City residents, visitors, and local businesses, the district court has made it needlessly more difficult to provide services to persons experiencing homelessness.

This judicial intervention has led to painful results on the streets and in neighborhoods. The sad fact is that thousands of persons experiencing homelessness sleep on San Francisco streets in tents and other makeshift structures. Many of these individuals refuse offers of services and shelter. These encampments frequently block sidewalks, prevent employees from cleaning public thoroughfares, and create health and safety risks for both the unhoused and the public at large. Local businesses, residents, and visitors also need to use these same public spaces, but frequently cannot. Often, encampments exist just outside of apartment buildings, schools, senior centers, and other community buildings, forcing families with children, persons with disabilities, and older community members to navigate around them or try to avoid going outside or using the area altogether. Without the ability to fully enforce its laws during the injunction, San Francisco has seen over half of its offers of shelter and services rejected by unhoused individuals, who often

cite the district court's order as their justification to permanently occupy and block public sidewalks.

San Francisco asks this Court to reject the Ninth Circuit's overreach, while being mindful of the consequences of finding that the Eighth Amendment provides *no* limit on a government's ability to punish an individual simply for being homeless. Were jurisdictions free to impose total bans on sleeping at all times, under all circumstances, and in all public spaces – when there is otherwise no available space to sleep – jurisdictions would effectively punish the mere status of being homeless. Doing so could not only be cruel and unusual, but it would also create perverse incentives to force unhoused individuals to migrate to jurisdictions like San Francisco that do not do so.

Fortunately, such bans are wholly unnecessary for local jurisdictions to have the discretion they need to address the homelessness crisis that troubles so many American cities. And such a holding is not necessary here to resolve the question presented in this case.

ARGUMENT

I. Any municipal laws that would criminalize sleeping in all public spaces at all times, when no alternative sleeping space is available in the jurisdiction, could run afoul of the Eighth Amendment.

The question presented concerns enforcement of generally applicable laws regulating "camping" on public property, and the City of Grants Pass's ordinances

at issue cover everything from the use of cooking stoves and the building of fires to the erection of tents, lean-tos, and shacks in and on public sidewalks, streets, parks, and right of ways. See Petr. Br. App. 2a–4a (quoting Grants Pass Mun. Code §§ 5.61.010, 5.61.030, 6.46.090). To the extent Petitioner contends that municipal restrictions on using and erecting such devices and structures do not run afoul of the Eighth Amendment's prohibition on cruel and unusual punishments, see Petr. Br. 37 (citing Grants Pass Mun. Code §§ 5.61.030, 6.46.090), San Francisco agrees. Limitations of these kinds do not, and never have, constituted cruel and unusual punishments under the Eighth Amendment.

But reasonable restrictions on erecting structures on public property have not been the only concern in *Johnson* and related cases. To the extent there is a concern as to whether a municipality may effectively *criminalize* the existence of unhoused individuals in their jurisdiction by prohibiting the ability to sleep – a biological necessity – *at all times*, and in *all public spaces*, this Court's precedents make clear that punishing someone for violating such a sweeping restriction *could* constitute a cruel and unusual punishment.

Under such circumstances, the Eighth Amendment would provide both the floor and the ceiling. As long as a municipality's laws do not ban sleeping at all times, under all circumstances, and in all public spaces within the jurisdiction – when no alternative sleeping space is available – the municipality may enforce time, place, or manner restrictions on sleeping on public

property, as well as restrictions on camping-related activities.

Because the Ninth Circuit erred below in failing to properly apply the Eighth Amendment, this Court should reverse that decision, while being mindful of the consequences of finding that the Eighth Amendment provides *no* limit on a government's ability to punish an individual simply for being homeless. However, such a holding is not necessary to resolve the question presented in this case.

A. This Court has long recognized substantive limits on what can be made punishable.

This Court has long recognized that, in limited circumstances, the Eighth Amendment can impose "substantive limits on what can be made criminal and punished as such." *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977). In *Robinson*, this Court held that while prosecutions for individual *acts* of using drugs are permissible, a "statute which makes the 'status' of narcotic addiction a criminal offense" violates the Eighth Amendment. 370 U.S. at 666. *Robinson* recognizes the basic, commonsense principle that the government cannot criminalize a person's mere status or existence within that jurisdiction. Nor can a jurisdiction criminalize unavoidable conditions of being human without providing an opportunity for individuals to conform their conduct to the law. As this Court reasoned, "[e]ven one day in prison would be a cruel and unusual

punishment for the 'crime' of having a common cold." *Id.* at 667.

B. A total prohibition on sleeping outside without time, place, or manner exceptions would effectively criminalize unhoused individuals for their indigent status.

To be sure, the principle announced in *Robinson* applies only "sparingly." *Ingraham*, 430 U.S. at 667. But regulations restricting individuals experiencing homelessness present one of the rare instances in which a jurisdiction's laws could cross the line between prohibiting conduct and prohibiting status. When a jurisdiction prohibits sleeping in public at all times, in all circumstances, and in all places – when no alternative sleeping space is available – the jurisdiction effectively punishes the mere status of being homeless within the jurisdiction. This is so because an unhoused person cannot reasonably conform their conduct to the law anywhere within the jurisdiction. Because everyone must sleep as a biological necessity, a criminal prohibition on sleeping at all times and in all public places within a jurisdiction punishes unhoused individuals for being homeless. Doing so effectively criminalizes their status, running afoul of *Robinson*'s admonition.[6]

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[6] Any such limitation on what a municipality may make criminal would not mean that the Eighth Amendment would be violated if a law enforcement officer sought to enforce a sleeping prohibition at a time or in a location where sleeping is allowed under the jurisdiction's laws. Under such circumstances, an

Punishing unhoused individuals simply for sleeping in public – when they have nowhere else to go in that jurisdiction – would also serve to discourage them from remaining in their communities, and effectively shunt them to jurisdictions that, like San Francisco, do not enforce such sweeping prohibitions. Moreover, if such bans were adopted state- or even nation-wide, unhoused individuals could be left with no place they could lawfully sleep at all.[7]

C. The Ninth Circuit improperly extended the scope of the Eighth Amendment well beyond the logic of *Robinson*'s narrow prohibition.

The Ninth Circuit, however, extended the reach of the Eighth Amendment well beyond the logic stemming from *Robinson*'s narrow prohibition. Indeed, while the Ninth Circuit vacated and remanded as to the City of Grants Pass's *anti-sleeping* ordinance – which ordinance is therefore not part of this appeal – it affirmed the district court's injunction of Grants

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individual could challenge such enforcement on the straightforward basis that they did not in fact violate the geographic or temporal scope of the municipality's laws.

[7] Notably, anti-camping laws are also increasingly matters of statewide consideration, where the larger geographic prohibitions at issue would raise even greater concerns. See Robbie Sequeira, *As homeless people become more visible, some cities and states take a tougher line*, Stateline (Jan. 3, 2024), https://stateline.org/2024/01/03/as-homeless-people-become-more-visible-some-cities-and-states-take-a-tougher-line/ [https://perma.cc/B3FZ-SW84].

Pass's *anti-camping* ordinances. See *Johnson*, 72 F.4th at 884–85.

The Ninth Circuit misapplied the Eighth Amendment. The Eighth Amendment does not require that municipalities provide shelter for every individual experiencing homelessness within their jurisdiction. *Martin*, 920 F.3d at 617. Nor does it require municipalities to allow "anyone who wishes to sit, lie, or sleep on the streets" to do so "at any time and at any place." *Ibid.* (citation omitted). Nothing in the Eighth Amendment restricts a jurisdiction's ability to enact time, place, or manner restrictions on sleeping in public spaces. Nor does the Eighth Amendment require jurisdictions to surrender public spaces for the use of tent encampments or to allow unfettered lodging on public property. When properly applied, the Eighth Amendment allows governments to clear encampments, including those that pose health, safety, and access issues, and impose restrictions on both housed and unhoused persons' use of public property.[8]

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[8] Where a municipality lacks any location for homeless individuals to sleep and enacts a complete ban on sleeping in public at all times and in all places, the municipality's laws could be subject to a facial challenge. Otherwise, any challenge to a municipality's policies and practices could only be raised after the laws were enforced against the individual, including as part of a defense to a criminal prosecution as in *In re Eichorn*, 69 Cal. App. 4th 382, 384 (1998), or post-conviction, as in *Robinson*. Claims about the enforcement of laws regulating sleeping in public would never be suitable for class action challenges or as claims brought by associations, because the inquiry would necessarily turn on the individual facts presented at the time of enforcement.

But the Ninth Circuit and its lower courts have repeatedly misapplied and overextended the Eighth Amendment, effectively constitutionalizing the arbitrary policy preferences of judges as to how best to address the homelessness crisis. San Francisco's experience illustrates the consequences caused by the Ninth Circuit's judicial overreach.

II. San Francisco's compassionate, services-first approach to address the homelessness crisis complies with the Eighth Amendment.

San Francisco's compassionate approach to the homelessness crisis falls well within any logic imposed by *Robinson* and the Eighth Amendment. Far from criminalizing homelessness, San Francisco devotes substantial resources to providing shelter and services to persons experiencing homelessness. San Francisco's time, place, or manner restrictions on sleeping outdoors do not ban sleeping outside at all times and in all places, leaving room within the jurisdiction where unhoused individuals may sleep outside.

A. San Francisco devotes substantial resources to its services-first approach to its homelessness crisis.

For at least four decades, San Francisco has devoted considerable resources to address the intractable problems posed by homelessness. Over the years, San Francisco voters and its legislative body have enacted a series of laws that reflect the public's considered judgment about how best to address the ongoing crisis. To prevent and reduce homelessness, the City leads with social services and devotes substantial resources to making shelter available to its unhoused residents. It has allocated billions of dollars in support of this approach. Since 2018, the City's efforts have helped more than 15,000 people exit homelessness in San Francisco through City programs including direct housing placements and relocation assistance.[9] Building on the success of San Francisco's efforts, the City's projected goal is to help at least an additional 30,000 people exit homelessness through permanent housing by 2028.[10]

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[9] Mayor Breed Announces $53 Million Federal Grant for San Francisco's Homeless Programs (Jan. 31, 2024), https://www.sf.gov/news/mayor-breed-announces-53-million-federal-grant-san-franciscos-homeless-programs [https://perma.cc/USB6-4KFE]; see also S.F., Cal., Admin. Code, § 118.2(j) (2022).

[10] S.F. Dep't of Homelessness and Supportive Housing, Home by the Bay, An Equity-Driven Plan to Prevent and End Homelessness in San Francisco (2023-2028), https://hsh.sfgov.org/wp-content/uploads/2023/09/Home-by-the-Bay-Single_Page-Layout.pdf (hereinafter "Home by the Bay") [https://perma.cc/Z6XS-UYEL].

As a prime example of the City's serious and ongoing commitment, in 2016, San Francisco created the Department of Homelessness and Supportive Housing ("HSH"), an agency dedicated exclusively to confronting the challenges of homelessness and armed with an annual budget of roughly $672 million. But even this significant financial commitment does not reflect the total allocation of resources San Francisco devotes to addressing homelessness through the work of dozens of other City agencies.

HSH and its partner departments work each and every day to:

- Assess the needs of each reported resident in San Francisco who is experiencing homelessness;
- Conduct outreach in an attempt, where possible, to connect individuals with shelter and services;
- Creatively address the problems each individual faces, such as offering one-time grants to potentially prevent homelessness by, for example, paying rent;
- Place individuals in supportive housing appropriate for their needs, often including, for example, job training programs on site; and
- Transition individuals from temporary supportive to permanent subsidized housing.[11]

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[11] Decl. of Emily Cohen in Supp. of S.F.'s Opp'n to Pls.' Mot. for Prelim. Inj., *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 45-2 ¶8 (Nov. 15, 2022).

This approach entails a coordinated response among a variety of City workers, including street crises personnel; social services workers who connect individuals with behavioral, medical, and welfare services offered by the City; sanitation workers who clean streets; peace officers who mitigate safety concerns; and emergency medical technicians who provide standby health and safety services as needed.

The responses and solutions provided by City workers when addressing the circumstances of any given person experiencing homelessness vary tremendously depending on that person's individual circumstances and needs. These case-specific resolutions defy simplistic, one-size-fits-all solutions, especially when considering the sheer variety of backgrounds and experiences that comprise San Francisco's unhoused community.

On February 23, 2022, during the City's most recently published point-in-time count, San Francisco estimated that 7,754 people were experiencing homelessness in the City and 4,397 were unsheltered.[12] Of those surveyed, 20 percent were between 18 and 24 years old and 25 percent were over the age of 51, 27 percent of individuals identified as LGBTQ, more than 50 percent identified as people of color, and 33 percent of the unhoused population reported experiencing

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[12] S.F. Dep't of Homelessness & Supportive Housing, *San Francisco Homeless Count and Survey, 2022 Comprehensive Report* (hereinafter "2022 PIT Count"), https://hsh.sfgov.org/wp-content/uploads/2022/08/2022-PIT-Count-Report-San-Francisco-Updated-8.19.22.pdf [https://perma.cc/N6UT-28W4].

homelessness four or more times over the past three years. Surveys also show that 21 percent of San Francisco's unhoused population self-attributes homelessness primarily to a lost job, 14 percent to eviction, 12 percent to substance use, 7 percent to incarceration, 7 percent to mental health issues, and 9 percent to personal disputes with family or friends.[13]

Because there is not a one-size-fits-all solution to addressing the complex array of challenges that San Francisco's unhoused population faces, the City has employed myriad tools to reach as many of its unhoused residents as possible. San Francisco's inventory of tools to offer temporary shelter have been considerable: it provides navigation centers, transitional housing, cabins, trailers, and other forms of congregate, non-congregate, and semi-congregate shelters, stabilization beds, and safe sleeping sites. Between 2019 and 2022, the years primarily at issue in San Francisco's litigation, the City increased its shelter bed capacity and reduced the number of unsheltered homeless persons by 15 percent.[14] For instance, the San Francisco Homeless Outreach Team made 1,652 shelter placements in fiscal year 2021 alone through general outreach and another 1,000 in coordination with encampment resolutions.[15] In 2022, HSH disbursed $5.6 million to over 1,000 households needing short-term emergency assistance with back rent, future rent,

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[13] *Ibid.*

[14] Cohen Decl. ¶¶5–6, *supra*, note 11.

[15] *Ibid.*

and/or move-in costs to prevent homelessness.[16] At the same time, 2,057 households were moved into supportive housing while HSH maintained approximately 11,000 households in existing permanent supportive housing.[17] With respect to the volume of permanent supportive housing in California, San Francisco is a consistent leader in its offerings.[18] And HSH's capacity to offer shelter has only grown over time. HSH acquired multiple sites for permanent supportive housing intended to bring over 1,100 bedrooms to San Francisco.[19] Some of these locations serve a dual purpose of providing on-site services, job training, and educational programming. Most recently, San Francisco has established the Home by the Bay Plan, with the strategic goals of reducing the number of people who are unsheltered by 50 percent and the total number of people experiencing homeless by 15 percent by 2028. San Francisco plans to provide prevention services to at least 18,000 people at risk of losing their housing and becoming homeless, and to ensure that at least 85 percent of people who exit homelessness do not experience homelessness again.[20]

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[16] 2022 PIT Count, *supra*, note 12.

[17] Cohen Decl. ¶16, *supra*, note 11.

[18] HUD 2023 Continuum of Care Homeless Assistance Programs, Housing Inventory Count Report – California, https://files.hudexchange.info/reports/published/CoC_HIC_State_CA_2023.pdf [https://perma.cc/69LZ-B2K2].

[19] Cohen Decl. ¶16, *supra*, note 11.

[20] Home by the Bay, *supra*, note 10.

In short, San Francisco deploys significant tools, substantial resources, and thousands of City workers to address the specific needs of the thousands of individuals experiencing homelessness in San Francisco.

B. San Francisco has limited time, place, or manner restrictions that are important to maintaining public health, safety, and welfare.

Notwithstanding the tremendous resources San Francisco and its agencies have devoted to providing social services and shelter options for the City's thousands of unhoused persons, San Francisco cannot – and is not constitutionally required to – meet all the needs of every unhoused person who lives in or comes into the City. And while San Francisco's approach to addressing homelessness is not to punish unhoused individuals merely for sleeping in public places, the City and its residents have considerable interests in maintaining the health, safety, and accessibility of San Francisco's streets and public spaces for all of its residents.

Accordingly, San Francisco has long had time, place, or manner limits on sleeping on public property that balance the needs of San Francisco's housed and unhoused residents. All told, the City's laws allow sleeping in public during nearly all hours of the day in multiple locations.[21] San Francisco's ordinances thus

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[21] For instance, San Francisco's laws require sidewalks to be clear during the day, but allows sleeping at night between 11 p.m.

do not ban sleeping in public in all times or at all places, and therefore do not implicate the logic of *Robinson*'s narrow limitations.[22]

While San Francisco's restrictions on sleeping in public spaces are limited, they are important to San Francisco's ability to preserve public spaces for the use of all San Franciscans and visitors, as well as to protect public health and safety. Many encampments erected by unhoused persons throughout the City present often-intractable health, safety, and welfare challenges for both the City and the public at large. Encampments frequently block sidewalks, preventing City employees from cleaning public thoroughfares and creating health and safety risks for both the unhoused and public at large. Local businesses, residents, and visitors also need to use these same public spaces, but frequently cannot. Encampments often exist on the curtilage of apartment buildings, schools, senior centers, and other community buildings, forcing families with children, persons with disabilities, and older community members to navigate around them, often having to cross into streets and intersections to do so.

To address these challenges, San Francisco promotes safe streets through a collaborative, service-first

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to 7 a.m. See S.F., Cal., Police Code, art. 2, § 168 (2010). San Francisco's parks, by contrast, allow sleeping between the hours of 8 a.m. to 8 p.m. See S.F., Cal., Park Code, art. 3, § 3.13 (2008).

[22] San Francisco's laws restricting sleeping on public property would thus clearly withstand any potential facial Eighth Amendment challenge on the basis of the text of the ordinances themselves.

approach that deploys teams of City workers and contractors to engage residents of encampments set up in public spaces, to offer them services, and to clean the areas. Each week, San Francisco's Healthy Streets Operation Center ("HSOC") conducts encampment resolutions through planned coordination among numerous agencies, including the San Francisco Police Department, Department of Public Works, HSH, Department of Emergency Management, Department of Public Health, and the San Francisco Fire Department.[23] HSOC encampment resolutions have several specific goals, including conducting client outreach, offering City services and housing, removing hazardous or abandoned materials, storing certain property in order to clean and temporarily secure sites until City workers are done with the resolution, and providing essential medical and behavioral care. These resolutions are planned in advance and can cover an area of up to a few City blocks at a time. City workers go to great lengths to provide advance notice to those impacted by a resolution, and outreach specialists from the various City agencies assess shelter, treatment, and service needs to match the needs of clients before, during, and following resolutions. But HSOC resolutions are also only one tool, and employees and contractors from the various City agencies engage with unhoused individuals in a variety of settings outside of HSOC resolutions to further similar goals.

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[23] Decl. of Sam Dodge in Supp. of S.F.'s Opp'n to Pls.' Mot. for Prelim. Inj., *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 45-4 ¶¶7–8 (Nov. 15, 2022).

These operations highlight the safety and public health challenges that outdoor encampment living poses to encampment residents. Many residents are well-known to the City workers and contractors who diligently work to provide them services, because they have engaged with City services before.[24] Common health hazards City workers confront are uncovered buckets of feces and urine, rotting food and drink, used needles, and blood.[25] These health hazards often intermingle with the tents and other items in the encampments, leaving the areas smelling of feces and littered with debris and other organic waste.[26]

Physical safety concerns are also present at encampments. Officials from the San Francisco Fire Department report seeing at least two encampment fires every day caused by burning trash, cooking, or open flames – some of which destroy residents' property or have taken lives.[27] City workers also report seeing weapons such as long knives and switch blades, drug

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[24] Decl. of Carl Berger in Supp. of Defs.' Opp'n to Pls.' Mot. to Enforce Prelim. Inj., *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 143-4 ¶16 (July 6, 2023).

[25] *Id.* ¶18.

[26] *Id.* ¶23.

[27] See Koehn & Sjostedt, *supra*, note 3; Wilson Walker, *Destructive encampment fires in San Francisco's Mission set locals on edge*, CBS News (Oct. 19, 2023), https://www.cbsnews.com/sanfrancisco/news/series-of-destructive-encampment-fires-in-san-franciscos-mission-sets-locals-on-edge/; Jessica Flores & Sam Whiting, '*People are dying': Fatal S.F. encampment fire provokes outcry over homelessness crisis*, S.F. Chronicle (Feb. 23, 2022), https://www.sfchronicle.com/sf/article/Encampment-fire-near-San-Francisco-s-Glen-Park-16940850.php.

dealing, and belligerent individuals at encampments.[28] And in some instances, City workers have been physically threatened or battered.[29] Recently, an unhoused person who is a registered sex offender set up an encampment near a public library and outside of a local school for children between the ages of five and fourteen years old. The encampment at issue included signs saying "Free fentanyl 4 new users" and "Meth for stolen items!"[30] Conduct of this nature undermines the extensive efforts San Francisco takes to combat drug use and protect public safety.

Accordingly, to provide safe and accessible public spaces for both its housed and unhoused population, San Francisco must regulate the use of public property through reasonable time, place, or manner restrictions. The City must have the ability to clean its streets, to ensure safe, accessible, and unblocked sidewalks, to protect children from facing unsafe conditions at and around their schools, and to ensure that seniors have the ability to navigate the streets day-to-day to take care of themselves. Those core governmental functions are essential to protecting public health and safety.

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[28] Berger Decl. ¶28, *supra*, note 24.

[29] Decl. of Lt. Wayman Young in Supp. of S.F.'s Opp'n to Pls.' Mot. to Enforce Prelim. Inj., *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 143-95 ¶5 (July 6, 2023).

[30] Kelly & Umanzor, *supra*, note 4.

III. The Ninth Circuit's decision below has hamstrung San Francisco's balanced approach to addressing the homelessness crisis.

Despite the tremendous range of social services that San Francisco provides and the fact that San Francisco's laws do not criminalize homelessness, the City has been stymied by the downstream consequences of the Ninth Circuit's decision in *Johnson*. In September 2022, seven named plaintiffs, alongside an organization that advocates for the unhoused, sued San Francisco. They have alleged, among other things, that the City violates the Eighth Amendment any time it enforces sit, sleep, or lie, anti-camping, and generally applicable public nuisance ordinances in the course of interacting with San Francisco's unhoused community.

The day after the plaintiffs filed their lawsuit, the Ninth Circuit entered the original panel decision below, which affirmed both the certification of a class of all "involuntarily homeless persons" and a permanent injunction against Petitioner's enforcement of ordinances relating to sitting, sleeping, and lying. *Johnson* v. *City of Grants Pass* (hereinafter "*Johnson* panel decision"), 50 F.4th 787, 798 (9th Cir. 2022). The panel majority held that under a "formula" it derived from *Martin*, a "government cannot prosecute homeless people for sleeping in public if there 'is a greater number of homeless individuals in [a jurisdiction] than the

number of available' shelter spaces.'" *Id.* at 795 (quoting *Martin*, 920 F.3d at 617).[31]

Drawing on the sweeping nature of the *Johnson* panel decision, on December 23, 2022, the Northern District of California issued a preliminary injunction against San Francisco, prohibiting the City from enforcing six state and local laws that limit the time, place, or manner in which unhoused individuals can sleep, lodge, or erect encampments on public property. Those laws give San Francisco the power to resolve encampments, encourage unhoused individuals to accept shelter and services, ensure access to both public and private property, and abate public nuisances. The district court enjoined those laws based on the involuntary homelessness "formula" from the panel's decision below. The preliminary injunction provided that San Francisco could not enforce or threaten to enforce laws limiting encampments, lodging, and nuisances on public property against individuals who were "involuntarily homeless" – without defining that term. The injunction "remain[s] effective as long as there are more homeless individuals in San Francisco than there

[31] Although the Ninth Circuit when denying rehearing en banc by a vote of 14 to 13 eventually amended and superseded the original panel decision below (*Johnson* panel decision) to remove any express reference to a "formula," *Johnson*, 72 F.4th at 938 (Smith, J., dissenting from the denial of rehearing en banc), the Ninth Circuit's formula-like analysis continues to serve as the foundation for the injunctions entered against both Petitioner and other *amici* like San Francisco.

are shelter beds available." *Coal. on Homelessness*, 647 F. Supp. 3d at 842.

Although they sought injunctive relief, none of the named plaintiffs demonstrated that they faced any future enforcement or threat of enforcement of the enjoined laws. Indeed, most, if not all, had housing, were in the process of obtaining housing, or had rejected shelter offerings from City outreach workers.[32] And the only named plaintiff that alleged to have ever been cited under one of San Francisco's laws publicly admitted to rejecting an offer of shelter because he preferred to stay on the street.[33] Nonetheless, on the basis of their legal claims backed by *Johnson*, the district court entered a sweeping injunction that prohibits the City's enforcement of its laws with respect to all "involuntary homeless" individuals.

The blunt approach taken by the district court, empowered by the Ninth Circuit's decision in *Johnson*, contrasts with the complex and varied nature of City workers' interactions with individuals experiencing homelessness. Some unhoused individuals work with outreach workers to complete housing assessments,

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[32] See generally Exhibit 2, Decls. of Toro Castaño, Sarah Cronk, Joshua Donohoe, Molique Frank, David Martinez, Teresa Sandoval and Nathaniel Vaughn in Supp. of Pls.' Mot. for Prelim. Inj., *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 9-4 (Sept. 27, 2022); Defs.' Notice of Mot. and Mot. to Dismiss the First Am. Compl., *id.*, ECF No. 112 (Mar. 14, 2022).

[33] Decl. of Toro Castaño, *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 9-4 ¶18 (Sept. 27, 2022).

successfully entering congregate shelter as a pathway to long-term housing. Other individuals refuse to engage with City outreach workers at all, expressly declining any offers of shelter or any efforts to assist them, including, as mentioned, one of the plaintiffs in the suit against San Francisco.[34] Others appear to be under the influence of substances or unable to meaningfully interact with the workers who approach them. In short, the conditions on the ground vary tremendously, making it difficult if not impossible for City workers to provide one-size-fits-all solutions, let alone anticipate in advance the appropriate response to each interaction.

Despite this, the district court has all but ignored San Francisco's substantial documentation of the diverse needs and challenges posed by the thousands of unhoused individuals City workers can encounter on a daily basis. The district court has discounted the expertise that San Francisco and its employees have developed through countless interactions with unhoused persons over the past several decades. Instead, emboldened by the breadth of the holding in *Johnson*, the district court has inserted itself into nearly every aspect of the City's interactions with unhoused individuals and the City's policy decisions about how to address street conditions. For example, although law

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[34] *Ibid.*; see also Lyanne Melendez, *SF Castro District merchants protest in frustration of unhoused encampment*, ABC7 News (July 20, 2023), https://abc7news.com/san-francisco-castro-district-unhoused-people-homeless-encampment-sf-merchants-protest/13526166/.

enforcement officers often accompany City workers who engage with unhoused individuals for safety reasons, the district court asserted that the mere presence of police officers could constitute a threat of enforcement of the City's enjoined laws, and thus a violation of the injunction.[35] The district court has also repeatedly exhorted the City to develop "simple scripts" to be uniformly deployed by thousands of City workers regardless of their positions or expertise – including certified social service workers, peace officers, and licensed health professionals – who encounter individuals experiencing homelessness every day.[36] The district court has no basis in law to require these changes to the City's outreach policies, to second guess the City's choices about how best to interact with unhoused persons, or to restrict San Francisco's use of peace officers to ensure the safety of City workers. Nonetheless, because of the Ninth Circuit's erroneous

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[35] Minutes of January 12, 2023 Hr'g, *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 84 (Jan. 12, 2023); see also Transcript Order Form, *id.*, ECF No. 87 (Jan. 20, 2023); January 12, 2023 Hr'g Tr. at 30:15-31:17, *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022) (transcript of hearing on file with *amici*).

[36] Minutes of August 24, 2023 Hr'g, *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 180 (Aug. 24, 2023); see also Transcript Order Form, *id.*, ECF No. 179 (Aug. 24, 2023); August 24, 2023 Hr'g Tr. 26:4-31:22 (transcript of hearing on file with *amici*); Minutes of September 20, 2023 Hr'g, *Coal. on Homelessness* No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF No. 190 (Sept. 20, 2023); see also Transcript Order Form, *id.*, ECF No. 192 (Sept. 22, 2023); September 20, 2023 Hr'g Tr. 9:23-11:8, *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022) (transcript of hearing on file with *amici*).

decision below, San Francisco has been subjected to this unjustified and ongoing judicial overreach.

In short, the district court has improperly enjoined San Francisco's lawful, compassionate, and balanced approach to addressing its homelessness crisis. As a result of the Ninth Circuit's decision below, the district court has strayed far beyond its judicial role and established Supreme Court precedent, and has inserted itself as a policy maker that second-guesses San Francisco's well-considered – and constitutionally permissible – choices.

CONCLUSION

This Court has long recognized that the Eighth Amendment's Cruel and Unusual Punishments Clause prohibits criminalizing a person's status or mere existence. And just as jurisdictions could not make it a crime to be homeless, there are logical limits on prohibiting sleeping – a biological necessity – in all public spaces and at all times and under all conditions, when there is no alternative sleeping space available in the jurisdiction.

However, the Eighth Amendment does not otherwise restrict the powers of local jurisdictions like San Francisco to address the variety of public health, safety, and welfare issues stemming from the ongoing homelessness crisis. Many jurisdictions – San Francisco chief among them – have chosen for years to invest considerable resources to employ a compassionate,

services-first approach when responding to the needs of individuals experiencing homelessness. Courts should not unduly constrain the policy choices of local jurisdictions who are on the front lines of the homelessness crisis.

This Court should therefore reverse the decision below as to generally applicable laws regulating camping on public property, subject to the narrow limitation set forth above.

Respectfully submitted,

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