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

BRIEF IN OPPOSITION

HOWARD A. BELODOFF
IDAHO LEGAL AID SERVICES, INC.
1447 So. Tyrell Lane
Boise, ID 83706

MARIA FOSCARINIS
ERIC S. TARS
TRISTIA BAUMAN
BRANDY RYAN
NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY
2000 M Street, NW
Suite 210
Washington, DC 20036

MICHAEL E. BERN
Counsel of Record
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
michael.bern@lw.com

Counsel for Respondents

QUESTION PRESENTED

Whether a homeless individual may be charged with a crime for sleeping outside when there is no shelter available to him or her.

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INTRODUCTION

In seeking rehearing en banc in the Ninth Circuit, petitioner recognized the panel's decision as "narrow," noting "that it would only preclude municipal governments from prosecuting homeless individuals criminally for the act of sleeping outdoors on public property when that person has no option of sleeping indoors." Appellee's CA9 Supp. En Banc Br. 1, ECF No. 72. That prohibition, petitioner asserted, "raises little actual conflict with Boise's Ordinances or its enforcement of the same" because "the City has never sought to prosecute homeless individuals for sleeping overnight in public when they truly cannot obtain shelter indoors." *Id.* at 2-3. "To the contrary," petitioner stressed, the "City's [own] Ordinances clearly and unequivocally set forth the City's long-standing policy" forbidding enforcement in those circumstances. *Id.* at 3. Indeed, petitioner claimed, "no homeless individual has ever been cited" by the City in the situation covered by the Ninth Circuit's opinion. *Id.*

Before this Court, however, petitioner conjures up a radically different story. In petitioner's new telling, the Ninth Circuit's holding will have "far-reaching and catastrophic" consequences, "cripple the ability of [municipalities] to maintain the health and safety of their communities" and make it impossible for petitioner to address "[p]ublic encampments" or apply "a whole host of other laws regulating public health and safety." Pet. 3-4. Petitioner now claims the Ninth Circuit's decision "categorically" "exempts from generally applicable criminal laws any conduct that is purportedly involuntary" and creates a "de facto constitutional right to live on sidewalks and in parks." *Id.* at 12-13, 3. Moreover, petitioner insists, the

decision threatens to broadly void laws criminalizing "purportedly involuntary" acts, including drug use and downloading child pornography. *Id.* at 21-23.

It is, of course, common practice for petitions for certiorari to dramatize the impact of the decisions they seek to challenge; but it is rare to find a petition that so thoroughly distorts the decision below and so brazenly asserts harms it previously disclaimed.

The Ninth Circuit's interlocutory ruling in this case is just as narrow as petitioner admitted less than a year ago. It does no more than prohibit the imposition of criminal penalties against homeless individuals who engage in "the simple act of sleeping outside" when "no alternative shelter is available to them"—something that already is supposed to be prohibited under Boise's current law. Pet. App. 64a, 36a. That result is limited in scope, and reflects the ought-to-be uncontroversial principle that a person may not be charged with a crime for engaging in activity that is simply a "universal and unavoidable consequence[] of being human." *Id.* at 62a (citation omitted).

The Ninth Circuit's holding does not conflict with any decision of this Court, nor that of any court of appeals or state supreme court. In *Robinson v. California*, this Court held that the Eighth Amendment prohibits the criminalization of an individual's status. 370 U.S. 660, 666 (1962). Five Justices, in two separate writings, subsequently agreed in *Powell v. Texas*, 392 U.S. 514 (1968), that the Eighth Amendment also may impose certain limits on a state's ability to criminalize conduct that is inseparable from an individual's status and "impossible" for an individual to avoid. *Id.* at 551 (White, J., concurring in the result).

Far from clashing with the result below, both decisions support the Ninth Circuit's conclusion that the Eighth Amendment prohibits the criminalization of engaging in "innocent," "life-sustaining" conduct—such as sleeping—as applied to homeless individuals who otherwise "do not have a single place they can lawfully be." Pet. App. 63a. At a minimum, however, petitioner points to no conflict between the decision below and any majority holding of this Court. Petitioner's asserted conflicts with the California Supreme Court and other courts of appeals, meanwhile, are so tenuous and unconvincing that even petitioner presses them only half-heartedly.

Petitioner instead devotes much of its petition to a barely disguised appeal to policy. That appeal is particularly remarkable because the Ninth Circuit's holding does no more than command what petitioner's own current ordinances already ostensibly require. And petitioner's dramatically overwrought assertion that the decision below constitutionalizes a right to live in parks, on sidewalks, and in encampments, is squarely disclaimed by the decision itself, which expressly notes that it does not prevent cities from "prohibiting sitting, lying, or sleeping outside at particular times or in particular locations" nor from "barring the obstruction of public rights of way or the erection of certain structures." Pet. App. 63a n.8; *see also id.* at 5a. Rather, it explained, an ordinance violates the Eighth Amendment only to the extent it "criminaliz[es] the biologically essential need to sleep when there is no available shelter." *Id.* at 4a.

In the end, therefore, petitioner and its amici ask this Court to depart from its ordinary criteria for certiorari to grant interlocutory review of the denial of summary judgment largely based on their

speculation of how the court's reasoning may be applied in future cases involving different issues or other cities that are not parties to this case. Review based on such conjecture is unwarranted—and, at the very least, highly premature. That is even more so the case here because review of this decision could force the Court to engage in fact-intensive, threshold jurisdictional determinations based on a *de novo* review of a voluminous summary judgment record.

For all those reasons, this case is ill-suited for this Court's review. The petition should be denied.

STATEMENT OF THE CASE

A. Factual Background

1. The City of Boise currently has three homeless shelters which offer emergency shelter services to the approximately 900 homeless people in Ada County. Pet. App. 36a-38a.

One shelter, run by Interfaith Sanctuary Housing Services, Inc. ("Sanctuary"), has 96 beds reserved for individual men and women, additional beds reserved for families, and some space on floor mats. *Id.* at 37a. It is the only shelter that allows couples and their children to stay together. *Id.* at 132a. Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." *Id.* In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. *Id.*

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. *Id.* at 38a. One of those shelters, the River of Life Rescue Mission ("River of

Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), is open only to women and children. *Id.* The BRM facilities have strict check-in policies, whereby those needing shelter must check in between 4:00 and 5:30 pm or may be denied entry. *Id.*

The BRM shelters run two programs. The first is the "Discipleship Program," which is an "intensive, Christ based residential recovery program" of which "[r]eligious study is the very essence." *Id.* at 39a. The other program is the Emergency Services Program, which permits stays at BRM shelters of up to 17 consecutive days for men and 30 days for women and children, after which they either must join the Discipleship Program or cannot return for at least 30 days.[1] *Id.* In addition, any guest in the Emergency Services Program that does not stay at BRM on each night during the 17 or 30-day period—for instance, because the guest has identified other shelter—is prohibited from returning to the shelter for 30 days. Pet. App. 39a. BRM's stay length rules are relaxed during the winter. *Id.*

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[1] The record indicates that even in the Emergency Services Program, there may be substantial pressure to engage in religious activities. For instance, BRM acknowledged in unrelated litigation that its facility maintains a "pervasively religious atmosphere" and a "comprehensively religious environment." BRM Br. 35, *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 637 F.3d 988 (9th Cir. 2011) (No. 10-35519), ECF No. 23-1. Shelter guests are also told during intake that the Shelter "would like to share the Good News [of Jesus]" with them. Pet. App. 38a. The Ninth Circuit found that a genuine factual dispute existed with respect to whether the Emergency Services Program has a religious component, *id.* at 47a, and petitioner does not challenge that finding in this Court.

2. Boise has two ordinances which criminally punish sleeping outside. The language of both ordinances has changed over the course of this litigation. The first is Boise City Code § 5-2-3(A) (formerly § 6-01-05 (2009)) (the "Disorderly Conduct Ordinance"), which at the outset of this case banned "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof." The second is Boise City Code § 7-3A-2(A) (formerly § 9-10-02 (2009)) (the "Camping Ordinance"), which similarly made it a misdemeanor to use "any of the streets, sidewalks, parks or public places as a camping place at any time."

Soon after this litigation began, petitioner amended the Camping Ordinance to define "camping" as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence." Boise City Code § 9-10-02 (2009). The Boise Police Department then promulgated a new "Special Order," effective as of January 1, 2010, that purported to prohibit enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on any night when no shelter had "available overnight space." Pet. App. 41a. In 2014, the City expressly codified the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code § 5-2-3(B)(1) (formerly § 6-01-05(D) (2014)); *id.* § 7-3A-2(B) (formerly § 9-10-02 (2014)). Boise law today thus, on its face, forbids enforcement of either the Camping or Disorderly Conduct Ordinance against homeless

individuals in circumstances when there is no available shelter.

City police implement this enforcement prohibition through a two-step procedure known as the "Shelter Protocol." Pet. App. 41a. Under this protocol, if any shelter in Boise reaches capacity on a given night, the shelter is asked to notify the police at roughly 11:00 pm. *Id.* If all shelters are full on the same night, police are to refrain from enforcing either ordinance. *See id.* Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. *Id.* Respondents also pointed to evidence below that BRM likewise sometimes "runs out of beds." ER866 ¶ 7; *see also* SER789. However, pursuant to an asserted policy "never [to] turn down anyone for food or shelter due to lack of space," ER369; *see also* ER372, 376, neither BRM shelter has ever reported that it was full. Pet. App. 41a-42a. As a result, the police have continuously enforced the ordinances. The Shelter Protocol does not account for other reasons why a shelter may be unavailable to an individual, such as because he has exceeded his 17-day stay limit at BRM.[2]

B. Procedural History

1. This litigation began over ten years ago when respondents, six current or former homeless residents of Boise, filed a complaint in the United States District Court for the District of Idaho, alleging that it violated the Eighth Amendment for petitioner

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[2] The Shelter Protocol was not in place at the time that respondents Robert Martin or Pamela Hawkes were issued the criminal citations that were later dismissed. Pet. App. 41a, 54a-55a.

to make it a crime for homeless individuals who lacked any available shelter space to sleep outside. *Id.* at 41a. Respondents sought relief under both 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. *Id.* Each respondent challenged past criminal charges under the ordinances, and two sought prospective relief. *Id.*

The district court initially granted summary judgment to petitioner on the ground that respondents' claims for retrospective relief were barred by the *Rooker-Feldman* doctrine and their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *See Bell v. City of Boise*, 834 F. Supp. 2d 1103, 1109-10 (D. Idaho 2011). The Ninth Circuit reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013).

On remand, the district court once again entered summary judgment in favor of petitioner. This time, the court held that respondents' Section 1983 claims should be dismissed pursuant to this Court's opinion in *Heck v. Humphrey*, 512 U.S. 477 (1994), which ordinarily bars a plaintiff from recovering damages under § 1983 if that judgment "would necessarily imply the invalidity of his conviction or sentence," *id.* at 487. *See* Pet. App. 43a. The district court concluded that granting either retrospective or prospective relief to respondents would necessarily invalidate their prior criminal convictions, and thus dismissed the § 1983 claims. *Id.* at 43a-44a. And while the district court concluded that *Heck* did not bar relief under the Declaratory Judgment Act, it held that respondents lacked standing to pursue that relief, because any claim for a declaratory judgment was mooted by the City's amendment to the ordinances. *Id.* at 44a. Because of that amendment,

the district court held, there was no "credible threat" that respondents would be unlawfully prosecuted under the ordinances. *Id.*

2. The Ninth Circuit reversed and remanded again. The court first rejected petitioner's argument that the 2014 amendment mooted respondents' claims for prospective relief. Although petitioner maintained that it had never enforced the ordinances when no alternative shelter was available, the court of appeals held that "there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether [respondents] face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter." *Id.* at 45a. Specifically, the Ninth Circuit noted that the City was "wholly reliant on the shelters to self-report when they are full." *Id.* at 46a. Although the court acknowledged that the BRM facilities "have never reported that they are full," the court pointed to "substantial evidence" in the record indicating that the BRM facilities "refuse to shelter homeless people who exhaust the number of days allotted by the facilities." *Id.* at 46a-47a. The court also noted that the City lacked any protocol for ensuring that the ordinance is not enforced against a homeless person excluded from a BRM facility under this policy on a night when Sanctuary is already full. *Id.* at 48a-49a.

Furthermore, the court noted, a genuine factual dispute existed over whether even BRM's Emergency Services Program had a religious component. *See, e.g.*, *id.* at 47a (noting one respondent's testimony that he was required to attend chapel). Accordingly, the court found "facts in dispute" over whether enforcing the ordinances against an individual who could stay

only at BRM would effectively use "the threat of prosecution" to "coerce an individual to attend religion-based programs." *Id.* That outcome, under Ninth Circuit precedent, would violate the Establishment Clause. *Id.* at 47a-48a (citing *Inouye v. Kemna*, 504 F.3d 705, 712-13 (9th Cir. 2007)).

The court thus held that even if "BRM's facilities have never been 'full,' and . . . the City has never cited any person under the ordinances who could not obtain shelter 'due to a lack of shelter capacity,' there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night" when "as a practical matter, no shelter is available." *Id.* at 48a-49a. As a result, the court concluded, respondents' claims for prospective relief were not moot.

The Ninth Circuit also found that although *Heck* barred many of respondents' requests for retrospective relief, it did not apply to respondents' claims based on "two injuries stemming from . . . dismissed citations" because "the *Heck* doctrine has no application" when "there is no 'conviction or sentence' that may be undermined by a grant of relief to the plaintiffs." *Id.* at 55a. The majority also held that *Heck* did not apply to respondents' claims of prospective relief. *Id.* at 57a-58a.[3]

3. Turning to the merits of respondents' claim, the Ninth Circuit framed the question as whether "the Cruel and Unusual Punishments Clause of the

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[3] Judge Owens agreed with the majority of the court's analysis, including "the majority's Eighth Amendment analysis," but would have found that *Heck* barred respondents' claims for prospective relief. Pet. App. 66a. Petitioner has not challenged the majority's holding on that issue in its petition to this Court.

Eighth Amendment preclude[s] the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter?" *Id.* at 58a-59a. The court answered that question in the affirmative, holding that the government cannot charge homeless individuals with a crime "for lacking the means to live out the 'universal and unavoidable consequences of being human.'" *Id.* at 63a.

The Ninth Circuit began by noting that in *Robinson*, this Court held that a "statute that 'ma[de] the "status" of narcotic addiction a criminal offense' [was] invalid under the Cruel and Unusual Punishments Clause." *Id.* at 59a. The court then went on to discuss *Powell v. Texas*, 392 U.S. 514 (1968), in which the Supreme Court considered the application of *Robinson* to an individual's conviction for public intoxication. In that case, the Ninth Circuit noted, a four-Justice plurality voted to affirm the individual's conviction, distinguishing *Robinson* "on the ground that the Texas statute made criminal not alcoholism but *conduct*." Pet. App. 60a. The Ninth Circuit found that in providing the decisive fifth vote, Justice White had cautioned that an individual who could show it was "impossible" to avoid conduct resulting from a status protected by *Robinson* might be able to assert a defense under the Eighth Amendment. The panel finally noted that the dissenting Justices agreed with that principle.

Consistent with the lessons of those cases, the Ninth Circuit held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.* at 62a. The court explained that, whether those activities "are defined as acts or conditions, they are

universal and unavoidable consequences of being human." *Id.* (citation omitted). "[J]ust as the state may not criminalize . . . being 'homeless in public places,' the state may not criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets" when there is no place else to go. *Id.* (citation omitted).

The court was careful to emphasize that its "holding" was "narrow." *Id.* The court explained that its decision "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless," *id.* (citation omitted), nor does it prohibit "criminaliz[ing] the act of sleeping outside," *id.* at 63a n.8. Instead, the opinion simply prohibits the "enforcement" of the ordinances in the limited circumstance where a homeless person truly has no place else to go. *Id.* at 58a-59a. It "does not cover individuals who do 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, but who choose not to use it." *Id.* at 62a n.8. And "[e]ven where shelter is unavailable," a city could prohibit sleeping or camping "at particular times or in particular locations," and could likewise "bar[] . . . the erection of certain structures." *Id.* at 63a n.8. As the court explained, "[w]hether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human.'" *Id.* (citation omitted).

Accordingly, the Ninth Circuit reversed and remanded for further proceedings. Petitioner did not petition for rehearing or rehearing en banc as to the court's Eighth Amendment holding. Instead, it requested rehearing only as to whether *Heck* barred

respondents' claims for prospective relief and whether two respondents could maintain claims for damages with respect to their dismissed citations.

The Ninth Circuit requested supplemental briefing on the Eighth Amendment issue. Following that briefing, the Ninth Circuit denied en banc review.

REASONS FOR DENYING THE PETITION

I. PETITIONER FUNDAMENTALLY MISCHARACTERIZES THE DECISION BELOW

1. Petitioner asks this Court to grant review of the question whether "the enforcement of generally applicable laws regulating public camping and sleeping constitute[s] 'cruel and unusual punishment' prohibited by the Eighth Amendment of the Constitution." Pet. i. That Question Presented conspicuously omits the central limitation contained in the opinion below: that enforcement is prohibited only as applied to a person "when no alternative shelter is available to them." Pet. App. 36a. As the Ninth Circuit's opinion carefully explains, shelter may be "available" to a person for a number of different reasons—they may "have the means to pay for it" or it may be "realistically available to them for free," as in the case of a shelter. *Id.* at 62a n.8. In each of these situations, a city may validly enforce ordinances criminalizing sleeping or camping outside.

It is thus flatly untrue, as petitioner now asserts, that the decision below results in cities being unable to "enforce public-camping laws against *any* individual unless and until they provide adequate shelter space to house *all* individuals." Pet. 27. To the contrary, a city is not required to "provide" shelter

to anyone. *See* Pet. App. 62a. ("[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless . . . ." (citation omitted)). And it may continue to enforce its ordinances against homeless individuals unless "no alternative shelter is available to them." *Id.* at 36a. Moreover, even in a circumstance "where shelter is [totally] unavailable," the court's decision expressly recognizes that cities may prohibit sleeping outside "at particular times or in particular locations." *Id.* at 63a n.8.[4] The only situation where enforcement of an ordinance is barred is one that is already prohibited under current Boise law and in which the City itself has long disclaimed enforcement—where "there is no option of sleeping indoors." Pet. App. 62a.[5]

2. The petition also mischaracterizes the decision below in a second and equally fundamental way. Petitioner asserts that the decision below holds that "the Constitution exempts from generally applicable criminal laws *any* conduct that is purportedly involuntary." Pet. 13 (emphasis added); *see also id.* at 19 (asserting a conflict over the "question whether involuntary conduct can *ever* be punished consistent

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[4] Similarly, it is unclear how petitioner arrives at the bizarre conclusion that the decision below will prevent it from enforcing laws against "public defecation and urination." Pet. 4. Petitioner does not contend there are no accessible public restrooms within the City of Boise.

[5] Notwithstanding the text of the ordinances, respondents pointed to substantial evidence below that the City, in fact, enforces the ordinances even in cases in which an individual lacks available shelter, as because they have exceeded BRM's stay limits, or due to BRM's policy of barring for 30 days an individual who finds alternative shelter for even one night. *See, e.g.*, Pet. App. 47-49a.

with the Cruel and Unusual Punishment Clause" (emphasis added)).

But nothing in the court's opinion remotely suggests that *all* "purportedly involuntary" conduct is immune from punishment. Rather, "[n]othing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter." Pet. App. 4a. Sleeping outside in that specific circumstance, the court stressed, is a "universal and unavoidable consequence[] of being human." *Id.* at 62a (citation omitted). *Any* human being would find it "impossible" to comply with an anti-sleeping ordinance when they have no access to shelter. The opinion thus does not extend to—and says nothing about—other contexts where an individual might "purport[]" that his actions are "involuntary," but the relevant action is not a "universal and unavoidable consequence of being human."

Properly understood, therefore, the decision below is limited in scope. Indeed, it places *no* additional constraint on petitioner beyond that already codified under its own municipal law.

II. THERE IS NO CONFLICT WARRANTING THIS COURT'S REVIEW

The decision below recognizes that it would be cruel and unusual to criminally punish a homeless person who violates the law simply because he engages in the biologically compelled activities of sitting, lying or sleeping outside when he has no place else to go. That result reflects basic common sense, is consistent with this Court's precedent, and creates no conflict in authority with any court of appeals or state court of last resort.

A. The Decision Below Does Not Conflict With This Court's Precedent

1. In *Robinson v. California*, 370 U.S. 660 (1962), this Court established that laws that criminalize an individual's "status" violate the Eighth Amendment, and accordingly struck down a law that criminalized the status of addiction. Six years later, in *Powell v. Texas*, 392 U.S. 514 (1968), the Court considered whether *Robinson* extended to the criminalization of public intoxication. In a fractured opinion, a four-member plurality concluded that *Robinson* did not apply to conduct, and thus did not bar a city from criminalizing the act of being drunk in public. *Id.* at 531-37; *id.* at 541-44 (Black, J., concurring).

Justice White provided the decisive fifth vote to affirm the conviction at issue. In his view, the plurality erred to the extent it believed that *Robinson* was categorically inapplicable to conduct. As Justice White explained, it makes 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." *Id.* at 548 (White, J., concurring in the result). As a result, he concluded that the Eighth Amendment may impose certain limits on the state's ability to punish individuals for conduct that was "impossible" to avoid. *Id.* at 551. Justice White concurred in the judgment, however, because he did not believe that the defendant's conduct in the case before him was "impossible" to avoid. *Id.* at 552.

The four-member dissent would have reversed the conviction at issue. But it agreed with Justice White that criminal penalties could not be imposed on an individual for conduct that is impossible to avoid.

Powell, 392 U.S. at 567-68 (Fortas, J., dissenting). As petitioner acknowledges (at 17), therefore, the plurality's contrary view did not command a majority of this Court.

2. Petitioner inexplicably asserts that "[t]he Ninth Circuit's decision cannot be reconciled with *Robinson* or the plurality or concurring opinions in *Powell*," because it involves regulation of "conduct" not "status." Pet. 16. But neither *Robinson* nor *Powell* remotely suggest that the Eighth Amendment is categorically inapplicable to laws that purport to criminalize "conduct."

While *Robinson* recognizes that status crimes violate the Eight Amendment, nothing in that opinion *limits* the scope of the Eight Amendment to such crimes. Nor did anything in *Robinson* purport to draw a bright-line distinction between crimes that penalize status and those that penalize innocent "conduct" that is an unavoidable by-product of a person's status, such as "sitting, lying, or sleeping" while being homeless. Pet. App. 62a (citation omitted).

This case underscores why. Pursuant to *Robinson*, the Constitution does not permit—and petitioner does not argue—that a city could make it a crime simply to be homeless. But a law that criminalizes sleeping outside the home when an individual has no alternative shelter available to him is no different—it merely adds a universal, unavoidable, and entirely innocent act to a "crime" that is otherwise defined purely by status.[6] Indeed, because a homeless

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[6] That is in stark contrast to, for example, criminalizing actions—like drug use or downloading child pornography—that are neither innocent, nor "universal and unavoidable consequences of being human."

individual cannot lawfully sleep on someone's private property, a law that also criminalizes sleeping on public property when no alternative shelter is available is tantamount to making it a crime simply to sleep while being homeless. As Judge Wilkinson recently acknowledged, laws that seek "to punish persons merely for their need to eat or sleep, which are essential bodily functions," offend "*Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *See infra* at 24.

Because five Justices in *Powell* would have held that an individual cannot be criminally punished for conduct that is impossible to avoid, that decision likewise supports the decision below. *See, e.g., United States v. Jacobsen*, 466 U.S. 109, 115-17 (1984) (relying on dissenting and concurring opinions constituting a majority to derive the rule in *Walter v. United States*, 447 U.S. 649 (1980)); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 16-17 (1983) (holding that *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655 (1978), did not overrule the "*Colorado River* test" because *Will*'s four dissenting Justices agreed with the concurring opinion that the test remained in effect).

At an absolute minimum, however, one cannot reasonably maintain that either *Robinson* or *Powell* is "irreconcilable" with the Ninth Circuit's decision. Pet. 12. Accordingly, there is no conflict with this Court's precedent warranting the Court's review.

B. The Asserted Circuit Conflict and Conflict With The California Supreme Court Are Illusory

Petitioner next asserts a conflict between the decision below and decisions of the California Supreme Court and the Eleventh, First, and Seventh Circuits. Those supposed conflicts rely on twisting both the scope of the Ninth Circuit's holding and the decisions with which it purportedly conflicts. Properly understood, there is nothing even approaching a conflict warranting this Court's review.

1. Petitioner first asserts a conflict between the decision below and the California Supreme Court's decision in *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995). But *Tobe* involved *only* a "facial challenge" to ordinances barring camping and storage on public property. The court in *Tobe* made clear that it was "consider[ing] only the text of the measure itself, not its application to the particular circumstances of an individual," *id.* at 1152, and, accordingly deemed "irrelevant" "any allegations identifying the [challengers] as . . . involuntarily homeless" or showing that the "violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable," *id.* at 1157. Instead, the only question addressed by the court was whether "there were *no circumstances* in which the ordinance could be constitutionally applied," *id.* (emphasis added), and thus a "total and fatal conflict" between the ordinances and the Eighth Amendment, *id.* at 1152 (citation omitted). In that posture, the court held that the ordinances were not invalid on their face, because there were circumstances in which they could be lawfully enforced.

That unremarkable holding fully accords with the decision below. Unlike in *Tobe*, the court here considered an "as applied" challenge to the ordinances, and held that their enforcement was impermissible when "homeless plaintiffs do not have a single place where they can lawfully be." Pet. App. 63a (citation omitted). Nothing in the Ninth Circuit's decision purported to find the ordinances unconstitutional on their face. Indeed, not only did the court acknowledge that there are many circumstances where Boise's ordinances may be constitutionally applied, *id.*, the *only* circumstance in which the Ninth Circuit held they may not is already prohibited by the facial terms of the ordinances themselves. The dispute between the parties here therefore has nothing to do with the facial validity of the ordinances at all, only the manner in which they are enforced—an issue *Tobe* expressly declined to address.[7]

There is thus no inconsistency whatsoever between *Tobe* and the decision below.

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[7] Petitioner also asserts (at 20) a conflict with the decision of a California intermediate court in *Allen v. City of Sacramento*, 183 Cal. Rptr. 3d 654 (Ct. App. 2015). This Court generally does not review purported conflicts with the state intermediate courts. *See* Sup. Ct. R. 10 (review limited to conflicts with a "state court of last resort"). And, in any event, the *Allen* plaintiffs did "not allege why [they] had no shelter" and "elected not to file a second amended complaint" explaining why shelter was not practically available to them. 183 Cal. Rptr. 3d at 670. Accordingly, unlike here, it could not be discerned from the complaint in *Allen* whether plaintiffs had "access to adequate temporary shelter [either] because they have the means to pay for it or because it is realistically available to them for free." Pet. App. 62a n.8.

2. There is likewise no conflict between the decision below and the Eleventh Circuit's opinion in *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), *cert. denied*, 532 U.S. 978 (2001).

As the Ninth Circuit itself explained (at Pet. App. 63a n.9), in *Joel* there was "unrefuted evidence" of available space at shelters at the time when plaintiffs were penalized, and evidence that "no individual had been turned away" from those shelters. *Id.* at 1362. "Consequently," the Eleventh Circuit stressed, the case was "distinguishable" from those where an ordinance "criminalizes involuntary behavior." *Id.* *Joel* thus stands for the modest proposition that a city "is constitutionally allowed to regulate where 'camping' occurs, [when] the availability of shelter space means that [homeless individuals have] an *opportunity to comply with the ordinance*." *Id.* (emphasis added). That holding in no way conflicts with the decision below, which expressly does "not cover individuals who"—as in *Joel*—"have access to adequate temporary shelter." Pet. App. 62a n.8.

Petitioner insists that *Joel* in fact establishes a broad rule that the Eighth Amendment does not apply to any law which "target[s] conduct." Pet. 20. But if the Eleventh Circuit intended such a sweeping rule, it would have had no need to "distinguish[]" *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992), and *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd and vacated on other grounds*, 61 F.3d 442 (5th Cir. 1995), on the grounds that "the lack of sufficient homeless shelter space in those cases . . . made sleeping in public involuntary conduct." 232 F.3d at 1362. Nor would the court have needed to discuss—and rely upon—"unrefuted evidence" of the availability of shelter as a basis for its decision. *Id.*

In any event, the fact that *Joel* expressly distinguished the circumstance addressed in the decision below alone precludes the possibility of a circuit conflict.

3. Because petitioner cannot point to a genuine circuit split concerning the actual holding at issue, it attempts to cobble together a conflict by suggesting that the decision below somehow clashes with decisions of the First and Seventh Circuit, holding that the Eighth Amendment does not preclude incarceration for drug use or child pornography. That effort fails.

These asserted circuit splits are entirely premised on mischaracterizing the Ninth Circuit's decision as holding that all "purportedly involuntary conduct" is "categorically exempt[]" from generally applicable criminal laws. Pet. 12. But the Ninth Circuit held no such thing. As discussed above, nothing in the opinion extends to the situation where an individual claims he cannot comply with a law because he has an internal compulsion to violate it. Instead, the Ninth Circuit was careful to limit its holding to those who are penalized for activity that is simply the "'universal and unavoidable consequence[] of being human'"—such as sleeping outside when one has "no option of sleeping indoors." Pet App. 62a-63a (citation omitted).

Taking drugs and downloading child pornography are *not* "universal and unavoidable consequences of being human," and it borders on the absurd to suggest that a subsequent panel in the Ninth Circuit will feel itself bound by the decision below to invalidate any such convictions. Indeed, in the time since the decision below, numerous opinions in the Ninth Circuit have affirmed drug and child pornography

convictions without even a hint that those convictions may implicate the Eighth Amendment.

The fact that petitioner resorts to drumming up these purported "conflicts" with the First and Seventh Circuits only underscores the absence of any genuine division of authority amongst the circuits.

4. Finally, petitioner asserts (at 23-25) a conflict with the Fourth Circuit's recent en banc decision in *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019). In *Manning*, the Fourth Circuit addressed a law significantly different to one here, which criminalized the possession of alcohol by individuals who had been placed under a civil interdiction order for drunk driving or habitual drunkenness. In the majority's view, the plaintiffs stated an Eighth Amendment claim by alleging that that statutory scheme as applied to them criminalized conduct that was "an involuntary manifestation of their illness, and that [wa]s otherwise legal for the general population." *Id.* at 283.

Petitioner asserts that *Manning* is "narrower" than the decision below because it only prohibits laws which "target a specific subset of the population" and punishes those people for their "otherwise legal behavior" Pet. 24-25. By contrast, petitioner asserts, "the ordinances here are generally applicable criminal laws" and therefore outside the scope of the Eighth Amendment. *Id.* at 25.

Petitioner's argument is a non-sequitur. Nothing about *Manning* purported to hold that laws of general applicability are categorically immune from Eighth Amendment scrutiny. Such a holding would be irreconcilable with *Robinson* itself, which invalidated just such a law. Indeed, despite their deep

disagreement over the case before them, *both* the majority and dissent in *Manning* appeared to agree with the result in this case.

The majority noted that, "[i]f the statute challenged in *Robinson* had instead allowed California to . . . arrest [prescription drug] addicts for filling [their] prescriptions, the statute *effectively* would also have criminalized 'being addicted to narcotics' even if it *nominally* punished only filling prescriptions." *Manning*, 930 F.3d at 283. "Such a statute," the majority explained, "would surely be just as unconstitutional as the statute in *Robinson*, and for precisely the same reasons." *Id.* That reasoning fully accords with the Ninth Circuit's recognition that punishing someone for sleeping outside, which is the "universal and unavoidable" consequence of being homeless, is no more permissible than punishing homelessness itself. Clearer still, the majority cited the decision below, and said it "arrived at the same conclusion we reach here." *Id.* at 282 n.17.

The principal dissent, meanwhile, acknowledged that in "the rare case where the Eighth Amendment [has been] found to invalidate a criminal law, the law in question sought to punish persons merely for their need to eat or sleep, which are essential bodily functions." *Id.* at 290 (Wilkinson, J., dissenting); *see id.* ("For plaintiffs, resisting the need to eat, sleep or engage in other life-sustaining activities is impossible." (quoting *Pottinger*, 810 F. Supp. at 1565)). Far from criticizing such results, the dissent described such outcomes as "simply a variation of *Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *Id.*

Petitioner thus utterly fails to explain how the governing rules in the Ninth and Fourth Circuits would lead to opposing results in any case. Both the majority and dissent in *Manning* suggested that the result in this case accords with *Robinson*. *Manning* thus creates no division in authority warranting this Court's review.

III. THE PETITION DRAMATICALLY EXAGGERATES THE SCOPE AND CONSEQUENCES OF THE DECISION BELOW

Because there is no relevant conflict in authority, Petitioner and its amici place heavy emphasis on policy. Their pitch to this Court is, in effect, that the policy ramifications of this case are so significant that the Court should depart from its traditional criteria for certiorari and grant review absent any conflict. But petitioner's policy concerns are dramatically overstated. And, petitioner conspicuously offers no defense of the only policy *actually* prohibited by the Ninth Circuit's decision: that of citing or imprisoning individuals who sleep outside when they have no access to shelter. Instead, petitioner rests exclusively on highly speculative assertions about how the decision below will affect other laws in other contexts and in other cities. This Court's intervention on the basis of that conjecture is unwarranted.

1. As discussed above, the decision below prohibits a city from enforcing its ordinances in one—and only one—situation: where it punishes a homeless person for sleeping, lying or sitting outside when he has no place else to go. That holding imposes *no* additional restriction on petitioner beyond that provided by the City's own law, which already

purports to prohibit enforcement of the ordinances when "there is no available overnight shelter." Boise City Code §§ 5-2-3(B)(1), 7-3A-2(B). Indeed, petitioner itself attested before the Ninth Circuit that the decision below "raises little actual conflict" with the City's ordinance and enforcement. Appellee's CA9 Supp. En Banc Br. 2. Furthermore, throughout this litigation, petitioner has maintained that it has *never* enforced the ordinances against individuals who have no access to shelter, and has no intent to ever do so.

That is for good reason. Despite their sky-is-falling protestations, petitioner and its amici fail to provide a single practical example of where a municipality would benefit from the ability to cite or imprison a homeless person who lacks any alternative but to sleep outside. Sleeping outside is a biological necessity for those who cannot obtain shelter. And a city that criminalizes both sleeping on private property *and* public property when no alternative shelter is available leaves a homeless individual who cannot obtain shelter with no capacity to comply with the law. As the author of the panel opinion explained, therefore, taking such individuals to jail "is both unconstitutional . . . and, in all likelihood, pointless." Pet. 5a.

There is simply no penological goal accomplished by arresting and imprisoning, at public expense, an individual for entirely innocent conduct that is a "universal and unavoidable consequence[] of being human"—when there is no shelter available to that individual. Pet. App. 62a (citation omitted). To the contrary, it has been widely recognized that, instead of reducing the factors that contribute to homelessness, imprisonment in such circumstances only exacerbates the very policy concerns on which

petitioner advances, by making it more difficult for indigent individuals to break out from homelessness, while imposing further burdens on scarce public resources. *See* Letter from Lisa Foster (Director, Office for Access to Justice, U.S. Dep't of Justice) to Seattle City Council Members at 3 (Oct. 13, 2016), https://assets.documentcloud.org/documents/3141894/DOJ-ATJ-Letterto-Seattle-City-Council-10-13-2016.pdf (explaining that "criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back" and "is both unconstitutional and misguided public policy, leading to worse outcomes for people who are homeless and for their communities" (citations omitted)); *Pottinger v. City of Miami ("Pottinger II")*, 359 F. Supp. 3d 1177, 1180-81 (S.D. Fla. 2019) (noting City of Miami's view that "arresting the homeless is never a solution because, apart from the constitutional impediments, it is expensive, not rehabilitating, [and] inhumane").[8]

Petitioner does not seriously dispute any of this. Indeed, the clearest evidence that the City does not, in fact, believe it is an effective or advisable policy to punish homeless people who have no alternative shelter is its own amendment barring enforcement in precisely that situation.

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[8] By contrast, abandoning efforts to criminalize sleeping outside in favor of more effective (and constitutionally permissible) tools promotes superior outcomes. Following *Pottinger II*, the city of Miami, Florida abandoned the criminalization of sleeping outside when no shelter was available, in favor of a shift to better solutions. Two decades later, the county's homeless population has fallen by 90%. *Pottinger II*, 359 F.3d at 1180-81.

Finally, the limited practical consequence of the decision below is further illustrated by the fact that the City has only issued a few dozen citations under the ordinances in the last 24 months. All of those citations, according to petitioner, were in compliance with its policy prohibiting enforcement against individuals who have no access to shelter. Hence, if petitioner is being truthful, none of even those few dozen citations are at all implicated by the decision below. Not even petitioner points to a *single citation* it has issued under the ordinances which it would be prohibited from issuing based on the decision below.

2. Unable to contest the only actual restriction imposed by the decision below, petitioner and its amici resort to exaggerated, slippery-slope speculation regarding the effect that the decision will have on *other* laws and enforcement contexts. None are persuasive.

First, petitioner asserts that the decision below will prohibit cities from ever "enforc[ing] public-camping laws against *any* individual" and will "create a de facto constitutional right to live on public sidewalks and in public parks." Pet. 27. That is simply untrue. The opinion makes clear that the City remains free to enforce the ordinance against any "individual[] who do[es] 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." Pet. App. 62a n.8. And "[e]ven where shelter is unavailable," the City can impose anti-camping provisions so long as they are limited to "particular times or in particular locations." *Id.* at 63a n.8. The decision below thus does not deprive the City of a single tool that it presently has to combat homelessness under existing law.

Second, petitioner extraordinarily spends a full five pages of its petition describing the hazards of "public encampments." But the opinion below expressly states that it does *not* prohibit enforcement of criminal laws restricting "erection of certain structures" nor does it bar ordinances restricting sleeping outside "in particular locations." *Id.* Nor does the opinion have any effect on a city's ability to use *civil* enforcement measures, including health and safety laws, to regulate the sites of public encampments. The decision below thus leaves cities with a powerful toolbox to address encampments—aside from imprisoning each and every person therein on a night when they have no place else to go.

Finally, petitioner and its amici speculate that the opinion's purported imprecision will leave cities "unable or unwilling" to take measures addressing homelessness "out of fear of substantial liability." Pet. 34. But, again, there is no reason to believe that will be so. A police officer who applies the decision below in good faith is likely to be protected by qualified immunity from her judgment. *See Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law"). And a municipality itself is unlikely to face liability unless it adopts a "policy or custom" of citing or imprisoning homeless individuals when there is no place else to go. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Hence, there should be no concern of liability—let alone "substantial liability"—for any municipality that makes systematic, good-faith efforts to ascertain the availability of shelter and does

not knowingly cite or imprison individuals who have no alternative but to sleep outside.[9]

Instead, the primary context in which the decision below will apply will be as a constitutional limitation in criminal enforcement actions. The availability of a defense that might prevent a homeless indigent person from being fined or imprisoned for conduct that is impossible to avoid should in no way "paralyze" any city in its efforts to curb the harms associated with homelessness.

In any event, to the extent that petitioner is concerned it does not know how the Ninth Circuit's ruling applies to each and every new factual scenario, that is not an objection to the decision below, but to how all rules of law develop within our system. Some degree of uncertainty attends every new legal rule, but this Court's ordinary practice is to await the contours of that rule to be elucidated in subsequent cases—not to prematurely intervene because of purported uncertainty about what the results *might* be in circumstances not presented by the cases before it. *See Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) ("Prudence" dictates "awaiting . . . the benefit of . . . lower court opinions squarely addressing" an issue before this Court intervenes.).

And it is disingenuous for petitioner to suggest that it will be "paralyzed" from acting in the interim. Pet. 33-34. Governmental entities routinely act without perfect clarity about how a legal rule might

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[9] The "shelter protocol" here, by contrast, is an example of a plainly inadequate mechanism for ensuring compliance, given that it results in continuous enforcement of the ordinances even in circumstances where shelter may be unavailable for a particular individual, such as because of stay limits.

be applied in novel situations. Police are not, for example, "paralyzed" from engaging in all searches and seizures because the text of the Fourth Amendment is not written like a detailed civil law code. The City's purported anxiety about how the decision below might be applied in other situations is thus overblown and, at most, a reason for this Court to wait for those situations to actually materialize before intervening.

IV. THIS CASE IS AN EXCEPTIONALLY POOR CANDIDATE FOR THIS COURT'S REVIEW

As shown above, there is no conflict between the decision below and this Court's cases or those of other circuit courts. And the Ninth Circuit's narrow holding does not remotely produce the parade of horribles on which petitioner relies. Those are more than sufficient grounds to deny the petition. Review should also be denied, however, because this case represents an especially bad vehicle for the court's review.

First, petitioner is not well placed to bring the challenge it presently brings. The decision below holds only that the Eighth Amendment prevents the criminalization of sleeping outside where there is no available shelter. But, as discussed above, Boise amended its law in 2014 to forbid the enforcement of its anti-camping and disorderly conduct ordinances in that scenario. *See* Boise City Code §§ 5-2-3(B)(1), 7-3A-2(B) ("Law enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter."). And the City has repeatedly *disclaimed* any intent to enforce the ordinance against a person who has no alternative but to sleep outside.

To be sure, respondents presented substantial evidence below that the City continues to criminalize sleeping outside as applied to those for whom no shelter is available. But the fact that Boise *itself* purports to follow the letter of the decision below makes this a poor candidate for review.

Second, the parties contested respondents' standing to bring their claims for prospective relief before the court of appeals. Although respondents prevailed (and rightly so), granting certiorari could embroil this Court in a highly fact-intensive, preliminary jurisdictional inquiry before reaching the merits. The presence of a fact-dependent threshold question, which may in fact prevent the Court from addressing the merits of the question presented, counsels against the Court's review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Furthermore, potentially enmeshed in that standing inquiry is a further constitutional question—whether petitioner may compel an individual to accept shelter in a self-described "pervasively religious" shelter on pain of criminal sanction. *See* BRM Br. 35, *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 637 F.3d 988 (9th Cir. 2011) (No. 10-35519), ECF No. 23-1. The Ninth Circuit noted, consistent with its precedent, that "[a] city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment." Pet. App. 47a-48a. That was an important premise supporting the Ninth Circuit's conclusion that there is federal jurisdiction over respondents' claims for

prospective relief. To assure itself of jurisdiction over those claims, therefore, this Court might well have to address this substantial question of First Amendment law. That strongly counsels in favor of awaiting a vehicle which does not present such a threshold complication.

Third, the interlocutory posture of this case counsels against review. The petition argues (at 32-33) that "the rule imposed by the Ninth Circuit . . . is ill-defined" and "rais[es] more questions than it answers." Pet. 33. Respondents disagree. But even crediting petitioner's view, it would merely underscore that this Court's review is premature absent further development and application of the decision below. It is hardly uncommon for a court's legal decision to leave certain questions of application to future cases; but that makes the decision less appropriate for certiorari, not more.

At minimum, the Court should await a final judgment reflecting a fully developed factual record, rather than issue a detailed decision about whether the court below was correct on the basis of contested facts. Moreover, the court's review of any standing questions will be particularly complicated at this interlocutory stage of the case, because the Court would be forced to review the voluminous summary judgment record *de novo* rather than after clear factual findings at trial.

And petitioner's extensive reliance on the impact of the decision below on *other* laws and enforcement contexts further counsels in favor of denying review at this early juncture. Whatever else is true, the dire consequences predicted by petitioner and its amici are necessarily speculative. Awaiting final judgment—or

a later vehicle—will at least afford time to better consider the actual impact of the decision below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL E. BERN
Counsel of Record
SAMIR DEGER-SEN
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
michael.bern@lw.com

HOWARD A. BELODOFF
IDAHO LEGAL AID
SERVICES, INC.
1447 So. Tyrell Lane
Boise, ID 83706

MARIA FOSCARINIS
ERIC S. TARS
TRISTIA BAUMAN
BRANDY RYAN
NATIONAL LAW CENTER
ON HOMELESSNESS &
POVERTY
2000 M Street, NW
Suite 210
Washington, DC 20036

Counsel for Respondents

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