No. 03-5554

IN THE
Supreme Court of the United States

LARRY D. HIIBEL,
Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, AND THE HONORABLE RICHARD A. WAGNER, DISTRICT JUDGE
Respondents.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF OF NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NATIONAL COALITION FOR THE HOMELESS, JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW, NATIONAL ALLIANCE TO END HOMELESSNESS, NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL, AND NATIONAL COALITION FOR HOMELESS VETERANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Amici will address the following question:

Whether laws that require individuals to identify themselves during *Terry* stops violate the Fourth Amendment particularly in light of the unreasonable burdens such provisions inflict upon homeless individuals.

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INTERESTS OF *AMICI CURIAE*

The National Law Center on Homelessness & Poverty ("NLCHP") is a not-for-profit organization based in Washington, D.C., established to address issues related to

homelessness and poverty at the national level.[1] Poor and homeless people are frequently without effective political voice or power. NLCHP works with groups throughout the country to ensure that the constitutional and statutory rights of homeless families and individuals are protected and that laws are not selectively enforced against them.

NLCHP monitors and advocates nationally against local laws that "criminalize" homelessness by making it a crime to perform life-sustaining activities in public areas. To date, NLCHP has published seven national reports on this topic, including surveys of the enactment and enforcement of such laws in over 50 major U.S. cities. NLCHP has challenged the selective enforcement of laws prohibiting the obstruction of sidewalks, jaywalking and sleeping in public spaces. Further, NLCHP has investigated state procedures that make it virtually impossible for homeless people to acquire valid identification. For example, NLCHP has surveyed the photo identification requirements in every state and has interviewed over 100 homeless service providers about the barriers that homeless people face when obtaining such identification. NLCHP has extensive experience with federal constitutional questions affecting homeless people and believes the insights derived from its experience will assist the Court.

The National Coalition for the Homeless ("NCH") is a non-profit organization and membership network of state and local homeless coalitions committed to the goal of ending homelessness through the creation of systemic and attitudinal change. NCH uses grassroots organizing, public education,

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

policy advocacy, technical assistance, and partnerships as tools to end homelessness. Concurrently, NCH works to support the civil rights of persons who are either homeless or are at risk of becoming homeless. As one component of its work in the area of civil rights, NCH helped establish the National Homeless Civil Rights Organizing Project (NHCROP), which has nine field sites in different regions of the country. In addition, NHCROP has published several reports on civil rights abuses, including two reports entitled *"Illegal to be Homeless: The Criminalization of Homelessness in the U.S."* in 2002 and 2003.

The Judge David L. Bazelon Center for Mental Health Law ("Bazelon") is a national public interest organization founded in 1972 to advocate for the rights of children and adults with mental disabilities. Bazelon has written model laws, advocated for protective legislation, and participated either as counsel or *amicus curiae* in virtually all civil cases concerning mental disability law that have come before this Court, most recently in *Olmstead* v. *L.C. ex rel. Zimring*, 527 U.S. 581 (1999), as well as in cases such as *Riggins* v. *Nevada*, 504 U.S. 127 (1992), and *Washington* v. *Harper*, 494 U.S. 210 (1990). Since 2000, Bazelon has focused increasing resources on people with mental illnesses in the criminal justice system.

The National Alliance to End Homelessness ("NAEH") is a non-profit membership organization working with the public, private and non-profit sectors to solve the problem of homelessness. NAEH's mission is to address the long-term solutions to homelessness. NAEH accomplishes this by working to direct national policy on homelessness and to increase the capacity of local organizations to deliver effective assistance. NAEH actively supports efforts to protect the constitutional rights of homeless people.

The National Health Care for the Homeless Council ("National Council") is a membership organization comprised of organizational members and hundreds of individuals who

are organized as the HCH Clinician's Network. The mission of the National Council is to help bring about reform of the health care system to best serve the needs of people who are homeless, to work in alliance with others whose broader purpose is to eliminate homelessness, and to provide support to National Council members. The National Council works closely with other service providers and advocates toward the elimination of homelessness. The National Council organizes an annual Policy Symposium that examines the impact of current and proposed public policies on homeless people, and contributes to various conferences, meetings and studies regarding health and homelessness each year. Members of the National Council serve over 350,000 homeless clients per year, and the National Council supports the protection of the constitutional rights of homeless persons.

The National Coalition for Homeless Veterans ("NCHV") is a public interest organization founded in 1990 by a group of community-based homeless veteran service providers. NCHV seeks to eliminate homelessness in the veteran community by inviting individuals and service providers to collaborate in the development of innovative, comprehensive services that will allow homeless veterans to support themselves. NCHV serves as a liaison between branches of the federal government and community-based homeless veteran service providers. NCHV aims to end homelessness among veterans by shaping public policy, educating the public, and building the capacity of service providers. NCHV shares the goal of protecting the civil rights of homeless people.

STATEMENT OF FACTS

Under Nevada Revised Statute section 171.123, an officer may detain an individual based on "circumstances which reasonably indicate" the commission of a crime. Nev. Rev. Stat. 171.123(1). While an individual is so detained, Nevada allows the officer to demand the individual identify himself.

Id. 171.123(3) ("The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself …").

Petitioner Larry Hiibel was stopped by a Humboldt County, Nevada police officer, who was investigating a battery complaint. See *Hiibel* v. *Sixth Judicial District Court ex rel. County of Humboldt*, 59 P.3d. 1201, 1203 (Nev. 2002). Acting upon a reasonable suspicion of criminal activity, the officer demanded that Mr. Hiibel identify himself on eleven separate occasions. *Id.* Mr. Hiibel refused to provide identification upon these requests. *Id.* Eventually the officer arrested him for delaying a police officer pursuant to Nev. Rev. Stat. 199.280 based on his failure to identify himself. *Id.* Mr. Hiibel was convicted of obstructing and delaying the police officer based on his failure to identify himself. *Id.* He was not tried on any other charge.

Squarely at issue then is the right of an individual to be free from mandatory identification requirements when detained by police officers pursuant to a *Terry* stop. The perspective of homeless people on such requirements is particularly relevant given that they must conduct much of their everyday living in public places and thus are less able to avoid contact with the police. Virtually every major U.S. city has criminalized the public performance of activities that many homeless people must perform in public, such as sleeping, sitting and eating. As a result, homeless people are often stopped by the police for such everyday activities. In addition, many states impose permanent address requirements that make it virtually impossible for homeless people to obtain identification documents. Allowing the law at issue here to stand would thus have particularly harsh consequences for homeless people. Already more likely to be stopped by police, homeless people would face not only greater privacy intrusions, but also a requirement that their situation makes extremely difficult for them to meet.

Homeless People Must Constantly Be In Public.

It is an obvious yet critical truth that homeless people are out in public more often than the general population, and consequently are uniquely and constantly exposed to the significant police power to regulate behavior in public places. Indeed, the McKinney-Vento Act[2] defines homeless people as "individual[s] who lack[] a fixed, regular, and adequate nighttime residence" and whose "primary nighttime residence … is … a supervised publicly or privately operated shelter designed to provide temporary living accommodations" or "a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings." 42 U.S.C. § 11302(a).

The number of people affected by this problem is not insignificant. While it is difficult to measure the total number of homeless people in this country, most estimates place the number of homeless people on any given day at between 500,000 and 750,000, and the number of homeless people throughout the year at anywhere between 1.5 million and 3.75 million. Ann Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 Hous. L. Rev. 211, 268 (2003); Martha Burt et al., *Helping America's Homeless: Emergency Shelter or Affordable Housing?* 49-50 (2001).

The causes of homelessness are complex, but the vast majority of homeless people is living in public involuntarily. Indeed, the most apparent reason why homeless individuals are forced to live in public is the lack of affordable housing,

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[2] The McKinney-Vento Homelessness Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987), is a comprehensive attempt to address the social service and legal needs of homeless individuals, including the needs for shelter, food, health care, housing and education. *See* 42 U.S.C. §§ 11301-11489.

although several other factors frequently contribute to the circumstances that force people into homelessness.[3]

America's cities face a growing gap in the availability of temporary shelter – a situation that forces homeless people to live involuntarily in public space. On any given night there are at least as many people sleeping on the street as there are sleeping in shelters. See James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 Am. J. of Orthopsychiatry 320, 323 (1995). A survey of 50 of the largest cities in the United States found that not one had enough shelter spaces for the number of homeless people in that city on any given day.[4] This crisis is desperate and getting worse; the 2002 report of the U.S. Conference of Mayors based on a 25-city survey estimated that requests for emergency shelter had increased by 19 percent since 2001, with 88 percent of cities reporting an increase. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2002: A 25-City Survey* ii (Dec. 2002). Any doubts as to the involuntary nature of homelessness are dispelled by the fact that, of the number of homeless people requesting emergency shelter in

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[3] NLCHP, *Out of Sight – Out of Mind* i (Jan. 1999) ("*Out of Sight – Out of Mind*"); Nat'l Coalition for the Homeless, *Illegal to be Homeless: The Criminalization of Homelessness in the United States* 11 (Aug. 2003) ("*Illegal to be Homeless*") (discussing decrease in affordable housing for low-income individuals). Other causes cited for homelessness, in order of frequency, include mental illness, substance abuse, low paying jobs, domestic violence, unemployment, poverty, prison release, downturn in the economy, limited life skills, and changes and cuts in public assistance programs. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2002: A 25-City Survey* ii (Dec. 2002).

[4] *Illegal to be Homeless* at 13; *Out of Sight – Out of Mind* at 1-2. In Atlanta, there are 15,000 to 22,000 people homeless on any given night, and a maximum of 2700 beds. In Los Angeles, there are 42,000 to 77,000 people homeless on any given night and a maximum of 8300 beds. *See* Maria Foscarinis, *Downward Spiral: Homelessness and its Criminal-ization*, 14 Yale L. & Pol'y Rev. 1, 13 (1996).

the surveyed cities, 30 percent of homeless people and 38 percent of homeless families were turned away. *Id*.[5]

Many shelters, moreover, require residents to leave during the day and do not allow residents to store their belongings at the shelter.[6] Thus, many homeless people, even if able to secure shelter at night, are left with nowhere to go during the day except public places, and are forced to carry all their personal possessions with them. In 32 percent of cities, families may have to spend their daytime hours outside the shelter used at night. *Id*. at iii.

Without permanent places of residence, homeless people must regularly perform acts in public that would otherwise be done in private – behaviors that may, in and of themselves, justify a *Terry* stop. These behaviors include walking the streets at all hours of the day and night, occupying public spaces for extended periods of time, carrying large amounts of personal property, sleeping in public, and erecting and living in makeshift shelters.

Studies Of *Terry* And Homeless People.

The perspective of homeless people regarding *Terry* stops is particularly relevant because of the unique relationship of *Terry* stops and homeless people. Several factors approved by various courts for use in deciding whether a *Terry* stop is

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[5] Families experiencing homelessness account for 41 percent of the homeless population and are especially hard hit by this lack of housing. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 2002: A 25-City Survey* iii (Dec. 2002). This figure is up from 37 percent in 1999. U.S. Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities, 1999: A 26-City Survey* 2 (Dec. 1999).

[6] Office of Policy Dev. & Research, U.S. Dep't of Hous. & Urban Dev., *A Report to the Secretary on the Homeless and Emergency Shelters* 38 (1988). In addition, some shelters charge fees, usually between $3 and $10, a price that can be prohibitively expensive for those seeking accommodations. *See* Foscarinis, *supra* note 4, at 13.

appropriate make it likely that a homeless person could be justifiably stopped. These factors include: hour of the day, unusual presence, high crime area, unusual dress, unusual actions, smell, sounds, information from witnesses, personal knowledge of a suspect, and statements by a suspect.[7] Such factors, however, may indicate not only a crime but also the reality of homelessness. For example, unusual dress, unusual presence, or public presence at an odd hour of the day are all unfortunate effects of a lack of housing.

In 1999, the Office of the Attorney General in New York City began an investigation into the New York City Police Department's use of the *Terry* stop and frisk. Civil Rights Bureau, Office of the Attorney Gen. of the State of N.Y., *The New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General* (Dec. 1, 1999) ("NYC Investigation"). The results of this analysis capture the impact of *Terry* stops on homeless individuals – merely because of the circumstances of their living situation, homeless people are more likely to be subject to police officers' use of the *Terry* stop and frisk. The first phase of the investigation sought to document and describe stop and frisk practices citywide. As a part of the NYC Investigation, the first of its kind, the Office of the Attorney General reviewed approximately 175,000 "stop & frisk" UF-250 police forms. Of these 175,000 stops, in 17,853 cases (just over 10%) the suspected charge was a "Misdemeanor/Quality of Life" violation. *Id*. at tbl.I.A.5. Additionally, of the 58 behaviors most commonly cited as justifications for the *Terry* stop, many were either directly or indirectly linked to the effects of homelessness. These factors include: Suspicious Behavior

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[7] Steven L. Argiriou, *Terry Stop Update: The Law, Field Examples and Analysis*, The Quarterly Review Archive 6-8, *available at* Dep't of Homeland Sec., Federal Law Enforcement Training Center website, http://www.fletc.gov/legal/archives.pdf (last modified Aug. 5, 2003).

(Nervousness, Pacing), Suspicious Clothing, Location (Out of Place), Panhandling, Loitering, Suspected Trespassing, Trespass Affidavit Program/Clean Halls Program, Disorderly Conduct, and Loitering on Subway Platform for Extended Period. *Id*. at tbl.II.A.1.

Considerable evidence also exists that some law enforcement officials use *Terry* stops to arrest and generally harass homeless people even absent reasonable suspicion of the occurrence of a "quality of life" crime. See, *e.g., Justin* v. *City of L.A.*, No. CV0012352LGBAIJX, 2000 WL 1808426, at *8 (C.D. Cal. Dec. 5, 2000). In *Justin*, homeless individuals sought injunctive relief against the City of Los Angeles and others to prevent "'a widespread campaign of harassment and intimidation directed at' the homeless … population." *Id*. at *1. The harassment consisted of, among other behaviors, "stopping homeless individuals and demanding identification without a reasonable basis upon which to suspect that a crime had been committed." *Id*. The court granted a permanent injunction based in part on declarations from the targeted homeless people attesting to random stops, demands for identification, and threats of arrest to compel compliance with identification requests. *Id.* at *13.

Governmental Efforts To Criminalize Homelessness.

The effects of investigative stops upon homeless individuals are all the more profound because "at least thirty-nine American cities have initiated or continued policies that criminalize activities associated with homelessness." Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 Colum. J.L. & Soc. Probs. 293, 293 (1996). These "quality of life" laws, defined as laws addressing behaviors that cannot be classified as serious crimes, "spread an exceedingly wide net." Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 St. John's L. Rev. 1367, 1369 (1998). For instance, homeless individuals resting on the sidewalk could often be at least investigated for

obstructing the sidewalk.[8] These laws also make it illegal to engage in activities such as sleeping, sitting, standing, leaning, cooking or storing personal belongings – behaviors that would be lawful if conducted in a private home. Examples of these types of anti-homelessness ordinances prevent sleeping in public places,[9] camping[10] or lodging in

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[8] It is estimated that 90 percent of cities in the United States have ordinances banning the obstruction of sidewalks. *See Illegal to be Homeless* 68-71 (Aug. 2003); NLCHP, *Punishing Poverty: The Criminalization of Homelessness, Litigation, and Recommendations for Solutions* v (May 2003).

[9] Dallas, Tex., City Code § 31-13(a)(1) (it is a crime to "sleep[] or doze[] in a street, alley, park, or other public place"); Beverly Hills, Cal., City Code art. 13, § 5.6.1303, *amended by* Beverly Hills, Cal., City Ordinance 93-0-2165 (1993) (prohibits sitting, lying, or sleeping in any public places, with exceptions for physical disability, legally conducted parades, and those who are "seated on a bench lawfully installed for such purpose"); Phoenix, Ariz., City Code § 23-48.01 ("[i]t shall be unlawful for any person to use a public street … sidewalk [or] other right-of-way, for lying, sleeping or otherwise remaining in a sitting position thereon, except in the case of a physical emergency or the administration of medical assistance"); Miami, Fla., Code § 37-3 ("[i]t shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof"); Cal. Penal Code § 647(j) (prohibiting "lodg[ing] in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to [its] possession or … control").

[10] Santa Ana, Cal., City Code § 10-402, *amended by* Santa Ana, Cal., Ordinance NS-2160 (Apr. 3, 1992), makes it "unlawful for any person to camp, occupy camp facilities, or use camp paraphernalia in … (a) any street; (b) any public parking lot or public area, improved or unimproved." The statute defines "camp facilities" and "camp paraphernalia" to include "temporary shelters," "tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment." *Id*. § 10-401(b), (c). The statute also makes it unlawful to "store personal property" in any public area. *Id*. § 10-403. Under Section 43.52 of the City Code for the City of Orlando, Florida, "camping," defined to include "sleeping out-of-doors," is prohibited.

any public area,[11] or public bathing.[12] Similarly, some cities have targeted homeless people either by eliminating public spaces utilized by homeless people or by attempting to prevent homeless people from using facilities that are generally available to the public.[13]

The most egregious cases of efforts against homeless people leave no doubt as to the motivation behind such laws. For example, the City of Santa Ana, California developed what the California Supreme Court described as a "four-year effort … to expel homeless persons" and "to show 'vagrants' that they were not welcome." *Tobe* v. *City of Santa Ana*, 892 P.2d 1145, 1151 (Cal. 1995). As a part of what the trial court described as Santa Ana's "war on the homeless," police conducted sweeps in which homeless persons "were handcuffed and taken to an athletic field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location." *Id*. Some of the conduct leading to the arrests "involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking." *Id*.

Other documented anti-homeless campaigns include San Francisco's directive that police officers vigorously enforce eighteen "quality of life" crimes, an effort also known as the

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[11] Cal. Penal Code § 647(j) prohibits "lodg[ing] in any [public] building, structure, vehicle, or place … without the permission of the owner or person entitled to [its] possession or … control." N.Y. Admin. Code § 16-122(b) bars erecting "any shed, building or other obstruction."

[12] San Antonio, Tex., City Code § 22-88 prohibits bathing in any body of water in any public area of the city.

[13] In Montgomery County, Texas, for example, a commissioner's court approved a measure to put combination locks on the county building restrooms to prevent homeless people from using the facilities. Carla Rivera, *California Is 'Meanest' State for Homeless*, L.A. Times. Aug. 6, 2003, at B.8; *Illegal to be Homeless* at 49. According to a county judge, the combination would be given to anyone unless "'they walk in with a suitcase.'" *Id.*

"Matrix" program. *Joyce* v. *City & County of San Francisco*, 846 F. Supp. 843, 846 (N.D. Cal. 1994).[14] Many of these violations were transparently focused on homeless people, including prohibitions against "trespassing, . . . urinating or defecating in public, removal and possession of shopping carts, solicitation on or near a highway, erection of tents or structures in parks, obstruction and aggressive panhandling." *Id*. These efforts apparently led to over 3,000 citations issued to homeless people. *Id*. at 848.

Other similar efforts, short of outright prohibitions, have included systematic imposition of focused restrictions on the time and location of various homeless "activities."[15] Examples of such ordinances include limiting the time one can remain on a beach,[16] stand near an ATM,[17] or lie down in a public place.[18] Though many loitering statutes have been

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[14] On appeal, the Ninth Circuit found that the *Joyce* case was moot because, under the new mayoral administration, the city eliminated the official Matrix policy and dismissed many citations and warrants issued under the program. *Joyce* v. *City & County of San Francisco*, 87 F.3d 1320 (9th Cir. 1996) (table), *available at* 1996 WL 329317.

[15] Foscarinis, *supra* note 4, at 1.

[16] *See, e.g.,* Santa Monica, Cal., Mun. Code § 4.08.090, *amended by* Santa Monica, Cal., Ordinance 1738 (Apr. 26, 1994).

[17] *See* NLCHP, *No Homeless People Allowed* 33 (1994) (documenting a San Francisco ordinance which prohibited loitering within 30 feet of an ATM machine); *Clark* v. *City of Cincinnati*, No. 1-95-448, slip op. at 14 (S.D. Ohio May 22, 1995) (enjoining the city from enforcing an ordinance that criminalized soliciting funds within certain distances of some buildings, ATM machines, and crosswalks, and in all areas after 8 p.m.).

[18] Seattle, Wash., Municipal Code § 15.48.040 prohibits lying or sitting on sidewalks in downtown and neighborhood commercial areas from 7 a.m. to 9 p.m. *See Berkeley Cmty. Health Project* v. *City of Berkeley*, 902 F. Supp. 1084, 1086 (N.D. Cal. 1995) (preliminary injunction issued forbidding enforcement of ordinance that prohibited sitting or lying down on a sidewalk within six feet of the face of a building during certain hours and soliciting in certain locations or in a "coerc[ive], threaten[ing],

voided by courts as unconstitutionally vague,[19] more narrowly-drawn statutes have been upheld and remain in effect.[20]

Many States Make It Very Difficult Or Impossible For Homeless People To Obtain Identification Documents.

The process of acquiring formal identification documents can pose insurmountable obstacles for homeless persons. Many states require proof of residence as a prerequisite to obtaining identification cards.[21] Homeless persons, lacking not merely proof of residence but residence itself, are therefore unable to acquire state-issued identification. Twenty-seven states have also recently enacted rule changes or laws that increase the documentation requirements for proof of residency and other prerequisites for driver's licenses and identification cards.[22] In addition, obtaining formal

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hound[ing] or intimidat[ing]" manner), *vacated upon settlement*, 966 F. Supp. 941 (N.D. Cal. 1997).

[19] *See City of Chicago* v. *Morales*, 527 U.S. 41 (1999) (loitering ordinance void for vagueness); *United States ex rel. Newsome* v. *Malcolm*, 492 F.2d 1166, 1171-74 (2d Cir. 1974), *aff'd on other grounds sub nom. Lefkowitz* v. *Newsome*, 420 U.S. 283 (1975).

[20] *See* Paul Ades, *The Unconstitutionality of "Antihomeless" Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 Cal. L. Rev. 595, 604 (1989); *United States* v. *Cassiagnol*, 420 F.2d 868, 872-77 (4th Cir. 1970) (upholding regulation barring loitering on government property).

[21] *See, e.g.,* 67 Pa. Code § 91.4 (In order to obtain an identification card, an applicant must present proof of address, as well as supporting papers confirming identity); Va. Code Ann. § 46.2-323(B) (In order to acquire a Virginia driver's license, an applicant must "provid[e] satisfactory proof that he is a resident of the Commonwealth.").

[22] *See* Rich Stanek, *Essay: Terrorism: Minnesota Responds to the Clear and Present Danger*, 29 Wm. Mitchell L. Rev. 739, 744 (2003).

identification often requires payment of a fee, which poses special obstacles for those living in poverty.[23]

States frequently impose further burdens by having strict and circular documentation requirements that are difficult for homeless people to meet. For example, some states require a birth certificate to obtain photo identification, but require photo identification in order to obtain a birth certificate.[24] Such requirements often leave homeless people caught in the catch-22 of needing identification to acquire identification.[25]

SUMMARY OF ARGUMENT

The Fourth Amendment generally prohibits searches and seizures without probable cause. U.S. Const. amend. IV. At the heart of the Fourth Amendment lies "'the right to be let alone – the most comprehensive of rights and the right most valued by civilized men.'" *Winston* v. *Lee*, 470 U.S. 753, 758 (1985) (quoting *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

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[23] *See, e.g.,* Or. Rev. Stat. § 807.410; *see also* Oregon Driver Licensing Fees, *available at* http://www.odot.state.or.us/dmv/DriverLicensing/drfees.htm (last modified Oct. 14, 2003).

[24] *See, e.g.,* Va. Code Ann. § 46.2-345 (In order to receive a state identification card, the applicant must present a birth certificate or other acceptable evidence of his name and date of birth). Some states will accept only original or certified copies of documents. *See, e.g.,* Okla. Admin. Code § 595:10-1-3(b).

[25] Lacking any place to store possessions, homeless people also often face loss or destruction of their belongings, including their identification. *See Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1555-56 (S.D. Fla. 1992) (documenting incidents of malicious destruction of the property of homeless persons including "two burning incidents in Lummus Park in which City police officers awakened and handcuffed class members, dumped their personal possessions – including personal identification, medicine, clothing and a Bible – into a pile, and set the pile ablaze.").

Under certain circumstances, exceptions to this right have been created in light of legitimate needs of law enforcement, although even these exceptions have been circumscribed by the resulting intrusion upon individual liberty. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court recognized one such exception by allowing a police officer to conduct preliminary questioning and a search for weapons when the officer has a reasonable, articulable suspicion of criminal activity. This Court has extended that *Terry* exception to other circumstances, but it has never before questioned the right of individuals to be free not to answer the questions posed – and not to identify themselves – during pre-custodial investigation.

The right to refuse to identify oneself has been a bedrock guarantee embodied in both the Fourth and Fifth Amendments. In *Brown* v. *Texas*, 443 U.S. 47 (1979) – a case not involving reasonable suspicion – this Court expressly noted that "appellant may not be punished for refusing to identify himself." *Id*. at 53; *see also Davis* v. *Mississippi*, 394 U.S. 721, 727, n.6 (1969) ("[W]hile police have the right to request citizens to answer voluntary questions concerning unsolved crimes they have no right to compel them to answer."). Chief Justice Rehnquist recently confirmed the vitality of this rule, when he observed for the Court "the individual's right to go about his business or to stay put and remain silent in the face of police questioning," at least in the absence of reasonable suspicion. *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000). In the Fifth Amendment context, *Miranda* and its progeny likewise instruct that this right applies in the context of custodial investigation. *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Mandujano*, 425 U.S. 564, 579-81 (1976).

This Court's inquiry into the reasonableness of searches and seizures has always been properly informed by the realities faced by citizens and law enforcement personnel. Flight at the sight of the police, for instance, is treated

differently than calm retreat. Compare *Wardlow*, 528 U.S. at 125, and *Florida* v. *Royer*, 460 U.S. 491 (1983). While *Terry* itself involved fears of an armed robber, however, the ordinances used to justify *Terry* stops of homeless individuals often involve mere nuisances.

Homeless individuals are, in practice, particularly vulnerable to *Terry* stops given their unavoidable presence in public spaces. As previously noted, numerous cities across the nation have indeed criminalized conduct in which only homeless individuals routinely engage. See *supra* 10-14. Several communities have overtly directed their law enforcement to target homeless people for enforcement of "quality of life" crimes in efforts to expel homeless people. See *id.* The net result of the efforts to criminalize the activities of homeless people is to transform them into "walking reasonable articulable suspicions," rendering the "right to be let alone" an empty promise for homeless people.

Moreover, approval by this Court of a formal identity document requirement would be particularly unreasonable as applied to homeless persons because many states have requirements for obtaining identification that homeless persons cannot meet. See *supra* at 14-15. Requiring a formal means of identification to be produced by a person when such identification is practically impossible to obtain can hardly be "reasonable" within the meaning of the Fourth Amendment. Application of the rule at issue here to homeless persons, however, would have just that result.

The Nevada law at issue is also unreasonable under the Fourth Amendment in that it is vague on the central issue of the requirement to "identify himself." Is mere utterance of a name adequate? Or is the production of a state-issued identity-document required? The Nevada statute is thus infected with the same infirmity this Court identified in *Kolender* v. *Lawson*, 461 U.S. 352, 360-61 (1983).

Unless the right to refuse to identify oneself is a bright-line liberty that applies not only to *Brown* stops without reasonable suspicion and *Miranda* custodial interrogation, but also to *Terry* stops based on reasonable suspicion, it will mean very little indeed. A completely innocent average citizen – much less a poor, innocent homeless person – has no way of ascertaining whether an officer is making a request for identification to be supplied voluntarily. A constitutional principle that relies upon pervasive understanding of the nuances of the Fourth Amendment is in effect a dead letter. Such a rule would in practice eviscerate "the individual's right to go about his business or to stay put and remain silent in the face of police questioning." *Wardlow*, 528 U.S. at 125. Only a clear, bright-line freedom to remain silent when asked to identify oneself will protect the constitutional principles of the Fourth Amendment.

The perspective of homeless people on this issue is especially relevant because the justice of a rule of law should be measured by its impact upon those least able to defend themselves in the political process. Because homeless people are constantly exposed to police surveillance and because securing identification is often impossible for them, it is particularly unreasonable to allow police to demand identification from them during a *Terry* stop. Accordingly, this Court should be mindful of homeless people in assessing the proper limitations on the *Terry* exception to the Fourth Amendment.

ARGUMENT

THE FOURTH AMENDMENT PROHIBITS STATUTES THAT IMPOSE BLANKET REQUIREMENTS TO PROVIDE IDENTIFICATION DURING *TERRY* STOPS.

Nevada's identification statute exceeds the "narrowly drawn authority" recognized in *Terry* v. *Ohio*, 392 U.S. 1, 27

(1968), as an exception to the Fourth Amendment. Given the standards of *Terry* and the multitude of "quality of life" crimes cities have enacted, homeless persons have been transformed into "walking reasonable articulable suspicions." Especially in light of the pervasive use of *Terry* encounters upon homeless persons, identification statutes must be sufficiently curtailed to preserve an effective constitutional right to refuse to identify oneself to the police.

A. The Right To Refuse To Identify Oneself Is A Well-Established Liberty.

This case presents a narrow window of uncertainty within well-established liberties that restrict police investigative conduct in the face of personal privacy. The right to refuse to respond to any questions by the police is well-recognized at both ends of this spectrum: the right is clear both (1) where police lack any reasonable articulable suspicion of a criminal violation, see *Brown* v. *Texas*, 443 U.S. 47, 52-53 (1979), and (2) where police are conducting a custodial interrogation, see *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

The Court first recognized a Fourth Amendment right to refuse to provide police with identification in the absence of any reasonable articulable suspicion in *Brown* v. *Texas*, 443 U.S. 47 (1979). The appellant in *Brown* was convicted under a Texas statute that made it an offense to "'intentionally refuse[] to report or give[] a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.'" *Id*. at 49 n.1. After observing that the arresting officers "lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct," the Court reversed the conviction, making clear that "appellant may not be punished for refusing to identify himself." *Id*. at 53.

Since *Brown*, the Court has repeatedly reaffirmed this liberty to "ignore the police" based on "the individual's right to go about his business or to stay put and remain silent in the

face of police questioning" when reasonable suspicion is absent. *Illinois* v. *Wardlow*, 528 U.S. 119, 125 (2000); see also *Florida* v. *Royer*, 460 U.S. 491 (1983). The Court in *Brown*, however, expressly left open the issue of whether a person could be forced to identify himself during a *Terry* stop. See *Brown*, 443 U.S. at 53 n.3.

Similarly, under the aegis of the Fifth Amendment, the Court has repeatedly recognized the individual's fundamental right to remain silent once police have initiated a custodial investigation. See, *e.g.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966); *United States* v. *Mandujano*, 425 U.S. 564, 580-81 (1976) ("Under *Miranda*, a person in police custody has, of course, an absolute right to decline to answer any question, incriminating or innocuous"); see also *Doyle* v. *Ohio*, 426 U.S. 610, 617-18 (1976) (noting that *Miranda* assures that post-arrest silence will carry no criminal penalty).

Thus, the Court previously has recognized in the clearest of terms the right to refuse to identify oneself in both the "pre-*Terry*" (*i.e.*, before a reasonable, articulable suspicion has arisen) and "post-*Terry*" (*i.e.*, after probable cause has been obtained) scenarios. It is against this backdrop that the Court must confront the yet unaddressed question of such a right in the context of a *Terry* encounter.

B. The *Terry* Exception Should Not Be Expanded To Require Individuals To Identify Themselves.

The Fourth Amendment's requirement of probable cause serves as a bulwark of personal liberty. See *Winston* v. *Lee*, 470 U.S. 753, 759 (1985). In *Terry*, the Court addressed the inescapable tension between this liberty and the competing need for law enforcement to employ "an escalating set of flexible responses" in dealing with dangerous situations on city streets. *Terry*, 392 U.S. at 10. In doing so, the Court struck a delicate balance, limiting both the circumstances in which such a seizure could be performed as well as the scope and nature of the procedure. *Id.* at 20.

First, the Court held that a stop-and-frisk comports with the Fourth Amendment only in situations when the police officer has a reasonable and articulable suspicion that criminal activity may be afoot *and* where the officer "has reason to believe that he is dealing with an armed and dangerous individual." *Id.* at 27. This "reasonable articulable suspicion" requirement serves as an important protection against arbitrary government searches that inflict "a serious intrusion upon the sanctity of the person." *Id*. at 16-17. Accordingly, the Court afforded only a "narrowly drawn authority" to intrude upon this sanctity, permitting it only where there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 21; see also *Ybarra* v. *Illinois*, 444 U.S. 85, 93 (1979) ("The *Terry* case created an exception to the requirement of probable cause, an exception whose narrow scope this Court has been careful to maintain") (internal quotation marks omitted).

Although *Terry* placed significant emphasis upon the need for police officers to protect themselves from objectively suspicious individuals who may be dangerous, subsequent cases have upheld these encounters in less threatening situations, such as possessory drug offenses[26] and immigration violations.[27] Despite this expansion, *Terry*'s progeny have not abandoned the balance struck in *Terry* itself between "the neutralization of danger to the policeman in the

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[26] *See, e.g.*, *Alabama* v. *White*, 496 U.S. 325 (1990); *United States* v. *Sokolow*, 490 U.S. 1 (1989); *United States* v. *Montoya de Hernandez*, 473 U.S. 531 (1985); *United States* v. *Place*, 462 U.S. 696, 700-06 (1983);

[27] *See, e.g.*, *United States* v. *Arvizu*, 534 U.S. 266 (2002); *United States* v. *Cortez*, 449 U.S. 411 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-82 (1975).

investigative circumstance and the sanctity of the individual." *Terry*, 392 U.S. at 26.[28]

Second, the Court in *Terry* also emphasized that intrusions on individual liberty must be limited to the scope necessary to effect the legitimate purpose of the seizure: "The manner in which the seizure and search [are] conducted is, of course, as vital a part of the inquiry as whether they were warranted at all." *Id*. at 28. "[T]he investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Royer*, 460 U.S. at 500.

Although the Court in *Terry* declined to dictate the permissible limits of such stops, Justice White in his concurrence emphasized that the individual retained a right to refuse to answer any questions, which should include questions concerning identity:

> [G]iven the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course*, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest*….

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[28] Some lower courts, however, have upheld *Terry* encounters based on officer suspicions of crimes less serious than those justifying the *Terry* encounters upheld by the Court to date. *See, e.g.*, *State* v. *Brooks*, 560 N.W.2d 180, 186 (Neb. Ct. App. 1997) (upholding *Terry* encounter based on suspicion that defendant was violating indecent exposure ordinance); *State* v. *Claussen*, 353 N.W.2d 688, 690 (Minn. Ct. App. 1984) (upholding *Terry* stop based on suspicion of violation of alcohol consumption by minors); *Mayo* v. *State*, 382 So. 2d 327, 328-29 (Fla. Dist. Ct. App. 1980) (per curiam) (upholding *Terry* stop based on officer's knowledge that defendants were leaving private property where young people frequently trespassed); *State* v. *Fitzgerald*, 620 A.2d 874, 875 (Me. 1993) (upholding *Terry* encounter based on suspicion of littering).

Terry, 392 U.S. at 34 (White, J., concurring) (emphasis added).

Since *Terry*, the Court has on numerous occasions echoed Justice White's view. Most significantly, in *Berkemer* v. *McCarty*, 468 U.S. 420 (1984), the Court embraced fully the limits of *Terry* articulated by Justice White:

> [T]he stop and inquiry must be 'reasonably related in "scope to the justification for their initiation.'" *Ibid.* [quoting *Terry* v. *Ohio*]. Typically, this means that the officer must ask the detainee a moderate number of questions *to determine his identity* and try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obligated to respond.* And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.

Id. at 439-40 (emphases added) (footnote omitted). In *Davis* v. *Mississippi*, 394 U.S. 721 (1969), the Court similarly recognized the "settled principle" that "while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Id.* at 727 n.6.[29]

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[29] The related First Amendment right to anonymity repeatedly recognized by the Court also bears on the unreasonableness of identification demands by law enforcement. *See, e.g.*, *Watchtower Bible & Tract Soc'y of N.Y., Inc.* v. *Village of Stratton*, 536 U.S. 150, 166 (2002); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958). As the Court has recognized, "[a]nonymity is a shield from the tyranny of the majority." *McIntyre* v. *Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (citing J.S. Mill, *On Liberty and Considerations on Representative Government* (R. McCallum ed. 1947)).

C. Identification Requirements Are Particularly Unreasonable When Applied to Homeless Persons.

As the Court recognized in *Terry* itself, "[the] inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. at 8-9. The "reasonable articulable suspicion of criminal activity" requirement, however, offers significantly less protection to the homeless "citizen[s] on the streets of our cities." *Id.*

1. Homeless Persons Are Frequently Subjected To Law Enforcement Encounters.

The prevalence of "quality of life" crimes and the unfettered application of the *Terry* criteria on the streets conspire to render homeless individuals vulnerable to stop and frisk encounters. The harsh realities of life on the street force homeless individuals to act in ways that reasonably give rise to a reasonable articulable suspicion of violations of public nuisance laws (however unreasonable such laws themselves may be), such as those against loitering, sleeping in public, panhandling and public encampment. Because homeless people are more prone to being subjected to *Terry* encounters, they are more often confronted by the intrusiveness of being forced to disclose their identity to police, regardless of their innocence or guilt. As a result, statutes like Nev. Rev. Stat. 171.123(3) pose a palpable threat to homeless persons' "right to be let alone" because they allow law enforcement to bootstrap charges onto what are essentially status crimes.[30] Unlike persons who have a

[30] *See Robinson* v. *California*, 370 U.S. 660, 678 (1962) (Douglas, J., concurring) ("We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick"); *Powell* v. *Texas*, 392 U.S. 514, 521-22, 532 (1968) (plurality); *Lambert* v. *California*, 355 U.S. 225, 229 (1957).

Although this Court has not addressed the constitutionality of a statute criminalizing homelessness under an Eighth Amendment analysis, several

residence to which they can retreat and maintain their privacy, homeless persons, by definition, must remain in public.

The practical application of *Terry*'s guidelines, moreover, provides law enforcement personnel a basis to question most homeless people at their whim and caprice. This is most apparent when that *Terry* encounter is justified by the mere suspicion of criminal activity. By way of example, if a disheveled, "homeless-looking" person is observed late in the evening holding a blanket folded under his arm, then this innocent act still could create a reasonable articulable suspicion that this person will be sleeping in public. As a result, such a person, posing no threat to police or public safety, could nonetheless be stopped wherever sleeping in public is prohibited by law.[31] A person with the same appearance observed with a shopping cart containing collapsed cardboard boxes could likewise raise a reasonable suspicion that this person may be about to erect a shelter.[32] Indeed, merely "lodging" in a public place without permission would justify a *Terry* encounter in Nevada.[33] And

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federal courts have held that efforts to criminalize conduct associated with homeless people to be violative of the Eighth Amendment. *See*, *e.g.*, *Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992). In *Pottinger*, a class action alleged that the Miami police routinely arrested homeless people for harmless and necessary acts such as sleeping, sitting or eating in public, despite insufficient shelter space in the city. *See id.* In holding that punishment for such conduct violates the Eighth Amendment, the Court concluded that "[t]he harmless conduct for which [the homeless] are arrested is inseparable from their involuntary condition of being homeless." *See id.*

[31] *See, e.g.*, Dallas, Tex.,City Code § 31-13(a)(1) (prohibiting "sleeping or dozing in a street, alley, park, or other public place").

[32] Such shelters could well be illegal under, for example, Cal. Penal Code § 647(j) (prohibiting "lodg[ing] in any [public] building, structure, vehicle, or place … without the permission of the owner or person entitled to [its] possession or … control").

[33] *See* Nev. Rev. Stat. 207.030(1)(g) ("It is unlawful to … [l]odge in any building, structure or place, whether public or private, without the

upon such a *Terry* encounter, the detained homeless person would be subject to Nev. Rev. Stat. 171.123(3)'s intrusive requirement that he disclose his identity upon request.

2. Compliance With Vague Identification Requirements Is Especially Unreasonable For Homeless People Given Their Difficulties In Obtaining Identification.

The scope of the Nevada statute is unreasonable for the further reason that it ambiguously requires that the detained individual "identify himself." Nev. Rev. Stat. 171.123(3). The term "identify" is nowhere defined, however, and is subject to differing interpretation as to what identification requires.[34] As a result, it is unclear whether the Nevada statute requires merely that the person tell the officer his name or provide more formal documentary identification.

Nev. Rev. Stat. 171.123 is thus infected with even more vagueness than the statute struck down in *Kolender* v. *Lawson*, 461 U.S. 352 (1983). There, the Court invalidated a similar "stop-and-identify" statute, which required the provision of "'credible and reliable' identification" and an accounting of one's presence upon request by a police officer during a lawful *Terry* stop. *Id*. at 356. Although the Court invalidated the statute as void for vagueness, the Ninth Circuit

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permission of the owner or person entitled to the possession or in control thereof.")

[34] Facial rejection of Nev. Rev. Stat. 171.123 is appropriate because it fails to give a reasonable opportunity to distinguish lawful from unlawful conduct, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), and vests unbridled discretion in a government official over whether to punish conduct that may be constitutionally permissible, *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 162-63 (1972); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (Stevens, J.) ("'It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits.'") (quoting *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402-03 (1966)).

also considered the law to violate the Fourth Amendment. See *Lawson* v. *Kolender*, 658 F.2d 1362 (9th Cir. 1981), *aff'd*, 461 U.S. 352 (1983). Such rules indeed represent a dangerous opportunity for abuse in that they "entrust[] lawmaking to the moment-to-moment judgment of the policeman on his beat." See *Kolender*, 461 U.S. at 360 (alteration and internal quotation marks omitted); see also *City of Chicago* v. *Morales*, 527 U.S. 41, 65 (1999) (O'Connor, J., concurring).

The prospect of Supreme Court approval of laws that require formal identification to be carried would be particularly unreasonable for homeless individuals who face significant difficulties in obtaining such documentation. *See supra* at 14-15. Too many states still require proof of permanent residence before issuing an identification card. *See id.* It is a sad irony that lack of proof of residence can often be the main obstacle a homeless person faces in obtaining formal identification.

Even if homeless persons are able to obtain state-issued identification, it is difficult for homeless individuals to retain such documents, as they often have no secure place in which to store them. See *supra* note 25. Lacking the personal security of a home, homeless individuals are also particularly vulnerable to theft of their IDs, particularly given the potential street value of such documents.

Requiring identification to be produced when by law that identification is either actually or practically impossible for homeless people to obtain could not be "reasonable" within the meaning of the Fourth Amendment standard. Such a law would, in effect, penalize homeless persons for their status of lacking a residence. See *supra* note 30.

3. A Bright-Line Rule That A Person May Remain Silent During A *Terry* Stop Is Necessary To Protect The Privacy Right Of Homeless People.

The context of homelessness underscores the need to preserve the narrowness of a lawful *Terry* exception by reaffirming the right to refuse to identify oneself during such an encounter. Only a bright-line rule recognizing the fundamental right to refuse to self-identify can meaningfully protect the privacy rights of homeless people. Few people – much less homeless individuals – would ever be able to ascertain whether an officer has such a reasonable suspicion or if such a suspicion is lacking and the person is free to walk away. And the rule must be clear enough that professional law enforcement personnel have practical guidance during their investigation.

Only a clear, bright-line rule that a suspect may remain silent will protect the constitutional principles of the Fourth Amendment and its protection of individual privacy. Such a rule would not only be consistent with the principles underlying the Fourth Amendment, but also would help to ensure that the many *Terry* encounters with homeless people are only as intrusive as is necessary. This reaffirmation of the Fourth Amendment is thus faithful to *Terry*'s promise that its guarantees belong also to the "citizen on the streets of our cities." *Terry*, 392 U.S. at 8-9.

At the end of the day, identification requirements such as Nevada's offer the potential for significant abuse of homeless individuals by law enforcement – a potential that has too often been realized. At times, the main application of such requirements with respect to most offenses has been to bootstrap a minor offense into serving as the basis for a more substantive arrest. Such searches are neither reasonable for any citizens nor necessary for police, and are particularly absurd when one considers the "quality of life" offenses of which homeless persons are often suspected. The freedom of

citizens from unreasonable searches and seizures must not fail to protect those who are the least among us.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision below should be reversed.

Respectfully submitted,

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