No. 19-247

In the Supreme Court of the United States

CITY OF BOISE, IDAHO, *Petitioner*,
v.
ROBERT MARTIN, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS, WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS, AND WASHINGTON STATE SHERIFFS ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Established in 1935, the International Municipal Lawyers Association ("IMLA") is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before state and federal appellate courts.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments and represents more than 19,000 cities and towns in the United States. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association ("ICMA") is a nonprofit professional and educational organization of over 9,000 appointed chief

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and no entity or person aside from counsel for amicus curiae made any monetary contribution toward the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2, *amici curiae* state that counsel for all parties received notice and have consented to the filing of this brief.

executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The Washington State Association of Municipal Attorneys ("WSAMA") is a non-profit organization of municipal attorneys in Washington State representing the over 280 municipalities throughout the state.

The Washington Association of Sheriffs and Police Chiefs ("WASPC") is a non-profit representing management personnel from Washington State law enforcement agencies, including county sheriffs, city and town police chiefs, executives of the Washington State Patrol and Department of Corrections, and representatives of federal and tribal law enforcement agencies. WASPC's mission is to foster collaboration among law enforcement executives to enhance public safety. It develops industry best practices and standards, including a comprehensive approach to homelessness.

The Washington State Sheriffs Association ("WSSA") represents the 39 elected Sheriffs of Washington State. WSSA's mission is to promote ethics, professionalism, leadership development, training, and dialogue among its members and the law enforcement community.

The decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), is of significant concern to local governments nationwide and represents an unwarranted departure from established law in its

application of the Eighth Amendment to invalidate a municipal ordinance banning anyone from camping on public property. The broad pronouncements in that decision unduly impinge on local governments' authority to exercise their police powers to protect the public and public property from risks to health and safety. The court imposes impracticable requirements on local governments working to address the homeless issue. In addition, *Martin*'s overbroad, and at times contradictory, language creates confusion for local governments as they try to interpret and apply the decision as they serve homeless individuals and others in their communities.

SUMMARY OF ARGUMENT

According to U.S. Department of Housing and Urban Development statistics, 552,830 people experienced homelessness in the United States on a single day in January 2018; 35% of them reside in the Ninth Circuit.[2] The reasons for homelessness are multi-fold, including the financial crisis of 2008, rising housing costs, mental illness, drug and alcohol abuse, and unemployment. A number of sub-populations make-up the homeless, including families; those suffering from alcoholism, drug addiction, and mental illness; and the chronically homeless. Approaches to address homelessness have evolved over time. It is no longer seen solely as a criminal law enforcement problem. Nor is it simply a housing issue, given that

[2] "The Annual Homeless Assessment Report to Congress," U.S. Department of Housing and Urban Development (Dec. 2018), pp. 10, 14 at https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

many homeless individuals require services beyond housing. Local governments are devoting significant resources to these seemingly intractable problems, taking different approaches depending on the situations in their communities.

Local governments have limited resources, however. While working to ease the plight of homeless individuals, local governments are also dealing with negative consequences of large numbers of people camping on public property. These impacts include public health and safety problems: unmanaged human waste, garbage, discarded drug paraphernalia, camping fires, blocked sidewalks and open spaces, and blight. Encampments are frequently marked by outbreaks of contagious diseases, vermin, and crime.[3] Nearby residents and businesses complain that these problems negatively affect the community and render some public property unusable by the general public.[4]

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit applied the Eighth Amendment proscription on cruel and unusual punishment well beyond what the Constitution's framers intended or how it has been interpreted by this Court. Further, *Martin* improperly restricts local governments' ability to exercise their broad police powers to safeguard the health, safety, and welfare of their communities. Not only is the decision confusing, but it is unworkable as a practical matter. The difficult

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[3] *See* https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/.

[4] *See* https://www.nbcbayarea.com/news/local/Homeless-Camp-Near-East-Oakland-School-Sparks-Backlash-558377631.html.

issue of homelessness is better left to local policymakers to determine the most appropriate responses rather than to the judiciary.

There is no question that more needs to be done to address the root causes of homelessness, ensure that all have adequate shelter, and remedy unsafe living conditions. At the same time, local governments are responsible for the health and safety of all their constituents. Local governments need more tools, not fewer, to deal with these challenges. The *Martin* decision constrains local governments' ability to address one of the most challenging problems they face.

ARGUMENT

I. Review Should Be Granted Because the Ninth Circuit Improperly Expands the Reach of the Eighth Amendment and Impinges on the Broad Police Powers of Local Governments

A. The *Martin* Court Improperly Extends the Eighth Amendment

In *Martin*, the Ninth Circuit applied the Eighth Amendment beyond how it has ever been interpreted by this Court. "[E]very decision of this Court considering whether a punishment is 'cruel and unusual' within the meaning of the Eighth and Fourteenth Amendments has dealt with a criminal punishment." *Ingraham v. Wright*, 430 U.S. 651, 666 (1977). The Eighth Amendment is rarely used to limit the scope of conduct that can be punished, and in those rare cases, it is "to be applied sparingly." *Id.* at 667.

By contrast, the *Martin* court proceeded on the premise that ordinances making it a misdemeanor to camp on public property criminalize an unavoidable consequence of the status of being homeless. It concluded the Eighth Amendment "bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to." *Martin*, 920 F.3d at 603. In so doing, the Ninth Circuit expanded the Eighth Amendment to include the mere citation of individuals for violations of anti-camping ordinances: "For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate *only the initiation of the criminal process against him, not a conviction*." *Id.* at 614 (emphasis added).

The *Martin* court purported to base its decision on a plurality opinion of this Court in *Powell v. Texas*, 392 U.S. 514 (1968), and on *Jones v. City of Los Angeles*, 444 F.3d 118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), even though the latter opinion was vacated and is not binding. *Martin* expands without any legal justification this Court's more limited holding in *Robinson v. California*, 370 U.S. 660, 666-67 (1962), that the Eighth Amendment prohibits criminalizing the condition of drug addiction when a person does not also engage in the conduct of possessing or using drugs. As Judge Smith articulated in explaining why the Ninth Circuit should re-hear the case *en banc*, the *Martin* court's ruling is inconsistent with *Ingraham* and takes the Ninth Circuit "far afield" from the purpose of the Eighth Amendment. *Martin*, 920 F.3d at 599.

B. *Martin* Hampers Local Governments' Ability to Protect Their Communities

The Ninth Circuit's opinion in *Martin* disregards public health and safety impacts of homeless encampments as well as the power and responsibility of local governments to address those problems. The decision thus impinges on the well-established police powers reserved to states and local governments.

This Court has long upheld the broad authority of state and local governments to exercise their police powers. For example, in *Eubank v. City of Richmond*, 226 U.S. 137 (1912), the Court explained the broad reach of municipal police powers, which extend "not only to regulations which promote the public health, morals, and safety, but to those which promote the public convenience or the general prosperity." *Id.* at 142. In addition, "'[i]t is the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.'" *Id.* at 142-43 (quoting *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909)). This Court continued that "[g]overnmental power must be flexible and adaptive." *Eubank*, 226 U.S. at 143. *Accord Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) ("The police power of a state extends beyond health, morals and safety, and comprehends the duty, with constitutional limitations, to protect the well-being and tranquility of a community"); *Sligh v. Kirkwood*, 237 U.S. 52, 58-59 (1915) ("The limitations upon the police power are hard to define, and its far-reaching scope has been recognized in many decisions of this court"; "The police power, in its broadest sense, includes all legislation and almost every function of

civil government"). Moreover, local governments have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (quotations and citations omitted).

The Ninth Circuit ruling limits and, in some cases, eliminates the tool of criminal sanctions from local governments as they work to protect the health, safety, and welfare of the public. Below are some examples of the impact of *Martin* on municipalities.

1. Spokane, Washington

The *Martin* decision seriously undermines Spokane's ability to connect unsheltered individuals with social services through its jail alternative court system. Spokane's Municipal Court established a Community Court docket, a criminal justice initiative addressing low level non-violent misdemeanor crimes. The list of Community Court eligible offenses includes misdemeanors such as disorderly conduct, open consumption, urinating/defecating in public, sidewalk sitting/lying, and unauthorized camping on public property.[5]

Jail is not the mission of Community Court. Rather, individuals cited for eligible offenses such as illegal camping are referred directly to Community Court, where they access social services while they

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[5] *See* "Downtown & Northeast Community Court Eligible Offenses" at Spokane Municipal Court website, https://static.spokanecity.org/documents/municipalcourt/therapeutic/community-court/community-court-eligible-offenses-2017-12-11.pdf. *See* Spokane, Wash., Code § 12.02.1010(D).

commit to community service. Community Court works with social service providers who connect defendants with a range of services, including assistance with food, clothing, health care and insurance, education and job training, behavioral health, and government assistance.[6] The *Martin* decision prevents Spokane from issuing the criminal citations that require participation in these services. It consequently seriously impairs Spokane's ability to connect individuals needing vital services through its Community Court, which has a proven track record. This situation underscores how local policymakers are better situated than federal courts to determine the most effective approaches to these problems.

Further, Spokane has a significant government interest in using the criminal process to connect homeless illegal campers with Community Court services to help deter illegal encampments. Encampments present public health and safety risks to the public at large and campers themselves, and addressing them requires significant public resources. These risks arise from uncontained fires; improper disposal of solid waste, including feces and hypodermic needles; and other problems. In 2018, Spokane received approximately 500 reports of homeless camps, which cost approximately $100,000 to clean up.[7]

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[6] *See* Spokane Municipal Court, "City of Spokane Community Court" brochure at https://my.spokanecity.org/courts/municipal-court/therapeutic/.

[7] *See* Roley, Amanda, KREM 2 Spokane News, "City of Spokane launches project to coordinate homeless camp clean-ups," 5 Feb. 2019, accessed 5 Sept. 2019, https://www.krem.com/article/news/

Cleanup teams include Spokane Department of Code Enforcement employee crews, law enforcement officers, and hauling/dump trucks.[8] An estimated 1,000 pounds of garbage per day is hauled out of homeless encampments in Spokane.

The public health and safety risks of these encampments include uncontained fires; improper disposal of solid waste, including feces and hypodermic needles; and damage to landscaping and critical infrastructure such as bridge abutments and streets.[9] At one encampment along the Spokane River, City staff recently found a garbage pit fifteen feet across and four feet deep, containing multiple five-gallon buckets filled with human feces.[10]

The increasing presence of improvised and other weapons at encampments poses yet another public safety risk, including to the safety of City cleanup crews. Almost all campers contacted reportedly conceal at least one knife and many have uncapped, used syringes. At one large encampment along the Spokane River, officers located multiple edged weapons,

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local/city-of-spokane-launches-project-to-coordinate-homeless-camp-clean-ups/293-5d95345d-4de0-406a-b7fe-85b9bdf36a39.

[8] *See* Comito, Barbara, Union Gospel Mission ("UGM"), "Cleaning Up Homeless Encampments," UGM (blog), 5 June 2019, accessed 5 Sept. 2019, https://blog.uniongospelmission.org/the-impact/cleaning-up-homeless-encampments.

[9] *See* Spokane City Council "Briefing Paper and Fiscal Note" regarding Spokane, Wash., Code §§ 12.02.1000, *et seq*., available at https://static.spokanecity.org/documents/citycouncil/advance-agendas/2018/04/city-council-advance-agenda-2018-04-30.pdf.

[10] *See* Comito, *supra*, note 8.

including knives, hatchets, and arrows. One city employee assigned to a cleanup crew was injured when he stepped on a concealed board with nails driven through it used as a 'booby-trap' set up to protect an illegal marijuana grow at a camp site. Several such traps, resembling improvised spike strips, were laid around the camp and trails.[11]

2. San José, California

The City of San José, the tenth largest city in the country and home to over 6,000 homeless individuals, looks to criminal enforcement as a last resort, when outreach and warnings are ineffective in resolving unsanitary or dangerous conditions at homeless encampments.[12] This tool is particularly important when it comes to San José's prerogative to issue criminal citations to those, including the homeless, who trespass in its watershed areas. The other tools at the City's disposal—such as outreach to homeless individuals and maintaining fencing and other barriers—are not always effective.

Homeless camps have repeatedly arisen along the banks of Coyote Creek and the Guadalupe River. The resulting trash and human waste are especially problematic. Indeed, San José was sued in federal court because of the increased fecal bacterial and trash levels in these waterways and is under a federal court

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[11] *See* Epperly, Emma, "Booby trap injures city worker cleaning out illegal camp," *The Spokesman-Review*, 8 Aug. 2019, accessed 5 Sept. 2019, https://www.spokesman.com/stories/2019/aug/28/booby-trap-injures-city-worker-cleaning-out-illega/.

[12] https://www.sanjoseca.gov/DocumentCenter/View/85899.

consent decree to reduce those levels.[13] The allegations centered on violations of the Clean Water Act, and as a part of that consent decree, the City is to appropriate at least $100 million to implement a Comprehensive Load Reduction Plan to meet the Fecal Indicator Bacteria load reduction standard.[14] In other words, the City must monitor and limit the amount of garbage and human waste that enter local waterways.

Various City departments—from police to fire to public works—regularly clear encampments, collect and dispose of garbage and hazardous materials, and maintain City infrastructure like damaged fencing and bridges.[15] The City's municipal code prohibits anyone from trespassing in watershed areas, under penalty of fines and even jail time, and is a useful tool to prevent abuse of these sensitive areas.[16] In addition, more than a third of the fire calls to which San José's Fire Department responded in the last fiscal year were related to homeless individuals, including more than 40% of vegetation fires. Needless to say, fires represent a significant concern in California.

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[13] *San Francisco Baykeeper v. City of San José*, U.S. District Court Case No. 15-CV-00642-BLF (N.D. Calif.).

[14] *Id.*, Dkt. #51.

[15] In its 2017-2018 fiscal year, San José removed 955 tons of garbage from homeless camps. More than 80 percent of that garbage was removed from waterways. Annual Homeless Report & Homeless Emergency Assistance Program (Oct. 22, 2018), http://www.sanjoseca.gov/documentcenter/view/80974.

[16] San José, Cal., Code § 10.20.150.

San José works to assist people camping on public land and to address the problems that often result from homeless encampments. It dispatches multi-disciplinary teams from its housing department, who speak with the homeless to understand their needs. These teams provide the homeless with information about housing and service options. City staff also assess environmental needs like trash and sanitation concerns. To protect public health and safety, as well as to comply with the federal consent decree, the City sometimes posts notices that a location must be cleaned up, advising people camping there that they must take their belongings and leave.

Despite San José's efforts to connect homeless individuals with supportive services, some refuse to move from encampments.[17] It is the City's experience that there is a population of long-term, chronically homeless who refuse housing, whether due to mental health issues; drug addiction; general opposition to government services; shelter restrictions on pets, drug or alcohol use; or other perceived limitations.[18] In some cases, homeless individuals who refuse services re-establish camps after the City has completed a cleanup or set up camp on other public property. In these circumstances, criminal sanctions for trespassing on

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[17] "Homeless Census Survey, Comprehensive Report," Santa Clara County (2019), pp. 25-26 at https://www.sccgov.org/sites/osh/ContinuumofCare/ReportsandPublications/Documents/2015%20Santa%20Clara%20County%20Homeless%20Census%20and%20Survey/2019%20SCC%20Homeless%20Census%20and%20Survey%20Report.pdf.

[18] *See* City of San Jose Homeless Census & Survey (2019), pp. 21-22 at https://www.sanjoseca.gov/DocumentCenter/View/85898.

public property are useful to ensure that an area remains clean and safe.

Yet under *Martin*, the City could be prevented from enforcing its anti-trespassing ordinance, even in the face of a consent decree mandating the cleanup of waterways, if there are fewer shelter beds available than the entire homeless population. *Martin* has thus removed one of the tools available to maintain clean and safe public areas in San José.

3. Spokane Valley, Washington

The City of Spokane Valley has a population of nearly 100,000 and is the tenth largest city in Washington. Spokane Valley contracts for a majority of its services. It has agreements with Spokane County for all public safety-related services, including law enforcement, prosecution and public defense, court, and jail services. The City also contracts with a private company to provide all park maintenance and upkeep services.

Further, Spokane Valley does not have homeless shelters within its boundaries. Instead, its residents contribute over a million dollars per year to a regional Continuum of Care program to address regional low-income housing issues. The resources to assist those experiencing homelessness, such as mental health, drug or alcohol addiction services, or financial assistance, are located outside of Spokane Valley in downtown Spokane. Spokane Valley funds homeless services that are available nearby but not within its borders.

As a result, *Martin*'s requirement that a jurisdiction have shelter space available in order to enforce its laws has effectively frozen Spokane Valley's efforts to enforce the "no camping" regulations in its parks. Between 2018 and 2019, the number of homeless living in Spokane Valley's parks is estimated to have increased over 325%. Two City parks have seen such a significant increase in homeless camping that citizens no longer visit the parks, the City has stopped accepting reservations for park facilities, and the parks have in effect become City-funded homeless encampments. Impacts include increased garbage and litter, illegal drug paraphernalia, human waste, graffiti, direct damage to park facilities, other illegal activities, and incidents of direct interference with other park users, as well as increased City costs to combat these problems. Spokane Valley only has thirteen parks, and one of the affected parks is in the center of the City. Thus, losing these two parks to homeless campers has a significant negative impact on the parks program and park users.

4. Olympia, Washington

Olympia, population 51,000, is the capital of Washington State. The homeless population in downtown Olympia is in the hundreds. In July 2018, the city declared a public health emergency related to homelessness.

The City's municipal code forbids camping on city-owned property, except with permission of the city manager after a declaration of emergency has been passed by City Council. Olympia, Wash., Code § 12.74.010. It also provides that no one shall obstruct

passage of pedestrians or vehicles in the downtown commercial zone between certain hours. *Id.* § 9.16.180. As a result of the *Martin* decision, Olympia has stopped arresting the homeless for violating these criminal provisions when committed on city-owned property, parks, or sidewalks, except as a last resort.

As a result of the constraints of *Martin*, public health issues have proliferated. Homeless encampments have no solid waste facilities and create mountains of garbage in mere days. Although the City provides some of these services even to unsanctioned encampments, issues with human feces, garbage (including drug paraphernalia), fire, damage to city property, and vandalism of public infrastructure abound.

Because of *Martin*, Olympia can no longer use its publicly-owned property for the benefit of the public at large unless it has provided the homeless an alternative place to sleep. That task is anything but simple. First, the number of shelter space openings is fluid. Second, the City's attempts to provide transitional sites for the homeless is proving insufficient, particularly given that Olympia is now being advertised as a "homeless sanctuary." Third, many homeless individuals have no identification, making it impossible to track whether an individual was offered and declined an alternative to camping.

Members of the business community allege that the lack of enforcement has negatively impacted their businesses and economic development in downtown. The City's limited enforcement of these municipal code violations post-*Martin* has even resulted in legal action

against Olympia.[19] Whatever the merits of those claims, the City must use limited public resources to defend against these actions. Moreover, they demonstrate the extent to which the *Martin* decision hampers Olympia's ability to provide a safe, hospitable environment for its constituents.

II. *Martin* Sows Uncertainty for Local Governments and Is Unworkable

A. *Martin* Introduces Undefined Standards into its Eighth Amendment Analysis

While on the one hand *Martin* prohibits cities from prosecuting those who sleep outside on public property when there are more homeless persons than available shelter beds, its footnote number 8 creates confusion about how local governments can comply with the ruling.[20]

In footnote 8, the Ninth Circuit panel qualifies its holding, saying its ruling does not apply to those who "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." *Martin,* 920 F.3d at 617 n.8. It continues: "Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an

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[19] *Douglas Heay, et al., v. City of Olympia*, Thurston County Superior Court No. 18-2-06080-34.

[20] That confusion is exacerbated by the circuit split that *Martin* created, with local governments outside of the Ninth Circuit left guessing whether their own anti-camping ordinances are unlawful. *See* Petition at pp. 19-21.

ordinance prohibiting sitting, lying or sleeping outside at particular times or in particular locations might well be constitutionally permissible." *Id.* (emphasis in original). This language suggests municipalities may do what the holding prohibits, although it fails to explain when it would be permissible.

Further, this language adds an element: the housing must be "adequate" or "sufficient." But the court fails to define these terms. The decision leaves open a number of questions, such as what might be considered "adequate" or "sufficient" housing or how the different needs of people experiencing homelessness might impact the analysis.

Martin itself suggests the analysis is complicated. It argues—although it does not hold—that "adequate" shelter must not be incongruous with an individual's religious beliefs. *Martin*, 290 F.3d at 609-10. But the decision is silent about how a jurisdiction should weigh religious beliefs in determining whether a particular person has an "adequate" alternative to camping. Nor does *Martin* explain how to evaluate the adequacy of available shelter that an individual chooses not to access on a given day. Indeed, named plaintiff Martin, whose claims the Ninth Circuit allowed to proceed, apparently had housing in another city but chose to travel to Boise, where he was cited for camping. *Id.* at 606.

B. *Martin*'s Articulated Standards are Unworkable as a Practical Matter

Even if those definitions were established, it would still be impossible as a practical matter to issue

camping citations without risking running afoul of *Martin*. The shelter availability prerequisite cripples the ability of local governments to issue criminal citations to the homeless for these offenses.

First, most jurisdictions cannot practically determine how many homeless individuals reside within their geographical jurisdiction on a daily basis. It would be impossible to do so without dedicating cost-prohibitive staffing resources to conduct daily counts. These counts would take the whole workday or longer, rendering count data untimely and useless for the anti-camping enforcement shelter count requirement. *See also Martin*, 920 F.3d at 594-95 (Smith, J., dissenting from denial of rehearing *en banc*).

Second, *Martin* seems to foreclose counting some available housing options. *Martin* does not specify whether a local government may rely on available beds in neighboring cities within its metropolitan area. And *Martin* prevents local governments from counting beds at religious institutions. In Spokane, 286 shelter beds at Union Gospel Mission may not be counted under *Martin* because the shelter's services involve religious rites.[21] Even if all available beds could be counted, many municipalities simply lack the capacity to shelter all who need it, notwithstanding efforts to increase housing opportunities.

Third, even assuming a local government had shelter capacity for all homeless individuals in its

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[21] *See* "Union Gospel Mission: Our Doors Are Open," 22 April 2019, accessed 5 Sept. 2019, https://blog.uniongospelmission.org/the-impact/union-gospel-mission-our-doors-are-open.

jurisdiction, it is unclear whether the *Martin* shelter availability prerequisite means available shelter beds for overnight sleeping or 24/7. In some jurisdictions, shelters are not open 24 hours due to staffing or janitorial needs. During these periods of closure, no shelter beds are available. Nor does the decision help answer other questions, such as whether law enforcement may rely on notice of shelter availability from the preceding night to cite an individual engaging in illegal camping on public property the next day.

In short, it is impossible to determine whether an individual has "an option of sleeping indoors," *Martin*, 920 F.3d at 617, on any given day, and thus whether a local jurisdiction is in a position to enforce its criminal laws prohibiting camping. These issues are more than theoretical and demonstrate *Martin*'s overbreadth.

The challenges local governments face in understanding and complying with the *Martin* decision are further underscored by settlement agreements or consent decrees some jurisdictions have entered into in the aftermath of the ruling. For example, in *Vannucci v. County of Sonoma*, involving Sonoma County and the City of Santa Rosa, California, the order entered into in reaction to *Martin* sets forth:

> [t]he adequacy of a shelter will depend on a person's individual circumstances, such as mental disability, physical disability, gender, sexual orientation, gender identity, essential personal possessions, family status, possession of a service animal or pet, religious or ethical convictions, educational needs of any school-aged children, proximity to employment,

> proximity to medical or other social services, and transportation needs. For some people (particularly those with certain mental health conditions), a barracks-style placement may not be adequate based on their individual circumstances.[22]

Moreover, to constitute "adequate shelter," the placement "must be immediately available for 30 consecutive days or more," "be open both days and nights," and "must provide a single-gender placement for someone who objects to a mixed-gender placement."[23] It will be difficult, if not impossible, to meet these criteria for "adequate" shelter and to have all these options provided by a jurisdiction and available at all times.

In a settlement agreement in a case arising in Southern California, Orange County must "ensure appropriate due process protocols, including a timely and effective administrative appeals process, for homeless individuals being denied access to, or being terminated from County-administered shelters" that "comply and be otherwise consistent with local, state, and federal laws."[24] Whether an individual has access to adequate shelter thus becomes a matter for a quasi-judicial determination, leaving law enforcement's

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[22] *Vannucci v. County of Sonoma*, U.S. District Court, Case No. 18-cv-01955 VC (N.D. Cal.), Dkt. #109-1. See p. 5 of 14.

[23] *Id.* at p. 6 of 14.

[24] *Orange County Catholic Worker, et al. v. County of Orange*, U.S. District Court Case No. 8:18:cv-00155-DOC-JDE (C.D. Cal.), Dkt. #318-1, p. 15.

hands tied while that process plays out, and adds further costs to litigating those issues that could be better spent providing direct services or housing.

III. *Martin*'s Construction of Status, as Opposed to Conduct, Leads to Untenable Results

Further difficulties arise when local governments consider *Martin*'s impact beyond ordinances that prohibit camping. The decision is premised on its assertion that "sitting, sleeping or lying outside on public property for homeless individuals who cannot obtain shelter" are the "'unavoidable consequence of being human.'" *Martin*, 920 F.3d at 616 (quoting *Jones*, 444 F.3d at 1136). It reasoned: "[A]ny 'conduct at issue here is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.'" *Id.* at 617 (quoting *Jones*, 444 F.3d at 1136).

Under the *Martin* court's reasoning, a municipality may not be allowed to prosecute those who urinate, defecate, or even engage in sexual activities in public, since under the Ninth Circuit's analysis those are "unavoidable consequences of being homeless." These acts should not be beyond the reach of a government's police powers. *Accord Martin*, 920 F.3d at 590 (Smith, J., dissent from denial of rehearing *en banc* ("the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination").

The Ninth Circuit's decision narrowly identifies the conduct at issue as "sitting, lying or sleeping" and declares these acts to be "involuntary" and "inseparable from status." It concludes they are outside a city's authority to prosecute if there are a greater number of homeless individuals in a city than the number of available beds in shelters. This holding severely misunderstands the public health and safety crisis caused by illegal encampments and fails to recognize what is occurring in many communities. Encampments are often fraught with uncontained human waste, garbage, illicit activity, and dangerous conditions that violate universal social norms. Many common behaviors attendant to illegal camping cannot be characterized as "the universal and unavoidable consequences of being human."

IV. Responses to the Intractable Challenges of Homelessness Are Best Addressed by Policymakers

The problems created by the Ninth Circuit's decision underscore why local policymakers, not the federal courts, should make decisions about how to address homelessness in their communities. Local governments are better equipped to evaluate the immediate situation, to assess the resources available, and to determine the most effective policy responses.

Indeed, another difficulty with the Ninth Circuit's approach is articulated in one of the opinions making up the *Powell* plurality on which *Martin* relies: Justice Black, in concurring, declined to extend the Eighth Amendment to prevent criminalizing public drunkenness because doing so "would significantly

limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct." *Powell*, 392 U.S. at 536. He observed: "I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem." *Id.* at 539-40 (Black, J., concurring).

Judge Smith also expressed his concern about the limits of judicial authority, explaining that the impact of a local ordinance "'should be addressed to the Legislature and the [] Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.'" *Martin*, 920 F.3d at 593 (dissent to denial of rehearing *en banc,* quoting *Tobe v. City of Santa Ana*, 9 Cal.4th 1069 (1995)).

Yet that is precisely what the *Martin* panel has done. The Ninth Circuit ruling ignores this Court's instruction that federal courts "do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. The legislative power has limits … [b]ut the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare …." *Day-Brite Lighting Inc. v. State of Missouri*, 342 U.S.

421, 423 (1952) (upholding criminal enforcement of Missouri statute guaranteeing paid time off to vote). Similarly, "[c]ourts may not create their own limitations on legislation, no matter how alluring the policy arguments for doing so, and no matter how widely the blame may be spread." *Brogan v. United States*, 522 U.S. 398, 408 (1998).

The *Martin* decision is in conflict with other courts, as set forth in the petition for review, including the California Supreme Court decision *Tobe v. City of Santa Ana*, 9 Cal.4th 1069 (1995). *See* Petition at pp. 19-21. In *Tobe*, the California Supreme Court upheld a city's no-camping ordinance against Eighth Amendment challenge. Under the guise of applying this Court's Eighth Amendment jurisprudence, the Ninth Circuit has constrained California cities more than their own Supreme Court has done. *Martin* thereby turns on its head the teaching that states should "serve as 'laborator[ies]' of democracy." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2484, 204 L. Ed. 2d 801 (2019) (Gorsuch, J., dissenting) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

Further, local governments have broad responsibilities to their communities but have limited resources. Providing sufficient beds to comply with *Martin* could hijack municipal budgets well beyond what is appropriate in light of other municipal responsibilities. But if local governments do not comply, they may be left with encampments that are beyond their reach. *See Martin*, 920 F.3d at 595-96 (Smith, J., dissenting) (if local governments lack the

resources to provide housing, "[t]hey have no choice but to stop enforcing laws that prohibit public sleeping and camping" and "effectively allow[] homeless individuals to sleep and live wherever they wish on most public property"). The Petition should be granted because the *Martin* court's interpretation of the Eighth Amendment yields untenable results for local governments responsible for addressing homelessness and serving their broader communities.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, *amici curiae* respectfully request that this Court grant the Petition for Certiorari.

Respectfully submitted,

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