No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,

v.

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

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

BRIEF OF AMICI CURIAE SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES BEN TOMA AND PRESIDENT OF THE ARIZONA STATE SENATE WARREN PETERSEN IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE

Amici are Speaker of the Arizona House of Representatives Ben Toma and President of the Arizona State Senate Warren Petersen. They file this brief in their official capacities as the presiding officers of their respective chambers on behalf of the Fifty-sixth Legislature of the State of Arizona (the "Legislature").[1]

As a broad and bipartisan group of amici identified at the petition stage, the Opinion Below improperly hampers the Legislature, local governments in Arizona, and legislatures and local governments of other states in the Ninth Circuit from enacting statutes that enhance residents' safety and quality of life, and protecting homeless persons from the public safety and health risks that result from mass, unlawful encampments.

Lawmakers must use a suite of state and local government policies, including camping ordinances, to adequately address the social and public health effects of homelessness. But the Ninth Circuit's jurisprudence interprets the Eighth Amendment as blocking states and localities alike from enacting non-status-based policies, removing a critical tool previously available to states, counties, and cities working to combat homelessness. Without this ability, lawmakers will be unable to work towards a comprehensive solution to homelessness that respects the welfare of their residents.

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[1] Pursuant to Rule 37.6, the undersigned certifies that no party's counsel authored this brief in whole or in part, and only Amici made a monetary contribution to this brief's preparation and submission.

The Legislature also has a pressing interest in homelessness because it confronted the realities of America's homelessness crisis every day, including only a few blocks from the state capitol complex, for years. Phoenix, Arizona, was home to one of the nation's largest homeless encampments, commonly known as "The Zone." With hundreds of homeless residents, The Zone was a place of intense poverty, frequent crime (including multiple homicides), social instability, and poor living standards. *See, e.g.*, Justin Lum, *Crimes of "The Zone": Theft, Assaults, Drugs, Unsanitary Conditions Plague Area of Downtown Phoenix Tent City,* Fox 10 Phoenix (Sept. 15, 2022, 9:33 PM) https://www.fox10phoenix.com/news/crimes-zone-theft-assaults-drugs-unsanitary-conditions-plague-downtown-phoenix-tent-city.

The Zone has also been the subject of ongoing litigation. In *Fund for Empowerment v. City of Phoenix*, the United States District Court for the District of Arizona held that a nonprofit organization and homeless individuals were likely to succeed on the merits of their claim that the City of Phoenix's camping and public sleeping ordinances violated their rights under the Eighth Amendment. 646 F. Supp. 3d 1117, 1123–24 (D. Ariz. 2022), *as amended* by Dkt. No. 119 (Oct. 17, 2023). The Ninth Circuit's caselaw thus directly frustrated the Legislature's ability to ameliorate harms from unlawful public camping.

SUMMARY OF ARGUMENT

For centuries, state and local governments have passed laws governing conduct (*i.e.*, acts). Such laws regulate public spaces, preserve order, and establish public health codes that protect residents. And it makes sense that local and state officials set policies for their communities. After all, these officials are the closest representatives of their constituents and best situated to craft complex policies for their states.

In the Opinion Below, the Ninth Circuit decided it was better at making policy than elected state legislatures and city councils. Instead of deferring to their limited constitutional role, appellate judges "seiz[ed] policymaking authority that our federal system of government leaves to the democratic process." *Johnson v. City of Grants Pass*, 72 F.4th 868, 925 (9th Cir. 2023) (O'Scannlain, J., statement respecting denial of rehearing en banc). The Ninth Circuit brushed aside longstanding case law as well as principles of federalism and separation of powers, declaring that it should decide how state and local officials may and may not work to alleviate the effects of homelessness. The Circuit's decision was an exercise of raw and unfounded judicial power.

It was also incorrect as a matter of law. The Eighth Amendment's history and tradition show that it prohibits the federal government (and, through the Fourteenth Amendment, state and local governments) from subjecting criminal defendants to unduly harsh penalties like the rack. The Eighth Amendment's text and history also demonstrate that it has nothing to do with limiting the authority of lawmaking bodies to define criminal conduct (*i.e.*, acts). Indeed, the prohibition on cruel and unusual punishment and laws prohibiting even vagrancy coexisted for

hundreds of years, dating back to the common law. *See Harmelin v. Michigan*, 501 U.S. 957, 974–79 (1991) (Scalia, J., concurring) (discussing common-law history of prohibition on "cruell and unusuall punishments" and original public meaning at time of ratification); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 & n.4 (1972) (discussing history of vagrancy laws that "were 'derived from early English law'"). There is no basis to conclude that the Eighth Amendment curtailed the authority of legislatures to define the acts that communities deem to be criminal conduct.

This Court's precedents reveal that even if a court were to look beyond the Amendment's original public meaning, longstanding law suggests that the Amendment allows states to criminalize acts so long as they do not criminalize status. But the Opinion Below mischaracterizes this longstanding and workable dichotomy, preferring to limit the degree to which states may regulate homeless individuals' conduct by pretending that the states are regulating the status of "involuntary" homelessness rather than individual acts.

The Opinion Below has also had terrible real-world consequences for state and local communities, including in Arizona. In Phoenix alone, a large homeless encampment brought festering crime and health risks to the public, only blocks from the state capitol. Yet state legislators were hampered from taking action to comprehensively address and resolve this humanitarian crisis. Why? The Opinion Below strips Arizona's legislators of the tools they needed to do so.

ARGUMENT

I. The Opinion Below Injects the Federal Courts Into a Policymaking Area Reserved for State and Local Lawmakers.

In depriving lawmakers of their authority to enact certain types of laws addressing homelessness, the Opinion Below violates longstanding principles of federalism and separation of powers. These fundamental principles of our system of government must inform the proper interpretation of the Eighth Amendment.

"It is a timeless adage that states have a 'universally acknowledged power and duty to enact and enforce all such laws . . . as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people.'" *Martin v. City of Boise*, 920 F.3d 584, 596 (9th Cir. 2019) (M. Smith, J., dissenting from denial of rehearing en banc) (quoting *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901)). Indeed, this Court has "repeatedly . . . affirmed" that it "do[es] not conceive it [the Court's] function to pass upon 'the wisdom, need, or appropriateness' of the legislative efforts of the States to solve such difficulties." *Edwards v. California*, 314 U.S. 160, 173 (1941).

Moreover, this Court has long recognized, "[u]nder our federal system, the 'states possess primary authority for defining and enforcing the criminal law.'" *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1995) (citation omitted). And when considering complex factual determinations, including how to address harmful behavior stemming from supposedly involuntary conditions, "[t]he lesson [this Court has] drawn is not that government may not act in the face

of this uncertainty, but rather that courts should pay particular deference to reasonable legislative judgments." *Jones v. United States*, 463 U.S. 354, 364 n.13 (1983) (discussing insanity).

Homelessness is an issue that touches on the safety, health, morals, comfort, and welfare of each locality that it affects. It requires policy solutions informed by (implicit or explicit) legislative factfinding in the face of uncertainty. It is thus a challenge that each state's elected legislatures are best positioned to address. But the Opinion Below approaches this complicated problem differently. By removing a significant part of the power to regulate homelessness from the legislature and vesting it with the judiciary, the Opinion Below's "strange and sweeping mandate" unconstitutionally injects the judiciary into the state's lawmaking process, foreclosing a legislature's ability to take the steps necessary to protect its population from serious and significant harms. 72 F.4th at 925 (O'Scannlain, J., statement respecting denial of rehearing en banc).

For example, under the Opinion Below, if a judge merely determines that there are more individuals without homes than the number of beds available in specific non-sectarian shelters, cities and municipalities are prohibited from applying the deterrent of criminal law to unlawful public camping by homeless individuals. Such a conclusion—unlike democratically made policies—allows no room for nuance. It pays no attention to the possibility that some homeless individuals may stay with friends or family on a given night. Nor does it consider that some individuals prefer to live outdoors and that laws may properly regulate such decisions. Mark Sundeen, *Homeless by Choice: How to Live for*

Free in America, The Atlantic (Mar. 7, 2012), https://www.theatlantic.com/national/archive/2012/03/homeless-by-choice-how-to-live-for-free-in-america/254118/. Instead, the Opinion Below takes a blunderbuss approach to policymaking that supplants state and local governments addressing the complex and ever-changing homeless population within their jurisdictions.

As Judge Milan Smith wrote in his dissent from the denial of rehearing en banc, the Opinion has "require[d] unelected federal judges . . . to act more like homelessness policy czars" instead of "Article III judges applying a discernible rule of law." 72 F.4th at 943. And as Judge O'Scannlain wrote in his statement respecting denial of rehearing en banc, the Opinion Below and *Martin* deserve blame for "paralyzing local communities from addressing the pressing issue of homelessness, and seizing policymaking authority that our federal system of government leaves to the democratic process"—two problems that "will be greatly worsened by the doctrinal innovations introduced" in the Opinion Below. 72 F.4th at 925.

II. The Opinion Below Entrenches a Plainly Incorrect and Deeply Damaging Construction of the Eighth Amendment.

A. A Law That Merely Defines Criminal Conduct Does Not Impose a Cruel and Unusual Punishment.

When the Framers drafted the Eighth Amendment, the language they used had an understood public meaning, which was "to proscribe . . . methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976). This is supported by the words used in the amendment itself—"impos[ing]"

excessive fines or "inflict[ing]" cruel and unusual punishments. U.S. Const. amend. VIII.

In *Harmelin v. Michigan*, Justice Scalia analyzed historical sources and explained that the prohibition on "cruell and unusuall punishments" as found in the English Declaration of Rights of 1689, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." 501 U.S. 957, 974 (1991) (Scalia, J., concurring) (citations omitted). "Wrenched out of its common-law context[] and applied to the actions of a legislature . . . the Clause [in the Bill of Rights] disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 975–76 (Scalia, J., concurring).

Moreover, evidence from state ratifying conventions "confirms the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." *Id.* at 979 (Scalia, J., concurring) (internal quotation marks and citation omitted). Patrick Henry, speaking at the Virginia Ratifying Convention, fought against the absence of a Bill of Rights, arguing that "Congress will lose the restriction of not . . . inflicting cruel and unusual punishments. . . . What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." 3 Debates on the Federal Constitution 447 (J. Elliot 2d ed. 1854). The Massachusetts Convention likewise heard a delegate's objection that, without a ban on such punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." 2 *id.*, at 111.

Ample historical evidence shows that neither the Framers, nor the state legislators who ratified the Eighth Amendment, understood it to reach the substantive authority to criminalize certain acts—even vagrancy. State and local laws and ordinances on vagrancy "were 'derived from early English law.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 (1972). This Court explained that these laws persisted even through the British Parliament's "reform of the Poor Law in the first half of the 19th century." *Id.* at 161 n.4. In fact, it was not until 1972 that this Court invalidated commonplace vagrancy laws, and it did so on void-for-vagueness grounds under the Due Process Clause of the Fourteenth Amendment. *Id.* at 162. The historical record therefore shows that the Eighth Amendment cannot be read to limit the legislature's authority to define criminal conduct.

B. This Court Should Reaffirm the Status-Act Distinction.

The Opinion Below contravenes this Court's cases by prohibiting states from passing criminal ordinances dealing with acts that are in some instances incident to homelessness. Doing so upends decades of precedent and needlessly muddies how state legislatures and local governments may implement policy solutions. To address this confusion, the Court should explicitly reaffirm that the proper reading of *Robinson v. California*, 370 U.S. 660 (1962), is that the Eighth Amendment does not prohibit criminalizing acts, even if those acts involuntarily flow from status.

As Judge O'Scannlain explained in his statement regarding denial of rehearing en banc, the Opinion Below relies on a mistaken reading of *Robinson* and *Powell v. Texas*, 392 U.S. 514 (1968). In *Robinson*, this

Court held that the Eighth Amendment prohibited making it a crime "to be addicted to the use of narcotics." 370 U.S. at 662 (cleaned up). A state may create laws "punish[ing] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration." *Id*. at 662, 666. The holding and logic of *Robinson* are commonly referred to as the "status-act distinction." States may enact criminal laws that punish conduct (*e.g.*, "the use of narcotics") but not those that punish status (*e.g.*, "be[ing] addicted to the use of narcotics").

The status-act distinction is supported by this Court's caselaw. In *Powell*, this Court upheld a Texas statute prohibiting public drunkenness against an Eighth Amendment challenge asserting that the alcoholic's status made him drink in public. 392 U.S. 514. Notably, no majority rejected the status-act line drawn in *Robinson*, although the opinion was fractured along other lines. *See id*. Justice Marshall's four-justice plurality upheld the statute based on *Robinson's* status-act distinction. *Id*. at 516–37 (plurality). Then, Justice White's lone concurring opinion, which provided the dispositive fifth vote, upheld the statute because it involved a deliberate act. *Id*. at 548–54 (White, J., concurring). Although Justice White upheld the law, he declined to determine whether a non-volitional act could be criminalized. *Id*. Because Justice White did not reach whether the act in question was compelled, he left *Robinson*'s core holding undisturbed. *See Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 289 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting).

Despite this Court's continued application of the status-act distinction, the Opinion Below, like the

Fourth Circuit's decision in *Manning*, turned to *Powell's* fractured decision, attempting to "tease [its] preferred reading from the dicta" of Justice White's concurrence. *Manning*, 930 F.3d at 290 (Wilkinson, J., dissenting). Setting aside the fact that such readings clearly distort this Court's instruction from *Marks v. United States* that the narrowest position that gained the support of five justices is treated as the Court's holding, 403 U.S. 188 (1977), no majority in *Powell* disrupted *Robinson*'s status-act distinction. Nor did any majority adopt Justice White's position. Thus, any attempt to claim that the Opinion Below follows this Court's precedent is incorrect. As Judge O'Scannlain explained, the majority reaches its conclusion by "stitching together dicta in a lone concurrence with a dissent." 72 F.4th at 925 (O'Scannlain, J., statement respecting denial of rehearing en banc).

III. The Opinion Below Improperly Interferes With State and Local Policymaking on the Critically Important Issue of Homelessness.

A. Homelessness Creates Real and Significant Threats to Public Health.

Homelessness is a complex and persistent problem that results in health and environmental risks, most significantly to the homeless themselves.

Homeless men, women, and children are exposed to an increased risk of rare and serious diseases. The Central Arizona Shelter Service reports that Tuberculosis ("TB") has a prevalence of only 5 out of 100,000 in the general population. Central Arizona Shelter Services, *Homelessness as a Health Crisis*, https://www.cassaz.org/2022/02/homelessness-as-a-health-crisis. However, it increases by a staggering 880%—to 44 out of 100,000—in the homeless

population. *Id*. And because treatment requires an extended regimen, many of those afflicted will experience advanced TB. *Id*. Researchers have also found increasing numbers of Hepatitis A virus ("HAV") in the homeless population, including in Maricopa County. They concluded that "crowding and suboptimal hygiene practices might have facilitated . . . transmission." Sally Ann Iverson et al., *Hepatitis A Outbreak Among Persons Experiencing Homelessness—Maricopa County, Arizona, 2017*, 4 Open Forum Infectious Diseases (2017). Professor Marc Siegel, a NYU Langone Health faculty member, explains that homeless areas are "at risk for the reemergence of another deadly ancient disease—leprosy." Marc Siegel, *Is a Dark Ages Disease the New American Plague Threat?*, The Hill (September 08, 2019, 3:00 PM), https://thehill.com/opinion/healthcare/460442-is-a-dark-ages-disease-the-new-american-plague-threat/. These diseases are exceptionally rare in the general population. But they are a fact of life in homeless encampments.

The homeless also suffer from common disorders and diseases at rates far greater than the general public and struggle to manage those diseases once they arise. They are more likely to suffer from hypertension (61% of the homeless have hypertension, compared to 45% of the general population), major depressive disorder ("MDD") (45% of homeless women have MDD, double the rate of the general population), Hepatitis C (36% of homeless people have Hepatitis C, compared to 1% of the general population), and diabetes (18% of the homeless population have diabetes, double the rate of the general population). Central Arizona Shelter Services, *supra*. A lack of hygiene practices, an inability to meet dietary

requirements, and a lack of access to shelter means that even minor issues like skin lesions can become multi-system health complications. *Id.* Treatment options are limited or inaccessible until the problem becomes emergent, fueling high healthcare costs and poor outcomes. *Id.*

Homelessness also creates improper waste disposal that can harm a state's natural environment. Homelessness often involves public urination and defecation. The resulting human waste is a biological hazard that can enter waters and public lands. Circuit courts interpreting the Clean Water Act have long recognized that "the most common way by which pollutants reach the surface waters is through improper 'land application'" because "when waste is excessively or improperly land-applied, the nutrients contained in the waste become pollutants that can and often do run off into adjacent waterways or leach into soil and ground water." *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 494 (2d Cir. 2005).

All of these health and environmental issues are proper bases for legislative action.

B. Arizona Suffers From a Crisis of Unauthorized Homeless That Resulted in Camping in the Heart of Phoenix.

Arizona has seen a dramatic increase in the homeless population in the middle of its largest city. From approximately 2018 until late 2023, a significant concentration of the homeless population camped in an area known as "The Zone," located only blocks from the Arizona capitol building. With up to

1,000 "residents" at certain times, The Zone was one of the nation's largest homeless campsites.[2]

Studying the Zone reveals the harm that the Opinion Below inflicts. The area was transformed into a place of intense poverty, frequent crime, and social instability. Before 2018, the City of Phoenix enforced its urban camping ordinances, which allowed people to sleep on the streets but not to pitch tents. Officers could prevent a large homeless encampment from forming. But in 2018, the Ninth Circuit's decision in *Martin* enjoined the city from enforcing camping ordinances if no shelter beds were available. Although the City of Phoenix and Maricopa County offer more than 12,300 beds in homeless shelters, the city's ballooning homeless population possibly exceeds those available beds. Corinne Murdock, *A Wasteland of Corpses, Living and Dead: A Devastating Inside Look at Phoenix's Homeless Zone*, AZ Free News (Mar. 6, 2023), https://www.goldwaterinstitute.org/a-wasteland-of-corpses-living-and-dead-a-devastating-

[2] In summer 2023, it was reported that The Zone was "home to between 600 and 1,000 people each night." Juliette Rihl, *Phoenix Planning Campground for Homeless People Living in 'The Zone.' Where it May Go*, AZ Central (June 27, 2023, 7:26 PM), https://www.azcentral.com/story/news/local/phoenix/2023/06/27/phoenix-to-build-campground-for-homeless-residents-of-the-zone/70362299007/. The Zone was cleared in November 2023. *See* Helen Rummel, *Phoenix's Largest Homeless Encampment, "The Zone," is Now Gone*, AZCentral (Nov. 2, 2023, 6:02 AM), https://www.azcentral.com/story/news/local/phoenix/2023/11/02/phoenixs-largest-homeless-encampment-the-zone-is-now-gone/71415236007/; Helen Rummell, *Phoenix's Campground Now Open for People Who Are Experiencing Homelessness*, AZCentral (Nov. 13, 2023, 6:01 AM), https://www.azcentral.com/story/news/local/phoenix/2023/11/13/phoenix-structured-campground-open-for-homeless-population/71524369007/.

inside-look-at-phoenixs-homeless-zone/. Because of this potentiality, the Ninth Circuit's precedents have operated to discourage city and state officials from preventing public camping as a practical matter.

The result was an unmitigated disaster. In November 2022, residents found the burned remains of a premature baby in the middle of a street. Cassy Fiano-Chesser, *Body of Preborn Child Found Set Ablaze in Phoenix Homeless Camp*, LiveAction (Nov. 18, 2022, 6:34 PM), https://www.liveaction.org/news/burned-body-preborn-child-phoenix-homeless/. A few months later, a homeless man's burned body was recovered nearby. Miguel Torres, *2 of 3 Suspects in Fatal Burning Arrested by Phoenix Police*, AZ Central (Apr. 28, 2023, 7:49 AM), https://www.azcentral.com/story/news/local/phoenix-breaking/2023/03/23/2-arrested-after-body-found-burning-phoenix-dumpster-the-zone/70043611007/. The deaths of a man and child, while tragic, were but two of an increasing number of homeless deaths in Phoenix. In 2022, the Maricopa County Medical Examiner's Office reported 732 homeless deaths in 2022, a 42% increase from the prior year. Maricopa County Office of the Medical Examiner, Medical Examiner Annual Report: 2022, 50 (May 2023), https://www.maricopa.gov/ArchiveCenter/ViewFile/Item/5601. Defecation, urination, drug deals, assaults, sexual acts, and rape also occur in the open air with increasing impunity. Lum, *supra*.

Unsurprisingly, The Zone was a significant challenge for law enforcement. In 2022, the Phoenix Police Department reported 200 incidents in The Zone's few-block radius. Murdock, *supra*. The Zone has generated well over 4,000 police calls from 2019 through 2022, with 1,200 calls for fire department

assistance alone last year. *Id.* Press outlets reported that the Phoenix Fire Department would not respond to calls about fires in The Zone without police assistance and assurance that the scene of an incident is secure. *Id.* In addition, those articles indicate that crowds in The Zone were likely to assault the emergency responders, further hampering any attempts to alleviate the harsh living conditions there. *Id.*

C. The City's Decision to Ameliorate The Zone Only Highlights the Challenges the Opinion Below Creates.

In November 2023, the City of Phoenix began the lengthy process of relocating residents from The Zone to other areas in its jurisdiction. But even then, the City made sure that it had enough open shelter space to accommodate everyone that it moved, going as far as to use nearby city-owned land for residents to continue camping. *See* Rihl, *supra*; Kevin Stone, *Phoenix Provides Update on Those Relocated When Zone Homeless Encampment Was Cleared*, KTAR News (Dec. 22, 2023, 2:30 PM), https://ktar.com/story/5554603/phoenix-provides-update-on-those-relocated-when-zone-homeless-encampment-was-cleared/#:~:text=Of%20the%20718%20individuals%20who,nearly%20six%2Dmonth%20cleanup%20effort. Yet, within a month of the clearance, approximately half of all individuals were out of city shelters and presumably back on the street. *Id.*

The Zone's repercussions exist on several dimensions. First, the City's decision to relocate residents from The Zone to other open shelters does not ameliorate the impact that the site had on both housed and homeless residents of Phoenix while it

existed. For the housed residents, The Zone was not merely localized but permeated into the daily lives of the community. Even with its physical removal, the memory and disruption linger. For the homeless, The Zone was a place of needless suffering. Ameliorating conditions in The Zone does little to rectify these past harms.

Second, the risk of recurrence looms large. The 2023 relocation project did not remove the root causes that led to the establishment of The Zone. If this Court endorses the Ninth Circuit's flawed construction of the Eighth Amendment, state legislatures will be prevented from adopting comprehensive strategies to address homelessness and cities remain susceptible to the reemergence of similar encampments. This risk is especially high here, given that many of the homeless relocated to a campsite only a few blocks away from The Zone or otherwise left Phoenix's shelter system within thirty days of the clearing. *See* Rihl, *supra*; Stone, *supra*. To break free of this counterproductive cycle of clearing public encampments only to have them reappear in a different location, states and municipalities must be able to address the underlying factors causing this crisis: their inability to prevent public camping.

D. The Ninth Circuit's Opinions Thwarted the Legislature's Efforts to Address a Crisis on Its Own Doorstep.

While The Zone was only a few blocks from the Arizona capitol complex, the Ninth Circuit's Opinion Below made it harder for lawmakers to take appropriate action. As Judge Smith correctly observed, "*Martin* handcuffed local jurisdictions as they tried to respond to the homelessness crisis; [the Opinion Below] now places them in a straitjacket." 72

F.4th at 936 (M. Smith, J., dissenting from denial of rehearing en banc). Judge Smith is absolutely correct that the perception by many state and local lawmakers regarding the effect of the Ninth Circuit's decisions is that they create a straitjacket and unnecessary legal risk, hampering the legislative process.

For example, in 2022, the Arizona Senate passed Senate Bill ("S.B.") 1581, which would have allowed the Arizona Department of Housing to distribute grants to municipalities and counties to establish sanctioned camping sites for homeless individuals, and S.B. 1263, which would have allocated funds to support emergency and transitional homeless shelter services. S.B. 1581, 55th Leg., 2nd Reg. Sess. (Ariz. 2022); S.B. 1263, 55th Leg., 2nd Reg. Sess. (Ariz. 2022). In a hearing before the House Appropriations Committee, the sponsor of these bills, Senator David Livingston, explained that he had been working on homeless-related bills for three years and that he was proud of those bipartisan efforts. *See Hearing on S.B.s 1263 and 1581 Before the H. Comm. on Appropriations*, 55th Leg., 2d Reg. Sess. (Ariz. 2022), https://www.azleg.gov/videoplayer/?eventID=2022031106, at 2:00:00–2:00:20. Senator Livingston explained that although "any one of these bills by themselves won't solve any problems," legislators have an "opportunity here to make a historic difference on homelessness." *Id.* at 2:00:28–2:00:41. He emphasized, "[W]e've had 600 people die in Maricopa County on the streets last year. I don't know what else we need to say [but] we need to do more than what we're doing and what we're doing is not working." *Id.* at 2:00:50–2:01:02.

The legislative committee also heard public testimony about the significant rise in homelessness over recent years in Maricopa County and The Zone in particular, as well as the community's efforts to provide statewide emergency shelter and services. *Id.* at 2:02:23–2:03:02. The Vice Chairman of the committee, Representative John Kavanagh, discussed his extensive experience dealing with the homeless population in New York City as a police officer. *Id.* at 2:11:42–2:12:50. Representative Kavanagh added, "I also know that the history of tent encampments in this country is a disaster." *Id.* at 2:12:51–2:12:54. He criticized "the jungle in San Francisco—which was eventually shut down by the woke San Francisco police [who] tolerated it until it got totally out of control with murders, rapes, and rampant drug use." *Id.* at 2:12:54–2:13:10.

Testifying in support of S.B. 1581 on behalf of a nonprofit, The Cicero Institute, a consultant told the committee:

> The problem with homelessness is it's not easily solvable. We know that. It's not easily dealt with. And we know that. This bill . . . envisions us having a short-term solution where there is none now. We have cities that are in stasis; they are afraid of being litigated against, rightfully so. We are operating under a Ninth Circuit Court of Appeals decision which says that you have to offer a bed for a homeless person if you ban them from sleeping on the streets. . . . And you see the result of that. We see people everywhere. There are a thousand people just two blocks from here that are camped out around the human services campus.

Id. at 2:21:24–2:22:23. In the House, lengthy discussions ensued among legislators about the impact and legal effect of the *Martin* decision and various aspects of this complex humanitarian crisis. *See, e.g., Hearing on S.B. 1581 Before the H. Comm. on Health and Human Serv.*, 55th Leg., 2d Reg. Sess. (Ariz. 2022), https://www.azleg.gov/videoplayer/?eventID=2022031094&startStreamAt=13307, at 3:22:33–4:47:06. Neither S.B. 1263 nor S.B. 1581 made it to the House Floor.

In the spring of 2023, the 56th Legislature considered even more bills aimed at addressing the homelessness crisis. Representative Livingston introduced a comprehensive measure, House Bill ("H.B.") 2284. H.B. 2284, 56th Leg., 1st Reg. Sess. (Ariz. 2023). During a committee hearing, a legislative attorney flagged the bill as potentially unconstitutional under *Martin*. *See Hearing on H.B. 2284 Before the H. Comm. on Rules*, 56th Leg., 1st Reg. Sess. (Ariz. 2023),https://www.azleg.gov/videoplayer/?eventID=2023031023, at 1:46–5:12. Representative Livingston later sponsored a Floor Amendment to the bill, removing the criminal-penalty provisions. H.B. 2284 (Adopted Floor Amendment), 56th Leg., 1st Reg. Sess. (Ariz. 2023).

The Legislature successfully passed S.B. 1413, a bill that required counties, cities, and towns, upon notice of the existence of a homeless encampment, to notify the owner to remove the structure from the location and designated a violation as criminal trespassing. S.B. 1413, 56th Leg., 1st Reg. Sess. (Ariz. 2023). However, Governor Hobbs vetoed S.B. 1413, stating that the bill "effectively criminalizes experiencing homelessness." Veto of S.B. 1413 (Ariz. 2023) (Veto Letter, June 5, 2023), https://www.azleg.

gov/govlettr/56leg/1r/sb1413.pdf. The Legislature also passed S.B. 1024, which prohibited persons from erecting or maintaining full or partial enclosures (such as tents and boxes) for habitation on public rights-of-way. S.B. 1024, 56th Leg., 1st Reg. Sess. (Ariz. 2023). Unfortunately, S.B. 1024 met the same fate as S.B. 1413. In Governor Hobbs' veto letter, she asserted that S.B. 1024 was not "comprehensive" enough to address Arizona's housing and homelessness crisis. *See* Veto of S.B. 1024 (Ariz. 2023) (Veto Letter, March 30, 2023), https://www.azleg.gov/govlettr/56leg/1r/sb1024.pdf.

Despite these challenges and policy disagreements, in May 2023, the Legislature passed and the Governor signed a bipartisan budget that immediately awarded nearly $20 million in grants to local governments "for programs that provide shelter and services to unsheltered persons who are experiencing homelessness." S.B. 1720, Sec. 104, 56th Leg., 1st Reg. Sess. (Ariz. 2023). The City of Phoenix received more than $13 million of that total, and the cities of Flagstaff, Mesa, Scottsdale, Tempe, and Tucson also received grants to serve the unsheltered population. *See* Ariz. Dept. of Housing Press Release (June 7, 2023), https://housing.az.gov/sites/default/files/PRESS-State-acts-quickly-and-awards-millions-to-address-homelessness.pdf.

Accordingly, the Legislature has a strong interest in crafting policy to address this complex humanitarian crisis and ensuring that its legislative judgments and appropriations can be implemented efficiently without fear of legal invalidity based on an erroneous interpretation of the Eighth Amendment.

CONCLUSION

Amici respectfully request that the Court reverse the Opinion Below and provide clarity to lawmakers on the critically important issue of their authority to legislate regarding homelessness.

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