

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 THE MANHATTAN INSTITUTE,
STEPHEN EIDE, AND JUDGE GLOCK
AS *AMICI CURIAE*
SUPPORTING PETITIONER**

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 20001
(212) 599-7000
ishapiro@manhattan.institute

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QUESTION PRESENTED

Whether the enforcement of generally applicable laws regulating camping on public property constitutes “cruel and unusual punishment” prohibited by the Eighth Amendment.

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INTEREST OF *AMICUS CURIAE*¹

The **Manhattan Institute** (MI) is a nonprofit public policy research foundation whose mission is to develop and disseminate ideas that foster economic choice and individual responsibility. MI has a particular interest in the orderly functioning and economic dynamism of America's cities.

Stephen Eide, Ph.D., is a senior fellow at MI and contributing editor of *City Journal* whose work focuses on social policy questions, including mental illness and homelessness. He is author of *Homelessness in America* (2022).

Judge Glock, Ph.D., is senior fellow and director of research at MI. He has written extensively on urban history, housing, and homelessness. He served on the Mayor of Dallas's task force on homelessness and was an expert witness in the *Brown v. City of Phoenix* encampment case.

This case interests *amici* because it involves the health of our cities, the proper functioning of our civil-litigation system, and the rule of law.

SUMMARY OF ARGUMENT

Grants Pass, Oregon, has ordinances that restrict camping in city parks and other public areas. The city considers these laws crucial to its efforts to maintain safe and orderly public spaces. The Ninth Circuit enjoined Grants Pass from enforcing its ordinances on the grounds that they inflict "cruel and unusual punishments" on the homeless, thus violating the

¹ Rule 37 statement: No party's counsel authored this brief in whole or in part and no person or entity other than *amicus* funded its preparation or submission.

Eighth Amendment. *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023). This finding was, in large part, an application of that court’s previous ruling in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

Yet enforcing laws against encampments benefits both the homeless and non-homeless alike. In both *Grants Pass* and *Martin*, the Ninth Circuit asserts that its decisions are “narrow,” in the sense that they don’t expand judicial authority unduly or undermine localities’ efforts to address street homelessness. *See Martin*, 920 F.3d at 617 (“Our holding is a narrow one.”). Time has proven that, regardless of any narrowness intended, the rulings have broadly hamstrung efforts to create safe and orderly communities. In their wake, localities have been left without viable tools to combat homelessness.

Indeed, in the ensuing years since the *Martin* decision, unsheltered homelessness has grown more rapidly in the Ninth Circuit than in the rest of the country. The rulings also expand judicial oversight over local homeless response systems, impose unsustainable financial obligations on localities, and lay the groundwork for further needless judicial entanglement with social policy. Developing a response to homelessness policy—the appropriate mix of enforcement and social programs—should be left to local legislative action, within constitutional bounds.

This Court should reverse the Ninth Circuit.

ARGUMENT**I. REDUCING HOMELESS ENCAMPMENTS THROUGH ENFORCEMENT EFFORTS BENEFITS BOTH COMMUNITIES AND THE HOMELESS THEMSELVES**

The sleeping and camping laws at issue in *Grants Pass*, and in the *Martin* case that preceded it, were enacted legislatively by municipalities that sought to address street homelessness. The Ninth Circuit paid only passing lip service to (1) the benefits of reducing street homelessness (2) the essential role that law enforcement plays in such efforts.

Homeless encampments are unhealthy places that boast high rates of untreated mental illness, substance abuse, mortality, and crime. Encampments typically arise because municipalities fail to enforce laws against public camping.

By contrast, municipalities that enforce camping bans experience dramatic reductions in encampments and their consequent social ills. Cities have demonstrated that a humane enforcement policy is effective in reducing unsheltered homelessness. Where these policies have been deployed, almost all the unsheltered individuals who do not wish to accept services or a place in the sanctioned camping area voluntarily leave. In only the rarest of circumstances must an unsheltered individual be arrested.

While the majority of the homeless in America are sheltered, and most of the sheltered homeless do not have severe problems with drugs, alcohol, or mental illness, these problems are much more prevalent among the unsheltered. One UCLA study of the

unsheltered homeless in 15 states found that 78% reported a substantial mental health condition, 75% reported a substance abuse problem, and the majority reported both. 50% of the unsheltered reported that their mental health condition was a factor in their loss of housing, nearly three times the sheltered rate, and 51% reported that substance use was a factor in loss of housing, more than eight times the sheltered rate. See Janey Rountree, Nathan Hess & Austin Lyke, *Health Conditions Among Unsheltered Adults in the U.S.*, Calif. Policy Lab Policy Brief, Oct. 2019, <http://tinyurl.com/2brhvef4>.

And these problems appear to be even worse among the inhabitants of large public encampments. One study of two Philadelphia homeless camps found “near ubiquitous substance use among those staying in the encampments.” See Stephen Metraux et al., *An Evaluation of the City of Philadelphia’s Kensington Encampment Resolution Pilot*, City of Philadelphia, Mar. 5, 2019, <http://tinyurl.com/3wmc52z9>.

Individuals with these problems, when left without support or security in public, endure high rates of violent victimization and death. In Los Angeles in 2020 and early 2021, 15% of all violent crime in the city involved a homeless person, though the homeless represent only about 1% of the population. See Sophie Flay & Grace Manthey, *What is Really Going on with Homeless Crime? We Crunched the Numbers*, ABC 7, Oct. 21, 2021, <http://tinyurl.com/3vt3f4rz>. The most common victims of crimes by homeless perpetrators were other homeless people: the homeless were 24% of the city’s murder victims. See Eric Leonard, *LA’s Homeless Were 24% of City’s Murder Victims*, NBC 4,

Jan. 4, 2023, <http://tinyurl.com/jy8xp8m4>. The city has also seen over 2,000 homeless deaths per year. See L.A. County Dep't of Public Health, *Mortality Rates and Causes of Death Among People Experiencing Homelessness in Los Angeles County: 2014-2021*, May 2023, <http://tinyurl.com/yfkh2vmr>.

While reducing housing costs can help people out of homelessness, high rents alone cannot account for the street homelessness crisis throughout West Coast cities. Researchers have noted that rental burden variations between cities can explain between one quarter and a little over half of the variation in the extent of homelessness across different locations, but that still leaves substantial variation due to non-cost and non-rent factors. Housing and rental prices also seem to have more effect on the sheltered homeless population than the unsheltered, where issues like temperature can play a large role. See Clayton Page Aldern & Gregg Colburn, *Homelessness is a Housing Problem: How Structural Factors Explain U.S. Patterns* (2022).

The remaining variation in homelessness, especially among the unsheltered, seems to be related to other issues including the ease or encouragement of outside camping. Cities that have stopped enforcement of camping bans have seen sudden influxes of the unsheltered concurrent with the relative ease of street living. When Austin voted to end its camping ban in 2019, the city saw an increase in unsheltered homelessness of about 45% by the following year. This was likely not just due to increased visibility, since the sheltered homeless dropped by about 20% in the same time period. See Sarah Duzinski & Matt Mollica, *2020 Point-in-Time*

Count Austin/Travis County at 6, Ending Community Homelessness Coalition, 2020, <http://tinyurl.com/t4cckjec>. Los Angeles saw a sharp decline in unsheltered homelessness the year after it began its “Safer Cities Initiative” to enforce laws against street camping in Skid Row in 2006, and continued declines in thereafter. But after Los Angeles moved away from street enforcement around 2014, it experienced continual increases in unsheltered homelessness, from a near nadir of 22,590 in 2014 to 50,046 in 2023. See U.S. Dep’t of Housing & Urban Development, *PIT and HIC Data Since 2007*, Dec. 2023, <http://tinyurl.com/yb9zrfws>. If a city offers the option of street-sleeping and camping, many of the formerly sheltered or housed, and many nonresidents, will take it.

Considering the substantial problems with drug abuse and mental illness among the unsheltered, it is perhaps not surprising that large numbers of individuals in public encampments are “service resistant,” meaning absent some sort of public mandate, they will not willingly accept shelter or alternatives. In two surveys of homeless encampment residents, only 25–41% of residents said they would go willingly into shelter. See Sharon Chamard, *Homeless Encampments: Responses to the Problem of Homeless Encampments*, ASU Center for Problem-Oriented Policing, Jan. 2010, <http://tinyurl.com/2p8sbv57>. The mere provision of shelter alternatives, without a mandate to use them, will not get the majority of the unsheltered off the streets.

The homeless population is mobile, meaning that in the absence of enforcement more individuals will

migrate to a city to live on its streets. In San Francisco and Austin, about a third of the homeless came from other places, and in Los Angeles it was about a third of all unsheltered. See Duzinski & Mollica, *2020 Point-in-Time Count Austin/Travis County* at 22; Applied Survey Research, *San Francisco Homeless Count and Survey, 2022 Comprehensive Report*, S.F. Dep't of Homelessness and Supportive Housing, Aug. 2022, <http://tinyurl.com/mujm2bf7>; 2020 *Greater Los Angeles Homeless Count Presentation*, L.A. Homeless Services Authority, June 2020, <http://tinyurl.com/yc6d8ba6>.

If many of the homeless are moving into a city from elsewhere, adding more or cheaper housing cannot solve the local homelessness crisis. Mobility among the homeless helps explain why one study estimated that it would take a city approximately ten permanent supportive housing beds to reduce its unsheltered homeless population by one. See Kevin Corinth, *The Impact of Permanent Supportive Housing on Homeless Populations*, 35 J. Housing Econ. 69 (March 2017).

Mobility also explains why cities that accommodate camping and drug use tend to attract more encampments. A 2016 Seattle survey found that less than half of the homeless became homeless inside the city. Of those who came to the city almost 10% cited legal marijuana as their reason for coming, 15% cited the provision of services for the homeless, and 16% claimed they were just “traveling or visiting.” Applied Survey Research, *2016 Homeless Needs Assessment* at 2, City of Seattle, 2017, <http://tinyurl.com/mujm2bf7>.

Numerous homeless individuals state that the ease of drug use and the ability to live on the streets are a reason for attracting them and other homeless individuals to the camps in cities that encourage them. See Natasha Anderson, *I Get Paid to Be Homeless in San Francisco*, Daily Mail, Feb. 20, 2022, <http://tinyurl.com/2s4j6xba>; Teun Voeten, *Skid Row: Inside the Epicentre of LA's Homeless and Crystal Meth Crisis*, The Independent, Oct. 10, 2021, <http://tinyurl.com/3rh8p5vj>; Heather MacDonald, *San Francisco, Hostage to the Homeless*, City Journal, Autumn 2019. The pervasive mental health and addiction problems among the unsheltered, the mobility of the unsheltered population, and the relative lack of response of homeless rates to increased subsidized or reduced-rate housing means that enforcement of laws against public camping and sleeping is an appropriate measure to take to reduce street homelessness and protect health and safety.

Considering the problems among the unsheltered population, and the high rates of violence and death among them, it is perhaps not surprising that effective police response can help reduce the problems associated with public encampments. This response does not require widespread arrests.

The most extensive study of enforcement against camping and street sleeping was published by Richard Berk and John MacDonald in *Criminology & Public Policy* in 2010. They found significant reductions in violent and property crime as part of Los Angeles's "Safer Cities Initiative" and efforts at clearing homeless encampments along Skid Row and did not find significant negative spillovers to other communities. Richard Berk & John MacDonald,

Policing the Homeless: An Evaluation of Efforts to Reduce Homeless-Related Crime, 9 Criminology & Pub. Pol’y 813 (Nov. 2010).

The enforcement was accompanied by significant overall reductions of homeless deaths in the first year, including about a 50% reduction in natural deaths and overdoses on Skid Row in the first half of 2007 compared to a year earlier. Patrick McGreevy, *Crackdown cuts Skid Row Death Toll, Bratton Says*, L.A. Times, June 8, 2007, <http://tinyurl.com/mwp2dep4>. Berk and MacDonald also found no negative spillover effects of crime into other nearby communities—suggesting that enforcement does not merely shift the problem elsewhere.

Other cities have seen similar positive results after enforcing bans on street-sleeping. The city of Colorado Springs once had around 600 homeless campers according to local officials. But after it began enforcing its anti-camping laws in February 2010, it saw significant reductions in homelessness and increases in service acceptance. According to Homeward Pikes Peak, the local homeless service organization, after enforcement about 160 of the homeless went back to their families, 35 went into rehabilitation, 80 into subsidized housing, and about 150 got jobs. As the head of the organization said, “We reached out to 610 campers, and 435 didn’t return to homelessness We decreased chronic homelessness by two-thirds in seven-and-a-half months.” See Jeremy P. Meyer, *Effect of Camping Bans Debated as Denver Considers Ordinance*, Denver Post, Apr. 12, 2012, <http://tinyurl.com/mpchkksk>. The city still offers

services to those who remain on the streets, but also requires them to move if they refuse.

In most places, once enforcement begins, there are few arrests and large numbers of individuals connected to services. There were no reported arrests in Colorado Springs despite the large number of people moved into services. In Burien, Washington, after the city gave notice to around 50 to 100 unsheltered homeless to vacate, several moved on to unknown locations, several accepted services, and only one was arrested. See Christopher Rufo, *Enforcement Works*, City Journal, Aug. 23, 2019, <http://tinyurl.com/9fy47dz7>. In Austin, after reinstatement of a camping ban, there were substantial reductions in public camping, and only one reported arrest after the first year. See Maria Aguilera, *One Year after Voters Reinstated the Camping Ban, Austin's Homeless Woes Continue*, KVUE, May 2, 2022, <http://tinyurl.com/y4nz9apk>.

The Arizona State University Center for Problem-Oriented Policing includes “Shutting down homeless encampments” as part of its “General Principles for an Effective Strategy” for dealing with the “Problem of Homeless Encampments.” It recommends providing residents with effective notice of camp clearance, contacting homeless service providers to connect residents with services, and offering the storage of personal property. It also then recommends citations of any residents who refuse to move followed by, if necessary, the “arrest [of] any remaining” residents, along with posted signs to ensure residents do not return to the camp. See Chamard, *Homeless Encampments* at 31.

In practice, camp-clearings, warnings, and referrals to services are usually enough to clear camps with minimal citations and few if any arrests. The large number of residents who return to families, hometowns, or other locations that are not public camps after such clearings means that many, or most, do not even require an immediate alternative location. It also suggests that that a key factor leading to homeless encampments are the municipal policies that attract unsheltered populations: lack of enforcement against camping bans and an unwillingness to force individuals to leave if they refuse to accept services.

II. THE RULING BELOW HAMPERS LOCAL EFFORTS TO REDUCE ENCAMPMENTS AND OTHERWISE CANNOT BE CONSIDERED “NARROW”

The Ninth Circuit stressed repeatedly, in both *Martin* and *Grants Pass*, that its jurisprudence is “narrow.” This claim fails in four ways.

First, and most importantly, the rulings have hampered localities’ abilities to reduce homeless encampments. This is the explicit testimony of the many public officials from throughout the Ninth Circuit who petitioned this court to review *Grants Pass*. “The Ninth Circuit’s interpretation of the Eighth Amendment imposes unworkable restraints on local governments and has allowed unchecked encampments to overwhelm public spaces and threaten the health and safety of both housed and unhoused communities.” Brief for the League of Oregon Cities, et al. as *Amici* Supporting Petitioner at 3, *City of Grants Pass v. Johnson*, No. 23-175

(2023). “*Grants Pass*’ prohibition on criminal and civil enforcement of important public health and safety laws against those that fall within its definition of ‘involuntary homeless’ has enabled, in part, the establishment of semi-permanent encampments that foster dangerous conditions, criminal activity and disorderly conduct that threatens the safety of persons experiencing homelessness and the general public.” Brief of Ten California Cities as *Amici Curiae* Supporting Petitioner at 2, *City of Grants Pass v. Johnson*, No. 23-175 (2023).

Public data from the Department of Housing and Urban Development’s annual homeless surveys, known as Point-in-Time counts, support the officials’ claims. In every single one of the nine states within the Ninth Circuit’s jurisdiction, street homelessness has increased since *Martin* was handed down, as shown in the following table:

Increase in Unsheltered Homelessness, U.S. States in the Ninth Circuit Jurisdiction, 2018-2023				
	2018 Unsheltered Homelessness	2023 Unsheltered Homelessness	# Change	% Change
Alaska	309	468	159	51.5%
Arizona	4,066	7,615	3,549	87.3%
California	89,543	123,423	33,880	37.8%
Hawaii	3,475	3,907	432	12.4%
Idaho	723	1,058	335	46.3%
Montana	373	496	123	33.0%
Nevada	4,239	4,555	316	7.5%
Oregon	8,925	13,004	4,079	45.7%
Washington	10,621	13,953	3,332	31.4%
Total	122,274	168,479	46,205	37.8%

Source: U.S. Dep’t of Housing and Urban Development, *PIT and HIC Data Since 2007*.

The cumulative increase in unsheltered homelessness was 37.8%. The increase in unsheltered homelessness the same period in the rest of the country was only 22.1%. *Id.* As street homelessness has increased, so, too, has the attendant suffering. Many of the largest cities in the circuit, including Los Angeles, Seattle, San Francisco, and Portland, have seen 50% or greater increases in annual homeless deaths in some years since the *Martin* decision, largely driven by increases in overdoses, with few or none attributed to COVID. See Thomas Fuller, *Death on the Streets*, N.Y. Times, Apr. 25, 2022, <http://tinyurl.com/cftxcerp>; Anna Patrick, *More Homeless People Died in King County in 2022 Than Ever Recorded before*, Seattle Times, Jan. 16, 2023, <http://tinyurl.com/yjhzf7nk>; Caroline Cawley, et al., *Mortality among People Experiencing Homelessness in San Francisco During COVID-19 Pandemic*, JAMA Network Open, Mar. 10, 2022, <http://tinyurl.com/347kwvvv>; Claire Rush, *Substances Fuel Record Homeless Deaths in Portland, Oregon*, Associated Press, Feb. 15, 2023, <http://tinyurl.com/f4pxj95d>.

Martin also imposed unsustainable fiscal obligations on cities. Tax bases vary in strength. In the wake of the Great Recession, three major Ninth Circuit cities went bankrupt (Vallejo, Stockton, and San Bernardino—all in California). Poor cities, already straining to support basic municipal services, and make good on long-term commitments related to debt and retirement benefits, are in no position to embark on a massive new investment in homelessness programs. And yet that is what the Ninth Circuit requires as a condition for enforcing

public camping regulations. Maintaining orderly public areas is a core responsibility of local self-government. A legal regime that mandates that cities either provide shelter for all the street homeless living in their borders, or allow that population live in the streets and parks, in effect makes self-government unaffordable for poor cities.

Grants Pass also isn't narrow in the expanded role it creates for the judicial supervision of homelessness programs. The opinion stipulates that local policy must proceed in three steps. First, the city should assess how many homeless people live in it. Second, the city must make available temporary or permanent housing to everyone in its borders who claims he doesn't have it. Third, it may then enforce laws prohibiting sleeping in public. *See Johnson v. City of Grants Pass*, 72 F.4th 868, 878–883 (9th Cir. 2023). Any West Coast city interested in whether its response to homelessness is constitutionally sound and doesn't inflict “cruel and unusual punishments” must subject its system to the Ninth Circuit's test.

Crucially, for the Ninth Circuit's test, counting shelter beds isn't enough. Shelter must be “practically” or “realistically” available. A shelter bed may be empty but still objectionable to an unsheltered person. Potential reasons include that a program is run by a faith-based group—even if no religious requirements are imposed as a condition for using that shelter—curfews, and rules against pet ownership. *Martin* even suggests that references to Jesus Christ on a shelter's intake form or “messages and iconography on the walls,” Pet. App. 38a, might render shelter “practically [un]available.” *Martin*, 920 F.3d at 605.

That counting issue raises serious problems of judicial administrability. The same qualities that make some shelters unavailable to certain members of the homeless population may in fact make them available to others. One obvious example is time limits that free up beds for new clients. Others are rules against smoking—two of the plaintiffs in *Martin* complained about not being as free to smoke as they preferred in local shelters. Pet. App. 79a, 84a.—and sobriety requirements. *Robert Martin et al. v. City of Boise*, No. 1:09-cv-00540-REB, Memorandum Decision and Order at 15 (D. Idaho, Sept. 28, 2015). “Dry” shelters sometimes have the reputation, on the streets, of being safer and more orderly than “wet” shelters. Under *Martin* and *Grants Pass*, it is left to the judiciary to sort through when objections to shelter programs constitute reasonable grounds for “service resistance.” Is everyone entitled to his or her own custom-tailored shelter program? How much variety, in a small city like Grants Pass (pop. 39,000), should be expected from the local shelter system? The judiciary should not entangle itself in local, legislative, minutiae best handled by elected representatives.

Courts also lack the competence to assess whether someone is truly “involuntarily” homeless. *Martin* noted that “our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.” *Martin*, 920 F.3d at 617 (emphasis in original). “Involuntary” homeless status is the standard promulgated by the Ninth Circuit for determining when someone truly has no other choice but to camp in public.

But not everyone on the street is there by necessity. The *Martin/Grants Pass* test sees the homeless population as static whereas it is quite dynamic, as noted in Section I above, of the mobility of the homeless population and illustrated by the life stories of the petitioners in both *Martin* and *Grants Pass*. (Robert Martin and John Logan, petitioners in *Martin* and *Grants Pass*, respectively, once drifted through the city in question, but were not camping there throughout the litigation. See *Martin*, 920 F.3d at 610; *Johnson*, 72 F.4th at 883. *Grants Pass*'s conception of "involuntary" homelessness fails to consider whether a city may attract homeless people by providing more homeless services. Such a service-driven migration is the recent experience of New York, where the current migrant crisis is more severe than those of peer cities because of the "draw" effect exerted by New York's unique "right to shelter."

The final reason why it's inaccurate to describe *Grants Pass* as narrow is because it lays the groundwork for further and deeper judicial intrusions into social policy. "Involuntary" homelessness is a potent concept. The Ninth Circuit clarified that someone deserves that protected status because sleeping is a "biologically essential need." *Martin*, 920 F.3d at 589 (Berzon, J., concurring). But a list of other activities that could fit that description, which cities nonetheless regulate, would include urination and defecation. If *Grants Pass* can't prohibit sleeping in public, it's not obvious why any similarly situated city is authorized to restrict its homeless population from engaging in those activities in public areas.

There is an alternative to the broad and thoroughgoing judicial oversight of local homelessness policy envisioned by *Martin* and *Grants Pass*, and that is local democracy. Fears that homelessness policy will be unacceptably cruel, if left up to local democracy are unfounded. Throughout the Ninth Circuit's geographical jurisdiction, the public, through the ballot-initiative process, has on several recent occasions directly authorized more spending on homelessness programs. Some opinion surveys have found that large portions of the public believe they or someone in their family are at risk of homelessness. USC Sol Price School of Public Policy and USC Schwarzenegger Institute, *New USC Poll Reveals Likely California Voters' Sentiments on Homelessness Ahead of March 3 Primary Election*, Feb. 13, 2020, <http://tinyurl.com/3tk484ev>.

A decisive reversal of *Grants Pass*, and the *Martin* decision on which it rests, would authorize elected officials to design and implement responses to homelessness. Those officials could then be held accountable by voters for their policies' humaneness and effectiveness. Effective homelessness policy entails a mix of law enforcement and social programs. Local officials, not courts, should be deciding on the appropriate mix.

CONCLUSION

Laws prohibiting public camping may not be a sufficient solution to homelessness, but they are necessary and do not violate any constitutional right. Humane enforcement of laws against public camping and sleeping can make a material difference in the lives of homeless people and in the cities of which they are residents. Homeless Americans, like all Americans, have constitutional rights which it is the obligation of courts to safeguard.

In both this case and *Martin*, the Ninth Circuit went far beyond that function to establish excessive, counterproductive, and *ultra vires* court oversight over local homelessness policies. This Court should reverse.

Respectfully submitted,

Ilya Shapiro
Counsel of Record
Tim Rosenberger
MANHATTAN INSTITUTE
52 Vanderbilt Ave.
New York, NY 20001
(212) 599-7000
ishapiro@manhattan.institute

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