NO. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,

v.

GLORIA JOHNSON, ET AL., 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 FOR THE CITY OF CHICO AS AMICUS CURIAE SUPPORTING PETITIONER

ALVAREZ-GLASMAN & COLVIN
ERIC G. SALBERT
ESALBERT@AGCLAWFIRM.COM
13181 CROSSROADS PARKWAY NORTH, SUITE 400
CITY OF INDUSTRY, CALIFORNIA 91746
PHONE: (562) 699-5500 • FAX: (562) 692-2244

Counsel for Amicus Curiae
COUNSEL OF RECORD

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INTEREST OF *AMICUS CURIAE*[1]

The City of Chico, California ("Chico") is the largest city in Butte County, with a population of just over 100,000 people. If figures from the 2023 point-in-time count are accurate, there are 366 homeless persons residing in Chico.[2] Despite having a far smaller number of homeless persons than cities such as San Francisco and Los Angeles, Chico has nevertheless experienced tremendous difficulty as its public officials try to protect the health and safety of all residents after *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) ("*Martin*") and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) ("*Johnson*").

In April 2021, the United States District Court for the Eastern District of California enjoined Chico from enforcing state and local disorderly conduct and anti-camping laws. The parties ultimately settled,

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[1] Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation and submission of this brief.

[2] BUTTE COUNTY CONTINUUM OF CARE, *2023 Point-In-Time Executive Summary* (2023) at 13, https://www.buttehomelesscoc.com/uploads/1/1/7/5/117500423/2023_pit_executive_summary.pdf.

one product of which was Chico's creation of a 177-unit non-congregate shelter for the homeless. In the year since Chico's shelter opened, the city removed 908 tons of trash from public grounds, outreach and engagement personnel assessed 401 homeless persons for placement in shelter, and 207 homeless individuals resided at the Chico-run shelter as of the year anniversary date. Despite these improvements, Chico is unable to timely address threats to public health and safety.

Pursuant to the terms of the settlement Chico entered into, homeless persons may be relocated from an encampment into shelter as long as the city has enough shelter availability to house all individuals residing at the specific location(s) being cleared. That process requires counting people and shelter availability, and thereafter providing at least seventeen days' notice before completely cleaning up an encampment. Residents do not understand why Chico cannot immediately address issues of open drug use, violence, theft, uncontrolled fires, environmental degradation, and other threats to a person's physical and mental well-being. Like many other public agencies, Chico is interested in ensuring its public officials will be able to exercise their discretion to combat homelessness-related threats to public health

and safety, as they were able to before the Ninth Circuit heavily restricted the same.

INTRODUCTION

Chico currently has no straightforward and effective path toward improving public health and safety outcomes that are threatened by the proliferation of homeless encampments. The city has been enjoined from enforcing a state anti-vagrancy law—California Penal Code section 647—that has been used, in one iteration or another, to levy misdemeanor convictions carrying the threat of fines, and incarceration since at least as early as 1887. Likewise, Chico is presently unable to enforce the anti-camping provisions within its own municipal code, one of which was adopted approximately three decades ago in 1993, and all of which carry the threat of not greater than fines, incarceration, and a misdemeanor conviction.

Not only has Chico been enjoined from enforcing the above laws, but its settlement agreement has also barred it from enforcing any "analogous provision(s)" of state and local law. The vague contours of the holdings in *Martin* and *Johnson* mean that it is practically impossible for Chico to understand what "analogous" laws it may enforce.

That is because the Ninth Circuit's decisions restrict state and local governments from enforcing regulations that prohibit any "involuntary act or condition" of being homeless, but there exists no standard for determining what constitutes such acts and conditions.

California Penal Code section 647, subdivision (c), prohibits begging for money, but Chico is unable to enforce the same, ostensibly because doing so would punish an "involuntary act or condition." However, asking for money is not an involuntary act insofar as one intends to do so. Further, soliciting alms is not an unavoidable act because homeless persons can obtain state benefits. This raises the question of what other laws might be restricted under the Ninth Circuit's reasoning? Judge Milan D. Smith's dissenting opinion in *Martin* posited that laws against public urination and defecation have been rendered unenforceable. 920 F.3d at 590. What about laws proscribing littering, loitering, open containers, smoking in public, and the like?

Unfortunately, all state and local governments are faced with the above-described, sand-in-the-gears ambiguity. Even though Chico's settlement terms prevent the enforcement of "analogous provision(s)," all public agencies are left in the dark as to what

public health and safety regulations may be enforced because the Ninth Circuit has left such questions open to seemingly unending litigation. No resident of Chico or any other municipality should be worried that their public officials will be unable to prevent sprawling homeless encampments in or adjacent to their neighborhoods, parks, waterways, schools, retail shopping centers, city centers, and other areas where all members of the general population should be, and until recently have been, able to enjoy.

Questions over what laws *Martin* and *Johnson* impact need not persist. The reason being: the very laws Chico, and others, have been unable to enforce were enacted and administered long before the holdings in *Martin* and *Johnson*, with punishments yielding relatively nominal fines, incarceration and conviction. Under the plain meaning of the Cruel and Unusual Punishments Clause, those laws are neither cruel nor unusual. Stated differently, state and local governments should not be required to litigate the bounds of *Martin* and *Johnson* at the expense of public health and safety because the Eighth Amendment does carry the restrictions the Ninth Circuit has gleaned. Accordingly, Chico respectfully requests that this Court reverse *Martin* and *Johnson*.

SUMMARY OF THE ARGUMENT

Chico's argument reviews the laws the City is unable to enforce and details the public health and safety issues that have arisen as a result. The first section recites the state law and local ordinances Chico is unable to enforce. In the second section, the argument explains that the relevant state law has been enforced, in one form or another, since at least 1887. Next, the third section details that Chico began adopting its currently restricted local ordinances since at least 1993. Because both the state law and the local ordinances have existed for decades and carry no more punishment than a misdemeanor conviction, a fine and incarceration, the argument is made that the enforcement of those regulations has been, and currently is, neither cruel nor unusual. Finally, the fourth section of the argument specifies how the Ninth Circuit's interpretation of the Eighth Amendment has made it exceedingly difficult for Chico to find some legal means by which it can address threats to public health and safety. Chico concludes by respectfully requesting that this Court reverse the Ninth Circuit's decisions in *Martin* and *Johnson*, thereby enabling states and local governments to decide how to respond to public health

and safety concerns in the context of the homelessness crisis.

ARGUMENT

I. Chico has Been Unable to Address Homelessness Issues Through the Enforcement of State and Local Laws.

On April 8, 2021, eight homeless persons filed a lawsuit against Chico alleging, *inter alia*, violation of their civil rights derived from *Martin*. The United States District Court for the Eastern District of California ("Eastern District") entered a temporary restraining order against Chico on April 11, 2021, restricting it from enforcing the following laws against the homeless: California Penal Code section 647, subdivision (c) ("Section 647(c)"), and Chico Municipal Code ("CMC") sections 9.20.010 through 9.20.060, CMC section 9.50.030, subdivisions (B) through (E), CMC section 12.18.430 and CMC section 12R.04.340. Thereafter, the Eastern District issued a preliminary injunction on July 8, 2021, preventing Chico from taking enforcement actions against the homeless. *Warren v. City of Chico*, 2021 WL 2894648 at *4 (E.D. Cal. July 8, 2021).

Chico settled its homelessness litigation in January 2022. The general framework of the

settlement allows city personnel to: (1) count the number of homeless persons in a limited geographic area or (up to three) areas; (2) confirm sufficient shelter exists for those individuals; (3) assess those persons to determine which shelter option is most suitable for their needs; (4) offer shelter according to the assessments; and (5) enforce anti-camping and related laws against any persons who remain in the limited geographic area(s) after receiving notice of the enforcement operation. However, Chico presently may not enforce anti-camping and related laws on homeless persons who leave the area designated for enforcement, even if they refuse Chico's offer of shelter.

The laws and ordinances that Chico is restricted from enforcing pursuant to the settlement agreement are generally the same as those proscribed by the Eastern District's April 11, 2021, temporary restraining order—*i.e.*, Section 647(c) and CMC sections 9.20.010 through 9.20.060, CMC section 9.50.030, subdivisions (B) through (E), CMC section 12.18.430 and CMC section 12R.04.340. However,

Chico is further restrained from enforcing any "analogous provision(s)" of state or local law.

II. California State Law Has Restricted Activities of the Homeless for Over 100 Years.

California Penal Code section 647, subdivision (c)—the same law restricted by the Eastern District's orders and in Chico's settlement agreement—reads:

> Except as provided in paragraph (5) of subdivision (b) and subdivision (k), every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: … Who accosts other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms.

That statute was enacted in 1961 and its precursor had been enforced at least as early as 1887.

In *Ex Parte McCarthy*, 72 Cal. 384, 385-386 (1887) ("*McCarthy*"), the California Supreme Court considered whether a defendant could be convicted of the misdemeanor offense of vagrancy in violation of the pre-1961 iteration of California Penal Code

section 647 ("Section 647"). At that time, the first clause of the statute read:

> Every person (except a California Indian) without visible means of living, who has the physical ability to work, and who does not for space of ten days seek employment, nor labor, when employment is offered him, every healthy beggar who solicits alms as a business, is a vagrant.

McCarthy, 72 Cal. at 385-386. The defendant argued that another portion of Section 647 that proscribed people from being "idle and dissolute persons who wander and roam about the streets" could not be enforced against her because it had not been alleged that she was "without visible means of living" as set forth in the first clause of Section 647. *Id.* Because the Court reasoned that the first clause of Section 647 and the later portions operated independently, the defendant's misdemeanor conviction for vagrancy was proper and remanded her to the custody of the sheriff. *Id.* at 385-387. Though not explained by the *McCarthy* Court, violation of the pre-1961 version of Section 647 was "punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such

fine and imprisonment." *Ex Parte Cregler*, 56 Cal.2d 308, 309 & n. 1 (1961).

The text of the 1961 version of Section 647 was reprinted in *Gleason v. Municipal Court of the Los Angeles Judicial District*, 226 Cal.App.2d 584, 585 & n.1 (1964) ("*Gleason*"). Comparing that text with the current version of Section 647 reveals that although the preamble has been modified, subdivision (c) remains unchanged to date. At issue in *Gleason* was whether Los Angeles Municipal Code section 41.18, subdivision (b), which proscribed loitering, was preempted by Section 647. *Gleason*, 226 Cal.App.2d at 585. The Court of Appeal reasoned that the purpose of the ordinance was to prohibit loitering in tunnels to prevent individuals from, among other things, "us[ing] such facilities as toilets or for shelter," which validly supplemented Section 647 because that statute did not specifically prohibit loitering in tunnels. *Id.* at 586-588. Consequently, the *Gleason* Court held that Section 647 did not preempt Section 41.18, subdivision (b), of the Los Angeles Municipal Code and defendant's prosecution was allowed to proceed. *Id.* at 585 & 588.

Fast forward over forty years, and the Ninth Circuit held that Section 41.18, subdivision (d), of the Los Angeles Municipal Code violated the Eighth

Amendment's proscription against cruel and unusual punishment. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) ("*Jones*"). By that time, much of Los Angeles Municipal Code section 41.18 ("Section 41.18") had been amended since *Gleason*, yet the subject matter remained the same—*i.e.*, homelessness. At the time *Jones* was decided, Section 41.18, subdivision (d), stated, in pertinent part, "No person shall sit, lie or sleep in or upon any street, sidewalk or other public right of way." The Ninth Circuit held that "[t]he *Robinson* and *Powell* decisions, read together, compel us to conclude that enforcement of section 41.18(d) at all times and in all places against homeless individuals who are sitting, lying, or sleeping in Los Angeles' Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause." Of course, this holding, although vacated, laid the foundation for *Martin* and the proceedings below.

True, Section 41.18 has changed over time from a loitering ordinance to a so-called "sit-lie ordinance," but Section 647 has remained largely the same since at least as far back as 1887, and Section 647(c) has been virtually identical since 1961. Likewise, violations of Section 647 have been punishable as misdemeanors since 1887 and remain so today. Cal.

Pen. Code § 647; *Ex Parte McCarthy*, 72 Cal. at 385. Stated differently, the enforcement of Section 647(c) cannot be cruel because violations are mere misdemeanor offenses; and it cannot be unusual because that statute, in one form or another, has been in existence and enforced for over 100 years. Nevertheless, Chico remains effectively enjoined from enforcing or threatening to enforce said state law because of the Ninth Circuit's more recent jurisprudence.

III. Chico has been Restricted from Enforcing its Own Homelessness Ordnances that it Began Creating Decades Ago.

Again, following the Eastern District's temporary restraining order and preliminary injunction, which formed the foundation of Chico's settlement agreement, the city is unable to freely enforce Chico Municipal Code sections 9.20.010 through 9.20.060, CMC section 9.50.030, subdivisions (B) through (E), CMC section 12.18.430 and CMC section 12R.04.340. Similar to Section 647, Chico's ordinances are neither cruel nor unusual.

Chico Municipal Code section 12R.04.340 was adopted on August 3, 1993, via Resolution No. 19 93-94, to prohibit any person from camping at public

parks and playgrounds between one hour after sunset and one hour before sunrise. Violations of that section are punishable as infractions pursuant to CMC section 12R.02.060.

On January 15, 2008, Chico's City Council adopted Ordinance 2369, thereby creating CMC sections 9.20.010 through 9.20.060. Those sections prohibit any person from camping on public property that is not formally operated and maintained as a campground. Violations are punishable as either an infraction or misdemeanor under CMC section 9.20.060.

Since adopted by Ordinance 2466 on October 6, 2015, CMC section 9.50.030, subdivisions (B) through (E), have restricted any person from entering, staying at, camping at, and storing property on waterways and any adjoining greenways or parklands in Chico without authorization. Violations are punishable as infractions or misdemeanors under CMC section 9.50.040.

The Chico City Council adopted CMC section 12.18.430 on December 8, 2020, via Ordinance 2556. Like CMC section 12R.04.340, this provision restricts any person from camping at public parks and playgrounds between one hour after sunset and one hour before sunrise. However, violations are

punishable as either an infraction or misdemeanor per CMC section 12.18.465.

When *Martin* was decided by the Ninth Circuit in 2019, Chico had been in the process of creating and enforcing ordinances designed to promote public health and safety, but that could be applied to homeless persons, for over two decades. In other words, the very ordinances curtailed by *Martin* were not, and still are not, unusual. Further, none of Chico's ordinances were, or are, cruel because they are no more than misdemeanor offenses, unable to result in punishment of a fine exceeding $1,000 and/or jail time exceeding one year.

IV. The Ninth Circuit's Decisions Have Hamstrung Chico's Ability to Reasonably Address Public Health and Safety Issues.

1. The Vague Contours of *Martin* Enable Inventive Claims and Stymie Public Health and Safety Efforts.

The Ninth Circuit has created standards that are not only unmoored from the Eighth Amendment, but that also interfere with state and local agencies' ability to address public health and safety issues. In Chico, various parts of the *Martin* and *Johnson*

decisions have created widespread problems that officials are unable to reasonably address.

In Chico, the city cannot combat public health and safety issues insofar as it is unable to ascertain a person's claim that they are engaging in "involuntary" acts or are the subject of an "involuntary" condition. That is because both *Martin* and *Johnson* prohibit "the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being," yet no explanation is provided as to when an act or condition is "involuntary." *Martin*, 920 F.3d at 616 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006)); *Johnson*, 72 F.4th at 892 (quoting *Martin*, 920 F.3d at 616). For example, California Penal Code section 647, subdivision (c), prohibits people from accosting others for money, but asking for money does not appear to be an involuntary act or condition because doing so requires one's intent coupled with an affirmative act. *Ulmer v. Municipal Court*, 55 Cal.App.3d 263, 265-267 (1976) (explaining that the word "accost" is used in Section 647(c) to differentiate between asking for donations versus mere receipt of the same). Moreover, homeless persons are eligible to receive state benefits, so why would asking for money be even so much as an

unavoidable act? Nevertheless, Chico has been prevented from enforcing that statute.

Chico is likewise restricted from enforcing Chico Municipal Code section 9.50.030, subdivision (C), which prohibits persons from storing property on public property. Is the storage of property always involuntary or unavoidable? No. In Chico, homeless persons commonly place their trash on public property when they could deposit their trash in dumpsters and other smaller receptacles the city has provided for such purpose. Yet Chico is unable to clean and clear encampments without ensuring there is enough shelter availability for all persons in the encampment and assessing each person for shelter placement. That is a time-consuming process because noticing procedures under Chico's settlement agreement take at least seventeen days, and the city may only clean and clear a maximum of three locations at one time.

Complicating the above-described procedural dilemma is *Martin's* holding that, "'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.'" *Martin*, 920 F.3d at 616 (quoting

Jones, 444 F.3d at 1135). Is Chico's court-approved settlement agreement in violation of the Eighth Amendment because the city limits cleanup operations by ensuring there is enough shelter available for homeless persons in a particular encampment or encampments instead of counting all homeless persons in the city? Hopefully not, but it remains unclear as to what constitutes "a jurisdiction."

Accurately counting homeless persons and bed availability is also inherently problematic. *Johnson*, 72 F.4th at 886 (noting "it 'would be extremely difficult to accurately estimate the population of people who are homeless'"). When Chico law enforcement officers conduct counts at encampments, some tents may be empty, leaving officers with no choice but to ask others whether a vacant tent is in use by any person(s). Advocates for the homeless then count at the same location and have regularly reported increased figures, arguing that cleanup and enforcement operations may not proceed. Differences could arise because of fluctuating numbers of persons going to and from the encampment, because people misreport who might be in an otherwise vacant tent, or because the homeless have different reasons for

providing conflicting answers to law enforcement officers versus their own advocates.

It is likewise difficult to accurately count bed availability at any specific time because of fluctuating capacity and the fact that Chico must obtain figures from multiple shelters. The privately operated Torres Community Shelter is a congregate facility with rooms divided by gender and gender-neutral rooms, and the city's shelter is non-congregate. Based on these differences, advocates for the homeless have objected that even if the overall bed count is sufficient, bed availability issues remain for certain genders and/or couples who do not want to be in separate rooms. The result of the above issues is that objections are often made that delay Chico's efforts to place people in shelter and clean impacted areas notwithstanding the fact that Chico has not encountered a situation, since entering its settlement agreement, where a homeless person who accepted an offer of shelter was not able to enter due to availability.

Martin also prevents enforcement against homeless persons who "cannot obtain shelter." *Martin*, 920 F.3d at 616. But what are the circumstances under which a person cannot obtain shelter? If a person decides to start using illicit drugs,

chooses to use drugs over staying employed, and prefers to be homeless due to lifestyle choices, is it always true that they cannot obtain shelter? If not, how are law enforcement officers supposed to make such a determination when deciding whether to cite and arrest? If the answer is that law enforcement officers must gather whatever information is available at the time of contact and make the best decision they can, but may later be found incorrect through the discovery process, at least some law enforcement agencies likely will not take on the risk; that risk being liability for significant attorneys' fees as provided for under Title 42 of the United States Code, section 1988, over a misdemeanor offense.

Whether a person is voluntarily homeless appears to have been foreclosed by *Martin's* holding that, "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, *on the false premise they had a choice in the matter*." *Martin*, 920 F.3d at 617 (emphasis added). Stated differently, it appears there can be no analysis of whether a person has chosen to be homeless because, regardless of such choice, the Ninth Circuit has determined that no homeless person has a choice as to when or where they sleep. Unfortunately,

footnote eight of the *Martin* opinion has not clarified this issue.

At footnote eight of the *Martin* opinion, the Ninth Circuit stated, "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 n. 8 (emphasis in original). Even if one reads this as an exception insofar as choice is not a false premise when "adequate temporary shelter" exists, there is little guidance as to what constitutes "adequate temporary shelter." Yes, *Martin* did clarify that a shelter cannot require occupants to engage in religious programs, but even that restriction is not clear. In Chico, there is a shelter called the Jesus Center that offers religious programs but does not require occupants to participate in the same. Nevertheless, the Eastern District would not authorize a settlement agreement that permitted the city to offer and place homeless persons at that shelter. Additional issues abound.

In Chico, homeless persons have claimed that even the shelters authorized in its settlement agreement—the city-run shelter and the privately operated Torres Community Shelter—are not

"adequate temporary shelter." Chico's settlement agreement requires the city-run shelter to allow occupants to stay for unlimited duration because that is allegedly a "best practice" for "low barrier" shelters—the argument being that if homeless persons do not like a shelter because of its policies, such a shelter must not be "adequate." However, the Ninth Circuit has expressed that adequate shelters may also be temporary, so when does a shelter meet such a standard? Would it be permissible for a city to cite and arrest homeless individuals if there is more than enough shelter available on the relevant occasion, but stays are limited to one day? One week? One month? Nobody knows.

Homeless persons have made several other types of claims as to when shelter is inadequate. Such claims include, without limitation, that shelter is not adequate when: (1) the shelter maintains quiet hours or a curfew that restricts a person from "working" by collecting cans at night to turn in for cash; (2) the shelter is not able to have pets on location; (3) the shelter separates dorms by gender and gender-neutral classifications and consequently does not permit a heterosexual couple to live in the same room together; (4) the shelter does not accommodate a person's claimed mental disabilities such as having a

fear of living anywhere other than in an individual unit with locking doors; (5) the shelter has restrictions on entry and exit that do not allow a person to leave the premises to go to a quiet place when they want to; (6) the shelter requires occupants to be sober; and (7) the shelter offers mats in a climate-controlled room, rather than beds, for people to sleep on. Is a tent at a sanctioned campground "adequate temporary shelter?" Is a congregate facility where all persons stay in the same room permissible? It is impossible for local governments to determine any of these issues under *Martin* because the Ninth Circuit has not defined "adequate temporary shelter." And clarity may not be quickly obtained; it took the Ninth Circuit approximately four years to explain "that 'sleeping' in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements." *Johnson*, 72 F.4th at 896.

Chico has encountered additional issues in making many of the other determinations apparently relevant pursuant to footnote eight of the *Martin* opinion. Law enforcement officers have no ability to compel a homeless person to prove whether they have "means to pay" for shelter. And when is shelter "realistically available for free?" One person

explained that they have family they often stay with in another town, but that they live outside while in Chico. Are those other accommodations realistically available for free, or must the other shelter options be available in Chico? When does a person "choose not to use" shelter and when is shelter "unavailable?" If a person has pets the shelter will not allow due to insurance requirements or otherwise, is refusal to enter such shelter a choice or is the shelter "unavailable?" Lastly, when does a city punish a person for "lacking the means to live out the 'universal and unavoidable consequences of being human?'" Does this mean lacking the *immediate* means to do so, and is homelessness always a "universal and unavoidable consequence of being human?"

The vagueness of the Ninth Circuit's holdings has made it impossible for Chico to determine when a homeless person is protected by the Eighth Amendment. This potentially results in more individuals entering shelter than what may be required, leaving less space for those who should

receive it and impairing the city's ability to advance public health and safety objectives.

2. Gamesmanship and False Claims Impede the Advancement of Public Health and Safety.

There are 177 shelter units that can house up to two persons each at the shelter operated by Chico, and the Torres Community Shelter has the capacity to house up to 177 people. Recently, Chico's available shelter units have hovered in the teens and about thirty to fifty beds have been available at the Torres Community Shelter. In other words, Chico has been able to bring hundreds of homeless people into shelter. However, the city has encountered an increasing tendency for those who remain outside to take steps to avoid being sheltered.

Police officers and outreach and engagement personnel have observed some homeless people will leave an enforcement area when city employees show up such that those homeless persons are never assessed for shelter. Have those individuals refused offers of shelter in a manner that would give Chico the ability to cite and arrest? Chico's position is that they have because it ensured shelter was available and it is the actions of the homeless who have prevented an

actual offer from being made, not the city. Homeless persons' position is that these are instances where they simply need more time before moving into shelter but that does not mean they are refusing shelter.

Chico has also encountered situations where homeless persons remain in an enforcement area, receive offers of shelter, but do not enter the shelter so offered. The homeless argue that they should be reassessed for shelter if they are subsequently contacted by law enforcement, rather than cited and arrested, because their circumstances may have changed in a manner that would either make shelter unavailable to them or they may be ready to enter shelter by that time. Whatever the case, such "inventive" arguments delay Chico's ability to quickly move people into shelter at the expense of timely cleaning up locations littered with human and pet waste, used hypodermic needles, ashes and burnt objects from campfires, broken furniture, discarded automotive parts and substances, more bicycles and parts thereof than one can count, and other garbage destructive to people and the environment.

Next, Chico's enforcement efforts have been hampered by homeless persons who simply move out of the relevant enforcement location to other public

property mere feet away. In September 2023, Chico conducted enforcement operations at a rectangular piece of public property known as Depot Park, the perimeter of which is bounded by sidewalk. Several people decided they could move to the sidewalk to escape the threat of citation and arrest.

In December 2023, an enforcement operation was conducted along a portion of bike path with similar results. Officers took video footage of the entire bike path prior to enforcement to compare its status after enforcement. That footage demonstrated that no homeless person was living on portions of the bike path north of the enforcement area prior to enforcement. After operations concluded, officers discovered that several people moved to the previously unoccupied northern stretch of bike path. Additionally, officers were able to identify that at least six of those persons were subject to the sheltering operations that had just taken place. Short of commencing another cleanup and enforcement operation requiring at least seventeen days' notice before final cleanup actions taking place, Chico could not force those individuals to accept shelter. Even if an new enforcement operation were undertaken, those same six people could engage in a never-ending cycle of moving from one public property to another.

This is inherently unfair: Chico spends at least $4.7 million per year to operate its shelter but is unable to quickly prevent people from effectively ignoring the settlement agreement by relocating.

Homeless people have also avoided shelter by moving to areas that have already been cleaned and cleared. Those areas have not filled up with the same number of persons previously located there, but that does not mean the adverse impacts are minimal. In February 2024, Chico removed a total of twelve tons of refuse from three such locations.

False claims also impact Chico's homelessness operations. For example, two homeless persons reported to the media that they stayed at the shelter Chico operates only to be kicked out and forced to move eleven times "like rodents" around the city. However, their shelter records reveal they were expelled for significant behavioral issues including property theft, keeping flammable/hazardous substances at the shelter, keeping drug paraphernalia at the shelter, smoking an unknown substance at the shelter, verbally threatening other occupants, and inviting unauthorized persons to the shelter. Moreover, those homeless persons never sought to return after expulsion as permitted by

procedures outlined in the shelter rules all occupants are provided, meaning they chose to stay outside.

Other false claims include one shelter occupant's assertion of disability claims based on his "need" to use a wheelchair when shelter staff thereafter observed him riding a bicycle on multiple occasions. Another homeless person claimed that police officers took the claimant's children's ashes despite that same person having explained on a subsequent occasion that the children were buried on a mountain.

To the extent that this section has raised Fourth Amendment, Americans with Disabilities Act, and other issues, it is nevertheless relevant to understanding the burdens that *Martin* and *Johnson's* Eighth Amendment rulings place on Chico and other governmental agencies. Most state and local governments do not have enough shelter for their respective homeless populations. To address public health and safety concerns, many have begun creating shelter space, which can take a significant amount of time. Meanwhile, homeless encampments and the adverse impacts associated with the same continue to grow. When new shelter space becomes available, government agencies are thrust into the exceedingly elusive process of trying to understand

how many homeless persons can be placed in shelter without creating so many ancillary legal issues that the government's temporal and financial resources are either unreasonably restricted or completely depleted. This Hobson's choice is one that state and local governments should not be required to endure. If the Eighth Amendment does not constrain state and local governments from citing and arresting the homeless (and it does not), those entities must have the discretion to determine how to best address local homelessness problems.

3. Evidentiary and Practical Issues Plague Enforcement of Laws not Impacted by *Martin* or *Johnson*.

It is not clear exactly what laws are impacted by *Martin* because of the vague boundaries created by the standard that a government agency may not punish "a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes." *Martin*, 920 F.3d at 617 n.8. Thus, as Judge Milan D. Smith's dissenting opinion in *Martin* pointed out, such a rule

could result in the striking down of laws prohibiting public urination and defecation. 920 F.3d at 590.

State and local governments could provide hygienic facilities near encampments and adopt laws that require the same to be used, arguably creating a situation where relieving oneself in public would not be "unavoidable." However, it is easy to see the arguments that would arise. How large is the encampment in question? How many restrooms did the government provide? Were there enough restrooms for everybody in the encampment to use when needed? Were all bathrooms operable at the time of the incident in question? If not, why not? Were the restrooms unavailable because of actions of a homeless person or persons? These very questions have arisen in Chico, where the homeless have demanded that restrooms and handwashing stations be placed downtown when the city constructs its annual ice rink, which makes it more difficult for the homeless to access facilities near the ice rink. If *Martin* and *Johnson* are upheld, such questions will likely need to be examined through legal proceedings, leaving state and local governments in the dark as to what they can enforce without becoming mired in

litigation and potentially receiving an adverse judgment.

Laws more likely outside the scope of *Martin* and *Johnson* are nevertheless beset with their own evidentiary and practical issues. For example, laws prohibiting littering do not appear to impact an "unavoidable consequence of being human." Assuming they do not, how are law enforcement agencies supposed to enforce the same?

In Chico, the city has cleared more than 900 tons of trash from homeless encampments since April 2021. If law enforcement officers are required to obtain evidence by patrolling encampments so they can view what activity is taking place, homeless persons are likely to be more discrete in how they discard garbage. One alternative might be to place surveillance cameras around homeless encampments, but such actions could be met with arguments like those that arose in *United States v. Tuggle*, 4 F.4th 505, 513 (7th Cir. 2021) (considering arguments as to whether the Fourth Amendment prohibits the use of pole-mounted surveillance cameras on public property that are pointed toward a personal residence). Even if there were a clear means for law enforcement officers to legally observe acts of littering and enforce anti-littering laws, the sheer volume of

such offenses would likely force law enforcement agencies to decide whether to assign enough patrol officers to bring the issue under control or allow some level of violations to persist so that enough officers are available to address more significant crimes.

The above issues would likely also arise in the context of combating theft, drug sales, drug use, public intoxication, so-called "open containers," smoking in public, and other offenses. Consequently, the potential exists for governments to be overwhelmed with exorbitant litigation costs and personnel issues—*e.g.*, whether there are enough officers to enforce the law, whether it is possible to hire enough officers to do so, etc. However, there is no reason to allow these and other problems to fester. The City of Grants Pass, Chico and other *amici* have provided sound reasoning that demonstrates the Eighth Amendment does not restrict state and local governments from punishing the homeless. Accordingly, state and local governments should be free to determine how to address public health and safety issues as they relate to homelessness.

CONCLUSION

To clarify Eighth Amendment jurisprudence and avoid the issues identified by those in support of

the City of Grants Pass from becoming cemented throughout the nation, Chico respectfully requests that the *Martin* and *Johnson* decisions be reversed.

Respectfully submitted,

ERIC G. SALBERT
ALVAREZ-GLASMAN & COLVIN
13181 Crossroads Parkway North, Suite 400
City of Industry, California 91746
Telephone (562) 699-5500
esalbert@agclawfirm.com

Counsel for Amicus Curiae
Counsel of Record

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