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 AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

TIMOTHY SANDEFUR*
JOHN THORPE
SCHARF-NORTON CENTER FOR CONSTITUTIONAL LITIGATION AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org
**Counsel of Record*

Counsel for Amicus Curiae Goldwater Institute

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

Does the enforcement of generally applicable laws regulating camping on public property constitute "cruel and unusual punishment" prohibited by the Eighth Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated.

GI's Project on Homelessness devotes substantial resources to the question of municipal governments' handling of the ongoing homelessness crisis—a crisis greatly exacerbated both by the Ninth Circuit's ruling in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), and by local governments' misinterpretations of that ruling. Specifically, GI is involved in litigation in its hometown of Phoenix over the city's refusal to enforce anti-camping ordinances—a refusal the City rationalized as necessitated by the *Martin* decision. *See Brown v. City of Phoenix*, No. CV 2022-010439, 2023 WL 8524162, at *1 (Maricopa Cnty. Super. Ct. Sept. 20, 2023).

GI has also produced research and journalism on the ongoing homelessness problem in Phoenix and other western cities. *See* Corinne Murdock, *A Wasteland of Corpses, Living and Dead: A Devastating Inside*

[1] Counsel for amicus affirm no counsel for any party authored this amicus brief in whole or in part, and that no person or entity, other than amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief.

Look at Phoenix's Homeless Zone, AZ Free News, Mar. 6, 2023.[2]

GI believes its experience and policy expertise will assist this Court in deciding this case.

SUMMARY OF ARGUMENT

This Court should overrule *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), and reverse the decision here, because both rulings embody an untenable assumption that people lack free will—and therefore cannot be held responsible for their actions—whenever the government fails to provide them with a free-of-charge alternative to breaking the law. Laying aside the question of whether the Eighth Amendment's Cruel and Unusual Punishment Clause applies at all to the *arrest* of individuals violating municipal anti-camping ordinances,[3] both rulings rest on the same core fallacy: treating voluntary actions as if they were involuntary. This is a false conception of human nature, and of the principle of personal responsibility that undergirds the entire legal tradition. It is

[2] https://www.goldwaterinstitute.org/a-wasteland-of-corpses-living-and-dead-a-devastating-inside-look-at-phoenixs-homeless-zone/.

[3] It does not, because the Clause applies only to "punishment," which refers only to penalties imposed after trial and conviction. Therefore, properly interpreted, it simply does not apply to arrests. *See generally Hudson v. McMillian*, 503 U.S. 1, 18–20 (1992) (Thomas, J., dissenting).

inconsistent with, and ultimately undermines, a wide range of longstanding legal doctrines.

A corollary mistake in both cases is the assumption that the government cannot penalize "involuntary" conduct—and is thus powerless to protect innocent citizens from harms inflicted by people who are unable to control their actions. On the contrary, even when a wrongdoer acts involuntarily, the government can legitimately protect people against harms she inflicts, including through civil and criminal penalties. The law cannot punish people for *who they are*, but it certainly can arrest and incarcerate people for *what they do*.

ARGUMENT

I. The Ninth Circuit's illogical concept of "voluntariness" must be overruled.

Professor Ellickson warned almost 30 years ago that activists were seeking to "take advantage of [the] legal doctrine" of status crime in order "to characterize municipal crackdown ordinances that purportedly target *behavior* as actually targeting *status*." Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 Yale L.J. 1165, 1187 (1996) (emphasis added). These activists, Ellickson observed, think the poor are "so constrained by economic and social circumstances that they lack real choices . . . [and] always act under duress," and thus believe that "society

should not . . . ask them to bear any responsibilities." *Id.*

In both *Martin* and this case, these activists succeeded. They persuaded the Ninth Circuit to adopt the principle that whenever the government fails to give people a free place to sleep, such people have "no option of sleeping indoors," and therefore their residing in parks, streets, vacant lots, etc., is the "universal and unavoidable consequence[] of being human." 920 F.3d at 617 (citation omitted).

Among the absurd results of that victory are cases such as *Fund for Empowerment v. City of Phoenix*, 2:22-cv-02041-PHX-GMS (D. Ariz., filed Nov. 30, 2022), where the plaintiffs include mentally competent and physically capable people who have remained homeless for three decades, and who have financial income and even credit cards, but who nonetheless characterize themselves as "involuntarily" homeless, and therefore as constitutionally entitled to live indefinitely in tents on public property.[4]

Simply put, *Martin* and this case classify volitional acts and omissions as if they were inevitable,

---

[4] According to the operative complaint, the plaintiffs are a man who "has been chronically unsheltered off and on since 2000," and a woman who is at least sufficiently self-responsible enough to maintain a credit card account. *See* First Amended Complaint (Doc. 45) ¶¶ 20, 80. It should be obvious that a person who has been homeless for 23 years is not doing so because of the "unavoidable consequences of being human." *Martin*, 920 F.3d at 617 n.8 (quoting *Jones v. City of L.A.*, 444 F.3d 1118, 1136 (9th Cir. 2006)).

and human beings as if they are helpless victims of fate. That is wrong. To regard the homeless as lacking free will—or, in today's fashionable jargon, as lacking "agency"—not only paralyzes public officials and harms the hardworking taxpayers who expect their public employees to enforce the law for the protection of their neighborhoods; it's also dehumanizing to the homeless themselves. "To treat the destitute as choiceless underestimates their capacities and, by failing to regard them as ordinary people, risks denying them full humanity." Ellickson, *supra* at 1187.

Martin and this decision represent a fallacious application of the principle of "status crime." That principle, articulated in *Robinson v. California*, 370 U.S. 660 (1962), embodies the obvious truth that people cannot legitimately be punished either for immutable characteristics or for "acts of God." Doing so would be self-contradictory, because the purpose of law (and punishment) is to require people to conform their actions to rules, whereas if people lack free will, they cannot conform to rules. Stephen J. Morse, *The Non-Problem of Free Will in Forensic Psychiatry and Psychology*, 25 Behav. Sci. L. 203, 205 (2007).

The "status crime" principle is limited, by its own premises, to situations involving things *truly* outside one's control. Yet, as traditional tort concepts of causation and attenuation teach, such situations are extremely rare. Because people are responsible for *foreseeable* consequences of their actions, including attenuated or unlikely ones, the law requires them to take precautions against accidents, blind spots, and

vices that might lead to catastrophe. That is why voluntary intoxication is not a defense to most torts or crimes. *See Montana v. Egelhoff*, 518 U.S. 37, 43–45 (1996). Every person is obligated to avoid becoming so intoxicated that she loses control of her faculties—especially when she's aware of her own vulnerabilities or susceptibilities. Otherwise, as Justice Story observed, "the commission of one crime [would become] an excuse for another. Drunkenness is a gross vice, and . . . so far from its being in law an excuse for [crime], it is rather an aggravation of its malignity." *United States v. Cornell*, 25 F. Cas. 650, 657–58 (No. 14,868) (C.C. R.I. 1820). Likewise, a person who needs psychotropic medication to maintain self-control can be held liable for harms that come about due to her not taking that medication, because it's foreseeable that this would lead to harming others. *See*, *e.g.*, *Stuyvesant Assocs. v. Doe*, 534 A.2d 448, 450 (N.J. Law. Div. 1987). The fact that the defendant cannot control what she does without that medication is no excuse.

The *Powell v. Texas*, 392 U.S. 514 (1968) plurality recognized how narrowly limited the status crime principle is when it rejected an Eighth Amendment argument by a defendant who, in Justice Marshall's words, was "convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion." *Id.* at 532. The status crime principle, he wrote, simply means "that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing," and does not prohibit the state from

punishing conduct "because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Id.* at 533.

In his concurrence, Justice White (who did not join the plurality) contended that the question of whether or not punishing an alcoholic for becoming intoxicated qualified as a status crime could only be answered by reference to the particular circumstances of each individual case. The Eighth Amendment, he wrote, "might . . . forbid conviction," but only if the "record satisfactorily show[ed] that it was not feasible for [the defendant] to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Id.* at 552 (White, J., concurring).

Remarkably, the dissenters agreed on that point: the nature of alcoholism, wrote Justice Fortas, "provide[s] only a *context* for consideration of the instant case . . . [and] should not dictate our conclusion. . . . Our task is to determine . . . whether, *in the case now before us*, [constitutional] principles preclude the imposition of . . . punishment." *Id.* at 565–66 (Fortas, J., dissenting) (emphasis added).

In other words, every justice in *Powell* recognized that the "status crime" theory could not work an across-the-board exoneration of persons accused of public disorder; instead, it requires an assessment of each defendant's *particular* circumstances.

This recognition of free will is even more applicable to cases that, like this one, involve broad economic and social influences. As Professor Ellickson observed,

the idea that an anti-camping law falls into the same category as the prohibition of addiction involved in *Robinson*, equates to a presumption that poor people lack free will and cannot be held responsible for their acts. But this represents a misunderstanding of free will. People still have volition even when their choices are caused.[5] The fact that circumstances influence one's choices doesn't make one a helpless "victim" of those circumstances—particularly where the circumstances in question are ones a person has placed herself into, only to later find them hard to escape.

The irrationality of *Martin* and the decision below are exacerbated by the Ninth Circuit's across-the-board numerical formula, whereby the presumption of helplessness applies based *not* on circumstances specific to the individual in question, but on society-wide economic factors. Specifically, the Ninth Circuit declared it cruel and unusual "to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters

---

[5] Indeed, to assume that free will means an *uncaused* will is to commit a self-contradiction. A will that acts without causality is a will that acts randomly. So under this (surprisingly common) assumption, only irrational or insane people—whose minds act causelessly—could have free will. *See* Daniel C. Dennett, *Elbow Room: The Varieties of Free Will Worth Wanting* 27 (1984) (refuting the idea that "the only hope of having a rational will involves the exemption from physical causality of one's mind"); *see also* Thomas Aquinas, Summa Theologiae pt. II-I, question 6, art. 1, Reply to Obj. 3 (Fathers of the English Dominican Province trans. 1920) ("just as by moving natural causes [God] does not prevent their acts being natural, so by moving voluntary causes He does not deprive their actions of being voluntary").

where those individuals can sleep," *regardless* of the person's actual acts or omissions. App. 19a.[6] In other words, a person is *per se* "involuntarily" sleeping on the streets—even when she "engag[es] in conduct necessary to protect themselves [*sic*] from the elements when there [is] no shelter space available," such as building a makeshift shelter on public property, *id.* at 5a,—whenever the government fails to give her free shelter.

That's simply not what "involuntariness" means. An involuntary act is an *unavoidable* act—one about which the individual can make no deliberate choice. *Navarro v. FDIC*, 371 F.3d 979, 981 (7th Cir. 2004). It means the "universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. But a person who chooses to live indefinitely on the streets—or chooses not to take steps to avoid such a situation, or who, while living there, takes deliberate steps to maintain that mode of living—is not doing so as an unavoidable consequence of being human.

By the Ninth Circuit's logic, if a person drives home intoxicated from a bar, and gets into a collision that kills someone, she cannot be held criminally responsible—because the government failed to provide her with a taxicab. That is illogical. Likewise, someone

---

[6] This numerical formula, of course, does *not* include beds at church-run shelters, because the Ninth Circuit said that counting them would violate the Establishment Clause. *Martin*, 920 F.3d at 609–10. Given that churches are probably the most common source of shelter for the homeless, this discrimination against church-run shelters biases the formula at the outset.

who chooses to start a fire that gets out of control and consumes a neighbor's house has no "involuntariness" defense to an arson charge just because the government did not give him an electric heater. And a person who pours poisonous waste into a river is *not* "involuntarily polluting" simply because the government failed to provide her with a toxic waste disposal service.

In any event, as the dissent below observed, the entire theory of "status crime" requires "an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person." App. at 80a (Collins, J., dissenting). As *all* the justices in *Powell* agreed, it requires a court to inquire as to whether the particular person in question is capable of taking responsibility for his or her acts. The Ninth Circuit's numerical formula makes this individual assessment impossible.

Supporters of the Ninth Circuit's approach typically claim to be acting in the name of "equity." Yet equity itself is *inherently individualized*. That is, equity operates based on the circumstances of particular cases. *See* Lord Kames, *Principles of Equity* 27 (Indianapolis: Liberty Fund, 3d ed. 2014) (1760) ("To determine every particular case according to what is just, equal, and salutary, taking in all circumstances, is undoubtedly the idea of a court of equity in its perfection."). Yet contrary to centuries of equity practice, the *Martin* rule applies a *per se* rule based on a mathematical formula—a rule that categorically prohibits the

case-by-case determinations that are, in any event, necessary to aid the homeless.

Martin's presumption of helplessness is also manifested in such rhetorical tricks as the Respondents engage in when they accuse Petitioners of "criminalizing homelessness." Resp'ts' Opp'n to Pet. at 4. This is a semantic device intended to substitute intimidation and accusation in place of rational legal analysis. It's safe to say that no party or amicus in this case seeks to criminalize homelessness. Rather, the laws in question are laws against sleeping in public parks, polluting public areas, and other acts *which are voluntary*, at least in the vast majority of cases, and that the exceptions can only be discerned on a case-by-case basis. Yet the *Martin* rule effectively bars that case-by-case determination, substituting a false and insulting paternalism whereby people are viewed as *per se* incapable of taking responsibility for their own lives.

II. *Martin* and this case have encouraged poor policy choices.

True, *Martin* said local governments can still enforce anti-camping ordinances. 920 F.3d at 617 n.8. Yet in practice, *Martin*'s bizarre application of the concept of "involuntary homelessness" is hard to square with that limitation on its holding. As the dissenters below observed, *Martin* "treats a shelter-beds deficit, when combined with conclusory allegations of involuntariness, as sufficient for an individual to show that he or she is involuntarily homeless," App. 148a (Smith, J.,

dissenting), and that, in turn, entitles the person, as a matter of constitutional right, to reside indefinitely in parks, streets, or sidewalks—in dangerous, unclean, and inhumane conditions—exempt from law enforcement intervention.

At least that's how many municipal officials interpret *Martin*. Notwithstanding the caveats in that case, such officials have taken *Martin*'s bizarre "involuntariness" theory as an opportunity to shrug off their responsibility to enforce laws that are wholesome and necessary for the public good. The result is a stark homelessness crisis in cities across the west.

Phoenix's case is particularly shocking. For well over a year—until commanded to change their ways by a state judge—Phoenix officials essentially operated an open-air homeless shelter in the streets of downtown Phoenix, known locally as "The Zone." Its population rose to over 1,000 people at one point—people living in tents on sidewalks and vacant lots, during the COVID pandemic, and during summers that can easily reach 120°.

The City repeatedly admitted in court that it decided to maintain this encampment *intentionally*, as a "policy choice,"[7] in response to the *Martin* ruling. While police wanted to enforce the law in The Zone, testimony in court showed that their superiors would not let

---

[7] *See* Timothy Sandefur, *City of Phoenix Says: If You Don't Like Homeless Encampments, Vote Us Out*, Goldwater Inst. (Nov. 1, 2022), https://www.goldwaterinstitute.org/city-of-phoenix-says-if-you-dont-like-homeless-encampments-vote-us-out/.

them. Those superiors claimed their hands were tied by *Martin*—and continued to maintain this, even after an Arizona trial court issued a preliminary injunction finding The Zone a public nuisance and ordering the City to desist. Indeed, the City embraced both *Martin* and the panel decision here as a rationalization for their own refusal to enforce existing laws, regardless of the actual limitations on those holdings specified by the Ninth Circuit.[8]

The consequences of Phoenix's deliberate inaction included not only the open discharge of sewage into streets and gutters, and the physical and economic destruction of neighborhood businesses, but even incidents of arson and homicide. *Brown*, 2023 WL 8524162, at *5–6. Finally, in September 2023—almost a year after the parties argued the case—the court issued a permanent injunction ordering the City to abate the public nuisance it had created. *Id.* at *17. The City consequently ordered the population of The Zone to disperse, and provided those who needed temporary shelter with space in a campground the City created on its own property.

Respondents and their allies here point to this as proof that cities can address the problem of homeless encampments already, and thus that *Martin* need not be overruled, *see*, *e.g.*, Resp'ts' Opp'n to Pet. at 27, but this is wrong. First, the circumstances in Phoenix were unusually extreme, given the City's explicit,

[8] This point is explained in detail in Amicus Goldwater's brief in support of the Petition.

announced policy of refusing to enforce existing law. Moreover, The Zone was probably the largest homeless encampment in the United States. *See* Eli Saslow, *A Sandwich Shop, a Tent City and an American Crisis*, N.Y. Times, Mar. 31, 2023.[9] The circumstances were so egregious that the court determined that *the City itself* was actually operating a public nuisance in The Zone. Indeed, the City essentially conceded that in litigation.

Cities will rarely be that brazen or candid. For example, officials in Tucson have been similarly derelict in enforcing anti-camping and anti-pollution ordinances, but have not created a single, massive Zone-like area.[10] It's little comfort to law-abiding, taxpaying Tusconans that perhaps, if the situation becomes as atrocious as Phoenix's Zone, they might eventually be able to sue. Even the judge in the *Brown* case said as much, writing:

> The *Martin* and *Grants Pass* decisions created an unworkable mandate based upon questionable legal analysis. . . . One need only look at the multitude of dangerous and dehumanizing homeless encampments and open-air drug markets in cities under the jurisdiction of the Ninth Circuit—such as the Zone in Phoenix—to see the profound impact that *Martin* and *Grants Pass* have had. The Court received evidence that after the *Martin* decision, states

---

[9] https://www.nytimes.com/2023/03/19/us/phoenix-businesses-homelessness.html.

[10] *See Bradford v. City of Tucson*, No. C20234363 (Pima Cnty. Super. Ct., pending).

> under the jurisdiction of the Ninth Circuit saw a 25% increase in unsheltered homeless, while states outside of the Ninth Circuit's jurisdiction saw a 25% decrease in unsheltered homeless. The [principles] enunciated in *Martin* and *Grants Pass* partially tie the hands of cities that seek in good faith to address the growing homeless encampment epidemic. And the decisions also provide a convenient excuse for other city leaders that wish to do nothing while such encampments grow and fester.

Brown, 2023 WL 8524162, at *15 n.7.

Along with the type of official dereliction involved in *Brown*, cities have also seen *Martin* and this case as rationales for implementing profoundly flawed policy responses to the homelessness crisis. Foremost among these is a foolhardy policy called the "Housing First Model," which holds that the fundamental solution to homelessness is to give homeless people the keys to taxpayer funded apartments, with *absolutely no* conditions or rules required to maintain that housing. It is widely known and understood that the largest single factors responsible for chronic homelessness are mental health or substance abuse issues. *See* Dep't of Housing & Urban Dev., Annual Homelessness Assessment Report (2015)[11]; Marku Saldua, *Addressing Social Determinants of Health Among Individuals Experiencing*

[11] https://www.huduser.gov/portal/datasets/ahar/2015-ahar-part-1-pit-estimates-of-homelessness.html.

Homelessness, SAMHSA Blog (Nov. 15, 2023).[12] Once placed in an apartment, many of these individuals simply continue the same lifestyle choices they made on the streets, only now taxpayers must financially support that lifestyle.

The idea behind "Housing First" is simple: there will be no more homelessness if everyone has a home. The fault with that logic is that there are many individuals who do not want housing—at least, not at the cost of giving up their addictions or other poor lifestyle choices—and for that reason choose not to take advantage of available aid. Because "Housing First" does not require people to attend treatment for mental health or substance abuse, or to stay clean and sober while living in a new shelter space, it merely treats a symptom while perpetuating, and even exacerbating, the problem itself.

In San Francisco, in 2004, then-Mayor Gavin Newsom (amicus in this case) pledged that the city would eliminate homelessness entirely within a decade. Since then, San Francisco has become a proverb and a byword of how to not address the homelessness crisis.[13] The city built enough permanent supportive housing to shelter every homeless individual—and the result has been an increase in the number of people living on the streets. *See* Judge Glock, *Housing First is a Failure*,

---

[12] https://www.samhsa.gov/blog/addressing-social-determinants-health-among-individuals-experiencing-homelessness.

[13] The brief of Amici Neighbors for a Better San Francisco, et al., in Support of the Petition addresses this in detail.

Cicero Inst. (Jan. 12, 2022).[14] Similarly, Phoenix Mayor Kate Gallego announced the "Housing Phoenix Plan" in June of 2020, which follows the "Housing First" approach.[15] Since the implementation of that policy, Phoenix has seen an overall increase in homelessness rates from 2,380 to 3,333 in 2023. Maricopa Ass'n of Gov'ts, 2023 Point-in-Time (PIT) Count Report 4 (2023).[16]

Obviously, if there are no preconditions to enter housing via the "Housing First" policy, then there are no conditions to *maintaining* that housing as well. This means an individual can continue the self-destructive lifestyle that caused him or her to live on the streets in the first place—yet with *less* fear of being held accountable to the law, and *less* likelihood of being referred to mental health or substance abuse treatment programs. Thus "Housing First" essentially incentivizes the downward spiral that led to homelessness to begin with—all at the expense of law-abiding taxpayers.

Even before the *Martin* decision, "Housing First" was obviously a failed strategy. From 2014 to 2020, California, Washington, and Oregon, relied heavily on "Housing First." Yet homelessness in these states during that period increased, by 41.8% in California, 24.3% in Washington, and 20.5% in Oregon. During the

---

[14] https://ciceroinstitute.org/research/housing-first-is-a-failure.

[15] *See* City of Phoenix, Housing Phoenix (June 2020) https://www.phoenix.gov/housingsite/Documents/Final_Housing_Phx_Plan.pdf.

[16] https://azmag.gov/Portals/0/Homelessness/PIT-Count/2023/2023-PIT-Count-Report-Final.pdf.

same time frame, every other state in America saw a combined *decline* in the homeless population of 11.7%. Wayne Winegarden, "*Housing First" Puts Lofty Goals Above Real-World Results*, Pac. Rsch. Inst. (Oct. 3, 2022).[17] Yet *Martin* has encouraged cities to *adopt and expand* the "Housing First" approach, on the theory that the alternatives are "cruel and unusual."

Phoenix, for example, adopted its failed "Housing First" approach largely as a consequence of *Martin*. *See* Br. Amici Curiae Freddy Brown, et al., in Support of Pet. at 18a–19a. Even Boise itself cited *Martin* as one reason it adopted a "Housing First" approach, *see* HUD Office of Policy Development & Research, *Boise, Idaho: Our Path Home Brings the Housing First Model to Idaho*,[18] yet recent studies show that homelessness has increased by at least 6% since 2020. *See* Sally Krutzig, *New Data Show Homeless Population Numbers in Boise, Ada County. Are Efforts Working?* Idaho Statesman, June 1, 2023.[19]

"Housing First" is not a viable solution when housing demands are already at an all-time high, and when government refuses to address root causes of homelessness such as mental health issues and substance abuse. The more cities and states turn to "Housing

---

[17] https://www.pacificresearch.org/housing-first-puts-lofty-goals-above-real-world-results/.

[18] https://www.huduser.gov/portal/casestudies/study-112921.html.

[19] https://www.idahostatesman.com/news/local/community/boise/article275965821.html.

First"—as encouraged by the *Martin* rule—the more homeless populations will continue to grow.

III. "Voluntariness" cannot be the sole predicate for enforcing the law.

Along with the essential fallacy embedded in the *Martin* rule—which leads to the faulty policies described above—there is an additional fallacy at issue here: the proposition that the state can legitimately act against lawbreaking only if that lawbreaking is "voluntary" in the first place.

While it's true that the state may not legitimately penalize people simply for *who they are*, it does not follow that the state can take no action against people who violate the rights of others through an unintentional, involuntary, or innocent act. On the contrary, the government certainly may protect innocent victims against harms unintentionally inflicted by another person. *Cf.* Robert Nozick, *Anarchy, State, and Utopia* 34 (1974) (explaining, with a famous hypothetical example, that one may use coercion to defend oneself against innocent threats). If an intoxicated or insane person, lacking self-control or self-awareness, threatens the life, liberty, or property of an innocent person, the latter *may* defend herself, and the state *may* defend her, including through the use of coercion.

The Ninth Circuit ostensibly acknowledged this, *see*, *e.g.*, *Martin*, 920 F.3d at 616, but its logic mandates the conclusion that the state *cannot* take steps to protect citizens against threats to their rights posed by

people who, for whatever reason, lack self-control. Indeed, the decision below takes this position explicitly, at times: "The anti-camping ordinances," it declares, "prohibit Plaintiffs from engaging in activity they *cannot avoid* . . . [but these] cannot be criminalized." App. 46a (emphasis added). The court also held that a person cannot be held *civilly* liable for such things. *See* App. 3a.

Yet there are many activities a person "cannot avoid" for which she is nonetheless properly held responsible—or, at least, she is obligated to take steps to avoid inflicting harms on others as a consequence of the inability to control her actions. The obvious cases are simple: a person who breaks the speed limit may be driving so fast that she "cannot avoid" hitting a pedestrian—but that hardly exonerates her, because she had a duty not to break the speed limit; a person who stores flammable substances on her property may be unable to avoid the fire that later breaks out—perhaps literally through no fault of her own—but is still liable for the resulting damage; people cannot avoid emitting bodily waste, but they must do so in a sanitary manner; people cannot avoid eating, but this does not excuse even a poor person stealing food.

As for addiction, the *Martin* theory would empower addicts to use their addiction as a defense for whatever crimes committed while high. That would "transform a constitutional provision designed to ban only hideously painful punishments into a right to injure the person or property of someone else to satisfy the offender's insatiable need for pleasure (or pain

avoidance) that he or she *voluntarily acquired at some past time.*" Paul J. Larkin, *Camping and the Constitution*, 22 Geo. J.L. & Pub. Pol'y ___ (forthcoming, 2024) at 29.[20] And, as Justice Story warned, would transform an *aggravating* factor into an *exonerating* factor. *Cornell*, 25 F. Cas. 650, 657–58. That cannot be the law.

In fact, even the famous example in *Robinson*—that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," 370 U.S. at 667—is doubtful. Quarantine laws are ubiquitous and have been for centuries. These may not inflict criminal liability—although a person who breaks quarantine is subject to civil and/or criminal punishment for doing so. *State ex rel. Kennedy v. Head*, 185 S.W.2d 530, 531 (Tenn. 1945). In any event, they provide for the involuntary confinement of contagious individuals, and legitimately so[21]—even though they do not turn on the question of the individual's fault, let alone the person's ability to prevent infection. *See*, *e.g.*, *Ex parte Dillon*, 44 Cal. App. 239 (1919); *People ex rel. Barmore v. Robertson*, 134 N.E. 815 (Ill. 1922). The woman confined in *Barmore* was an asymptomatic carrier of the typhoid bacillus, through no fault of her own—and she could not avoid infecting others. Yet the court rightly held that the state had lawful authority

---

[20] https://www.law.georgetown.edu/public-policy-journal/wp-content/uploads/sites/23/2024/02/Paul-J.-Larkin.pdf.

[21] During the early 20th Century, Arizona became a particular destination for tuberculosis patients, because its desert climate makes it easier for them to breathe. Consequently, Arizona has an entire statutory chapter specifically addressing tuberculosis quarantine. A.R.S. § 36-711 *et seq*.

to keep her in custody, and to fine her for violating that custody—as long as it accorded her sufficient individualized due process protections—in order to protect others from being infected. *See id.* at 818–20.

The bottom line is: *voluntariness* is not a *sine qua non* of state intervention; rather, state intervention is justified by the protection of others.

Unsurprisingly, the failure of local governments to enforce the type of laws at issue here is partly responsible for the recent resurgence in the U.S. of diseases previously encountered only in third-world cities, including typhoid fever, typhus, and tuberculosis. Anna Gorman, *Medieval Diseases are Infecting California's Homeless*, The Atlantic, Mar. 8, 2019.[22] Public streets and sidewalks in San Francisco and other cities are covered in human excrement and used syringes. Phil Matier, *Cleaning Up S.F.'s Tenderloin Costs a Lot of Money—Soon it Might Cost Even More*, S.F. Chronicle, May 1, 2019[23]; Bigad Shaban, et al., *Mayor Breed's First Year: Feces, Needles Complaints Decline; Trash Gripes, Homelessness Rise*, NBC Bay Area, July 10, 2019.[24] Obviously, these are all disease vectors.

But homelessness is not like typhoid—something a person just happens to catch through no fault of her

---

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

[23] https://www.sfchronicle.com/bayarea/philmatier/article/Cleaning-up-SF-s-Tenderloin-costs-a-lot-of-13808447.php.

[24] https://www.nbcbayarea.com/news/local/mayor-london-breedfirst-year-in-office/154431/.

own. Although it's often claimed that "[o]ver the course of a year, more than a million individuals and families experience homelessness," U.S. Interagency Council on Homelessness, *State of Homelessness* (Dec. 19, 2022),[25] the reality is that most people who are homeless are only so for a day or two. *See* Dennis Culhane, *Five Myths about America's Homeless*, Wash. Post, July 11, 2010.[26] Chronic or long-term homelessness, by contrast, is most often a result of addiction or mental illness. *See* U.S. Dep't of Housing & Urban Dev., HUD 2022 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations (Dec. 2022) at 2.[27] And these are precisely the "involuntary" cases that the decision below prevents cities from effectively addressing.

Leaving people to remain living indefinitely on the streets, or in tents in a park—precisely on the grounds that they are unable to do otherwise!—is not a compassionate response. On the contrary, it simply reasserts, under the strangest of disguises, the cold attitude of a past era that viewed the poor as a mere "surplus population" beyond possibility of rescue. *Cf.* Herbert Spencer, *Social Statics* 380 (1851) ("Beings thus imperfect are nature's failures, and are recalled by her laws when found to be such. . . . If they are sufficiently complete to live, they *do* live, and it is well. . . . If they are

---

[25] https://www.usich.gov/guidance-reports-data/data-trends.

[26] https://www.washingtonpost.com/wp-dyn/content/article/2010/07/09/AR2010070902357.html.

[27] https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2022.pdf.

not sufficiently complete to live, they die, and it is best they should die.").

A *compassionate* response would consist of providing people with the care they need—including taking them into custody against their will if they are unable or unwilling to manage themselves. And it would include what the dissent below called "an assessment of a person's individual situation." App. 80a (Collins, J., dissenting). That individualized assessment is what the Ninth Circuit, here and in *Martin*, has rendered impossible.

Finally, the law-abiding, taxpaying public deserves compassion, also. The victims of municipalities' abdication of their law-enforcement duties aren't just the homeless—who certainly deserve better than to be left to live on the streets—but also members of the community who must suffer threats, pollution, damage to their properties, and the ruin of their businesses as the consequence of a legal principle that is indefensible either as a matter of precedent, of Originalism, of textualism, or of policy.

CONCLUSION

The *Martin* decision should be overruled and the decision in this case *reversed*.

Respectfully submitted,

TIMOTHY SANDEFUR*
JOHN THORPE
SCHARF-NORTON CENTER FOR
CONSTITUTIONAL LITIGATION
AT THE GOLDWATER INSTITUTE
500 E. Coronado Rd.
Phoenix, AZ 85004
(602) 462-5000
litigation@goldwaterinstitute.org

**Counsel of Record*