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 OF AMICI CURIAE THIRTEEN CALIFORNIA CITIES

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INTERESTS OF THE AMICI CITIES[1]

Amici are thirteen cities within the State of California: the cities of Newport Beach, Fillmore, Murrieta, Orange, Glendora, Chino, Hesperia, Fountain Valley, Roseville, Huntington Beach, Garden Grove, Santa Clarita, and Santa Ana ("Amici"). All Amici seek to protect the health and safety of their communities, including homeless populations, through the enforcement of local camping ordinances.

The Amici cities are each uniquely attempting to address their homeless issues by providing outreach and necessary resources to persons experiencing homelessness. The cities are diverse in their geographic size, population, and budgets and resources available to address homelessness. For instance, the City of Fillmore is a small rural city in Ventura County abutting the Santa Clara River Valley.[2] Fillmore has a population of 16,419, with a homeless population ranging from five to twenty-four,[3] and an annual budget of $150,000 to provide services and shelter.[4]

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[1] No counsel for any party authored this brief in any part, and no person or entity other than amici, amici's members, or amici's counsel made a monetary contribution to fund its preparation and submission.

[2] These facts are contained in the Declaration of Chief E. Malagon at https://www.awattorneys.com/declarations/

[3] Fillmore's Point in Time Count ("PIT") noted only approximately five persons experiencing homelessness.

[4] These facts are contained in the Declaration of Chief E. Malagon at https://www.awattorneys.com/declarations/

The City of Fountain Valley is a suburban city in Orange County with a population of 56,495. The city has a Point in Time ("PIT") count of approximately thirty-eight persons experiencing homelessness and an annual budget of more than $1 million to fund outreach and engagement, shelter, and treatment for persons experiencing homelessness. This budget is also used to fund two full time community resource officers and the City's Central Cities Navigation Center's operations.[5]

The City of Murrieta, located in southwestern Riverside County, has a population of 112,991, and a PIT count that has increased since 2019 to approximately seventy persons.[6] The city currently spends approximately $1 million for fiscal year 2023-24 to pay for shelter-beds, programs, and services in addition to funding a full-time Homeless Outreach Team.

The City of Huntington Beach, is a coastal city in Orange County with a population of approximately 198,711 residents[7] with a PIT count of approximately three hundred and thirty individuals.[8] In fiscal year 2022-23 the city spent $4.5 million dollars for homeless outreach and resources.[9]

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[5] These facts are contained in the Declaration of Joshua Imeri-Garcia at https://www.awattorneys.com/declarations/

[6] These facts are contained in the Declaration of Brian Ambrose, Murrieta Community Services Director at https://www.awattorneys.com/declarations/

[7] These facts are contained in the Declaration of Lieutenant Brian Smith at https://www.awattorneys.com/declarations/

[8] *Id.*

[9] *Id.*

Unfortunately, despite these cities' significant efforts to address homelessness, the misguided decision in *Johnson v. Grants Pass*, because it lacks direction, has effectively legalized public camping and exacerbated an unprecedented health crisis resulting in disproportionate deaths among the homeless population attributed to unnatural causes, including overdose and suicide.[10]

These cities have found that the vast majority of their homeless populations are not actively seeking shelter and refuse all services. A large number are suffering from substance use disorders and/or serious mental illness. Preventing law enforcement from effectively intervening in unlawful encampments is clearly contributing to this health and safety crisis. Cities need every available tool to protect their communities including the ability to enforce camping ordinances. As such, the Amici have a strong interest in the outcome of this case.

STATEMENT OF THE CASE

This matter arises out of a putative class action brought by individuals experiencing homelessness challenging the constitutionality of ordinances enacted by the City of Grants Pass, Oregon which precluded use of a blanket, a pillow, or a cardboard box for pro-

[10] 72 F.4th 868, 876-77 (9th Cir. 2023), *cert. granted*, WL 133820 (Jan. 12, 2024) (No. 23-175), *See*, Orange County Sheriff's Department, *Report on 2021 Orange County Homeless Deaths* (January 2022), https://www.ocsheriff.gov/sites/ocsd/files/2023-02/Homeless%20Death%20Review%20paper_FINAL.pdf

tection from the elements while sleeping within the city's limits and which authorized civil fines and exclusion orders. If the exclusion orders were violated, a violator could be subject to criminal prosecution for trespass.[11] The Plaintiffs claimed these ordinances violated the Eighth Amendment's prohibition on cruel and unusual punishment as these "involuntarily homeless" persons had no other available options for shelter.

Ruling in favor of the Petitioners, the Ninth Circuit extended the reach of the Cruel and Unusual Punishments Clause to allow a homeless person to "tak[e] necessary minimal measures to keep themselves warm and dry while sleeping."[12] Claiming it a "life-preserving imperative," the *Grants Pass* majority ruled that governments cannot prohibit "articles necessary to facilitate sleep" or the "most rudimentary precautions . . . against the elements" when shelter is unavailable.[13] For the same reason, the *Grants Pass* majority also barred enforcement of laws against sleeping in cars at night.[14] In so ruling the Ninth Circuit relied primarily on its decision in *Martin v. City of Boise*.[15]

In *Martin*, several homeless or previously homeless residents of Boise, Idaho challenged the City's two criminal ordinances against sleeping outside on

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[11] *Johnson supra*, 72 F.4th 876-77

[12] *Id.* at 891.

[13] *Id.*

[14] *Id.* at 896.

[15] 920 F.3d 584 (9th Cir. 2019).

public property.[16] The first ordinance barred the use of "any of the streets, sidewalks, parks, or public places as a camping place at any time."[17] "Camping" was defined as "the use of public property as a temporary or permanent place of dwelling, lodging, or residence."[18] The other ordinance forbade "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private . . . without the permission of the owner or person entitled to possession or in control thereof."[19] The violation of either ordinance was a misdemeanor and each applied throughout the City of Boise without geographic or temporal limitation.[20] The *Martin* plaintiffs argued that the anti-camping and disorderly conduct ordinances violated the Cruel and Unusual Punishments Clause because no shelter was available to them. Agreeing, the Ninth Circuit, ruled that enforcement of the two ordinances "violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[21]

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16 920 F.3d at 603.

17 *Id.*

18 *Id.* at 603–04.

19 *Id.*

20 *Id.*

21 *Id.* at 589.

SUMMARY OF ARGUMENT

The Amici urge this Court to find that the enforcement of generally applicable laws regulating camping on public property does not constitute "cruel and unusual punishment" prohibited by the Eighth Amendment for the following three reasons.

First, the Ninth Circuit's holding relying upon the decision in *Martin* is inconsistent with historical jurisprudence addressing the applicability of the Eighth Amendment's prohibition on cruel and unusual punishment.

Second, *Martin* and *Grants Pass* rely on the inaccurate premise that lack of access to shelter is the overriding reason why a person is experiencing homelessness because the causes of homelessness are complex and multifaceted. Numerous studies demonstrate that merely providing shelter to the chronically homeless, without effectively addressing the root causes of their homelessness, is not an effective or permanent solution. This is in part because many chronically homeless people are not interested in a shelter until the underlying causes of their homelessness are addressed. Hence, the Ninth Circuit's focus on shelter alone removes the intervention tool needed for cities to get persons experiencing homelessness into treatment to address the root causes of their homelessness.

Third, the Ninth Circuit's lack of guidance to cities and counties to avoid an Eighth Amendment violation has caused significant confusion and uncertainty for cities seeking to protect the public health and safety of all of their residents including persons

experiencing homelessness, thus exposing cities to significant risk of litigation.

ARGUMENT

A. The *Grants Pass* decision, which expands upon the decision in *Martin*, is inconsistent with historical jurisprudence addressing the applicability of the Eighth Amendment's prohibition on cruel and unusual punishment.

The Eighth Amendment of the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Constitution and Bill of Rights were ratified in 1791. Until the issuance of the *Martin* decision on April 1, 2019, jurisprudence interpreting the Cruel and Unusual Punishments Clause focused almost entirely on whether punishments for particular criminal conduct determined to violate criminal statutes were "cruel and unusual." The following are examples drawn from many cases demonstrating this focus of jurisprudence in applying the "Cruel and Unusual Punishment[s]" Clause of the Eighth Amendment.

In *Bucklew v. Precythe*, a case in which the Petitioner challenged the State of Missouri's method of lethal injunction for purposes of execution claiming it was cruel and unusual, the Supreme Court noted that traditionally a punishment was considered cruel and unusual when "terror, pain, or disgrace" were

superadded to the punishment.[22] Thus, traditionally, though executions by hanging or firing squad did not violate the Eighth Amendment, methods like "[d]isgusting practices as dragging the prisoner to the place of execution, disemboweling, quartering, public dissection, and burning alive that superadded cruelty and torture to the execution did violate the Eighth Amendment."[23]

In *Estelle v. Gamble*, a prison inmate brought an action pursuant to 42 U.S.C. 1983 against the prison's medical director alleging inadequate medical treatment that constituted cruel and unusual punishment under the Eighth Amendment.[24] The court in *Estelle*, noted that more recent jurisprudence interpreting the Eighth Amendment recognized that the Amendment proscribes more than physically barbarous punishments.[25] The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency against which the Supreme Court must evaluate penal measures."[26] Thus, the Supreme Court has "held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society."[27] In light of this developing standard, the Court concluded that the

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[22] 139 S.Ct. 1112 (2019).

[23] *Id.* at 1123.

[24] 429 U.S. 97 (1976).

[25] *Estelle*, 429 U.S. at 102.

[26] *Id.*, *quoting Jackson v. Bishop*, 404 F.2d 571, 579 (C.A. 1968).

[27] *Id.*, *quoting Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

deliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," that violates the Eighth Amendment.[28] The Court further stated that willful refusal to treat a serious medical condition in the worst cases may lead to torture and lingering death.[29] However, the Court ultimately concluded the facts did not support the claim as the inmate had been treated approximately seventeen times for his various medical conditions. The fact the treatments did not resolve the medical conditions did not give rise to cruel and unusual punishment.[30]

In *Harmelin v. Michigan*, Petitioner Harmelin challenged his sentence of life in prison without the possibility of parole after he was convicted for possessing more than 650 grams of cocaine.[31] Harmelin asserted this mandatory minimum sentence constituted cruel and unusual punishment as it was grossly disproportionate to the crime committed and did not provide for the consideration of mitigating factors that may reduce the sentence. After providing a lengthy and detailed history of the origins of the "Cruel and Unusual Punishments" Clause in the Eighth Amendment, the court held, "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[32]

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[28] *Id.* at 104.

[29] *Estelle*, 429 U.S. at 104.

[30] *Id.* at 107.

[31] 51 U.S. 957 (1991).

[32] *Id.* at 994.

In one instance this Court invalidated a substantive criminal ordinance as a violation of the Cruel and Unusual Punishments Clause. The case, *Robinson v. California*, involved a challenge to then California Health and Safety Code, section 11721 which stated, "No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics."[33] "It shall be the burden of the defense to show that it comes within the exception."[34] Petitioner Robinson was convicted under this statute. The jury instructions indicated Robinson could be convicted either for using narcotics, being under the influence of narcotics or being addicted to the use of narcotics. Furthermore, even if the jury disbelieved the evidence of Robinson's actual use of narcotics, Robinson could be convicted for merely being addicted to the use of narcotics.[35]

This Court reversed Robinson's conviction for "be[ing] addicted to the use of narcotics"[36] observing that a person could violate the law without ever touching any narcotic drug within the State or being guilty of any irregular behavior there.[37] Hence, a punishment based on the "status" of being a narcotic addict—"an illness which may be contracted innocently

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[33] 370 U.S. 660 (1960).

[34] *Id.* at fn. 1 (emphasis added).

[35] *Id.* at 665.

[36] *Id.* at 667.

[37] *Id.*

or involuntarily"[38] violates the Cruel and Unusual Punishments Clause, whereas someone guilty of behavior[s]" such as using, purchasing, or possessing narcotics[39] could be criminal responsible for such actions.

These cases are a mere sampling of the jurisprudence interpreting the nature and scope of the Eighth Amendment's prohibition against cruel and unusual punishment. They each reflect the historic focus of this jurisprudence on the nature of the punishment after a criminal conviction for particular conduct. Since 1791, when the Bill of Rights was ratified, until *Martin*, there is not a single case in which this Court or any other federal court ruled that the criminal enforcement of a uniformly applied ordinance prohibiting certain conduct against a class of individuals who allegedly had no choice but to engage in such conduct constituted cruel and unusual punishment.

This Supreme Court was invited to expand the reach of the Cruel and Unusual Punishments Clause in *Powell v. Texas*.[40] In *Powell*, Petitioner Powell was convicted for being intoxicated in public in violation of Texas Penal Code, Art. 477 (1952), which stated, "[w]hoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars." Powell attempted to assert as a defense that he was a chronic alcoholic who had no

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[38] *Id.*

[39] *Id.* at 666.

[40] 392 U.S. 514 (1966).

control over his actions when he was intoxicated. Therefore, as in the *Robinson* case, he claimed he was convicted for his status as a chronic alcoholic. The trial court refused to allow this defense concluding that Powell had the ability to ensure he was not intoxicated in public.[41] Powell appealed his conviction to this Supreme Court which affirmed the conviction. In so ruling, Justice Marshall speaking for the prevailing plurality who were joined by Justice White in affirming the conviction, stated the Cruel and Unusual Punishments Clause had no relevance to laws proscribing conduct. Justice Marshall reiterated that the Clause's "primary purpose" has "always been considered . . . to be directed at the method or kind of punishment imposed for the violation of criminal statutes."[42] It thus had little to do with the substantive area of criminal law. And *Robinson* wasn't controlling, he said, because the Texas defendant was convicted for being drunk in public—"public behavior which may create substantial health and safety hazards"—not "mere status" as in the California case.[43]

Speaking for himself, Justice White concluded that the defendant had "showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest."[44] Because the defendant could not establish that his being drunk in public was "involuntary," Justice White explained

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[41] *Id.* at 535.

[42] *Id.* at 531–32.

[43] *Id.*

[44] *Id.* at 553–54.

that he "did not show that his conviction offended the Constitution."[45] Citing *Robinson*, Justice White did state in dicta that "the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk."[46] Even so, Justice White believed that "the chronic alcoholic" cannot be "shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act."[47]

The dissent, written by Justice Fortas and joined by three others, read *Robinson* broadly to conclude that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[48] He opined that being a "chronic alcoholic" was a "condition" which the defendant "had no capacity to change or avoid."[49] Thus, the conviction for being drunk in public resulted from "an uncontrollable compulsion to drink."[50] However, this Court in *Powell v. Texas* continued to limit the applicability of the Cruel and Unusual Punishments Clause to the nature of punishment for criminal conduct.

From 1791 until April 1, 2019, when the Ninth Circuit Court of Appeals published the *Martin* decision, anti-vagrancy laws and regulations have peacefully coexisted with the Cruel and Unusual Punishments

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[45] *Id.*

[46] *Id.* at 549.

[47] *Id.* at 550.

[48] *Id.* at 567.

[49] *Id.* at 568.

[50] *Id.*

Clause.[51] Despite more than two hundred years of precedent, the Ninth Circuit reinterpreted *Powell v. Texas* and concluded that the Clause stood for the proposition that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[52] However, *Martin*'s interpretation of *Powell* is inconsistent with the text of the Powell decision. If Justice White intended that to be the holding of *Powell,* he could have joined the dissent to overturn Powell's criminal conviction. But he did not. Hence, the *Martin* Court's interpretation of the Powell decision is inconsistent with all of the jurisprudence applying the Cruel and Unusual Punishments Clause.

B. The *Martin* and *Grants Pass* decisions rest on an inaccurate factual premise that lack of access to shelter is the sole reason why a person is homeless when, in reality, large numbers of persons experiencing homelessness choose to be unsheltered or, due to addiction or mental health conditions, are incapable of remaining in shelters.

In *Grants Pass* the Ninth Circuit affirmed its holding in *Martin* that "[A]n ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them"[53] and "so long as there

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[51] *Coalition on Homelessness, et al. v. City and County of San Francisco*, 90 F.4th 975, 982 (9th Cir. 2024).

[52] *Martin*, 920 F.3d at 616.

[53] *Johnson* 72 F. 4th at 899; quoting *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018), *opinion amended and*

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."[54] The *Grants Pass* court also repeated the statement in *Martin* that the court "in no way dictates to the city that it must provide sufficient shelter for the homeless or allow anyone to sit, lie, or sleep on the streets at any time and at any place."[55] These statements are inconsistent and leave the door open for litigation against cities as a conservative interpretation of these cases is that cities must have an available shelter bed for each homeless person to be able to enforce its camping regulations against persons experiencing homelessness.

The premise that a city's enforcement of its camping regulations is cruel and unusual punishment unless it provides adequate shelter to its entire homeless population oversimplifies the cause of chronic homelessness as merely a lack of shelter. The evidence shows that a majority of the homeless population choose to be unsheltered for what they consider to be legitimate reasons, including ensuring their physical safety, navigating their need for accessibility, protecting their property, and maintaining contact with their community and social support network.[56]

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superseded on denial of reh'g, 920 F.3d 584 (9th Cir. 2019) (emphasis added).

[54] *Johnson* 72 F. 4th at 899; citing *Martin* 902 F. 3d at 617.

[55] *Johnson* 72 F. 4th at 877; citing *Martin* 902 F. 3d at 617.

[56] Ben A. McJunkin, *The Negative Right to Shelter*, 111 CAL. L. REV. 127, fn. 285 (2023).

This is consistent with the experiences of several of the Amici cities.[57]

For example, the City of Garden Grove reports that despite its multiple partnerships with local shelters and homeless service groups, since 2021 less than 1 percent of individuals are accepting mental health services or shelter.[58] The cities of Huntington Beach and Newport Beach have similar experiences with the number of homeless rejecting the shelter and services offered.[59] On average, since the *Martin* decision, in the City of Murrieta 75 percent of the homeless who are offered shelter beds reject those offers.[60] As a result, compelling cities to provide a significant number of beds that will not be used needlessly diverts limited resources from other programs that attempt to treat and address the varying underlying causes for chronic homelessness.

Moreover, a person experiencing homelessness that has substance abuse issues may be precluded from some shelter facilities. Drug use often impedes the ability to obtain shelter because many shelters do not admit guests who are intoxicated or showing other signs of substance use. A shelter's rules may

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[57] These facts are contained in the Declaration of Joshua Imeri-Garcia, https://www.awattorneys.com/declarations/

[58] These facts are contained in the Declarations of Sgt. Jeffrey Brown, https://www.awattorneys.com/declarations/

[59] These facts are contained in the Declarations of Lt. Brian Smith and Natalie Basmaciyan, https://www.awattorneys.com/declarations/

[60] These facts are contained in the Declaration of Brian Ambrose, https://www.awattorneys.com/declarations/

vary from allowing all, to allowing individuals so long as they do not use during the time that they are in shelter, to not allowing anyone who uses at all.[61] Some shelters do not allow use on site and do not allow individuals to leave during their stay. Individuals who abuse alcohol or drugs may also have behavioral issues that result in them being asked to leave or they may find compliance with the shelter's rules too difficult.[62]

To put the magnitude of homelessness into the context, in 2023, approximately 653,100 persons, or about 20 of every 10,000 people in the United States, experienced homelessness.[63] In California, more than 171,000 people experienced homelessness.[64] This means that even though California has 12 percent of the nation's population, it has approximately 26 percent of the nation's total homeless population,

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61 Benioff Homelessness and Housing Initiative, *California Statewide Study of People Experiencing Homelessness*, University of California San Francisco (June 2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf. (The Benioff Homelessness and Housing Initiative conducted the California Statewide Study of People Experiencing Homelessness (CASPEH) the largest representative study of homelessness since the mid-1990s and is the first largescale representative study to use mixed methods (surveys and in-depth interviews).) note 20, at 10.

62 *Id.*

63 U.S. Dep't of Hous. & Urban Dev., Office of Cmty. Planning & Dev., *The 2023 Annual Homeless Assessment Report (AHAR) to Congress* (Dec. 2023), https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf.

64 Benioff Homelessness and Housing Initiative, *supra* note 20, at 4, 11.

making this an even more consequential issue for California cities like the Amici.[65]

As discussed in more detail below, as described in the Benioff Homelessness and Housing Initiative study ("BHHI") the causes of homelessness include a convergence of structural factors such as, the availability of affordable permanent housing, individual factors that increase a person's risk of becoming homeless such as substance abuse and addiction and mental health challenges, and economic and social reasons including the absence of a social safety net.[66]

1. Availability of Affordable Permanent Housing

Some advocates for the homeless have promoted the policy of "housing first" which places the primary focus on providing permanent housing available to persons experiencing homelessness along with some supportive services, believing that once a person has stable living conditions their other disorders and disabilities can be more easily addressed. However, this approach has not resulted in an appreciable reduction in the homeless population.

Furthermore, the cost of providing sufficient housing for every homeless individual, is prohibitively expensive for most local governments. Los Angeles, for

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65 *Id.*

66 Benioff Homelessness and Housing Initiative, *supra* note 20, at 10.

example, would need to spend $403.4 million to house every homeless individual not living in a vehicle.[67]

In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year.[68] As such, this approach is unworkable for the Amici cities, many of which have a fraction of the general fund budgets as their larger neighbors such as Los Angeles and San Francisco. Moreover, unfortunately, this approach has not proven to be successful.

2. Mental Health Disorders and Substance Abuse

For chronically homeless individuals, serious mental illness and substance abuse issues are among the primary causes of homelessness approximately seventy-five percent of the time.[69] "Chronically homeless" is defined as a person who is homeless for at least one year or on four or more separate occasions in the last three years and has a substance use disorder, serious mental illness, developmental disability, PTSD,

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[67] *See* Los Angeles Homeless Services Authority, *Report on Emergency Framework to Homelessness Plan* 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-ShelteringReport.pdf.

[68] *See* Heather Knight, *A Better Model, A Better Result?*, S.F. CHRONICLE (June 29, 2016), https://projects.sfchronicle.com/sfhomeless/shelters.

[69] Benioff Homelessness and Housing Initiative, *supra* note 20; Jialu L. *Streeter, Homelessness in California, Causes and Policy Considerations*, Stanford Institute for Economic Policy Research Policy (SIEPR) (May 2022).

cognitive impairments from brain injury, or chronic physical illness or disability.[70]

With regard to mental health disorders, individuals with untreated psychiatric illnesses comprise one-third of the homeless population in the United States.[71] Of the homeless tracked in the BHHI study, participants had the following experiences:

- 82 percent reported a period in their life where they experienced a severe mental health condition
- 27 percent had been hospitalized for a mental health condition
- 56 percent of these hospitalizations occurred prior to the first instance of homelessness[72]

Eighty-two percent of the BHHI study participants also reported one or more severe mental conditions including at least one of the following:

- 69 percent experienced depression
- 69 percent experienced anxiety
- 23 percent experienced hallucinations

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[70] *Id.*

[71] *Id.*, citing USDHHS, 2021, USDHUD, 2010; National Alliance to End Homelessness, *Health and Homelessness* (Dec. 2023), https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/health/; Edward J. Martin, *Affordable Housing, Homelessness, and Mental Health: What Health Care Policy Needs to Address*, 38 J. OF HEALTH AND HUM. SERVS. ADMIN. 1, 67-89 (2015).

[72] Benioff Homelessness and Housing Initiative, *supra* note 20, at 4-5.

- 25 percent experienced Post-traumatic Stress Disorder[73]

Twenty-seven percent of the participants also reported being hospitalized for a mental health disorder and half reported a hospitalization before their first episode of homelessness. The rise in serious mental health issues related to homelessness has not occurred in a vacuum. The relationship between serious mental health and homelessness can be traced back to the deinstitutionalization of the 1950s and the subsequent closing down of public psychiatric hospitals.[74] Hence, while it has been recommended that persons experiencing homelessness have much greater access to mental health treatment, more facilities are needed to have sufficient capacity to help everyone in need.[75] Furthermore, because *Martin* and *Grants* pass have removed an important tool for cities to intervene, even when such treatment is available, cities do not currently have any means of compelling persons needing such services to accept those services to address the root causes of their homelessness.

In addition to mental illness, substance abuse is also a leading cause of homelessness. The BHHI Study reported:

- 62 percent of participants reported having a period of heavy drinking (3+ a week)

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[73] Benioff Homelessness and Housing Initiative, *supra* note 20, at 11.

[74] *Id.* at 7; Treatment Advocacy Center 2016a; SAMHSA 2016.

[75] Streeter, *supra* note 17, at 6.

- 57 percent of the participants reported regular use of illicit drugs without treatment
- 56 percent of the participants reported regular amphetamine use
- 22 percent of the participants report regular use of opioids
- 26 percent of participants had injected drugs at some point
- 64 percent of participants reported regular use of illegal substances before their first homeless episode.
- 20 percent of participants reported a significant increase in substance use after becoming homeless
- 38 percent of participants reported no change in substance use frequency once homeless.[76]

To further compound the issues with substance abuse, the study confirmed that being homeless prevents most individuals from accessing treatment. Only six percent of participants in the BHHI study were participating in a substance abuse treatment program.[77]

Thus, Amici cities need all intervention tools at their disposal to have the highest chance of successfully helping persons address the root causes of their homelessness.

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[76] Benioff Homelessness and Housing Initiative, *supra* note 20 at 63.

[77] *Id.* at 63

3. Economic and Social Issues

When a person is named on the lease or mortgage, they are a "leaseholder".[78] A person experiencing homelessness whose personal household does not include a leaseholder is a "non-leaseholder".[79] A non-leaseholder includes someone staying with family or friends or in informal living arrangements without the protection of a lease. For leaseholders, a main cause of becoming homeless is economic, for non-leaseholders the main cause is primarily social. Participants whose last housing was as a leaseholder cited at least one economic reason (58 percent) more commonly than non-leaseholders (40 percent).[80] Leaseholders were more likely to report various economic reasons than non-leaseholders. Economic reasons all point to the fact that, for most, the rent was too high for their income because of multiple reasons including:

- 11 percent of participants experienced layoffs
- 10 percent of participants experienced reduced income
- 8 percent of participants experienced reduced work hours
- 5 percent of participants were fired

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78 *Id.* at 37.

79 *Id.* at 37.

80 *Id.*

- 22 percent of participants experienced a loss of their own or partner's income because of COVID-19.[81]

The participants also reported the following social causes leading to homelessness included the following:

- 12 percent of participants experienced conflicts among residents
- 7 percent of participants had conflict with the owner of their residence
- 7 percent of participants experienced living with an ill or disabled household member
- 6 percent of participants had their residences sold or foreclosed upon
- 6 percent of participants experienced household violence or abuse
- 5 percent of participants experienced a breakup with partners
- 4 percent of participants experienced substance abuse[82]

"Homelessness in California is complex, and the diverse causes and trajectories suggest that the solutions are diverse [where] policymakers should consider a combination of strategies that address the housing shortage and cost issues and those that tackle the mental health and drug addiction crisis."[83]

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[81] *Id.*

[82] *Id.* at 47.

[83] Streeter, *supra* note 17, at 8-10.

Contrary to the notion that persons experiencing homelessness are from out of state, studies indicate that people who experience homelessness in California are Californians.[84]

The Amici recognize that the homelessness issue is far from resolution. However, local jurisdictions are best suited to determine how best to assist their populations as they get to know the circumstances and needs of each individual. The inability for cities to intervene that has resulted from the *Martin* and *Grants Pass* decisions has resulted in dire consequences both for local jurisdictions and for those persons experiencing homelessness.

C. Subjecting the enforcement of anti-camping ordinances to Eighth Amendment protections is unworkable as it has led to court-established "rules" that are difficult or impossible for jurisdictions to comply with and expose jurisdictions to significant legal risk.

Several post-*Martin* and *Grants Pass* decisions have attempted to clarify the scope and reach of *Martin* and *Grants Pass* but have only created great uncertainty for jurisdictions, including the Amici cities, as to those camping regulations a jurisdiction may safely enforce without running afoul of the Eighth Amendment. In *Martin* the court held that Boise's enforcement of two ordinances that served to ban camping on public property, "violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors,

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84 *Id.* (emphasis added).

on public property, when no alternative shelter is available to them."[85]

In an apparent effort to answer the dissenting justices who asserted the Ninth Circuit's holding was literally and figurately unprecedented and sweeping, the majority stated, "[o]ur holding is a narrow one. []"we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place."[86] However, the Court then states "[w]e hold only 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."[87] "That is, 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."[88] The Court then relegates further "guidance" to the decision's footnote 8, which makes the following three points:

1. "[O]ur 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."

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[85] *Martin*, 920 F.3d at 1036.

[86] *Id.* at 1048.

[87] *Id.*

[88] *Id.*

2. "[We do not] suggest that a jurisdiction with insufficient shelter can never criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible."

3. "[A]n ordinance barring the obstruction of public rights of way or the erection of certain structures" might also be constitutionally permissible.[89]

While these statements endeavor to provide some clarity and guidance to jurisdictions seeking to address their legitimate public health and safety concerns through the regulation of camping on public property, the doors they endeavor to leave open are too vague and are undercut by the final statement in footnote 8:

> "Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the 'universal and unavoidable consequences of being human' in the way the ordinance prescribes."[90]

In *Grants Pass*, the Ninth Circuit affirmed its decision in *Martin* and, by its own admission, reached beyond its *Martin* decision in holding that:

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89 *Martin* at 1048, Fn. 8

90 *Id.* (emphasis added.)

1. [C]lass certification is not categorically impermissible in cases such as this;

2. "[S]leeping" in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements;

3. *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined; and,

4. On remand, the district court must narrow its injunction to enjoin only those portions of the anti-camping ordinances that prohibit conduct protected by *Martin* and this opinion. In particular, the district court should narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless persons for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available.[91]

Frustratingly, however, the Court concludes with, "[o]ur decision does not address a regime of purely civil infractions . . . "[92] Because the Grants Pass regulations included primarily civil penalties that could graduate to criminal penalties if the offender failed to comply with certain exclusion orders, it would seem the Court could have assisted jurisdictions trying to regulate this type of camping activity to address public health and safety concerns by determining whether Grants Pass's regulations would violate the

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[91] *Grants Pass*, 72 F.4th at 896.

[92] *Id.*

Eighth Amendment if the criminal penalties were removed from the ordinances.

As a result, *Martin* and *Grants Pass* upended how local agencies seek to address homelessness and left unanswered numerous critical questions the answers to which are necessary for jurisdictions to move forward in addressing their legitimate public health and safety issues with camping on public property without running afoul of the Eighth Amendment. These include,

1. In what circumstance may a jurisdiction enforce its ordinances if it does not have shelter beds if the court is not mandating that jurisdictions provide shelter to every person experiencing homeless?

2. What is meant by the use of the term "jurisdiction"?[93] Does it mean only the jurisdiction that is enforcing the camping regulations or does it extend more regionally to include shelter beds available in the County in which the jurisdiction is located or in a neighboring jurisdiction?

3. What constitutes adequate and realistically available shelter?

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[93] Before *Martin*, in California, homeless outreach and assistance was primarily led by counties as a regional issue. Post-*Martin*, under a conservative interpretation of the *Martin* decision, would have to provide shelter, costing hundreds of thousands to millions of dollars each year even though merely having shelter beds available fails to address the issue and many of the chronically homeless decline the bed because what they need is treatment for mental illness and/or addiction.

4. What constitutes adequate shelter and if a jurisdiction provides locations for persons experiencing homelessness to temporarily camp, would that comply with *Martin*?

5. What limits may a jurisdiction place on "rudimentary forms of protection from the elements?"

6. Would regulations on camping on public property that include only civil citations violate the Eighth Amendment?

7. Does the jurisdiction have the burden of establishing a person experiencing homelessness is voluntarily homeless before it may enforce its regulations on that person? If so, what would constitute adequate proof ?

8. What time, place and manner restrictions on camping on public property would not be considered a form of "punishment" against persons experiencing homelessness?

At a minimum these questions require answers from the legislature and this Court to reassure cities that their regulations do not run afoul of the Eighth Amendment as interpreted by the Ninth Circuit.

These questions also split the decision into multiple methods of interpretation. For example, a conservative interpretation of *Martin* would require a city to confirm that is has available and adequate shelter beds within its jurisdictions for every person experiencing homelessness before enforcing any anti-camping type ordinance. This interpretation broadens the scope of the jurisdiction's preliminary inquiries prior to enforcement and sets a very high bar. However, an alternative interpret-

ation stems from the additional language in *Martin*, which appears to only require an assessment of whether a bed is available for a particular person. This interpretation narrows the scope of the jurisdiction's preliminary inquiries prior to enforcement. Yet, concurrently, *Martin* focuses on whether a person has an "option of sleeping indoors."[94] Footnote 8 attempts to explain, in pertinent part, that its holding does not apply to those "who do have access to adequate temporary shelter . . . because it is realistically available to them for free, but who choose not to use it."[95] In short, the latter interpretation may create an exemption for a person who is offered shelter and rejects it, implying said person has no Eighth Amendment claim and cannot preclude the jurisdiction from enforcing its anti-camping ordinances.

The City and County of San Francisco put forward this interpretation in opposition to a Motion for Preliminary Injunction in the federal district court case of *Coalition on Homelessness v. City & County of Los Angeles*.[96] However, the court declined to consider the interpretation because of a "lack of factual support."[97]

Several legal scholars have also acknowledged the lack of clear guidance in these opinions that has resulted in multiple interpretations of their meaning. One article analyzes "the *Martin* decision as an example of inadequate constitutional rulemaking [sic], [when]

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[94] *Martin* at 611 Fn. 8.

[95] *Id.*

[96] No. 22-cv-05502-DMR, 2022 WL 17905114, at *1 (N.D. Cal. Dec. 23, 2022).

[97] *Id.* at 24.

"[d]espite focusing on individual "choice" as a prerequisite for criminalization, the *Martin* court neglected to grapple with the social and cultural conditions that drive these choices"[98] This article provides the following interpretation of *Martin*, stating "[u]nder *Martin*, a city can still regulate unsheltered populations in accessing and occupying public spaces so long as the city can show that a "choice" for shelter—however unrealistic or impracticable—exists for the unsheltered population."[99] McJunkin's analysis is based on an alternative interpretation that focuses on the person's willingness to choose or decline the shelter rather than the shelter-to-homeless ratio formula set out in *Grants Pass.* McJunkin's analysis recognizes the need to parse each word of the *Martin* decision's footnote 8 to attempt to make sense of the Court's ruling.

Additionally, another scholar, Sarah Rankin,[100] focuses on the ambiguity of what constitutes "reasonably alternative shelter." She states "*Martin* stands for the proposition that laws criminalizing homelessness are unconstitutional when [] existing shelters are inadequate in number or are functionally not accessible to their homeless population."[101] "*Martin* also clarifies

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98 Ben A. McJunkin, *The Negative Right to Shelter*, 111 CAL. L. REV. 127, 162 (2023).

99 *Id.*

100 Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 117 (2019), https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1815&context=faculty (Rankin is a national expert on legal and policy issues relating to people experiencing homelessness. She is the founder and Director of the Homeless Rights Advocacy Project at the Korematsu Center at the Seattle University School of Law)

101 *Id.*

that determining whether a city provides reasonable alternatives is not a simple mathematical calculation of shelter beds. Instead, that sufficient reasonable alternative shelter must be 'functionally accessible.'[102] But, if *Martin* is not a "simple mathematical calculation of shelter beds" as Rankin claims, how and why else then are, "[s]everal cities . . . already taking note of *Martin*, proactively declining to enforce existing anti-camping laws."[103]

Rankin's conclusory analysis fails to understand that it is the lack of clarity in the law that is causing cities to refrain from enforcement because of the exposure to litigation. Even cities that are working hard to help the homeless are being sued. The exposure is not only theoretical. Hence, the Court's lack of guidance opens the door for Rankin to develop her own interpretation of the Court's "sufficient reasonable alternative" that she recharacterizes and coins the term as a "functionally accessible" shelter-bed, where a shelter does not include overcrowding, unhealthy, unsanitary, or dangerous conditions, or a system of rules and regulations.[104] While that is Rankin's interpretation, the Court and legislature have left the question unanswered—leaving the Amici without practical guidance. Even McJunkin observed that "the Court fails to address how the quality of homeless shelter or the location of a homeless shelter may factor into

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[102] *Id.*

[103] *Id.* at 118.

[104] *Id.* at 117.

whether a shelter is considered 'practically available.'"[105]

Not only is the Court's ruling incomplete, but the Ninth Circuit acknowledges the gap and refuses to clarify its decision when given the opportunity to do so. For example, in *Coal. on Homelessness v. City & County of Los Angeles*, the Ninth Circuit telegraphed that answers to the questions above will not be coming any time soon by indicating that each of these unanswered questions must first be considered at the District Court level before it will consider it.[106] This is expressed in the following passage:

> The dissent would nevertheless wade into the deeply complex and significant constitutional issues implicated in the City's new geographic scope argument without the benefit of consideration or key factual findings by the district court. Our judicial system generally assumes that consideration of an issue at both the trial court and appellate court level is more likely to yield the correct result, because the issue will be more fully aired and analyzed by the parties, because more judges will consider it, and because trial judges often bring a perspective to an issue different from that of appellate judges."[107] These principles are the foundation of our

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105 McJunkin, *supra* note 4, at 161, fn. 274.

106 *Coal. on Homelessness v. City & Cnty. of San Francisco*, 90 F.4th 975, 987 (9th Cir. 2024).

107 *Ecological Rts. Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1154 (9th Cir. 2000).

> waiver doctrine and present sound reasons for us to decline to consider these issues at this juncture.[108]

Furthermore, when the City of San Francisco attempted to rely on the guiding language in *Martin* regarding permissible time, place and manner restrictions, the Court almost disavowed that guidance stating:

> The City further argues—again for the first time on appeal—that enjoining enforcement of San Francisco Police Code § 168 was improper because that provision is time restricted. Section 168 prohibits sitting or lying on a public sidewalk only "during the hours between seven (7:00) a.m. and eleven (11:00) p.m." S.F. Police Code § 168(b). The City relies on language in *Martin* suggesting that "an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." However, the *Martin* court did not resolve this question because such a law was not before it. Whether such a law is in fact constitutionally permissible is not a question that is properly before us in this case, either.[109]

Hence, public agencies are unable to rely on any of the "guidance" language in *Martin* or *Grants Pass*.

The Ninth Circuit crafted a rule that is subject to various interpretations and leaves the heavy lifting of determining what is and what is not a violation of

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[108] *Coalition on Homelessness*, supra at 978.

[109] *Id.* at 980. (emphasis added.)

the Eighth Amendment to the lower courts on a case-by-case basis. This lack of guidance for public agencies to lawfully enforce camping regulations consistent with *Martin* and *Grants Pass* has created a void which impacts local governments, their residents, visitors, and businesses daily. As discussed above, "homelessness is precipitated primarily by external factors, such as "unemployment/under-employment personal and family difficulties; alcoholism; drug abuse; family abuse; the lack of affordable housing; inappropriate behavior; mental disorders; or a combination of these or other factors." Unfortunately, the Ninth Circuit's approach created a rule that is "literally impossible of application by the officer [and the city and county officials] in the field."[110] Instead, "the Court has undermined, rather than furthered the goal of consistent law enforcement; [because] it has failed to offer any principles to guide the cities and counties in their application of the new rule."[111]

Cities are left with two practical options. Either enforcing regulations that may be subject to litigation for violating the Eighth Amendment, or forgo enforcing any regulations for fear of litigation and its costs. This Sophie's Choice hurts both the housed and the unhoused. Devastatingly, the Eighth Amendment's Cruel and Unusual Punishments Clause applies, but not in the way the Ninth Circuit intends. The *Martin* and *Grants Pass* decisions are "cruel because [they leave] the citizens of [the Ninth Circuit] powerless to enforce their own health and safety laws with-

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110 *New York v. Belton*, 453 U.S. 454, 458 (1981), quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979).

111 *Id.* at 453.

out the permission of a federal judge. And "[they are] unusual because no other court in the country has interpreted the Constitution in this way."[112]

Accordingly, the Amici respectfully request this Court overturn the *Martin* and *Grants Pass* decisions and return to the state and local jurisdictions the discretion to adopt regulations to protect public health and safety while addressing the core reasons for homelessness without the specter of expensive litigation and exposure to substantial monetary damages and attorney fees.

CONCLUSION

The *Martin* and *Grants Pass* decisions are inconsistent with the long history of jurisprudence interpreting the reach of the Eighth Amendment and rest upon questionable interpretations and extensions of this Court's decisions in *Robinson* and *Powell*. These decisions have resulted in rules and endless questions that the Ninth Circuit has declined and/or is unable to answer. The primary holding of *Martin*, "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" is a misguided approach to homelessness and has largely impeded the ability of cities to help the homeless. For these

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112 *Coal. on Homelessness v. City & Cnty. of San Francisco*, *supra* at 982.

reasons described herein, the Amici respectfully request this Court overturn both *Martin* and *Grants Pass* to the extent they stand for the proposition that the enforcement of generally applicable laws regulating camping on public property can constitute "cruel and unusual punishment" under the Eighth Amendment.

Respectfully submitted,

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