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 FOR AMICUS CURIAE ADVOCATES FOR EMPOWERMENT CA IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus Curiae Advocates for Empowerment CA ("Amicus") is the public policy advocacy affiliate of Tenants and Owners Development Corporation ("TODCO"), a San Francisco based nonprofit.[1] TODCO was founded in 1971 by the low-income residents of San Francisco's Yerba Buena Redevelopment Area to oppose and remedy their forced displacement and the permanent destruction of their "skid row" homes due to the City of San Francisco's approved redevelopment program. For the 53 years since, it has advocated for low-income communities. It has also built over 1,000 units of affordable housing for those residents. This housing now includes more than 200 units reserved for homeless persons in San Francisco.

Amicus files this brief to protect its interests and those of its tenant-residents. As the owner and responsible operator of eight residences in the South of Market neighborhood, TODCO is familiar with the everyday realities of homelessness in San Francisco. It is determined to resolve the complex issues that surround homelessness in a manner that both assures a decent life for homeless persons and protects the quality of life in San Francisco.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus curiae certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than Amicus, its members, or its counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

Amicus joins Respondents and the Amici that support them in urging the Court to uphold the amended opinion in *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023). That opinion correctly found that the Cruel and Unusual Punishments Clause of the Eighth Amendment does not permit a city to punish homeless people who have nowhere else to go for resting or sleeping with a blanket anywhere in public at any time.

SUMMARY OF ARGUMENT

The majority opinion in *Johnson* held only that a jurisdiction cannot criminalize the act of sleeping or resting in public in a location with bedding material by individuals who are involuntarily homeless. *Johnson* was rightly decided under applicable precedent. It provides an important check on governmental action that is neither complicated nor onerous: a city violates the Eighth Amendment when it enforces such ordinances against homeless persons who have no other place in the city to go.

Johnson did not cause the epidemic of homelessness in the western United States. That argument ignores both skyrocketing real estate prices and the fallout of the COVID-19 pandemic. It also ignores the fact that over the past five years homelessness has increased throughout the United States, including in cities that are outside of the Ninth Circuit and therefore not bound by *Johnson*.

If this Court overturns *Johnson*, the practical result will be that any city or state in the country can criminalize the basic human acts of sleeping and resting when one is poor and unhoused and has no alternative but to do so in a public space. Despite rhetoric espousing "compassion", many American cities will then do exactly that: they will enact statutes making it illegal to sleep or rest on public property. Even those cities that do not want to pass such legislation will be pressured to do so or be faced with an influx of homeless persons from other jurisdictions who are fleeing such laws.

It is already illegal for homeless persons to sleep or rest on private property. Therefore, in places like Grants Pass, which have inadequate (or zero) shelter beds, there will be nowhere for unhoused persons to sleep unless the city provides them some form of shelter.

However, the harsh reality is that American cities have limited financial resources and can never possibly afford to provide enough shelter for this nation's 800,0000 unhoused. All people must sleep. Therefore, unhoused persons will be forced to break the law by sleeping in public, which will then result in their incarceration.

Because jails and prisons are already full, the inevitable outcome will be mass internment camps for the unhoused, akin to refugee camps that currently exist in other countries:

Refugee camp in Turkey

And while technically, the homeless will be "able to leave" these camps, as a practical matter there will be no other city or county or state for them to go to where they can sleep and exist legally. For the San Francisco Bay Area, the dystopian outcome that will likely follow the repeal of *Johnson* is thus an ever-growing series of "resettlement camps", or whatever euphemistic name is adopted, at county properties such as the San Bruno and Santa Rita jails.

Within a short period of time, California and other western states will thus slide into an unending nightmare, with a substantial fraction of their population subsisting as a serially interned nomadic underclass without any hope, and with even less of a future or a home. Other states will presumably follow suit,

resulting in what will amount to a nationwide ban on homeless persons.[2] This ban will apply equally to our seniors, disabled persons, and the un- or under-employed.

ARGUMENT

I. *Johnson* was rightly decided.

Amicus joins the arguments made by Respondents and numerous Amici, including the United States, that in *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), cert. granted sub nom. *City of Grants Pass, Oregon v. Johnson*, 144 S. Ct. 679 (2024), the Ninth Circuit correctly held that the Eighth Amendment prohibits a local government from criminalizing the status of homelessness by effectively barring individuals without access to shelter from residing in the jurisdiction.[3]

This is because *Robinson v. California*, 370 U.S. 660 (1962) holds that punishing someone for living with a status violates the Punishments Clause.

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[2] *See* Brief of the United States as Amicus Curiae at 27 ("[I]f every jurisdiction in the Nation adopted ordinances like those at issue here, there would be nowhere for people without homes to lawfully reside.").

[3] Here, the ordinances at issue define the term "camping" so broadly that it includes simply being present in a place where any type of material used for sleeping (including a blanket) is "placed, established, or maintained." Grants Pass Municipal Code §§ 5.61.010, 5.61.030. The prohibition on "camping" extends to all public property at all times and applies even if a person has nowhere else to go. *Ibid*.

Therefore, under *Robinson*, punishing a person for having the status of being involuntarily homeless would violate the Eighth Amendment.

Furthermore, punishing a person who is involuntarily homeless for sleeping in a place where any type of bedding material is found is the equivalent of punishing them for their status of being homeless for the following reasons:

1. All human beings must sleep in order to survive.
2. Involuntarily homeless persons (meaning people who have no available shelter) must sleep outdoors.
3. In order to sleep outdoors in a locale such as Grants Pass, one must have some type of bedding such as a blanket or other type of covering.
4. Therefore, criminalizing the act of sleeping outdoors with some type of bedding is effectively criminalizing the act of sleeping outdoors.
5. Because involuntarily homeless persons must sleep outdoors, criminalizing the act of sleeping outdoors is effectively the same thing as criminalizing the status of being involuntarily homeless.

However, *Johnson* is limited in scope. It does not stand for the proposition that homeless people can sleep wherever and whenever they wish. To the contrary, the majority opinion is clear that where there is

shelter available, a city can prohibit sleeping in public areas.

Johnson thus creates a win-win-win situation. It protects the people who are involuntarily homeless from being criminalized due to their status. It encourages cities and other jurisdictions to create facilities to house the homeless. And it encourages homeless persons to make use of those facilities when they are available.

For these reasons, this Court should not overturn *Johnson*. If it does, cities will be able to imprison homeless people for sleeping outside when there is no other place for them to sleep. That will only add to the challenges these individuals face and make it harder for them to escape poverty and homelessness.

Furthermore, the foreseeable consequence of overturning *Johnson* will be that homeless people are forced to move out of the jurisdictions with the most draconian laws. However, in order to survive they will have to go somewhere. In all likelihood, they will move to cities that are perceived to be more friendly to the homeless, such as those in the San Francisco Bay Area. Those cities will then have to enact their own set of draconian laws. This will result in a race to the bottom, compelling cities to criminalize sleeping in public spaces and forcing the involuntary homeless to shuffle from one increasingly hostile locality to another.

A. The holding in *Johnson* is narrow and limited.

Petitioner and many of the Amici who support it exaggerate the scope of the holding in *Johnson*. In fact, the holding of the case is quite narrow. The majority opinion allows cities and other jurisdictions to address homelessness as they deem fit, with one exception: they cannot punish an individual for the act of sleeping in public when that individual is involuntarily homeless. *See* 72 F.4th 868, 915 ("Jurisdictions remain free to address the complex policy issues regarding homelessness in the way those jurisdictions deem fit, subject to the single restriction that involuntarily homeless persons must have '*somewhere*' to sleep and take rudimentary precautions (bedding) against the elements.").

However, as the majority opinion takes great pains to clarify, where a homeless person refuses a specific offer of shelter elsewhere, that individual may be punished for sleeping in public. *Id*., at 915 ("And emphatically, when an involuntarily homeless person refuses a specific offer of shelter elsewhere, that individual may be punished for sleeping in public.").

Furthermore, as the majority opinion has clarified, *Johnson* does not mandate a jurisdiction-wide inquiry regarding the availability of shelter. *Id.* Rather, the inquiry focuses on the homeless person at issue: Has that person been provided with a specific offer of shelter? If

so, they are not "involuntarily homeless" and the holding in *Johnson* does not apply to them.[4] *Id.* at 917.

Finally, *Johnson* does not provide that people who are involuntarily homeless can sleep wherever and whenever they wish. *Id.* at 915. Nor does *Johnson* place any limitation on cities' ability to address public urination and defecation. *Id.* at 917. The majority opinion is also careful to point out that it does not address a regime of purely civil infractions. *Id.* at 896.

II. *Johnson* did not cause the homelessness epidemic and overturning it would make matters significantly worse.

Petitioner and many of its Amici either argue or imply that *Johnson* (and/or *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) is to blame for the increased homelessness in the western United States. They marshal images and stories in support of this argument that are chosen to shock the reader. But Petitioner and its Amici fail to demonstrate that *Johnson* and *Martin* caused the homelessness epidemic. And they do not show how overturning *Johnson* would do anything to alleviate it.

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[4] Pursuant to this holding, a jurisdiction-wide inquiry would be relevant where, as in *Johnson*, a city had "zero shelter beds available on almost every night of the year." 72 F.4th at 916. Under those circumstances, the jurisdiction-wide inquiry would show that a city could not have made good faith offers of shelter to homeless individuals as no such shelter existed.

As a preliminary matter, the argument that *Johnson* and *Martin* are somehow to blame for the increased homelessness in the western United States over the past five years is without merit. That argument ignores both the skyrocketing real estate prices during that time period and the fallout of the COVID-19 pandemic.[5]

The attempt to blame *Johnson* and *Martin* also ignores the fact that homelessness has increased throughout the United States, including in cities that are outside of the Ninth Circuit and therefore not bound by *Johnson* or *Martin*.[6] It also ignores the high rates of homelessness in states as disparate as North and South Dakota, Oklahoma, Florida, and Vermont. (2023 AHAR, 18.)

Indeed, according to the Project Director for the Department of Housing and Urban Development's Annual Homeless Assessment Report, the three main issues driving homelessness in California are "unaffordable housing, stagnated incomes and systemic racism."[7] The holdings in *Johnson* or *Martin* are notably

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[5] "California's steady rise in home prices and rents is the primary reason behind the state's homelessness crisis. . . ." https://calmatters.org/housing/2023/12/california-homelessness-housing/#:~:text=California's%20steady%20rise%20in%20home, of%20the%20state%20this%20year.

[6] These cities include New York City and Denver. *See* U.S. Dep't of Hous. & Urb. Dev., *The 2023 Annual Homelessness Assessment Report (AHAR) to Congress 1* (Dec. 2023) ("2023 AHAR"), https://perma.cc/HVNS-VPTX, 22.

[7] https://www.theguardian.com/us-news/2023/dec/19/california-us-street-homelessness-youth-unsheltered-annual-report#:~:text=

absent from that list, and there is simply no evidence beyond mere anecdotes to support any attempt to pin the blame on the increase in homelessness on those cases.

Furthermore, Petitioner and its Amici fail to consider what the likely consequences of overturning *Johnson* would be. Those likely consequences are as follows:

First, the cities, counties, and states that agree with the approach taken by Grants Pass would enact or amend statutes that criminalized sleeping in public. They would then enforce those laws.

Residents of those jurisdictions who were involuntarily homeless would then have to choose between escalating punishments culminating in incarceration and moving to a jurisdiction that did not have such laws. Those jurisdictions, many of which, like San Francisco, San Jose, and Oakland, already have sizeable unhoused populations, would then have to choose between being utterly overwhelmed by additional unhoused persons and enacting their own versions of the same laws.

The predictable result of overturning *Johnson* would thus be a race to the draconian bottom that would undo any progress made over the past few years. Homeless persons would be forced to shuffle from one city to the next in search of a place that did not

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Meghan%20Henry%2C%20project%20director%20for,8.53%20million%20renters%20were%20on.

criminalize them for sleeping outside. This would make it that much harder for them to escape homelessness and push them even further down the economic ladder.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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