

No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS,

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 THE FUND FOR EMPOWERMENT
AS AMICUS CURIAE
SUPPORTING RESPONDENTS**

BENJAMIN L. RUNDALL
ALEXIS J. EISA
ZWILLINGER WULKAN PLC
2020 North Central Avenue
Suite 675
Phoenix, AZ 85004

ANDREW KIM
Counsel of Record
COLLIN M. GRIER
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
*andrewkim@
goodwinlaw.com*
(202) 346-4000

April 3, 2024

TABLE OF CONTENTS

	PAGE
INTEREST OF THE <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. Phoenix has weaponized local ordinances to punish unhoused individuals for merely existing in circumstances they cannot control.....	4
A. The number of unhoused individuals eclipses the shelter space created through Phoenix’s modest efforts.....	6
B. Even after <i>Martin</i> , Phoenix arrested unhoused people with nowhere to go, or funneled them into an open, outdoor area that presented unbearable conditions.	8
C. Citing purportedly competing court obligations, Phoenix dismantled the Zone and uprooted unhoused individuals, forcing them out onto other public spaces.	11
II. Enforcing the Eighth Amendment to protect the unhoused does not handcuff cities from achieving their policy objectives.....	16
CONCLUSION	20

TABLE OF AUTHORITIES

Page(s)

Cases

<i>Martin v. City of Boise</i> , 902 F.3d 1031 (9th Cir. 2018), <i>amended on denial of reh'g</i> 920 F.3d 584 (9th Cir. 2019).....	2, 9, 16, 18, 19
<i>Robinson v. California</i> , 370 U.S. 660 (1962).....	19
<i>Rogers v. Lodge</i> , 458 U.S. 613 (1982).....	19

Statutes

Glendale, Ariz. City Code § 25-90(b)(4).....	9
Phx., Ariz. Code § 23-30	8
Phx., Ariz. Code § 23-30(B)	12
Phx., Ariz. Code § 23-48.01	8, 12

Other Authorities

Madeline Ackley, <i>Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protesters Say</i> , Ariz. Mirror (Jan. 9, 2020, 9:13 a.m.).....	9
--	---

Melissa Blasius, <i>How Phoenix Decides What's Trash vs. Property During Controversial Homeless Camp Sweeps,</i> ABC15 (Mar. 6, 2022, 11:51 a.m.)	11
City of Phoenix, Office of Homeless Solutions, https://www.phoenix.gov/solutions	7
City of Phoenix, Office of Homeless Solutions, <i>Phoenix City Council Approves Zoning for Safe Outdoor Space</i> (Sept. 21, 2023, 6:00 p.m.)	15
City of Phoenix, Office of Homeless Solutions, <i>Strategies to Address Homelessness: Task Force Recommendations to the City Manager</i> (2022)	7, 17
Denzen Cortez, <i>Here's an Inside Look at Living in Phoenix's The Zone Homeless Encampment</i> , KTAR News (Oct. 27, 2023, 6:11 a.m.)	10
Katherine Davis-Young, <i>Arizona Will Spend More to Address Homelessness This Fiscal Year Than It Ever Has Before,</i> KJZZ (June 29, 2023, 9:43 a.m.).....	5
Katherine Davis-Young, <i>Phoenix Cleared "The Zone," But the City's Homeless Population is Still Growing</i> , KJZZ (Nov. 15, 2023, 3:03 p.m.)	5

Bridget Dowd, <i>The Population at an Arizona Homeless Encampment Swells But Resources Fall Short</i> , Nat'l Pub. Radio (Aug. 26, 2022, 7:23 a.m.).....	5
Editorial Board, <i>Opinion: Why is Phoenix Homelessness Among the Nation's Worst? Look at What Got Us Here</i> , Ariz. Republic (May 1, 2023, 9:38 a.m.)	4
Jen Fifield, <i>Can Homeless Sleep on the Streets? Phoenix Area Cities are Rethinking Bans</i> , Ariz. Republic (Dec. 10, 2018, 4:19 p.m.).....	8
Human Servs. Campus, https://hsc-az.org/	10
Justin Lum, <i>Surviving 'The Zone': Crime Drops Where Phoenix's Tent City Once Was But Homeless Crisis Persists</i> , Fox 10 Phoenix (Jan. 30, 2024, 11:19 a.m.).....	15, 16, 18
Maricopa Ass'n of Gov'ts, <i>2022 Point-in-Time (PIT) Count Report</i> (2022)	7
Maricopa Ass'n of Gov'ts, <i>2023 Point-in-Time (PIT) Count Report</i> (2023)	6
<i>Phoenix Finishes Cleaning Up Final Blocks of the Zone Homeless Encampment</i> , KTAR (Nov. 2, 2023, 9:44 a.m.).....	14

Deanna Pistono, *'Like a Frying Pan': Extreme Heat Overwhelms Phoenix's Unhoused Community*, Ariz. Capitol Times (Sept. 29, 2023) 10

Press Release, City of Phoenix, *Phoenix City Council Approves Zoning for Safe Outdoor Space* (Sept. 21, 2023, 6:00 p.m.) 18

Press Release, U.S. Dep't of Justice, *Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department* (Aug. 5, 2021) 11

Juliette Rihl, *Arizona Has One of the Worst Homelessness Crises in the Nation, Federal Data Shows*, Ariz. Republic (Jan. 10, 2023, 6:48 a.m.)..... 4

Helen Rummel, *1 Arrested as Phoenix Continues Clearing 'The Zone' Homeless Encampment*, Ariz. Republic (Nov. 25, 2023, 11:53 a.m.) 15

Helen Rummel, *Where is the Phoenix Homeless Camp Called 'The Zone'?*, Ariz. Republic (Nov. 25, 2023, 11:54 a.m.) 10

Erica Stapleton, *'Just Spread the Mess Out a Lot Further': More Homeless Encampments Popping Up in Phoenix Neighborhoods After 'The Zone' Cleanup* (Nov. 21, 2023, 7:14 a.m.) 16

Kevin Stone, *Phoenix Provides Update on Those Relocated When Zone Homeless Encampment Was Cleared*, KTAR
 (Dec. 22, 2023, 2:30 p.m.)..... 14, 15

Ali Swenson, *Phoenix's Homeless Fight for New City Policy on Sleeping Outside, Per Ruling*, Phoenix New Times
 (Jan. 8, 2020)..... 9

D.S. Woodfill, *Phoenix Program Helps Address Nuisance Crimes*, Ariz. Republic
 (June 22, 2014, 10:30 p.m.)..... 8

INTEREST OF THE *AMICUS CURIAE*¹

The Fund for Empowerment (“FFE”) is a nonprofit charity that operates in Phoenix, Arizona. FFE serves the unsheltered population of Phoenix by providing direct services, capacity-building training, and project support. Its members include both the currently and formerly unhoused, as well as allies looking to support unhoused people who lack shelter.

FFE advocates for, and seeks to protect, the dignity, rights, and choices of Arizonans experiencing homelessness or housing insecurity. FFE amplifies the voices of the unsheltered to expose the root causes of homelessness, and to create ways of living in which everyone has a safe place they can call home. In furtherance of this mission, FFE and its members filed a lawsuit against the City of Phoenix, which seeks to permanently enjoin policies and practices that violate the constitutional rights of unhoused people.²

As an organization that advocates for the unhoused, FFE has a strong interest in ensuring that cities do not use local ordinances to punish an individual merely for existing as an unhoused person who has no choice but to live in public areas. For many, homelessness is a circumstance that cannot be readily changed—even temporary shelter will not permanently cure the individual effects of a systematic problem. The Ninth Circuit correctly determined that the Eighth Amendment

¹ No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

² *Fund For Empowerment v. City of Phoenix, Ariz.*, No. 2:22-cv-02041 (D. Ariz.) (filed Nov. 30, 2022).

forbids governments from punishing unhoused people for living and sleeping in public when they have nowhere else to go.

SUMMARY OF ARGUMENT

I. Phoenix is one of the epicenters of the homelessness crisis gripping the country. A combination of macroeconomic and individualized factors have left a growing number of Phoenix residents unable to afford their homes. Because there is little shelter space available, many of these individuals take refuge in Phoenix's public areas.

The city government has offered a capricious response to the homelessness crisis. On the one hand, the city has made an effort to aid unhoused individuals by providing them with resources, including, when possible, access to temporary shelter and permanent housing. But, on the other hand, the city also antagonizes the unhoused community by using law enforcement, invoking local ordinances as a reason to arrest and detain people for doing nothing more than sleeping on the city's streets.

The City of Phoenix's treatment of unhoused people may well be Exhibit A of local governments punishing people for residing at, and sleeping in, public areas when they are left with no other choice, *i.e.*, unhoused people being punished for their status of being unhoused.

Even after the Ninth Circuit decided *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *amended on denial of reh'g* 920 F.3d 584 (9th Cir. 2019), the city continued enforcing its local bans on unhoused individuals, in sharp contrast to the city's neighbors. The one place where the city relaxed its enforcement was

an area known as “the Zone,” an unforgiving stretch of concrete in downtown Phoenix that, at its peak, was “home” to about a thousand Phoenix residents. But even in the Zone, unhoused people were not left alone by the city government. There, the city often stripped unhoused people of the few belongings they had during random “sweeps.”

The Fund for Empowerment and several of its members obtained a preliminary injunction in federal court, which prevents the city from punishing individuals for being unhoused either by arresting them for violating the city’s camping and sleeping prohibitions (akin to petitioner’s here), or by stripping them of their possessions in the Zone. Eventually, a state court ordered the city to dismantle the Zone, finding the Zone to be a public nuisance after local business owners complained that the humanitarian crisis in the Zone was an eyesore. The city was able to clear the Zone while complying with the federal injunction. The injunction currently serves as the only restraint that stops the city from reverting back to its old ways and using local ordinances to punish the unhoused.

II. The homelessness crisis in Phoenix teaches that the criminalization of homelessness is not just unconstitutional, but it is also ineffective. Petitioner and its *amici* argue that the Eighth Amendment’s protections for unhoused individuals prevent municipalities from tackling homelessness. But if anything, a restrained City of Phoenix has shown that it is possible and, indeed, preferable, to combat homelessness without punishing individual instances of it. Cities can achieve other policy objectives, too, without subjecting unhoused people to the criminal justice system.

Enforcing the Eighth Amendment to protect the rights of the unhoused, as the Ninth Circuit did in *Martin*, does not mean judges become policymakers on homelessness. Rather, judges are tasked with what they have done for every other constitutional violation: craft a remedy that is tailored to the violation. Courts enforcing the Eighth Amendment do not dictate what state and local governments *must* do to alleviate homelessness; instead, they merely hold that the actions of these governments must stay within the lines of what the Constitution permits.

ARGUMENT

I. Phoenix has weaponized local ordinances to punish unhoused individuals for merely existing in circumstances they cannot control.

The homelessness crisis affects every major city in America. The impact of the crisis is arguably the most pronounced and most severe in Phoenix, which has been described as the “nucleus of Arizona homelessness,” with a situation that is “among the worst in the country.”³ Despite the fact that the nationwide numbers of unhoused individuals have held relatively “steady,” homelessness in Phoenix has “worsened significantly.”⁴

³ Editorial Board, *Opinion: Why is Phoenix Homelessness Among the Nation’s Worst? Look at What Got Us Here*, Ariz. Republic (May 1, 2023, 9:38 a.m.), <https://www.azcentral.com/story/opinion/editorial/2023/05/01/phoenix-homelessness-worst-nation-how-got-here/70159191007/>.

⁴ Juliette Rihl, *Arizona Has One of the Worst Homelessness Crises in the Nation, Federal Data Shows*, Ariz. Republic (Jan. 10, 2023, 6:48 a.m.), <https://www.azcentral.com/story/news/local/arizona/2023/01/05/federal-report-shows-arizona-has-one-of-the-worst-homelessness-crises/69778359007/>.

The individuals most affected by the crisis—individuals who are unhoused—are also the least well-situated to resolve it. Many take refuge in Phoenix’s streets because they have no place else to go. They find themselves houseless for a number of reasons beyond their control, such as the too-familiar problems of “rising rents” and “high inflation.”⁵ A person might find himself unhoused because his roommate moved out, and studio apartments are unaffordable.⁶ Or he may be trying to learn a trade but has “little money,” no job opportunities, and “nowhere to stay.”⁷

Citing Phoenix as an example, petitioner and its *amici* wrongly imply that the unhoused are simply being too picky about the shelter available to them. Pet. Br. 46. The stark reality is that, for the vast majority of unhoused individuals in Phoenix, there is no shelter available to them—which Phoenix itself concedes. And for years, these individuals have been

⁵ Bridget Dowd, *The Population at an Arizona Homeless Encampment Swells But Resources Fall Short*, Nat’l Pub. Radio (Aug. 26, 2022, 7:23 a.m.), <https://www.npr.org/2022/08/26/1119568398/the-population-at-an-arizona-homeless-encampment-swells-but-resources-fall-short>.

⁶ See Katherine Davis-Young, *Phoenix Cleared “The Zone,” But the City’s Homeless Population is Still Growing*, KJZZ (Nov. 15, 2023, 3:03 p.m.) (describing the experience of Jay Duval), <https://kjzz.org/content/1862845/phoenix-cleared-zone-citys-homeless-population-still-growing>.

⁷ *Id.* (telling the story of DeArrio Lowery); see also Katherine Davis-Young, *Arizona Will Spend More to Address Homelessness This Fiscal Year Than It Ever Has Before*, KJZZ (June 29, 2023, 9:43 a.m.) (describing Mr. Lowery’s desire “to learn to be a welder”), <https://kjzz.org/content/1850706/arizona-will-spend-more-address-homelessness-fiscal-year-it-ever-has>.

punished for merely living and breathing on Phoenix’s streets, in conditions that the city itself created.

Petitioner euphemistically asserts that local ordinances merely govern conduct that is the “byproduct” of houseless status. Pet. Br. 38. But people must lay their heads *somewhere*. What petitioner, the City of Phoenix, and other governments seek to criminalize is being unhoused. As respondents explain, the Eighth Amendment forbids that outcome.

Whatever the reasons for a person becoming unhoused, the solution to what is a collective crisis in Phoenix lies in collective action from “[e]veryone,” from “state government to Phoenix City Hall to our bedroom communities to our churches and universities.”⁸ It does not lie in antagonizing and punishing the unhoused for life circumstances they cannot immediately change—circumstances that, in turn, define their status.

A. The number of unhoused individuals eclipses the shelter space created through Phoenix’s modest efforts.

As of 2023, more than 3,000 individuals are living without housing or shelter in Phoenix.⁹ Just six years prior, the number of individuals who were unhoused and unsheltered was less than half that.¹⁰

⁸ *Opinion, supra* note 3.

⁹ Maricopa Ass’n of Gov’ts, *2023 Point-in-Time (PIT) Count Report 4* (2023), https://azmag.gov/Portals/0/Homelessness/PIT-Count/2023/2023-PIT-Count-Report-Final.pdf?ver=3to_Hr4cxOTZboaVUI4H3Q%3d%3d.

¹⁰ *Id.* at 1.

Recognizing that the most effective short-term response to homelessness is to find shelter for unhoused individuals, Phoenix has made an active effort to create shelter space for unhoused individuals. But those efforts nevertheless leave many people unsheltered and unhoused. There is simply not enough room for them in available shelter space, and affordable housing—even scarcer than shelter space—is out of reach for them. In 2022, for example, Phoenix had an estimated 3,096 individuals who were unhoused,¹¹ and only 1,492 shelter beds available for them.¹² And as Phoenix concedes, many of these beds may not be truly “available,” as they may be limited to “families with children, victims of domestic violence, or working unsheltered.” Phoenix Amicus Br. 9.

Shelter space is also only a temporary (though necessary) salve for alleviating homelessness. While the

¹¹ Maricopa Ass’n of Gov’ts, *2022 Point-in-Time (PIT) Count Report 4* (2022), <https://azmag.gov/Portals/0/Documents/MagContent/2022-PIT-Count-Report-Final.pdf>.

¹² City of Phoenix, Office of Homeless Solutions, *Strategies to Address Homelessness: Task Force Recommendations to the City Manager 14* (2022) (“*Phoenix Task Force Recommendations*”), <https://www.phoenix.gov/humanservicessite/Documents/Task%20Force%20Recommendations%20to%20the%20City%20Manager-Final.pdf>.

Phoenix claims in its *amicus* brief (at 20-21) that it has “3,219 shelter beds.” It is not clear how Phoenix arrived at that number. At the end of 2021, Phoenix had 1,492 shelter beds available. In 2022 and 2023, Phoenix added 1,072 shelter beds, City of Phoenix, Office of Homeless Solutions, <https://www.phoenix.gov/solutions>, which totals 2,564 beds by the end of 2023—still not enough to provide shelter to all 3,096 unhoused individuals in 2023, assuming that they even qualified for the shelter space.

root causes of homelessness are complex, mitigating homelessness requires a combination of more permanent solutions, such as an increase in affordable permanent housing and providing unhoused individuals with resources that would allow them to *stay* in permanent housing. These solutions take time to implement. In the meantime, the population of unhoused individuals only continues to balloon.

B. Even after *Martin*, Phoenix arrested unhoused people with nowhere to go, or funneled them into an open, outdoor area that presented unbearable conditions.

Historically, Phoenix police officers had often responded to unhoused individuals living in public spaces by arresting them for violating minor ordinances, such as Phoenix’s laws against camping or sleeping in public spaces.¹³ The law enforcement approach did nothing to address homelessness, as unhoused individuals “would simply move to another part of town ... or they would be released from county jail to go back to the street.”¹⁴ Phoenix police asserted that arrests were a “last resort,”¹⁵ but, in reality, they proved to be a regular occurrence.¹⁶

¹³ D.S. Woodfill, *Phoenix Program Helps Address Nuisance Crimes*, Ariz. Republic (June 22, 2014, 10:30 p.m.), <https://www.azcentral.com/story/news/local/phoenix/2014/06/23/phoenix-program-quality-life-issues/11252909/>; *see also* Phx., Ariz. Code § 23-30 (camping ban); Phx., Ariz. Code § 23-48.01 (sleeping ban).

¹⁴ *Id.*

¹⁵ Jen Fifiield, *Can Homeless Sleep on the Streets? Phoenix Area Cities are Rethinking Bans*, Ariz. Republic (Dec. 10, 2018, 4:19 p.m.),

In 2018, after the Ninth Circuit issued its decision in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *amended on reh'g*, 920 F.3d 584 (9th Cir. 2019), Phoenix's city-neighbors reevaluated whether they could enforce local camping prohibitions on unhoused individuals.¹⁷ Tempe, for example, “stopped enforcing its law,” while Glendale changed its camping ban to prohibit criminal prosecution if “no alternative shelter is available to” the unhoused individual.¹⁸

Phoenix, however, insisted on enforcing its local prohibitions on unhoused individuals. Local police kept “doing the same thing they’ve always done.”¹⁹ In the case of one 60-year-old Phoenix resident, police had “cited her multiple times for camping-related offenses and ... confiscated her possessions” in the year-and-a-half following *Martin*, taking “her birth certificate, identification card and sentimental jewelry.”²⁰

<https://www.azcentral.com/story/news/local/glendale/2018/12/10/arizona-cities-change-laws-banning-homeless-sleeping-streets-urban-camping/2195323002/>.

¹⁶ Ali Swenson, *Phoenix's Homeless Fight for New City Policy on Sleeping Outside, Per Ruling*, Phoenix New Times (Jan. 8, 2020), <https://www.phoenixnewtimes.com/news/homeless-sleeping-phoenix-9th-circuit-court-martin-boise-arrest-11422139>.

¹⁷ *Id.*

¹⁸ *Id.*; Glendale, Ariz. City Code § 25-90(b)(4) (“No criminal sanction shall be imposed against individuals sleeping outdoors on public property when no alternative shelter is available to them.”).

¹⁹ Madeline Ackley, *Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protesters Say*, Ariz. Mirror (Jan. 9, 2020, 9:13 a.m.), <https://azmirror.com/2020/01/09/phoenix-still-criminalizes-homelessness-despite-court-ruling-protesters-say/>.

²⁰ *Id.*

When Phoenix police were not arresting unhoused people for sleeping in Phoenix’s public areas as a last resort, the police funneled them to an area known as “the Zone,” which is about seven-tenths of a mile long, and about half a mile wide.²¹ At its peak, roughly 1,000 unhoused people called the Zone home.

Life in the Zone had been described as one of “constant survival.”²² The Zone was particularly unforgiving in the summer, where mere contact with concrete surfaces would cause serious burns: “it’s so hot,” one resident said, “it’s like a frying pan.”²³ But for many of the Zone’s residents, it was a necessary place of last resort, in part because the Zone was also home to the Human Services Campus, a collection of “more than a dozen nonprofits that offer a variety of services” to the unhoused.²⁴

Despite enforcing local camping and sleeping bans elsewhere in the city, Phoenix police did not enforce those bans on unhoused people living in the Zone. In-

²¹ Helen Rummel, *Where is the Phoenix Homeless Camp Called ‘The Zone?’*, Ariz. Republic (Nov. 25, 2023, 11:54 a.m.), <https://www.azcentral.com/story/news/local/phoenix/2023/10/02/where-is-the-zone-phoenix-homeless-camp/70802739007/>.

²² Denzen Cortez, *Here’s an Inside Look at Living in Phoenix’s The Zone Homeless Encampment*, KTAR News (Oct. 27, 2023, 6:11 a.m.), <https://ktar.com/story/5545900/heres-an-inside-look-at-living-in-phoenixs-the-zone-homeless-encampment/>.

²³ Deanna Pistono, *‘Like a Frying Pan’: Extreme Heat Overwhelms Phoenix’s Unhoused Community*, Ariz. Capitol Times (Sept. 29, 2023), <https://azcapitoltimes.com/news/2023/09/29/like-a-frying-pan-extreme-heat-overwhelms-phoenixs-unhoused-community/>.

²⁴ Rummel, *supra* note 21; *see also* Human Servs. Campus, <https://hsc-az.org/> (describing the services offered at the campus).

stead, police officers and “clean-up crews” conducted early-morning “sweeps” of the Zone, often “trash[ing] ... personal belongings” when their owners were not in a position to claim them because they were “at work, receiving medical care, or even just getting something to eat.”²⁵ One Zone resident reacted to the sweeps by remarking: “It’s kind of like they took the world away from you.”²⁶

In 2021, the U.S. Department of Justice announced that it was investigating, in relevant part, whether the Phoenix Police Department was engaged in a pattern or practice of “unlawfully seiz[ing] or dispos[ing] of the belongings of individuals experiencing homelessness.”²⁷ That investigation remains ongoing.

C. Citing purportedly competing court obligations, Phoenix dismantled the Zone and uprooted unhoused individuals, forcing them out onto other public spaces.

To stop Phoenix police from antagonizing unhoused individuals with no place else to go—either by arresting them for violations of local ordinances or by sweeping away the few personal effects they could call their

²⁵ Melissa Blasius, *How Phoenix Decides What’s Trash vs. Property During Controversial Homeless Camp Sweeps*, ABC15 (Mar. 6, 2022, 11:51 a.m.), <https://www.abc15.com/news/local-news/investigations/how-phoenix-decides-whats-trash-vs-property-during-controversial-homeless-camp-sweeps>.

²⁶ *Id.*

²⁷ Press Release, U.S. Dep’t of Justice, *Justice Department Announces Investigation of the City of Phoenix and the Phoenix Police Department* (Aug. 5, 2021), <https://www.justice.gov/opa/pr/justice-department-announces-investigation-city-phoenix-and-phoenix-police-department>.

own—the Fund for Empowerment (FFE) and several of its members sued the City of Phoenix and the leadership of the Phoenix Police Department. The plaintiffs alleged that the city violated the Eighth Amendment rights of unhoused individuals by enforcing camping and sleeping bans (similar to petitioner’s) on unhoused individuals who rest on public lands because they have no place else to go. *See generally* Phx., Ariz. Code § 23-30(B) (defining “camp,” as used in the camping prohibition, as using “the real property of the City for living accommodation purposes such as sleeping activities, or making preparations to sleep”); Phx., Ariz. Code § 23-48.01 (making it “unlawful ... to use a public street, highway, alley, lane, parkway, sidewalk or other right-of-way ... for lying, sleeping or otherwise remaining in a sitting position thereon”). They also asserted that the city violated the Fourth Amendment rights of unhoused individuals by using “sweeps” to clear personal property, and that the city violated the Fourteenth Amendment rights of unhoused individuals by pushing them into the Zone. *See* Compl., *Fund for Empowerment v. City of Phoenix*, No. 22-cv-2041 (D. Ariz. Nov. 30, 2022).

The district court issued a preliminary injunction enjoining the city from (1) enforcing its camping and sleeping bans against “individuals who practically cannot obtain shelter,” (2) seizing the property of unsheltered individuals without providing prior notice, absent specific exigent circumstances, (3) destroying seized property without “maintaining it in a secure location” for at least 30 days, so as to give the property’s owner a chance to reclaim it. *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1132-33 (D. Ariz. 2022).

FFE's lawsuit was not the only one that affected the lives of the unhoused in Phoenix, particularly those living in the Zone. A few months before FFE filed its lawsuit against the city, a group of business owners sued the city in Arizona state court, complaining that the city "refuse[d] to enforce" its laws and failed to "abate a public nuisance" in allowing a "semi-permanent tent encampment" to exist on their doorstep, *i.e.*, in the Zone, and that the lack of enforcement allegedly resulted in misconduct in their neighborhood. Under Advisement Ruling at 2, *Brown v. City of Phoenix*, No. CV 2022-010439 (Ariz. Super. Ct. Mar. 27, 2023).

FFE's litigation against the city to protect the rights of unhoused people had been delayed in part because the parties attempted to negotiate a settlement. The business owners' state-court litigation, however, trudged on. In September 2023, the business owners prevailed, and a state trial court ordered the city to clear the Zone. While issues relating to the Eighth Amendment and *Martin* were not before the state court, it took a swipe at *Martin* anyway, suggesting that the Ninth Circuit was somehow responsible for "dangerous and dehumanizing homeless encampments" like the Zone. Under Advisement Ruling at 23 n.7, *Brown v. City of Phoenix*, No. CV 2022-010439 (Ariz. Super. Ct. Sept. 20, 2023). The court nevertheless acknowledged that the city could comply with both *Martin* and its direction to clear the Zone. *Id.* at 27 (recognizing that "the City has discretion in how to comply with [the state court's] Order and" declining to "direct with specificity any of the myriad actions that would lead to compliance").

Asserting that it was between a rock and a hard place with respect to Phoenix's "hard place," the city

asked the district court in the *Fund for Empowerment* case to modify its preliminary injunction. Without “enforcement tools for addressing a sprawling homeless encampment,” the city asserted, the task of dismantling the Zone would be “Herculean and possibly unattainable.” Defs.’ Mot. to Modify Preliminary Injunction and Mot. for Expedited Consideration and Emergency Status Conference at 1, ECF No. 109, No. 22-cv-2041 (D. Ariz. Oct. 9, 2023). It asked for permission to arrest unhoused individuals in the Zone, so long as there was at least public outdoor space in which those individuals could sleep. *See id.* at 7 (seeking a modification of the injunction to “enforce the Camping Ban ... and the Sleeping Ban ... in the Zone, provided those displaced may either be moved to a shelter or other indoor facility or to an alternative, public, outdoor space”).

The district court ultimately modified the preliminary injunction: the city was enjoined from enforcing its camping and sleeping bans against the “involuntarily” unhoused “if there are no other areas or appropriate shelters where those individuals can sleep.” Order at 3, *Fund for Empowerment v. City of Phoenix*, ECF No. 119, No. 22-cv-2041 (D. Ariz. Oct. 17, 2023).

By the first week of November 2023, the city had cleared the Zone.²⁸ Over 700 people were displaced from the Zone, with a little over half finding shelter,²⁹

²⁸ *Phoenix Finishes Cleaning Up Final Blocks of the Zone Homeless Encampment*, KTAR (Nov. 2, 2023, 9:44 a.m.), <https://ktar.com/story/5547020/phoenix-finishes-clearing-final-blocks-the-zone/>.

²⁹ Kevin Stone, *Phoenix Provides Update on Those Relocated When Zone Homeless Encampment Was Cleared*, KTAR (Dec. 22, 2023, 2:30 p.m.), <https://ktar.com/story/5554603/phoenix-provides->

either indoors or in an area that the city described as a “Safe Outdoor Space,” a shaded, concrete slab that is only a mild improvement from the physical conditions of the Zone.³⁰ And the city did not need to resort to arrest by law enforcement to clear the Zone: virtually everyone cooperated with the city’s clearance efforts.³¹ Unfortunately, within less than a month, about a third of the individuals who managed to find shelter with the city’s help found themselves no longer sheltered.³²

Eliminating the Zone hardly resolved homelessness for the unhoused individuals who sought refuge there. Some people found shelter, but many did not. Closing the Zone did not open up long-term beds or other safe shelter options for unhoused individuals: to the contrary, there were “virtually no beds available.”³³ So,

update-on-those-relocated-when-zone-homeless-encampment-was-cleared.

³⁰ City of Phoenix, Office of Homeless Solutions, *Phoenix City Council Approves Zoning for Safe Outdoor Space* (Sept. 21, 2023, 6:00 p.m.), <https://www.phoenix.gov/newsroom/homeless-solutions/2866>.

³¹ Helen Rummel, *1 Arrested as Phoenix Continues Clearing ‘The Zone’ Homeless Encampment*, *Ariz. Republic* (Nov. 25, 2023, 11:53 a.m.) (explaining that, by the time the City of Phoenix cleared half the Zone, only three arrests had been made), <https://www.azcentral.com/story/news/local/phoenix/2023/09/20/phoenix-estimates-largest-homeless-camp-the-zone-halfway-cleared/70895405007/>.

³² Stone, *supra* note 29 (“Of those who accepted help, 68% were still receiving services in a shelter or treatment facility or were housed at the end of November.”).

³³ Justin Lum, *Surviving ‘The Zone’: Crime Drops Where Phoenix’s Tent City Once Was But Homeless Crisis Persists*, *Fox 10 Phoenix* (Jan. 30, 2024, 11:19 a.m.), <https://www.fox10phoenix>.

people were forced to sleep elsewhere.³⁴ And those unhoused people have been harder to find, making it more difficult to support them with essential resources,³⁵ and thus making it more likely that they will remain trapped in a cycle of homelessness. The only thing keeping these individuals from being punished for violating local law because of their unhoused status is the preliminary injunction that the *Fund for Empowerment* court has left intact.

II. Enforcing the Eighth Amendment to protect the unhoused does not handcuff cities from achieving their policy objectives.

One argument offered against *Martin* is that *Martin* has stymied municipalities' efforts to address homelessness. Pet. 11 (highlighting the policy concerns raised by dissenting Ninth Circuit judges); Toma & Warren Amicus Br. 17 (“[S]tate legislatures will be prevented from adopting comprehensive strategies to address homelessness and cities remain susceptible to the reemergence of similar encampments.”); Phoenix Amicus Br. 34 (suggesting that interpreting the Eighth Amendment to prohibit punishing the unhoused simply for being unhoused would “hamstring[] efforts to address other municipal interests such as sanitation,

com/news/surviving-the-zone-crime-drops-where-phoenixs-tent-city-once-was-but-homeless-crisis-persists.

³⁴ Erica Stapleton, ‘Just Spread the Mess Out a Lot Further’: More Homeless Encampments Popping Up in Phoenix Neighborhoods After ‘The Zone’ Cleanup (Nov. 21, 2023, 7:14 a.m.), <https://www.12news.com/article/news/local/valley/phoenix-homeless-camp-cleared/75-5556d73b-7f00-4232-bb5e-d2507dfb913e>.

³⁵ Lum, *supra* note 33 (“People have had to move, which makes it harder for outreach teams to find them and keep them engaged.”).

public safety, and providing access points for services and appropriate shelter”). But the ongoing homelessness crisis in Phoenix teaches that this policy concern is wrong in several critical ways.

1. Imposing criminal consequences on unhoused individuals for engaging in “conduct” that is essential to living will not do anything to solve the homelessness crisis. Incredibly, the City of Phoenix and other *amici* suggest that placing unhoused individuals in jail for sleeping on Phoenix’s streets when they have nowhere else to go is ultimately a mission of mercy. Phoenix Amicus Br. 12 (“The criminal justice system provides a superior venue to assess whether an individual is involuntarily homeless ...”); Goldwater Amicus Br. 24 (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”). But the city has tried that before, and it has not worked. Arresting unhoused people simply because they are unhoused will not change the fact that they are unhoused, nor will it equip them with the tools they need to no longer be unhoused.

A lasting solution to homelessness involves, among other things, identifying “[e]xits to permanent housing,”³⁶ and ensuring that people have access to the resources they need to sustain that housing, whether those resources come in the form of financial opportunities, or necessary medical care. Homelessness is not a hardship that can be alleviated by individual responsibility alone. There are many unhoused people living on the public spaces of Phoenix who work hard to make

³⁶ *Phoenix Task Force Recommendations*, supra note 12, at 19.

a living; “[t]hey just can’t afford to get a place.”³⁷ State and local governments cannot expect individuals to pull themselves up by the bootstraps if there are no boots to be worn. One of the major root causes of homelessness in Phoenix is the lack of affordable housing, and the only way to uproot that cause is to make such housing available.

2. The City of Phoenix and other *amici* have also complained that the protections of the Eighth Amendment, as articulated in *Martin*, prevent them from responding to other local concerns—for example, sanitation and health. To be sure, those are legitimate concerns, but they can be addressed without arresting individuals simply because they are engaging in essential activities that need to be done to exist. If anything, Phoenix’s clearance of the Zone demonstrates that. Instead of arresting individuals *en masse* to clear the Zone, the city made a concerted effort to find shelter space for individuals—or at least a tent, “access to storage,” and a “safe” outdoor space in which to sleep.³⁸

If an encampment begins to present a public health issue, there are means to address the issue without resorting to the indiscriminate arrest of unhoused people. Moreover, the City of Phoenix has never been restrained by *Martin* or by the *Fund for Empowerment* injunction from responding to “immediate threat[s] to public health or safety,” or from “lawfully engaging in its regular public health and safety activities.” 646 F.

³⁷ *E.g.*, Lum, *supra* note 33 (explaining that one individual who lived in the Zone “work[ed] nightshift at Amazon”).

³⁸ Press Release, City of Phoenix, *Phoenix City Council Approves Zoning for Safe Outdoor Space* (Sept. 21, 2023, 6:00 p.m.), <https://www.phoenix.gov/newsroom/homeless-solutions/2866>.

Supp. 3d at 1132. But law enforcement should be used sparingly to address true threats to human health and safety, not to badger the unhoused out of sight.

3. Protecting the Eighth Amendment rights of the unhoused by forbidding the criminalization of existing in public in an unhoused state—*e.g.*, sleeping in public spaces—does not turn judges into “homeless policy czars.” Phoenix Amicus Br. 34. Judges, of course, do not have “expertise to adjudicate social questions such as how to prevent homelessness.” *Id.* at 35. But *Martin* does not attempt to dictate a solution for solving homelessness. Instead, it prescribes a framework for implementing a remedy that is “tailored to cure the ‘condition that offends the Constitution.’” *Rogers v. Lodge*, 458 U.S. 613, 627-28 (1982) (citation omitted). And the remedy here is not to prescribe a particular approach to the homelessness crisis, or to strip localities of all of their policymaking tools to resolve the crisis. Instead, the remedy is limited to declaring that the cudgel of law enforcement cannot be used to punish an unhoused individual “for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go.” Pet. App. 57a.

The Ninth Circuit’s decision faithfully implements the clear instruction of *Robinson v. California*, 370 U.S. 660 (1962)—that “status ... for which the offender may be prosecuted at any time before he reforms” cannot be the basis of a “criminal offense.” *Id.* at 666. Punishing individuals for living in a state of being unhoused is “an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” *Id.*

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

BENJAMIN L. RUNDALL
ALEXIS J. EISA
ZWILLINGER WULKAN PLC
2020 North Central Avenue
Suite 675
Phoenix, AZ 85004

ANDREW KIM
Counsel of Record
COLLIN M. GRIER
GOODWIN PROCTER LLP
1900 N Street, NW
Washington, DC 20036
*andrewkim@
goodwinlaw.com*
(202) 346-4000

April 3, 2024