

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 Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**BRIEF FOR CALIFORNIA GOVERNOR
GAVIN NEWSOM AS AMICUS CURIAE
SUPPORTING PETITIONER**

BRIDGET L. MURPHY
SIDLEY AUSTIN LLP
1 S. DEARBORN
Chicago, IL 60603
(312) 853-7000

DAVID R. CARPENTER*
COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 West Fifth St.
Los Angeles, CA 90013
(213) 896-6679
dcarpenter@sidley.com

Counsel for Amicus Curiae
September 22, 2023 * Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF <i>AMICUS CURIAE</i>	1
INTRODUCTION	2
ARGUMENT	4
I. <i>Martin's</i> Narrow Ruling Has Been Dis- torted to Justify Broad Injunctions Against Common-Sense Policies.	4
II. Encampment Resolutions Are Vital.	7
III. This Court's Intervention Is Needed to Pro- vide the Clarity that the Ninth Circuit Has Not.	11
CONCLUSION	12

TABLE OF AUTHORITIES

	Page
CASES	
<i>Boring v. Murillo</i> , No. LA CV 21-07305-DOC, 2022 WL 14740244 (C.D. Cal. Aug. 11, 2022)	6
<i>Coal. on Homelessness v. City of S.F.</i> , No. 22-cv-05502-DMR, 2022 WL 17905114 (N.D. Cal. Dec. 23, 2022), <i>appeal docketed</i> , No. 23-15087 (9th Cir. Jan. 23, 2023) ..	5, 6, 10
<i>Fund for Empowerment v. City of Phx.</i> , No. CV-22-02041-PHX-GMS, 2022 WL 18213522 (D. Ariz. Dec. 16, 2022)	7, 11
<i>L.A. All. for Hum. Rts. v. City of L.A.</i> , No. LA CV 20-02291-DOC-KES, 2020 WL 2512811 (C.D. Cal. May 15, 2020).....	6
<i>Martin v. City of Boise</i> , 920 F.3d 584 (9th Cir. 2019).....	2, 4
OTHER AUTHORITIES	
Lane Anderson, Deseret News, <i>Saving ‘Throwaway Kids.’ In Los Angeles, Sex Trafficking Doesn’t Look Like It Does In The Movies</i> (Dec. 31, 2015), https://shorturl.at/iswSW	8
Associated Press, <i>Number of Damaging Fires in Los Angeles Homeless Camps Grows</i> (May 13, 2021), https://shorturl.at/cnOZ8	8
Cal. Dep’t of Transp., <i>Maintenance Policy Directive 1001-R1</i> (effective Oct. 10, 2022).	10
Cal. Interagency Council on Homelessness, <i>Homeless Housing, Assistance, and Prevention (HHAP) Grant Program</i> (Jan. 27, 2023), https://shorturl.at/iEIS5	9

CBS, <i>West Oakland Neighbors Shocked By City-Sanctioned Homeless Camp</i> (July 2, 2019), https://shorturl.at/dnorZ	8
Thomas Fuller, The N.Y. Times, <i>Death on the Streets</i> (Apr. 25, 2022), https://shorturl.at/gLDOP	8
Anna Gorman, The Atlantic, <i>Medieval Diseases Are Infecting California's Homeless</i> (Mar. 8, 2019), https://shorturl.at/fgjyF ...	9
Sam Levin, The Guardian, <i>At Least 14 Unhoused People Froze to Death in LA Last Year, Records Reveal</i> (Oct. 4, 2022), https://shorturl.at/rsuHM	9
Lolita Lopez & Phil Drechsler, NBC, <i>Gangs of LA On Skid Row</i> , https://shorturl.at/lyDOU (updated Mar. 19, 2018).....	8
Off. of Governor Newsom, <i>California Awards Eight Communities \$48 Million to Help People Living in Encampments Transition to Housing</i> (Oct. 26, 2022), https://shorturl.at/iyTZ1	10
Off. of Governor Newsom, <i>California Awards Nearly \$200 Million to Move 7,300 People Out of Encampments and Into Housing</i> (Jun. 14, 2023), https://shorturl.at/kuz56	10
Off. of Governor Newsom, <i>Governor Newsom Calls for More Aggressive Action on Homelessness, Pauses Latest Round of State Funding</i> (Nov. 3, 2022), https://shorturl.at/nqzFZ	9
Sam Quinones, L.A. Mag., <i>Skid Row Nation: How L.A.'s Homelessness Crisis Response Spread Across the Country</i> (Oct. 6, 2022), https://shorturl.at/cfgCZ	8

INTEREST OF *AMICUS CURIAE*¹

Gavin Newsom is the Governor of California, the former Lieutenant Governor of California, and the former Mayor of San Francisco. In these roles, he has witnessed firsthand the challenges of the homelessness crisis. As Mayor of San Francisco, he partnered with local organizations to help thousands of people transition from the streets to supportive housing. And as Governor, he has allocated more than \$15 billion towards housing and homelessness and its root causes, and launched programs to reward local governments that reduce barriers to affordable housing while holding accountable those cities and counties that refuse to do their fair share to address the affordable housing crisis.

In connection with these efforts, the Governor has also addressed encampments, which foster dangerous and unhealthy conditions for those living in them and for communities around them. Encampment resolutions are a vital tool for helping to move people off the streets, to connect them with resources, and to promote safety, health, and usable public spaces.

The Governor believes strongly that helping people experiencing homelessness requires meeting them where they are and treating them with dignity. The crisis of homelessness will never be solved without

¹ Under Supreme Court Rule 37.2, *amicus curiae* provided timely notice to all parties of its intention to file this brief. Under Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* and his counsel made any monetary contribution intended to fund the preparation and submission of this brief.

solving the crisis of housing, as the two issues are inextricably linked. And both issues are highly complex, requiring multifaceted strategies to solve them.

But while states, cities, and counties work on long-term approaches to help with these crises, they need the flexibility to also address immediate threats to health and safety in public places—both to individuals living in unsafe encampments and other members of the public impacted by them. The Governor thus has a strong interest in ensuring that judicially created rules, however well-intentioned those rules may be, do not hamstring state and local governments' ability to address these problems, and do not impede common-sense measures to keep people safe.

INTRODUCTION

The homelessness crisis is one of our nation's most vexing problems. It implicates interrelated socioeconomic, criminal, legal, public health, and public safety concerns, and it demands a combination of long-term solutions, transitional accommodations, and, at times, immediate interventions. The ruling below exacerbates the challenges communities face in addressing these problems and makes it harder for state and local governments to protect the health and welfare of their housed and unhoused constituents alike by refusing to define the scope of the constitutional principle upon which it rests.

The Governor does not take issue with the narrow rule adopted by the Ninth Circuit in *Martin v. City of Boise* that people experiencing homelessness should not be criminally prohibited by a municipality from sleeping outside when they have nowhere else to go within the boundaries of that municipality. 920 F.3d

584, 617 (9th Cir. 2019). But lower courts have interpreted *Martin* far more broadly than that. The Ninth Circuit decision here does little to disabuse courts of those interpretations, and indeed expands *Martin* in troubling and uncertain ways by authorizing the use of classwide injunctions divorced from individualized inquiries into whether individuals truly have nowhere else to go. Pet. App. 55a.

The Ninth Circuit and respondents have tried to downplay the ways in which the ruling ties local leaders' hands, but their arguments only confirm the decision's ambiguity and unworkability. Respondents insist that the ruling below does not prohibit clearing encampments, yet multiple district courts have held that it does exactly that. Respondents contend any expansion of *Martin* is purportedly "narrow," Pet. App. 55a–57a, yet the decision leaves open that it "may or may not" include a right to use stoves, build fires, and erect structures. Pet. App. 55a. And the decision affirms a classwide injunction, yet one that necessarily depends on individualized assessments that were not—and apparently need not be—made.

As reflected in the dissenting opinions from the denial of rehearing en banc, state and local leaders need the flexibility to craft policies that balance competing interests, particularly when faced with problems as complex as the crisis of homelessness afflicting many cities today. Of course, those policies must respect constitutional rights and individual dignity. And to do their fair share to address the statewide crisis on our streets, every jurisdiction's policy should center on connecting individuals experiencing homelessness with shelter and supportive services. But courts are not well-suited to micromanage such nuanced policy issues based on ill-defined rules. Accordingly, the

Court should grant review to clarify the scope and limits of the Eight Amendment rights asserted.

ARGUMENT

I. *Martin*'s Narrow Ruling Has Been Distorted to Justify Broad Injunctions Against Common-Sense Policies.

Martin offered a “narrow” holding: “as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property.” 920 F.3d at 617. In other words, if the government cannot offer an unhoused person indoor shelter, it cannot enforce an all-places or all-times criminal prohibition on sleeping outdoors.

The Governor supports this modest check on government’s use of criminal prohibitions to address the homelessness crisis. Californians who “do not have a single place where they can lawfully be” should not be criminally prosecuted for needing sleep, an unavoidable basic human need. *Id.* (quoting *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (N.D. Fla. 1992)). The unhoused people in our State—from forgotten military veterans to LGBTQ+ youth fleeing abuse and rejection—may be experiencing loss, battling addiction, or coping with extreme, diagnosable mental health challenges. All of this is made more difficult when sleep itself is criminalized in all places and at all times.

But *Martin* did not purport to prohibit every effort by state and local governments to clear encampments or to regulate the time, place, and manner in which an unhoused person may sleep. See *id.* at 617 n.8 (“Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside.”). Instead, the Court emphasized that “[e]ven where shel-

ter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible,” *id.*, even as the court of appeals declined to meaningfully articulate the outer limits of this “narrow” holding.

Since *Martin*, courts have rebranded that narrow holding into a far broader set of proscriptions on government action. The practical result is that the fate of any given effort to manage homelessness turns not on the wisdom of the project but on an assessment of an application for a temporary restraining order—often filed *ex parte*—and whether “enough” has been done to aid the individuals in an encampment, relative to how unsafe or unhealthy or dangerous a particular encampment may be to those living in it and to the surrounding community. And this calculation is conducted not by policymakers or democratically elected officials, but by federal judges.

Consider, as an example, San Francisco—one of California’s great cities. Following *Martin*, San Francisco implemented a collaborative policy under which officers and other local officials worked together to clear and clean the most dangerous encampments only after posting a notice in the encampment that clearing will occur on a particular day, performing outreach at the encampment the weekend prior to the clearing, and issuing reminders about the clearing 24 to 72 hours in advance. See *Coal. on Homelessness v. City of S.F.*, No. 22-cv-05502-DMR, 2022 WL 17905114, at *5–7 (N.D. Cal. Dec. 23, 2022), *appeal docketed*, No. No. 23-15087 (9th Cir. Jan. 23, 2023). Under the policy, an officer cannot arrest a person experiencing homelessness for particular offenses unless the officer first “secure[s] appropriate shelter” for that person. *Id.* at *4. While

the evidence of the City’s compliance with this policy is disputed, a district court reviewing the policy focused not on the facts of individual encampments or plaintiffs but on a single question: was there a deficit in the number of shelter beds? *Id.* at *21–23. Answering that question in the affirmative, the court issued a broad injunction that effectively prevented the City from executing its conscientious, outreach-focused encampment clearance policy for nine months. *Id.* at *24.²

In Los Angeles, a district court layered further complexity into the calculation. Only if shelters meet a long list of requirements—from nursing staff, to testing for communicable diseases, to on-site security—may the City enforce common-sense anti-camping laws. See *L.A. All. for Hum. Rts. v. City of L.A.*, No. LA CV 20-02291-DOC-KES, 2020 WL 2512811, at *3–4 (C.D. Cal. May 15, 2020) (opining that *Martin* “gave constitutional significance to the availability of shelter”).

Broad interpretations of *Martin* have paralyzed other communities, too. When Santa Barbara sought to impose a geographically and time-limited ban against sleeping only in the downtown area, a district court still held that the plaintiffs stated a plausible *Martin* claim. See *Boring v. Murillo*, No. LA CV 21-07305-DOC (KES), 2022 WL 14740244, at *6 (C.D. Cal. Aug. 11, 2022). And just this month, a district

² The Ninth Circuit recently issued a limited order declining to modify the scope of the injunction based on the parties’ agreement, without addressing the merits of the constitutional questions at issue. See Order, *Coalition on Homelessness v. City of San Francisco*, No. 23-15087 (9th Cir.), Dkt. 88.

court extended a temporary restraining order that relied on *Martin* to block the City of San Rafael from enforcing an ordinance that limits locations and density for encampments but does not purport to prohibit sleeping in public within the City’s limits. See Order, *Boyd v. City of San Rafael*, No. 3:23-cv-04085-EMC (N.D. Cal. Sept. 8, 2023), Dkt. 67; Order, *Boyd v. City of San Rafael*, No. 3:23-cv-04085-EMC (N.D. Cal. Aug. 16, 2023), Dkt. 19; see also Pet. App. 151a-156a (describing additional cases).

Nor are broad interpretations of *Martin* espoused only by judges in California. When Phoenix adopted a policy that “officers must make individualized assessments” before issuing citations against unhoused persons for particular offenses, a district court in Arizona dismissed it as a mere “statement of administrative policy” that is insufficient to “forestall the Plaintiffs’ ultimate likelihood of success on the merits” of their *Martin* claims. *Fund for Empowerment v. City of Phx.*, No. CV-22-02041-PHX-GMS, 2022 WL 18213522, at *3 (D. Ariz. Dec. 16, 2022). That it was “not contested that there are more unsheltered individuals than shelter beds in Phoenix” all but ended the inquiry. *Id.*

These courts have stretched *Martin*’s reasonable limit into an insurmountable roadblock, preventing cities and towns from imposing common-sense time and place restrictions to keep streets safe and to move those experiencing homelessness into shelter. California’s elected officials who seek in good faith to improve what often appears to be an intractable crisis have found themselves without options, forced to abandon efforts to make the spaces occupied by unhoused people safer for those within and near them.

II. Encampment Resolutions Are Vital.

Encampments are dangerous. These semi-permanent tent cities dot the landscape of many cities and rural towns, and are surely familiar to anyone who has traveled in the Western United States. And while the residents of public encampments may have fostered an important sense of community, stability, and place in these areas, public encampments indisputably threaten public safety and health.

Start with public safety. The number of fires related to homelessness has doubled since 2018, as residents seek to prepare food, share heat, and smoke.³ Criminals also prey on those living in public encampments, leaving residents at risk of exposure to criminal activity and controlled substances, and of subjugation to sex work or physical abuse.⁴

The safety concerns for those living near and around encampments are real, too. Business owners and residents near encampments are confronted by trash, used needles, and human waste, and increased instances of open drug use, property damage, theft, and break-ins.⁵ They have seen their property values decline, their

³ Associated Press, *Number of Damaging Fires in Los Angeles Homeless Camps Grows* (May 13, 2021), <https://shorturl.at/cnOZ8>.

⁴ Lane Anderson, Deseret News, *Saving 'Throwaway Kids.'* *In Los Angeles, Sex Trafficking Doesn't Look Like It Does In The Movies* (Dec. 31, 2015), <https://shorturl.at/iswSW>; Lolita Lopez & Phil Drechsler, NBC, *Gangs of LA On Skid Row*, <https://shorturl.at/lyDOU> (updated Mar. 19, 2018).

⁵ CBS, *West Oakland Neighbors Shocked By City-Sanctioned Homeless Camp* (July 2, 2019), <https://shorturl.at/dnorZ>; Sam Quinones, L.A. Mag., *Skid Row Nation: How L.A.'s Homelessness Crisis Response Spread Across the Country* (Oct. 6, 2022), <https://shorturl.at/cfgCZ>.

small businesses fail, and their public spaces become uninhabitable.

Encampments also pose immense public health concerns. Rates of fatal overdoses from drugs like fentanyl and heroin have increased substantially among the unhoused in California,⁶ and public encampments lacking running water present significant risks for disease transmission.⁷ And the mere fact of living without true shelter is threatening to the health and safety of the individuals in encampments, who are exposed to the weather extremes that include freezing and exceptionally hot temperatures.⁸

Encampment resolutions play a critical role in addressing these public health risks by getting people out of dangerous situations and into housing. The Governor and the California Legislature have invested more than \$15 billion toward homelessness issues, including \$750 million to cities and counties across the state specifically to address unsafe encampments and move people into housing and shelter. Local governments applying for billions in available grant money under the State's Homeless Housing, Assistance, and Prevention Program must detail how funds will be used to move individuals experiencing homelessness into

⁶ Thomas Fuller, The N.Y. Times, *Death on the Streets* (Apr. 25, 2022), <https://shorturl.at/glDOP>.

⁷ Anna Gorman, The Atlantic, *Medieval Diseases Are Infecting California's Homeless* (Mar. 8, 2019), <https://shorturl.at/fgyjF>.

⁸ Sam Levin, The Guardian, *At Least 14 Unhoused People Froze to Death in LA Last Year, Records Reveal* (Oct. 4, 2022), <https://shorturl.at/rsuHM>.

housing and must meet specific goals to become eligible for additional funding.⁹ The California Department of Transportation, as a matter of policy, contacts service providers, either directly or in coordination with the relevant local jurisdiction, in advance of most encampment clearances on state rights-of-way and requests outreach services for persons experiencing homelessness at the encampment.¹⁰ Local governments have sponsored similar programs to connect people with housing and services, including medical and behavioral health services and support groups, as part of their resolution efforts. See, *e.g.*, Appellants’ Opening Brief at 18, *Coal. on Homelessness v. City & Cnty. of San Francisco*, No. 23-15087 (9th Cir. Feb. 21, 2023), Dkt. 11 (detailing how San Francisco’s Homeless Outreach Team conducts outreach “to offer services, connections, and/or referrals”).

Encampment clearance activities also clear fire and public health hazards, remove trash and debris, and return parks, playgrounds, and sidewalks to usable public spaces for the benefit of the full community.

Misinterpretations of *Martin*—as now reaffirmed by the Ninth Circuit in the decision below—are affirmatively harming these efforts. As just one tangible example, San Francisco was awarded more than \$17

⁹ Off. of Governor Newsom, *Governor Newsom Calls for More Aggressive Action on Homelessness, Pauses Latest Round of State Funding* (Nov. 3, 2022), <https://shorturl.at/nqzFZ>; see also Cal. Interagency Council on Homelessness, *Homeless Housing, Assistance, and Prevention (HHAP) Grant Program* (Jan. 27, 2023), <https://shorturl.at/iEIS5>.

¹⁰ Cal. Dep’t of Transp., *Maintenance Policy Directive 1001-R1* (effective Oct. 10, 2022).

million in state funding in the past year to provide services to hundreds of people living in encampments.¹¹ Because San Francisco is under a sweeping injunction, however, the City was, at least until recently, unable to use its discretion to connect people with shelter and services while enforcing its encampment clearance policy to address the harms to the public attendant to uncontrolled encampments. In short, *Martin*'s distortions have paralyzed communities and blunted the force of even the most common-sense and good-faith laws to limit the impacts of encampments. The ill effects of these cases “are felt not merely by the States, and not merely by our cities, but block by block, building by building, doorway by doorway.” Pet. App. 161a.

III. This Court’s Intervention Is Needed to Provide the Clarity that the Ninth Circuit Has Not.

Grants Pass offered an opportunity for the Ninth Circuit to course correct—to clarify that *Martin* stands for the *narrow* principle that all-places, all-times restrictions on sleeping in public spaces are unconstitutional when no shelter is available. Instead, the Ninth Circuit expanded *Martin* through its class-wide relief and chose to leave undefined the purportedly “narrow” scope of the constitutional principle—leaving still unresolved when and how localities can enforce policies to address specific encampments that are impacting the ability of the public to use specific public spaces or severely impacting public health or safety. Pet. App.

¹¹ Off. of Governor Newsom, *California Awards Nearly \$200 Million to Move 7,300 People Out of Encampments and Into Housing* (June 14, 2023), <https://shorturl.at/kuz56>; Off. of Governor Newsom, *California Awards Eight Communities \$48 Million to Help People Living in Encampments Transition to Housing* (Oct. 26, 2022), <https://shorturl.at/iyTZ1>.

57a. If there were any doubt that *Grants Pass* perpetuates the risk that district courts will misunderstand or misinterpret *Martin*, look no further than the district court orders that have attempted to parse it. See *Coal. on Homelessness*, 2022 WL 17905114, at *21–22; *Fund for Empowerment*, 2022 WL 18213522, at *3.

There are real life costs to that refusal to define the scope of the constitutional right. Any attempt to move unhoused persons out of encampments and into shelter, or to limit the place or manner in which unhoused persons can sleep, will at best subject the community to litigation and at worst result in a broad injunction. And *Grants Pass* provides no guidance about how state and local governments can enforce policies to clean encampments or move individuals to safer locations, even when they are not attempting to enforce total bans on the presence of homeless individuals within a particular jurisdiction. It provides no answers, for example, to questions about the hours during which a city may prohibit sleeping in public, or about whether a person experiencing homelessness has a right to select one location over another, or about who bears the burden of establishing that a particular person is experiencing homelessness voluntarily.

Our government officials are trapped, at risk of suit for taking action but also accountable for the consequences of inaction. Our communities will suffer for it.

To tackle the complicated issues of housing and homelessness in our State, California’s policymakers need access to the full panoply of tools in the policy toolbox. They also need the discretion, born of experience, to innovate—to use these tools in good faith and consistent with the Constitution to serve the health and safety interests of their housed and unhoused residents. The Ninth Circuit’s failure to provide clarity on

the governing legal standard—culminating in *Grants Pass*—has effectively removed those tools, leaving only the most rudimentary and fragmented options for effecting change during a growing national crisis. This Court should intervene.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIDGET L. MURPHY
SIDLEY AUSTIN LLP
1 S. DEARBORN
Chicago, IL 60603
(312) 853-7000

DAVID R. CARPENTER*
COLLIN P. WEDEL
SIDLEY AUSTIN LLP
555 West Fifth St.
Los Angeles, CA 90013
(213) 896-6679
dcarpenter@sidley.com

Counsel for Amicus Curiae

September 22, 2023

* Counsel of Record