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

BRIEF OF *AMICI CURIAE* CITY OF PHOENIX & THE LEAGUE OF ARIZONA CITIES AND TOWNS SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

The City of Phoenix (the "City" or "Phoenix") is the capital of Arizona and the fifth largest city in the country, with a population of over 1,600,000 people. There are more than 13,553 homeless people in Arizona.[2] In Phoenix, there are more than 3,333 unsheltered individuals.[3]

Founded in 1937, the League of Arizona Cities and Towns (the "League") is a voluntary membership organization of all 91 incorporated Arizona municipalities. The League advocates for its members' interests before the legislature and courts. The League is advised by its Amicus Committee,

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[1] Amici state: (1) neither party's counsel authored the brief in whole or in part; (2) neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief; (3) no person other than Amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief, and (4) Amici provided timely notice to the counsel of record regarding submission of this brief on September 15, 2023.

[2] U.S. DEP'T OF HOUS. AND URB. DEV., *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress* at 16 (2022), https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf.

[3] MARICOPA ASS'N OF GOV'TS, *2023 Point-in-Time (PIT) Count Report* at 4 (2023), https://azmag.gov/Portals/0/Homelessness/PIT-Count/2023/2023-PIT-Count-Report-Final.pdf?ver=8CRzv7xw28C-V2G0sMdKfw%3d%3d.

which identified this case as having statewide significance.

There is no dispute that Arizona suffers from a homelessness crisis. The largest homeless encampment in Arizona is located in downtown Phoenix, in an area colloquially referred to as the "Zone," with populations fluctuating to as high as 1,000 people. From larger cities to rural towns, the impacts of *Johnson* are sweeping—reaching public parks, freeway underpasses, and countless miles of public rights-of-way repurposed into homeless encampments.

Amicis' interest in this case is rooted in federal and state lawsuits stemming from the Ninth Circuit decisions in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) and *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), which combine to significantly limit the ability of municipalities to address public health and safety concerns from homeless encampments.

INTRODUCTION

The City is walking a legal tightrope between competing federal and state lawsuits seeking to enjoin governmental actions addressing homelessness. On the one hand, the City is grappling with an injunction issued by the District of Arizona in *City of Phoenix v. Fund for Empowerment*, which largely *enjoined* the City from enforcing camping and sleeping ordinances.[4] On the other hand, the City is being *compelled* to remove tents and take enforcement action against "individuals committing offenses against the public order" under an injunction issued by the Maricopa County Superior Court in *Freddy Brown, et al. v. City of Phoenix.*[5] This injunction ordered the City to clean up homeless encampments downtown and remove people camping in the area, finding the encampments constituted a public nuisance. The injunction was made permanent in a sweeping order issued September 20, 2023.[6]

The state of the law is simply unworkable after *Martin* and *Johnson*, which are driven more by policy

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[4] Order at 2, *City of Phoenix v. Fund for Empowerment*, No. CV-22-02041-PHX-GMS (D. Ariz. Dec. 15, 2022), ECF No. 34.

[5] Under Advisement Ruling at 22, *Freddy Brown, et al. v. City of Phoenix*, No. CV2022-010439 (Maricopa Cnty. Superior Ct. Mar. 27, 2023).

[6] Under Advisement Ruling at 26, *Freddy Brown, et al. v. City of Phoenix*, No. CV2022-010439 (Maricopa Cnty. Superior Ct. Sept. 20, 2023). Notably, the state court judge lamented that the *Martin* and *Johnson* decisions are unworkable and urged this Court to accept review of *Johnson*. *Id.* at n.7.

considerations than constitutional law. As Judge Smith observed in his dissent:

> Unlike the officials tasked with addressing homelessness, the members of our court are neither elected nor policy experts. Of course, the political process must yield to the fundamental rights protected by the Constitution, and some of federal courts' finest moments have come in enforcing the rights of politically marginal groups against the majority. But when asked to inject ourselves into a vexing and politically charged crisis, we should tread carefully and take pains to ensure that any rule we impose is truly required by the Constitution—not just what our unelected members think is good public policy.[7]

At bottom, the issues raised strike at the heart of legislative and executive functions and warrant review by this Court to assess whether the rights cobbled together by the Ninth Circuit are, in fact, constitutionally required. As explained in the Petition for Writ of Certiorari and further discussed in this brief, the Ninth Circuit has strayed far from the historical origins of the Eighth Amendment based on a misreading of the plurality decision in *Powell v. Texas*, 392 U.S. 514 (1968). Amici respectfully request that the Court grant the petition for certiorari and,

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[7] *Johnson v. City of Grants Pass*, 72 F.4th 868, 936 (9th Cir. 2023) (Smith, J., dissenting).

ultimately, correct the constitutional wrongs by overturning *Martin* and *Johnson*.

SUMMARY OF THE ARGUMENT

The Ninth Circuit erred in ruling that municipalities cannot enforce laws restricting public camping, sitting, lying, and sleeping against an unsheltered person when there are no available shelter beds. This holding was first articulated in *Martin*, in which the Ninth Circuit struck down an ordinance limiting public camping under the guise of the Eighth Amendment's Cruel and Unusual Punishment Clause because it purportedly criminalized the "status" of unsheltered homelessness.[8] The Ninth Circuit wrote, "[A]s 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."[9]

Subsequently, in *Johnson*, the Ninth Circuit reaffirmed its holding in *Martin*, broadening *Martin's* application to civil enforcement if "closely intertwined" with criminal penalties and extending constitutional protections to "rudimentary forms of

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[8] *Martin v. City of Boise*, 902 F.3d 1031, 1049 (9th Cir. 2018), *op. am. and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019).

[9] *Id.* at 1048.

precautions" against the elements.[10] These decisions create unprecedented rights to occupy public property, obstructing municipalities' ability to address sprawling encampments that threaten health and safety.

The decisions are hard to decipher, harder to comply with, and risk inaction at the expense of public health. The decisions compel municipalities to engage in a delicate balancing act to navigate impending litigation and class action lawsuits, all while addressing the pressing needs of basic sanitation and social services aimed at transitioning people off the streets. The Eighth Amendment requires none of this.

The Ninth Circuit's decisions should be reversed because: (1) cities should not be forced to walk a legal tightrope to enforce fundamental public health and safety laws where the Constitution requires no such balancing act, (2) litigation stemming from *Martin* and *Johnson* impedes enforcement of public health and safety laws, and (3) the Ninth Circuit erred in its interpretation of the Eighth Amendment. The Supreme Court should take this opportunity to correct course and provide guidance and uniformity nationwide.

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[10] *Johnson v. City of Grants Pass*, 50 F.4th 787, 813 (9th Cir. 2022), *op. am. and superseded on denial of reh'g*, 72 F.4th 868, 896 (9th Cir. 2023).

ARGUMENT

I. CITIES SHOULD NOT BE FORCED TO WALK A LEGAL TIGHTROPE TO ENFORCE BASIC PUBLIC HEALTH AND SAFETY LAWS WHERE SUCH A BALANCING ACT IS NOT CONSTITUTIONALLY REQUIRED.

A. Western States, like Arizona, are Experiencing a Dramatic Increase in Homelessness.

The population of homeless individuals in western states continues to escalate. In 2022, Arizona recorded a population of over 13,000 homeless people, with more than 59% residing in unsheltered locations, such as on streets, in abandoned buildings, or other places unsuitable for habitation.[11] Over the past three years, Phoenix experienced a significant increase in homelessness, with a Point-in-Time ("PIT") survey conducted in late January 2023 identifying 3,333 unsheltered persons compared with 2,380 at the same time in 2020.[12]

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[11] U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 2, at 16. https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf.

[12] MARICOPA ASS'N OF GOV'TS, *supra* note 3, at 4. The terms "homeless" and "unsheltered" are often used interchangeably. Being unsheltered is a category within homelessness. The PIT count is of unsheltered persons; the actual number of people experiencing homelessness includes persons living temporarily with relatives or in transitional housing and is a larger total.

The City's downtown area has borne the brunt of this dramatic spike in homelessness, with up to 1,000 people camping in a sprawling homeless encampment that local businesses and property owners call the "Zone." This area has garnered national media attention as the City struggles to combat criminal activity and address health hazards from the concentration of unsheltered people camping downtown.[13]

B. There is Insufficient Shelter Capacity to House the Homeless Throughout the Ninth Circuit.

In Phoenix, like numerous cities in the Ninth Circuit, local officials struggle with addressing homelessness as there are insufficient shelter beds to accommodate the entire unsheltered population. To illustrate, in 2023, there were about 3,333 homeless individuals in Phoenix.[14] There were approximately

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https://azmag.gov/Portals/0/Homelessness/PIT-Count/2023/2023-PIT-Count-Report-Final.pdf?ver=8CRzv7xw28C-V2G0sMdKfw%3d%3d

[13] *See, e.g.*, Grant Archer, *Half of violent crimes in Phoenix come from 8% of city blocks*, ABC (June 6, 2023, 5:37 PM), https://www.abc15.com/news/crime/half-of-violent-crimes-in-phoenix-come-from-8-of-city-blocks; Jack Healy, *Phoenix Dismantles a Homeless Encampment, One Block at a Time*, N.Y. TIMES (May 10, 2023), https://www.nytimes.com/2023/05/10/us/phoenix-homeless-camp-the-zone.html.

[14] MARICOPA ASS'N OF GOV'TS, *supra* note 3, at 4. https://azmag.gov/Portals/0/Homelessness/PIT-Count/2023/2023-PIT-Count-Report-Final.pdf?ver=8CRzv7xw28C-V2G0sMdKfw%3d%3d

3,219 shelter beds, without accounting for any already occupied.[15] Many of the existing shelter beds had restrictions—limiting them to families with children, victims of domestic violence, or working unsheltered, to name a few. Put simply, there are not enough shelter beds to accommodate all the unsheltered downtown, let alone the entire City.

Small and rural municipalities in Arizona are not immune from the homelessness crisis; they face an uphill battle to address homelessness surges due to a shortage of staff, resources, and inadequate support systems.[16]

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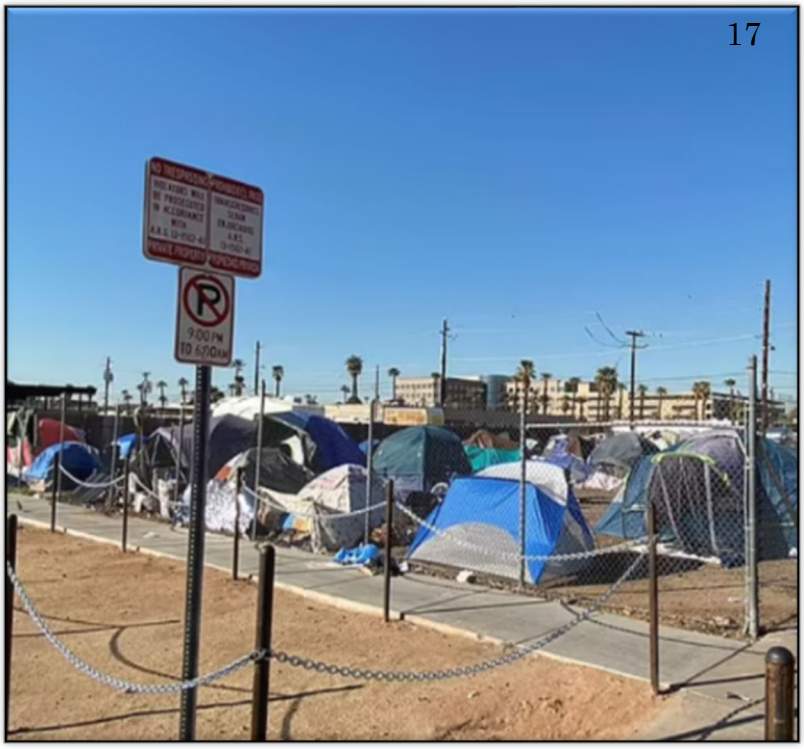
[15] Opening Br. of Def./Appellant at 5, *Freddy Brown, et al. v. City of Phoenix*, No. 1 CA-CV 23-0273 (Ariz. Ct. App. Aug. 9, 2023).

[16] Locating housing for the unsheltered is further complicated in border states by migrants seeking asylum. *See, e.g.*, Associated Press, *Arizona sheriff seeks state and federal help to handle arrival of asylum-seekers in rural area*, SEATTLE TIMES (Sept. 14, 2023, 4:49 PM), https://www.seattletimes.com/nation-world/nation/arizona-sheriff-seeks-state-and-federal-help-to-handle-arrival-of-asylum-seekers-in-rural-area/.

C. Homeless Encampments are Threatening Public Health and Safety.



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In Phoenix's case, the homeless encampments downtown consist of hundreds of tents and makeshift structures erected along public sidewalks.[17]

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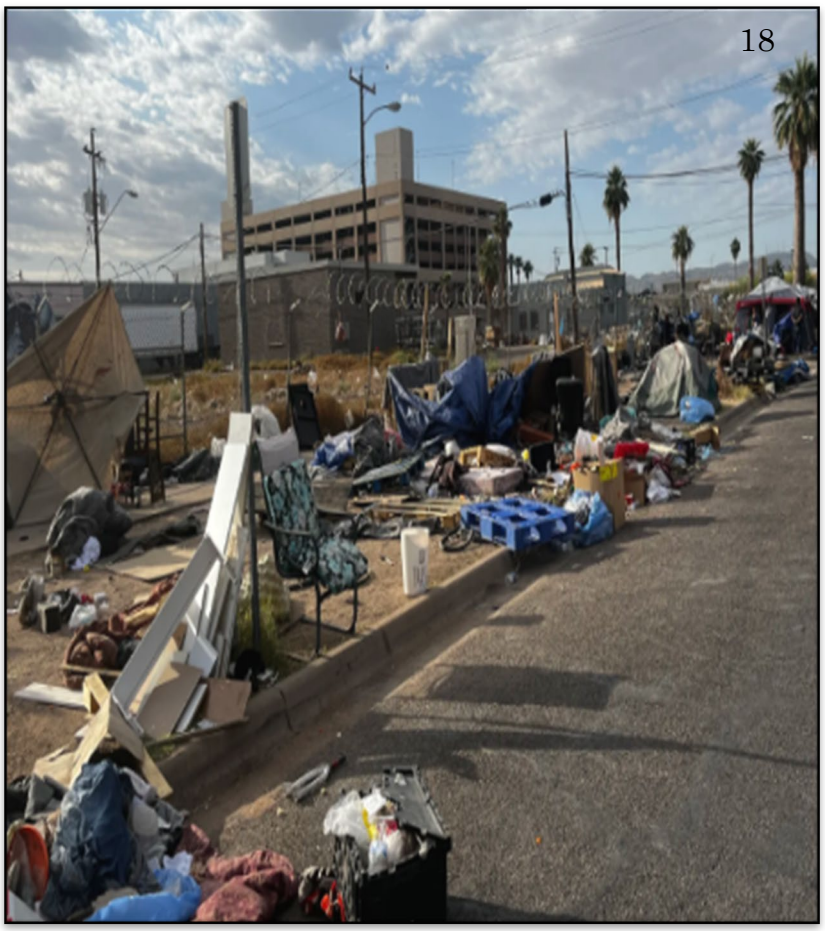
[17] See Photograph 17. *Depiction of tents within the Zone* (Photograph), in *Phoenix's tent city population INCREASED by more than 100 people despite massive effort to clear blocks of homeless people in controversial rehousing program*, DAILYMAIL.COM (June 25, 2023), https://www.dailymail.co.uk/news/article-12232615/More-homeless-people-Phoenixs-streets-city-began-massive-rehousing-operation.html.

Significant health concerns include trash, debris, public urination, defecation, and hazardous waste.[18]



[18] See Photograph 18. *Items left behind in the Zone* (Photograph), in *Phoenix begins clearing "The Zone" homeless encampment*, AXIOS PHOENIX (May 10, 2023), https://www.axios.com/local/phoenix/2023/05/10/zone-homeless-encampment-sweep-phoenix-court-order.

The Phoenix downtown area also suffered from the most reported violent crimes within City boundaries in 2022-2023.[19] The encampments are simply unsafe.[20]

D. Municipalities are Dedicating Substantial Resources to Addressing Homelessness.

In response to the growing problems of homelessness and complicating factors from the opioid epidemic, COVID-19 pandemic, and affordable housing crisis, the Phoenix City Council (the "Council") adopted strategies to address homelessness and assist private property owners downtown.[21]

Construction of Shelters. The Council appropriated over $140 million to build hundreds of

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[19] Archer, *supra* note 13. https://www.abc15.com/news/crime/half-of-violent-crimes-in-phoenix-come-from-8-of-city-blocks;

[20] The City has prioritized indoor shelter due to concerns about heat-related deaths. Juliette Rihl, *Hundreds of people experiencing homelessness died in Maricopa County last year. Will 2023 be worse?*, AZ REPUBLIC (July 27, 2023, 6:00 AM), https://www.azcentral.com/story/news/local/phoenix/2023/07/26/hundreds-of-maricopa-county-homeless-population-died-in-2022/69903536007/ ("At least 76 unhoused people died primarily from heat exposure").

[21] PHOENIX COMM. OFF., *Strategies to Address Homelessness* (Oct. 2020), https://www.phoenix.gov/humanservicessite/Documents/Homeless%20Strategies%20Final%20Report.pdf.

new shelter beds.[22] The Council established an Office of Homeless Solutions to oversee the construction of shelter space, allocate funding for operational needs of shelters, and manage the litany of services provided to the homeless.[23] Phoenix has invested significant taxpayer money to increase shelter capacity and provide resources to assist the homeless.

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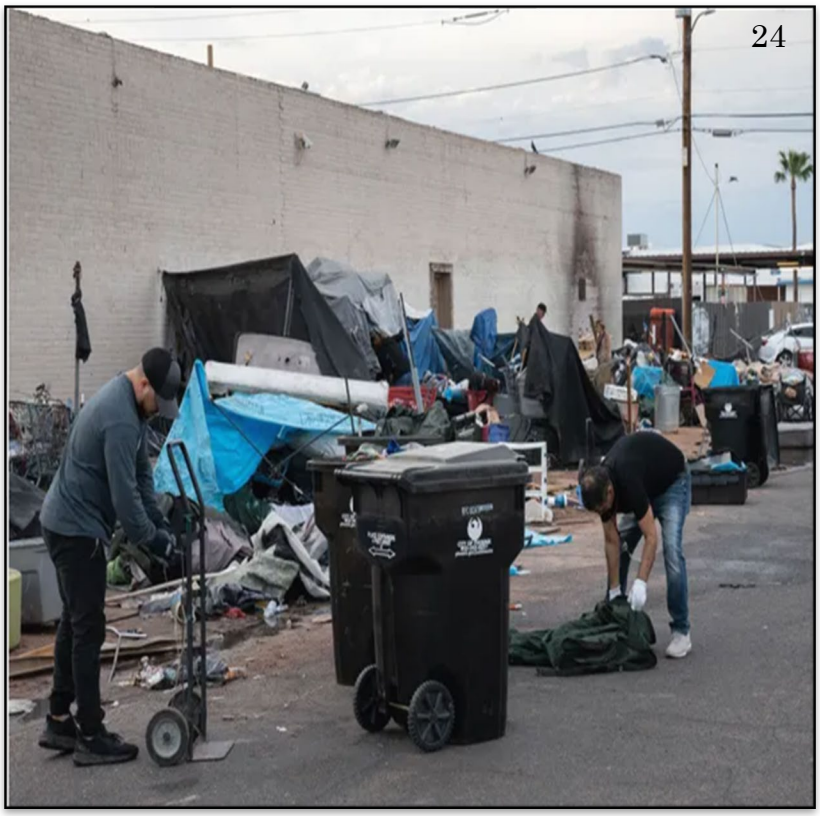
[22] The City maintains public records documenting its shelter projects, accessible online at *Office of Homeless Solutions*, CITY OF PHOENIX, https://www.phoenix.gov/solutions, which highlights that over the last year, the City has completed a 175-person shelter in partnership with Central Arizona Shelter Services, a 100-person sprung structure at the Human Services Campus downtown known as Respiro; a 200-bed shelter operated by St. Vincent de Paul known as the Washington Relief Center; and 117-room hotel named Rio Fresco with Community Bridges, Inc. In total, the City created approximately *600 shelter beds* in 2022, with more in various stages of construction.

[23] Prelim Inj. Hr'g Tr. at 116:16-118:15, *Freddy Brown, et al. v. City of Phoenix*, No. CV2022-010439 (Maricopa Cnty. Superior Ct. Oct. 27, 2022).

Cleanup of Homeless Encampments. To address encampment concerns, cities have developed detailed cleaning procedures.[24]



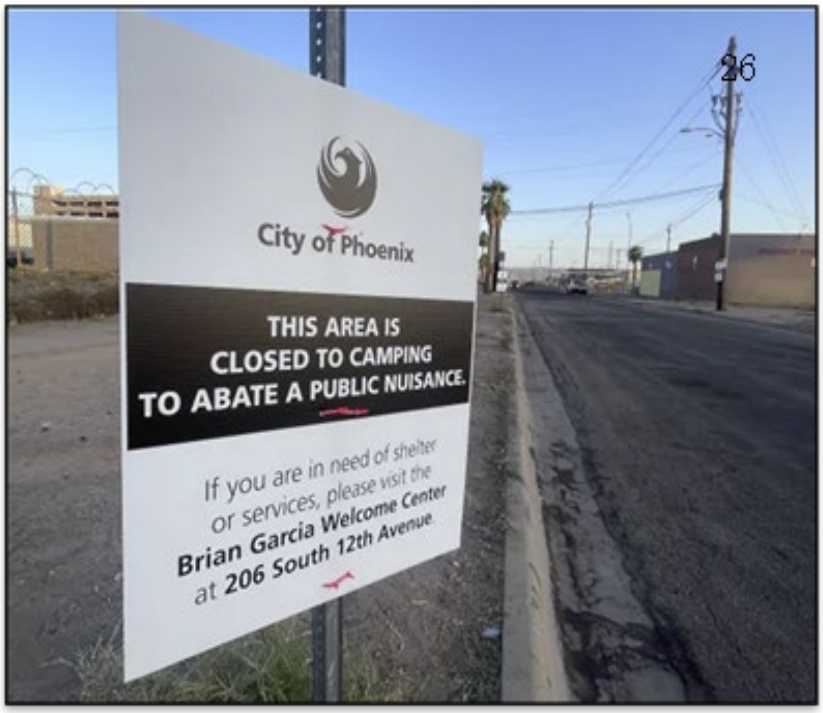
[24] See Photograph 24. *Phoenix workers clear Zone* (Photograph), in *After Phoenix's first 'Zone' homeless encampment cleanup, where did people go?*, AZCENTRAL (June 21, 2023), https://www.azcentral.com/story/news/local/phoenix/2023/06/21/after-first-the-zone-homeless-camp-cleanup-in-phoenix-where-did-people-go/70331251007/.

Phoenix's procedures were discussed at a hearing on the plaintiffs' request for a preliminary injunction in the *Freddy Brown* lawsuit.

City officials testified that the City adopted procedures to allow for enhanced cleanings where homeless people would move their tents and other items to allow for the cleaning of sidewalks. The procedures require *notice* and *storage* of possessions left unattended on public property.[25]

[25] See Def. Ex. 72 at 1, *Freddy Brown, et al. v. City of Phoenix*, No. CV2022-010439 (Maricopa Cnty. Superior Ct. May 10, 2023).

After notice, cleanups are conducted block by block, starting with closing streets, moving belongings, deep cleaning the area, and removing trash and debris. While the City has regularly conducted cleanings downtown, the City began *enhanced* cleanings in December 2022, which continue today, with the new step of closing blocks to public camping after cleaning beginning in May 2023.[26]



[26] See Photograph 26. *Notice of cleanup sign* (Photograph), *Phoenix's first 'Zone' homeless encampment cleanup, where did people go?*, AZCENTRAL (June 21, 2023), https://www.azcentral.com/story/news/local/phoenix/2023/06/21/after-first-the-zone-homeless-camp-cleanup-in-phoenix-where-did-people-go/70331251007/.

Closing Areas to Public Camping. This last step—*closing the blocks to public campin*g—is crucial to address sprawling campgrounds. Cities must be able to tell people they cannot camp indefinitely on public property and rights-of-way.

Similarly, cities must have the ability to remove tents from the sidewalk, and, as available, work with vulnerable populations to provide shelter and social services to address their underlying issues, whether addiction, mental health, or other complicating factors. Some individuals may be service-resistant, preferring to live on the streets. In such instances, cities must be able to enforce public camping laws without first establishing enough shelter capacity for the jurisdiction's entire unsheltered population.

E. Due to a Lack of Shelter Space, Many Cities, like Phoenix, have been Forced to Curtail Enforcement of Camping Ordinances and Other Health and Safety Measures.

Due to a lack of shelter space, municipal efforts to address sprawling encampments have been curtailed—either voluntarily while legal guidance is promulgated or by way of court order (or both).[27]

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[27] *See, e.g.*, *Quintero v. City of Santa Cruz*, No. 5:19-CV-01898-EJD, 2019 WL 1924990, at *3 (N.D. Cal. Apr. 30, 2019) ("The City has suspended the enforcement of its camping ordinance to ensure that no indigent homeless individual will be cited for sleeping outdoors or camping."); *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1085 (W.D. Wash. 2019) (observing that the

Municipalities are grappling with the scope of *Martin*, including how to make an individualized determination of whether someone is involuntarily homeless, what constitutes adequate shelter, and what regulations might survive constitutional scrutiny. As explained below, these questions have confused and delayed responses to encampments appropriating public spaces.

The Scope of the Law. Despite the Ninth Circuit's efforts to refine its Eighth Amendment jurisprudence, the scope of the law is unclear. First, in *Martin*, the Ninth Circuit held: "We conclude that a municipality cannot criminalize [camping on public property] consistently with the Eighth Amendment when no sleeping space is practically available in any shelter."[28] Then, in *Johnson*, the Ninth Circuit held: "We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons 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."[29] Municipalities are grappling with these holdings.

Does the Ninth Circuit merely demand application of a mathematical formula—if the number of homeless individuals exceeds the available shelter

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city's camping ordinance was not being enforced due to the city's inability to provide adequate shelter to the homeless).

[28] 920 F.3d at 618.

[29] 72 F.4th at 896.

beds, public sleeping bans are entirely unenforceable—or is the dispositive issue the immediate availability of shelter space for a specific individual on a particular day?[30] In the latter case, what type of individual assessment must a public entity perform (*e.g.*, is the entity required to conduct an inquiry regarding the person's mental health, medical impairments, familial status, property, pets, etc. to determine if they meet the criteria for a shelter vacancy)? What options are available if the unsheltered person is uncooperative? The law is unclear. Frankly, both propositions are challenging, but at least in the latter scenario, if shelter can be identified, a city may lawfully enforce camping bans.

In Phoenix's case, due to the uncertainty as to what is required by *Martin* and *Johnson*, it is modeling its policies on the narrower reading of the law—which is particularly important because, as discussed above, the population of homeless individuals in the Phoenix downtown area, let alone the entire City, consistently surpasses the available shelter beds on any given night. If the City adheres to the mathematical approach, the City may never enforce public camping bans unless the City reallocates substantial financial resources to construct massive amounts of shelter. Even then, the

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[30] *See* Under Advisement Ruling, *supra* note 5, at 20 ("[T]he burden is on any party arguing that Martin or Grants Pass preclude enforcement against a particular individual to establish – based upon credible evidence – that the individual cannot otherwise obtain shelter and/or that the individual's offending conduct is an unavoidable consequence of his or her status.").

City must deal with the confounding question of what is "adequate" shelter.

Conversely, under the second approach, if the City establishes that an individual has immediate access to shelter, then camping or sleeping bans could be enforced against that person individually. Still, the time and difficulty in determining whether someone is involuntarily homeless or if the shelter available is adequate, bars or at least delays most enforcement actions. Neither approach is practicable in the real world.

Involuntariness. The *Martin* and *Johnson* decisions establish that a municipality cannot ban public sleeping when an *involuntarily* homeless person engages in conduct necessary for self-protection against the elements and there is no available shelter space.[31] These rulings introduced a layer of complexity in distinguishing between those who are involuntarily homeless and those who voluntarily choose to be homeless. Ordinarily, police operate on well-defined standards when dealing with individuals' constitutional rights, such as informing them they have the right to remain silent. However, determining whether someone qualifies as "involuntarily" homeless is not straightforward.

The *Martin* and *Johnson* decisions raise questions about whether police should inquire into the financial situations or personal relationships of homeless individuals to determine whether they

[31] *Johnson*, 72 F.4th 868.

genuinely lack housing. How else can one truly ascertain an individual's status as involuntarily homeless? And how long is an offer of shelter "good" for *Martin* purposes—may a city take enforcement action against an unsheltered individual a day after rejecting an offer of shelter, a week? The unanswered questions are endless.

The parallel lawsuits and conflicting court orders confronting the City illustrate the practical difficulties of applying Ninth Circuit precedent on the issue of voluntariness. In the *Freddy Brown* lawsuit, the judge chastised the City for failing to present "credible evidence that *every* individual in the Zone lacks access to adequate temporary shelter."[32] Conversely, the District Court in *Fund for Empowerment* appeared to discard the idea of involuntariness and, instead, focused on whether a homeless individual "practically cannot obtain shelter."[33] The legal principles are moving targets, confusing municipalities and frustrating action to address health and safety issues.

The Availability of Shelter. Historically, many cities like Phoenix have not owned, operated, or maintained shelter facilities. Instead, shelters have been run by nonprofits, county or state health departments, or third-party vendors. In Phoenix's case, because it does not own or operate most of the shelter facilities within the metropolitan area, there is no easy way to determine the number of available beds

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[32] Under Advisement Ruling, *supra* note 5, at 5.

[33] Order, *supra* note 4, at 2.

on any given day. City employees must contact various facilities to ascertain capacity. Bed availability fluctuates regularly, requiring constant research before law enforcement engagement.

Adequate Shelter. The Ninth Circuit has not established clear guidance for defining "adequate shelter" either. The *Martin* decision originally suggested that "adequate shelter" necessitates indoor sleeping arrangements.[34] Based on this premise, in a California District Court case, a court found that a city's temporary outdoor shelter facility at the municipal airport was unsuitable for people.[35] The court's reasoning highlighted that the airport site was essentially an "asphalt tarmac with no roof and no walls, no water and no electricity. It is an open space with what amounts to a large umbrella for some shade. It affords no real cover or protection to anyone."[36]

While the amended decision in *Johnson* appears to clarify that there is no rigid, one-size-fits-all definition of adequate shelter, the law is far from clear. The acceptability of outdoor camping facilities under Ninth Circuit precedent remains ambiguous. Given the numerous unresolved questions regarding shelter space, many municipalities have temporarily

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[34] *Martin*, 920 F.3d at 617.

[35] *Warren v. City of Chico*, No. 221CV00640MCEDMC, 2021 WL 2894648, at *3 (E.D. Cal. July 8, 2021).

[36] *Id.* at 4.

halted cleanup efforts while trying to develop policies and procedures to withstand judicial scrutiny.

Time, Place, and Manner Restrictions. The fact that *Martin* appears to possibly allow regulations for time, place, and manner of encampments does not provide much relief either. In practice, the injunctions being issued against the enforcement of camping laws have been sweeping in nature[37] and do not account for reasonable time, place, and manner restrictions.[38] Moreover, the Ninth Circuit in *Martin* and *Johnson* failed to explain what time, place, and manner restrictions might be valid, thus diminishing the utility of this exception. Ultimately, even if a city prohibits camping on public property, it still faces the threat of federal litigation and broad injunctions if there is insufficient shelter space for the homeless.

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[37] There is no reference to any time, place, or manner restriction that Phoenix may place against public camping in the District Court injunction. *See* Order, *supra* note 4, at 2. The order broadly enjoins: "Enforcing the Camping and Sleeping Bans against individuals who practically cannot obtain shelter as long as there are more unsheltered individuals in Phoenix than there are shelter beds available." *Id.* The order provides no flexibility for use of camping ordinances unless the City shows first that shelter is practically available.

[38] *See* *Martin*, 902 F.3d at 1048 n.8 ("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.") (emphasis added)

II. EFFORTS TO ADDRESS HOMELESSNESS ARE FRUSTRATED BY LITIGATION SEEKING TO SIMULTANEOUSLY RESTRAIN AND REQUIRE LAW ENFORCEMENT ACTION.

Despite the City's considerable efforts to adhere to Ninth Circuit precedent, the City has found itself entangled between two competing lawsuits: a federal and state court case seeking diametrically opposed relief, where both sets of plaintiffs seek to use the judiciary to compel their preferred approach to tackling homelessness. Collectively, these cases illustrate the tension within the legal framework established by the Ninth Circuit. A summary of the cases is presented to illustrate the intricacies and importance of the issues.

A. The Federal Lawsuit.

In the federal lawsuit, *Fund for Empowerment et al. v. City of Phoenix et al.*, the plaintiffs sought an injunction barring enforcement of the City's camping and sleeping ordinances and halting cleaning activities. The District Court largely agreed with the plaintiffs and enjoined the City from "[e]nforcing the Camping and Sleeping Bans against individuals who practically cannot obtain shelter as long as there are more unsheltered individuals in Phoenix than there are shelter beds available."[39] The City continues to grapple with the preliminary injunction and defend

[39] Order, *supra* note 4, at 2.

against plaintiffs' request to make it permanent—threatening to tie the City's hands for years.[40]

B. The State Lawsuit.

In the state-court lawsuit, *Freddy Brown et al. v. City of Phoenix*, the Maricopa County Superior Court issued a preliminary injunction in favor of businesses and private property owners, who sued the City over the homeless encampment they call the Zone.[41] The injunction ordered the City to take the following actions, among others:

1. Abate the nuisance in the downtown area by removing tents, biohazards, drug paraphernalia, and trash from the public right-of-way; and

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[40] Shortly after the preliminary injunction was issued, Phoenix paused its enhanced cleanings to comply with federal orders. *See* Order at 2, *City of Phoenix v. Fund for Empowerment*, No. CV-22-02041-PHX-GMS (D. Ariz. May 22, 2023), ECF No. 71 ("IT IS FURTHER ORDERED that Defendants shall not conduct any cleanup in the Zone until the Court has held the hearing and provided further orders to the parties."); Order at 1, *City of Phoenix v. Fund for Empowerment*, No. CV-22-02041-PHX-GMS (D. Ariz. May 26, 2023), ECF No. 87 ("IT IS FURTHER ORDERED that the Court's previous stay ordering Defendants to 'not conduct any cleanups in the Zone until the Court has held the hearing and provided further orders to the parties,' (Doc. 71), is lifted).").

[41] Under Advisement Ruling, *supra* note 5, at 22.

2. Stop individuals from committing offenses against the public order.[42]

Most recently, on September 20, 2023, the trial court entered a permanent injunction requiring the City to "abate the nuisance it presently maintains on the public property in the Zone, including the removal of all tents and other makeshift structures by November 4, 2023."[43] Thus, the trial court has provided the City with less than seven weeks to relocate hundreds of homeless persons while navigating the legal minefields created by the Ninth Circuit's undefined test for voluntariness and indeterminate standard for the adequacy of shelter—a Herculean, if not unachievable, task in light the Ninth Circuit's evisceration of the City's enforcement powers.

Ultimately, the tension between the lawsuits illustrates the practical difficulties municipalities face when trying to tackle homeless encampments—and Phoenix is not alone in facing competing lawsuits stemming from encampments. On September 19, 2023, two lawsuits were filed against the City of Sacramento, one by private businesses and residents and another by the Sacramento County District Attorney,[44] both alleging unsanitary conditions in

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[42] *Id.*

[43] Under Advisement Ruling, *supra* note 6, at 26.

[44] Complaint, *Prime Auctions, LLC et. al. v. City of Sacramento*, No. 23CV008662 (Sacramento Cnty. Superior Ct. Sept. 19, 2023); Complaint, *People v. City of Sacramento*, No. 23CV008658 (Sacramento Cnty. Superior Ct. Sept. 19, 2023).

homeless encampments and seeking to compel city action—the very action that *Martin* and *Johnson* threaten to restrain. The state of the law is not workable.

III. THIS COURT SHOULD ACCEPT CERTIORARI AND OVERTURN *MARTIN v. BOISE* AND *JOHNSON v. GRANTS PASS* AS THE CASES ARE FUNDAMENTALLY FLAWED.

A. The Ninth Circuit Decisions Improperly Extend the Eighth Amendment.

Application of the Eighth Amendment to public camping is doctrinally wrong. The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."[45]

Historical Origin. The Eighth Amendment, as originally contemplated, was a rebuke against the arbitrary power used by Chief Justice Jeffreys in defining new and unusual punishments from the King's Bench from 1683 to 1685 in response to the Monmouth's Rebellion, where a special commission tried, convicted, and executed hundreds of suspected insurgents.[46] Vicious punishments for treason were common in this period—including drawing, quartering and disemboweling.[47] The Eighth

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[45] U.S. CONST. amend. VIII. (emphasis added).

[46] *Harmelin v. Michigan*, 501 U.S. 957, 967–68 (1991).

[47] *Id.* at 968.

Amendment was intended to address modes of punishment that are not regularly or customarily employed.[48]

Status v. Act Considerations. Over time, this Court further held that while "acts" such as drug use, public intoxication, or other behaviors threatening public health and safety may be subject to prosecution, the mere "status" of being an addict is not subject to prosecution. *Compare* Robinson v. California, 370 U.S. 660, 667 (1962) (overturning state law which made the status of narcotic addiction a criminal offense) *with* *Powell v. Texas*, 392 U.S. 514, 536–37 (1968) (upholding conviction targeting act of being drunk in public). Unfortunately, this distinction has been muddled as courts move beyond *status or act* considerations to the *voluntariness or involuntariness* of the act or status.

Voluntariness Considerations. Consideration of the voluntariness or involuntariness of an act becomes problematic in the case of homelessness. The Ninth Circuit has essentially barred enforcement of camping and sleeping ordinances by reasoning 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.[49] Moving far beyond the historical focus of the Eighth Amendment on *modes of punishment*, the Ninth Circuit determined that if a person does not have the option to sleep indoors, criminalizing sitting, sleeping,

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[48] *Id.* at 976.

[49] *Martin*, 920 F.3d at 617.

or lying outside on public property is the same as punishing that person for being homeless.[50]

Using the *Martin* decision as a springboard, the Ninth Circuit further determined that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons "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."[51] Thus, *Johnson* expanded Eighth Amendment protections to encompass rudimentary protections from the elements.

What constitutes "rudimentary protection" from the elements is unclear but foreseeably includes blankets, pillows, tents, and perhaps even portable heaters intended to protect the unsheltered from inclement weather. *Johnson* further expanded the Eighth Amendment to *civil acts* such as removing encampments from public property or securing personal property to clean public property.[52]

Read together, these decisions impose robust restrictions on enforcement of public health and safety laws ranging from urban camping and fire code violations to potential laws prohibiting public urination, defecation, and other acts attendant with

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[50] *Id.* at 618.

[51] *Johnson*, 72 F.4th at 896.

[52] *Id.*

survival. This is far afield from mere regulation of modes of punishment.

The Confusion from Powell. The *Powell* decision, which considered application of the Eighth Amendment to status-based conduct, has understandably caused confusion as no single opinion was supported by the majority. Under the *Marks* rule, courts applying plurality decisions are to view the holding of the case as the "position taken by those Members who concurred in the judgments on the narrowest grounds."[53] Unfortunately, that is not what happened in the *Martin* line of cases.

In *Powell*, the narrowest rationale shared by the plurality and concurrence is that Powell could be punished because being in public while drunk was a voluntary act.[54] But rather than applying the *Marks* rule, the *Martin* court focused on mere dicta. Four Justices in *Powell* upheld the Texas statute because it punished conduct, not status. Justice White concurred because "Powell could have drunk at home and made plans while sober to prevent ending up in a public place."[55] Justice White did not find it necessary to pursue any analysis of the circumstances or state of intoxication which might bar the conviction of a chronic alcoholic for being drunk in public.[56] Justice White did not adopt the dissent's rationale that

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[53] *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation omitted).

[54] *Powell v. State of Tex.*, 392 U.S. 514 (1968).

[55] *Id.* at 553.

[56] *Id.*

conduct symptomatic of a condition is protected from punishment. Therefore, the Ninth Circuit read into Justice White's concurrence a rationale that this Court never adopted.

The Ninth Circuit approach may be well-intended, and indeed, cities like Phoenix have adopted strategies to lead with services, not citations, but the extension of Eighth Amendment protections to completely bar prosecution absent adequate shelter space for the entire unsheltered population within a jurisdiction is not constitutionally sound. Municipalities deploy multiple tools to minimize impacts of camping laws—including cite and release options, diversion programs with municipal prosecutors, and specialty homeless courts.[57]

While the wisdom of these different approaches may be debatable, there is no reason to twist the Eighth Amendment from its historical origins, or rely on dicta from this Court's *Powell* decision, to craft a constitutional right for the unsheltered homeless to camp on public property. This Court has held that the Eighth Amendment's limits on what a state may criminalize must be "applied sparingly."[58] The Ninth Circuit, in holding that involuntary homelessness cannot be punished, has based its decisions on a

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[57] *See, e.g.,* Andrew I. Lief, Comment, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. PA. L. REV. 1971 (2021); Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955 (2020).

[58] *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

misreading and overextension of this Court's precedent.

B. The Ninth Circuit Decisions Create an Unworkable Framework Compelling Judges to Act More as Homelessness Policy Czars than Judicial Officers Applying Discernible Rules of Constitutional Law.

The constitutional principles at hand strike at core legislative and executive functions, including how to best use law enforcement resources, expend taxpayer money to remedy homelessness, and use prosecutorial discretion when faced with criminal conduct. The Ninth Circuit justices have inappropriately intruded into what are essentially political questions and substituted their own judicially preferred plan for managing the homelessness crisis by carving out new constitutional rights.[59] The practical results of the decisions in *Martin* and *Johnson* have municipalities scrambling to reallocate resources and build massive amounts of shelter or be faced with potential liability for inaction amid sprawling homeless encampments taking over public property.

This is no mere codification of an established constitutional principle—it is the creation of a broad

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[59] *See* *Coker v. Georgia*, 433 U.S. 584, 592 (177) (holding that "Eighth Amendment judgments should not be, or appear to be, *merely the subjective views of individual Justices*; judgment should be informed by objective factors to the maximum possible extent.") (citation omitted) (emphasis added).

new right that undercuts the enforcement of basic public health and safety laws. The Eighth Amendment does not require this result. Homelessness raises quintessential legislative questions that are more appropriate for political debate and policy discussion than applying what should be discernible principles of constitutional law.

As some members of this Court have analogized, judges are like umpires calling balls and strikes, not players in the game. This Court should intervene to address a substantial overreach by the Ninth Circuit, which improvidently expanded the protections of the Eighth Amendment beyond its historical basis, disrupted the separation of powers between the judiciary and the legislature, and improperly usurped a policymaking function. Therefore, a grant of certiorari is appropriate.

CONCLUSION

Municipalities have struggled to walk the legal tightrope established by the Ninth Circuit in *Martin* and *Johnson*—with little success. The Ninth Circuit improperly extended the scope of the Eighth Amendment to bar enforcement of urban camping laws based on a tenuous argument that camping on public property is involuntary and thus cannot be criminalized. This is wrong. It is also bad public policy. The decisions may be well-intentioned, but the questions posed are squarely legislative. For these reasons, and the reasons stated in the Petition, this Court should grant certiorari and overturn the Ninth

Circuit decisions limiting the enforcement of public health and safety laws.

RESPECTFULLY SUBMITTED THIS 25th day of September, 2023.

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