**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 Appeal for the Ninth Circuit**

## BRIEF OF *AMICUS CURIAE* CITY OF LOS ANGELES IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE[1]

The City of Los Angeles and other local jurisdictions in the Ninth Circuit are trying to solve the humanitarian tragedy facing our unhoused residents, while simultaneously dealing with the health and safety concerns raised by having tens of thousands of people living with their possessions in public spaces intended for other, shared purposes. This crisis has reached such epic proportions in Los Angeles that the City declared a state of emergency to address homelessness. In *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) – as in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) before it – a deeply divided Ninth Circuit delivered an opinion that purports to be "narrow," but its terms are so sweeping, ambiguous, and ill-defined that the result is intolerable uncertainty for the policies, options, and continuing efforts to resolve homelessness in the City of Los Angeles and elsewhere.

The City agrees with the broad premise underlying the *Martin* and *Johnson* decisions: when a person has no other place to sleep, sleeping at night in a public space should not be a crime leading to an arrest, criminal conviction, or jail. *Martin*, 920 F.3d at 617. The City files this brief to clarify and provide local governments with guidance and certainty on *four*

[1] The City of Los Angeles served timely notice of its intention to file this amicus curiae brief to the counsel of record for all parties on September 11, 2023. Sup. Ct. R. 37.2. No party or counsel authored any part of this brief or made a monetary contribution intended to fund the preparation or submission of this brief. Sup. Ct. R. 37.6.

imperative questions the *Martin* and *Johnson* cases raise.

*First*, is the City of Los Angeles, and every other local government, required to conduct a temporal count of its homeless population and available shelter beds to determine whether there are enough beds for *every* homeless person within City limits before enforcing public space regulations against *any* individual? Such a count is physically impossible in a city the size of Los Angeles and is irrelevant in determining whether a shelter bed is available for a particular person.

*Second*, has the *Johnson* opinion foreclosed the possibility of individual enforcement against those who refuse to accept appropriate shelter by certifying a class of persons as "involuntarily homeless?" *Johnson's* contradictory language raises the unsettling possibility that available shelter beds, which are the first step to permanent supportive housing, will remain unused.

*Third,* does the language and rationale of *Martin* and *Johnson* disapproving regulation of the "unavoidable consequences of being human" extend beyond sleeping in public spaces when no shelter is available, possibly barring enforcement of basic public health and safety rules such as those prohibiting urination, defecation, or open flame cooking in public?

*Fourth*, has the *Johnson* decision expanded the *Martin* court's interpretation of the Eighth Amendment to preclude not just criminal enforcement but even *civil* penalties against persons experiencing homelessness who violate public space regulations?

If this Court allows the *Johnson* decision to stand – which skews the answer to all of the above questions towards yes – a real risk of lawlessness, illness, and threats to public health and safety exists, to the detriment of unhoused and housed residents alike.

Housing the unhoused remains the priority for the City until every single person experiencing homelessness has a safe place to sleep. In the interim, judicial clarity is essential to a well-run city maintaining the delicate balance of subsistence and safety in our communities. Sidewalks currently serve two often incompatible functions: housing tens of thousands of unsheltered residents (and their personal belongings), and also providing access and a right of way for pedestrians, wheel-chair bound travelers, school children seeking safe passage to and from school, business owners and customers relying on accessible store fronts, and residents seeking to access services from municipal, state, and federal government offices. The Ninth Circuit has made achieving an appropriate balance, incremental improvement, and progress unworkable. This Court should grant certiorari to help the City and other Ninth Circuit jurisdictions obtain judicial clarity so that we may keep public spaces safe and accessible to all while we work to house those in need.

## BACKGROUND

The City of Los Angeles is a sprawling metropolis covering 469 square miles[2] with a 2023 estimated population of 3,769,485,[3] 46,260[4] of whom were estimated to be homeless. The crisis in Los Angeles is of such unparalleled proportions that the Mayor has declared a state of emergency bringing focus, resources, and priority to this crisis.[5] The Mayor and City Council have dedicated unprecedented resources to these efforts and lifted impediments that cause delay and unwarranted expense in creating shelter and housing. The City has worked closely with the County of Los Angeles, the State of California, and federal agencies to obtain necessary aid to assist those who require public health resources, treatment, and social services that fall outside the City's jurisdiction to provide.

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[2] Los Angeles Almanac, City of Los Angeles, http:/www.laalmanac.com/LA/index.php (last visited August 28, 2023).

[3] U.S. Census Bureau, *City of Los Angeles Quick Facts* (July 1, 2022) ("Census Quick Facts"), https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia.

[4] L.A. Budget Summary, https://cao.lacity.org/budget/summary/2022-23%20Budget%20Summary_FINALrev.pdf; Los Angeles Homeless Services Authority ("LASHA") (based on a January 2023 count) https://www.lahsa.org/news?article=927-lahsa-releases-results-of-2023-greater-los-angeles-homeless-count (based on a January 2023 count).

[5] Mayor Karen Bass, posted December 12, 2002, https://mayor.lacity.gov/news/mayor-karen-bass-declares-state-emergency-homelessness

The sheer size of the City of Los Angeles and its large population of homeless individuals make counting unhoused people and available shelter beds on a regular basis infeasible. The City conducts an annual "Point-In-Time" count of unhoused individuals, as required by the United States Department of Housing and Urban Development.[6] In 2023, conducting the Point-in-Time count for the County of Los Angeles area required 6,066 volunteers working over three days.[7] The City cannot conduct an endeavor of such proportions on a daily, weekly, or even monthly basis.

The homelessness crisis, acute in the City, is not a tragedy easily solved. The root causes of homelessness are varied, complex, and beyond the powers of any city or even any court, acting alone, to create or to solve. Poverty is an obvious and significant cause of homelessness, where over 16 percent of the City's residents live in poverty.[8]

The affordable housing shortage and high cost of housing are also primary drivers of homelessness that have multifaceted causes and no quick or easy solutions. The temperate weather and economic engines in Los Angeles, including the entertainment

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[6] See, U.S. Department of Housing and Urban Development, https://www.hudexchange.info/trainings/courses/point-in-time-pit-count-standards-and-methodologies-training/ (Note: HUD requires, at minimum, an annual count of sheltered persons and a biannual count of unsheltered persons.)

[7] LAHSA Press Release, *LAHSA Wraps Up the 2023 Greater Los Angeles Unsheltered Count* (February 13, 2023), https://www.lahsa.org/news?article=914-lahsa-wraps-up-the-2023-greater-los-angeles-unsheltered-count.

[8] Census Quick Facts, see n.3.

industries, make Los Angeles one of the most expensive rental markets in the nation in terms of both rental rates and rent-burden (meaning the percentage of total income residents devote to rent). A 2021 study found that more than one-third of all Los Angeles renters were rent burdened[9] and the median rent in the City is nearly $3,000.[10] This lack of affordable housing persists despite a steady increase in housing stock and multiple efforts, including voter approved incentives and funding, to increase the supply of affordable housing.

Beyond household economics, other factors contribute to homelessness. The effects of the federal government's decision in 1981 to end its role in providing services to the mentally ill are directly reflected in the City's homeless population. According to the Los Angeles Homeless Services Authority's 2020 report, approximately 25 percent of unhoused residents suffer from serious mental illnesses, including psychotic disorders and schizophrenia.[11] A 2020 RAND study found that a majority of unhoused

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[9] University of Southern California Lusk Center for Real Estate, *Renter Vulnerabilities in Los Angeles, May, 2021.* https://la.myneighborhooddata.org/2021/05/renter-vulnerabilities-in-los-angeles/

[10] This is currently the fourth highest in the country, after New York, Miami, and San Diego. See USA Today, at https://www.usatoday.com/story/money/2023/06/25/nyc-rent-compared-la-chicago-major-us-cities/70351677007/

[11] LAHSA Press Release, *2020 Greater Los Angeles Homeless Count Results* (June 12, 2023), https://www.lahsa.org/news?article=726-2020-greater-los-angeles-homeless-count-results

residents – 54 percent – report experiencing mental illness.[12]

A broad spectrum of other factors contributes to the large homeless population in Los Angeles. For example, federal resources for veterans are insufficient, where veterans comprise three percent of the City's homeless residents.[13] In addition, 38% percent of homeless women on Skid Row experienced domestic violence or intimate partner violence, despite significant resources devoted to assisting domestic abuse victims.[14]

The number of persons experiencing homelessness in the City is daunting even though its elected leaders and taxpayers have, repeatedly, attempted to protect its most vulnerable residents by dedicating public resources, constructing shelters, and providing incentives to the private market to build affordable housing. In 2016, City leaders sponsored, and City voters overwhelmingly approved, Proposition HHH, a ballot measure to issue $1.2 billion in bonds to finance permanent supportive housing for the City's homeless residents.[15] In 2017, Los Angeles County voters taxed themselves to address homelessness by adopting

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[12] LOS ANGELES DAILY NEWS (January 28, 2023), Clara Harter, *LA is losing the battle against mental illness among its homeless,* https://www.dailynews.com/2023/01/28/los-angeles-is-losing-the-battle-against-mental-illness-among-its-homeless/

[13] L.A. Almanac, http://www.laalmanac.com/social/so14.php

[14] L.A. County Skid Row Action Plan, https://homeless.lacounty.gov/news/skid-row-action-plan-erf/ . And see, e.g., Safe LA, Domestic Abuse Response Team (DART), http://www.safela.org/about/dart/ (last visited August 28, 2023).

[15] See, L.A. Bureau of Contract Administration, https://bca.lacity.org/HHH_PLA_Docs

Measure H, imposing a County-wide sales tax to fund homeless outreach, emergency shelters, rapid rehousing, and permanent supportive housing.[16] Most recently, in 2022, City voters adopted Measure ULA, which imposed a transfer tax on the sale of certain real property to fund affordable housing projects and provide resources to tenants at risk of becoming homeless.[17] All told, the 2023-2024 budget of the City of Los Angeles provides $1.3 billion to address the homelessness crisis just this fiscal year alone.[18]

Unfortunately, even allocating these considerable resources has not yet abated the current homeless crisis. Instead, the latest Point-in-Time count revealed a ten percent increase in homelessness to 46,260[19] since the last count. Even with additional funding and the current Mayor and other City leaders prioritizing the crisis, the City struggles to keep pace with the ever increasing tide of individuals becoming homeless.

Like the cities of Boise and Grants Pass, the City of Los Angeles once had a city-wide ordinance banning dwelling in the public right of way. The Ninth Circuit invalidated the City's ordinance in the first case that prohibited public dwelling in public rights of way

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[16] As part of the L.A. County, Homeless Initiative, Measure H results in $355 million per year for 10 years to pay for services to those experiencing homelessness. See, https://homeless.lacounty.gov/measureh/.

[17] Los Angeles Office of Finance, https://finance.lacity.gov/faq/measure-ula

[18] L.A. Budget Summary, 2023-2024, at page 4, https://cao.lacity.org/budget23-24/BudgetSummary/

[19] L.A. Almanac, http://www.laalmanac.com/social/so14.php

under the Eighth Amendment. See *Jones v. City of Los Angeles,* 444 F.3d 1118 (9th Cir. 2006), vacated, 505 F.3d 1006 (9th Cir. 2007) (the former ordinance is quoted at 1123). In *Jones*, the Ninth Circuit held in a broad decision that it was cruel and unusual punishment under the Eighth Amendment for the City to enforce its ban on "sitting, lying or sleeping" on the sidewalk against a homeless person when more homeless persons than shelter beds existed in the City. *Id.*, at 1138. The City settled the *Jones* case, vacating the published opinion, under a negotiated enforcement plan that effectively legalized public dwelling during overnight hours. The City has been grappling with the ramifications of that settlement (*i.e.* the strain of having a large population of persons experiencing homelessness dwelling on shared public spaces) for more than 15 years. This brief reflects the City's well-founded concerns with the *Johnson* opinion gained from the City's experience and enduring commitment to reducing and resolving homelessness.

## SUMMARY OF ARGUMENT

On three separate occasions, the Ninth Circuit issued decisions applying the Eighth Amendment to public dwelling bans. Each decision left a wake of unacceptable consequences and confusion. *Johnson* relies heavily on *Martin,* which in turn fully endorses the broad, sweeping language of *Jones*, the earlier, vacated opinion. *Martin,* 920 F.3d at 617; *Johnson*, 72 F.4th at 877. To the significant detriment of local governments in the Ninth Circuit, these decisions are vague, overbroad, and internally inconsistent. While generally burdensome, *Johnson* manifests its incongruities in four particularly pernicious ways.

*First*, by generally citing *Jones* and *Martin* with approval and side-stepping the issue, *Johnson* raises the specter that cities must conduct a nightly count of persons experiencing homelessness and confirm that suitable shelter beds exist for *every* person before it can enforce a dwelling ban against *any* person. *Jones* held that until every homeless person in the City had an available bed, the City could not take any enforcement action against sleeping in public. See *Martin*, 920 F.3d at 617. This would require a current count of both homeless individuals and beds. As the dissenters to the denial of *en banc* rehearing in *Martin* observed, this requirement is impossible to administer even in the City of Boise (with 125 of its 867 homeless population unsheltered). *Id*., at 594 (Smith dissent). The challenge is exponentially greater, and virtually impossible, in the City of Los Angeles (with most of its 46,260 homeless population unsheltered). *Id*., at 594-95.

*Second*, while *Johnson* endorsed *Martin*'s declaration that its "limited" holding can only be applied by considering each person's individual circumstances to determine if they were involuntarily homeless, *Johnson* also undermined that declaration by affirming a class action remedy. See *Martin*, 920 F.3d at 617, n.8; *Johnson*, 72 F.4th at 918. *Johnson*'s attempt to sidestep this contradiction by incorporating "involuntarily homeless" into the class definition has the inappropriate effect of presupposing that all homelessness is involuntary, thus eliminating individual considerations. See *Johnson*, 72 F.4th at 878 and 908-10 (Collins, dissent), and 939-40 (Smith, dissent). As a result, *Johnson* appears to agree that the City may not enforce a public dwelling ban against

someone who is offered appropriate shelter but refuses it, unless the City has sufficient beds available for all other homeless individuals. The result would be that beds that the City struggles to fund and races to build will remain empty until the City proves enough beds exist for everyone.

*Third*, the sweeping rationale in *Martin,* now affirmed by *Johnson*, implicates not just public dwelling bans but *any* regulation of acts that are "unavoidable consequences of being human." *Martin*, 920 F.3d at 617, n.8; and see *Johnson*, 920 F.3d at 877. This rationale calls into question whether cities like Los Angeles can enforce public health and safety laws that prohibit public urination, defecation, and indecency, or public use or storage of hazardous and flammable materials (including cooking fuel) in public spaces. Doubt about the City's ability to enforce these and other rules makes our public spaces less safe and sanitary even where they are still accessible.

*Fourth*, *Johnson* is purportedly limited to potential criminal enforcement, but the named plaintiffs only received civil citations and were never criminally prosecuted. See *Johnson*, 72 F.4th at 933-34 (Graber, separate opinion). The Grants Pass ordinances only temporarily allow criminal prosecution after two infractions and a discretionary prior exclusion order and Grants Pass did not issue that order to any named plaintiff. *Johnson* further proclaims that its "decision does not address a regime of purely civil infractions" while affirming an injunction that barred Grants Pass from enforcing its ordinances using civil infractions. *Id*., at 896. The effect of *Johnson*, therefore, is to bar

cities from using civil infractions to enforce public dwelling laws.

Finally, the deeply divided Ninth Circuit creates an additional layer of uncertainty. This Court must provide local governments with the clarity required to pass defensible ordinances and enforce basic standards necessary for public health and safety in public spaces for the benefit of all its citizens.

## ARGUMENT

The priority for the City of Los Angeles is to procure shelter and supportive housing for its homeless population but, until substantially more options are available, the City recognizes that many of its homeless residents sleep outside out of necessity and not by choice. Reasonable restrictions on where and when public dwelling should occur balances the rights of our homeless residents with the responsible stewardship of the public spaces everyone shares. To reach this goal, the City needs judicial clarity for reasonable policies, enacted by policymakers in clearly drafted ordinances, that are applied with respect for clearly defined individual rights in conducting individual enforcement.

### I. CITIES FACING THE NATIONWIDE HOMELESSNESS CRISIS URGENTLY NEED CLARITY AND GUIDANCE FROM CERTIORARI REVIEW.

Given the national scope of the homelessness crisis, local governments urgently need clarity on how to regulate shared public spaces. Virtually every local government across the country has ordinances requiring passable public space and closing times for

parks. This Court should grant certiorari to ensure consistency in the constitutional principles applicable to these laws. See *New York v. Ferber*, 458 U.S. 747, 749, n.2 (1982) and *New York v. O'Neill*, 359 U.S. 1, 3 (1959) (where the Court granted certiorari "inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico").

## II. *JOHNSON* MAGNIFIES AND ADDS TO THE INCONSISTENCIES AND AMBIGUITIES OF *MARTIN* IN WAYS THAT ARE DETRIMENTAL TO A SAFE AND WELL-RUN CITY.

### A. The Nightly Tally of Homeless Persons and Shelter Beds Contemplated By *Johnson (*and *Martin)* Is Impractical for Most Cities.

*Johnson* reinforces an unworkable regime to regulate public spaces under the guise of constitutional principles. *Johnson* follows and builds on *Martin, Johnson*, 72 F.4th at 874 & 896, which held "so long as there is a greater number of homeless individuals in a jurisdiction than the number of individual beds in shelters, the jurisdiction cannot prosecute homeless individuals" for public habitation. *Martin*, 920 F.3d at 617, cleaned up.

While this broad holding would be difficult to implement in a small city like Grants Pass or Boise, it presents an impassable barrier to enforcement of basic public safety, sanitation, and health regulations in a city the size of Los Angeles. Grants Pass has a population of about 38,000, in which "at least fifty, and

perhaps as many as 600" people are homeless. *Johnson*, 72 F.4th at 874. Out of a population of over 235,000, Boise's homeless population totaled 867, about 125 of whom were unsheltered. *Martin*, 920 F.3d at 604. In stark comparison, the City of Los Angeles' homeless population is roughly 46,260, more than 32,000[20] of whom are unsheltered on any given night. See *Johnson*, 72 F.4th at 934 n.2 (Smith, dissent). The last time Los Angeles took a census of homeless residents it took three days and more than 6,000 volunteers.[21]

Counting available shelter beds in a major city is monumentally difficult. For example, Grants Pass had no secular shelters generally available to adults. *Johnson*, 72 F.4th at 877, and 894. Boise had just three shelters to monitor for a current count of available shelter beds. *Martin,* 920 F.3d at 605. In stark contrast, dozens of public, private, religious, and secular shelters are spread out over the 469 square miles that comprise the City of Los Angeles, and others are available in the 87 other cities and unincorporated territories that make up the County of Los Angeles Continuum of Care. Los Angeles, like Boise, does not own or operate all the shelters; thus, "the City is wholly reliant on the shelters to self-report when they are full." *Martin*, 920 F.3d at 609. Given the impossibility of determining available shelter beds in the aggregate under these conditions, the City's approach to street homelessness and bringing people indoors has focused on identifying availability and

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[20] L.A. Almanac, http://www.laalmanac.com/social/so14.php

[21] Los Angeles Daily News (February 13, 2023), https://www.dailynews.com/2023/02/13/volunteers

offering specific shelter beds to specific individuals or encampments.

*Johnson* and *Martin* also held that any shelter "with a 'mandatory religious focus' could not be counted as available due to potential violations of the First Amendment's Establishment Clause," *Johnson*, 72 F.4th at 877 (citing *Martin*, 920 F.3d at 609-10), raising the specter that a city like Los Angeles must assess each private shelter to determine whether it should be excluded on religious grounds even if an individual in need of shelter does not object to or even welcomes the offer of a bed in a non-secular shelter. The *Jones* analysis also raises additional imponderables, such as whether the shelter offered must be in a particular jurisdiction, or without conditions such as restrictions on drug use, smoking, or other conduct.

The six judges dissenting from the denial of *en banc* review of *Martin* agreed, describing the holding as leaving a city with a "Hobson's choice," either to "undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety." 920 F.3d at 594 (Smith dissent). Even if a relatively small town or city could potentially comply with the *Johnson*/*Martin* homeless versus shelter beds counting requirement, cities like Los Angeles, San Francisco, San Diego, Sacramento, Seattle, Portland, Las Vegas, Phoenix – and a host of others – simply cannot.

### B. *Johnson* Imposes Impractical Requirements on Los Angeles' Plenary Authority to Regulate Public Spaces and Fill Available Shelters.

The amended *Johnson* opinion both invoked and undermined the individual consideration that *Martin* relied on for its "narrow" holding, concluding that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." *Johnson*, 72 F.4th at 892. *Johnson* even quotes *Martin*: "our holding does not cover individuals who do have access to adequate temporary shelter…but who choose not to use it." *Id.*, at 877, and 918 (separate opinion). Nevertheless, *Johnson* undermined the individual consideration that *Martin* relied on by affirming class certification. In fact, neither *Johnson* nor *Martin* addresses the practical question Los Angeles faces every night: what are the City's options regarding a specific homeless individual for whom a shelter bed is available, but not enough shelter beds exist for the entire homeless population?

This ambiguity is rooted in the conflicting language in *Martin*, which both required individual consideration and also approved the sweeping language in *Jones* that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for dwelling in public, thus eliminating individual considerations. *Martin*, 920 F.3d at 604, 617; and see *Johnson*, 72 F.4th at 877, 892 (endorsing *Martin*'s reliance on *Jones*). While the amended *Johnson* opinion deleted an express statement that cities could

enforce public space restrictions only when sufficient shelter beds existed for all homeless individuals, that amendment did not clarify the holding's scope, but only reduced its transparency. See *Id.*, at 938-39 (Smith, dissent) ("But I fear that this amendment, in reality, does little to change the substance of *Grants Pass* and instead simply obscures what *Grants Pass* holds.") Indeed, *Johnson* still compares beds to homeless persons as the enforcement threshold. See *id.* at 874-75, and at 879.

In addition, in certifying an "involuntarily homeless" class, *Johnson* precludes the individual inquiry required to establish an Eighth Amendment defense to enforcement as discussed in *Martin*. *Johnson*, 72 F.4th at 907-08 (Collins, dissent); and see *Martin*, 920 F.3d at 607-08. Instead, *Johnson* used *Martin*'s scope of liability to improperly define a "fail-safe" class action, thus incorporating the individual determination of involuntarily homeless into the class definition. See *Johnson*, at 909-10 (Collins, dissent). The practical result is that an attempted individualized inquiry of whether a specific individual declined to access shelter available to them prior to enforcement gets pushed aside in favor of a simple comparison of the number of total shelter beds versus homeless persons. *Id.*, at 910 (Collins dissent), 939-40 (Smith dissent); and see *Coalition on Homelessness v. City and County of San Francisco,* __ F.Supp.3d __, 2022 WL 17905114, *28 (N.D. Cal. 2022) (injunction against enforcement upheld if more homeless individuals than beds exist, citing *Martin* and *Johnson*.). While it was already challenging under *Martin* for cities to govern public spaces, under *Johnson* it is a potential violation to even attempt

enforcement without first proving a homeless person's status. See, *Johnson*, 72 F.4th at 940-43 (Smith, dissent) (describing three cities' efforts to employ an individual assessment under *Martin* that were rejected for lack of enough shelters).

*Johnson* and *Martin*'s stated concern with the plight of homeless individuals rings hollow in light of the obstacles they've erected to the City's efforts to deploy all available shelter beds for its homeless residents. The Ninth Circuit misreads the Constitution to enjoin cities from preventing an individual from sleeping or camping (or as set forth below, engaging in other "unavoidable" activities) in the public right of way when a shelter bed is available to that person, leaving that bed unused. The Court should grant certiorari to answer yes to the simple question of whether the City can inform an individual that "It's illegal to sleep here, when we have a bed for you, and we do." though not enough beds exist for everyone.

### C. *Johnson* (and *Martin*) Undermine the City's Plenary Authority to Regulate Public Health, Sanitation, and Safety of its Public Spaces.

*Johnson* embraces the *Martin* and *Jones* holdings that a local government violates the Constitution when it prohibits conduct in public spaces that is an "unavoidable" result of being human. *Johnson*, 72 F.4th at 892; citing *Martin*, 920 F.3d at 616, quoting *Jones*, 444 F.3d at 1135. That is just plain wrong as a legal matter and unworkable at a practical level for local governments. A broad array of activities are "unavoidable consequences" of being human. May a

local government regulate cooking food or having an open flame on a public sidewalk? What about urination and defecation in public spaces? Public indecency? Obviously sleeping is not the only human activity that is "unavoidable" for all humans. Surely the City can regulate behavior and actions - even "involuntary" ones - that interfere with the shared purposes of our public spaces or endanger public health or safety. A core mandate for every municipality is to keep its public space safe and accessible to all of its residents. *Schneider v. State*, 308 U.S. 147, 160-161 (1939). As this Court repeatedly recognized, a municipality's duty is to keep public property "open and available for movement of people and property" – the "primary purpose for which the streets are dedicated" – while at the same time respecting "the constitutional liberty of one rightfully upon the street." *Schneider*, 308 U.S. at 160-161.

*Johnson* also added a new level of ambiguity by extending *Martin*'s focus on an individual's status or actions to include protection for their personal belongings. For example, while *Johnson* rules as a matter of constitutional law that a city cannot prevent "the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag for bedding purposes," it also suggests that a city could "limit the amount of bedding type materials allowed per individual…" See *Johnson*, 72 F.4th at 879, and 889. This contradiction burdens local governments with the task of determining, for example, whether a person's constitutional rights extend to having two blankets or three, or one or two pillows.

These legal ambiguities foster litigation and drain public resources. Case in point: like other jurisdictions attempting to regulate public encampments, the City faces lawsuits both for enforcing public space property storage regulations and for failing to sufficiently enforce them. Compare *Cooley v. City of Los Angeles,* 2019 WL 1936437, *4 (C.D. Cal. 2019) (homeless plaintiffs challenge law regulating the amount of personal property one may store in public space) and *Garcia v. City of Los Angeles,* 11 F.4th 1113, 1116 (9th Cir. 2021) (declaring unlawful portion of City ordinance that allowed for immediate seizure and destruction of "Bulky Items," defined as items larger than 60 gallons, stored in the public right of way); with *LA Alliance v. City and County of Los Angeles,* 2020 WL 13586046 (C.D. Cal. 2020) (plaintiffs assert constitutional and state law claims for the failure to rein in homeless encampments).

Trial court decisions throughout the Ninth Circuit reflect this unresolved confusion following the *Martin* decision. E.g., *Aitken v. City of Aberdeen*, 393 F.Supp.3d 1075, 1079 (W.D. Wash. 2019) (precluding enforcement of ordinance that imposed a civil infraction for camping on public property, even though it was enforceable only when shelter was available); *Miralle v. City of Oakland*, 2018 WL 6199929, at *2 (N.D. Cal. 2018) and *Le Van Hung v. Schaff*, 2019 WL 1779584, at *5 (N.D. Cal. 2019) (holding that *Martin* did not establish a constitutional right to occupy public property indefinitely); *Gomes v. County of Kauai,* 481 F.Supp.3d 1104 (D. HI. 2020) (upholding ordinance precluding camping without a permit, holding that the Eighth Amendment is not

implicated when other public land is available for homeless dwelling); *Santa Cruz Homeless Union v. Bernal*, 514 F.Supp.3d 1136, 1138 (N.D. Cal. 2021) (enjoining the city from closing homeless encampments in parks during a COVID-19 surge when the shelters were full); *Sacramento Homeless Union v. County of Sacramento*, 617 F.Supp.3d 1179 (E.D. Cal. 2022) (temporarily banning Sacramento from clearing homeless encampments during excessive heat event); *Shipp v. Schaff*, 379 F.Supp.3d 11022, 1035 (N.D. Cal. 2019) (*Martin* does not prevent a City from temporarily closing an encampment for cleaning).

Most recently, the district attorney for Sacramento County brought a nuisance and condemnation action asking that the state court require the City of Sacramento to enforce existing laws and create new measures to clear encampments in public areas, including those blocking access to the courthouse and the office of the district attorney,[22] on the heels of the federal court's temporary enforcement ban this summer.

Ironically and sadly, the chaos of defending lawsuits from both sides over whether or how to enforce public space regulations creates paralysis and diverts limited public resources from the homeless population that needs it most. The City endeavors to enact constitutionally sound public space regulations and this Court should grant certiorari to provide the guidance necessary to enact lawful health, safety,

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[22] CBS News, Sept. 19, 2023, https://www.cbsnews.com/sacramento/news/landmark-homeless-lawsuit-people-vs-city-of-sacramento/

sanitation, and welfare regulations in our public spaces that all can follow.

### D. *Johnson* Undermines the City's Enforcement Options for Regulating Public Spaces–and More.

The City of Los Angeles, like many cities, struggles to protect and serve all of its residents, both unhoused and housed, while also guarding public spaces and resources and minimizing the diversion of resources to seemingly endless litigation. *Johnson* compounds that struggle with a contradictory ruling that obfuscates the constitutional limitations on cities' ability to govern its public spaces and other matters within a municipality's jurisdiction. While *Johnson* professes that it limited its holding to potential criminal prosecutions, the *Johnson* injunction barred any attempted enforcement, including civil infractions. *Johnson*, 72 F.4th at 896.

In Grants Pass, after a person received two similar anti-camping infractions within one year, the police could exclude that individual from city parks for 30 days, and Grants Pass could criminally prosecute a violation of that exclusion order. *Johnson*, 72 F.4th at 876. However, Grants Pass did not send any of the named plaintiffs an exclusion letter or criminally prosecute them under the ordinances. See *id.*, at 933-34 (Graber, separate opinion). Thus, while *Johnson* states that its "decision does not address a regime of purely civil infractions" the Ninth Circuit did not limit the affirmed injunction to criminal prosecutions, but rather upheld a bar on all use of infractions and other civil means of enforcement. *Id.*, at 896. These contradictions further undermine confidence in what

tools cities may use to govern their public spaces, far beyond the context of homelessness.

### E. The Dramatic Ninth Circuit Split Further Increases Uncertainty.

The deeply divided Ninth Circuit further increases the uncertainty for local governments. The *Johnson* panel delivered a 2-1 decision upholding class certification over a strenuous dissent. *Johnson*, 72 F.4th at 896. The Ninth Circuit denied Grants Pass's petition for *en banc* rehearing by a 14-to-13 vote, resulting in three dissenting opinions, in which several senior judges joined, adamantly challenging the results in *Johnson* and *Martin*, both on the merits and regarding class certification. See *Johnson*, 172 F.4th at 934, 943, 944-45.

These circumstances are an additional reason why this Court should grant certiorari; such a deep division within the same circuit only seeds further confusion and uncertainty. Unable to predict the composition of future appellate panels, and with advocates on both sides emboldened by the division, local governments lack the guidance needed to implement constitutional ordinances that will not result in endless litigation and further enmesh the federal courts in the type of ongoing policy making and enforcement for which they are not well suited.

## CONCLUSION

The *Johnson* and *Martin* decisions undermine the efforts by the City of Los Angeles to balance the conflicting goals and purposes for its public spaces and the rights of those who share them. A homeless person with no other place to live than the public sidewalk

has potentially incompatible interests with children whose route to school takes them through encampments of adult living situations, including potential drug use; with disabled residents immobilized when their wheelchair or other mobility device is blocked; with local business owners operating behind an unbroken line of encampments; or with residents unable to access public services due to impassible sidewalks, blocked doorways, or simply out of fear. The Ninth Circuit's lack of clarity needlessly paralyzes the City's ability to resolve this conflict, and increases the risk of further litigation at a time when the homelessness crisis demands urgent, clear, solution-oriented approaches from local governments. The City strives to ensure that it offers homeless people appropriate places to sleep, that public sidewalks are safe and accessible for everyone, and that litigation does not divert public resources from desperately-needed shelters and housing. For these reasons, the City of Los Angeles urges this Court to grant certiorari.

Respectfully submitted,

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