

No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARY SITUATED,

Respondents,

*On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit*

**BRIEF OF AMICUS CURIAE
THE COUNTY OF ORANGE, CALIFORNIA
IN SUPPORT OF PETITIONER**

LEON J. PAGE, *County Counsel*

MARIANNE VAN RIPER, *Senior Assistant
County Counsel*

LAURA D. KNAPP, *Counsel of Record,
Supervising Deputy County Counsel*

GOLNAZ ZANDIEH, *Deputy County Counsel*

County of Orange, Office of the County Counsel

400 West Civic Center Drive, Suite 202

Santa Ana, California 92701

Telephone: (714) 834-3300

Facsimile: (714) 834-2359

laura.knapp@coco.ocgov.com

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE

Pursuant to Sup. Ct. R. 37, the County of Orange, California (“County of Orange,” “Orange County,” or “County”) respectfully submits this brief as *amicus curiae* in support of Petitioner, City of Grants Pass, Oregon¹.

Known for its warm and sunny weather, pristine beaches and parks, popular tourist attractions, enterprising spirit, diverse cultures, and desirable quality of life, Orange County is the third most populous county in the State of California. Home to more than 3.19 million residents, Orange County has a population approximately equal to the population of the State of Iowa, and, in fact, has more residents than some 18 States.

Within Orange County’s densely-populated 790 square miles of land, there are 34 separate, incorporated cities – all of which are empowered within their city limits to independently exercise police powers to protect public health and safety.

¹ Pursuant to Rule 37.6, Amicus Curiae County of Orange, California is a government entity and is therefore exempt from Rule 37.6 disclosure requirements. Nevertheless, the undersigned counsel for amicus curiae hereby certify that the counsel of no party has authored this brief in whole or in part. The undersigned further certify that none of the parties and no counsel of any of the parties has contributed to draft of this brief in whole or in part. Finally, the undersigned certify that no one other than amicus has contributed money to this brief.

Twenty-one of the County's 34 cities have their own police departments.²

As a result of the County being a desirable place for all people to live, including people experiencing homelessness, Orange County is significantly impacted by the Ninth Circuit's rulings in *Johnson, et al v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) *cert. granted sub nom. Grants Pass, OR v. Johnson*, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024) ("*Grants Pass*"), and *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019) ("*Boise*"). At the last completed Point in Time count, Orange County had over 5,718 sheltered and unsheltered homeless individuals³ living countywide, *i.e.*, within its geographic borders .

The County owns and operates two emergency shelters and provides funding to other city-operated and private shelter facilities throughout the County. However, neither the County nor its 34 cities can provide an adequate shelter bed for every person (in the world) who wishes to call Orange County home and the Constitution does not require that these local governments provide a practically unlimited number

² The Orange County Sheriff's Department provides law enforcement services to thirteen cities in the County and in the County's unincorporated areas.

³ Every two years each public agency serving homeless individuals throughout the nation conducts a Point in Time (PIT) count to obtain accurate data on the number of unsheltered and sheltered individuals experiencing homelessness in its jurisdiction. Orange County HMIS, OC Point In Time Count (PIT) Reports and Briefs: <http://ochmis.org/point-in-time-count-pit/>

of shelter beds as a prerequisite to protecting the health and safety of their residents.

Nonetheless, despite the ever-growing homeless population throughout California which has skyrocketed since the *Boise* decision, Orange County is the only County within California that saw a reduction in its homeless population in 2022.⁴ This *amicus* brief explains how Orange County achieved this spectacular result, *i.e.*, by obtaining a District Court's consent decree that authorized the County to operate outside of the unworkable *Boise* and *Grants Pass* framework.

The Ninth Circuit Created An Unpredictable and Uncertain Legal Minefield for Public Entities

When a local government entity, such as a county or city, endeavors to address the serious health and safety challenges presented by street homelessness and/or homeless encampments, challenges that include disease, contagion, human waste, crime, litter, fire risks, destruction of property and environmental degradation, public entities in the Ninth Circuit must now navigate an unpredictable and uncertain legal minefield that entails significant exposure to sizable attorney's fee awards – fee awards

⁴ Pursuant to 2022 PIT count County of Orange had the total of 5,718 individuals experiencing homelessness. In 2019, County of Orange had the total of 6,860 individuals experiencing homelessness. Orange County HMIS, OC Point In Time Count (PIT) Reports and Briefs: <http://ochmis.org/point-in-time-count-pit/>

that divert limited public resources away from those most in need of services.

The risk of adverse rulings and attorney fee awards is exacerbated by the difficult questions left unaddressed and unanswered by the Ninth Circuit in *Grants Pass* and *Boise*, including:

- (1) How is a local public entity to determine, in real time, whether there are enough shelter beds in a jurisdiction (however “jurisdiction” is to be defined) when many people experiencing homelessness are shelter resistant, perhaps even voluntarily homeless or suffering from mental illness that prevents them from accepting shelter even after multiple offers of assistance?
- (2) When a law enforcement officer has probable cause to believe that a person experiencing homelessness is engaged in trespassing, loitering, and/or unpermitted camping, in violation of state or local law, is the appropriate jurisdiction (for determining the number of available shelter beds and the “voluntariness” of the person’s conduct) the city, the county, or the State?
- (3) Does the determination of the appropriate “jurisdiction” depend on the specific law being enforced, the arresting officer’s employing department, the present location of the person experiencing homelessness, or something else? Does the availability of shelter beds across municipal boundaries in a different

jurisdiction, potentially a few blocks away, matter?

- (4) If enforcement of trespassing, loitering, and/or anti-camping ordinances is conditioned on the number of available shelter beds in a jurisdiction (however “jurisdiction” is defined), relative to the number of people experiencing homelessness in that same jurisdiction, how is a public entity to ascertain the number of actual homeless people in its jurisdiction on any particular day?
- (5) How is a law enforcement officer able to determine, in real time, whether an available shelter bed is “adequate” when an individual experiencing homelessness claims a disability under state and/or federal law and then requests a modification of services to accommodate his or her claimed disability?
- (6) Must jurisdictions be prepared to accommodate a homeless individual’s requests for personal privacy, and/or space for partners, caregivers, and/or pets before an available shelter bed is deemed “adequate?”
- (7) Is the failure to provide an adequate accommodation tantamount to a violation of the Eighth Amendment’s prohibition on cruel and unusual punishment, a Constitutional tort, if the individual is then arrested for trespassing, loitering, and/or violating an anti-camping ordinance?

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No court has answered these questions. Perhaps no court can, but as a result of the significant uncertainty created by the *Boise* and *Grants Pass* decisions, public entities are often paralyzed and take no action to protect public health and safety as homeless encampments metastasize – or are forced to litigate their public health response when they do. The results of such litigation will then depend upon the assigned judicial officer’s interpretation of the Ninth Circuit’s decisions and their answers to the questions presented above. These public interest lawsuits against public entities may span years and are often backed by large law firms seeking exorbitant attorney’s fee awards, which then threaten to cripple the public entities’ ability to assist the homeless population it is trying to serve.

In light of the questions presented above and the associated legal risks to the County, since litigation was not, in any real sense, winnable – the County could never build enough beds to shelter every homeless person who wishes call Orange County home – if Orange County was going to tackle its homeless crisis while protecting the health and safety of its residents, it had to find a better way.

**Facing Significant Legal Uncertainty and
Exposure to Attorney’s Fee Awards, Orange
County Quickly Settled and Entered into a
Consent Decree to Obtain Protection from
Other Lawsuits**

Given the uncertain state of the law, and the opportunity to recover significant attorney’s fee awards against public entity defendants, Orange

County's efforts to address its homeless crisis were quickly challenged in multiple public interest lawsuits, including one highly publicized case, *Orange County Catholic Worker v. County of Orange, et al.*, USDC Case No. 8:18-cv-00220-DOC (KES) ("*Catholic Worker*"), which was filed in response to Orange County's successful clearing of a large, 700+ person homeless encampment in the Santa Ana River, a flood control channel located in central Orange County.

With the assistance of the U.S. District Court, the Honorable David O. Carter, the *Catholic Worker* case resulted in a landmark class action settlement and consent decree that created an innovative, yet practical and workable framework for addressing homelessness across the County. It can and should be a model for all jurisdictions.

Under the *Catholic Worker* settlement, the County Sheriff is permitted to enforce local ordinances prohibiting unauthorized loitering and camping, but only under certain conditions. Significantly, in specified Restricted Areas and County parks, law enforcement is not required to identify an appropriate and immediately available shelter placement but is instead required to advise the individual to relocate to another area, and to then provide that homeless individual a reasonable opportunity to gather his or her belongings before issuing a citation or effecting an arrest.

For enforcement in other public areas, i.e., areas that are not specified Restricted Areas or County Parks, the *Catholic Worker* settlement did not require the County to identify and then make available one shelter bed for every person experiencing

homelessness in the jurisdiction – which some courts have interpreted the *Boise* decision to require. In fact, the *Catholic Worker* settlement is completely silent as to the total number of available shelter beds needed in the County’s jurisdiction. Instead, the *Catholic Worker* settlement requires that any enforcement of anti-camping or loitering laws against individuals experiencing homelessness be preceded by (1) contacts with System of Care personnel, and (2) an offer of shelter or some other housing opportunity.

The *Catholic Worker* settlement has provided Orange County with a mechanism to protect its parks, flood control channels, and other open spaces, while also facilitating contacts and engagement from specially trained County personnel. As a result, hundreds of people experiencing homelessness have been assisted, provided shelter and/or have been given housing vouchers to obtain permanent supportive housing. If not for the *Catholic Worker* settlement (which will expire in July 2025), the County would be paralyzed by the holdings of *Boise* and *Grants Pass*, as it could not possibly provide enough shelter beds for *every* person experiencing homelessness who wishes to reside in Orange County.

SUMMARY OF ARGUMENT

As a result of the significant uncertainty and unanswered questions created by the *Boise* and *Grants Pass* decisions, public entities have been needlessly stymied in their efforts to both assist persons experiencing homeless and maintain public health and safety. These ambiguous and detrimental decisions should be overturned for that reason alone –

by exacerbating the problem of homelessness, these ill-considered decisions have significantly and needlessly increased the quanta of human suffering in the Ninth Circuit.

Other considerations reinforce this conclusion. First, *Boise* and *Grants Pass* are based on a disregard of the plain and unambiguous language of the Eighth Amendment, which prohibits the infliction of “cruel and unusual punishments.” On its face, the Eighth Amendment has no bearing whatsoever on a law enforcement officer’s decision to arrest a person based on probable cause. An arrest in response to a criminal “conduct” is not “punishment”; it is merely the commencement of a legal process, necessarily supervised by a court, that can and often does then lead to diversion, treatment, rehabilitation, and housing. By conflating law enforcement with punishment, the Ninth Circuit has effectively immunized people experiencing homelessness, to their detriment, from state trespass and local anti-camping and anti-loitering law.

Second, even assuming *arguendo* that an arrest (or citation) for trespassing, loitering, and/or unpermitted camping, in violation of state or local law could be considered a violation of the Eighth Amendment, the analysis of whether the arrest or citation constitutes “cruel and unusual punishment” should be determined on an individual basis, not on a class-wide basis. Courts should not be making blanket assumptions about people experiencing homelessness, or how they came to be that way. Each person experiencing homelessness has a unique story – and each person experiencing homelessness requires a

unique solution – and gentle nudges from law enforcement are often an essential element of the solution.

Finally, these decisions wrongfully intrude and interfere with the lawful exercise of police power of local governments.

ARGUMENT

I.

The Ambiguities in the *Boise* and *Grants Pass* Mandates Have Crippled Public Entities and Should Be Overturned

The Ninth Circuit’s opinion in *Boise* is ill-considered, ambiguous, and, speaking from experience, entirely unworkable. While seemingly requiring that each *jurisdiction* (however defined) demonstrate the availability of an adequate shelter bed for every homeless individual within that jurisdiction, the *Boise* opinion also states:

“[n]aturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it” and that ordinances that ban camping may be lawful “at particular times or in particular locations.”

See *Boise, supra*, 920 F.3d at 617 fn.8. This footnote has led to countless disputes (typically waged between

County attorneys and homeless advocates) as to what constitutes “adequate” shelter.

Four years after *Boise*, the Ninth Circuit in *Grants Pass* took the *Boise* decision one step further and now effectively prohibits local governments from enforcing their anti-camping laws unless they can demonstrate the availability of a shelter bed for *every* single homeless individual within their political boundaries, regardless of whether some percentage of the homeless population is voluntarily homeless, mentally ill, or otherwise service resistant. As we discuss below, these two Ninth Circuit decisions are entirely unworkable and impractical for several reasons.

A.

Jurisdiction

First and foremost, the concept of “jurisdiction” is vague and ambiguous. In its decisions, the Ninth Circuit has not identified which “jurisdiction” is ultimately responsible for providing the adequate shelter beds that it views as the Constitutional precondition for the enforcement of laws prohibiting authorized camping, loitering, and/or trespassing. As noted above, Orange County has 34 incorporated cities; individuals experiencing homelessness are often transient and homeless individuals frequently migrate across municipal boundaries. Municipal governments vary widely in their size and the resources at their disposal. Some public services are offered by cities; other services are provided by the county or by the state government. The Ninth Circuit

has not addressed whether the determination of the appropriate “jurisdiction” depends on the specific law being enforced, the arresting officer’s employing department, or the present location of the person experiencing homelessness. Similarly, the Ninth Circuit has not addressed whether the availability of shelter beds across municipal boundaries in a different jurisdiction, potentially only a few blocks away (such as in densely populated Orange County) may be considered in determining whether local laws may be enforced. The Ninth Circuit’s failure to address these questions creates significant litigation risk and attorney fee exposure for public entities that endeavor to protect public health and safety while providing services to people experiencing homelessness.

The next question that a public entity must decide – again, at significant legal peril, assuming it desires to protect the health and safety of its residents – is the number of shelter beds it needs to make available for this transient homeless population. *Boise* and *Grants Pass* appear to mandate a one-to-one ratio of beds to individuals experiencing homelessness. Under the panel’s decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. There are many problems with this approach, and we highlight the most obvious below.

First, by imposing this one-to-one mandate, the Ninth Circuit failed to consider that many homeless individuals simply will not accept shelter. Many homeless individuals are service resistant, meaning

they will not accept any form of shelter, perhaps because of substance abuse, untreated mental illness, or perhaps by choice, preferring to “live off the grid” – or, as we have experienced, in an unpermitted campground by the beach. Consequently, the *Boise* and *Grant Pass* decisions require more shelter beds than would ever realistically be utilized before a person experiencing homelessness could be arrested by law enforcement for his or her unlawful camping, loitering, or trespassing. Facing limited budgets, it is simply easier for local officials to not enforce, abdicating their responsibility to protect health and safety, and to then blame the courts for the subsequent decline in their residents’ quality of life.

Second, by imposing this one-to-one mandate, the Ninth Circuit also failed to consider that homeless individuals will often migrate to more desirable jurisdictions that offer lax law enforcement and more generous public services. The tragedy here is that individuals who may have been able to live under the watchful and caring eye of a friend or family member will be induced, perhaps because of addiction or substance use disorder, to instead live on the street, particularly where law enforcement is unable to act due to the number of homeless individuals present in the jurisdiction. If subject to a one-to-one homeless to shelter bed requirement, the jurisdiction will never be able to keep up with an ever-growing homeless population.

Further, even assuming a specific number of available shelter beds can be determined at any given time, public entities cannot possibly have an accurate count as to the number of homeless individuals on any

given day. Although Point in Time counts identify the number of homeless individuals, they do so only at a specific point in time. These surveys are conducted only once every two years. Due to a number of different factors, including economic conditions, housing affordability, alcohol and substance abuse, the weather, the presence of law enforcement, etc., the number of people experiencing homelessness in any particular region is constantly in flux.

B.

Adequacy

In addition to requiring that shelter beds be made available at an impossible to satisfy one-to-one ratio, the *Boise* and *Grants Pass* decisions also require that such shelter beds be “adequate” – but without then providing any guidance to local entities attempting to offer these services. *Boise, supra*, 920 F.3d at 617 fn.8. Public entities are constantly challenged by advocates claiming that available congregate emergency shelter beds are “inadequate.”

The ongoing and daily debate experienced by County homeless outreach personnel and County attorneys about whether an offered shelter bed is appropriate often centers on what Orange County has referred to as the three “Ps”— Partners, Privacy and Pets. Each of these demands presents a unique challenge for public entities when attempting to comply with the “adequate” shelter mandate of *Boise*. Homeless advocates often argue that congregate shelters are not “adequate” because they cannot

accommodate their clients' unique needs. These particular needs include:

- (1) **Partners:** A homeless individual will often refuse to accept placement unless his or her partner (who does not qualify for services) is allowed to stay with him or her;
- (2) **Pets:** Homeless individuals often have pets, and quite often multiple pets (e.g. six Chihuahuas) and will refuse to be housed without their pets; and/or
- (3) **Privacy:** Homeless individuals will often refuse a placement based on their need for privacy because of their claimed disabilities, including anxiety, stress, and Post Traumatic Stress Disorder. As a result, an individual may often refuse to accept an available shelter bed, preferring to instead to live alone in a tent.

Fortunately for Orange County, the *Catholic Worker* settlement and Judge Carter's consent decree includes a dispute resolution mechanism whereby disputes concerning individual shelter placements – and the demands for partners, pets, and privacy – can be quickly resolved with the District Court's assistance. Other jurisdictions have no such mechanism, however, and disputes over shelter placements quickly become mired in an unproductive morass of litigation – all at great expense to the public, and without any benefit to people experiencing homeless.

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II.

The *Boise* and *Grants Pass* Decisions Were Wrongly Decided Since Enforcement That Criminalizes Conduct Does Not Violate the Eighth Amendment

Relying upon prior cases prohibiting punishment for status offenses, the Ninth Circuit Court held that “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.” *Boise, supra*, 920 F.3d at 616. Under the panel’s decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions.

The Eighth Amendment does not compel this result. On its face, the Eighth Amendment regulates punishment. It prohibits punishment that is cruel and unusual. However, local governments do not impose punishment. Punishment may only be imposed by a court, after trial and conviction. A law enforcement officer’s arrest of a suspect for his or her criminal conduct is not cruel and unusual punishment. In fact, an arrest is not punishment of any kind. It is merely the commencement of a particular legal process, necessarily supervised by a court, that can and often does then lead to diversion, treatment, rehabilitation, and housing.

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In any event, the *Boise* and *Grants Pass* decisions far surpass this Court’s prior holding in *Robinson v. California*, 370 U.S. 660 (1962) (*Robinson*), involving a California statute making it illegal to be an addict. Anti-camping rules and regulations do not punish the unhoused for their status. See e.g., *Powell v. State of Tex.* 392 U.S. 514, 532 (1968):

“The State of Texas thus has not sought to punish a mere status [for being an alcoholic]... Rather, it has imposed upon appellant a criminal sanction for public behavior [being drunk in public] which may create substantial health and safety hazards, both for appellant and for members of the general public. . .”

Id. at 532. As such, in line with this Court’s long-standing precedent, Orange County and other local governments must be permitted to enforce state and local law prohibiting camping, loitering, and trespassing. In acting to protect the health and safety of the public, the Eighth Amendment is not implicated.

III.

Any Eighth Amendment Challenge Should Be Determined on an Individualized Basis, Not a Class Wide Basis.

The *Grants Pass* and *Boise* rulings were decided in part on the flawed proposition that all homeless individuals are “involuntarily” homeless and incorrectly placed the burden on the local government to prove otherwise. See *Johnson v. City of Grants Pass*,

72 F.4th 868, 894 (9th Cir. 2023), *cert. granted sub nom. Grants Pass, OR v. Johnson*, No. 23-175, 2024 WL 133820 (U.S. Jan. 12, 2024) [“In fact, neither the City nor the dissent has demonstrated there is even one voluntarily homeless individual living in the City.”.]

The across-the-board, blanket determination that all homeless individuals are involuntarily homeless is based on a false premise. Each homeless individual has a unique circumstance that has resulted in his or her housing status, and not all are involuntarily homeless. Some individuals are homeless simply because they refuse to engage with services and take refuge in shelters. Others are homeless because of their mental health struggles or substance abuse, not because of their lack of residence. Some could reconnect with family or friends, but choose not to, because said family or friends would not tolerate their self-destructive behaviors.

The faulty premise that unhoused individuals are simply unhoused because they have no other choice ignores the firsthand experience of local governments dealing with “service-resistant” individuals that choose to sleep outside despite that individual’s ability to stay with friends, family, or in an emergency shelter and who consistently refuse mental health, substance abuse or other services altogether.

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IV.

Boise and Grants Pass Create a Dangerous Precedent Destroying a Local Government's Police Power.

Under the guise of the Eighth Amendment, *Boise* and *Grants Pass* have severely undermined the local police power and created an entire class of residents who are effectively immune to local ordinances prohibiting camping in public spaces. This does not help them – rather, it enables people experiencing homelessness to languish in squalor. The Ninth Circuit's decisions prescribe how state and local governments must address its homelessness problems without considering each local government's unique situation. The across the board, one-rule-fits-all approach taken by the Ninth Circuit is not only erroneous, but also creates a dangerous precedent. With respect to public health and safety, and indeed, civilization, itself, the Constitution is not a suicide pact.

Local governments, and elected officials must not only have within their police power the ability to promote safe, healthy, and hazard-free parks, streets, shorelines, and open spaces, but also have a duty to those who elected them to do as such. *Boise* and *Grants Pass* place an inappropriate limit on the powers of government to adequately address the needs of its homeless population. Neither case addresses the strangling issues of mental health disorders, drug and/or alcohol addiction and how these conditions impact finding adequate shelter under the standard created by *Boise*.

Boise ties the hand of law enforcement tasked with ensuring the safety and security of all the residents of Orange County. Orange County should be allowed to build on the success it has achieved under the *Catholic Worker* settlement after the District Court's consent decree expires.

CONCLUSION

For the foregoing reasons, this Court should overrule both *Boise* and *Grants Pass*. Orange County and other local governments in the Ninth Circuit have been and will continue to be negatively affected by the *Boise* and *Grants Pass* rulings. The undefined concepts at the core of the rulings impose an unworkable solution to addressing homelessness leaving public entities exposed to liability and unable to use its resources to help those most in need.

Respectfully Submitted,

LEON J. PAGE, *County Counsel*

MARIANNE VAN RIPER, *Senior Assistant
County Counsel*

LAURA D. KNAPP, *Counsel of Record,
Supervising Deputy County Counsel*

GOLNAZ ZANDIEH, *Deputy County Counsel*

By: /S/ Laura D. Knapp

LAURA D. KNAPP, *Counsel of Record
Supervising Deputy County Counsel*

Counsel for Amicus Curiae

COUNTY OF ORANGE, CALIFORNIA