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

BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NORTH DAKOTA LEAGUE OF CITIES, CITIES OF ALBUQUERQUE, ANCHORAGE, COLORADO SPRINGS, HENDERSON, LAS VEGAS, MILWAUKEE, PROVIDENCE, REDONDO BEACH, SAINT PAUL, SAN DIEGO, SEATTLE, SPOKANE, AND TACOMA, THE CITY AND COUNTY OF HONOLULU, AND THE COUNTY OF SAN BERNARDINO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Legislation

Other Authorities

INTERESTS OF *AMICI CURIAE*[1]

Established in 1935, the International Municipal Lawyers Association ("IMLA") is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoints of local governments around the county on legal issues before state and federal appellate courts.

The National League of Cities ("NLC") is the country's largest and oldest organization serving municipal governments and represents more than 19,000 cities and towns in the United States. NLC advocates on behalf of cities on critical issues that affect municipalities and warrant action.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The North Dakota League of Cities ("NDLC") is comprised of 355 member cities and was formed in

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[1] Pursuant to Supreme Court Rules 37.2 and 37.6, Amici Curiae state that counsel for all parties received notice of the intention to file this brief at least 10 days prior to the filing deadline, no counsel for any party authored this brief in whole or in part, and no outside entity or person, other than Amici Curiae and its counsel, made any monetary contribution for the preparation and submission of this brief.

1912 to support municipal governance throughout the state through information sharing, education, and legal advocacy.

The Cities of Albuquerque, Anchorage, Colorado Springs, Henderson, Las Vegas, Milwaukee, Providence, Redondo Beach, Saint Paul, San Diego, Seattle, Spokane, and Tacoma, the City and County of Honolulu, and the County of San Bernardino, are local governments of different sizes throughout the country whose communities are significantly affected by the homelessness crisis. Each of these entities is committed to solutions that appropriately balance compassion with efficacy while also protecting the livelihood of local businesses and residents.

The decisions in *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023), and *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), are of significant concern to local governments nationwide. *Martin* crossed into frontier territory by invoking the Eighth Amendment to prevent local governments from enforcing neutral laws against camping on public property. Four years later, *Johnson* reinforces that expedition and establishes a federal outpost in the West passing *a priori* judgments on criminal responsibility by using simple math.

This remodeling of the Constitution's architecture is not supported by any precedent, flouts traditional principles of federalism, and uses a "shelter availability" test that lacks any limiting principle. This Court should grant certiorari and overrule both *Martin* and *Johnson* to restore the power to address homelessness to local communities and their elected officials.

SUMMARY OF ARGUMENT

A town's power to keep the town square open to the public has never been seriously questioned before. But under the guise of the Eighth Amendment, the Ninth Circuit in *Johnson* affirmed a permanent injunction restraining a city of 38,000 people from enforcing public camping prohibitions unless the city first provides a shelter bed for each of the estimated 600 homeless individuals in the jurisdiction. The majority reasoned that the class of homeless plaintiffs were immunized from enforcement of camping bans because living on public land is an "involuntary act or condition [that] is the unavoidable consequence" of being homeless. *Johnson*, 72 F.4th at 892 (quotation omitted).

Homelessness is a complex and serious social issue that cries out for effective legislative responses. The Ninth Circuit's decisions in *Martin* and *Johnson* tie the hands of local policymakers and make solving this crisis harder. The unprincipled "shelter availability" test encourages federal courts to place new substantive limits around the police power and then prejudge whether a person's future conduct will be "involuntary" without any individualized inquiry. This unprecedented methodology is unworkable.

As a practical matter, these decisions compel local governments to choose between providing shelter or surrendering public lands to encampments that harm local communities. This separation of powers violation has a substantial impact on local budgets and appropriates limited tax dollars for the direct benefit of a disproportionately small percentage of

the population. It also presupposes that temporary shelter beds are *the* solution to homelessness, channeling local resources away from longer-term solutions like permanent supportive housing, mental healthcare, drug rehabilitation, and low-income housing support.

The social complexities of homelessness defy this compulsory one-dimensional response. State and local legislatures across the country are enacting new responses to address both the underlying causes of homelessness and the imperative to preserve communities as desirable places to live and work. These tough decisions involve philosophical compromises and fiscal tradeoffs; a balancing act the Constitution leaves to local governments to perform. The Ninth Circuit's approach is flawed in theory and unworkable in practice. This Court should grant certiorari to end this harmful experiment.

ARGUMENT

I. THE HOMELESSNESS CRISIS IS COMPLEX AND THE NINTH CIRCUIT'S DECISIONS HAVE PARALYZED LOCAL COMMUNITIES' ABILITY TO ADDRESS IT IN THE PLACES WHERE IT IS MOST ACUTE.

Everyone agrees that "homelessness is a serious issue 'caused by a complex mix of economic, mental-health, and substance-abuse factors.'" *Johnson*, 72 F.4th at 923 (Silver, J., statement regarding denial of reh'g, (quoting M. Smith, J., at 935, dissenting from denial of reh'g)). The dispute lies in finding an

agreeable response. Local elected representatives searching for answers have the arduous task of balancing strong human emotions, nuanced data, competing community interests, complex underlying causes of the problem, and limited budgets. This is a quintessentially democratic endeavor.

The friction in many communities affected by homelessness is at a breaking point. Despite massive infusions of public resources, businesses and residents are suffering the increasingly negative effects of long-term urban camping. As summarized last year by a state auditor, "Washingtonians are growing more frustrated and concerned as the number of people living on the streets and in encampments continues to grow, even as government spends more on programs to address homelessness."[2]

The impact that homeless encampments have on surrounding areas is undeniable. In addition to monopolizing common spaces like parks and sidewalks, the "unavoidable consequence" of encampments includes enormous volumes of garbage, human waste, and other health hazards like used needles.[3] In just one month in 2022, the City of

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[2] Wash. State Auditor, Contracted Homeless Services: Improving how local governments prioritize services and manage provider performance, report no. 103130, 3, https://sao.wa.gov/sites/default/files/audit_reports/PA_Contracted_Homeless_Services_ar-1031310.pdf, (Nov. 15, 2022).

[3] KCAL News, Hundreds Of Pounds Of Human Waste, Needles Cleaned From Former Homeless Encampment At Echo Park, CBS Los Angeles, https://www.cbsnews.com/losangeles/news/hundreds-of-pounds-

Seattle collected 671,169 pounds of undisposed trash and 46,497 used needles from encampments.[4] Similarly, the vast majority of encampment cleanups on Washington thoroughfares since 2017 have required disposal of human waste, hypodermic needles, and trash.[5] Solid waste is an "inevitable result of most homeless encampments."[6] These environmental effects are even more pronounced when encampments are located near waterways, such as the river running through Missoula.[7]

Encampments are dangerous to the homeless with disease, physical violence, and skyrocketing fentanyl overdoses.[8] They also have an intensely negative

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human-waste-needles-cleaned-from-former-homeless-encampment-echo-park/, (May 6, 2021).

[4] Seattle Parks & Recreation, Clean City Initiative June 2022, https://www.seattle.gov/parks/about-us/plans-and-reports/clean-city-initiative#cleancityreports, (last visited Sept. 18, 2023).

[5] Wash. State Dep't of Transportation, Public Health Associated with Homeless Encampments on Department Owned Rights of Way, https://wsdot.wa.gov/sites/default/files/2022-11/Public-Health-Homeless-Encampments-Report-November2022.pdf, (Nov. 2022).

[6] Wash. State Dep't of Ecology, $4 Million for Homeless Encampments Cleanup, pub. no. 20-07-002, https://apps.ecology.wa.gov/publications/documents/2007002.pdf , (Jan. 2020).

[7] Laura Lundquist, Homeless Encampments Create Additional River Pollution in Missoula, Missoula Current https://missoulacurrent.com/homeless-river-pollution/, (July 24, 2023).

[8] Anna Patrick, Fentanyl has devastated King County's homeless population, and the toll is getting worse, The Seattle Times, https://www.seattletimes.com/seattle-

impact on neighboring residents. Most report a plummeting quality of life, and businesses exasperated by the increased crime and decreased sales will often relocate to new markets.[9] These circumstances strain local infrastructure and make homelessness a top legislative priority in many areas.[10]

In the last fifteen years, homeless populations have also spiked in regional pockets from coast to coast. From 2007-2022, the number of homeless individuals in California increased by 31.6%; in New York by 40.3%; in Washington by 40.9%; in Oregon by 47.8%; and in Minnesota by 51.6%. U.S. Dep't of Housing & Urban Dev. (HUD), 2022 Annual Homelessness Assessment Report to Congress, 29, (Dec. 2022).[11] Today, more than half of the people

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news/homeless/fentanyl-has-devastated-king-countys-homeless-population-and-the-toll-is-getting-worse/, (May 21, 2023).

[9] Wilson Walker, San Francisco's cleanup of Tenderloin District faced with steep challenges, CBS News Bay Area, https://www.cbsnews.com/sanfrancisco/news/sfs-cleanup-of-tenderloin-district-faced-with-steep-challenges/, (Apr. 7, 2023); *see also* Petition at 31-34 n. 5-13.

[10] *E.g.,* California Legislative Analyst's Office, The 2022-23 Budget: The Governor's Homelessness Plan, https://lao.ca.gov/reports/2022/4521/homelessness-plan-020922.pdf, (Feb. 2022); Wayne Yoshioka, Homelessness Expected to Top 2018 Legislative Agenda (Again), Hawaii Public Radio, https://www.hawaiipublicradio.org/government-politics/2018-01-14/homelessness-expected-to-top-2018-legislative-agenda-again, (Jan. 14, 2018).

[11] https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf.

experiencing homelessness live in the four corners of the continental states, with over a third on the western seaboard. *See id.* at 16 (states with highest percentages of national homeless population are California (30%), New York (13%), Florida (5%), and Washington (4%)). Altogether, 42% of the Nation's homeless reside in the nine states in the Ninth Circuit, and more than half of the unsheltered population are in California alone. *Id.*

It is not clear why certain areas have seen such dramatic increases in homeless populations. As observed by Judge Bress, homelessness is "the result of a complex interaction of forces that defies any easy solution." *Johnson*, 72 F.4th at 945 (Bress, J., dissenting from denial of reh'g). What is clear, however, is that while homelessness presents a vexing societal problem for local governments across the country, the decisions in *Martin* and *Johnson* have an outsized impact given the disproportionately large homeless population out West.

The circuit split discussed in the Petition warrants certiorari on its own. The fact that such a large portion of the national homeless population resides in the Ninth Circuit increases the urgency of this Court's intervention.

II. THE NINTH CIRCUIT'S RULE RESHAPES THE LOCAL POLICE POWER IN CONFLICT WITH THIS COURT'S PRECEDENT AND BASIC FEDERALISM PRINCIPLES.

A town that is not allowed to keep its sidewalks clear and parks open is not really a town at all. It is just a cluster of people living close together.

This preeminent, fundamental function of local governance has always been recognized by this Court. As Justice Harlan wrote more than a century ago, "the police power extends, at least, to the protection of the lives, the health, and the property of the community against the injurious exercise by any citizen of his own rights." *Patterson v. State of Kentucky*, 97 U.S. 501, 504 (1878). It is axiomatic that "of all the powers of local government, the police power is 'one of the least limitable.'" *Lambert v. California*, 355 U.S. 225, 228 (1957) (quoting *District of Columbia v. Brooke*, 214 U.S. 138, 149 (1909)).

Taking steps to stop people from living in common spaces is at the bedrock of this "least limitable" authority. The Ninth Circuit held, however, that this basic use of local power is preempted by the tiny corner of the Eighth Amendment that imposes "substantive limits on what can be made criminal." *See Ingraham v. Wright*, 430 U.S. 651, 667 (1977). Even more troubling, the Ninth Circuit decided that enforcement of these traditional laws should be enjoined as to anyone who is "involuntarily homeless" whenever a local government does not provide sufficient shelter space to house them.

This is problematic on several levels. Substantively, it creates a federal doctrine of criminal responsibility. Procedurally, it converts generalized assumptions about individual conduct into a class-based immunity against enforcement of facially constitutional laws. Institutionally, the rule and reasoning in *Johnson* sharply clash with this Court's other decisions describing the substance and scope of the police power.

A. The Eighth Amendment Does Not Impose Substantive Limits on Criminal Responsibility.

In *Robinson v. California*, 370 U.S. 660 (1962), this Court held that a California statute criminalizing the illness of narcotic addiction violated the Eighth Amendment's prohibition against cruel and unusual punishment. This result was reached because on its face the law was "not one which punishes a person for the use of narcotics" or "for antisocial or disorderly behavior resulting" therefrom, but rather allowed a person to "be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State . . . [or] been guilty of any antisocial behavior there." *Id*. at 660.

The statute at issue there was unique. Six years later this Court refused to extend *Robinson* to purportedly involuntary *conduct* because "there is a substantial definitional distinction between a 'status' . . . and a 'condition.'" *Powell v. Texas*, 392 U.S. 514, 533 (1968). If this line is blurred, then "it is difficult

to see any limiting principle" that would "prevent this Court from becoming . . . the ultimate arbiter of the standards of criminal responsibility." *Id.* This Court reiterated this point three years ago, explaining that defining criminal responsibility is an ever-evolving endeavor "demanding hard choices among values" and so "is a project for state governance, not constitutional law." *Kahler v. Kansas*, 589 U.S. ___, 140 S. Ct. 1021, 1037 (2020).

In two decisions over four years, the Ninth Circuit unraveled this precedent and started sculpting substantive criminal law "under the aegis of the Cruel and Unusual Punishment Clause." *See Powell*, 392 U.S. at 533. First, in *Martin*, the Ninth Circuit decided that a person's purportedly involuntary conduct cannot be punished "on the false premise they had a choice in the matter." 920 F.3d at 617. Next, the court amplified this reasoning in *Johnson* by upholding a class-wide injunction and explaining that "a person cannot be prosecuted for involuntary conduct if it is an avoidable consequence of one's status." 72 F.4th at 893.

Homelessness is too impermanent and amorphous to be a "status." Factors "such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), and the degree to which an individual has control over that characteristic" distinguish a "status" from a "condition." *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166-67 (Cal. 1995) (citations removed). Labelling homelessness a "status" also denies "the efficacy of acts of social intervention to change the condition of those currently homeless." *Joyce v. City & Cty. of San*

Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994). The act of camping on a public street is like the alcoholic compelled to drink in *Powell*. Prohibiting this conduct is nothing like a law that imposes punishment for passively suffering from an addiction.

The decisions in *Martin* and *Johnson* erode any distinction between "status" and "condition" and create "a federal constitutional prohibition on the criminalization of purportedly nonvolitional conduct." *Johnson*, 72 F.4th at 928 (O'Scannlain, J., respecting denial of reh'g). That result flies in the face of this Court's holdings in *Robinson* and *Powell*.

B. "Involuntary Conduct" Cannot Be Summarily Prejudged for An Entire Class.

Even imagining that the rule from *Martin* could somehow be squared with *Robinson* and *Powell*, the outcome in *Johnson* plainly cannot. This on its own warrants the Court's intervention.

The procedural differences between the two decisions are significant. In *Martin* there were six identified plaintiffs who, after being cited for violating Boise's ordinances, brought individual § 1983 actions seeking retrospective and prospective relief. 920 F.3d at 603-04. The district court granted summary judgment for Boise, but the Ninth Circuit reversed because there was a "genuine issue of material fact concerning whether [the plaintiffs] have been denied access to shelter." *Id.* at 617 n. 9. The *Martin* court at least stayed within earshot of the admonition to only "adjudge the legal rights of

litigants in actual controversies" and not "formulate a rule of constitutional law broader than is required." *See United States v. Raines*, 362 U.S. 17, 21 (1960).

By contrast, the district court in *Johnson* certified a class of all "involuntarily homeless individuals living in Grants Pass," granted summary judgment, and then issued a permanent injunction. 72 F.4th at 878. The Ninth Circuit affirmed that individualized inquiries were not needed given the "complete absence of evidence that Plaintiffs are voluntarily homeless." *Id*. at 894. As pointed out by Judge Graber, this moon leap from *Martin* "is a step too far from the individualized inquiries inherent" to the Eighth Amendment and injunctive relief. *Id*. at 932 (Graber, J., dissenting from denial of reh'g).

Determining facts like whether someone has previously "declined offers of temporary housing" are an essential part of assessing whether that person's conduct is involuntary. *Id*. at 938 (M. Smith, J., dissenting from denial of reh'g). "It blinks reality to say that the district court could, 'in one stroke,' resolve the constitutionality of the public-camping ban as applied to each of the" class members here. *Id*. at 939 (quoting majority opinion, at 811).

There is no precedent for issuing an injunction against a facially constitutional law on the theory that a class of prospective defendants *might* engage in conduct that *may* be an "unavoidable consequence" of their *future* status or being. Judgments about culpability do not typically precede the conduct. They are instead made at trial – "the paramount event for determining the defendant's guilt or innocence" – rather than on affidavits that provide no

"opportunity to make credibility determinations." *See Herrera v. Collins*, 506 U.S. 390, 416 (1993).

Trial courts resolve comparable questions of individual culpability every day. Familiar common law defenses like necessity, duress, and automatism excuse similar claims of unavoidable conduct purportedly caused by circumstances outside the defendant's control. *E.g., United States v. Bailey*, 444 U.S. 394, 411-12 (1980) (necessity); *Dixon v. United States*, 548 U.S. 1, 13(2006) (duress); *State v. Deer*, 287 P.3d 539 (Wash. 2012) (somnambulism). For each of these defenses, the burden is generally on the defendant to prove it at trial.

There is no principled reason for a federal court to prejudge whether a group of people will engage in involuntary conduct in the future. If the Constitution prohibits penalizing someone who violates public camping bans because they say they have nowhere else to go, then that issue can only be decided with the benefit of the specific facts and context of a particular incident, either during pretrial hearings, trial, or sentencing before punishment is imposed. *Cf. City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) (noting "the Eighth Amendment has no application" until there has been a "formal adjudication of guilt," citing *Ingraham*, 430 U.S. at 671 n. 40).

C. The Ninth Circuit's Rule Is Inconsistent with This Court's Other Decisions Explaining Similar Exercises of Police Power.

The blanket exemption from criminal process created in *Johnson* conflicts with this Court's analyses in past cases describing the scope and substance of the local police power. Faced with different constitutional questions but similar fact patterns, this Court has explained the interests justifying the police power and the limitations on its use but has not implied that there might also be a hidden immunity protecting those who suffer the socioeconomic or behavioral issues often associated with homelessness.

This Court highlighted these state interests in a free speech case presenting almost identical facts. In *Clark v. Community for Creative Non-Violence*, the National Park Service granted an advocacy group's application to erect a short-term symbolic tent city in Lafayette Park "to call attention to the plight of the homeless," but denied the group's request for a special use permit that would have allowed demonstrators to sleep there overnight. 468 U.S. 288, 289 (1984). Agreeing that "sleeping" was conduct and assuming that it was also expressive, this Court had "very little trouble concluding that the Park Service may prohibit overnight sleeping in the parks involved here." *Id.* at 295. This Court explained why the "substantial interest" in maintaining attractive parks was sufficient:

> To permit camping – using these areas as living accommodations – would be totally inimical to these purposes, as would be readily understood by those who have frequented the National Parks across the country and observed the unfortunate consequence of the activities of those who refuse to confine their camping to designated areas.

Id. at 296.

The limits this Court has placed on the police power are typically more procedural than substantive. For example, in the vagrancy cases this Court struck down unconstitutionally vague laws directed at behaviors akin to camping on public land. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170-71 (1972) (e.g., "nightwalking"); *Kolender v. Lawson*, 461 U.S. 352, 361 (1983) ("credible and reliable identification"); *City of Chicago v. Morales*, 527 U.S. 41, 64 (1999) ("criminal street gang loitering"). The authority to regulate the underlying conduct was never truly in doubt, and this Court never suggested there might be a general "vagrancy status" immunity lurking in the shadows. *Cf. Bearden v. Georgia*, 461 U.S. 660, 669 (1983) ("poverty in no way immunizes a person from punishment"). The problem was simply insufficient notice of what conduct was prohibited.

Zoning laws provide a bird's eye view of the disconnect between *Johnson* and the government interests justifying the police power. This Court has explained that zoning schemes are valid because the "police power is not confined to elimination of filth,

stench and unhealthy places" but also extends to legislation that sets "out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). Homeless encampments directly undermine these legitimate aims and turn zoning schemes into hollow promises.

The premise of *Martin* is directly contradicted by this Court's Eighth Amendment jurisprudence. *Johnson* inflates this incorrect premise and creates conflict with other constitutional doctrines. Certiorari is warranted.

III. THE "SHELTER AVAILABILITY" TEST IS UNWORKABLE AND IMPOSES FINANCIAL OBLIGATIONS ON LOCAL GOVERNMENTS IN VIOLATION OF THE SEPARATION OF POWERS DOCTRINE.

The shelter availability calculus is unworkable and has the practical effect of imposing a judge-made financial obligation on local governments to provide public shelter options, regardless of whether local policymakers and their experts believe that is the best way to address homelessness. This test is made even more impracticable because it determines whether a population is "involuntarily homeless" while also failing to supply a workable definition of that term. Unconstrained by any limiting principle, this cursive separation of powers violation has massive budgetary ramifications.

A. *Johnson* Requires Local Governments to Provide Shelters at Public Expense.

The holding in this case is that Grants Pass may not enforce its anti-camping ordinances "when there is no shelter space available." *Johnson*, 72 F.4th at 896. Applying this holding, district courts have ordered similar injunctions to remain in effect "as long as there are more homeless individuals in [the jurisdiction] than there are beds available." *Coal. on Homelessness v. City and Cty. of San Francisco*, __ F. Supp. 3d __, 2022 WL 17905114, *28 (N.D. Cal. Dec. 23, 2022).

Injunctions like these amount to a forced choice: build more shelter or surrender public spaces. As noted *infra* at n. 14, many jurisdictions are devoting hundreds of millions of dollars each year to homeless services but continue losing ground. Because local governments are not usually permitted to incur budget deficits, spending in any amount necessarily means fewer resources for other programs or forms of public assistance. Smaller jurisdictions have even less flexibility to absorb these types of costs as a constitutional obligation.

The numbers from the City of Grants Pass illustrate this point. When this case was commenced in 2018 Grants Pass had an annual budget of $133,684,078.[12] The town's population at that time was about 38,000 and "there were at least 600

[12] City of Grants Pass, Adopted Operating & Capital Budget Fiscal Year 2017-18, 25, https://www.grantspassoregon.gov/DocumentCenter/View/10828/Complete-Adopted-Budget-FY18?bidId=, (2018).

homeless persons in the City." *Johnson*, 72 F.4th at 886. The national average cost of providing basic shelter has been conservatively[13] estimated to be about $16,000/unit/year. Dennis P. Culhane & Seongho An, Estimated Revenue of the Nonprofit Homeless Shelter Industry in the United States: Implications for a More Comprehensive Approach to Unmet Shelter Demand, 32 Housing Policy Debate 823, 830-33 tbl. 4 (2022) (relying on 2015 HUD Housing Inventory Count data).

Using these numbers, to avoid the injunction Grants Pass needed to apportion at least $9.6M ($16,000/bed x 600 people) that year. That would have meant earmarking 7.2% of the town's budget for the direct benefit of 1.6% of the population at more than four times the $2.25M allocation for park operations and maintenance. *See* Grants Pass Budget, 143, *supra*, n. 12.

This new spending must be offset by either cutting other programs or levying higher taxes. Tradeoffs like these are, in any context,

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[13] This estimate is likely well below what the actual cost would be. Annual shelter costs per unit are estimated to be between $58,400 and $70,400 in San Francisco, and at least $50,000 in New York. *See* Adam Shanks, What should solving S.F.'s unsheltered homelessness cost?, San Francisco Examiner, https://www.sfexaminer.com/news/what-should-solving-sfs-unsheltered-homelessness-cost/article_3431cdcc-ae44-11ed-814f-e7827eb49891.html, (updated Mar. 8, 2023). Just building a homeless campground in Grants Pass would require $1M. Roman Battaglia, Grants Pass narrowly approves $1 million grant for homeless campground, Oregon Public Broadcasting, https://www.opb.org/article/2022/07/12/grants-pass-oregon-grant-funding-homeless-campground/, (July 12, 2022).

fundamentally local compromises that should be struck democratically. This is particularly true for spending on public assistance, where this Court has recognized that other than imposing procedural safeguards, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." *See Dandridge v. Williams*, 397 U.S. 471, 487 (1970); *cf. Raines v. Byrd*, 521 U.S. 811, 820 (1997) (noting the "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere").

B. *Johnson's* Shelter Availability Test Is Unworkable.

Johnson's narrow focus on shelter availability exacerbates these budgetary impacts by failing to supply any discernable limiting principle. In addition to filtering out any inquiry into an individual's personal circumstances or decisions, *Johnson's* approach provides no room to consider a local government's size or resources, or the world outside of that isolated jurisdiction. Moreover, the decision fails to define what makes someone "involuntarily" homeless or what constitutes "adequate" shelter.

If there were, for example, five homeless people in a small town with one park and few residents, *Johnson* requires that town to provide either shelter or camping space. This is true even if that would mean cutting the library's budget or relinquishing the children's ballfield. Then, if the homeless population increased to ten people, or to one

hundred, the rule says the town must keep pace. Other factors like whether a person had just arrived, or if they had options available in another jurisdiction, don't come into play.

The inevitable ratcheting effect this will have on local budgets is obvious. Compounding that, *Johnson* also has the perverse impact of requiring municipalities to disparately enforce local laws. "[A]ny persons who did not possess such a residence would be immunized from enforcement of camping and lodging prohibitions, while those who did possess such a residence would not." *See Joyce*, *supra*, 846 F. Supp. at 852. Requiring this result runs against the principle that "[t]he rule of law, evenly applied to minorities as well as majorities, to the poor as well as the rich, is the great mucilage that holds society together." *Papachristou*, 405 U.S. at 171.

On top of these structural flaws, *Johnson* also glosses over the reality that homeless populations continue to rise in jurisdictions that are already devoting considerable public resources to homeless services.[14] There are many reasons for this, but one

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[14] *E.g.,* Nick Watt, California has spent billions to fight homelessness. The problem has gotten worse, CNN, https://www.cnn.com/2023/07/11/us/california-homeless-spending/index.html, (July 11, 2023); *also,* Chris Daniels, Seattle spent nearly $1 billion on homelessness, but number of unsheltered grew, KOMO News, https://komonews.com/news/local/seattle-homeless-crisis-spent-a-billion-dollars-on-homelessness-but-numbers-of-unsheltered-grew-washington-king-county-homeless-budget-money-citywide-spending-human-services-department-decade-labor-contract-state-of-emergency-organizations-people-living, (Apr. 3, 2023).

source of frustration for local governments has been the high rate of shelter offers that are declined. A 2021 study in Seattle found that offers of shelter were declined 52% of the time.[15] San Francisco similarly reports that over half of shelter offers have been declined since 2021.[16] A person's reasons for declining shelter will vary by individual and circumstance but can include such factors as policies prohibiting pets or drugs, uncomfortable congregate sleeping arrangements, theft of personal belongings, in-out schedules, physical violence, and the lack of private accommodations for couples.[17]

These reasons are not irrational. Undoubtedly, sleeping outdoors can afford more freedom and autonomy than congregate sleeping arrangements. But this also shows that, at least for some people sometimes, personal decisions and preferences can play a role in whether someone continues to be unsheltered. Getting a person off the street is not

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[15] Steve McCarron, Many homeless people decline shelter offers by city of Seattle, new report finds, KOMO News, https://komonews.com/news/project-seattle/many-homeless-people-decline-shelter-offers-by-city-of-seattle-report-finds, (Mar. 23, 2022).

[16] *See* SF.Gov, Health Streets Data and Information, https://sf.gov/data/healthy-streets-data-and-information#-data-and-information, (last visited Sept. 20, 2023).

[17] *E.g.,* Ari Shapiro, Why Some Homeless Choose The Streets Over Shelters, Talk of the Nation, https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters, (Dec. 6, 2012); *see also*, Walker, *supra* n. 9.

always as simple as just providing an alternative place to go.

This underscores the fundamental problem with the Ninth Circuit's failure to define "involuntarily homeless" as anything other than those who "do not 'have access to adequate temporary shelter.'" *Johnson*, 72 F.4th at 875 n.2 (quoting *Martin*, 920 F.3d at 617 n.8). These opinions also leave "adequate temporary shelter" undefined other than to exclude facilities with a "mandatory religious focus." *Id*. at 877. These ambiguities will continue to give rise to appeals that "raise[] the sole issue of the definition of 'involuntarily homeless.'" *See Coal. on Homelessness v. City and Cty. of San Francisco*, No. 23-15087, Dkt. 88 (9th Cir.) (Sept. 5, 2023) (minute entry denying San Francisco's motion to modify injunction).

Local governments need clarity now (not later) to tackle this mounting social problem. Homeless encampments have grown while federal injunctions under *Martin* have enjoined local governments from removing them. *See, Johnson*, 72 F.4th at 940-43 (M. Smith, J., dissenting from denial of reh'g). But localities are also being sued for *not* removing encampments, by business proprietors losing their livelihood, *Freddy Brown v. City of Phoenix*, No. CV2022-010439 (Ariz. Super. Ct.) (Maricopa Cty.) (Aug. 10, 2022), homeowners upset by the expanding nuisance across the street, *Lunn v. City of Los Angeles*, 629 F. Supp. 3d 1007 (C.D. Cal. 2022), and people in wheelchairs who are unable to use the sidewalks. *Tozer et al v. City of Portland*, No. 3:22-CV-01336 (D. Or. Sept. 6, 2022).

The legal pandemonium created by *Johnson's* "crude population-level inquiry" is dizzying to elected officials struggling to find answers to homelessness. 72 F.4th at 936 (M. Smith, J., dissenting from denial of reh'g). They are left wondering what tools remain available, and what the rules of this new game are. This Court should grant certiorari on this issue of "exceptional practical and institutional importance" and reverse the Ninth Circuit's unworkable decision that "undermines the power of the state and local governments to address the homelessness crisis." *Id.* at 931 (O'Scannlain, J., respecting denial of reh'g).

IV. States And Localities Are Responding Democratically With Bipartisan Laws Targeting The Causes Of Homelessness.

At its center, this case is not really about the Eighth Amendment. It is about what role the Constitution and federal judges should play in solving the complex social issues that emerge in modern life. Judge Bress, joined by eleven other judges, expressed this point. "Not every challenge we face is constitutional in character. Not every problem in our country has a legal answer that judges can provide. This is one of those situations." 72 F.4th at 945 (Bress, J., dissenting from denial of reh'g).

Elected representatives at the state and local level are performing the hard work of democracy while also investing enormous resources in homeless services. For example, Los Angeles is devoting a staggering $1.3B (10% of its total budget) to

homelessness in the 2023-24 fiscal year.[18] San Francisco invested $672M in 2022-23 which is comparable to surrounding years.[19] Seattle similarly spent $153.7M in 2023.[20] In the last four years, the State of California allocated $17.5B for homelessness responses. *See* Watt, *supra* n. 14.

While these emergency responses are being delivered, state and local governments are also following the policy research that emphasizes using coordinated efforts to address the "complex, multifaceted and interdependent" factors that drive unaffordable housing and long-term homelessness.[21] California, for example, implemented a wide array of housing reforms as part of the Housing Crisis Act of 2019, *see* 2019 Cal. Stat. ch. 654 (signed Oct. 9,

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[18] City of Los Angeles, Budget Summary FY 2023-2024, 4, https://cao.lacity.org/budget23-24/2023-24Budget_Summary.pdf, (last visited Sept. 18, 2023).

[19] City of San Francisco, Dep't of Homelessness & Supportive Housing: HSH Budget FY22-23 Adopted, https://hsh.sfgov.org/about/budget/, (last visited Sept. 18, 2023).

[20] City of Seattle Mayor Bruce Harrell, One Seattle Homelessness Action Plan, https://experience.arcgis.com/experience/af548fd66fc94e98a5067b299b7d1209, (last visited Sept. 18, 2023).

[21] *E.g.,* National Association of Counties, Advancing Local Housing Affordability: Best Practice and Policy Recommendations for County Leaders, 3, https://www.naco.org/sites/default/files/documents/Housing%20Task%20Force%20Toolkit_final_1.pdf, (July 2023).

2019), and continues to introduce new laws each year that are monitored for efficacy by the state auditor.[22]

Just earlier this year, Washington and Montana passed bipartisan measures overhauling traditional single-family zoning laws to increase urban housing density. *See, e.g.,* 2023 Wash. Sess. Laws ch. 332 (signed May 10, 2023) (establishing minimum development densities in residential zones); 2023 Mont. Laws ch. 445 (signed May 4, 2023) (revising municipal zoning laws). Oregon passed similar legislation in 2019. *See* 2019 Or. Laws ch. 639 (signed Aug. 8, 2019) (requiring duplexes in single-family dwelling zones). The City of Boise is also implementing comparable changes to its zoning code that will take effect December 1, 2023.[23]

Different states are trying other measures as well. Hawaii, for example, passed new legislation this past session to help reunify homeless individuals with their families in the continental states, *see* 2023 Haw. Sess. Laws act 94 (signed Jun. 21, 2023), and to defray unaffordable housing by providing home financing assistance. *See* 2023 Haw. Sess. Laws act 96 (signed Jun. 21, 2023). Idaho also passed new laws bolstering renters' protections and increasing

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[22] California State Auditor, Housing, Homelessness, & Employment Legislation We're Tracking, https://www.auditor.ca.gov/issues/legislation/housing-homelessness-and-employment (last visited Sept. 18, 2023).

[23] City of Boise, Modern Zoning Code Documents, https://www.cityofboise.org/departments/planning-and-development-services/planning-and-zoning/zoning-code-rewrite/zoning-code-documents/, (last visited Sept. 18, 2023).

available workforce housing. *See* 2023 Idaho Sess. Laws ch. 67 (signed Mar. 20, 2023) (renters' rights); 2023 Idaho Sess. Laws ch. 277 (signed Mar. 28, 2023) (workforce housing).

Debates on the optimal response to social issues like homelessness need to be held in legislatures, not in courtrooms. Each jurisdiction "must determine how it wants to address this complex, human problem based on the needs of the people experiencing homelessness and the availability of local resources." Wash. State Auditor, *supra* n. 2, at 38. These rational "legislative efforts to tackle the problems of the poor and needy" demand social and political compromises and should not be placed in the "constitutional straitjacket" created by the Ninth Circuit. *See Jefferson v. Hackney*, 406 U.S. 535, 546 (1972). "The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them." *Id.*

Homelessness was not created by *Martin* or *Johnson* and will not end with this Court overruling them. The same is true for public assistance programs and legislative responses. However, as this democratic process unfolds, it is crucial that states and local governments have the latitude to find effective solutions to this humanitarian crisis while simultaneously protecting the remaining community's right to safely enjoy public spaces. *Johnson* and *Martin* handcuff local policymakers by preventing them from enforcing neutral laws regulating camping on public property while they explore other tools in their legislative toolbox. Injunctions and the threat of federal litigation

impede this democratic process and pose an imminent threat to the livelihood of local governments and their constituents throughout the Ninth Circuit.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for certiorari.

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