

No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,

v.

GLORIA JOHNSON, ET AL., ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY
SITUATED,
Respondents.

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

BRIEF OF *AMICI CURIAE*

**INTERNATIONAL DOWNTOWN ASSOCIATION; CALIFORNIA
DOWNTOWN ASSOCIATION; CALIFORNIA BUSINESS
ROUNDTABLE; LA ALLIANCE FOR HUMAN RIGHTS; HISTORIC
CORE BUSINESS IMPROVEMENT DISTRICT PROPERTY
OWNERS ASSOCIATION; CENTRAL CITY EAST ASSOCIATION
OF LOS ANGELES; ARTS DISTRICT LA; HOLLYWOOD MEDIA
DISTRICT PROPERTY OWNERS ASSOCIATION; HOLLYWOOD
PROPERTY OWNERS ALLIANCE; DOWNTOWN SPOKANE
DEVELOPMENT ASSOCIATION; AND EAST SPOKANE BUSINESS
ASSOCIATION IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Downtowns throughout the United States, and especially in the Ninth Circuit, are suffering under the crushing weight of inhumanity both caused and exacerbated by the Ninth Circuits' recent decisions. Homeless encampments are becoming entrenched, and unlimited property accumulation obstructs the free passage and use of the streets and sidewalks. Encampments draw drug traffickers who target persons experiencing homelessness, fueling drug use, overdoses, human trafficking, property crimes, and violent assaults, the victims of which are primarily the unhoused. The multiplication of makeshift structures, garbage, human waste, and other detritus has led to disease outbreaks, fires, and lawlessness that combine to cripple local businesses and render neighborhoods unliveable for residents. Meanwhile, multiple people living on the streets die every day in major cities throughout the Ninth Circuit.

Amicus International Downtown Association (“IDA”) is a trade association with voluntary membership aimed at urban place management organizations, not-for-profit quasi-government entities managing city or town centers. IDA is a world leader and champion for vital and livable urban centers. Its members include business improvement districts, community benefit districts, downtown

¹ Rule 37 statement: All parties received timely notice of *amici* intent to file this brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and its members made any monetary contribution to its preparation or submission.

development authorities, town center managers, and city agencies that oversee the development of the municipalities' city centers. California Downtown Association, like IDA, is a representative membership association with the primary purpose of exchanging information pertinent to business districts and formulating solutions to mutually shared problems, including helping public-private partnerships manage the increasingly difficult issues surrounding those experiencing homelessness.

Amicus California Business Roundtable is a California non-profit trade association focused on California's economy and the creation of jobs. Its members are companies, including major employers across the state, with a shared focus on improving economic conditions in the state and in each individual community in which they operate.

Amici Historic Core Business Improvement District Property Owners Association, Central City East Association, Hollywood Media District Property Owners Association, and Hollywood Property Owners Alliance are non-profit entities managing "business improvement districts" ("BIDs") formed under California law. Similarly, *amici* Downtown Spokane Development Association and East Spokane Business Association manage BIDs formed under Washington law. BIDs are supported by extra taxes property owners impose on themselves in highly trafficked areas needing more waste management, street and sidewalk cleaning, public park maintenance, visitor hospitality, and security services than the city otherwise can provide. The BID *amici* operate where

all manner of business and residential neighbors live cheek-by-jowl with schools, parks, museums, walking paths and bikeways, and other public spaces. Many BIDs provide outreach to unhoused individuals within their district and have first-hand-experience and knowledge of the difficulty in connecting humans in desperate situations with needed services.

Amicus LA Alliance for Human Rights is a non-profit coalition of unhoused, formerly unhoused, and housed residents, property and business owners, nonprofit service providers, and other community members committed to ensuring local government takes prompt and ongoing action to help homeless individuals and to return public spaces to clean and safe conditions for the benefit of all throughout Los Angeles.

Amici are uniquely situated to provide the Court with a ground-zero picture of the exceptionally important real-life consequences of *Grants Pass*' Eighth Amendment and class action decisions for those required to deal with them.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in *Martin v. City of Boise* has backfired. It has elevated the legal risk to a city on homeless issues to a level that has left local government paralyzed, unwilling to enforce their own laws for fear of legal reprisal. The consequence has been nothing short of calamitous: encampments reminiscent of countries facing civil war and societal breakdown have proliferated in cities big-and-small,

replete with deadly diseases, violent conditions, and death tolls.

Johnson v. Grants Pass (“*Grants Pass*”) has adopted and extended *Martin’s* erroneous constitutional analysis, placing a continued emphasis on the impossible task of accurately counting beds and people experiencing homelessness. And when a city necessarily falls short in the equation, the *Martin-Grants Pass* construct establishes a presumption that every individual sleeping in public spaces is there because he or she has no other place to go. This deeply flawed presumption has placed an unmanageable burden on cities, many of which have given up on assistance and enforcement altogether because of the quandary created by the Ninth Circuit’s Decisions.

However well-intentioned, the *Martin-Grants Pass* paradigm ultimately harms most the people it was intended to protect: those experiencing homelessness who remain unassisted by stymied cities and troubled communities.

ARGUMENT

I. **The Consequences of the *Martin-Grants Pass* Decisions Have Been Devastating to Cities**

The homelessness crisis has been building for decades; as mental health affliction and drug addiction rates have risen, so has the cost of housing. Support structures for those on the streets have been stretched to the breaking point by burgeoning demands and insufficient funding by local, state, and federal governments. And in the last several years the

twin disasters of fentanyl explosion and the global pandemic have devastated many urban centers.

The legal landscape demarcated set by the Ninth Circuit in *Martin v. City of Boise* and most recently extended in *Johnson v. City of Grants Pass* has caused city governments, paralyzed by fear and confusion, to withdraw services and attempts at regulation altogether.

A compelling example of this dynamic is found in Berkeley, California, population 124,321, where an encampment has taken over several street blocks around Eighth Street and Harrison Street, a historically industrial area.² The City of Berkeley, a progressive city by all standards, has worked tirelessly within the bounds of *Martin-Grants Pass* to address the significant health, safety, and environmental concerns at the encampment, including “dead animals, open food sources and spoiled food, used uncapped drug needles, combustible materials like flammable gas containers inside unsafe wooden structures, bottles of urine, human feces, animal feces, soiled clothing and sheltering material, and other unidentifiable liquid and waste products” in addition to blocked sidewalks and debris “extend[ing] into the roadway, creating numerous concerning fire and traffic safety hazards.”³ For months, city

² Video: Berkeley Homelessness Series (Downtown Berkeley Ass’n (Aug. 14, 2023), https://umklaw.sharepoint.com/:v/s/UMKLaw/EYQrgmnl6IxIroK6B9q8FhUBLJWb66t_I1ibIR2tUakKrg?e=Jb5VW1).

³ Memorandum from Dee Williams-Ridley, City

management tried to work with encampment residents to build “good neighbor guidelines” to no avail. Beds were offered in congregate shelters, but most turned them down.⁴ Berkeley then applied for and received a \$5 million state grant, matched it with \$5 million of its own general funds, to lease a motel and contract with a service provider to provide a low-barrier, service-rich, non-congregate option to offer to residents. Once the beds were secured, the city spent months engaged in “intricate legal, operational, and tactical planning by staff across numerous city departments” to implement a full closure of the encampment with individual offers of shelter to each resident to avoid running afoul of *Martin*.⁵ Dozens of people were involved in planning between the City Manager’s office, Neighborhood Services, Police, Public Works, Health, Housing and Community Services Parks, Recreation, and Waterfront and multiple service providers.

Yet on three separate occasions in late 2023 when the City tried to move forward with its plan to close the encampment and move residents elsewhere it was met with “[c]ourt orders to cease, hours before or even during the operation, effectively rendering planning

Manager to the Honorable Mayor and Members of the City Council, Eighth St. and Harrison St. Encampment Efforts at 7–8 (Feb. 20, 2024), <https://berkeleyca.gov/sites/default/files/documents/2024-02-20-%20Eighth%20St%20and%20Harrison%20St%20Encampment%20Efforts.pdf>.

⁴ Williams-Ridley Memo. at 7

⁵ *Id.* at 3.

efforts moot.”⁶ Now enmeshed in two separate lawsuits— both based on *Martin*— the city ultimately decided to completely stop all efforts to resolve any encampments in the area “until the Court proceedings in the two pending cases . . . give us more insight and direction.”⁷

The effect of the city’s paralysis has been devastating both to the unhoused individuals in the encampment who continue to deteriorate and on the business community surrounding the area.

Tom Parrish runs the Berkeley Repertory Theatre which owns a theater production facility in the heart of the 8th/Harrison encampment. Since the establishment of the encampment in the last few years, the Theatre has faced an infestation of rats eating cables and wiring, encampments catching fire adjacent to the building, toxic spills, and significant increases in criminal activity including assaults, vandalism, theft, and at least one shooting which left a bullet hole in one of the employee’s office windows. Parrish recently observed a female resident of the encampment in a wheelchair stuck in a crosswalk gutter, unable to move, crying and shrieking. He asked her if he could help, and her answer shattered him: “No. There is no helping me.”

Barry Braden owns Fieldwork Brewing Company in the 8th/Harrison area, which had attracted customers from all over the bay area. Since the encampment exploded in the last couple years, his

⁶ *Id.* at 4.

⁷ *Id.* at 1.

sales have been down 25%, and he is now unsure if he can sustain the business. The company no longer allows employees to close at night on their own; they are required to walk to their cars in pairs. Recently a woman came into the brewery asking for free food. When Barry started to offer help, she left only to return two minutes later with a 10-foot metal pole swinging it at customers and employees; she was chased out of the restaurant by customers and ultimately arrested by police.

Without the ability to adjust its response based on local considerations, and with courts stymying every attempt to reestablish order into the area due to the *Martin-Grants Pass* construct, the city of Berkeley has had to abandon both businesses and unhoused residents in the area of 8th/Harrison to crushing conditions. And Berkeley is only a microcosm of what is playing out throughout the Ninth Circuit in Los Angeles, San Francisco, Spokane, Phoenix, Honolulu, Las Vegas, Seattle, Sacramento, Portland, and elsewhere.

In fiscal year 2021/2022 Sacramento County spent \$181 million to provide service and support for people experiencing homelessness, yet the area still saw a 67% increase in homelessness from 2019-2022. Below

is a picture of 10th Street and J in Downtown Sacramento:



In the Skid Row area of Los Angeles, Central City East Association’s Clean and Safe teams responded to 32 homeless-related fires in 2014. Ten years later, in 2024, they had 259—nearly ten times the number. Trash removal went from 1,780 tons of waste in 2019 to 3,190 in 2023. Nearby, in LA’s Historic Core District, a young mom walked her four-year-old child to the market when a mentally ill woman who had her own children taken away grabbed the four-year-old; the mom had to pick up her child and quickly move away. One block later the mom and child passed a person on the sidewalk writhing and screaming under a blanket. The next block a man yelled indistinguishably in Spanish as he pushed a small

cart. The day before, the mom had to shield the child from a man masturbating at a bus depot.

Below are images captured by Clean and Safe teams in Skid Row during recent intense storms in the area in January, 2024:







Central City East Association's Operations Team recently recorded video of the conditions on Wednesday, February 28, 2024:⁸

San Francisco's Tenderloin District has the highest concentration of children in San Francisco, many of whom from migrant families. Yet the

⁸ Video Series: Los Angeles Skid Row Series (Central City East Association Operations Team (Feb. 28, 2024):

Video 1,

https://umklaw.sharepoint.com/:v/s/UMKLaw/EbubZr_cbQVKs_vhADna3j2kBpsy_MRKlfZP9DyUKqevJ6Q?e=ZleZit;

Video 2,

<https://umklaw.sharepoint.com/:v/s/UMKLaw/EZU4RQ3xK-1MgiGeQNXYWQoBwK5N3PlpO4FUJNXPsbwfg?e=IQLeMe> ;

Video 3, -

<https://umklaw.sharepoint.com/:v/s/UMKLaw/EZ2NUvL5-ENBrVlFRKwup88BFLOKocFvvlIyo0INv10OmA?e=xfO7aX> ;

Video 4,

https://umklaw.sharepoint.com/:v/s/UMKLaw/ETf15Ggdn_BNi_yOW54li5usBf5hSnGKelQ-TIA0-gdCMtg?e=p5hjb1.

Tenderloin is also the area's epicenter of crime, drug use, and homelessness. Small children and elderly must walk in the street around tents completely blocking the sidewalk:



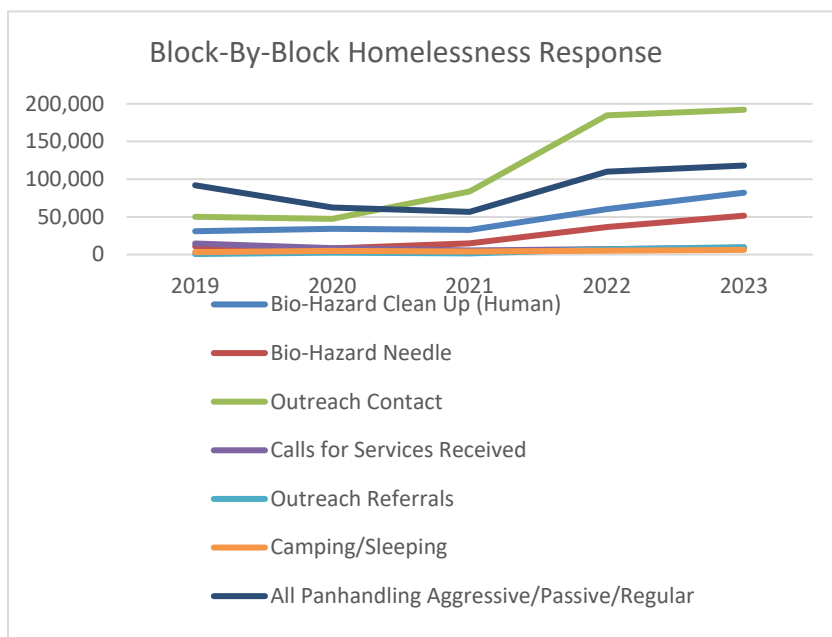
The private sector—largely in the form of business and residential groups exemplified by *amici*—has stepped into the void to try to manage their corner of the public realm to the extent possible. Residential and Business Improvement Districts (BIDs), by necessity, do a great deal to support homeless residents in their districts and guide them toward shelter and housing. Block-by-Block is an organization that provides Ambassador Services to various BIDs, place management organizations, and municipalities nation-wide, including sanitation, security, and outreach to the unhoused community within a BID district. They currently operate with approximately 3,000 employees in 100 cities nationwide, with 37 programs in the Ninth Circuit.

Outreach specialists with Block-by-Block work to build a rapport with unhoused individuals to connect them to services in the area or otherwise assist in bringing each person inside. But many don't want to engage in services if they have the option to stay where they are. In polling its offices nationwide, Block-by-Block estimates 51.75% of unhoused residents in their district are there by choice, meaning they will not accept shelter or services when offered. This is true despite months-to-years of trust-building by specialists. That number increases even further when the offers are exclusively for congregate shelters rather than ones that offer more privacy like motel conversions. As one BID member put it: "There are carrots and there are sticks. And carrots don't work if the person isn't hungry."

Nationwide, the number of homeless individuals has increased, though nowhere as dramatically as in California which hosts 28% of the nation's homeless. Mortality rates (i.e. the rate at which homeless individuals are dying) is up an "astonishing" 238% from 2011 to 2020.⁹ Block-by-Block statistics show the same trend with a marked increase in outreach contacts, panhandling calls, and bio-hazard cleanup

⁹ Marisa Kendall, *It's now significantly more deadly to be homeless. Why are so many people dying?* Cal Matters.org (Feb. 29, 2024), <https://calmatters.org/housing/homelessness/2024/02/homeless-mortality-report/>.

(needles and human waste). In particular outreach referrals have increased by 1,468%.



In practical terms, the *Martin* and *Grants Pass* decisions have created a zone of immunity from enforcement of any quality-of-life laws whenever the subject is unhoused. The proliferation of litigation capitalizing on *Martin* has bogged down response efforts and perversely disincentivized cities from doing anything more than the bare minimum damage control. The product of this judicial meddling has been an explosion in encampments, a kibosh on public-realm enforcement, and culture of fear around the use of enforcement as a tool to address the crisis.

In the laboratory of democracy, this experiment has failed.

Standing in stark contrast to Berkeley, California is Houston, Texas (not subject to the *Martin-Grants Pass* confines) which has seen a 61% decrease in overall homelessness since 2011. By pairing significant housing and shelter assistance with “camp decommissioning,” Houston has tackled the most difficult encampments and helped move tens of thousands of people inside. The key to making it work, according to community leaders, was local control which permitted citizens and elected officials to apply local solutions to local needs; sometimes that meant decommissioning without requiring offers of housing to every single resident. Unshackled by *Martin* or *Grants Pass*, Houston doesn’t have to navigate a Byzantine set of criteria like whether an offer of shelter was “adequate” or investigate whether a person is “involuntarily homeless,” and can instead focus on using all means at its disposal (including the enforcement of laws) to move encampment residents out of unhealthy and unsafe situations.

Austin, Texas, a city equally known for its progressive values, demonstrates the full spectrum of difficulty around this issue. In 2019, in direct response to the *Martin v. City of Boise* decision, Austin rescinded its anti-camping laws for fear of lawsuits. Austin’s unsheltered population exploded, particularly in the downtown area, crime spiked, narcotics proliferated, and business and tourism dropped. In a citizen-led-backlash in 2021, a local election referendum reinstated the anti-camping

ordinance passed by a strong margin. Since then, Austin has had tremendous success with its “HEAL” (Housing-focused Encampment Assistance Link) initiative, pairing unhoused individuals with services and shelter, and seen a significant increase in overall shelter and housing stock. Critically, there has been no significant increase in citations or arrests, but there has been a decrease in the number of unsheltered individuals from 1,574 in 2020 to 1,266 in 2023, with reductions of nearly sixty percent in downtown Austin. The use of enforcement is judicious and paired with minimum notice and an opportunity to comply. In reflecting on the shift, local operators note that when ordinances were abolished, intense efforts to help people also flatlined. Now that regulation of public spaces and quality-of-life laws have returned, and the city has flexibility to respond as needed, there is a significant effort to engage unhoused individuals.

Comparing the experiences of Houston, Berkeley, and Austin demonstrates the damage the *Martin-Grants Pass* scheme has done to local cities’ ability to react and respond appropriately in balancing the needs of all citizens living within its borders, housed and unhoused. Cities need a full range of tools to address the homelessness crisis as appropriate in their own local communities. By removing one of the most powerful tools (enforcement of laws), the Ninth Circuit has stripped West Coast cities’ ability to regulate their own areas for the benefit of all persons. The imposition of a constitutional barrier based on a tenuous Eighth Amendment theory robs communities

of the power to exercise their humanity in addressing the needs of their homeless residents and the community at large.

II. Limitations on the Right-To-Camp are Illusory

The practical impact of purportedly “narrow” rulings espoused in *Martin* and *Grants Pass* is anything but narrow. The holdings in those cases have handcuffed cities by ignoring the reality of homelessness and how cities address it. Under the *Martin-Grants Pass regime*, an officer, prior to every single encounter, must understand the exact number of homeless individuals within city limits and the exact number of “available” shelter beds. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (“[S]o long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public.”) (citations omitted). If the city has a shelter-bed-to-homeless-individual deficit, the officer presumptively may not enforce anti-camping laws unless the officer proves that the individual is “voluntarily” homeless which requires the officer to either conduct an extensive, impractical, and likely fruitless investigation or alternatively offer a single shelter bed and wait for the response. *Id.* at 617 n.8 (“[O]ur 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.”); *Johnson v. City of*

Grants Pass, 72 F.4th 868, 893 (9th Cir. 2023) (“[A] person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one’s status.”).

A judicial opinion focused on the unfairness of enforcement might have made sense in theory, but in practice, the theory falters. A review of the issues encountered by outreach workers and others employed by *amici* demonstrates the fallacy of such a notion.

A. Martin Mandates “Counting” That is Virtually Impossible

The *Martin-Grants Pass* scheme presupposes that cities know the exact number of homeless people within its borders and the exact number of shelter beds which could be counted as “available.” But in the analog world of city government, that presumption defies reality. The federal government, through the Department of Housing and Urban Development (HUD), requires that homeless individuals in each jurisdiction be counted every other year in January as a condition for certain homeless-related funding (this is known as the “point in time” or PIT count). In larger cities like Los Angeles, those counts take place over the course of several days and require thousands of volunteers, extensive training, and security.

“Accurate” counting is a myth, and most city efforts to comply with the HUD-mandated count relies largely on algorithms (e.g., 1.6 people assumed for every tent, 2 people assumed for every van, etc.) and extrapolation from certain areas physically counted to those areas which are completely ignored.

Unsheltered people wrapped in blankets under a bush or behind a dumpster are often missed completely. Rooftops and remote areas go largely uninspected. The PIT count is conducted in the winter, when many shelters are open that are otherwise closed during the summer, and when people are more likely to find a temporary space inside where they are safer from the elements.

The Los Angeles Homeless Services Authority (LAHSA) runs the PIT count in L.A. annually by choice. Several of the *amici* BIDs participate in that effort, and also do their own periodic counts on a smaller scale at various times throughout the year. The LA count takes several months to organize because thousands of volunteers need to be recruited by participating organizations like BIDs and other local non-profits, training needs to be arranged, recordkeeping needs to be prepared, law enforcement needs to be organized, and some property owners need to be notified for safety and access. “Counting” the homeless for any city even just once a year is an enormous undertaking.

“The last official count for which I volunteered was the culmination of more than two months’ worth of advance planning,” advises one volunteer counter in the Hollywood area of Los Angeles. Once volunteers gathered, they were assigned to a team, given training about how to count and estimate, given safety warnings, identification vests and flashlights, and paperwork/computer pads for collecting information. “I have volunteered for several of these counts over the years, and I didn’t see a lot of familiar faces; most

people are willing to do it only once because it is a huge commitment.”

The methodologies of all these counts are similar: in the Hollywood area of Los Angeles, for example, community volunteers, BID employees, and BID vendor employees such as Block-by-Block teams gather on the day of the count to divide up the areas in which the count will occur, and teams of 2-4 then begin a physical survey of each area, gathering again at the end of their respective inspections to share the collected information. The count typically begins in the early evening and continues until late at night, based on the assumption that most homeless persons will be at or near where they sleep when evening arrives. Some teams will cover an area entirely on foot, others will cover an area by vehicle and exit as homeless persons are observed so that parks and open space areas are covered as well as city streets and alleys. Vehicles, tents, and other temporarily erected structures are not entered due to privacy and safety concerns—anyone encountered outside of such a place is asked how many are inside, and absent other evidence counters are directed to list a tent or vehicle size and are told an algorithm will be used to assign a “count” to same. Teams assigned to city streets also are told not to venture onto rooftops or other secluded areas that may pose a danger to the counter, even when homeless are known to encamp at such spots. Similarly, park and open space areas are counted only insofar as tents or other evidence of encampments are observable from an adjacent roadway. Inconsistencies between teams and where

they choose to look and how well they count only further compound the already questionable degree of accuracy.

“A not-insignificant number of people experiencing homelessness that we meet on the streets during the day have found rooftops and other inconspicuous or difficult-to-reach places to encamp at night,” reports a member of an amicus BID “safe” team. “Access to many of those places, especially at night, is just plain dangerous, and so the counters miss virtually all of the people hiding there.” Another recent count volunteer reports finding detritus associated with encampments but without anyone present at the time of the count—“We just had to guess about whether it was one person there or several due to the hoarding. I have seen mounds of garbage and several shopping carts and even multiple tents that I know are associated with only one person, so there is no good way to tell how many might actually be sleeping at a given encampment at a given time.”

A recent RAND study documented at least an 18% count deficiency in Los Angeles’ 2022 count in three separate geographic areas.¹⁰ Other “micro” counts within Los Angeles’ varied communities similarly reflected wide variance from the official 2022 count.¹¹

¹⁰ Jason M. Ward, Rick Garvey, Sara B. Hunter, *Recent Trends Among the Unsheltered in Three Los Angeles Neighborhoods*, RAND.org (May 4, 2022), https://www.rand.org/pubs/research_reports/RRA1890-2.html#:~:text=Key%20Findings,September%202021%20to%20October%202022.

¹¹ Doug Smith, *Los Angeles homeless count raises doubt*

During the 2024 count, widespread technical failures were reported in Los Angeles of people's devices failing to upload or sync.

The challenges of counting persons experiencing homelessness are mirrored in the amorphous effort to count “adequate” and “available” shelter beds. Even if a city has a state-of-the-art real time bed-counting system (which most do not), what might be “adequate and available” to one might not be “adequate and available” to another person depending on accessibility, time expired on emergency shelter vouchers or other, and other individual considerations (such as pets, property, and privacy—also known as the “three Ps”). Some shelter beds are set aside for a specific purpose: domestic violence survivors, veterans, families, or single men.

Shelter beds also come in myriad forms, from one-night hotel room vouchers to temporarily converted gymnasiums, to commandeered motels, and to non-profit centers established for the specific purpose—and there is no centralized system able to corral the exact number of empty beds on any given night. Moreover, those assigned a bed usually are free to come and go, and typically do. It is virtually impossible to know how and where each available bed

about accuracy, Is it time for a new way? Los Angeles Times (Sept. 24, 2022, 5:00 AM), <https://www.latimes.com/california/story/2022-09-24/doubts-raised-over-the-los-angeles-homeless-count-is-it-time-for-a-new-way>.

might be on any given night without a tremendous amount of work.

One *amici* outreach provider described the arduous task as follows: “It takes several calls to local bed providers to find even just one open bed on a given night. Then we connect the homeless client to that provider, and that requires paperwork that many of our clients need substantial help to complete. Then we get the client to the bed, and often we first have to go find the client which itself can be difficult. There are a number of beds going empty each night, and some clients get to a provider only find “their” bed already has been taken. It can take hours just to connect one of our homeless clients to one bed for one night—sometimes it takes days.”

And *even if* an accurate number of beds and accurate number of people could be identified on a single day of the year, those numbers vacillate widely throughout the year because unhoused individuals, by their very transitory nature, move in, out of, and between jurisdictions. Thus, it is entirely possible that the PIT count in January could reflect a shelter-to-homeless surplus which, under *Martin-Grants Pass*, would mean enforcement of anti-camping laws could happen citywide without individual determinations, but soon thereafter (through an influx of individuals or simple miscounting of beds or people) an involuntarily homeless individual is lawfully arrested despite having other no shelter options or any other lawful place to be.

In a city the size of Boise, Idaho (pop: 237,446; PIT ~2,298) or Grants Pass, Oregon (pop: 39,364; PIT

~600) such an equation may be possible (though unrealistic), but for larger cities like Los Angeles, California (pop: 3,959,657; PIT ~46,260) and San Diego, California (pop: 1,382,000; PIT ~10,264) such an equation is impossible to affix.

B. Voluntariness as a Distinguishing Factor is a Mirage

Should a city be in a shelter-deficit, as nearly all cities are, the homeless population within the city boundaries (itself an arbitrary distinction) are presumed to all be “involuntarily homeless”—that is, an individual who is without “a single place where they can lawfully be”—unless a peace officer seeking to enforce some quality-of-life law can prove otherwise. *Martin*, 920 F.3d at 617. Again, this reflects practical misunderstanding of both the unhoused population and the efforts of those working to bring them inside.

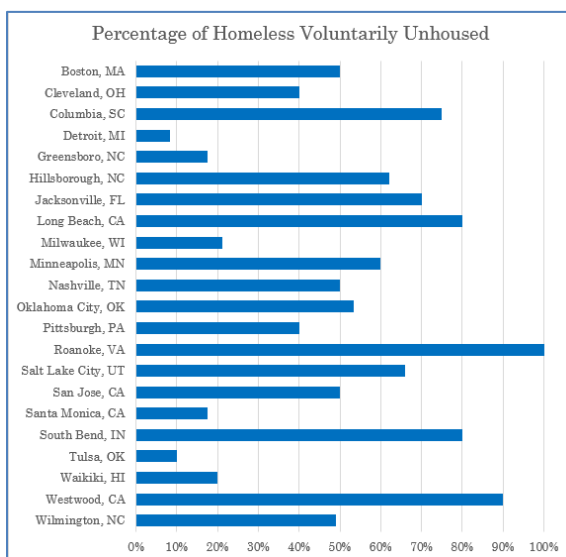
During the annual PIT count, volunteers are encouraged to collect a variety of information from the people experiencing homelessness they are able to count, including age, date of arrival in the city, job and housing history, family information, and access to/use of services. Only a small fraction of those who are counted will agree to even speak to a counter. And while some of the information collected—even if accurate—might help gauge whether a given individual is camping in a public space “voluntarily,” few if any counters are qualified to make that

judgment at all, let alone in a manner consistent with another counter's assessment.

A Venice, California area non-profit employee reports that she has volunteered for several counts, and “only a handful of the dozens of people I counted were willing to provide our team with information about themselves. I have low confidence that those who did provide information were entirely truthful, particularly regarding how long they had been on the street, where they came from, and the reason they were on the street in the first place. In terms of the sort of assistance they are getting or have been offered, I encountered only one who was willing to admit he was there just because it was on the beach and cheaper than a hotel or apartment, and because nobody was kicking him off the beach. But I know others for whom this is true, I have seen and talked to them at other times—I think not many are willing to admit it, and especially when a cop is around while we are doing the count.”

In Westwood, California, one Block-by-Block outreach specialist notes: “Despite consistent outreach efforts and the provision of information regarding shelters and housing resources, only approximately 10% of individuals have expressed willingness to pursue these options.” Another specialist in Cleveland, Ohio observed “There is about 49% of the population that is voluntary and wants to be outside because they do not have rules and can spend their money on what they want.” And in Nashville, Tennessee another outreach specialist estimates, “Of the 80-100 people that we see each day

I'd say that 45-55% of those people are not interested in service of any kind. The majority of the other people that we see on the streets may want housing but because of severe mental health and substance abuse issues obtaining that housing is almost impossible.” These sentiments are reflective of estimates throughout the country. Of all the central city areas who responded to an *amici* national survey request, the average response concluded that roughly 51.75% of the unhoused individuals encountered by outreach specialists are voluntarily unhoused, and another 48.25% either would take shelter if offered or could not due to severe mental health or substance use disorder issues:



There are also many success stories that outreach workers are eager to share:

- In Pasadena, CA, John M. had been unhoused since 2019 due to severe mental health issues and

drug use. Over the course of several years, one outreach worker was able to convince him to accept health and he now lives in an apartment just a couple blocks away.

- In Birmingham, AL, Mrs. Mary was a married woman who had separated from her husband but without resources to pay for her own housing ended up on the street. Nearby shelters were full, and she was exhausted and depressed. After several conversations, the outreach worker was able to reunite her with her estranged husband who was overjoyed to have her home. The two are still together and very much in love.

The work of connecting to an individual living on the street, gaining their trust, learning their story, and understanding the resources they might have (family support, social security payments, etc.) takes days, weeks, months, or even years. It is not something a police officer could discover in a two-minute conversation (even if one could assume an unhoused individual would be honest with the officer which, in *amici*'s experience, is a strong assumption). And for a city like Los Angeles whose unhoused individuals outnumber uniformed police officers 10-to-1, the task of investigating every homeless individual's "voluntary" status would incapacitate the department.

Should this Court uphold the *Martin-Grants Pass* Eighth Amendment "cruel and unusual" analysis as applied to involuntary homeless individuals, *amici* urge the Court to adopt Judge Collins' view that *Powell*, at most, provides that involuntariness is a

“case-specific affirmative defense to application of the statute.” *Grants Pass*, 72 F.4th at 898 (Collins, J., dissenting). This is a fair reading of *Powell* under the *Marks* “narrowest grounds” doctrine. *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds[.]’”) In *Powell*, Justice White, providing the fifth vote, concurred in the judgment because “Powell showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.” *Powell v. State of Tex.*, 392 U.S. 514, 553-54 (1968) (White, J., concurring). As noted by Judge Collins, “the context of the [*Powell*] case was precisely the extensive affirmative defense that Powell presented at trial, including the testimony of an expert.” *Grants Pass*, 72 F.4th at 907 n.9 (Collins, J., dissenting).

This reading resonates with this Court’s jurisprudence. “[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government, and [] we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.” *Patterson v. New York*, 432 U.S. 197, 201 (1977) (citation omitted). Thus, it is “normally ‘within the power of the State to regulate procedures under which its laws are carried out, including the burden of

producing evidence and the burden of persuasion.” *Id.* (citation omitted). Affirmative defenses which seek to excuse or justify conduct, but do not negate an essential element of the crime, do not offend constitutional due process limits and the prosecution need not prove the nonexistence of recognized mitigating circumstances. *Id.* at 209 (“If the State . . . chooses to recognize a factor that mitigates the degree of criminality or punishment, we think the State may assure itself that the fact has been established with reasonable certainty. To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expense, and too inaccurate.”).

None of the statutes at issue in *Grants Pass* refer in any way to “voluntary” or “involuntary” conduct, but rather collectively criminalize the mere act of sleeping on public sidewalks, streets, alleyways, parks, benches, and other publicly-owned property. *Grants Pass*, 72 F.4th at 876. Thus, by proving the act, the prosecution has met the elements; if the constitution recognizes the mitigating circumstance of lack of fault (involuntariness), that is properly presented as an affirmative defense to conviction rather than an element the prosecution (or citing police officer) must prove the nonexistence of. *Patterson*, 432 U.S. at 209.

From a practical standpoint, recognizing involuntariness as an affirmative defense to conviction rather than an element to the crime would return control and flexibility to the local government

seeking to balance use of its public spaces for all persons while still recognizing the right of person to be free from punishments for acts which are not under their control. Because after all, “preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and [the courts] should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.” *Id.* at 201 (citation omitted).

III. *Martin-Grants Pass* Has Hurt the Very People It Intended to Help

In Los Angeles, six people experiencing homelessness die every day.¹² The *Martin-Grants Pass* regime encourages and emboldens individuals who could benefit from shelter and services to stay in unsafe and unhealthy conditions. In so-doing, it allows criminal elements to prey upon the most vulnerable who need help rather than abandonment. In Berkeley, officials attempting to abate serious conditions on the street had to leave crucial beds open for months pursuant to court order, all for individuals whom they knew would not accept the offer anyway, just to “check the legal box.”

In Los Angeles’ Skid Row, where 5,000 people experiencing homelessness are packed into 50-square blocks, it is impossible for outreach workers to separate out those who are choosing to make a life on

¹² County of Los Angeles, Public Health, *Mortality Rates and Causes of Death Among People Experiencing Homelessness in Los Angeles County: 2014–2021* (May 2023), http://publichealth.lacounty.gov/chie/reports/Homeless_Mortality_Report_2023.pdf.

the streets from those who are desperately seeking shelter and services. Everyone encountered who claims interest in housing or shelter goes onto a list; the needier the person (including significant mental illness or drug addiction) the higher they rise on the list. The result is that the healthier an individual is (i.e. more likely to recover), the longer that individual must stay on the street and suffer until they finally become sick enough to come inside. The irony is that the higher a person is on the list, the less likely they are to accept shelter either because they don't actually want it or because their mental illness or addiction prevents them from reasonably accepting it. Critical beds stay empty for months as outreach workers methodically move down the list trying to connect and cajole acceptance. Meanwhile, *Martin/Grants Pass'* zone of immunity from enforcement has allowed the number of individuals on the street to increase, diluting the valuable limited resources the city and county have to offer.

Wenzial Jarrell, a veteran with shrapnel still embedded in his torso, lived on the streets in Skid Row for over six years as offer-after-offer of shelter or housing fell through or was given to someone sicker than him. During his time living unsheltered he witnessed murders, assaults, human trafficking, weapons and narcotics sales, and more flea-ridden rats than he could count. Maria Diaz, a domestic violence survivor, landed in Skid Row in 2017 when she had no other place to go. She spent five years on the streets, suffering daily threats of sexual and violent assault, before she finally was able to get into

a shelter outside of the area. Both Wenzial and Maria would have readily accepted shelter but never found themselves high enough on the list in an over-clogged system.

The *Martin-Grants Pass* scheme hamstring BID and other non-profit organizations' efforts to get people into shelter and off the streets for the benefit of both the unhoused and housed communities. Cities need a range of tools to address the homelessness crisis, which may at times include the need for enforcement in dynamic and flexible ways which *Martin-Grants Pass* prevents. No doubt these decisions were well-intentioned as a means to protect some of our country's most vulnerable citizens, but the practical effect has made things far worse for everyone, including and especially those without shelter.

CONCLUSION

Cities, residents, businesses, and unhoused individuals alike are suffering under the crushing weight of the *Martin-Grants Pass* construct. It deprives local governments of the essential tool of enforcement while making it nearly impossible to connect shelter-resistant homeless to critical services. Conducting the bed and homeless population counting that *Martin/Grants Pass* requires is all but impossible, as is readily determining whether an individual is on the streets voluntarily or involuntarily. The construct taxes cities with impossible standards, disincentivizing or sometimes totally preventing any efforts at all to assist those on

the street. As unhoused individuals stay on the streets longer, they are irreparably psychologically and physically affected; crime increases, diseases spread, homelessness becomes entrenched, acts of violence become commonplace, and rampant drug use further compounds the challenges facing the unhoused, making it nearly impossible for people to move out of homelessness and gain economic stability. The blunt instrument of the Eighth Amendment has backfired, and the essential enforcement powers of local governments must be restored to allow cities and counties to address the crisis of homelessness with authority and urgency.

Respectfully Submitted,

Date: March 4, 2024

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No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,

v.

GLORIA JOHNSON, ET AL., ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

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

**CERTIFICATE OF WORD COUNT IN SUPPORT OF BRIEF OF
AMICI CURIAE INTERNATIONAL DOWNTOWN ASSOCIATION,
ET AL. IN SUPPORT OF PETITIONER**

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CERTIFICATE OF WORD COUNT

As required by Supreme Court Rule 33.1(h), I certify that the foregoing document complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in new Century Schoolbook 12-point typeface, and that it contains 6,790 words.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 4, 2024

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