No. 23-175

In The

Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

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

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION and CALIFORNIA BUSINESS PROPERTIES ASSOCIATION IN SUPPORT OF PETITIONER

MARK MILLER
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
(561) 691-5000
Mark@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and California Business Properties Association

QUESTION PRESENTED

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit held that the Cruel and Unusual Punishments Clause prevents cities from enforcing criminal restrictions on public camping unless the person has "access to adequate temporary shelter." *Id.* at 617 & n.8. In this case, the Ninth Circuit extended *Martin* to a class wide injunction prohibiting the City of Grants Pass from enforcing its public-camping ordinance even though civil citations. That decision cemented a conflict with the California Supreme Court and the Eleventh Circuit, which have upheld similar ordinances, and entrenched a broader split on the application of the Eighth Amendment to purportedly involuntary conduct. The Ninth Circuit nevertheless denied rehearing en banc by a 14-to-13 vote.

The question presented is:

Does the enforcement of generally applicable laws regulating camping on public property constitute "cruel and unusual punishment" prohibited by the Eighth Amendment?

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit corporation organized for the purpose of litigating matters affecting the public interest. One of its signature issues is property rights. PLF attorneys have participated as lead counsel in several cases before the U.S. Supreme Court in defense of these rights. *See, e.g.*, *Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021); *Pakdel v. City and Cnty. of San Francisco*, 594 U.S. 474 (2021); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997).

PLF participation in this case would continue a long history of PLF emphasizing the right to reasonably use private property for housing; the denial of this right is a source of the rising homeless population in cities like Grants Pass that has motivated the novel interpretation of the Eighth Amendment by courts below. PLF's experience with restrictive land use laws will assist the Court in understanding and deciding the question presented.

California Business Properties Association (C.B.P.A.) is a commercial real estate trade association that serves as the legislative and regulatory advocate for property owners, tenants,

[1] Pursuant to Rule 37.3, Amici provided timely notice to all parties. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to find the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

developers, retailers, contractors, land use attorneys, brokers, and other professionals in the commercial real estate industry. With over 10,000 members, C.B.P.A. is the largest consortium of commercial real estate professionals in California.

C.B.P.A. is the designated legislative advocate for the International Council of Shopping Centers (ICSC), NAIOP of California, the Commercial Real Estate Developers Association (NAIOP), the Building Owners and Managers Association of California (BOMA), the Retail Industry Leaders Association (RILA), the Institute of Real Estate Management (IREM), the Association of Commercial Real Estate – Northern and Southern California (ACRE), the National Association of Real Estate Investment Trusts (NAREIT), AIR Commercial Real Estate Association, and the California Association for Local Economic Development (CALED).

C.B.P.A. is the recognized voice of all aspects of the commercial, industrial, and retail real estate industry in California. Its members range from some of America's largest retailers and commercial property owners and tenants to individual and family-run commercial real estate interests. C.B.P.A. supports the reversal of this decision because the homeless crisis in California is negatively impacting its members' business properties and the lower court's decision is making the problem worse.

SUMMARY OF ARGUMENT

"Political authorities . . . and, in general, public opinion all recognize that a situation in which . . . human beings lack adequate housing is a serious problem." *Homelessness and Housing, A Human*

Tragedy, A Moral Challenge: A Statement Issued by the Administrative Board of the United States Catholic Conference at ¶ 13 (Mar. 24, 1988).[2] As that statement from nearly 40 years ago recognizes, this country's politically elected leaders have a responsibility to the electorate to properly remedy a homeless crisis that faced our country then and has worsened in the years since. *Cf. Johnson v. City of Grants Pass*, 72 F.4th 868, 935 (9th Cir. 2023) ("Homelessness is caused by a complex mix of economic, mental-health, and substance-abuse factors, and appears to resist any easy solution. In recent years, state and local governments have taken a variety of steps intended to ameliorate the crisis[.]") (Smith, S.J., statement upon denial of reh'g en banc).

That the problem has worsened cannot be gainsaid. Although homelessness has existed in the country at least since the mid-1800s, before the 1970s homelessness generally ebbed and flowed with the economy. But by 1984, federal officials estimated the number of homeless in the country to be between 250,000 and 350,000, despite the economy roaring to life following the recession of 1981–82. That number pales compared to the number of homeless today. Last year, the federal government estimated that the number of Americans without a place to stay for the night has about doubled.

Growing homeless populations encroaching on public and private property, and the resulting conflicts among people who use or own those spaces,

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[2] https://www.usccb.org/issues-and-action/human-life-and-dignity/housing-homelessness/upload/homelessness-and-housing.pdf.

have driven the problem toward courts to resolve. The Ninth Circuit has created a rule purportedly grounded in the Eighth Amendment that ties the hands of local policymakers to adopt reasonable laws to move persons or encampments or try other ways to abate disorder in their communities. As the Petitioner and numerous amici have effectively argued, the constitutionality of the lower court's rule is untenable. *See* Brief for Petitioner at 4 (explaining that the Ninth Circuit "misread" and "stretched" Eighth Amendment precedent to reach a result not grounded in the Amendment's "text, history, or tradition"); Brief of Amicus Curiae The County of Orange, California, in Support of Petitioner at 3–4 (describing how the Ninth Circuit created an "unpredictable and uncertain legal minefield for public entities" with its *Martin* and *Grants Pass* decisions).

It must be added, however, that a key source of the growing homeless population is the lack of affordable housing in many if not most American cities today. Pervasive and increasingly restrictive land use laws are the principal cause of housing shortages throughout the country at all price points. "As a result of tightening" laws that prohibit private property owners and builders from supplying needed housing, "beginning in the 1970s, median housing prices have dramatically outpaced median incomes . . . facilitat[ing] acute housing shortages[.]" *See* M. Nolan Gray, *Arbitrary Lines: How Zoning Broke the American City and How to Fix It* 3 (Island Press 2022).

This issue is non-partisan. Recent former Presidents from both sides of the aisle and the current President have recognized the role government officials have played in creating the housing crisis

that puts housing out of reach for many of the homeless. And the problems created by modern land use restrictions has been known for decades. *See* The Report of President Reagan's Commission on Housing at xv (1982)[3] (recognizing that "government regulations [must] be simplified [to] lower[] the cost of housing.").

This brief urges more respect for property rights to help cure the social ill of homelessness through the ingenuity of entrepreneurs and the market in providing low-cost housing. That will happen only if government planners step out of the way. Yet, the Ninth Circuit's rule would encourage even more planning and control by the government over where people live and what gets built. What is needed is more freedom in land use.

The Ninth Circuit's rule, if adopted by this Court, would create a new, heretofore unknown Eighth Amendment right to sleep on public property, which would put new demands and responsibilities on local and state governments. That mistake would put even more power into the hands of government planners who are themselves in part responsible for the homeless crisis giving rise to this case.

ARGUMENT

I. The Rise of Modern Homelessness Parallels Rise in Land Use Regulation

A. Modern Homelessness Starts in 1970s and Doubles Between 1984 and Today

Although homelessness existed in the country at least since the mid-1800s, before the 1970s

[3] https://www.huduser.gov/Publications/pdf/HUD-2460.pdf.

homelessness ebbed and flowed with the economy. *See* Joseph Murphy and Kerri Tobin, *Homeless in the U.S.: a historical analysis*, American Education History Journal Annual 2014 (Vol. 41, Issue 1-2). But in the 1970s a "trend of chronic homelessness began to present itself," National Coalition for the Homeless, History of Homelessness 1929–1980,[4] and the "modern homeless era got going around 1980." Stephen Eide, *Homelessness in America: The History and Tragedy of an Intractable Social Problem* at ix (Rowman and Littlefield 2022); *see also id.* at 37 ("the era of modern homeless replaced the skid row era around 1980.").

The federal government estimated America's homeless population to be between 250,000 and 350,000 nationwide in 1984. *Id.* at 41 (citing U.S. Dep't of Housing and Urban Development, "A Report to the Secretary on the Homeless and Emergency Shelters," at 18 (Apr. 23, 1984). Fast forward to 2013, and the federal government estimated the homeless population to be approximately 610,000 individuals. *See* The 2013 Annual Homeless Assessment Report to Congress, U.S. Dep't of Housing and Urban Development Office of Community Planning and Development at 6. HUD estimated that it grew to approximately 653,000 in 2023. *See* the 2023 Annual Homeless Assessment Report to Congress, U.S. Dep't of Housing and Urban Development Office of Community Planning and Development at 2.[5] Over 40 years then, the federal government estimates that the

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[4] https://nationalhomeless.org/tbt-history-of-homelessness-1929-1980/

[5] https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf.

homeless population in the country doubled. And while the homeless were increasing, so too were the country's restrictions on land use.

B. Modern Land Use Restriction Schemes Come of Age Between 1970s and Today, as the Homeless Crisis Developed Alongside

The massive growth in homelessness has paralleled growth in the number, complexity, and expense of land use regulations. Restrictions on building housing, especially lower-cost housing, have often come in the guise of zoning reform. *See* Gray, *Arbitrary Lines* at 180 (more detailed zoning during and after the 1970s "block[ed] new housing construction, perpetuating a housing shortage that has shoved millions of people into precarious financial situations . . . and, in extreme cases, homelessness."). But other ways to regulate the use of land developed or accelerated in the 1970s as well. In coastal zones with the most acute housing shortages, permitting schemes drove up the cost of new homes and tested the bounds of the constitution. *See, e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987). That phenomenon continues today. *See* Mac Taylor, Perspectives on Helping Low-Income Californians Afford Housing, California Legislative Analyst's Office at 6 (2016) ("state and local policies limit[] the number of housing projects that are permitted").[6] Moreover, the federal government began overreaching its regulatory authority and steadily impairing the right to use property in a non-nuisance manner, including for housing, under the guise of environmental protection. *See, e.g.*, *Sackett v.*

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[6] https://www.lao.ca.gov/Reports/2016/3345/Low-Income-Housing-020816.pdf.

Environmental Protection Agency (*Sackett II*), 598 U.S. 651, 660 (2023) (EPA blocks building of a single house under misapplication of Clean Water Act for nearly 20 years).

1. Zoning has limited housing supply

Local and state officials regulate the way we use our property through land use codes that apply to nearly all populous areas throughout the country. Gray, *Arbitrary Lines* at 35 ("most local governments adopted zoning many decades ago"). State planners set out how local officials may restrict the private use of land, and most communities of even modest size have enacted complicated and restrictive expensive land use schemes regulating which parcels may contain housing and what type. *Id.* at 37.

Thus, government "gatekeepers" decide for us as Americans in most cities and towns where and how we can live, work, and recreate. *See* Richard D. Kahlenberg, *Excluded: How Snob Zoning, Nimbyism, and Class Bias Build The Walls We Don't See* 22–23 (Public Affairs Hatchette Press 2023) ("'Government gatekeepers . . . dictate which buildings can be built and how they should look,' which in turn determines who can live where.") (quoting Diana Lind, *Brave New Home: Our Future in Smarter, Simpler, Happier Housing* 94 (New York: Bold Type Books 2020)).

This Court knows, of course, that early forms of zoning began during the Wilsonian progressive era, and that racial segregation motivated its creation. *See Buchanan v. Worley*, 245 U.S. 60, 70–71 (1917) (striking down a Louisville, Kentucky, ordinance that prohibited blacks from moving into neighborhood blocks that were majority-white, and vice versa,

because it violated the Fourteenth Amendment). To its credit, this Court quickly struck down expressly racial zoning. But not quite a decade later the Court approved a Euclid, Ohio ordinance that divided the city into zones where various types of development were allowed or prohibited, *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926). Though the Cleveland metropolitan area zoning at the time was not explicitly race-based, as *Buchanan*, there was an undercurrent of anti-Semitic prejudice lurking below. *See* Michael Allan Wolf, *The Zoning of America:* Euclid v. Ambler 84 (University Press of Kansas 2008). And the decision allowed widespread zoning, often with improper pretextual motives, to flourish. *See* Richard Rothstein, *Under Color of Law: A Forgotten History of How Our Government Segregated America* 52–53 (Liveright Publishing Corp. 2017) (explaining how in the years after *Euclid*, "numerous white suburbs in towns across the country . . . adopted . . . zoning ordinances [where] snobbishness and racial prejudice were so intertwined . . . it was impossible to disentangle" the two).

The era of pervasive and highly restrictive land use regulation that *Euclid* ushered in has created housing shortages, particularly at the lower end of the market. As Gray explains:

> Between 1970 and 2010, median home values appreciated at a rate of nearly three times median household incomes, particularly in prospering coastal cities. Today, half of all American renters are rent-burdened—spending over a third of their income on rent—and one in four American renters is severely rent-

> burdened—spending over half of their income on rent. These figures have only worsened over the course of the COVID-19 pandemic, with supply shortages driving up housing prices at the highest rate since the crisis years of the late 1970s.

Gray, *Arbitrary Line*s at 52.[7] Prohibitive and restrictive land use laws are largely responsible for these price increases because they often "block[] new housing altogether, whether by prohibiting affordable housing or through explicit rules restraining densities . . . [which] results in less housing being built." *Id.*

And how does zoning do that? By turning our right to use our property into a privilege that the government may or may not bestow on us. *See* Timothy Sandefur, *The Permission Society: How the Ruling Class Turns Our Freedoms into Privileges and What We Can Do about It* 134 (Encounter Books 2016) ("zoning laws . . . force people to get permission from bureaucratic agencies before they may use the property that supposedly belongs to them[.]"). That permission sometimes is granted, but at great cost; moreover, sometimes the permission requires that the housing be built at "a higher quality than residents might otherwise require, through policies such as minimum lot sizes or minimum parking requirements[,]" which drives up costs in a different way. Gray, *Arbitrary Lines* at 52. If nothing else, pervasive land use regulation "often raises housing

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[7] *See also* Kahlenberg, *Excluded* at 52 ("[t]here is near-universal agreement among economists that since the 1970s, the rise of zoning laws that forbid the construction of multi-family housing has prevented housing supply from keeping up with demand.").

costs simply by adding an onerous and unpredictable layer of review to the permitting process." *Id.* at 52–53.

The impact of the permission requirement baked into government control of land use can be illuminated by considering an analogy:

> Imagine if there were a law that only 1,000 cars could be sold per year in all of New York. Those 1,000 cars would go to whoever could pay the most money for them, and chances are you and everyone you know would be out of luck . . . [t]his doesn't happen . . . because Ford and General Motors don't have to ask government permission to increase the number of cars or SUVs that their factories produce. By contrast, all changes to housing supply require explicit approval from local governments.

Kahlenberg, *Excluded* at 53 (internal quotations omitted).

2. Local and State Land Use Permitting Demands

Besides zoning, local and state government officials also restrict property rights by imposing costly financial conditions on the development of property. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (Justice Scalia likened one such demand to "an out-and-out plan of extortion"); Sandefur, *The Permission Society* at 146

(comparing local land use permitting schemes to "payoffs").[8]

The increasing use of the leverage government has in the permitting process to exact land and money as a condition of homebuilding has also driven up costs and reduced housing supply. As economists Edward Glaeser and Joseph Gyourko have explained, until the 1960s in the United States, homebuilding booms corresponded to economic booms. *See* Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, Journal of Economic Perspectives, Vol. 32, No. 1 (Winter 2018) at 3-30.[9] But, beginning in the 1960s, increasing reliance upon land use regulation, including the use of permitting fees to obtain the right to build, drastically reduced the production of housing and increased housing prices, especially along the coasts. *Id.*

Local and state governments have become more and more reliant upon the fees they exact through building permit conditions, *see, e.g.*, *Sheetz v. County of El Dorado*, 84 Cal. App. 5th 394 (2022), *cert. granted*, 144 S. Ct. 477 (Sept. 29, 2023). *Koontz v. St. Johns River Water Management District*, 570 U.S.

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[8] *See also* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae for Petitioner, *Sheetz v. County of El Dorado*, No. 22-1074, 2023 WL 8188403 *10–11 (Nov. 20, 2023) ("In modern America, the diversity of these exactions is limited only by the creativity of the human mind . . . developers often encounter conditions that bear vanishingly little relationship to the activity being permitted or its impact, including situations in which an approval of a project has been conditioned on paying for public art, providing daycare centers, or establishing 'ride-share programs[.]'" (internal citations omitted)).

[9] https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.32.1.3.

595, 612 (2013); *see also* Adam B. Cox & Adam M. Samantha, *Unconstitutional Conditions Questions Everywhere: The Implications of Exit and Sorting for Constitutional Law and Theory*, 5 J. Legal Analysis 61, 69 (2013) (noting that the expansion of the "welfare state" requires the government to fund the concomitant increase in services). All of these novel and expanding permitting fees tend to raise the cost of housing. *See Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 876 S.E.2d 476, 506–06 (N.C. 2022) (noting that these permitting fees for building are often passed along to the purchaser).

3. Environmental Regulations

Most property regulation occurs at the local and state level, as the zoning and permitting examples above set out. This includes environmental regulation, which like zoning and permitting drives up the price of housing and contributes to homelessness. *See* Jennifer Hernandez, *Green Jim Crow: How California's Climate Policies Undermine Civil Rights and Racial Equality*, The Breakthrough Institute (2021) (California's "climate-based housing policy accelerates the displacement of communities of color from urban employment centers . . . San Francisco, Oakland, and Los Angeles . . . boast shiny new residential towers alongside soaring homelessness rates and declining minority populations.").[10] But federal power has a substantial impact on land use, too, and restricts homebuilding.

Studies of housing market impacts since the 1970s, when implementation of many of the federal

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[10] https://thebreakthrough.org/journal/no-14-summer-2021/green-jim-crow.

environmental laws that impact land use began—the Endangered Species Act, the Clean Water Act, the Clean Air Act, among others—demonstrate that "environmental regulations do increase the price of housing." Katherine A. Kiel, *Environmental Regulations and the Housing Market: A Review of the Market*, Cityscape: A Journal of Policy Development and Research, Volume 8, Number 1 at 204 (2005). Indeed, "[e]nvironmental regulation is a significant hurdle in the development process." David Sunding, *Response to Environmental Regulations and the Housing Market: A Review of the Literature by Katherine A. Kiel*, Cityscape: A Journal of Policy Development and Research, Volume 8, Number 1 at 277 (2005).[11]

Environmental regulations often block the building of housing, and when they do not block the building of housing entirely, they tend to increase the cost of housing that does get built. They do this by:

- requiring the land user to "establish that all practicable steps have been taken to avoid and minimize adverse impacts" on the environment, which usually means fewer new houses than the property would otherwise allow;
- creating out-of-pocket costs the property owner would not otherwise bear, including the need to hire outside experts, such as attorneys and biological consultants, to navigate the permitting process, and the need

[11]https://www.huduser.gov/periodicals/cityscpe/vol8num1/res6.pdf.

to redesign the project based on the outcome of the review process; and

- delaying completion of the project which cost potential purchasers "who must live in a suboptimal location for some period of time, and also to developers and landowners who must wait for receipt of project revenues."

Sunding at 278.

These governmental demands to obtain permission to use one's property "makes it more difficult . . . to purchase homes in those areas [most impacted by environmental laws. The issue becomes one of affordability." Kiel, *Environmental Regulations* at 204. In other words, because fewer houses are built and because the ones that are built include costs not tied to the cost of building or genuine nuisance-like harms, it has become difficult to meet the demand for housing at all price points.

C. That the Housing Crisis Contributes to the Homelessness Crisis Is Undeniable

Observers across the political spectrum recognize that the prohibitive land use regulation raises the cost of housing and creates shortages.

For his part, President Biden has recognized that regulatory barriers to productive land use have created the housing crisis:

> Today's rising housing costs are years in the making. Fewer new homes were built in the decade following the Great Recession than in any decade since the 1960s—constraining housing supply and

> failing to keep pace with demand and household formation.
>
> * * *
>
> Exclusionary land use and zoning policies constrain land use, artificially inflate prices, perpetuate historical patterns of segregation, keep workers in lower productivity regions, and limit economic growth. Reducing regulatory barriers to housing production has been a bipartisan cause in a number of states throughout the country.

The White House, President Biden Announces New Actions to Ease the Burden on Housing Costs (May 16, 2022).[12]

Both President Trump and President Obama, however, went further than that statement from the Biden Administration, in that they both connected the housing crisis to the homeless crisis. President Trump's Administration recognized that federal, state, local, and tribal governments "regulatory barriers" including "overly restrictive zoning and growth management controls[,] . . . overly burdensome wetland or environmental regulations . . . cumbersome and time-consuming permitting and review procedures . . . and inordinate impact or developer fees[,]" increased "the costs associated with development." *See* President Trump's Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable

[12] https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/.

Housing (June 25, 2019).[13] These regulatory barriers to development "[are] a primary determinant of homelessness, and research has directly linked more stringent housing market regulation to higher homelessness rates." *Id.*

Meanwhile, President Obama acknowledged that cities with the highest regulatory barriers to housing, those barriers described as "zoning, other land use regulations, and lengthy development approval processes," caused an increase in homelessness. President Barack Obama Housing Development Toolkit at 2, 11 (Sept. 2016).[14]

Casual observers often attribute the homeless crisis to mental illness and drug addiction before they consider the cost of housing, contrary to the observations of Presidents Trump and Obama. But nonpartisan researchers confirm that Presidents Trump and Obama are on the right track, explaining that attributing the growth in homelessness primarily to drug addiction or mental illness underappreciates the role of housing shortages. *See* Alex Horowitz, et al., *How Housing Costs Drive Levels of Homelessness,* Pew Charitable Trusts (Aug. 22, 2023).[15] As Horowitz, et al., explain:

> A large body of academic research has consistently found that homelessness in

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[13] https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-establishing-white-house-council-eliminating-regulatory-barriers-affordable-housing/.
[14]https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/images/Housing_Development_Toolkit%20f.2.pdf.
[15] https://www.pewtrusts.org/en/research-and-analysis/articles/2023/08/22/how-housing-costs-drive-levels-of-homelessness.

> an area is driven by housing costs, whether expressed in terms of rents, rent-to-income ratios, price-to-income ratios, or home prices . . . housing costs explain far more of the difference in rates of homelessness than variables such as substance use disorder, mental health, weather, the strength of the social safety net, poverty, or economic conditions.

Id. So: housing shortages increase homelessness, and the various regulatory regimes impacting the ability to build, including but not limited to zoning, permitting abuses, and environmental regulations, are a principal driver of housing shortages. The country has all but ceded the right to use one's property to land use planners, and one consequence of this decades-long error is plain to see in this case.

To increase housing supply for those at all levels of income, including the homeless, land use regulations should be drastically simplified where they cannot reasonably be eliminated. Or put another way, the way to address the homeless crisis is *to take away* power from the government planners so that Americans can build more housing more cheaply, free of unreasonable government regulations on land use. But that is the opposite of what the Respondents seek in this case. What the Respondents ask is both wrong as a matter of policy and, as discussed below, constitutional rights.

II. Recognizing a Positive Right to a Public Space to Sleep Would Represent a Sea Change in This Court's Jurisprudence and Make the Homeless Crisis Worse

The Ninth Circuit resolved this case by fashioning what some say amounts to the first federal constitutional positive right this country has ever known. *See* Mila Versteeg, Kevin L. Cope, Gaurav Mukherjee, *The New Homelessness*, 113 Cal. L. Rev. __ (forthcoming 2025)[16] ("the U.S. Constitution . . . lacks . . . any . . . commitment to positive social-welfare rights . . . [but] this began to change" because of the Ninth Circuit's creation of "the *first true federal constitutional social right* . . . [for the homeless] to camp on public lands") (emphasis added); *see also Jackson v. City of Joliet*, 715 F.2d 1200, 1203–04 (7th Cir. 1983) (setting out that the Constitution protects negative rights, or rights that the government cannot interfere with, versus positive "liberties" or rights, which require the government to provide "basic governmental services"). The Petitioners label what the Ninth Circuit created "a right to public camping," Petition for Writ of Certiorari at 6; or, put another way, it is a right requiring the government to provide a public space for camping unless the city makes available adequate shelter to that homeless individual. *Johnson v. City of Grants Pass*, 50 F.4th 798 (9th Cir. 2022), *amended and superseded on den'l of reh'g en banc*, 72 F.4th 868.

If affirmed by this Court, the Ninth Circuit's holding: (i) would represent a sea change in this Court's individual rights jurisprudence; and (ii) would

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[16] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4718929.

worsen, not improve, the homeless crisis, because it would force the government to get even deeper into the morass of planning and providing for Americans' lives. But the Eighth Amendment does not require it.

The Ninth Circuit panel tried to downplay the significance of its novel conclusion, *id.* at 896 ("our decision is narrow"), but the decision—if upheld by this Court—would be very significant. Lurking underneath the surface of the case and that holding is an age-old philosophical issue—the difference between negative and positive rights. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 Harv. L. Rev. 1131, 1133 (1999) ("[e]ndorsing a view of the Federal Constitution as a 'charter of negative rather than positive liberties,' the [Supreme] Court has resisted acknowledging any 'affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.'") (citation omitted).

Negative rights say what the government cannot do to you. *See* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Rights in State Constitutions*, 73 Alb. L. Rev. 1459, 1462 (2010) ("negative rights entail freedom from government action. To enforce a negative right, a citizen merely insists that the government not act so as to impinge her freedom"). A purported constitutional positive right, by contrast, describes what government must do for you—what in some other countries is called a "social right." *See* William Cohen & David J. Danelski, *Constitutional Law: Civil Liberty and Individual Rights* 1081 (Foundation

Press, 3d ed. 1994). Positive rights, or "social rights," include "the rights to an adequate standard of living, to decent education, housing, or jobs[.]" *Id.* Before this case, one would struggle to think of any example of a positive right endorsed by this Court.

This Court has consistently rejected the idea that the Constitution requires the government to do something *for* Americans, even though the facts may draw upon our sympathies. The most famous example occurred in *DeShaney v. Winnebago County Dep't of Soc. Servs*, 489 U.S. 189 (1989). There, the Court faced a heartbreaking fact pattern. Joshua DeShaney, a four-year-old, was removed by the Wisconsin state court system from his father's custody because his father had abused him. *Id.* at 192. However, based on the say-so of experts and the county Department of Social Services (DSS), Joshua was returned to his father. *Id.* In the end, the father abused young Joshua so severely that Joshua fell into a coma. *Id.* at 193.

Joshua's mother sued the county on her son's behalf and claimed Joshua had a positive constitutional right, pursuant to the Fourteenth Amendment, to be protected by the state from his father. *Id.* The DSS's failure to do so amounted to violating that right. *Id.* The Court rejected Joshua's theory. *Id.* at 196–98. Chief Justice William Rehnquist explained that unless someone is in government custody (in jail, for example), they do not have a constitutional, positive right to be protected by the government from a private party. *Id.* He went on:

> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to

> secure life, liberty, or property interests of which the government itself may not deprive the individual. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 317–318, 100 S.Ct. 2671, 2688–2689, 65 L.Ed.2d 784 (1980) (no obligation to fund abortions or other medical services) (discussing Due Process Clause of Fifth Amendment); *Lindsey v. Normet*, 405 U.S. 56, 74, 92 S.Ct. 862, 874, 31 L.Ed.2d 36 (1972) (no obligation to provide adequate housing) (discussing Due Process Clause of Fourteenth Amendment); see also *Youngberg v. Romeo*, *supra*, 457 U.S., at 317, 102 S.Ct., at 2458 ("As a general matter, a State is under no constitutional duty to provide substantive services for those within its border").

Id. at 196. Importantly, Chief Justice Rehnquist recognized that Joshua may have other legitimate ways to sue the government for these injuries—for example, via state negligence law—but the Constitution does not guarantee a positive right to be protected. *Id.* at 201–02. The point remains the same whether the positive right is asserted under the Fourteenth or Eighth Amendment, as in this case.

Much as the world sympathized with Joshua, the Court here can similarly sympathize with the homeless who struggle with addiction, mental illness, and the need for more affordable housing. But that does not mean the homeless have a constitutional, positive right to a public space in which to sleep. *Johnson*, 72 F.4th at 945 (Bress, J., dissenting from

denial of reh'g en banc) ("[n]ot every challenge we face is constitutional in character.").

Instead, like Joshua again, they may have state law claims they can make against the government, but they do not have a constitutional claim against it. As the Respondent acknowledged in its Brief in Opposition to Grants Pass's Petition for Writ of Certiorari,[17] the State of Oregon recently passed a law to give the homeless the statutory right to sue if any local ordinance addressing their act of lying, sitting, sleeping, or keeping warm and dry on public property is not "objectively reasonable." Or. Rev. Stat. Ann. § 195.530(2). While it is not a federal, constitutional cause of action, homeless people in Grants Pass have a state statutory right to sue the local government for a place to sleep.

The Constitution and this Court's jurisprudence compels this Court to reverse the lower court decision. And besides being the correct application of this Court's precedents, that result also would avoid a rule that would encourage government planners to take even more control over the location, type, and volume of housing made available in our cities. Kahlenberg, *Excluded* at 236. To address the homeless crisis, elected government leaders on both sides of the aisle should read the writing on the wall:

> The government-sponsored walls that divide us do enormous harm—blunting opportunity, *making housing unaffordable*, damaging the environment, segregating us by race and class, and doing significant injury to our

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[17] *See* Respondents' Brief in Opposition at 35.

> fragile democracy. It is time to recognize the [government-imposed] walls that separate us, and then proceed to tear them down.

Id. (emphasis added). A positive right to shelter for hundreds of thousands of homeless persons means more government involvement in the planning of housing. This Court should reject the claim that the Eighth Amendment demands it. One hopes local and state governments may respond instead with policies respecting property rights and the demand for more, lower-cost housing nearly everywhere today.

CONCLUSION

The Court should reverse.

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Respectfully submitted,

MARK MILLER
Counsel of Record
Pacific Legal Foundation
4440 PGA Blvd., Ste. 307
Palm Beach Gardens, FL 33410
(561) 691-5000
Mark@pacificlegal.org

Counsel for Amici Curiae Pacific Legal Foundation and California Business Properties Association