

In The  
Supreme Court of the United States

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CITY OF GRANTS PASS, OREGON,  
*Petitioner,*

v.

GLORIA JOHNSON, *ET AL.*,  
*Respondents.*

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

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**BRIEF OF SAN BERNARDINO COUNTY, CALIFORNIA  
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## Books

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## Government Documents

- Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care* (Jan. 26, 2022), SAN BERNADINO COUNTY HOMELESSLES PARTNERSHIP (presentation from Tom Hernandez, Chief of Homeless Services), [https://www.sbcounty.gov/uploads/sbchp/ich/meetings\\_and\\_minutes/2022/20220126-Special-Joint-ICH-CoC-Meeting.pdf](https://www.sbcounty.gov/uploads/sbchp/ich/meetings_and_minutes/2022/20220126-Special-Joint-ICH-CoC-Meeting.pdf)..... 4, 6, 7, 10, 14, 16
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- Homeless P’ship, 10-Year Strategy to End Homelessness in San Bernardino County*, SAN BERNARDINO CNTY. (2009), [https://hss.sbcounty.gov/sbchp/docs/Final\\_Draft.pdf](https://hss.sbcounty.gov/sbchp/docs/Final_Draft.pdf)..... 2

*Homelessness & Housing Insecurity*, SAN BERNARDINO CNTY, <https://indicators.sbcounty.gov/housing/homelessness-housing-insecurity/>, (last visited Feb. 19, 2024)..... 2

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News Release, *Four Communities Complete Governor’s 100-Day Challenge on Encampments* CALIFORNIA INTERAGENCY COUNCIL ON HOMELESSNESS, (Apr. 22, 2022), [https://bcsh.ca.gov/media/press\\_releases/calich\\_20220422.pdf](https://bcsh.ca.gov/media/press_releases/calich_20220422.pdf).....14

Press Release, *Supervisors enact Laura’s Law to reduce crime and homelessness*, SAN BERNARDINO COUNTY UPDATE (June 15, 2023), <https://main.sbcounty.gov/2023/06/15/supervisors-enact-lauras-law-to-reduce-crime-and-homelessness/> ..... 3

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<i>H.O.P.E.</i> , SHERIFF’S OFFICE OF SAN BERNARDINO COUNTY, <a href="https://wp.sbcounty.gov/sheriff/programs/h-o-p-e/">https://wp.sbcounty.gov/sheriff/programs/h-o-p-e/</a> (last visted Feb. 23, 2024). .....	3
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<i>2003 Continuum of Care Homelessness Count and Survey: Final Report</i> , SAN BERNARDINO COUNTY, <a href="https://www.sbcounty.gov/uploads/sbchp/content/SBC-2023-Homeless-Count-Report.pdf">https://www.sbcounty.gov/uploads/sbchp/content/SBC-2023-Homeless-Count-Report.pdf</a> (last visited Feb. 23, 2023).....	2

### **Other Authorities**

Beau Yarborough, <i>San Bernardino County to spend more than \$72 million fighting homelessness</i> , SAN BERNARDINO SUN (Apr. 7, 2023), <a href="https://www.sbsun.com/2023/04/07/san-bernardino-county-to-spend-more-than-72-million-fighting-homelessness/">https://www.sbsun.com/2023/04/07/san-bernardino-county-to-spend-more-than-72-million-fighting-homelessness/</a> .....	3
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Tori Bedford, *‘They’re throwing us out’: Boston begins clearing encampment at Mass. and Cass*, *WGBH* (Oct. 31, 2023)..... 13

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**STATEMENT OF INTEREST OF  
*AMICUS CURIAE*<sup>1</sup>**

San Bernardino is the largest county in the United States by area, encompassing over 20,000 square miles.<sup>2</sup> As of the 2020 U.S. Census, the population crested 2,181,654 residents, making it the fifth-most populous county in California and the fourteenth most populous in the United States.<sup>3</sup>

Like many municipal governments throughout the nation, San Bernardino County (the “County”) has long endeavored seriously to meet the needs of its homeless residents while at the same time addressing a series of interrelated, societal problems—substance abuse, mental health, housing affordability—that are exacerbating the homelessness crisis and putting strains on entire communities.

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<sup>1</sup> *Amicus curiae* is authorized to submit this brief on behalf of San Bernardino County, California pursuant to Supreme Court Rule 37.3. No counsel for any party authored this brief in whole or in part, and no person or entity other than above-named *amicus curiae* and their counsel made a monetary contribution intended to fund its preparation or submission.

<sup>2</sup> *San Bernardino County, California*, U.S. CENSUS BUREAU,  
[https://data.census.gov/profile/San\\_Bernardino\\_Cou  
nty,\\_California?g=050XX00US06071](https://data.census.gov/profile/San_Bernardino_County,_California?g=050XX00US06071).

<sup>3</sup> *Id.*



When the County adopted a 10-Year Strategy to end chronic homelessness in 2007, the Homeless Census had “identified 7,331 persons either living on the streets or in facilities that serve homeless persons” within San Bernardino’s borders.<sup>4</sup> After a decade of implementation, this plan appeared to be paying some dividends: the number of homeless residents in the County had dropped by more than seventy percent, to 2,118.<sup>5</sup> In recent years, however, the number has climbed (to 4,195 homeless residents as of 2023), demonstrating the vexing durability of the crisis.<sup>6</sup>

The County remains committed to a whole-of-government approach to ending homelessness. It continues to maintain and fund the San Bernardino County Homeless Partnership, a collaboration of “community and faith-based organizations, educational institutions, non-profit organizations, private industry, and federal, state, and local

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<sup>4</sup> *Homeless Partnership, 10-Year Strategy to End Homelessness in San Bernardino County*, SAN BERNARDINO CNTY. (2009), [https://hss.sbcounty.gov/sbchp/docs/Final\\_Draft.pdf](https://hss.sbcounty.gov/sbchp/docs/Final_Draft.pdf).

<sup>5</sup> *Homelessness & Housing Insecurity*, SAN BERNARDINO CNTY, <https://indicators.sbcounty.gov/housing/homelessness-housing-insecurity/>, (last visited Feb. 19, 2024).

<sup>6</sup> *2003 Continuum of Care Homelessness Count and Survey: Final Report*, SAN BERNARDINO COUNTY, at 6, <https://www.sbcounty.gov/uploads/sbchp/content/SB-C-2023-Homeless-Count-Report.pdf> (last visited Feb. 23, 2023).

governments.”<sup>7</sup> The Sheriff’s Office of San Bernardino County implements a Homeless Outreach and Proactive Enforcement (“HOPE”) program that is rooted in a community policing philosophy.<sup>8</sup> The County also voted unanimously just this past summer to participate in “Laura’s Law,” a California statute that allows the Sheriff’s Office to seek court-ordered, outpatient, mental-health treatment for homeless residents.<sup>9</sup> Perhaps most significantly, the County’s ongoing Homeless Investment Spending Plan represents a \$72.7 million investment, leveraging federal, state, and discretionary general fund resources to support a bevy of strategic initiatives aimed at reducing homelessness and increasing the supply of permanent and transitional housing opportunities for residents who are at risk of becoming homeless.<sup>10</sup>

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<sup>7</sup> *San Bernardino County Homeless Partnership*, SAN BERNARDINO COUNTY, <https://sbchp.sbcounty.gov/> (last visited Feb. 23, 2024).

<sup>8</sup> *H.O.P.E.*, SHERIFF’S OFFICE OF SAN BERNARDINO COUNTY, <https://wp.sbcounty.gov/sheriff/programs/h-o-p-e/> (last visited Feb. 23, 2024).

<sup>9</sup> Press Release, *Supervisors enact Laura’s Law to reduce crime and homelessness*, SAN BERNARDINO COUNTY (June 15, 2023), <https://main.sbcounty.gov/2023/06/15/supervisors-enact-lauras-law-to-reduce-crime-and-homelessness/>.

<sup>10</sup> Beau Yarborough, *San Bernardino County to spend more than \$72 million fighting homelessness*, SAN BERNARDINO SUN (Apr. 7, 2023), <https://www.sbsun.com/2023/04/07/san-bernardino-county-to-spend-more-than-72-million-fighting-homelessness/>.

Yet even the best homelessness relief efforts fail to find beds for one hundred percent of homeless residents. San Bernardino County’s participation in a 100-Day Challenge initiative, for example, sought to work with “150 individuals living in encampments, with 30% becoming stably housed and 60% connected to services on the pathway to housing.”<sup>11</sup>

San Bernardino County, California as *amicus curiae* in support of Petitioner, needs flexibility to be able to respond to the multi-faceted challenges of the homelessness crisis with compassion—even when the County cannot secure a bed for every resident in the community. The ruling below, which rests on a muddled application of *Powell v. Texas*, 392 U.S. 514 (1968), risks denying municipalities that flexibility.

### SUMMARY OF ARGUMENT

*Amicus curiae* San Bernardino County, California, takes seriously its obligation to meet the needs of *all* of its residents—including its homeless residents. The County has committed significant resources to addressing the problem of homelessness at large encampments that literally run for miles along the banks of the Santa Ana and Mojave Rivers. The County has leveraged tens of millions of dollars in

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<sup>11</sup> *Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care, SAN BERNARDINO COUNTY HOMELESS PARTNERSHIP* (Jan. 26, 2022), at 18-19 (presentation from Tom Hernandez, Chief of Homeless Services), [https://www.sbcounty.gov/uploads/sbchp/ich/meetings\\_and\\_minutes/2022/20220126-Special-Joint-ICH-CoC-Meeting.pdf](https://www.sbcounty.gov/uploads/sbchp/ich/meetings_and_minutes/2022/20220126-Special-Joint-ICH-CoC-Meeting.pdf)

federal, state, and local funding, while maintaining an investment in the San Bernardino County Homeless Partnership for nearly two decades. The Ninth Circuit’s rulings 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), unfortunately, have complicated *amicus curiae*’s efforts and are making it harder to respond to today’s homelessness crisis with compassion. Many programs aimed at transitioning people out of encampments are now in jeopardy.

Ultimately, both *City of Grants Pass* and *Martin* rest on a misapprehension of this Court’s well-established jurisprudence in evaluating the constitutionality of a myriad of vagrancy laws, including decisions in: *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). A throughline connecting the vagrancy laws struck down in those cases is that they all shared a common focus on marking people as outsiders—excluding them from acceptable society. See Risa Goluboff, VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S, at 332 (Oxford Univ. Press 2016) (hereinafter “Goluboff, VAGRANT NATION”) (“[V]agrancy laws, rather than the people they had long regulated, now seemed very much out of place.”).

Criticism of those earlier, unjust initiatives cannot possibly be leveraged against modern “clearance and closure with support” programs like those in San Bernardino County, which are trying desperately to bring homeless residents back into a community. See,

*e.g., Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care, SAN BERNARDINO COUNTY HOMELESS PARTNERSHIP (Jan. 26, 2022), at 18-19, supra note 11 (The County offers “intensive and empathetic outreach and engagement services that support the human experience, dignity and rights of the encampment residents....”).*

Our laws can protect the civil liberties of individuals like Petitioners—consistent with the letter and spirit of *Robinson, Powell, Coates, and Papachristou*—while at the same time giving local governments the room needed to work creatively on new approaches to reduce homelessness and move residents into more stable and safer housing options. The Ninth Circuit’s decisions have unwittingly hamstrung well-meaning, targeted efforts like those underway in San Bernardino County.

## ARGUMENT

### **I. The Ninth Circuit’s Rulings in *Martin* and *City of Grants Pass* Have Hamstrung Local-Government Efforts to Address Homelessness with Compassion.**

San Bernardino County has two sites that drive its concern in the instant case: (1) an extended area along the Santa Ana River where “[t]here are a number of encampment areas strewn throughout the 14 mile area;” and (2) the banks of the Mojave River which “is lined with large encampment areas” from Victorville,

California to the City of Hesperia.<sup>12</sup> The County's Office of Homeless Services has leveraged \$1.7 million from the State of California's Encampment Resolution Funding Program to move at least ninety percent of individuals in these areas to stable housing or services that can place them on a pathway to housing.<sup>13</sup>

*Amicus curiae* is gravely concerned that the *Martin* and *City of Grants Pass* decisions could adversely affect initiatives such as these. The majority opinion in *Martin v. City of Boise*, 920 F.3d 584 (2019), purports to assure communities like San Bernardino that its ruling "in no way" dictates to municipal governments that they must "allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Id.* at 617 (alteration in the original) (citation omitted). But two sentences later, the court delineates at least one way a locality *would* be liable: "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Id.* (footnote omitted).

Following *Martin*, the court of appeals in *Johnson v. City of Grants Pass* has determined that ordinances prohibiting the use of temporary bedding are unconstitutional, while demurring on vital questions regarding restrictions against open fires, the use of

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<sup>12</sup> *Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care*, SAN BERNARDINO COUNTY HOMELESS PARTNERSHIP (Jan. 26, 2022), at 18, *supra* note 11.

<sup>13</sup> *Id.* at 18-19.

stoves, and the construction of semi-permanent structures (e.g., tents). The Ninth Circuit would require a municipality to “explain the City’s interest in these prohibitions,” but also warns that “these prohibitions may or may not be permissible.” *Johnson v. City of Grants Pass*, 72 F.4th 868, 895 (9th Cir. 2023) (internal footnotes omitted).

In the Ninth Circuit, the touchstone apparently is whether “the fire, stove, and structure prohibitions deprive homeless persons of sleep or ‘the most rudimentary precautions’ against the elements.” *Id.* (footnote omitted). But what of other salient factors, such as a community’s interest—especially in fire-prone California—in promoting public safety? What of the likelihood that structures would effectively grant sole use of public spaces only to those individuals who exert physical control over an area to the exclusion of other community members? What of “clearance and closure with support” initiatives, which aim to end reliance on encampments by connecting homeless residents with services that could lead to more stable housing down the road?<sup>14</sup>

These questions are not hypotheticals. *Amicus curiae*, like many communities, has a compassionate and sincere public interest in connecting homeless residents with services that can put them on

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<sup>14</sup> See, e.g., Lauren Dunton, *et al.*, *Exploring Homelessness Among People Living in Encampments and Associated Cost*, U.S. DEP’T OF HOUSING AND URBAN DEV., at 14-15, (Feb. 2020) (describing “well-developed strategies” to address homelessness in Chicago, Houston, San Jose, and Tacoma), <https://www.huduser.gov/portal/sites/default/files/pdf/Exploring-Homelessness-Among-People.pdf>.

pathways to housing—along with its interests in promoting public safety, reducing fire risk, and preserving public spaces for shared use. In 2021, San Bernardino County joined communities in Sacramento, Santa Cruz, Merced, and Fresno in participating in California Governor Gavin Newsom’s “100-Day Challenge designed to spur innovations related to encampments.”<sup>15</sup> This challenge was explicitly “encampment-focused,” with the goal of encouraging participating municipalities “to work together to set audacious goals, streamline systems, and *find innovative ways* to help persons experiencing homelessness.”<sup>16</sup> Governor Newsom’s program built on similar efforts sponsored by the U.S. Department of Housing and Urban Development (“U.S. HUD”).<sup>17</sup> But the “innovative ways” adopted by *amicus curiae* and other governments across the nation may be stymied by *Martin* and *City of Grants Pass*, regardless of whether they prove beneficial to homeless populations by connecting them with the services municipalities are striving to provide.

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<sup>15</sup> *California Launches Encampment Resolution Grant Program*, OFFICE OF GOVERNOR GAVIN NEWSOM (Oct. 29, 2021), <https://www.gov.ca.gov/2021/10/29/california-launches-encampment-resolution-grant-program/>

<sup>16</sup> *Id.* (emphasis added).

<sup>17</sup> *Youth Homelessness*, RE!NSTITUTE, <https://re-institute.org/our-work/our-projects/housing-homelessness/youth-homelessness>, (last visited Feb. 28, 2024) (noting partnerships “with the U.S Department of Housing and Urban Development ... to launch RE!NSTITUTE 100-Day Challenges with communities across the country.”).



San Bernardino County’s 100-Day Challenge programs, for example, sought “to engage frontline staff to plan for innovative interventions to engage unsheltered [residents] in large encampment areas.”<sup>18</sup> And in the program supported by U.S. HUD, the County focused on moving youth and young adults, ages 18 to 24, “into safe and stable housing.”<sup>19</sup> The County’s proposal under this 100-Day Challenge was notably ambitious as it focused on a highly at-risk cohort, “50% of whom have been system-involved which may include, but is not limited to, the criminal justice system, child welfare, and/or the foster care system.”<sup>20</sup>

The urgent need to move this vulnerable population out of encampments as quickly as possible is well-supported by public-health literature. A study conducted across five cities in the United States in 2014 found that 98% of participants experiencing homelessness had been victims of a “violent attack,”

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<sup>18</sup> *Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care*, SAN BERNARDINO COUNTY HOMELESS PARTNERSHIP (Jan. 26, 2022), at 18, *supra* note 11.

<sup>19</sup> *HUD Cohort 6: 100 Day Challenge Summary*, San Bernardino County, CA, U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, *ET AL.*, , at 1, <https://files.hudexchange.info/resources/documents/100-Day-Challenge-San-Bernardino-County-Summary.pdf> (last visited Feb. 23, 2024).

<sup>20</sup> *Id.* at 2.

with one-fifth of those reporting having been victimized four or more times while on the streets.<sup>21</sup>

Homelessness is also associated with a myriad of public-health challenges. In addition to increased incidences of violence and trauma, people experiencing homelessness are far more likely than the sheltered population to report suffering from adverse physical conditions or mental health disorders.<sup>22</sup> And they are *twenty-five times* more likely than sheltered individuals to present with trimorbidity, *i.e.*, a psychiatric disorder combined with substance abuse and a chronic, physical condition.<sup>23</sup>

The freedom to explore creative, inclusive solutions is desperately needed. One study, conducted on a large homeless population living near the intersection of Massachusetts Avenue and Melnea Cass Boulevard in Boston (the so-called “Mass. and Cass” encampment), is particularly instructive.<sup>24</sup> In January 2022, the City of Boston “launched a unique

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<sup>21</sup> Molly Meinbresse, *et al.*, *Exploring the Experiences of Violence Among Individuals Who Are Homeless Using a Consumer-Led Approach*, 29 VIOLENCE & VICTIMS 122, 127 (2014).

<sup>22</sup> Janey Rountree, *et al.*, *Policy Brief: Health Conditions Among Unsheltered Adults in the U.S.*, CALIFORNIA POLICY LAB, at 5 (Oct. 2019), <https://www.capolicylab.org/wp-content/uploads/2023/02/Health-Conditions-Among-Unsheltered-Adults-in-the-U.S..pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> Michael Mayer, *et al.*, *Encampment Clearings and Transitional Housing: A Qualitative Analysis of Resident Perspectives*, 43 HEALTH AFFAIRS 218 (2024).

initiative designed to remove the encampment while simultaneously offering transitional housing,” *i.e.*, six to twelve months of stable housing.<sup>25</sup> Former encampment residents were also offered “wraparound health care and access to social services” to aid in their individual efforts to find more permanent housing solutions and re-integrate fully into the broader Boston community.<sup>26</sup>

The study’s authors found that “encampment clearings” on their own were “generally ineffective,” but concluded that a transitional housing approach to encampment removal could be successful when focused on improving the health and safety of homeless residents: “Many shared that they felt hopeful and motivated to pursue long-term goals such as permanent housing, employment, and recovery from addiction.”<sup>27</sup>

A study commissioned by U.S. HUD confirmed that many cities—Chicago, Houston, San Jose, and Tacoma—have settled on this very same strategy of “clearance and closure *with support*” as a best management practice: “In every case, the clearance has included resource-intensive outreach to help encampment residents connect with needed services and *to try* to ensure that closure does not mean an encampment resident has no place to go.”<sup>28</sup>

The U.S. HUD report, the Boston example in managing the “Mass. and Cass” encampment, and *amicus curiae* San Bernardino County’s innovative

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<sup>25</sup> *Id.* at 219.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 224.

<sup>28</sup> Lauren Dunton, *et al.*, *supra* note 14, at 15 (emphasis added).

efforts through the 100-Day Challenge on homelessness, all stand as promising responses to the concerns of Justice Thurgood Marshall: “before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world....” *Powell v. Texas*, 392 U.S. 514, 530 (1968) (plurality opinion).

Sadly, it is doubtful whether Boston’s well-meaning efforts to remedy the multi-faceted problems created by the “Mass. and Cass” encampment would survive a court challenge in the Ninth Circuit under *Martin* and *City of Grants Pass*.<sup>29</sup> The *City of Grants Pass* court simply compared available “secular shelter space” with a point-in-time count of homeless residents—waiving aside nuanced questions related to religiously affiliated shelters, strained family relationships, or the challenges of connecting people with private resources or other personal support networks. *City of Grants Pass*, 72 F.4th at 894-95.

The *City of Grants Pass* decision also overlooks that even the best homelessness programs are unable to guarantee a bed for every resident in a community ahead of time. Respectfully, the County as *amicus curiae* maintains that clouded messaging from the Ninth Circuit on these and other details has made it

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<sup>29</sup> See Tori Bedford, *‘They’re throwing us out’: Boston begins clearing encampment at Mass. and Cass*, WGBH (Oct. 31, 2023), <https://www.wgbh.org/news/local/2023-10-30/theyre-throwing-us-out-boston-begins-clearing-encampment-at-mass-and-cass>.

harder to do the good and difficult work of managing our Nation’s homelessness crisis.<sup>30</sup>

As stated in the Statement of Interest of *Amicus Curiae*, *supra* pp. 1-4, San Bernardino County has been committed to addressing homelessness in a holistic way, with a focus on moving people off of the streets and bringing them into the community. And the County has seen some success with its most innovative efforts. Under Governor Newsom’s 100-Day Challenge, the County “was able to house 52 people experiencing unsheltered homelessness and put another 98 people on the path to housing.”<sup>31</sup>

It is worth pausing here to emphasize what the data confirms: good programs do not always guarantee homeless residents immediate access to housing—but they do often put these community members on a path to a more stable future. The Ninth Circuit’s ruling in *Martin*, 920 F.3d at 617, would risk requiring a municipality to secure an available bed for every homeless individual prior to initiating these encampment-focused programs. That is an unworkable standard even for a municipality like San Bernardino County, which has committed tens of

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<sup>30</sup> See, e.g., *Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care*, SAN BERNARDINO COUNTY HOMELESS PARTNERSHIP (Jan. 26, 2022), *supra* note 11.

<sup>31</sup> News Release, *Four Communities Complete Governor’s 100-Day Challenge on Encampments* CALIFORNIA INTERAGENCY COUNCIL ON HOMELESSNESS, (Apr. 22, 2022), [https://bcsh.ca.gov/media/press\\_releases/calich\\_2022\\_0422.pdf](https://bcsh.ca.gov/media/press_releases/calich_2022_0422.pdf)

millions of dollars to the homelessness crisis. And *City of Grants Pass*, 72 F.4th at 895-96, leaves open the door to striking down the most basic “fire, stove, and structure prohibitions” if they are deemed “rudimentary forms of protection from the elements.”

To be sure, the civil liberties of our homeless neighbors need to be honored, and programs designed only to punish and mark homeless residents as outsiders raise serious constitutional concerns. But the overly broad language of *Martin* and *City of Grants Pass* risk doing far more harm than good. These rulings risk frustrating San Bernardino County’s efforts to draw homeless residents into a community of support through implementation of highly regarded “clearance and closure with support” programs.

## **II. Vagrancy Laws Were Unconstitutional Because They Cast People Out; Homelessness Programs Are Valid Because Bring People In.**

The Ninth Circuit majorities in both *Martin* and *City of Grants Pass* err in misapprehending this Court’s opinions in *Powell v. Texas*, 392 U.S. 514 (1968), while also failing to consider other applicable precedents affecting so-called “vagrancy” laws. Some of these precedents are rooted in the Eighth Amendment, *Robinson v. California*, 370 U.S. 660, 666-67 (1962), while others find a home in the Fourth, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1972).

*Amicus curiae* respectfully offers a lodestar that can help navigate a path through these cases: State or local-government efforts that seek to *exclude*

citizens from the community have historically been constitutionally suspect. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940) (tossing out a labor organizer’s conviction under an anti-loitering and anti-picketing statute). The 100-Day Challenge programs in San Bernardino County, in contrast, were developed specifically to draw people in: “In 100 days, we will work with 150 individuals living in encampments, with 30% becoming stably housed and 60% connected to services on the pathway to housing ... [with] intensive and empathetic outreach and engagement services that support the human experience, dignity and rights of the encampment residents.”<sup>32</sup> The Ninth Circuit’s decisions risk invalidating all of these encampment-focused programs, tossing the proverbial baby out with the bathwater.

The Ninth Circuit’s missteps begin with its application of Supreme Court precedent on the Eighth Amendment and the criminalization of “status” offenses. In *Robinson v. California*, this Court held that “a state law which imprisons a person thus afflicted as a criminal, *even though he has never touched any narcotic drug within the State* or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment.” 370 U.S. at 667 (emphasis added). Thus, the Eighth and Fourteenth

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<sup>32</sup> *Agenda: Special Joint Meeting of the Interagency Council on Homelessness (ICH) and the San Bernardino City/County Continuum of Care, SAN BERNARDINO COUNTY HOMELESS PARTNERSHIP* (Jan. 26, 2022), at 18-19, *supra* note 11.

Amendments bar States from criminalizing the mere “status” of being a narcotics addict. *Id.* at 666–67.<sup>33</sup>

Shortly thereafter, a four-Justice plurality in *Powell v. Texas*, 392 U.S. 514 (1968), led by Justice Marshall, announced the judgment of the Court and upheld a criminal conviction for public drunkenness—notwithstanding the defendant’s disease of “chronic alcoholism.” The Marshall plurality distinguished *Robinson*, explaining that the “appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*.” 392 U.S. at 532. Justice Marshall’s plurality opinion understood *Robinson* as standing for the view that “criminal penalties may be inflicted *only if the accused has committed some act ....*” *Id.* at 533 (emphasis added).<sup>34</sup>

Four years after *Powell v. Texas*, this Court considered a new vagrancy-law challenge in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). Absent dissent, the *Papachristou* Court anchored its analysis in the Fourth Amendment, noting that vagrancy “statutes are in a class by

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<sup>33</sup> Curiously, “several justices intimated that they were willing to invalidate the addiction law [in *Robinson*] partly because they felt it was distinguishable from [other] vagrancy laws, which they deemed constitutional.” Goluboff, VAGRANT NATION, at 107-08.

<sup>34</sup> The critical fifth vote to uphold the conviction came from Justice White, who agreed that a requisite *actus reus* had been present. *Powell*, 392 U.S. at 554 (footnote omitted).



themselves, in view of the familiar abuses to which they are put....” *Papachristou*, 405 U.S. at 166 (quoting *Winters v. New York*, 33 U.S. 507, 540 (1948) (Frankfurter, J., dissenting)). The Court struck down the Florida regime because, “It furnishes a convenient tool for ‘harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.’” *Papachristou*, 405 U.S. at 170-71 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940)); *see also Lanzetta v. New Jersey*, 306 U.S. 451, 458 (1939) (striking down a statute as void for vagueness because it “condemns no act or omission”).

Importantly, *Papachristou* was preceded by *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), which delineated, in *dicta*, the kind of ordinances that would likely pass constitutional muster. “The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited.” *Id.* at 614.

A throughline connecting the Court’s evaluation of this multitude of vagrancy laws is an insistence on fair treatment for those too-easily cast aside as “poor people, nonconformists, dissenters, idlers.” *Papachristou*, 405 U.S. at 170. Vague statutes (*Papachristou*, *Coates*) and those establishing “status” crimes (*Robinson*) fail to give notice to potential arrestees, while giving “unfettered discretion” to the police. *Papachristou*, 405 U.S. at 168-69. Stated differently, unconstitutional vagrancy laws from an earlier generation were bent on

criminalizing the behavior of certain groups deemed undesirable and enforcing racial and class hierarchies. See Risa Goluboff & Adam Sorensen, *United States Vagrancy Laws*, in OXFORD ENCYCLOPEDIA OF AMERICAN URBAN HISTORY, at 1350–1365 (Timothy J. Gilfoyle ed., 2019). The Court in the 1960s and 1970s rejected those restrictions, which had historical roots in the “Elizabethan poor laws.... Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that, because a person is without employment and without funds, he constitutes a ‘moral pestilence.’ Poverty and immorality are not synonymous.” *Edwards v. California*, 314 U.S. 160, 174-77 (1941).

Criticism of those earlier statutes cannot possibly be leveraged against modern ordinances aimed at ending homeless encampments and connecting homeless residents with services—including “clearance and closure with support” programs and ordinances that prohibit “use of stoves or fires, as well as the erection of any structures.” *City of Grants Pass*, 72 F.4th at 895. Prior, unconstitutional efforts, such as the laws struck down in *Robinson* and *Papachristou*, sought to keep people out of acceptable society. Modern-day, whole-of-government efforts, like the State of California’s Encampment Resolution Grant Program and “100-Day Challenge focused on serving persons experiencing unsheltered homelessness,” are trying desperately to bring people back in.<sup>35</sup>

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<sup>35</sup> *California Launches Encampment Resolution Grant Program*, OFFICE OF GOVERNOR GAVIN NEWSOM, (Oct. 29, 2021),

There can be no doubt that many programs aimed at tackling the societal problem of homelessness—like those adopted by *amicus curiae* San Bernardino County—fit comfortably within the world of regulations that the *Coates* Court expected would be upheld. *See Coates*, 402 U.S. at 614. And so State and local governments must retain their ability to enact common-sense efforts aimed at protecting the public health and safety of *all* members of a community, including but not limited to its homeless residents. *See, e.g.*, San Bernardino County, Cal., Code of Ordinances § 12.80.130(L) (“Within the limits of any public park or playground . . . it is unlawful for any person to . . . [l]ight or maintain any fire unless such fire is lighted and maintained only in a stove or fire circle or place provided for such purpose.”); *id.* § 12.80.130(P) (“Within the limits of any public park or playground . . . it is unlawful for any person to . . . [c]amp, lodge or tarry overnight unless there are set aside certain places for this purpose.”).

“Clearance and closure with support” programs, along with prohibitions on open fires, stoves, and semi-permanent structures are not aimed at criminalizing the status of homeless residents; instead, they address valid public health and safety concerns by restricting “public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public....” *Powell v. Texas*, 392 U.S. 514, 532 (1968) (Marshall, J., plurality opinion).

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<https://www.gov.ca.gov/2021/10/29/california-launches-encampment-resolution-grant-program/>.

## CONCLUSION

Laws that had sought to cast “others” out of society by criminalizing standardless behavior, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) or status, *Robinson v. California*, 370 U.S. 660, 666-67 (1962) were rightly stricken down in defense of individual civil liberties.

In stark contrast, the programs and laws employed by countless municipalities, including *amicus curiae*, are rooted in a methodology that supports homeless residents and seeks to bring them into the community and off of the streets. San Bernardino County is committed to meeting the homeless crisis with compassion and respect; it simply needs leeway to develop the tools to do so.

Respectfully submitted,

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