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 FOR *AMICUS CURIAE* CITY OF SAN CLEMENTE IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus City of San Clemente is interested in enforcing its public health and safety ordinances, and in effectively addressing the serious social problems associated with homelessness.

[1] No counsel for any party authored this brief in any part, and no person or entity other than *amicus* or *amicus*'s counsel made a monetary contribution to fund its preparation or submission.

INTRODUCTION & SUMMARY OF ARGUMENT

In 2019, the Ninth Circuit held that, under the Eighth Amendment, homeless individuals may not be subject to criminal penalties for sleeping outdoors on public property if no alternative shelter is available to them. *Martin v. City of Boise*, 920 F.3d 584, 604 (9th Cir. 2019) (en banc). That apparently simple rule actually raised a series of unanswerable practical and conceptual questions, and had no logical endpoint. The decision below, which extends *Martin* to civil penalties for public sleeping and the use of various bedding materials, Pet.App. 47a, illustrates as much. This line of cases has already stunted the enforcement of public health and safety ordinances within the Ninth Circuit, and its harmful consequences will only grow if left intact. The dangerous confusion wrought by *Martin* and the opinion below—which *Amicus* has already experienced firsthand—compels reversal.

I. To begin, it is not clear what it means for shelter to be "available" to a homeless individual. The first question is *where* shelter must be available. If the answer is "within the jurisdiction that is attempting to enforce the ordinance"—as the opinion below appears to hold, Pet.App. 57a—then even small towns like *Amicus* may suddenly be charged with maintaining a substantial, oscillating stock of shelter beds.

Similarly, it is unclear *what kind* of shelter must be available. For example, *Amicus* San Clemente has previously sought to comply with *Martin* and its progeny by designating a city-owned lot as a camping area for homeless individuals. But homeless advocates have argued that this line of cases requires *indoor* shelter to be available before anti-camping

ordinances can be enforced. And San Clemente faced a barrage of complaints about the lot's conditions, including claims that the Constitution required it to provide cell-phone charging stations for the homeless.

Nor is it clear *at what time* availability should be measured. If the answer is "at the moment of enforcement," then a homeless person could immunize himself from public camping ordinances simply by violating shelter rules and getting evicted (with the result that the shelter would no longer be "available" to that person). That cannot be right. But nor can any other answer be reasonably drawn from the Ninth Circuit's reasoning.

II. There are also difficult questions concerning how to measure whether shelter is available. *Martin* and the decision below arguably allow enforcement of public sleeping and camping ordinances only if the number of available shelter beds exceeds the number of homeless people in the jurisdiction. But calculating the number of homeless individuals is prohibitively difficult. Nor is it straightforward to monitor the number of available shelter beds, especially given that some shelters are privately run, and not all shelter beds are available to all individuals.

In the end, many local governments may simply cease to enforce their public sleeping and camping ordinances rather than attempt to comply with the onerous requirements imposed by the decision below—indeed, some cities have already done so.

III. Finally, it is unclear what *other* laws are cast into doubt by this line of cases. The decision below—which sweeps in the imposition of civil penalties for sleeping *and* using various bedding supplies in public

areas—illustrates the inevitable expansion of *Martin*'s holding. The next targets are likely to include laws that prohibit obstructing traffic; laws that prohibit lighting fires or building of structures on public land; and even laws against public urination, defecation, and drug use. *See* Pet.App. 141a (M. Smith, J., dissenting from denial of rehearing en banc) (warning the majority's logic could preclude city with lack of shelter space from citing a homeless person for "public defecation and urination on the sidewalk").

Ultimately, what all of these problems illustrate is that the Ninth Circuit's approach is profoundly mistaken. A particular homeless individual's inability to comply with the law should be addressed in that individual's enforcement proceeding, perhaps through the assertion of a necessity defense. Attempting to solve the problem wholesale via constitutional law and broad pre-enforcement injunctions inevitably begets precisely the confusion *Martin* has already caused.

ARGUMENT

I. WHAT DOES IT MEAN FOR SHELTER TO BE AVAILABLE?

A. It Is Unclear *Where* Shelter Must Be Available.

One significant question created by the Ninth Circuit's doctrine is *where* the requisite shelter must be available—in other words, what is the jurisdictional level at which its rule must be applied.

Given that the rationale for the rule is that it is improper to punish *involuntary* behavior, *see* Pet.App. 47a-48a, the relevant question would seem to be whether shelter is available in *any* jurisdiction that the homeless individual could reasonably access.

But this line of cases goes broader. *Martin* held that public sleeping and camping ordinances cannot be enforced as long as "there is a greater number of homeless individuals *in a jurisdiction* than the number of available [shelter] beds." 920 F.3d at 617 (emphasis added; quotation omitted). And the opinion below appears to hold that the relevant question is whether there is any "other place *in the City* for [homeless individuals] to go." Pet.App. 57a (emphasis added). This is certainly the reading that has been adopted by homeless advocates.

That rule, however, makes little sense. Especially in areas containing many small jurisdictions, it may be completely impractical to ensure that each one has its own sufficient shelter space to house the maximum number of homeless individuals that might be present in that jurisdiction at a given time. California, for example, has over 1000 cities with fewer than 10,000 residents each.[2]

Moreover, in some states—including California—the primary responsibility for providing indigent care lies with *a different level of government* than the primary responsibility for enforcing basic public order ordinances. While cities such as San Clemente enact ordinances regarding public sleeping and camping, it is *counties* that are charged by state law with caring for the indigent. *See* Cal. Welf. & Inst. Code § 17000; *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1165 n.18 (Cal. 1995) ("If the inability of ... homeless persons ... to afford housing accounts for their need to 'camp' on public property, their recourse lies not with the city,

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[2] *See* CUBIT, *California Cities by Population*, http://tinyurl.com/bdd359mv.

but with the county" to whom the legislature "allocat[ed] ... responsibility to assist destitute persons."); *Clinton v. Cody*, 2019 WL 2004842, at *8 (Cal. Ct. App. May 7, 2019) ("[C]ounties, not cities, have a statutory obligation regarding housing for the indigent.").

Under the Ninth Circuit's rule, then, cities can only enforce their ordinances by taking on the obligations that state law assigns to counties. The decision below thus works a significant and unwarranted intrusion on California's scheme of governance. *Cf. Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 437 (2002) ("Whether and how to use th[e] discretion [to delegate governmental powers to local government units] is a question central to state self-government.").[3]

By applying the *Martin* rule at the level of the municipality, the Ninth Circuit functionally decided the Constitution compels each city to maintain enough beds for the number of homeless individuals within a city limits at any given time. Pet.App. 13a, 57a. And until that precondition is met, cities may not enforce

[3] The confusion as to the relevant jurisdictional level is reflected in a settlement that Orange County entered in order to resolve claims resembling those addressed in *Martin*. Notice of Filing Settlement of Class Action, *Orange Cty. Catholic Worker v. Orange Cty., et al.*, No. 8:18-cv-00155, Dkt. 318 (C.D. Cal., July 23, 2019). Orange County agreed that, in attempting to place homeless individuals in shelters, it would not transport those individuals across "Service Planning Areas." *Id.* at 10. These "Service Planning Areas" are arbitrary units with no preexisting jurisdictional significance or relevance under state law or otherwise. *See id.* at 9.

generally applicable ordinances no matter the public-safety or public-welfare interests at stake.

This non-traditional allocation of responsibility creates a resource crunch. Local communities, whose budgets were designed in reliance on California law's designation of *counties* as the primary provider of social services for the homeless, lack the resources necessary to care for large homeless populations. Yet, in the Ninth Circuit's telling, the Cruel and Unusual Punishments Clause concerns itself with exactly that, and cities must for the first time in history bear the burden of establishing and maintaining city-specific homeless shelters or give up their right to enforce all sorts of public-safety and public-welfare ordinances.

The Ninth Circuit's rule also raises an additional puzzle. In many places in Southern California, unlike Oregon, you can walk across the street and be in a neighboring city. Suppose that, in an attempt to comply with this doctrine, a city purchased a building in a neighboring city to operate as a shelter. Are those beds "available" to homeless individuals in the city that owns and operates the shelter, or would that city violate the Eighth Amendment by enforcing its anti-camping ordinance in reliance on that shelter? Would the answer change if the city offered to provide free transportation to the shelter? How convenient would that transportation have to be? What if the beds were within walking distance? The decision below provides no answers—and no certainty.[4]

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[4] This question is all the more pressing in light of the significant land-value discrepancies among nearby jurisdictions in California. For example, the land values in San Clemente, which boasts over 20 acres of beautiful beaches, are significantly

B. It Is Unclear *What Kind* of Shelter Must Be Available.

The Ninth Circuit decisions also provide precious little guidance as to what sort of accommodations must be provided at a shelter in order to "qualify" as a true alternative to violating a public camping ordinance.

Perhaps the most basic question is whether the shelter must be indoors. For example, seeking to comply with *Martin*, San Clemente in 2019 adopted an emergency ordinance designating a city-owned lot as the exclusive permissible camping site, where anti-camping ordinances would not be enforced.[5] The City contracted for a decomposed granite floor covering, lighting and fencing, and bathroom facilities for the homeless population to use while at the site.[6] The City also provided security, including cameras and a security guard.[7] In addition, City staff coordinated with a homeless-outreach service provider to make regular visits to the site to offer various social services.[8] The City's objective was to ensure that the

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higher than in cities just a few miles away. There is therefore a compelling logic to building the homeless shelters in the cheaper jurisdictions, where the same amount of resources would yield far larger and more comfortable accommodations. But as noted above, it is doubtful that *Martin* would allow this.

[5] *See* Request for Judicial Notice at 9-14, *Housing Is a Human Right Orange Cty. et al. v. Cty. of Orange et al.*, No. 8:19-cv-00388, Dkt. 72-2 (C.D. Cal. July 1, 2019).

[6] Declaration of Erik Sund, ¶¶ 2, 5, *Housing Is a Human Right Orange Cty. et al. v. Cty. of Orange et al.*, No. 8:19-cv-00388, Dkt. 75-2 (C.D. Cal. July 1, 2019).

[7] *Id.* ¶¶ 2, 6.

[8] *Id.* ¶¶ 10, 11.

homeless had a place to sleep without violating the law—such that the City's ordinances could be constitutionally enforced in the rest of the City.

Under the basic logic of *Martin*, the availability of an outdoor camping area like the San Clemente lot *should* allow a jurisdiction to enforce its public sleeping ordinances elsewhere. After all, the underlying question is whether the homeless person had *no choice* but to sleep in an area where sleeping is prohibited. *Martin*, 920 F.3d at 615-17. The San Clemente lot gave homeless individuals a choice by providing them with an alternative place to sleep.

However, stray language in *Martin* could be read to suggest only *indoor* shelter is acceptable. *See id.* at 617 (describing the inquiry as focusing on whether a homeless person has the "option of sleeping *indoors*" (emphasis added)). And lower courts have seized on that language to reject the availability of outdoor shelters. *See* Pet.App. 155a (M. Smith, J., dissenting from denial of rehearing en banc) (citing district court ruling in homeless litigation arising from Chico). If that is the rule, then no jurisdiction could enforce its public sleeping ordinances unless it erected and maintained sufficient *indoor* shelter space to house its entire homeless population—a prohibitively expensive proposition. *See Martin*, 920 F.3d at 594-95 & n.11 (M. Smith, J., dissenting from denial of rehearing en banc).

For example, in 2019, in an attempt to comply with *Martin*, San Clemente deliberated the development of an indoor 35-bed shelter. This facility would have provided for less than half of the number of unsheltered homeless individuals in San Clemente, yet, the costs were overwhelming. *See* County of

Orange, Everyone Counts: 2019 Point in Time Summary (July 30, 2019), http://tinyurl.com /yew2h39u. The City estimated the shelter would cost $500,000 for initial building improvements, $114,000 per year for the lease, and would require $1.1 million to $2 million annually to maintain. *See* San Clemente City Council Meeting Agenda Report, at 1-2 (Aug. 20, 2019), http://tinyurl.com/yc2j78f9. These annual operational costs alone represented between 1.6% and 2.8% of the City's 2019-2020 General Fund expenditures. *See* City of San Clemente, Annual Budget 2019-2020, at 77, http://tinyurl.com/44x7nd6v.

Even assuming that outdoor shelter is acceptable, the next question is *what accommodations* must be offered at that site (or for that matter at any other kind of shelter). For example, San Clemente had to contend with claims that conditions at its outdoor camping lot violated both the Fourteenth Amendment and the Americans with Disabilities Act, among other laws.

Plaintiffs asserted, among other things, that the lot violated the law because (1) it lacked shade; (2) one had to climb a hill to get to the site; (3) at the entrance to the camp, "the land dips several inches and there is a divot"; (4) the portable toilets were not serviced often enough; (5) there was no easily accessible parking for visitors; (6) it was necessary to walk ".35 miles" to get to an area where cooking was permitted; and (7) there was nowhere for homeless residents to charge cell phones.[9]

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[9] Memorandum in Support of Ex Parte Application for a Temporary Restraining Order at 5, 15-18, *Housing Is a Human Right Orange Cty. et al. v. Cty. of Orange et al.*, No. 8:19-cv-00388, Dkt. 69-1 (C.D. Cal. June 30, 2019).

Absurd as this may sound, the uncertainty around claims of this sort puts immense pressure on cities to settle, rather than expose themselves to costly litigation and the threat of damages under § 1983. *See, e.g.*, Notice of Filing Settlement of Class Action, *Orange Cty. Catholic Worker v. Orange Cty., et al.*, No. 8:18-cv-00155, Dkt. 318 (C.D. Cal., July 23, 2019).

Finally, yet another category of questions concerns whether, and under what circumstances, a shelter's policies can render it unavailable for a given homeless individual. For example, many shelters have a religious orientation. *See, e.g.*, Pet.App. 19a; *Martin*, 920 F.3d at 609-10. Is such a shelter unavailable to an individual who advances a religious objection? *Martin* suggested that "coerc[ing] an individual to attend religion-based treatment" "via the threat of prosecution" would violate the Establishment Clause. *Martin*, 920 F.3d at 610. And the opinion below accepted this premise in full. *See* Pet.App. 19a. If that position is correct, it would potentially eliminate all religious shelters from the *Martin* calculus. Moreover, it would also be necessary to ask what *other* constitutional rights may render large categories of shelters unavailable. For example, could "coerc[ing]" an individual to stay at a shelter that requires residents to surrender certain dangerous items constitute a Fourth Amendment violation (or a Second Amendment violation, for that matter)? Could a shelter policy against using profane language violate a resident's free speech rights? All of this remains to be determined, if the *Martin* error is not corrected.

Other questions readily present themselves, too. For example, some shelters are open exclusively to men or to women. *See, e.g.*, *Martin*, 920 F.3d at 605.

Is such a shelter "available" to a married individual whose spouse would be excluded? Does that implicate his constitutional due process rights? What about a homeless individual who does not identify as a man or woman? Similarly, some have asserted that homeless individuals who own pets should not be required to use a shelter that does not allow pets. San Clemente has experienced cases in which a homeless individual refuses offered shelter because the shelter does not accept pets. Indeed, it has been suggested that some homeless individuals are *acquiring pets* in the hopes that this will exempt them from the enforcement of anti-camping ordinances.

In addition, some shelters may not admit persons with prior convictions for various serious offenses (such as violent crimes or sex crimes). Under the Ninth Circuit rule, does every jurisdiction have to maintain a separate shelter for such individuals?

In short, the question of what constitutes "adequate" shelter, while a prerequisite under *Martin* and the decision below to enforcement of any public order ordinances, remains profoundly unsettled.

C. It Is Unclear *When* Shelter Must Be Available.

There are also serious lurking questions as to *when* a homeless individual must have access to shelter. The answer may appear to be obvious: shelter must be available as of the moment when the government attempts to enforce its ordinance. But that approach quickly devolves into paradox.

Consider a shelter that (as any shelter must) imposes some basic rules on its residents, such as a prohibition on assaulting other residents. Should such

a shelter still be viewed as available to an individual who does not wish to abide by those rules? The answer must surely be yes.

But now imagine that the same individual checks into the shelter, violates the rule against assaulting other residents, and is evicted as a result. Should the shelter *now* be regarded as available? If the question is considered at the time of enforcement, the answer would appear to be no. *See Martin*, 920 F.3d at 610 (suggesting that its rule would apply to individuals who were "denied entry" to a shelter "for reasons other than shelter capacity"). This cannot be right. There is no justification for allowing homeless individuals to exempt themselves from public sleeping ordinances simply by violating rules that, *ex ante*, all would agree they should be expected to follow.

This is no mere theoretical construct. The Orange County Sheriff's Department—which is the contract law-enforcement agency for many cities within its borders—advised *Amicus* San Clemente that its officers would not enforce the City's public camping ordinance against individuals who were evicted from the San Clemente campsite, claiming that *Martin* tied their hands. This regime—which rewards willful violations of even the most uncontroversial shelter rules—is perverse and dangerous.

And the same sort of temporal paradox reappears in any number of contexts. For example, *Martin* notes that two shelters in Boise deny admission to anyone arriving after 8 PM. *Martin*, 920 F.3d at 605. If availability must be measured at the moment of enforcement, a homeless individual could be cited for camping in public at 7:30 PM, but not at 8:30 PM (even

though it would still be true at 8:30 PM that she *had been* free to go to the shelter at 7:30 PM). The Boise shelters also do not allow individuals who voluntarily leave the shelters to return immediately. *Id.* at 610. It would be odd to treat a shelter as unavailable to someone who is excluded from it only because he made a choice to leave; yet that is what *Martin* suggests. *See id.*

Another version of the same difficulty arises with respect to homeless individuals who travel from one location to another. Suppose there is adequate shelter in City A, but a homeless individual makes a voluntary decision to relocate to City B. Should shelter in City A be viewed as available to that individual? May City B, at least, impose a durational residency requirement such that its shelters are available only to persons who have lived in City B for some prescribed period? Prohibiting such requirements would be untenable as a practical matter; a desirable city could be forced to provide more and more shelter, *ad infinitum*, as more homeless individuals arrived from all over the country. And yet, again, that is arguably what *Martin* and the opinion below would require.

This problem in particular is compounded by the burgeoning immigration crisis at California's southern border. Nothing in *Martin* or the decision below indicates that the doctrine excludes unauthorized aliens (and in any event, it would hardly be practical, and likely illegal, *see* Cal. Gov. Code § 7284.6, for San Clemente to ascertain every homeless individual's immigration status before deciding whether to enforce its ordinances against that individual).

In all of these examples, the conceptual problem is traceable to the difficulty of assessing when an action should be considered "voluntary." The decision below completely fails to grapple with this question. *Jones v. City of Los Angeles*—an earlier Ninth Circuit opinion that reached the same conclusion but was vacated due to settlement—analyzed the matter a bit more carefully. 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). *Jones* suggested that the underlying question was whether an individual's "past volitional acts" were "sufficiently proximate to the conduct at issue … for the imposition of penal sanctions to be permissible." *Id.* at 1137.

Under that framework, the issue in the examples above would be whether the lack of available shelter is so tightly linked to an individual's prior volitional acts that the individual should be viewed as sleeping on the streets voluntarily, even if no shelter is available to her at that precise moment. But it is not clear whether *Martin* and the decision below leave room even for that modest qualification. *Compare* Pet.App. 14a & n.2, 35a-36a, 39a-40a, 57a (suggesting that volitional nature of the act matters), *with* Pet.App. 148a-149a (M. Smith, J., dissenting from denial of rehearing en banc) (calling this "window dressing" given that majority rested its involuntariness determination on conclusory say-so of homeless plaintiffs); *see also* Pet.App. 89a-90a n.13 (Collins, J., dissenting); Pet.App. 158a-159a (Collins, J., dissenting from denial of rehearing en banc). And even if they did, there is no practical way for city officials making street-level enforcement decisions to conduct an all-things-considered evaluation of which "past volitional acts" (if any)

deprived a particular homeless person of access to shelter.

On this issue too, the Ninth Circuit's approach thus leads to an intractable set of problems that render it practically impossible to enforce a city ordinance.

II. How Should Shelter Availability Be Measured?

A. It Is Prohibitively Difficult To Measure the Number of Homeless Individuals.

Under *Martin*, public sleeping ordinances cannot be enforced "so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters." *Martin*, 920 F.3d at 617 (quotation omitted). To determine whether it may enforce its ordinances, a local government must therefore determine how many homeless individuals are within its jurisdiction. Doing that, however, is virtually impossible.

One logical place to start would be the "Point in Time" count (or "PIT Count"), a federally required census of the homeless population. However, the PIT Count of the unsheltered population is conducted only once every two years.[10] Thus, at most times, the PIT Count information will be significantly out of date, especially given that homeless populations fluctuate dramatically. While governments may attempt to adopt enforcement policies based on the most recent PIT Count, it is far from certain that courts will treat the PIT Count as a safe harbor.

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[10] *See* County of Orange, Everyone Counts: 2019 Point in Time Final Report 13; *Martin*, 920 F.3d at 604 (noting that most recent available data for Boise was from 2016).

Any attempt to count the homeless population more frequently—for example, on any day when the local government would wish to enforce its public sleeping or camping ordinances—would be impossibly expensive and difficult. To perform such a census, someone would have to "painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway." *Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc). In Los Angeles, for example, this task requires three days even with the participation of thousands of volunteers—and still fails to produce a complete count. *Id.* at 594-95.

Making this process even harder, not every individual sleeping on the streets should be counted. As the *Martin* court explained, its "holding does not cover individuals who *do* have access to adequate temporary shelter," such as individuals who "have the means to pay for it" but decline to do so. *Martin*, 920 F.3d at 617 n.8.

Accordingly, to obtain an accurate count of individuals for whom shelter must be made available, local governments would have to somehow distinguish between individuals who are sleeping outside *by necessity* and those who are doing so *by choice*. There is simply no feasible way to do this.

B. It Is Also Difficult To Assess the Number of Available Shelter Beds.

Meanwhile, continually measuring the availability of shelter beds presents its own set of challenges. For one thing, some shelters are run by private organizations, so governments must engage in a

complex coordination effort to maintain accurate and up-to-date records of vacancies at those shelters.

What is more, some shelters are limited to one gender, so simply knowing that shelter beds are available may not be sufficient. More generally, as discussed in Part I of this brief, determining whether a given shelter is "available" for a given individual is a complex and fraught fact-intensive inquiry.

In addition, it is not clear what relationship a given jurisdiction should strive to achieve between the number of shelter beds and the number of homeless individuals. One option would be simply to aim for the number of beds to exceed the homeless population by at least one. But, as Judge Smith noted in *Martin*, it would be easy to miscalculate by failing to account for one or more homeless individuals. That innocent error would create an Eighth Amendment violation, "potentially leading to lawsuits for significant monetary damages and other relief." *Martin*, 920 F.3d at 595 (M. Smith, J., dissenting from denial of rehearing en banc).

The only safe alternative, then, would be to maintain shelter capacity *significantly exceeding* the homeless population. That would make compliance with the Ninth Circuit's rule even more extravagantly expensive. And the expense would not be justified by any coherent policy rationale. In effect, it would result in maintenance of a significant stock of shelter beds *that will never be used.* Indeed, even maintaining a number of beds *equal* to the number of homeless persons would guarantee that some beds would go

unused, as some portion of the homeless population simply does not wish to reside in a shelter.[11]

In the end, it is far from clear what it would take to comply with the Ninth Circuit's rule. What is clear is that—as long as the decision below remains in force—local governments will not be able to enforce their ordinances without great risk and expense. As a result, many cities will be forced to simply abandon them—as some have already done. *See* Pet.App. 141a (M. Smith, J., dissenting from denial of rehearing en banc). The consequences for public safety and health will be as predictable as they are dire.

III. WHAT OTHER LAWS WILL BE AFFECTED?

Martin's expansive logic also threatens a host of other public health and safety laws, and the decision below stretches further still.

To appreciate the scope of *Martin* and the decision below, it is helpful to compare them with their vacated predecessor, *Jones*. The *Jones* panel made at least some effort to cabin its opinion. In particular, it identified a safe harbor for laws which required, as an element, "some conduct" beyond simply sitting, lying, or sleeping in the streets. 444 F.3d at 1123-24. *Jones* said such laws were permissible because they did not "criminaliz[e] the status of homelessness." *Id.* at 1123. Neither *Martin* nor the opinion below contains any such assurances—and indeed the opinion below bows

[11] Perhaps in tacit recognition of this point, the court in one recent case approved a settlement requiring beds "for at least 60 percent of the unsheltered individuals" in the relevant area. Notice of Settlement at 5, *Orange Cty. Catholic Worker et al. v. Orange Cty. et al.*, No. 8:18-cv-00155, Dkt. 272 (C.D. Cal. Oct. 26, 2018). Of course, that figure is entirely arbitrary.

past this restriction by constitutionalizing the right of the homeless to do whatever they must to protect "against the elements," "including [using] articles necessary to facilitate sleep." Pet.App. 47a-48a.

One category of laws falling within the *Jones* safe harbor are "time, place, and manner" laws—*e.g.*, ordinances that apply only during limited hours, or prohibit sleeping "in clearly defined and limited zones," or prohibit "obstruct[ing] pedestrian or vehicular traffic." 444 F.3d at 1123. *Martin*, by contrast, says only that such statutes "*might* well be constitutionally permissible." *Martin*, 920 F.3d at 617 n.8 (emphasis added). That is hardly reassuring.

Indeed, as noted above, *Martin* and its progeny could be read to suggest that cities must provide *indoor* shelter before enforcing their ordinances. Under that logic, would an ordinance forbidding public sleeping in certain designated areas be construed as an attempt to, in effect, turn the rest of the city into an inadequate outdoor shelter? If so, then Judge Smith was right to say that the decision "effectively allows homeless individuals to sleep and live wherever they wish on most public property." *Martin*, 920 F.3d at 595-96 (M. Smith, J., dissenting from denial of rehearing en banc).

Another category of laws that *Jones* viewed as clearly permissible were ordinances against *camping* (as opposed to merely *sleeping*) in public. 444 F.3d at 1123. Yet two of the Grants Pass ordinances at issue in this case *were* anti-camping ordinances. *See* Pet.App. 15a-17a. The majority made clear that these ordinances fell within the scope of *Martin*, because they could be "enforced against homeless individuals

who take even "'the most rudimentary precautions'" to protect themselves "against the elements." Pet.App. 48a (quoting *Martin*, 920 F.3d at 618).

One cannot help but wonder what else the Ninth Circuit will regard as constitutionally protected "precautions … from the elements." *Martin*, 920 F.3d at 618. Beyond the constitutional right to bedding, for example, it is easy to imagine an argument that the decision below creates an Eighth Amendment right to light fires (necessary for cooking) or even erect structures (necessary to ensure shade from the sun and protection from the rain) on public property.

More generally, the panel's insistence that only voluntary conduct can be penalized leads naturally to the conclusion that a wide range of other laws—such as laws against public urination, defecation, and drug use—may also be unconstitutional in many cases. *See* Pet.App. 141a (M. Smith, J., dissenting from denial of rehearing en banc); *see also, e.g.*, *Mahoney v. City of Sacramento*, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020) (interpreting *Martin* to restrict public urination and defecation prosecutions).

The decision below compounds the problem created by *Martin* by expanding its reach to *civil* penalties. Even *Martin*—which was uniquely aggressive in applying the Eighth Amendment to enforcement of public health ordinances, Pet.App. 128a-129a (O'Scannlain, J., statement respecting the denial of rehearing en banc)—was limited to *criminal* penalties. 920 F.3d at 616. The panel in this case, however, extended *Martin* to preclude *civil* sanctions against homeless individuals who violate Grants Pass's anti-camping ordinances. *See* Pet.App. 44a-46a.

Not surprisingly, many plaintiffs have already filed lawsuits relying on *Martin*, challenging an array of local ordinances and policies, and absent intervention by this Court, there will be many more to come.[12]

San Clemente is, sadly, all too aware of how *Martin* has become part of a broader assault on the enforcement of health and safety ordinances. A class of homeless plaintiffs sued, first in federal court and then in state court, claiming that the City's treatment of the homeless violated various provisions of federal and state law. In a legal environment exemplified by *Martin*, municipalities are often pressured to settle such claims rather than defend their policies, and San Clemente was no exception. Rather than risk an even more intrusive injunction and damages liability, the City agreed to a settlement requiring, among other things, that it post notice at least 24 hours before removing any personal property from public areas; store all removed property nearby for at least 90 days; and deliver any stored property on demand. This sort

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[12] *See, e.g.*, *Shipp v. Schaaf*, 378 F. Supp. 3d 1033 (N.D. Cal. 2019); *Hung v. Schaaf*, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019); *Quintero v. City of Santa Cruz*, 2019 WL 1924990 (N.D. Cal. Apr. 30, 2019); *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1076 (W.D. Wash. 2019); *Rios v. City of Sacramento*, 562 F. Supp. 3d. 999 (E.D. Cal. 2021); *Mahoney*, 2020 WL 616302; *Coal. on Homelessness v. City & Cnty. of San Francisco*, 647 F. Supp. 3d 806, 808 (N.D. Cal. 2022), a*ff'd*, 90 F.4th 975 (9th Cir. 2024), *and aff'd in part, remanded in part*, 2024 WL 125340 (9th Cir. Jan. 11, 2024); *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1121 (D. Ariz. 2022); *Boring v. Murillo*, 2022 WL 14740244 (C.D. Cal. Aug. 11, 2022); *see also, e.g.*, *Blake et al. v. City of Grants Pass*, 2019 WL 3717800 (D. Or. Aug. 7, 2019) (certifying class of homeless people in a challenge to city's sleeping and camping ordinances).

of settlement makes enforcement so burdensome that cities might well opt to leave abandoned property on sidewalks, and more generally accept the widespread disregard of their health and safety rules.

* * *

As the many problems discussed above illustrate, the decision below is profoundly misconceived. It simply makes no sense for courts to attempt to resolve these complex issues with broad pre-enforcement injunctions. If a particular homeless person cannot comply with a particular ordinance, that issue should be addressed in that person's criminal trial or civil enforcement proceeding—perhaps via the traditional necessity defense, recognized under California law. *See In re Eichorn*, 81 Cal. Rptr. 2d 535, 539-40 (1998). That approach would properly allow individual circumstances to be taken into account. By contrast, the blunderbuss approach adopted by the Ninth Circuit severely undermines the ability of local governments to address difficult social problems.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

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