

No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
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 OF RETAIL LITIGATION CENTER, INC.
AND RETAIL INDUSTRY LEADERS
ASSOCIATION AS *AMICI CURIAE* IN SUPPORT
OF PETITIONER

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INTEREST OF *AMICI CURIAE*¹

The Retail Litigation Center (“RLC”) is a 501(c)(6) nonprofit organization that represents national and regional retailers, including many of the country’s largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade association solely dedicated to representing the retail industry’s perspective in the courts. The RLC’s members employ millions of people throughout the U.S., provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been favorably cited by multiple courts, including this Court. See, e.g., *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The Retail Industry Leaders Association (“RILA”) is the U.S. trade association for retailers that have earned leadership status by virtue of their sales volume, innovation, or aspiration. RILA advances the industry

¹ Pursuant to Supreme Court Rule 37.6, counsel for *Amici* certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than *Amici*, its members, or its counsel contributed money intended to fund preparing or submitting the brief.

through public-policy advocacy and promotes operational excellence and innovation. RILA’s members include the largest and fastest growing companies in the industry—including retailers, product manufacturers, and service suppliers—together accounting for more than \$1.5 trillion in annual sales. RILA members provide millions of jobs and operate more than 100,000 stores, manufacturing facilities, and distribution centers.

One of RILA’s highest priority programs is the Vibrant Communities Initiative (“VCI” or “the Initiative”), a first-of-its-kind national partnership between the Retail Industry Leaders Association and the National District Attorneys Association to “address safety concerns of employees and consumers by launching a partnership among relevant public and private stakeholders focused on identifying and tackling issues that contribute to the increase in crime, violence, vagrancy, and blight in and around retail environments, business districts and communities across the country.”² The Initiative brings together leading retailers, district attorneys’ offices, social services leaders, law enforcement and other community partners from around the country to establish open lines of communication, identify common challenges, share information, and work together to create “durable solutions” to community problems threatening the vibrancy of communities across the country. Through the Initiative,

² Retail Industry Leaders Association, *Vibrant Communities Initiative*, 2 (June 2023), <http://tinyurl.com/bde55chs>.

Amici have witnessed first-hand the importance of effective coordination among law enforcement, prosecutors, retailers, and policymakers to address the multi-faceted issues contributing to deteriorating social and economic conditions.

The Vibrant Communities Initiative is important to retailers because of their role on the front lines of local communities. In this role, retailers see the public safety impact to consumers and employees of public encampments neighboring and abutting storefronts. Retailers both aid in efforts to address problems like homelessness³ and must also contend with public health and safety risks when some of those same challenges are left unaddressed.

³ The Home Depot Foundation, for example, supported construction and renovation of supportive housing facilities to help keep at-risk veterans in their homes and to help veterans experiencing homelessness access housing. See *The Home Depot Foundation to Fund More than 750 New Housing Units for Veterans Facing Homelessness*, Home Depot, <http://tinyurl.com/y8bawd7h> (Apr. 25, 2023). Target's Coronavirus Relief Fund partnered with community organizations caring for people experiencing homelessness and elderly people. *Here's How Target's \$10 Million Coronavirus Relief Fund is Helping Partners Care for Communities*, Target Corp. (Apr. 17, 2020), <http://tinyurl.com/vnbya36h>. And Starbucks partnered with homeless outreach and housing non-profits to provide short-term resources (like gloves and hats in winter, information about local shelters, soup kitchens, medical centers, and places offering showers) and long-term care. Frida Garza, *Homeless at Starbucks: Why the Coffee Chain is Bringing in Outreach Workers*, <http://tinyurl.com/3hu5wnne>.

SUMMARY OF ARGUMENT

The Ninth Circuit’s requirement that governing jurisdictions assess the voluntariness of a person’s housing status before enforcing a civil ordinance is not only wrong as a matter of constitutional law, it is unworkable in practice. The current Ninth Circuit constitutional regime will either result in de facto non-enforcement of generally applicable public safety laws or will turn judges into policymakers adjudicating “voluntariness” post-hoc.

Retailers, their customers and employees are on the front lines of the health and safety risks from campsites on public property. Campsites are erected near (and sometimes on) retailers’ doorsteps. Customers and employees passing through public property on the way to store entrances are unavoidably affected when items from or conditions in campsites pose a safety risk. Retailers and their customers and employees rely on municipalities to combat those risks, and they depend on local officials to use community tools to respond to the problem.

The City of Grants Pass, like many jurisdictions, enacted an ordinance to regulate public camping that prohibited “occupy[ing]” a “campsite” (any place with bedding, or a stove or fire, maintained for purpose of a temporary place to live) on “public property.” Pet. App. at 16a (quoting GPMC 5.61.010). The Ninth Circuit held that Grants Pass’s ordinance violated the Eighth Amendment “*only against involuntarily homeless person* (sic) for engaging in conduct necessary to protect

themselves from the elements when there is no shelter space available.” Pet. App. at 57a, 66a (emphasis added).

This flawed interpretation of this Court’s decision in *Powell v. Texas*, 392 U.S. 514 (1968) constitutionalizes complex policy issues enacted in response to legitimate public safety problems and strips local officials of the ability to respond to the risks from campsites on public property. Because it is impossible for officers in the field to distinguish between those who are “voluntarily” unhoused and those who experience homelessness “involuntarily,” the inevitable outcome of the Ninth Circuit’s test is non-enforcement of encampment policies or post-hoc judicial policy making.

Retailers and other community partners will continue to advocate for creative and durable solutions to improve conditions that lead to community challenges like homeless encampments, but the Eighth Amendment should not be read to enact an unworkable constitutional regime that prevents municipalities from advancing reasonable regulatory tools. This Court should reject the invitation to “formulat[e] a constitutional rule [that] would reduce, if not eliminate, th[e] fruitful experimentation, and freeze the developing productive dialogue between” community stakeholders (including local retailers), public officials, and law enforcement, “into a rigid constitutional mold.” *Powell*, 392 U.S. at 536–37.

ARGUMENT

Cities enact ordinances to regulate public camping for important public safety reasons. Unregulated public

encampments consistently result in the spread of disease, increased criminal activity, and health and safety risks such as fire and exposure to unsecured medical or drug paraphernalia—any of which can impact people living in encampments, as well as the broader community. Retailers are on the front lines of encountering these risks and partner with local officials to ensure safe access for consumers and employees to community storefronts. Cities like Grants Pass have observed these complex problems and enacted varied policies (including so-called “anti-camping” ordinances) in response. The Ninth Circuit acknowledges that these generally applicable laws are constitutional but takes issue with the “enforcement of those ordinances . . . against *involuntarily* homeless person(s).” Pet. App. at 57a (emphasis added); see *Martin v. City of Boise*, 902 F.3d 1031, 1048 n.8 (9th Cir. 2018) (“Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.”), *opinion amended and superseded on denial of reh’g*, 920 F.3d 584 (9th Cir. 2019).

That standard is unworkable in practice. The Ninth Circuit instructed the district court to craft a narrower injunction taking into account “limitations when a shelter bed is available.” Pet. App. at 55a. Such limitations require law enforcement and prosecutors to determine, person by person, who is *voluntarily* homeless and who is not, requiring an individualized assessment of that person’s ability to afford a place to

stay and the community's ability to provide a bed free of charge. Law enforcement officials responding to public safety concerns cannot make such assessments in the field. As a result, local governments like Grants Pass must choose between Scylla and Charybdis—either abandon public safety laws or risk violating individual constitutional rights as later determined by judges.

I. Retailers are on the front lines of observing and experiencing the impact of public encampments on public health and safety

Retailers are present in every locality across America. They serve all members of their communities, each of whom regularly cross public sidewalks to enter storefronts and enjoy the benefits of brick-and-mortar access to goods and services. Retail establishments are often located in easily accessible areas near public spaces and frequently have awnings to shelter customers or carts from bad weather, as well as parking lots, dumpster areas, and green spaces. Encampments are often built near such storefronts, and persons experiencing homelessness seek shelter, hygiene, and goods from local retailers. Retailers have thus, by default, become first-line responders when those encampments pose risks to public health and safety; in turn, retailers collaborate with law enforcement, social services, and other local partners to help address these issues.

Numerous *amici* have documented the array of public health and safety concerns accompanying public

encampments.⁴ *Amici* RILA and the RLC write to convey the perspective of the retail industry, and specifically, to detail how the health and safety concerns accompanying public encampments require immediate, on-the-ground judgment by retailers in collaboration with local officials.

A. Health

Unregulated public encampments often contribute to public health hazards—including infectious disease, pollution, and human waste—that beset the encampments themselves and spread into the surrounding community. This situation presents unique challenges for retailers adjacent to public encampments, who work to ensure a clean and accessible pathway to community stores and who maintain restrooms frequently used by those in neighboring encampments.

⁴ See, *e.g.*, Pet. Stage Amicus Br. for Goldwater Inst. 17–22; Pet. Stage Amicus Br. for Dist. Att’y of Sacramento Cnty. 16–22; Pet. Stage Amicus Br. for Speaker of the Ariz. House of Representatives et al. 11–15; Pet. Stage Amicus Br. for Cal. State Sheriffs Ass’n et al. 8–23; Pet. Stage Amicus Br. for Off. of San Diego Cnty. Dist. Att’y 3–9; Pet. Stage Amicus Br. for League of Or. Cities et al. 15–17; Pet. Stage Amicus Br. for Brentwood Cmty. Council 13–17; Pet. Stage Amicus Br. for LA All. for Human Rights et al. 14–18; Pet. Stage Amicus Br. for City of Phoenix & League of Ariz. Cities & Towns 10–12; Pet. Stage Amicus Br. for Wash. State Ass’n of Sheriffs & Police Chiefs 9–12; Pet. Stage Amicus Br. for Neighbors for a Better S.F. 6–11; Pet. Stage Amicus Br. for City of Chico 24–35.

Encampments have led to disproportionately high levels of disease for several, interrelated reasons, such as unhygienic conditions, limited healthcare access for residents, and close quarters where disease can spread. Diseases like typhus, shigella, and trench fever—which “typically don’t pose a threat to the general American population in the 21st century”—are thus observed in homeless communities.⁵ Seattle, for instance, experienced outbreaks of these and other communicable diseases among the city’s homeless population, particularly in crowded encampments.⁶

Disease also spreads through contaminated feces due to inadequate restroom facilities in encampments—a striking concern for retailers located near those encampments, who often assume clean-up costs. See, e.g., R.W. Dellinger, *Facing LA’s ‘Human Catastrophe’ on Skid Row with Faith*, Angelus News (May 24, 2019), <http://tinyurl.com/mrxyah9d> (describing efforts of a Los Angeles downtown business association to maintain neighborhood, including hiring fifteen formerly unhoused street workers to clean up feces, urine, blood, and vomit); Shaun Boyd, *Businessman Jon Caldara Dumps Human Poop on Steps of Denver City and*

⁵ Brian Mastroianni, *Outbreaks of ‘Medieval’ Diseases Are Becoming More Common in Cities*, Healthline (Apr. 2, 2019), <http://tinyurl.com/ypje3ue6>.

⁶ Vianna Davila & Jonathan Martin, *Rare Infectious Diseases are Rising at an ‘Alarming’ Rate in Seattle’s Homeless Population, Concerning Health Officials*, Seattle Times (Mar. 15, 2018), <http://tinyurl.com/3unhd96w>.

County Building, CBS (Sept. 25, 2023), <http://tinyurl.com/553ew9ee> (“We have to clean up vomit and urine and syringes and used condoms and feces.”).

Retailers alert local officials to unsafe conditions, and rely on those officials to remedy the situation. Law enforcement’s response must necessarily depend on local policy directives, which were passed by local governments that took into account the circumstances of the community. These laws must supply retailers and law enforcement with clear guidance in this area. In at least one instance, an employee of one of *Amici’s* members was *himself* threatened with a citation by Seattle law enforcement when the employee asked a person to leave the retailer’s premises so that the business could clean the pavement in front of the store. As this example illustrates, retailers—and their employees—cannot operate effectively without knowing what measures they can and cannot take to clean and secure their premises and surrounding areas where customers approach to enter.

B. Safety

Beyond health risks, public encampments create a variety of safety risks to retailers and to their customers and employees. These risks run from fire hazards to violent crime.

To begin, the use of makeshift propane stoves and campfires in encampments generates significant fire hazard. In recent years, several fires that started in encampments have spread throughout communities, endangering lives and destroying property. For

instance, in 2021, a fire broke out in a homeless encampment in Northwest Washington, D.C., leaving one victim dead after he was unable to escape a burning tent.⁷ Numerous others have experienced similar fates when their makeshift structures or bedding materials caught ablaze⁸—which has also endangered responders.⁹

These fires have spread to retailers and public roads, causing significant damage to local businesses and disruption to travel.¹⁰ One small sporting goods business

⁷ See NBC Wash. Staff & Jackie Bensen, *1 Dead After Fire in Northwest DC Homeless Encampment*, NBC Wash. (Oct. 6, 2021), <http://tinyurl.com/4cn22b79>.

⁸ See, e.g., Norah Hogan, *Officials Respond Two Fatal Tent Fires at Homeless Encampments*, WMTW (updated Nov. 28, 2023) <http://tinyurl.com/rxefb6py> (two dead after tents caught fire at two separate encampments on same weekend in Maine); CBS Baltimore, *Officials: 1 Dead After Tent Fire at Rockville Homeless Camp*, CBS News (Jan. 21, 2016), <http://tinyurl.com/ys5uss7u> (one Rockville man dead after tent caught fire); WCCO Staff, *Body Found Following Fire at Northeast Minneapolis Encampment*, CBS News Minnesota (Oct. 5, 2023), <http://tinyurl.com/245yk8xs> (body discovered following encampment fire in Minneapolis); City News Serv. *1 Person Found Dead Near Fire at Sun Valley Homeless Encampment* (May 9, 2021), <http://tinyurl.com/yub6kxmr> (firefighters discovered body while putting out vegetation fire at encampment in Sun Valley).

⁹ See, e.g., Tony Kurzweil, *L.A. Fire Captain Hurt in Explosion at Homeless Encampment*, KTLA News (Jan. 23, 2024), <http://tinyurl.com/4dwdmt9t>.

¹⁰ See, e.g., Gigi Graciette & Kelli Johnson, *Homeless Encampment Fire Spreads to Highland Park Strip Mall*,

owner in Los Angeles, for example, lost more than \$100,000 in merchandise to a fire started in an encampment.¹¹ And in Atlanta, a major highway was shut down for several hours after an encampment caught fire under a bridge.¹²

In some areas, these threats are near-constant: downtown Los Angeles, for example, traces 80% of city fires, approximately 24 fires a day, to encampments.¹³ Similarly, nearly half of all fires in Portland are “homeless-related fires.”¹⁴ And threats are especially acute to any retail business that sells propane (such as home improvement or general convenience stores) because, by regulation, they are required to store

Destroying 2 Businesses, Fox 11 L.A. (June 14, 2023), <http://tinyurl.com/y93csx2z> (encampment fire spread to nearby strip mall and destroyed businesses).

¹¹ KCAL News, *Homeless Encampment Fires Account for 80% of Blazes Plaguing DTLA In Recent Weeks: ‘It’s So Sad’*, CBS News (June 14, 2021), <http://tinyurl.com/z8xxzfsx>.

¹² Tom Jones, *Atlanta City Workers Inspect Homeless Encampment Near Site of Bridge Fire*, WSB-TV (Feb. 14, 2024), <http://tinyurl.com/43fr8esf> (major Atlanta highway shut down for several hours after fire at encampment under bridge).

¹³ Doug Smith et al., *24 Fires a Day: Surge in Flames at L.A. Homeless Encampments a Growing Crisis*, L.A. Times (May 12, 2021), <http://tinyurl.com/42ktyvhp>.

¹⁴ Lucas Manfield, *Data Shows Fires at Homeless Camps Remained a Large Portion of Portland Blazes Last Year*, Willamette Week (Mar. 15, 2023), <http://tinyurl.com/2p96zs7u>.

propane outside of the store building due to the volatility of the product if it interacts with fire.

Businesses near encampments must remain vigilant to these risks, and report fire-risking conduct (such as trash burning or abandoning stoves) to law enforcement. Law enforcement, in turn, must be empowered to act expeditiously and in keeping with community policy solutions enacted in response to a history of problematic conduct.

Drug use in encampments has likewise proven to present a safety risk impacting retailers. Outside storefronts, drug use and discarded needles pose unsafe conditions for employees, customers, and the community writ large.¹⁵ Within retail establishments, individuals experiencing homelessness sometimes self-administer drugs in restrooms, a chronic problem that can alarm employees and customers who also use a retailer's restrooms.

¹⁵ See, e.g., 'Millsvilles': *The Maine Wire Visits Portland's Drug-Infested Tent Cities*, *The Maine Wire* (Aug. 14, 2023), <http://tinyurl.com/ymwdd54x> (local Maine business owner describing littering of his property with used needles); *Ballpark Area Shop Owners Tired of Cleaning Up Waste, Vomit, Needles Left by Homeless in Doorways*, *Denver7* (Oct. 25, 2018), <http://tinyurl.com/mt4bf86w> (similar, for Denver business owners); Carlos Granda, *Business Owners Struggle to Deal with Homeless Encampments They Say Bring Crime, Hurt Bottom Line*, *ABC 7 News L.A.* (Mar. 22, 2023), <http://tinyurl.com/3sebj82e> (Los Angeles business owners' descriptions of drug use and accompanying crime, disorderly conduct near encampments).

Retailers must communicate with law enforcement as needed to remove drug users from the premises, issue citations, and/or refer them to treatment services. Because of the active nature of these threats (such as the possibility that a customer could step on a needle or encounter drug use in the restroom), some communities enact policies regulating encampments to address these concerns before an injury occurs. Similarly, retailers calling law enforcement for assistance need aid in responding to these concerns on an immediate basis—*before* a consumer or employee crossing a public walkway adjacent to a store is injured.

Beyond drug offenses, people experiencing homelessness are also statistically more likely to be both victims and perpetrators of crime.¹⁶ As such, the presence of public encampments significantly increases the likelihood that retailers must contend with routine threats to employee and customer safety.

For example, the owner of a small sandwich shop in Phoenix has reported numerous incidents stemming from a nearby public encampment. The New York Times profiled the business, reporting that in 2022, within a half-mile of the store, police were called to an

¹⁶ CBS Staff, *DA: Homeless More Likely to be Crime Victims and Perpetrators in San Diego County*, CBS 8 (Mar. 21, 2022), <http://tinyurl.com/mr3ykzn9> (two-year study by San Diego District Attorney's Office).

average of eight incidents per day.¹⁷ There were at least 1,097 calls for emergency medical help, 573 fights or assaults, 236 incidents of trespassing, 185 fires, 140 thefts, 125 armed robberies, 13 sexual assaults and four homicides.¹⁸

Retailers located near public encampments must routinely respond to health and safety concerns like those above when the consequences of encampments affect customers, employees, and store properties. Efforts such as the Vibrant Communities Initiative attempt to respond to these challenging problems collaboratively, but retailers still rely on local tools (including municipal policies) to mitigate health and safety risks.

II. The Ninth Circuit’s constitutional regime inhibits enforcement of important public health and safety policies and requires judges to engage in post-hoc regulatory determinations

Municipalities enact ordinances to regulate public camping and related matters to promote public safety and respond to complicated risks in particular communities. The Ninth Circuit’s flawed reading of this Court’s decision in *Powell* created an unusable constitutional standard that leaves law enforcement and prosecutors with two choices: (1) stop enforcing laws

¹⁷ Eli Saslow, *A Sandwich Shop, a Tent City and an American Crisis*, N.Y. Times (updated Mar. 31, 2023), <http://tinyurl.com/ck39cjz9>.

¹⁸ *Id.*

regulating public camping or (2) attempt to engage in an impossible assessment of a particular violator’s housing situation, ability to pay for a hotel bed, and determination of the number of shelter beds available (and type, because religiously-based organization shelter beds don’t count) before enforcing a law responding to public safety needs. This approach improperly constitutionalizes a challenging policy issue, prevents local officials from enforcing public safety laws, and stifles retailers’ and other local stakeholders’ efforts to safeguard their community.

A. The Ninth Circuit’s flawed reading of *Powell* created a constitutional landscape with no clarity for local governments that need to respond to public health and safety concerns connected with the challenging issue of homelessness

The Ninth’s Circuit rigid ruling in *Martin* rests on a fundamental misunderstanding of this Court’s decision in *Powell*. According to *Martin*, *Powell* cemented into law the principle “that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.” Pet. App. at 50a (internal quotations omitted). But as Petitioner and various *amici* have noted,¹⁹ this reading improperly cobbled together Justice Fortas’s four-Justice dissent in *Powell* (which opined that the Eighth Amendment prohibits punishing behavior that a

¹⁹ Pet. Br. 30–37.

defendant is powerless to change) with Justice White's lone concurrence (which opined that the Eighth Amendment might prohibit enforcement of the challenged law if the defendant had nowhere else to go, but noted it was unnecessary to decide the issue because the defendant did not prove he had no choice but to be drunk in public on the night in question). See *Powell*, 392 U.S. at 548–70. This dissent-plus-concurrence-dicta approach ran afoul of this Court's instruction in *Marks v. United States*, 430 U.S. 188 (1977), that lower courts interpreting fractured decisions should examine only the views of Justices *concurring* in the judgment.

The injunctive relief in this case illustrates the difficulty a local government faces in determining how to comply with the Ninth Circuit's constitutional regime. On one hand, the Ninth Circuit said: "the district court was careful to point out that, consistent with *Martin*, the scope of the decision was limited" and the "court's order made clear that the City was not required to provide shelter for homeless persons and the City could still limit camping or sleeping at certain times and in certain places." Pet. App. at 23a. On the other hand, the Ninth Circuit acknowledged the permanent injunction "provided a complicated mix of relief" where "the anticamping ordinances may be enforced under some circumstances during the day, but never at night." *Id.* at 24a–25a.

The Ninth Circuit required the district court on remand "to craft a *narrower injunction* recognizing Plaintiffs' limited right to protection against the elements, *as well as limitations when a shelter bed is*

available.” Pet. App. at 55a (emphasis added). It then observed in a footnote that the district court should reconsider enjoining a related ordinance (the park exclusion ordinance) in its entirety “because [the ordinance] *presumably* may be enforced against Plaintiffs who engage in prohibited activity unrelated to their status as homeless persons.” Pet. App. at 55a, n.36 (emphasis added). Neither the district court nor the Ninth Circuit could clearly articulate instructions for injunctive relief that provide clarity to local officials on what is expected.²⁰

The constitutional standard adopted by the Eighth Amendment does not give clear guidance to jurisdictions

²⁰ Injunctions issued by district courts within the Ninth Circuit since *Martin* have likewise proven inscrutable. For example, in *Coalition on Homelessness v. City and Cnty. of San Francisco*, No. 22-cv-05502, 2022 WL 17905114 (Dec. 23, 2022), the district court issued a preliminary injunction against San Francisco, prohibiting it from enforcing or threatening to enforce local laws prohibiting sitting, sleeping, or lying against individuals who were “involuntarily homeless”—without defining that term. The injunction “remain[s] effective as long as there are more homeless individuals in San Francisco than there are shelter beds available.” *Id.* at *28. The city sought clarification on the definition of “involuntarily homeless,” but the district court declined to provide it. See *Coalition on Homelessness v. City and Cnty. of San Francisco*, 4:22-CV-05502, Administrative Motion for Clarification, ECF No. 70 (Jan. 3, 2023); *id.*, Minute Order, ECF No. 84 (Jan. 12, 2023) (denying motion). See also Pet. Stage Amicus Br. for City of Phoenix 3, 23 (describing unworkability of Post-*Martin* citywide injunctions).

with laws regulating conduct that often arises out of homelessness. Indeed, the Ninth Circuit’s decision in this case “crystal[ized] *Martin* into a crude population-level inquiry, greenlighting what should be (at most) an individualized inquiry for class-wide litigation, and *leaving local governments without a clue of how to regulate homeless encampments without risking legal liability.*” Pet. App. at 142a (Smith, J., dissenting from denial of rehearing en banc) (emphasis added).

B. The Ninth Circuit’s distinction between voluntary and involuntary homelessness is unworkable on the ground

Even with clarity on the proper scope of *theoretical* enforcement, any constitutional standard that excludes those experiencing homelessness “involuntarily” is unworkable for *practical* enforcement. The Ninth Circuit imposes both an individual voluntariness assessment (can this person find a bed or otherwise afford housing?²¹) and a jurisdictional voluntariness assessment (are there more constitutionally qualifying²² shelter beds available in this jurisdiction than unhoused

²¹ *Martin*, 902 F.3d at 1048 n.8 (“Naturally, our holding does not cover individuals who do have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.”).

²² Pet. App. at 19a (noting that shelter beds offered by religiously based organizations would not “count” in this assessment “due to potential violations of the First Amendment’s Establishment Clause”).

individuals tonight?²³). See Pet. App. at 148a (Smith, J., dissenting from denial of rehearing en banc) (“District courts will have to choose between following what *Grants Pass* now says in one place (there must be a meaningful voluntariness inquiry) and what *Grants Pass* says and does in another place (a shelter-beds deficit and conclusory allegations are all one needs).”). Law enforcement officers are not equipped with the information necessary to make either determination at any and all given points in time.

For example, a retailer in a city with an ordinance similar to Grants Pass’s may call law enforcement after finding needles or human waste in the retailer’s walkway and observing a person setting up a campsite night after night in the public space adjacent to its storefront. Before the officer can take any action (including just issuing a civil citation, as in this case), that officer must first find out whether the person has another place to stay or the ability to secure a place—potentially including a couch at a friend’s house or the ability to sleep elsewhere in a vehicle. The officer may also have to know the number of beds available at the local shelter—something that could change from minute

²³ In *Martin v. City of Boise*, the Ninth Circuit held “only that ‘so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],’ the jurisdiction cannot prosecute homeless individuals for ‘involuntarily sitting, lying, and sleeping in public.’” 920 F.3d 584, 617 (9th Cir. 2019) (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006)), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).

to minute as shelter residents come and go. If the officer does not obtain credible information on either question and issues the citation, the officer risks violating that person's constitutional rights (including exposing the local jurisdiction to Section 1983 litigation claiming such a violation occurred).

Realistically, an officer responding to an encampment (typically called to the location because of a health or safety concern) will not know whether a specific person has "access to adequate temporary shelter." *Martin*, 902 F.3d at 1048 n.8. For one thing, it is unclear what the Ninth Circuit would consider "adequate" temporary shelter. Does a safe place to encamp outdoors in a privately owned location qualify? Would a co-ed facility suffice? What if the available facility offers beds, but no showers? Would a location with a single bathroom for a large number of people be appropriate? The Ninth Circuit made clear that "shelters with a 'mandatory religious focus' could not be counted as available due to potential violations of the First Amendment's Establishment Clause." Pet. App. at 19a (quoting *Martin*, 902 F.3d at 1041). But the Ninth Circuit provided little guidance as to what shelter *could* be counted.

And, even if the Ninth Circuit condoned a mathematical approach comparing the number of non-religiously affiliated available beds against the number of unhoused persons, officers responding to calls for support are unlikely to know such information. Estimates of how many shelter beds are available in a

given jurisdiction, at a given moment, are unreliable.²⁴ So, too, are estimates for the total number of persons experiencing homelessness in a certain jurisdiction, at a particular time.²⁵ With these difficulties, it is nearly impossible for an officer in the field to accurately assess whether the jurisdiction has a sufficient number of available shelter beds.

Similarly, an officer interacting with a particular individual experiencing homelessness would not likely know whether that individual has “the financial means to obtain shelter.” Pet. App. at 14a. Nor is it realistic to expect the officer to decipher—available shelter bed or not—whether a particular person experiencing

²⁴ See, e.g., Homelessness Audit: Interim Housing and Shelter Bed Data, LA City Controller (Dec. 5, 2023), <http://tinyurl.com/2wyx89m4> (describing Los Angeles’s “antiquated and inefficient methods of data collection” on available shelter beds); Pet. Stage Amicus Br. for City of Phoenix & League of Ariz. Cities and Towns 21–22 (“In Phoenix’s case, because it does not own or operate most of the shelter facilities within the metropolitan area, there is no easy way to determine the number of available beds on any given day. City employees must contact various facilities to ascertain capacity.”).

²⁵ See Charley Willison et al., *Persistent Disparities: Trends in Rates of Sheltered Homelessness Across Demographic Subgroups in the USA*, 11 J. Racial & Ethnic Health Disparities 326 (2023), <http://tinyurl.com/4f3nsrc3> (explaining that “[t]he most frequent data reporting on homelessness is conducted by the U.S. Department of Housing and Urban Development (HUD), through their Point-In-Time (PIT) counts of homelessness during a single night” which “may inaccurately represent the burden of homelessness as a time invariant measure”).

homelessness has nevertheless chosen to reside in an encampment.²⁶

Adding more complexity to the assessment of “voluntariness” is the interaction of trauma with housing choices.²⁷ Many individuals experiencing homelessness who have been in and out of permanent housing and short-term shelters have faced traumatic moments at shelter and warming locations, rendering revisiting those facilities difficult or impossible as a matter of trauma response. An officer responding to a public safety threat at an individual’s encampment may know

²⁶ Some studies suggest that an individual’s interest in visiting a shelter turns on the nature of the shelter. See Josh Kruger, *Facts from the Independent Study of Philly’s Encampment Closures*, City of Phila. (Mar. 12, 2019), <http://tinyurl.com/2uycxmf> (“56 percent of encampment residents” surveyed in Philadelphia “were open to going to a shelter” but “[t]his number jumped to 91 percent when they were asked if they would go to what’s known as a ‘low barrier’ shelter: one where there are basic rules that do not include requirements of round-the-clock abstinence from drugs”). And because many persons experiencing homelessness also suffer from psychiatric or emotional conditions, an individual who insists they do not want to visit a shelter might do so because of their psychiatric or emotional condition. See Stefan Gutwinski, et al., *The Prevalence of Mental Disorders Among Homeless People in High-Income Countries: An Updated Systematic Review and Meta-regression Analysis*, 18 PLoS Med. E1003750 (2021), <http://tinyurl.com/3dc2b7m8> (prevalence of mental disorders among homeless persons was 76.2% following systematic review and meta-analysis of studies).

²⁷ See Joe Colletti, PhD., *The Increasing Need for Trauma-informed Care Shelter*, Hub for Urban Initiatives (Aug. 3, 2020), <http://tinyurl.com/58v7eyuh>.

that a shelter bed is available but may not know whether the individual would consider that option viable because of their history at that site.

Because the many features on which the Ninth Circuit’s definition of “involuntarily homeless” could turn cannot be realistically evaluated by an officer on the ground, jurisdictions—and individual officers—are forced to decide whether to ignore generally applicable public safety ordinances or to speculate on the variety of factors a court may later determine yielded an unconstitutional result. Inevitable non-enforcement of local laws and regulations leaves retailers, their customers, and employees subject to the health and safety risks described in Section I, *supra*. This Court should reject an Eighth Amendment test that carries no meaning on the ground.

C. Under the Ninth Circuit’s standard, judges will be forced to act as policy czars regulating post-hoc any enforcement that is attempted

Under the Ninth Circuit’s approach, any attempts by municipalities to enforce policies responding to complicated public safety issues that often arise out of alleged “statuses” like homelessness will likely result in the judiciary regulating policy post-hoc. As Judge Smith recognized in his dissent from denial of rehearing en banc: the “misreading of Supreme Court precedent . . . require[s] unelected federal judges—often on the basis of sloppy, mixed preliminary-injunction records—to act more like homelessness policy czars than as Article III judges applying a discernible rule of law.” Pet. App. at

156a (Smith, J., dissenting from denial of rehearing en banc).

Using the Eighth Amendment to hobble enforcement of generally applicable laws regulating public safety without the legislative or regulatory infrastructure designed to consider the various facets of the issue, and without the flexibility needed to address local dynamics, is not supported by constitutional law and is unworkable in practice. To the extent laws regulating public camping are an arrow in the quiver needed to address homelessness in our society, then it “is a project, if any is, that should be open to revision over time, as new . . . knowledge emerges and as legal and moral norms evolve. Which is all to say that it is a project for state governance, not constitutional law.” *Kahler v. Kansas*, 140 S. Ct. 1021, 1037 (2020).

Local officials and lawmakers have the expertise to enact appropriate policies for a particular community and are typically well-connected with community partners exploring other ways to address root problems of local challenges. Flexibility to explore a range of tools to address the issues is an essential part of balancing public safety needs of all people in the community. See *Blue Ribbon Commission on Homelessness Governance Report* 8 (Mar. 30, 2022), <https://tinyurl.com/brch033022> (discussing the “[n]eed for [f]lexibility and [n]imbleness” and explaining that “[t]here are many ways into homelessness, and there should be many ways out”). Localities “need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban

conditions.” *Sailors v. Board of Educ. of Kent Cnty.*, 387 U.S. 105, 110–11 (1967).

Retailers and their adjacent business peers, including restaurants, hospitality, and property owners, are uniquely positioned to spark collaboration, leveraging their position within communities to draw in the public and civil society partners required to make a meaningful difference. Retail Industry Leaders Ass’n, Vibrant Communities Initiative (June 2023), <http://tinyurl.com/bde55chs>. Retailers have partnered with local officials to enact practical solutions working with local communities and non-profits to improve the conditions that often lead to the public safety risks identified above. These partnerships facilitate dialogue and collaboration among different stakeholders, such as retailers, people experiencing homelessness, policymakers, law enforcement, advocates, and researchers. Such important efforts, however, cannot replace governments’ role in enacting broader policy solutions. Durable solutions require collaboration among government, law enforcement, the business community, non-profits, and social services to leverage the expertise of each participant.

Lawmakers, for their part, need the flexibility to craft and implement local health and safety measures that address the unique needs of the particular locality to keep communities safe, peaceful, and sanitary. Identifying, enacting, and enforcing the right policies is the province of elected officials and voters. *Accord Pet. App.* at 161a–62a (“[W]e must allow local leaders—and the people who elect them—the latitude to address on

the ground the distinctly local features of the present crisis of homelessness and lack of affordable housing.” (Bress, J., dissenting from denial of rehearing en banc)).

The decision below upends that dynamic by placing public safety policy that intersects with or often arises out of homelessness in the hands of unelected judges. The test the Ninth Circuit devised defines a rigid approach on constitutional terms.²⁸ *Amici* ask this Court to reject the invitation to “formulat[e] a constitutional rule [that] would reduce, if not eliminate, th[e] fruitful experimentation, and freeze the developing productive dialogue between” local officials, law enforcement, and community stakeholders—including retailers—“into a rigid constitutional mold.” *Powell*, 392 U.S. at 536–37.

* * *

This case is not a binary choice between different members of local communities. The difficult task of balancing the rights and dignity of people experiencing homelessness against the documented safety risks arising out of public encampments is best left to policymakers. These dynamics involve complex policy choices that impact those experiencing homelessness, retailers, customers, employees of local businesses, and

²⁸ Accord Pet. App. at 142a (Smith, J., dissenting from denial of rehearing en banc) (“[W]hen asked to inject ourselves into a vexing and politically charged crisis, we should tread carefully and take pains to ensure that any rule we impose is truly required by the Constitution—not just what our unelected members think is good public policy.”).

other members of local communities. *Amici* ask this Court to reverse the underlying decision and reject the Ninth Circuit's unworkable approach to constitutional regulation of generally applicable public safety laws.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court reverse the decision below.

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