

No. 19-247

IN THE
Supreme Court of the United States

CITY OF BOISE,
Petitioner,

v.

ROBERT MARTIN, LAWRENCE LEE SMITH,
ROBERT ANDERSON, JANET F. BELL, PAMELA S. HAWKES,
AND BASIL E. HUMPHREY,
Respondents.

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

**BRIEF FOR *AMICI CURIAE* CALIFORNIA
STATE ASSOCIATION OF COUNTIES AND
33 CALIFORNIA COUNTIES AND CITIES
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICI CURIAE*¹

Amici comprise the California State Association of Counties (“CSAC”) and a coalition of 33 California counties and cities providing short- and long-term solutions to the state’s homelessness crisis.²

CSAC is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program administered by the County Counsels’ Association of California and overseen by the Association’s Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and determined that this case is a matter affecting all counties.

Amici coalition members have collectively devoted hundreds of millions of dollars and countless hours of public employee time providing services and housing for the homeless in a manner that recognizes the dignity of homeless individuals and addresses critical public health and safety concerns affecting both unsheltered and sheltered residents in their jurisdictions.

Yet, as Judge Milan Smith recognized in his dissent from denial of en banc rehearing, the Ninth Circuit’s holding in this case requires municipalities to make the Hobson’s Choice of “either undertak[ing] an

¹ Pursuant to Rule 37.6, counsel for *Amici* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *Amici* or their counsel made a monetary contribution intended to fund the brief’s preparation or submission. All parties’ counsel of record provided blanket consent for the filing of *amicus* briefs and received timely notice regarding the filing of this brief.

² A complete list of *Amici* is set forth in the appendix.

overwhelming financial responsibility to provide housing for or count[ing] the number of homeless individuals within their jurisdiction every night, or abandon[ing] enforcement of a host of laws regulating public health and safety.” Pet. App. 15a (Smith, J., dissenting from denial of reh’g en banc).

If left to stand, the Ninth Circuit’s decision will sow confusion and significantly impact *Amici*, who have a substantial interest in enforcing critical public health and safety laws without incurring the threat of civil liability under 42 U.S.C. §§ 1983 and 1988. This confusion and potential liability are further magnified because the California Supreme Court reached a contradictory conclusion on this issue—a ruling that California trial and appellate courts are bound to follow notwithstanding the Ninth Circuit’s holding below. *See Tobe v. City of Santa Ana*, 892 P.2d 1145, 1150, 1166 (Cal. 1995).

For all of these reasons, *Amici* have an acute interest in this Court granting certiorari.

SUMMARY OF ARGUMENT

No one doubts the severity of the nation’s homelessness crisis or the need for more housing and support services. In the face of this crisis, counties and cities throughout California—where nearly half of the nation’s unsheltered population resides—have developed creative and effective solutions and devoted extraordinary resources to provide temporary shelter and social services for homeless individuals while making efforts to build more permanent supportive housing. The Ninth Circuit’s decision, however, threatens to derail these efforts by imposing an ill-defined and unworkable standard.

The decision below not only leaves municipalities at an interpretive loss by creating more questions than it answers but also places an enormous financial and logistical burden on them, exposes them to costly and wasteful litigation while leaving no room for error, and calls a host of essential public health and safety laws into constitutional doubt. At the same time, the decision makes it harder for local governments to protect unsheltered and sheltered individuals from the unprecedented fire, flood, and environmental hazards California communities currently face without risking potential civil liability including attorney's fees under 42 U.S.C. §§ 1983 and 1988.

Unless this Court grants review, the Ninth Circuit's "decision [will] generate[] dire practical consequences for the hundreds of local governments within [its] jurisdiction, and for the millions of people that reside therein." Pet. App. 15a (Smith, J., dissenting from denial of reh'g en banc).

ARGUMENT

I. California Counties and Cities Are on the Front Lines of the Nation's Homelessness Crisis.

California is in many ways the epicenter of both the homelessness crisis and the most creative and effective approaches to ameliorate that crisis. Coalition members have played a critical role in developing these solutions, expending extraordinary resources to assist homeless individuals.

A. California is home to 21 of the 30 most expensive housing rental markets in the nation and lacks sufficient affordable housing to meet the demand of low-

income households.³ The state’s 2.2 million extremely low-income and very low-income renter households compete for 664,000 affordable rental homes.⁴ In January 2018, “nearly half of all unsheltered people in the country were in California (47% or 89,543).”⁵ Because many homeless individuals also suffer from mental illness or substance abuse, helping individuals end the cycle of homelessness often requires both housing and intensive support services.

Homelessness in California is occurring “not just in major cities and urban areas but also in rural [communities], in our heavily forested areas, along our rivers and in our suburban neighborhoods.”⁶ For example, Los Angeles County is home to the nation’s largest unsheltered population (approximately 44,214) and San Diego County is home to the nation’s fifth-largest homeless population.⁷ Between 2013 and 2018, Orange County “experienced a 53-percent increase in the unsheltered homeless population.” 2018 Cal. Stat. 336, § 1(a). Sacramento County experienced a 45-percent increase in the number of homeless individuals between 2013 and 2017 and a 19-percent increase since 2017. And between 2017

³ Institute for Local Government, *Homelessness Task Force Report: Tools and Resources for Cities and Counties* (2018), https://www.ca-ilg.org/sites/main/files/htf_homeless_3.8.18.pdf, at 1 (hereinafter *ILG Homelessness Task Force Report*).

⁴ *Ibid.*

⁵ U.S. Dep’t of Housing and Urban Development, *The 2018 Annual Homeless Assessment Report (AHAR) to Congress* (Dec. 2018), <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>, at 14.

⁶ *ILG Homelessness Task Force Report* at 1.

⁷ *Id.* at 8.

and 2019, the number of unsheltered individuals in San Joaquin County nearly tripled.

B. As the Institute for Local Government observed, “[a] number of California counties and cities have been pioneers in homeless services.”⁸ The following is a sampling of these creative and proactive approaches to assist the state’s growing unsheltered population.

Declaring a Shelter Crisis. Dozens of California cities and counties have declared a shelter crisis, collectively entitling them to millions of dollars in state funding under the Homeless Emergency Aid Program (“HEAP”) for emergency assistance to those experiencing homelessness or at imminent risk of homelessness. *See* Cal. Health & Safety Code § 50211(a) (creating HEAP “for the purpose of providing localities with one-time flexible block grant funds to address their immediate homelessness challenges”); *id.* § 50213(a)(1), (b), (c)(1) (providing up to \$500 million in funding for this program); *id.* § 50212(a) (requiring most localities to “declare[] a shelter crisis” in “order to be eligible for program funds”).

Permanent Supportive Housing. Coalition members have also relied on state funding administered through the California Emergency Solutions and Housing Program (“CESH”) and the Tax Credit Allocation Committee to undertake bold visions for increasing permanent supportive housing—which combines affordable housing with critical services for the homeless. The City of Salinas, for example, has devoted millions of dollars from city, county, and state funds to developing 88 units of affordable permanent supportive housing. The commercial space in the lower floors will be reserved for wrap-around services consistent with

⁸ *Id.* at 6.

best practices, including healthcare, mental health, and other key services. But before project development could begin, Salinas had to clear an encampment on the site and keep the site clear during construction.

Regional Approaches. Some coalition members have taken a regional approach, working together to maximize efficiency with county-wide housing and service programs. In 2018, after the “lack of regional focus [] continue[d] to stymie the implementation of a long-term solution to homelessness in the County of Orange,” the County “and the cities within the county . . . worked together . . . to establish and authorize the use of an Orange County Housing Finance Trust” to develop housing projects and acquire the “necessary funds for those projects.” 2018 Cal. Stat. 336, § 1(b), (c); *see also* Cal. Gov’t Code § 6539.5(a)(1). The goal of the Housing Finance Trust is to create 2700 new permanent supportive housing units within the County—1800 of which are currently in the development pipeline.

In 2017, San Diego County established the Innovative Housing Initiative to increase the regional supply of permanent affordable housing. The Initiative provides gap financing and construction loans to developers to build or rehabilitate housing for low-income households and vulnerable populations. To date, the County has committed \$50 million to the Initiative, \$12 million of which has been allocated to developing 453 permanent affordable housing units.

In 2017, Los Angeles County voters passed a measure to raise about \$355 million annually for ten years to fund subsidized housing, coordinated outreach and

shelters, case management, social services, homelessness prevention assistance, and rapid rehousing programs.

Navigation Centers. California municipalities have also spent millions of dollars creating and operating “navigation centers,” which are designed to shelter highly vulnerable and long-term homeless individuals who are often fearful of accessing traditional shelter and services. Navigation centers provide unsheltered individuals room and board while case managers work to connect them to jobs, public benefits, health services, and permanent housing options. Unlike many traditional shelters, navigation centers frequently allow homeless individuals to be sheltered with their partners, pets and possessions.

In San Francisco, which pioneered the navigation center model, 57 percent of the nearly 3,000 homeless individuals serviced through the City’s navigation centers as of June 2018 had been provided with housing.⁹ Numerous California cities are following suit with their own navigation centers.¹⁰

Public-Private Service Partnerships. Many coalition members are also partnering with non-profits to provide critical services to their unsheltered populations with the ultimate goal of increasing homelessness exits. Orange County, for example, contracted with non-profit organization City Net

⁹ See Kevin Fagan, *Gateways to New Lives* (S.F. Chronicle June 26, 2018), <https://www.sfchronicle.com/bayarea/article/SF-s-homeless-navigation-centers-seem-to-be-13025012.php?psid=3RHqz>.

¹⁰ See, e.g., Hanh Truong, *Buena Park’s 150-bed Homeless Shelter Breaks Ground, Will Serve All of North Orange County*, (Orange Cnty. Register July 12, 2019), <https://www.ocregister.com/2019/07/12/buena-parks-150-bed-homeless-shelter-breaks-ground-will-serve-all-of-north-orange-county/>.

to offer intensive care management and shelter to individuals encamped in Orange County's Flood Control Channel. Between July 2017 and February 2018, City Net provided seven-day-a-week case management and, as a result, 202 of 623 unsheltered individuals in the Channel are now housed.

The City of Salinas and many other Bay Area communities are partnering with the Downtown Streets Team, a non-profit organization focused on restoring the dignity and rebuilding the lives of unhoused individuals. At the Downtown Streets Team, homeless volunteers work collaboratively on beautification and cleanup projects in their communities. In exchange, the volunteers receive a non-cash stipend to help cover basic needs and access to case management services to help them find permanent housing and employment.¹¹

Safe Camping and Parking Sites. Many California municipalities provide safe camping sites with 24-hour security, portable bathrooms, and storage.¹² The City of Salinas has taken a slightly different approach, leasing private property near the biggest homeless encampment in the City to provide 24-hour access to bathrooms and showers. The City plans to contract with a service provider to deliver wrap-around social services to homeless individuals. Still other cities are

¹¹ See Downtown Streets Team, About, <https://www.streetsteam.org/about> (last visited Sept. 21, 2019); Downtown Streets Team, Model, <https://www.streetsteam.org/model> (last visited Sept. 21, 2019).

¹² See, e.g., Susan Murphy, *San Diego Launches Campground for the Homeless* (KPBS Oct. 9, 2017), <https://www.kpbs.org/news/2017/oct/09/san-diego-launches-homeless-campground/>.

creating public spaces for those living in their cars to prevent them from becoming unsheltered.¹³

Homeless Outreach Teams. Cities and counties across California have also developed Homeless Outreach Teams, also known as “HOTs,” which work to assist unsheltered individuals to break the cycle of homelessness. HOTs work around the clock to establish and maintain personal contact with homeless individuals to build trust and make referrals to organizations providing medical and mental health services, housing, and employment opportunities.

C. Despite the efforts of municipalities to adopt creative short-term solutions to assist the unsheltered populations in their communities, in California, most permanent and much temporary housing cannot be constructed quickly. Even where adequate funding and space exists, building many types of shelters and permanent housing generally requires a lengthy land use approval and permitting process, including environmental review under the California Environmental Quality Act (“CEQA”) to address potentially significant environmental impacts. See Cal. Pub. Res. Code §§ 21151(a), 21080(a), 21100(a).¹⁴

¹³ See Jeong Park, *Fullerton Moves Closer to Creating Safe Parking Program for People Living in their Cars* (Orange Cnty. Register July 5, 2019), <https://www.ocregister.com/2019/07/04/fullerton-moves-closer-to-creating-safe-parking-program-for-people-living-in-their-cars/> (Fullerton, Los Angeles, and Long Beach).

¹⁴ See, e.g., Liam Dillon & Benjamin Oreskes, *Homeless Shelter Opponents Are Using This Environmental Law in Bid to Block New Housing* (L.A. Times May 15, 2019), <https://www.latimes.com/politics/la-pol-ca-ceqa-homeless-shelter-20190515-story.html>.

The California Legislature recently made it easier for certain cities and counties to build homeless shelters during a shelter crisis and for all cities and counties to build navigation centers by exempting both types of shelters from CEQA. *See* Cal. Gov't Code § 8698.4(a)(4); *id.* §§ 65660(a) & (b); *id.* § 65662; *id.* § 65666. But these relaxed restrictions apply only to *temporary* housing reserved entirely for the homeless and therefore do not allow bypassing CEQA for *permanent* housing solutions or temporary *mixed* housing solutions. *See* Cal. Gov't Code § 8698.4(a)(2)(B), (b)(1); *id.* § 65660(a).

II. The Ninth Circuit's Decision Impedes Municipalities in Their Ongoing Efforts to Assist Homeless Individuals.

Amici now face an entirely new challenge in navigating the homelessness crisis: interpreting and applying the Ninth Circuit's opinion with the risk of liability for violating the Eighth Amendment. Review is warranted because the Ninth Circuit's opinion is unworkable from a practical standpoint, exposes municipalities to endless and costly litigation over its meaning with little room for error, and casts constitutional doubt on a host of long-established public health and safety laws.

A. The Ninth Circuit's Decision Is Unworkable for Municipalities.

The Ninth Circuit's holding—that public agencies may not enforce laws prohibiting camping or sleeping in public against homeless individuals unless more shelter beds are “practically available” in the “jurisdiction” than the number of homeless individuals—raises a host of unanswered questions as to what “practically available” and “jurisdiction” mean and imposes an

enormous financial and administrative burden on municipalities already working hard to provide short- and long-term assistance for homeless individuals.

1. The Ninth Circuit held that public agencies cannot enforce ordinances prohibiting sleeping outside on public property when no sleeping space is “practically available” in any shelter. Pet. App. 65a. The court explained that a shelter that forces an individual to enroll in “programming that is antithetical to his or her religious beliefs” is not practically available. Pet. App. 48a. But beyond that narrow example, the decision provides little guidance as to what “practically available” means, forcing public agencies to grapple with its meaning in practice and risk substantial civil liability should a court later disagree with that interpretation.

For example, is shelter space “practically available” if it does not accommodate pets? What if beds are available but the shelter cannot accommodate a large amount of personal possessions or the individual’s partner, spouse, or other adult relative? In *Amici*’s experience, these are common reasons why unsheltered individuals may decline a shelter bed.

By similar token, is shelter space “practically available” to homeless individuals with, for example, post-traumatic stress disorder who decline shelter with unpartitioned sleeping arrangements if only unpartitioned beds are available? One district court in California—relying on the Ninth Circuit’s earlier decision in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136-38 (9th Cir. 2006), which was vacated by settlement but essentially re-adopted by the Ninth

Circuit here—seemed to conclude that such shelter would not be “practically available”:

[T]he common assumption that it’s enough for the government simply to make temporary shelter beds available is likely wrong. Even if shelter beds are available, the ability of the government to take enforcement action against homeless people who are camping should depend on the adequacy of conditions in the shelters. This is a particular concern for people with disabilities, who sometimes struggle to see their needs met in temporary shelters.

Drake v. County of Sonoma, 304 F. Supp. 3d 856, 857-858 (N.D. Cal. 2018). While *Amici* disagree with this conclusion, the *Drake* opinion illustrates how broadly the Ninth Circuit’s decision could be extended to place immense financial and logistical burdens on public agencies trying to provide services to homeless individuals.

Moreover, does the available sleeping space need to be indoors? In other words, may enforcement officers issue citations to homeless persons who refuse to relocate to another available *outdoor* site where they will not be cited for camping or sleeping in public? While *Amici* assert that the Ninth Circuit’s decision permits “ordinance[s] prohibiting sitting, lying, or sleeping outside at particular times or in particular locations” as well as “ordinance[s] barring the obstruction of public rights of way or the erection of certain structures” (Pet. App. 62a-63a n.8), it is far from clear whether courts applying the decision will agree with that interpretation.

Finally, what if a municipality has shelter beds available for every homeless person it cites for sleeping in public? Does it matter under the Ninth Circuit's decision whether there are enough shelter beds available for the many unhoused persons the municipality does *not* cite? Although *Amici* contend that the citation's constitutionality under *Martin* does not turn on sleeping options available to those who are *not* cited,¹⁵ courts applying the decision may disagree.

2. The Ninth Circuit's decision also leaves public agencies to guess at the meaning of "jurisdiction" in determining whether "there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters." Pet. App. 62a. Does it depend on the size of the jurisdiction? What if beds are available nearby in a neighboring city? Some *Amici*, like Newport Beach, want to partner with neighboring cities to build shelters that serve multiple cities. Others, like Sutter County, rely on bi-county cooperation with neighboring Yuba County. Under the Ninth Circuit's rule, how are available shelter beds and homeless individuals counted with regional shelters?

Similarly, does the answer change if the property is owned by one municipality but the citation is issued by another? Many California counties provide law enforcement for small cities. If a county sheriff issues a citation in one of those cities, does the citation's legality turn on the number of homeless individuals and available shelter beds in the city or the county as a whole?

¹⁵ See Pet. App. 6a (Berzon, J., concurring in denial of reh'g en banc) (explaining that the decision merely forbids criminalizing sleeping somewhere "in public *if one has nowhere else to do so*" (emphasis added)).

What if a county clears an encampment on county-owned land located within a city? What is the appropriate jurisdiction for purposes of counting homeless individuals and shelter beds? Is it the city where the land is located? The entire county? Or just the small portion of land on which the encampment existed? Sacramento County recently addressed a similar situation on unincorporated county land surrounded by the City of Sacramento. After providing three-months' notice and offering a wide variety of services, the County cleared the encampment to address multiple public health and safety concerns and to allow for construction of permanent affordable housing.

By overlooking these practical realities, the Ninth Circuit's decision limits public agencies' ability to solve homelessness at a regional level without fear of protracted litigation and potential civil liability.

3. Putting aside its interpretive shortcomings, the Ninth Circuit's decision also raises significant logistical challenges for municipalities.

As Judge Smith observed, the decision “inevitably leads to the question of how local officials ought to know whether” homeless individuals have the choice to sleep indoors because the “number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time.” Pet. App. 16a (Smith, J., dissenting from denial of reh'g en banc). Rather, “volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway.” *Ibid.* Because of “the daily fluctuations in the homeless population, the [Ninth Circuit's] opinion

would require this labor-intensive task be done every single day.” *Ibid.*

Some coalition members are developing ways to reliably track shelter vacancies in real-time, but it will take more time and resources to make such programs operational. And even if these efforts are successful, how are public agencies to determine how many homeless individuals are within their borders on a given evening? If a city “(understandably) lack[s] the resources necessary for such a monumental task,” must it “stop enforcing laws that prohibit public sleeping and camping”? Pet. App. 17a-18a (Smith, J., dissenting from denial of reh’g en banc). Even if a city could “manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under [a good faith but] false impression that the number of shelter beds exceeds the number of homeless people that night?” *Id.* at 17a. If a future court agrees with Judge Smith’s reading of “the panel’s opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.” *Ibid.*

B. The Ninth Circuit’s Decision Leaves Municipalities No Room for Error and Encourages Endless and Costly Litigation.

The Ninth Circuit’s holding that the mere issuance of a citation—even without a conviction—forms the basis for an Eighth Amendment claim compounds the problems identified above. Two plaintiffs in this case “received citations under the ordinances that were dismissed before the state obtained a conviction.” Pet. App. 54a. Nevertheless, the Ninth Circuit concluded

that these plaintiffs could still bring an Eighth Amendment claim because they “need demonstrate only the initiation of the criminal process against [them], not a conviction,” to bring an Eighth Amendment challenge. Pet. App. 56a.

Thus, under the Ninth Circuit’s reasoning, a local government risks liability under 42 U.S.C. § 1983—including potentially attorneys’ fees—even when the government subsequently dismisses a citation after determining that, in fact, there were insufficient beds available when the citation was issued. As the dissent warned, the Ninth Circuit’s ruling could be interpreted to force local governments to have “absolute confidence that they can house every homeless individual” at the moment a citation is issued (Pet. App. 19a (Smith, J., dissenting from denial of reh’g en banc)), and “would amount to permitting precisely the theory of strict *respondeat superior* liability rejected in *Monell [v. Department of Social Services of City of New York]*, 436 U.S. 658 (1978).” *City of Canton, Ohio v. Harris*, 489 U.S. 378, 400 (1989) (quotation marks omitted).

Such a rule also deviates from other circuits. As one district court recognized, “[w]hile some courts have concluded that a plaintiff has standing to challenge an anti-camping ordinance only if he has been convicted under it, *see Johnson v. City of Dallas*, 61 F.3d 442, 443-45 (5th Cir. 1995), courts in the Ninth Circuit have found that a citation or arrest under an anti-camping ordinance is sufficient to confer standing.” *Porto v. City of Laguna Beach*, No. 8:12-cv-00501-DOC, 2013 WL 2251004, at *4 (C.D. Cal. May 21, 2013) (citing *Jones*, 444 F.3d 1118).

Municipalities in California have already seen a proliferation of litigation based on the Ninth Circuit's decision. *See, e.g., Butcher v. City of Marysville*, No. 2:18-cv-02765-JAM, 2019 WL 918203 (E.D. Cal. Feb. 25, 2019); *Miralle v. City of Oakland*, No. 18-cv-06823-HSG, 2018 WL 6199929 (N.D. Cal. Nov. 28, 2018); *Orange County Catholic Worker et al. v. Orange County et al.*, No. 8:18-cv-00155-DOC (C.D. Cal. 2018); *Housing Is a Human Right Orange County, et al. v. County of Orange et al.*, No. 8:19-cv-00388-PA (C.D. Cal.); *Le Van Hung v. Schaaf*, No. 3:19-cv-01436-CRB, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019); *Quintero v. City of Santa Cruz*, No. 5:19-cv-01898-EJD, 2019 WL 1924990 (N.D. Cal. Apr. 30, 2019); *Rios et al. v. County of Sacramento et al.*, No. 2:19-cv-00922-KJM (E.D. Cal.); *Shipp v. Schaaf*, 379 F. Supp. 3d 1033 (N.D. Cal. 2019); *Sullivan et al. v. City of Berkeley*, 383 F. Supp. 3d 976 (N.D. Cal. 2019); *Vannucci, et al. v. County of Sonoma et al.*, No. 3:18-cv-01955-VC (N.D. Cal.). This is just a prelude of what is to come under *Martin*, which continues to force municipalities to spend public resources litigating the decision's contours.

Although most district courts have rightly refused to extend the Ninth Circuit's decision any further, some have read the decision more expansively. One court even stayed enforcement of *civil penalties* imposed by anti-camping ordinances to "determine whether [] *Martin's* rationale concerning criminal sanctions extends to the civil penalties." *See Aitken v. City of Aberdeen*, --- F. Supp. 3d ---, No. 3:19-cv-05322-RBL, 2019 WL 2764423, at *4 (W.D. Wash. July 2, 2019). Similar extensions of the Ninth Circuit's misguided and unworkable decision are bound to follow unless this Court grants immediate review.

**C. The Ninth Circuit’s Decision Casts
Constitutional Doubt Upon a Host of
Public Health and Safety Laws.**

The Ninth Circuit concluded that camping and sleeping in public was “involuntary and inseparable from status” in this case because “human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.” Pet. App. 62a. The court explained that “[w]hether some other ordinance is consistent with the Eighth Amendment will depend . . . on whether it punishes a person for lacking the means to live out the ‘universal and unavoidable consequences of being human’ in the way the ordinance prescribes.” Pet. App. 62a-63a n.8.

As the dissenting opinion cautions, this reasoning could be extended to “prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination.” Pet. App. 6a (Smith, J., dissenting from denial of reh’g en banc). The Ninth Circuit’s reasoning similarly could be extended to “cast[] doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.” *Ibid.* Although the author of the Ninth Circuit’s decision stressed the “limited nature of the opinion” in response to Judge Smith’s dissent, Pet. App. 3a, as one judge has recognized, “[t]he very day that a doctrine of this nature is announced, a court relinquishes control over its course. Many insidious principles seek innocuous entries, and the majority has no control over how its new rule will be applied.” *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 294 (4th Cir. 2019) (en banc) (Wilkinson, J., dissenting).

III. The Ninth Circuit’s Decision Puts California Municipalities to a Hobson’s Choice.

Given the difficulty of interpreting the Ninth Circuit’s decision and the minimal room for error it leaves local public agencies, it is no surprise that “several cities have thrown up their hands and abandoned any attempt to enforce” anti-camping ordinances. Pet. App. 18a-19a n.12 (Smith, J., dissenting from denial of reh’g en banc) (cataloging cities); *see also id.* at 15a.

But many California counties and cities do not have the option of abandoning enforcement of ordinances prohibiting camping on public property notwithstanding the risk of liability posed by the decision below. Indeed, California’s geography and current climate require municipalities to take proactive steps *before* an emergency arises to engage in critical fire, flood, and environmental hazard mitigation to protect the unsheltered and sheltered members of their communities alike. Being able to enforce public camping ordinances is essential for municipalities seeking to require those encamped in hazard-prone areas to accept housing services or move to another location where they will not be cited. The Ninth Circuit’s decision in many instances leaves local agencies with a Hobson’s Choice on these critical issues.

A. The Ninth Circuit’s decision threatens local public agencies’ ability to require homeless individuals to accept services or relocate so that critical disaster prevention management strategies can be implemented to protect both unsheltered and sheltered members of the community.

1. Communities across California have been devastated by fires in recent years, resulting in more than 100 fatalities, hundreds of missing people, and \$12

billion in property damage.¹⁶ And scientists predict that fires in the state will only intensify in future years.¹⁷

To mitigate the disastrous effects of future fires, California public agencies must engage in proactive fuel management strategies *before* any emergency arises. Yet, the Ninth Circuit’s opinion makes it more difficult for local agencies to engage in these essential, proactive fire prevention activities by, for instance, clearing underbrush in areas where there also happen to be homeless encampments. *See Quintero v. City of Santa Cruz*, No. 5:19-cv-01898-EJD, 2019 WL 1924990, at *4 (N.D. Cal. Apr. 30, 2019) (“Multiple fires have occurred in the Encampment since its inception. It is within the public interest for the City to identify health and safety hazards as is the case here and implement solutions and regulations to avoid preventable tragedies.”).

Destructive and dangerous fires have threatened encampments in cities across the state, posing a danger to those living in the encampments and the surrounding areas. Several years ago, a fire at an encampment in a high-brush area in Los Angeles spread to 400 acres, eventually destroying the encampment, six

¹⁶ See Cal. Dep’t of Insurance, “Wildfire Insurance Losses from November 2018 Blazes Top \$12 Billion,” Press Release (May 8, 2019), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2019/release041-19.cfm>; Insurance Information Institute, Facts + Statistics: Wildfires, <https://www.iii.org/fact-statistic/facts-statistics-wildfires>.

¹⁷ See Adam Rogers, *The Only Thing Fire Scientists Are Sure of: This Will Get Worse* (WIRED Aug. 1, 2018), <https://www.wired.com/story/the-only-thing-fire-scientists-are-sure-of-this-will-get-worse/>.

nearby homes and damaging a dozen more.¹⁸ And less than two months ago, a brush fire broke out at an encampment in the San Fernando Valley, causing “pure pandemonium” and leading to the emergency evacuation of 100 unhoused individuals.¹⁹

2. By similar token, “[t]he number of people . . . in California’s flood-prone areas is growing, raising . . . the threat to public safety.”²⁰ *Amici* are no stranger to this risk, as “[m]ost of California is vulnerable to floods” and “[e]very county has been declared a flood disaster area multiple times.”²¹ These flood risks will be compounded by the projected 10 inches in sea level rise expected by 2050.²²

Just as with fire prevention, it is critical that California public agencies take action to mitigate flood hazards *before* an emergency arises. Encampments in

¹⁸ See Benjamin Oreskes, *To Prevent Wildfires, L.A. Wants to Make It Easier to Clear Homeless Encampments* (L.A. Times Aug. 21, 2019), <https://www.latimes.com/california/story/2019-08-21/homeless-encampment-wildfire-city-council-high-risk-fire>; Jenna Chandler, *LA Will Send Police to Remove Homeless Residents from High-Risk Fire Zones* (Curbed L.A. Sept. 4, 2019), <https://la.curbed.com/2019/8/29/20838728/homeless-encampments-wildfire-enforcement>.

¹⁹ See Melissa Leu, *Brush Fire in Sepulveda Basin Caused ‘Pure Pandemonium’ Among Homeless Forced to Evacuate* (LAist July 30, 2019), https://laist.com/2019/07/30/brush_fire_breaks_out_in_sepulveda_basin.php.

²⁰ Public Policy Institute of California, “Floods in California” (2017), <https://www.ppic.org/publication/floods-in-california/>.

²¹ *Ibid.*

²² See Anne C. Mulkern, *In California, Rising Seas Pose a Bigger Economic Threat Than Wildfires, Quakes* (Scientific American Mar. 14, 2019), <https://www.scientificamerican.com/article/in-california-rising-seas-pose-a-bigger-economic-threat-th-an-wildfires-quakes/>.

flood-prone areas such as riverbeds pose a danger to those living in the encampment and can pose a flood risk in many California cities and counties if officials are unable to enforce public camping ordinances against those who refuse to accept shelter or move to other locations where they will not be cited. For example, a rapid and unprecedented increase in encampments along the American River in Sacramento has impeded officials' ability to monitor, inspect, maintain, rebuild, repair and operate the levee system, increasing the flood risk to those living in the encampments and others throughout the City. Similarly, before Orange County cleared an encampment of hundreds of homeless individuals along the Santa Ana River, alterations made in the slope and grading along the riverbanks threatened the integrity of the County's flood control facility.

The Ninth Circuit's decision makes it more difficult for local agencies in California to address these critical flood mitigation efforts responsibly and proactively without risk of potential civil liability for issuing citations to those refusing to relocate from floodplains. Indeed, one California city has already faced a lawsuit under *Martin* after preventing homeless individuals from entering a flooded encampment site as floodwaters were still receding. See *Butcher v. City of Marysville*, No. 2:18-cv-02765-JAM-CKD, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (plaintiffs "who allege[d] that the City blocked them from entering their encampments 'at threat of arrest'" had standing to bring Eighth Amendment claim).

B. The Ninth Circuit's decision also puts California municipalities to a similar Hobson's Choice of risking either potential civil liability or contamination of waterways from improperly disposed human waste.

An increase in fecal coliform levels above the amount allowed in state-issued stormwater runoff permits could endanger the public and expose local public agencies to penalties exceeding \$25,000 per day. *See* Cal. Water Code § 13385(b)(1), (c) (discussing court-imposed and administrative liability); 40 C.F.R. § 122.41(a)(3) (discussing administrative fines).

These risks are real. Over the course of merely 12 days in January 2018, for example, Orange County removed approximately 400 pounds of human waste from the Santa Ana River. A 2017 study commissioned by the San Diego Water Board concluded that the most cost-effective approach to improving health at beaches is to prevent human feces from contaminating the region’s watersheds. The study emphasized the importance of reducing “human sources of bacteria which scientists agree have a high likelihood of causing illness by . . . reducing the number of transient encampments near waterways by providing housing in addition to other support services.”²³

The Ninth Circuit’s decision impedes public agencies’ ability to eliminate these risks. For example, before the Ninth Circuit’s decision, the City of Salinas successfully used the threat of a citation to relocate encampments away from storm drains to ensure the City was meeting its permit requirements and protecting nearby waterways. But after the decision, Salinas must choose between the risk of potential § 1983 liability for relocating encampments away from watercourses

²³ Cost-Benefit Analysis, *San Diego Region Bacteria Total Maximum Daily Loads* (Oct. 2017), https://www.waterboards.ca.gov/sandiego/water_issues/programs/basin_plan/docs/issue3/Fin_al_CBA.pdf, at 3.

or environmental harm and state fines for failing to keep fecal coliform within permitted levels.

C. The Ninth Circuit’s decision also puts local public agencies to the Hobson’s Choice of risking either potential § 1983 liability for enforcing public camping ordinances against homeless individuals who refuse to relocate to another site, or the health and safety of public employees. For example, in August 2019, inspectors with California’s Division of Occupational Safety and Health (“Cal/OSHA”) found that city workers at Los Angeles City Hall were exposed to “trash and bodily fluids” on the exterior passageways outside of City Hall where encampments are located.²⁴ Cal/OSHA issued citations to Los Angeles, assessing a combined \$1,995 in penalties.²⁵

Similarly, eight months earlier, a pest control company issued a report linking rodent infestation at Los Angeles City Hall to several encampments in the immediate area.²⁶ One City employee who contracted typhus filed a \$5-million claim against the City, alleging that the City’s failure to remove garbage and human feces outside City Hall allowed typhus-carrying rats and fleas to thrive.²⁷

²⁴ See David Zahniser, *L.A. Exposed City Workers to Trash, Bodily Fluids Outside City Hall East, State Says* (L.A. Times Aug. 15, 2019), <https://www.latimes.com/california/story/2019-08-15/city-workers-trash-bodily-fluids-los-angeles-civic-center>.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ See David Zahniser, *Lawyer Files \$5-million Claim, Saying L.A. City Hall Rat Problem Caused Her Illness* (L.A. Times Apr. 21, 2019), <https://www.latimes.com/local/lanow/la-me-ln-city-attorney-rat-flea-typhus-legal-claim-20190421-story.html>.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counties and Cities

September 24, 2019

APPENDIX

APPENDIX

List of *Amici Curiae*

California State Association of Counties

California Counties

County of Del Norte	County of Fresno
County of Los Angeles	County of Orange
County of Riverside	County of Sacramento
County of San Diego	County of San Joaquin
County of Sutter	

California Cities

City of Covina	City of Crescent City
City of Fairfield	City of Fullerton
City of Gardena	City of Glendora
City of Laguna Beach	City of La Habra
City of Lodi	City of Lompoc
City of Manhattan Beach	City of Manteca
City of Newport Beach	City of Redondo Beach
City of Sacramento	City of Salinas
City of San Buenaventura	City of San Rafael
City of Thousand Oaks	City of Torrance
City of Vista	City of West Covina
City of Westminster	City of Whittier