

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

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

MARK MILLER

Counsel of Record

Pacific Legal Foundation

4440 PGA Blvd., Ste. 307

Palm Beach Gardens, FL 33410

(561) 691-5000

Mark@pacificlegal.org

Counsel for Amici Curiae

Pacific Legal Foundation and

California Business Properties

Association

QUESTION PRESENTED

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

The question presented is:

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

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF
AMICI CURIAE 1

INTRODUCTION AND SUMMARY 3

ARGUMENT 4

 I. THE COURT SHOULD GRANT
 CERTIORARI BECAUSE THE DECISION
 BELOW LEAVES LOCAL OFFICIALS
 WITHOUT WORKABLE OR CLEAR
 GUIDELINES FOR ADDRESSING THE
 HOMELESSNESS CRISIS..... 4

 II. THE COURT SHOULD GRANT
 CERTIORARI BECAUSE THE DECISION
 BELOW EXACERBATES THE DAMAGE TO
 PRIVATE PROPERTY THAT IS
 OCCURRING BECAUSE OF THE
 HOMELESSNESS CRISIS..... 8

CONCLUSION..... 12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Cedar Point Nursery v. Hassid</i> , 141 S.Ct. 2063 (2021)	1
<i>Jackson v. City of Joliet</i> , 715 F.2d 1200 (7th Cir. 1983)	5
<i>Johnson v. City of Grants Pass</i> , 50 F.4th 787 (9th Cir. 2022), <i>amended on denial of reh’g</i> , 72 F.4th 868 (9th Cir. 2023).....	3, 5–7, 11–12
<i>Knick v. Township of Scott</i> , 139 S.Ct. 2162 (2019)	1
<i>Martin v. City of Boise</i> , 920 F.3d 584 (9th Cir. 2019)	i, 3, 5–6, 9, 11
<i>Murr v. Wisconsin</i> , 582 U.S. 383 (2017)	1
<i>Pakdel v. City and Cnty. of San Francisco</i> , 141 S.Ct. 2226 (2021)	1
<i>Palazzolo v. Rhode Island</i> , 533 U.S. 606 (2001)	1
<i>Suitum v. Tahoe Reg’l Planning Agency</i> , 520 U.S. 725 (1997)	1
<i>Wilkins v. United States</i> , 143 S.Ct. 870 (2023)	1

United States Constitution

U.S. Const. amend. VIII	i, 4–5
U.S. Const. amend. XIV.....	5

Rules

Supreme Court Rule 37.2	1
Supreme Court Rule 37.6	1

Other Authorities

Associated Press, <i>Phoenix faces dueling lawsuits over homeless crisis as advocates scramble for more shelter</i> , AZPM News (May 27, 2023), https://news.azpm.org/p/newsc/2023/5/27/216199-phoenix-faces-dueling-lawsuits-over-homeless-crisis-as-advocates-scramble-for-more-shelter/	10
Burgos, Annalisa, <i>Businesses plead for long-term solutions as they ‘play police’ with aggressive patrons</i> , Hawaii News Now (Jan. 19, 2023), https://www.hawaiinewsnow.com/2023/01/20/hawaiis-homeless-crisis-takes-toll-local-restaurants/	10
Carlton, Jim, <i>A Montana Town Faces a Homelessness Problem Similar to San Francisco and L.A.</i> , The Wall Street Journal (Sept. 2, 2023), https://www.wsj.com/business/hospitality/a-montana-town-faces-a-homelessness-problem-similar-to-san-francisco-and-l-a-eba26824	9

- Granda, Carlos, *Business owners struggle to deal with homeless encampments they say bring crime, hurt bottom line*, ABC 7 News Los Angeles (Mar. 22, 2023), <https://abc7.com/lincoln-heights-homeless-encampment-los-angeles-city-council/12988239> 8
- Green, Sara Jean, *Citing ‘dire conditions,’ 33 King County Superior Court judges urge immediate shutdown of Seattle’s City Hall [Homeless] Park*, The Seattle Times (June 25, 2021), https://www.seattletimes.com/seattle-news/law-justice/citing-dire-conditions-33-king-county-superior-court-judges-urge-immediate-shutdown-of-seattles-city-hall-park/?utm_source=marketingcloud&utm_medium=email&utm_campaign=BNA_062621032006+33+judges+urge+immediate+shutdown+of+City+Hall+Park_6_25_2021&utm_term=Active%20subscriber 10
- KCAL-News Staff, *Northridge business owner says homelessness hurting sales*, CBS Los Angeles (July 29, 2022), <https://www.cbsnews.com/losangeles/news/northridge-business-owner-says-homelessness-hurting-sales/> 9

- Lillis, Ryan, *'A better life.'* *How a Facebook community helps thousands fleeing California for other states,*
The Sacramento Bee (July 13, 2022),
<https://www.sacbee.com/news/california/article263363228.html#storylink=cpy> 11
- Nazaryan, Alexander, *San Francisco is in trouble, battered by remote work and the homeless crisis,*
Yahoo! News (June 16, 2023),
<https://news.yahoo.com/san-francisco-is-in-trouble-battered-by-remote-work-and-the-homeless-crisis-160203782.html> 10
- Saslow, Rachel, *Fleeing Portland? We have bad news about home prices in surrounding bedroom towns,*
Willamette Week (Apr. 13, 2022),
<https://www.wweek.com/news/2022/04/13/fleeing-portland-we-have-bad-news-about-home-prices-in-surrounding-bedroom-towns> 11
- Schauer, Frederick, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press paperback ed. 1992)..... 6

Shapiro, Ilya, <i>State Police Powers and the Constitution</i> , Cato Institute Pandemics and Policy (Sept. 15, 2020), https://www.cato.org/pandemics- policy/state-police-powers- constitution	4–5
Sunstein, Cass R., <i>Justice Scalia’s Democratic Formalism</i> , 107 Yale L.J. 529 (1997)	7
Tweet of Governor Gavin Newsom of California, X (Aug. 29, 2023), https://x.com/gavinnewsom/status/16 96600790188822690?s=46&t=KKw0 PCXg7R0gudKVowDDt	7

Pursuant to Rule 37.2 of the Rules of this Court, Amici Curiae, Pacific Legal Foundation (PLF) and the California Business Properties Association (C.B.P.A.), submit this brief in support of Petitioner City of Grants Pass.¹

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) is a nonprofit corporation organized for the purpose of litigating matters affecting the public interest in private property rights, individual liberty, and economic freedom; all of those interests are at issue in the instant case. PLF attorneys have participated as lead counsel in several cases before the U.S. Supreme Court in defense of these rights. *See, e.g., Wilkins v. United States*, 143 S.Ct. 870 (2023); *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021); *Pakdel v. City and Cnty. of San Francisco*, 141 S.Ct. 2226 (2021); *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019); *Murr v. Wisconsin*, 582 U.S. 383 (2017); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). PLF's arguments based on this experience will assist the Court in understanding and deciding the

¹ Pursuant to Rule 37.2, Amici provided timely notice to all parties. Pursuant to Rule 37.6, Amici affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici, their members, or their counsel made a monetary contribution to its preparation or submission.

important issues presented by the petition in this case.

C.B.P.A. is a commercial real estate trade association that serves as the legislative and regulatory advocate for property owners, tenants, developers, retailers, contractors, land use attorneys, brokers, and other professionals in the commercial real estate industry. With over 10,000 members, C.B.P.A. is the largest consortium of commercial real estate professionals in California.

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

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

INTRODUCTION AND SUMMARY

“Homelessness is presently the defining public health and safety crisis in the western United States.” *Johnson v. City of Grants Pass*, 50 F.4th 787 (9th Cir. 2022), *amended on denial of reh’g*, 72 F.4th 868, 934 (9th Cir. 2023) (Smith, J., dissenting from den’l of reh’g en banc). The homelessness crisis inordinately and negatively impacts private property and private business across the western states that comprise the Ninth Circuit’s jurisdiction. Government exists to protect individual rights, including their personal safety and private property rights. But the Ninth Circuit’s murky rule issued here makes it difficult for cities to protect individual safety and public or private property in cities with large homeless populations.

In the instant case, the City of Grants Pass, Oregon, passed a number of ordinances to address the crisis, and those ordinances in part prohibited individuals who sought to sleep or camp on public property from doing so. *Id.* at 876. This exercise of the city’s police powers fell well within the ambit of how cities have addressed trespassing on public property for time immemorial. *Id.* at 944–45 (Bress, J., dissenting from denial of rehearing en banc) (explaining that before the Ninth Circuit injected itself into the question, the question of how to address a homeless crisis was a question left to local and state governments, and that it was best left that way).

Unfortunately, the Ninth Circuit’s decision in the instant case, when combined with an earlier precedent from the same court, *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), tied the hands of elected city leaders in the West who sought to address the homeless crisis. It did so premised on a reading of the

Eighth Amendment’s cruel and unusual punishment prohibition that this Court has never endorsed.

Certainly, the police powers exercised by Grants Pass in this case are constrained by individual constitutional rights. But by taking public policy options off the table for policy makers premised on a constitutional right that this Court has heretofore not recognized, the Ninth Circuit has exceeded its authority.

That being the case, this Court should grant certiorari.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW LEAVES LOCAL OFFICIALS WITHOUT WORKABLE OR CLEAR GUIDELINES FOR ADDRESSING THE HOMELESSNESS CRISIS

The western states’ homeless crisis calls for health and safety legislative policy decisions to address it, and these police powers are within the ambit of state and local legislative authority when properly exercised. *See* Ilya Shapiro, *State Police Powers and the Constitution*, Cato Institute Pandemics and Policy (Sept. 15, 2020) (“State police powers have long been recognized to include the authority to make laws for public health and safety”).² In exercising their police powers, the elected leaders of Grants Pass set out tailored ordinances designed to protect the public from the dangers that inevitably follow homeless

² <https://www.cato.org/pandemics-policy/state-police-powers-constitution>.

encampments. The city's ordinances prohibited individuals who sought to sleep or camp on public property from doing so. *Johnson*, 72 F.4th at 876. If an individual refused to abide by the prohibition, they could be fined. *Id.* If violations of the ordinances continued, then they could face criminal discipline. *Id.*

To be sure, the Fourteenth Amendment limits how far cities may go in exercising their police powers. See Shapiro, *State Police Powers and the Constitution* (“Exercises of the state police power must respect the individual rights guaranteed in the Constitution”). But the Ninth Circuit created an unworkable and opaque rule, enjoining enforcement of a number of those Grants Pass ordinances purportedly because the ordinances violated the Eighth Amendment. The court held that “involuntarily homeless persons must have ‘somewhere’ to sleep and take rudimentary precautions (bedding) against the elements.” *Johnson*, 72 F. 4th at 915 (quoting *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc)). It announced from that conclusion that the homeless had a novel, positive constitutional right³ to sleep in public spaces, such as public parks or

³ As Judge Richard Posner once observed, the Constitution protects negative rights (what the government cannot do to you), not positive rights (what the government purportedly owes you). See *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (“[T]he Constitution is a charter of negative rather than positive liberties . . . [t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people, but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services.”).

sidewalks, even when doing so interferes with others' ability to safely use or enjoy them.

Further, because Grants Pass does not have enough beds for *all* homeless people, it could not even enforce the camping ban against *particular* individuals who are offered a bed but choose to illegally camp instead. See *Johnson*, 72 F.4th at 938 (Smith, J., dissenting from denial of reh'g en banc). To be sure, the majority deleted this "bed formula" from the revised opinion, since the formula had come in for so much criticism after the original opinion was released. *Id.* But as Judge Smith explains, removing the bed formula did not change the implications of the decision since "the approach that [deleted] language forthrightly described remains embedded in the opinion." *Id.* The bed formula makes it virtually impossible for cities to act—thus it is unworkable.

The Ninth Circuit's rule also leaves cities without clear options to protect public property from trespassing and becoming public nuisances. Rules are supposed "to foster the interrelated virtues of reliance, predictability, and certainty." Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life*, at 137 (Clarendon Press paperback ed. 1992). The "rule" of *Martin* and now *Johnson* has failed to deliver on any of those virtues. Instead, cities are tied up in the federal courts because their good faith efforts to ameliorate the homeless crisis are faced with lawsuits premised on the *Martin* rule, see *Johnson*, 72 F.4th at 940–43 (Smith, J., dissenting from denial of rehearing en banc) (describing the lawsuits in San Francisco,

Phoenix, Santa Barbara, Sacramento, and Chicago), as now revised by *Johnson*.

When a rule is unpredictable, no one can rely upon it—least of all, as we see here, legislators who have every reason to want to act legally because otherwise they end up in court. *Compare* Cass R. Sunstein, *Justice Scalia’s Democratic Formalism*, 107 *Yale L.J.* 529, 531 (1997) (explaining that Justice Scalia favored clear rules in part because they provide the background upon which legislators write, they make the law more readily predictable, and they better ensure “that Congress [or in this case, local and state legislators] will legislate in the constitutionally preferred fashion”).

Governor Gavin Newsom of California threw his hands up in response to these two Ninth Circuit decisions. In addressing the crisis on X (formerly known as Twitter), he stated in pertinent part: “On homelessness . . . California has made record investments—\$15.3 bil. But federal courts block local efforts to clean street encampments—even when housing and services are offered. Courts must also be held accountable. Enough is enough.”⁴ Governor Newsom’s point and the Amici’s point is the same: the Ninth Circuit has gone too far.

To be sure, “[t]he challenges faced by individuals experiencing homelessness are severe. And the challenges that face municipalities are daunting.” *Johnson*, 72 F.4th at 934 (Graber, J., dissenting from denial of rehearing en banc). The Ninth Circuit’s unworkable and confusing rule prevents local and

⁴ <https://x.com/gavinnewsom/status/1696600790188822690?s=46&t=KKw0PCXg7R0gudKVowDDtA>.

state elected officials from addressing the crisis in a way that protects the public—including the homeless men and women who are members of the public.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW EXACERBATES THE DAMAGE TO PRIVATE PROPERTY THAT IS OCCURRING BECAUSE OF THE HOMELESSNESS CRISIS

Recent news reports detailing the decline of city life litter the newspapers and news stations of the West. These stories universally tie the decline to the increase in crime, disease, and drug use that the rising tide of homeless bring to these cities.

For example, in the Lincoln Heights section of Los Angeles, earlier this year business owners explained that they regularly see gun violence, gang activity, drug use, and vehicles broken into in the homeless encampment near their stores, and that the problem is getting worse.⁵ One explained: “Customers come to me, so many customers. Once they come over here to my place for my service, and they see the [homeless in the] area, they just leave.”⁶

Likewise, over in the San Fernando Valley business owners describe a drop in business directly tied to the open drug use and trash piling up in the

⁵ Carlos Granda, *Business owners struggle to deal with homeless encampments they say bring crime, hurt bottom line*, ABC 7 News Los Angeles (Mar. 22, 2023) (quoting business owners in the Lincoln Heights section of Los Angeles), <https://abc7.com/lincoln-heights-homeless-encampment-los-angeles-city-council/12988239/>.

⁶ *Id.*

homeless encampment set up directly in front of or adjacent to their businesses, and they describe a city government that is doing nothing about it.⁷

Circumstances are no better in Missoula, Montana:

Some 600 people without homes live in the Northern Rockies college town [Missoula], triple the number of a decade ago, many of them in tents in city parks. Their presence has sown growing anger among residents who say the parks have become dirty and unsafe.

Shannone Hart said a group of teens she works with saw homeless people fighting in a park and that she moved in June from a house near an encampment along the Clark Fork.

“Just the sheer litter and feces and garbage pollution that was going into the river was concerning,” Hart said.

Jim Carlton, *A Montana Town Faces a Homelessness Problem Similar to San Francisco and L.A.*, *The Wall Street Journal* (Sept. 2, 2023).⁸

The *Journal* story explains why Missoula officials cannot address the problem: “Missoula has a decades-old law that makes it illegal to camp in a park, but can’t enforce it because of a 2018 ruling [*Martin*] by the Ninth Circuit . . . that found removing anyone

⁷ KCAL-News Staff, *Northridge business owner says homelessness hurting sales*, CBS Los Angeles (July 29, 2022), <https://www.cbsnews.com/losangeles/news/northridge-business-owner-says-homelessness-hurting-sales/>.

⁸ <https://www.wsj.com/business/hospitality/a-montana-town-faces-a-homelessness-problem-similar-to-san-francisco-and-l-a-eba26824>.

camping in a public space . . . when there isn't a shelter bed for them constitutes cruel and unusual punishment." *Id.* The story goes on to note that Missoula has less than half the beds necessary to comply with the order. *Id.*

Other cities in the West fare no better, with recent news stories from Phoenix,⁹ Seattle,¹⁰ Honolulu,¹¹ and of course San Francisco,¹² all describing how the

⁹ Associated Press, *Phoenix faces dueling lawsuits over homeless crisis as advocates scramble for more shelter*, AZPM News (May 27, 2023) (describing homeless crisis in area of town known as "The Zone"), <https://news.azpm.org/p/newsc/2023/5/27/216199-phoenix-faces-dueling-lawsuits-over-homeless-crisis-as-advocates-scramble-for-more-shelter/>.

¹⁰ Sara Jean Green, *Citing 'dire conditions,' 33 King County Superior Court judges urge immediate shutdown of Seattle's City Hall [Homeless] Park*, The Seattle Times (June 25, 2021) (describing dangerous conditions for judges, court personnel, and jurors because of homeless encampments near courthouse), https://www.seattletimes.com/seattle-news/law-justice/citing-dire-conditions-33-king-county-superior-court-judges-urge-immediate-shutdown-of-seattles-city-hall-park/?utm_source=marketingcloud&utm_medium=email&utm_campaign=BNA_062621032006+33+judges+urge+immediate+shutdown+of+City+Hall+Park_6_25_2021&utm_term=Active%20subscriber.

¹¹ Annalisa Burgos, *Businesses plead for long-term solutions as they 'play police' with aggressive patrons*, Hawaii News Now (Jan. 19, 2023) (describing how Honolulu businesses are reporting more confrontations with aggressive homeless people and that the homeless crisis is impacting their bottom line), <https://www.hawaiinewsnow.com/2023/01/20/hawaiis-homeless-crisis-takes-toll-local-restaurants/>.

¹² Alexander Nazaryan, *San Francisco is in trouble, battered by remote work and the homeless crisis*, Yahoo! News (June 16, 2023) (setting out how the easy availability of fentanyl and the lack of mental health services, combined with the pandemic, exacerbated the chaos occasioned by the homeless crisis in San Francisco), <https://news.yahoo.com/san-francisco-is-in-trouble->

homeless crisis—largely arising from drug abuse and mental health problems—is getting worse, hurting businesses, and escapes easy answers.

Likewise, homeowners living in cities in the Ninth Circuit’s jurisdiction also face the homeless crisis—often right on their doorstep. In Portland, realtors say the recent increase in homelessness is the number one reason people are seeking to move out of town, and they point to homeless encampments on public property specifically as a driver behind the desire to flee the city.¹³ And the Sacramento Bee points to the “exploding” homeless crisis as a significant factor driving hundreds of thousands of Californians to leave the state.¹⁴

The *Martin* and *Johnson* decisions have only exacerbated the problem facing elected leaders, businesses, and residents. The Court should grant the petition in order to clarify a workable rule that allows cities to better address the crisis.

battered-by-remote-work-and-the-homeless-crisis-160203782.html.

¹³ Rachel Saslow, *Fleeing Portland? We have bad news about home prices in surrounding bedroom towns*, Willamette Week (Apr. 13, 2022), <https://www.wweek.com/news/2022/04/13/fleeing-portland-we-have-bad-news-about-home-prices-in-surrounding-bedroom-towns/>.

¹⁴ Ryan Lillis, *‘A better life.’ How a Facebook community helps thousands fleeing California for other states*, The Sacramento Bee (July 13, 2022), <https://www.sacbee.com/news/california/article263363228.html#storylink=cpy>.

CONCLUSION

This Court should grant the petition.

DATED: September 2023.

Respectfully submitted,

MARK MILLER

Counsel of Record

Pacific Legal Foundation

4440 PGA Blvd., Ste. 307

Palm Beach Gardens, FL

33410

(561) 691-5000

Mark@pacificlegal.org

Counsel for Amici Curiae

Pacific Legal Foundation

and California Business

Properties Association