

No. 23-175

In The Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON, ET AL., 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 *AMICI CURIAE* ON BEHALF OF
CURRENT & FORMER SAN FRANCISCO
OFFICIALS AND CIVIC ORGANIZATIONS
IN SUPPORT OF RESPONDENTS**

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<i>Blake v. City of Grants Pass</i> , No. 18-cv-01823, 2020 WL 4209227 (D. Or. July 22, 2020).....	17
<i>Buchanan v. Warley</i> , 245 U.S. 60 (1917)	4
<i>Coalition on Homelessness v. San Francisco</i> , 647 F. Supp. 3d 806 (N.D. Cal. 2022) ...	25, 26, 27, 29, 31
<i>Coal. on Homelessness v. San Francisco</i> , No. 23-15087, 2024 WL 125340 (9th Cir. Jan. 11, 2024).....	23
<i>Cole v. City of Memphis</i> , 839 F.3d 530 (6th Cir. 2016)	31
<i>Commonwealth v. Pike</i> , 428 Mass. 393 (Mass. 1998)	12, 28
<i>Crabtree v. State</i> , 112 P.3d 618 (Wy. 2005).....	12
<i>Dear Wing Jung v. United States</i> , 312 F.2d 73 (9th Cir. 1962)	11
<i>Gomes v. Cnty. Of Kauai</i> , 481 F. Supp. 3d 1104 (D. Haw. 2020).....	18, 19
<i>Ingraham v. Wright</i> , 430 U.S. 651 (1977).....	32

<i>Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.</i> , 510 U.S. 27 (1993)	30, 32
<i>Johnson v. City of Grants Pass</i> , 72 F.4th 868 (9th Cir. 2023)	2, 14, 15, 16,17, 18, 19, 20, 21, 23, 31, 32
<i>Martin v. City of Boise</i> , 920 F.3d 584 (9th Cir. 2019)	2, 3, 14, 15,16, 18, 19, 20, 21, 22, 23, 26
<i>People v. Baum</i> , 251 Mich. 187 (Mi. 1930)	12
<i>People v. Green</i> , 114 Misc. 2d 339 (N.Y. Sup. Ct. 1982)	12-13
<i>Reitman v. Mulkey</i> , 387 U.S. 369 (1967)	5
<i>Robinson v. California</i> , 370 U.S. 660 (1962)	13, 14, 15, 19, 21
<i>Shelton v. Bledsoe</i> , 775 F.3d 554 (3d Cir. 2015)	31
<i>Shook v. El Paso Cnty.</i> , 386 F.3d 963 (10th Cir. 2004)	31
<i>State v. Charlton</i> , 846 P.2d 341 (N.M. Ct. App. 1992)	12
<i>United States v. Ju Toy</i> , 198 U.S. 253 (1905)	11
<i>Yaffe v. Powers</i> , 454 F.2d 1362 (1st Cir.1972)	31
<i>Yee v. Escondido</i> , 503 U.S. 519 (1992)	30

Statutes, Rules and Regulations:

U.S. Const., amend VIII.....	2, 3, 11, 13,14, 15, 16, 21, 23, 24, 27, 30, 31, 32
U.S. Const., art. IV.....	11, 12
Cal. Code Regs. Tit. 19, § 321	17
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Cal. Health & Safety Code § 50251	23
Cal. Health & Safety Code § 50251.1(c)(4)	23
Cal. Penal Code § 647(c)	18, 19
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California SB 1011 (2024)	23
Fed. R. Civ. P. 23(b)(2)	31
Grants Pass Mun. § 5.61.010	15
Grants Pass Mun. § 5.61.030	15
S.F. Municipal Health Code § 581	18
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S.F. Police Code § 22	18
S.F. Police Code § 23	18
S.F. Police Code § 24	18
S.F. Police Code § 169	23, 26, 27

Other Authorities:

4 ELLIOTT’S DEBATES, 455 (1836)	11
31 Car. II. C. 2 (1679).....	11

Aldo Toledo, <i>Fight over S.F. homeless sweeps intensifies ahead of crucial court hearings</i> , S.F. Chronicle (Aug. 24, 2023), https://www.sfchronicle.com/sf/article/sf-homeless-crisis-sweeps-lawsuit-aclu-breed-18310974.php	29
Aldo Toledo, <i>More S.F. homeless people would be put on buses out of the city under new proposal</i> , S.F. Chronicle (Nov. 27, 2023), https://www.sfchronicle.com/sf/article/sf-homeless-bus-homeward-bound-off-the-streets-18520054.php	28
Appellee’s Opening Brief, <i>Coalition on Homelessness v. San Francisco</i> , No. 23-15087 (9th Cir.), https://cdn.ca9.uscourts.gov/datastore/uploads/cases-of-interest/23-15087/23-15087-Answering-brief.pdf	28
CALIFORNIA LEGISLATIVE ANALYST’S OFFICE, <i>California’s Housing and Homelessness Challenges in Context</i> , 1-2 (2023), https://lao.ca.gov/handouts/socservices/2023/Housing-and-Homelessness-Challenges-020623.pdf	6
<i>California’s New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-Homeless Laws in the Golden State</i> , BERKELEY LAW SCHOOL (2016), https://www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf	8
Chris Glynn et al., <i>Inflection points in community-level homeless rates</i> , 15 ANNALS APPLIED STAT. 1037 (2021)	7

Chris Herring & Dilara Yarbrough, <i>Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco</i> (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620426	9, 12
Chris Herring, <i>Complaint-Oriented Policing: Regulating Homelessness in Public Space</i> , 84 AM. SOC. REV., No. 5, Oct. 2019	8, 12
Clement Lai, <i>The Racial Triangulation of Space: The Case of Urban Renewal in San Francisco's Fillmore District</i> , ANNALS OF THE ASS'N OF AM. GEOGRAPHERS (2012), https://www.jstor.org/stable/41412759	5
Coal. on Homelessness, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF Nos. 9-1 through 9-9, 49, & 50-1 through 50-18	25
Coal. on Homelessness, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), Declaration of Kaki Marshall, ECF No. 50-10, ¶ 11-23.....	27
<i>Coalition on Homelessness v. San Francisco</i> , No. 23-15087, Oral Argument (9th Cir. Aug. 2023), https://www.youtube.com/watch?v=mhfZw15ENdI&t=3470s	22
David Sjostedt, <i>Scathing audit paints damning picture of San Francisco homeless outreach teams</i> , SAN FRANCISCO STANDARD (Nov. 7, 2023), https://sfstandard.com/2023/11/07/san-francisco-homelessness-damning-report/	25

Dr. Margot Kushel et al., *The California Statewide Study of People Experiencing Homelessness*, UNIVERSITY OF CALIFORNIA, SAN FRANCISCO (2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf 10

Eli Moore et al., *Roots, Race, & Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area*, HAAS INST. FOR A FAIR AND INCLUSIVE SOC’Y, UNIV. OF CALIFORNIA, BERKELEY (Oct. 2019) 4

Eric McGhee et al., *California’s Renters*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Feb. 27, 2024), <https://www.pplic.org/blog/californias-renters/> 7

Erwin Chemerinsky, *San Francisco and Newsom’s targeting of judges is a threat to judicial independence*, S.F. CHRONICLE (Aug. 30, 2023), <https://www.sfchronicle.com/opinion/openforum/article/san-francisco-newsom-judges-18338500.php>.... 29

Greg Rosalsky, *How California Homelessness Became A Crisis*, NPR (June 8, 2021), <https://www.npr.org/sections/money/2021/06/08/1003982733/squalor-behind-the-golden-gate-confronting-californias-homelessness-crisis>..... 6

HUD 2023 *Housing Inventory Report: California* (2023), https://files.hudexchange.info/reports/published/CoC_HIC_State_CA_2023.pdf..... 10

Joe Kukura, *Irate Gavin Newsom Wants to Dox Judge Who Blocked Encampment Sweeps*, SFIST (Aug. 30, 2023), <https://sfist.com/2023/08/30/irate-gavin-newsom-wants-to-dox-judge-who-blocked-encampment-sweeps/>..... 29

- Joe LaBriola, *The Race to Exclude: Residential Growth Controls in California Cities, 1970-1992*, HOUSING POLICY DEBATE (2023) 5
- John M. Quigley et al., *Regulation and the High Cost of Housing in California*, 95 AMERICAN ECONOMIC REVIEW, 323 (2005) 6
- Kate Anthony et al., *Homelessness in the San Francisco Bay Area: The crisis and a path forward*, MCKINSEY & Co., (2019), <https://resources.ecww.org/sites/default/files/Homelessness-in-the-San-Francisco-Bay-Area-Thecrisis-and-a-path-forward.pdf> 7
- Maggie Angst, *S.F. DA Brooke Jenkins faces blowback after saying homeless people should be made 'uncomfortable'*, S.F. CHRONICLE (Dec. 13, 2023), <https://www.sfchronicle.com/sf/article/brooke-jenkins-homeless-uncomfortable-18547794.php> 28
- Mapping Inequality: Redlining in New Deal America, San Francisco, CA*, UNIV. OF RICHMOND, [https://dsl.richmond.edu/panorama/redlining/#loc=12/37.758/-122.514&city=sanfrancisco-ca&area=D1.\(D1 & C4\)](https://dsl.richmond.edu/panorama/redlining/#loc=12/37.758/-122.514&city=sanfrancisco-ca&area=D1.(D1%20%26%20C4))..... 5
- Marc Weiss, “*Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley*,” BERKELEY PLAN. J. (1986)..... 4
- Mary K. Cunningham, *The Homelessness Blame Game*, URBAN INST. (September 23, 2019), <https://www.urban.org/urban-wire/homelessness-blame-game>..... 12
- Mayor Breed Delivers State of the City Address*, ABC7 NEWS (Mar. 7, 2024), https://www.youtube.com/watch?v=0BRg_JmjXf8..... 28

McKinsey Global Inst., <i>A tool kit to close California’s housing gap</i> , MCKINSEY & CO. (2016), https://www.mckinsey.com/~media/mckinsey/industries/public%20and%20social%20sector/our%20insights/closing%20californias%20housing%20gap/closing-californias-housing-gap-full-report.pdf	7
<i>Merriam-Webster.com dictionary</i> . Retrieved March 6, 2024, from https://www.merriam-webster.com/dictionary/vagrant#:~:text=a,whose%20conduct%20constitutes%20statutory%20vagrancy	10
Michael F. Armstrong, <i>Banishment: Cruel and Unusual Punishment</i> , 111 U. PA. L. R. 758 (1963)	11
Michael Gennaro, <i>California slams San Francisco over failure to build housing</i> , COURTHOUSE NEWS SERVICE (Oct. 25, 2023), https://www.courthousenews.com/california-slams-san-francisco-over-failure-to-build-housing/	8, 29
OXFORD CLASSICAL DICTIONARY (4th ed. 2012).....	11
<i>Performance Audit of San Francisco Street Teams</i> , S.F. BUDGET & LEG. ANALYST (2023).....	25
Plaintiffs’ Letter to City Attorney David Chiu (Aug. 10, 2023), https://lccrsf.org/wp-content/uploads/2023/08/08.10.23-Letter-to-City-Attorney-With-Links66.pdf	29
S.F. PLAN. DEPT., <i>Context: Dismantling San Francisco’s Housing Inequities</i> , (Apr. 6, 2021), https://storymaps.arcgis.com/stories/26bc500b5aee4f0281a860a2144a5998	7

*San Francisco Homeless County & Survey
Comprehensive Report 2019*, S.F. DEP'T OF
HOMELESSNESS & SUPPORTIVE HOUSING (2020),
[https://hsh.sfgov.org/wpcontent/uploads/
2020/01/2019HIRDReport_SanFrancisco_
FinalDraft-1.pdf](https://hsh.sfgov.org/wpcontent/uploads/2020/01/2019HIRDReport_SanFrancisco_FinalDraft-1.pdf) 10, 19

Sara K. Rankin, *Influence of Exile*, 76 MARYLAND
L. REV. 4 (2016) 9, 11, 12

Sara K. Rankin, *Punishing Homelessness*,
22 NEW CRIM. L. REV. 99 (2019) 12

Summary and Minutes of the Special Meeting,
S.F. PLANNING DEP'T (June 7, 1978),
[https://archive.org/details/37minutesofsanfran
1978san/page/42/mode/2up](https://archive.org/details/37minutesofsanfran1978san/page/42/mode/2up)..... 5

U.S. DEPARTMENT OF HOUSING AND URBAN
DEVELOPMENT, *Annual Homelessness
Assessment Report to Congress* (2022)..... 4, 8, 10

INTEREST OF AMICI CURIAE¹

Amici curiae are current and former San Francisco officials, neighborhood and business associations, social services providers, and other civic organizations deeply concerned by the misinformation being presented to this Court regarding state and local responses to homelessness across California—particularly in San Francisco. *Amici* are compelled to correct that misinformation in the interests of all Californians. They include San Francisco’s previous District Attorney, the Public Defender’s Office, and the City’s former Director of Shelter. A full list of *amici* appears as Appendix A to this brief.

SUMMARY OF ARGUMENT

Californians deserve the truth. The Golden State’s failed housing policies have resulted in an extreme affordable housing shortage that has forced thousands of working Californians onto the street. Instead of addressing the problem, California has adopted so-called “vagrancy” laws to expel tens of thousands of residents from their home state. The term “vagrancy” is an ugly misnomer. It implies that homeless residents come from elsewhere. Not so. California cities intend to cleanse themselves of their own hardworking residents rather than take accountability for a housing crisis they created. This form of public banishment harkens the draconian penalties of Ancient Greece—and was repudiated across the United States long ago.

¹ No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission. Rule 37.6.

California's elected leaders agree that it is unconstitutional to punish individuals who have no place to sleep overnight other than on a public street or sidewalk. In addressing this Court, Governor Gavin Newsom, San Francisco Mayor London Breed, and other California leaders intone that these punishments violate the Eighth Amendment, are cruel and unusual, and make "no sense." They are correct. The Ninth Circuit should be affirmed on the sole, narrow question before this Court. Petitioner has violated our Constitution.

California politicians instead attempt to use this case to stage a farce at the expense of this Court and the American public. They purport that they are powerless to address homelessness because they have been "confused" by the Ninth Circuit's narrow decision in *Martin v. City of Boise*, 920 F. 3d 584 (CA9 2019), and the decision below in *Johnson v. City of Grants Pass*, 72 F. 4th 868, 890 (CA9 2023). This is political theatre. Nothing stops California from investing in affordable housing and emergency shelter for thousands of its residents forced to sleep outside. Nothing stops California from providing shelter and services to eliminate street homelessness. And nothing stops California from enforcing every applicable health, safety, and other legal restriction to ensure safe conditions on our streets. California knows that it can and must take all of these steps. Cities across California have adopted policies that identify a panoply of options to address homelessness—including the enforcement of any number of applicable laws to address street homelessness or unlawful conduct—provided that no California resident is criminally punished simply for sleeping or resting outside if there is nowhere else for them to go. In short, there is no genuine disagreement about the Eighth Amendment's clear and limited scope.

Despite brooking no actual disagreement with the Ninth Circuit *on the law* of what is cruel and unusual, California's top politicians have manufactured their appeals to this Court, simply because they do not want to be held accountable *for the facts*. Nowhere is this truer than in San Francisco. San Francisco has cited, fined, and arrested *hundreds* of unhoused residents for the sole crime of having nowhere to sleep in violation of the Eighth Amendment, the City's own clear laws and policies that pre-date *Martin*, and basic common sense. A federal court enjoined these practices because they are nothing short of egregious. The litigation revealed just how little San Francisco has accomplished on homelessness despite wasting millions of dollars in taxpayer money on unconstitutional enforcement instead of the affordable housing and shelter residents so desperately need.

Thus began a political campaign of deflection and misdirection that is now on display before this Court. Politicians have looked to blame everyone but themselves for failing to properly address homelessness. But Californians deserve accountability, not excuses. The *amici curiae* briefs seeking reversal are factually wrong and have nothing to do with the narrow constitutional question at bar. They should be disregarded. Particularly because California's political leaders agree with Respondents on the sole legal question before this Court: It is cruel and unusual to jail the unhoused and call it housing policy.

ARGUMENT

I. California’s Draconian “Vagrancy” Laws Attempt to Banish Working Californians to Other Jurisdictions in a Brutal, Misguided Race to the Bottom That Exacerbates the Homelessness Crisis.

A. California Created the State’s Homelessness Crisis by Enacting Intentionally Racist Zoning Laws.

California’s crisis of street homelessness is the worst in the United States.² This is no accident. It is the direct result of decades of racist and exclusionary housing policies. In the 1880s, California cities were among the first to use explicitly racist zoning laws to exclude communities of color.³ This Court put an end to that brand of blatant racialized exclusion. *Buchanan v. Warley*, 245 U.S. 60, 82 (1917). In response, California cities invented single-family zoning laws as a pretext to keep people of color out.⁴ California’s aggressive use of these ordinances was praised at the time as “protection against invasion of Negroes and Asiatics.”⁵

From the 1930s-1960s, California cities collaborated with local financial institutions to actively discriminate

² U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, *Annual Homelessness Assessment Report to Congress* (2022), at 16.

³ Eli Moore et al., *Roots, Race, & Place: A History of Racially Exclusionary Housing in the San Francisco Bay Area*, HAAS INST. FOR A FAIR AND INCLUSIVE SOC’Y, UNIV. OF CALIFORNIA, BERKELEY (Oct. 2019), at 15.

⁴ *Id.*; see also Marc Weiss, “Urban Land Developers and the Origins of Zoning Laws: The Case of Berkeley,” *BERKELEY PLAN. J.* (1986).

⁵ Moore, *supra* note 3, at 15.

against Black and Asian homeowners and renters—attempting to stem a perceived “infiltration of Negroes and Japs.”⁶ Meanwhile, San Francisco housing authorities took direct aim at Black neighborhoods they called “an indeterminate shade of dirty black”—ejecting thousands of Black families in one of the country’s largest racialized urban displacement projects.⁷

In the 1970s—after this Court struck down the state’s latest attempt at explicit racial exclusion in residential housing (*Reitman v. Mulkey*, 387 U.S. 369 (1967))—cities proliferated an unprecedented number of “downzoning” laws driven by a desire to exclude Black, Hispanic, and Asian residents.⁸ These were the most restrictive anti-housing laws in the country.⁹ San Francisco knew its law would eliminate 180,000 housing units, “drive up costs,” “create even more of a housing shortage,” and make it so that “middle income households would not be able to afford living in San Francisco.”¹⁰

⁶ *Mapping Inequality: Redlining in New Deal America, San Francisco, CA*, UNIV. OF RICHMOND, [https://dsl.richmond.edu/panorama/redlining/#loc=12/37.758/-122.514&city=sanfrancisco-ca&area=D1.\(D1 & C4\)](https://dsl.richmond.edu/panorama/redlining/#loc=12/37.758/-122.514&city=sanfrancisco-ca&area=D1.(D1%20&%20C4)).

⁷ *Clement Lai, The Racial Triangulation of Space: The Case of Urban Renewal in San Francisco's Fillmore District*, ANNALS OF THE ASS'N OF AM. GEOGRAPHERS (2012), <https://www.jstor.org/stable/41412759>.

⁸ Joe LaBriola, *The Race to Exclude: Residential Growth Controls in California Cities, 1970-1992*, HOUSING POLICY DEBATE (2023), at 2-3.

⁹ *Id.*

¹⁰ *Summary and Minutes of the Special Meeting*, S.F. PLANNING DEP'T (June 7, 1978), at 6-8, <https://archive.org/details/37minutesofsanfran1978san/page/42/mode/2up>.

That is exactly what happened. Race-driven rezoning laws limited housing production intensely across California starting in the 1970s—driving up rents, discouraging investment, and propelling a major affordable housing crisis.¹¹ Shortly after these racist zoning laws took effect, California saw its first visible crisis of street homelessness.¹²

B. California Failed to Address its Affordable Housing Crisis for Decades, Forcing Unprecedented Numbers of Low-Income Residents onto the Streets.

The affordable housing shortage California cities intentionally created decades ago is the direct cause of homelessness in California today. California knows that its egregious record on affordable housing is the leading cause of homelessness.¹³ But cities have refused to correct course. For example, San Francisco utterly failed to meet state targets for affordable housing production between 1999 and 2014—ultimately constructing 61,000 fewer units than needed while simultaneously losing

¹¹ See, e.g., John M. Quigley et al., *Regulation and the High Cost of Housing in California*, 95 AMERICAN ECONOMIC REVIEW, 323-328 (2005).

¹² Greg Rosalsky, *How California Homelessness Became A Crisis*, NPR (June 8, 2021), <https://www.npr.org/sections/money/2021/06/08/1003982733/squalor-behind-the-golden-gate-confronting-californias-homelessness-crisis>.

¹³ CALIFORNIA LEGISLATIVE ANALYST'S OFFICE, *California's Housing and Homelessness Challenges in Context*, 1-2 (2023), <https://lao.ca.gov/handouts/socservices/2023/Housing-and-Homelessness-Challenges-020623.pdf>.

housing supply.¹⁴ This profound failure forced unprecedented numbers of residents into homelessness under further housing pressure.¹⁵

Because of the affordable housing shortage, roughly one-third of California households are “severely cost burdened”—meaning they are forced to spend more than 50% of their income on rent.¹⁶ In San Francisco, the number is much larger—with more than three-quarters of households paying rent that is “unaffordable” to them according to federal guidelines.¹⁷ These standard metrics of housing unaffordability are a direct predictor of homelessness.¹⁸ In fact, more than one million Californians are currently behind on their rent, and tens of thousands of those individuals are at imminent risk of eviction.¹⁹ That is why at least 170,000 Californians

¹⁴ Kate Anthony et al., *Homelessness in the San Francisco Bay Area: The crisis and a path forward*, MCKINSEY & CO., (2019), at 4, <https://www.mckinsey.com/industries/social-sector/our-insights/homelessness-in-the-san-francisco-bay-area-the-crisis-and-a-path-forward>.

¹⁵ See S.F. PLAN. DEPT., *Context: Dismantling San Francisco’s Housing Inequities*, (Apr. 6, 2021), <https://storymaps.arcgis.com/stories/26bc500b5aee4f0281a860a2144a5998>.

¹⁶ Eric McGhee et al., *California’s Renters*, PUBLIC POLICY INSTITUTE OF CALIFORNIA (Feb. 27, 2024), <https://www.ppic.org/blog/californias-renters/>.

¹⁷ McKinsey Global Inst., *A tool kit to close California’s housing gap*, MCKINSEY & CO. (2016), at 4, 7, https://www.mckinsey.com/~/_media/mckinsey/industries/public%20and%20social%20sector/our%20insights/closing%20californias%20housing%20gap/closing-californias-housing-gap-full-report.pdf.

¹⁸ See, e.g., Chris Glynn et al., *Inflection points in community-level homeless rates*, 15 ANNALS APPLIED STAT. 1037, 1037-1053 (2021).

¹⁹ McGhee, *supra* note 16.

experience homelessness each year—more than anywhere else in the United States.²⁰

Nevertheless San Francisco is still rebuffing state housing mandates today—effectuating the same anti-housing policies that caused homelessness in the first place.²¹

C. California Passes Regressive Laws to Punish Poverty, Scapegoating Impoverished Black & Brown Residents for a Housing Crisis the State Refuses to Address.

Instead of addressing the housing crisis, California cities have enacted criminal laws to punish the very residents they drove into homelessness. California has amassed at least 592 local anti-homelessness ordinances over the last several decades.²² San Francisco has “more anti-homeless ordinances on its book than any other California and possibly U.S. city.”²³ At their most extreme, these recent criminal laws make it illegal to exist in public if you are experiencing homelessness. California created its housing crisis because it wanted to

²⁰ U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, *supra* note 2.

²¹ Michael Gennaro, *California slams San Francisco over failure to build housing*, COURTHOUSE NEWS SERVICE (Oct. 25, 2023), <https://www.courthousenews.com/california-slams-san-francisco-over-failure-to-build-housing/>.

²² *California’s New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-Homeless Laws in the Golden State*, BERKELEY LAW SCHOOL (2016), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf>.

²³ Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOC. REV., No. 5, Oct. 2019, at 769, 790, 794.

force people of color out—and now it is citing, fining, and arresting Black and Brown residents to punish them for the crisis the state began.²⁴

But criminal punishment for being unhoused is a brutal and ineffective approach to California’s housing problem.²⁵ The primary obstacle to housing is the ongoing affordable housing shortage. That is not a problem punishment can solve. These criminal laws only serve to protect politicians from taxpayer accountability at the expense of impoverished residents—pushing unhoused people from block to block under the guise that cities have taken real steps to address the housing crisis.²⁶

D. “Vagrancy” is an Ugly Misnomer; Recent Sleeping Bans Target Low-Income Californians in the Very Place They Have Always Called Home.

Criminal bans on sleeping or existing in public have been justified across California on the mistaken premise that people experiencing homelessness are “vagrants” who come to California for good weather, lax policies, and more generous social programs. That is a well-debunked myth. The latest comprehensive study makes clear that more than 90% of unhoused people were living and working in California before they could no longer afford rent—and most still reside in the same California county

²⁴ Chris Herring & Dilara Yarbrough, *Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco* (2015), at 55-56, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2620426.

²⁵ *Id.* at 1, 31.

²⁶ Sara K. Rankin, *Influence of Exile*, 76 MARYLAND L. REV. 4, 45-46 (2016).

where they first became homeless.²⁷ San Francisco reports the same numbers—and counts that thousands were living and working in the City for at least a decade before they were priced out of their homes.²⁸

In other words, bans on sleeping or existing in public do not target vagrants—i.e. those who “wander idly from place to place.”²⁹ They have the effect of ejecting local residents. Vagrancy is an ugly misnomer for these laws that attempt to blame long-time California residents for the housing crisis.

E. California’s Bans on Public Homelessness Amount to Banishment—An Extreme and Archaic Form of Punishment Outlawed Across the United States.

California’s profound shortage of emergency shelter is by far the worst in the United States.³⁰ In the absence of available shelter, California’s criminal bans on public sitting or sleeping make it illegal for unhoused people to

²⁷ Dr. Margot Kushel et al., *The California Statewide Study of People Experiencing Homelessness*, UNIVERSITY OF CALIFORNIA, SAN FRANCISCO (2023), at 5, https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf.

²⁸ *San Francisco Homeless County & Survey Comprehensive Report 2019*, S.F. DEP’T OF HOMELESSNESS & SUPPORTIVE HOUSING (2020), at 18, https://hsh.sfgov.org/wp-content/uploads/2020/01/2019HIRDReport_SanFrancisco_FinalDraft-1.pdf.

²⁹ Merriam-Webster. (n.d.). Vagrant. In *Merriam-Webster.com dictionary*. Retrieved March 6, 2024, from <https://www.merriam-webster.com/dictionary/vagrant#:~:text=a,whose%20conduct%20constitutes%20statutory%20vagrancy>.

³⁰ Compare U.S. DEP’T OF HOUSING AND URBAN DEV., *supra* note 2, at 16-17, 93, with HUD 2023 *Housing Inventory Report: California* (2023), https://files.hudexchange.info/reports/published/CoC_HIC_State_CA_2023.pdf.

exist *anywhere* within their own community. This forced exclusion from the community amounts to banishment—which is precisely what California’s local ordinances are intended to do.³¹

Banishment is an extreme form of punishment that has long been outlawed in the United States. Even among the draconian penalties of Ancient Greece, it was reserved for only the most severe of violent crimes.³² Almost a century before the American Revolution, the English Habeas Corpus Act of 1679 enshrined a right against banishment for all English subjects.³³ James Madison authored a legislative report in 1799 calling banishment “among the severest of punishments” and expressing serious doubt that it could be “constitutionally inflicted.” See *United States v. Ju Toy*, 198 U.S. 253, 269-70 (1905) (Brewer, J., dissenting), *citing* 4 ELLIOTT’S DEBATES, 455 (1836). These attempted expulsions violate the Eighth Amendment and are a relic of history. See *Dear Wing Jung v. United States*, 312 F.2d 73 (9th Cir. 1962); see also Michael F. Armstrong, *Banishment: Cruel and Unusual Punishment*, 111 U. PA. L. R. 758, 761 (1963). They have no place in the modern era—and certainly not in California.

F. Criminalization of Homelessness Exacerbates the Housing Crisis and Creates a Race to the Bottom in Violation of Article IV of the U.S. Constitution.

Seeking to expel unhoused individuals from a jurisdiction is also an illegitimate use of state police power—both in fact and in law. As a factual matter, laws

³¹ Rankin, *Influence of Exile*, *supra* note 26, at 44.

³² See Exile, OXFORD CLASSICAL DICTIONARY (4th ed. 2012).

³³ 31 Car. II. C. 2 (1679).

that punish people for experiencing homelessness do not work. This should be intuitive. Jailing people for being unhoused does not make housing affordable to them. Nor does it help reduce homelessness when those who are jailed have nowhere to turn for shelter or housing upon release.³⁴ Punishment only drives people further into poverty by putting their financial recovery at risk—which can make homelessness worse.³⁵ That is why research has consistently found that criminalization is both costly and irrational—and no replacement for empirically supported, commonsense housing solutions.³⁶

As a matter of law, using criminal penalties to force unhoused residents out is a violation of interstate comity. California needs to take accountability for the housing crisis it began—not foist that problem onto other jurisdictions. To allow otherwise is to “disturb that fundamental equality of political rights among the several States which is the basis of the Union”—as guaranteed by Article IV of the U.S. Constitution. *People v. Baum*, 251 Mich. 187, 190 (Mi. 1930); *see also, e.g., Commonwealth v. Pike*, 428 Mass. 393, 403-05 (Mass. 1998) (“[i]t is against constitutional principles of interstate comity to ‘make other states a dumping ground’”); *Crabtree v. State*, 112 P.3d 618, 621-22 (Wy. 2005) (“banishment from an entire county will incite dissention and provoke retaliation among counties”); *State v. Charlton*, 846 P.2d 341, 344 (N.M. Ct. App. 1992); *People v. Green*, 114 Misc. 2d 339,

³⁴ Herring, *supra* note 24, at 31; Mary K. Cunningham, *The Homelessness Blame Game*, URBAN INST. (September 23, 2019), <https://www.urban.org/urban-wire/homelessness-blame-game>.

³⁵ Herring, *supra* note 23, at 790; Rankin, *supra* note 26, at 45-46.

³⁶ Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 104, 109, 130-34 (2019).

344 (N.Y. Sup. Ct. 1982). San Francisco agrees: “[d]oing so could not only be cruel and unusual, but it would also create perverse incentives to force unhoused individuals to migrate to [other] jurisdictions.” S.F. Br. 9.

California needs to finally address the decades-long affordable housing shortage it caused—not use brutal and ineffective criminal laws to begin a race to the bottom where every state and local jurisdiction seeks to abdicate its sovereign responsibility.

II. California Officials Agree That Criminalizing Homelessness is Cruel and Unusual and That Therefore Petitioner Has Violated the Eighth Amendment—the Only Question Presented to This Court.

A. California Government Amici Endorse the Central Holdings in *Robinson*, *Martin*, and *Johnson*.

The State of California, its major cities, and their leaders recognize that it is cruel and unusual to punish residents for being too poor to afford a home. They also acknowledge that this Court’s decision in *Robinson v. California* controls. 370 U.S. 660, 666-67 (1962). That decision “recognize[d] the basic, commonsense principle that the government cannot criminalize a person’s mere status or existence within that jurisdiction.” S.F. Br. 11. “The principle that a person’s status may not be the basis for criminal sanction has been an established part of this Court’s Eighth Amendment precedent for more than six decades.” Cal. Br. 15, *citing Robinson*, 370 U.S. at 666-667.

California officials agree that *Robinson* squarely applies whenever unhoused people have nowhere they

can lawfully be in their home jurisdiction. *See, e.g.*, Cal. Br. 16 (“It should be beyond dispute that, [...] the government may not punish the status of being homeless”), *citing Robinson*, 370 U.S. at 666-667; Newsom Br. 5 (“Californians who do not have a single place where they can lawfully be should not be criminally prosecuted for needing sleep”); S.F. Br. 12 (“When a jurisdiction prohibits sleeping in public at all times [...] the jurisdiction effectively punishes the mere status of being homeless within the jurisdiction [...] running afoul of *Robinson’s* admonition”); L.A. County Br. 3 (“the authority to punish involuntarily homeless persons for sleeping in public with blankets [...] the County certainly does not advocate for”).

The Ninth Circuit has applied *Robinson* in precisely the same way. *Martin*, 920 F. 3d at 616 (“[F]rom *Robinson* the principle that the Eighth Amendment prohibits the state from punishing an involuntary act [...] compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter”); *Johnson*, 72 F. 4th at 921 (“Criminalizing the act of sleeping in public when an individual has nowhere else to sleep is, in effect, criminalizing the underlying status of being homeless”) (joint statement on denial of rehearing en banc), *citing Robinson*, 370 U.S. at 660.

California’s leaders agree with these central holdings. *See* Newsom Cert. Br. 2 (“The Governor does not take issue with the narrow rule adopted by the Ninth Circuit in *Martin v. City of Boise*”); L.A. Br. 5 (Los Angeles takes no issue with the “premise underlying the *Martin* and *Johnson* decisions”).

B. California Government Amici Agree This Court Should Affirm on the Sole Question Presented.

The only question Petitioner presented to this Court is whether “the enforcement of [its] generally applicable laws” can be “prohibited by the Eighth Amendment.” *See* Question Presented. Petitioner enforces a municipal code that makes sleeping or “camping” on public property illegal at all times. Grants Pass Mun. §§ 5.61.010, 5.61.030; *see also Johnson*, 72 F.4th at 890-91 & n.27; United States Br. 20 (“the act of sleeping outdoors while using a protective item like a blanket is inseparable from the status of being homeless” because “the use of such protection is necessary to avoid death”).

California’s elected leaders agree that this kind of ban on sleeping *anywhere* in public, at *any time*, when unhoused people have *nowhere* to shelter, does violate the Eighth Amendment—for the reasons already explained in *Robinson*, *Martin*, and *Johnson*. *See* Newsom Br. 5 (“Californians who do not have a single place where they can lawfully be should not be criminally prosecuted for needing sleep”); S.F. Br. 12 (“When a jurisdiction prohibits sleeping in public at all times [...] the jurisdiction effectively punishes the mere status of being homeless within the jurisdiction [...] running afoul of *Robinson*’s admonition”).

California and its leaders therefore agree with Respondents that this Court’s decision in *Robinson* governs, it has been faithfully applied, and the Ninth Circuit should be affirmed on this sole question. *Johnson*, 72 F. 4th at 892, *citing Robinson*, 370 U.S. at 666. No other question was presented to this Court—nor should any other question be entertained. *See* Rule 14.1(a). Petitioner has violated the Eighth Amendment.

III. California Jurisdictions Retain Every Tool to Properly Address the Homelessness Crisis, and Any Purported “Confusion” Regarding the Limited Scope of the Decision Below is Purely Theatrical.

California officials have instead used this case to play politics. They have filed a litany of repetitive briefs decrying that *Johnson* makes it impossible for them to address homelessness. But California’s politicians know full well that they retain every tool to properly address street encampments and the homelessness crisis more broadly. Nothing in the decision below stops California from investing in affordable housing and emergency shelter for thousands of its residents forced to sleep outside. And nothing stops California from enforcing every applicable health, safety, and other legal restriction to ensure safe, secure, and accessible conditions on our streets. That is why the State of California filed its own brief regarding just how narrow *Martin* and *Johnson*’s holdings really are. Cal. Br. 18-21. The only thing California cannot do is criminalize the mere status of homelessness as Petitioner has—something its leaders already agree is cruel, unusual, and counterproductive.

A. *Martin* and *Johnson* Explain That the Eighth Amendment’s Protections Are Exceptionally Narrow—And Local Laws Make Clear the Broad Authority Cities Have to Address Homelessness.

That Ninth Circuit explains that the Eighth Amendment is “exceptionally narrow” and only precludes the enforcement of laws that make it illegal to be homeless. *Johnson*, 72 F. 4th at 921. The State of California notes that jurisdictions still have “substantial

flexibility” and “broad power” to address the homelessness crisis in the way they deem fit. Cal. Br. 15, 18; *see also Blake v. City of Grants Pass*, No. 18-cv-01823, 2020 WL 4209227, at *15 (D. Or. July 22, 2020), *aff’d sub nom. Johnson*, 50 F.4th 787 (identifying the “large toolbox for regulating public space” that jurisdictions retain). For the avoidance of doubt, we address the unsupported handwringing of local California politicians that purport confusion—despite their jurisdictions’ own laws which clarify they have myriad tools to address homelessness.

1. *Nothing Prevents California Cities from Disbanding Encampments that Pose Health and Safety Problems.*

California politicians and businesses argue that the decisions in *Martin* and *Johnson* preclude the clearing of sprawling encampments that pose serious health risks, or that they prevent enforcement of important health, fire, and sanitation laws.³⁷ Those claims are false. The Ninth Circuit’s decision below makes clear that it does not in any way affect the application of these health and safety laws to street encampments. *Johnson*, 72 F. 4th at 880 (noting that Grants Pass can still “prevent the erection of encampments that cause public health and safety concerns”); *Blake*, 2020 WL 4209227, at *15 (“this holding does not limit Grants Pass’ ability to enforce laws that actually further public health and safety”).

California has many state and local health and safety laws that would apply in these circumstances. *See, e.g.*, Cal. Code Regs. Tit. 19, § 321 (“Any condition that presents a fire hazard, [...] interfere[s] with the rapid exit of persons from the tents [...] shall be immediately

³⁷ San Diego Br. 9-16, Chico Br. 15-30, Newsom Br. 10-11, L.A. Br. 14, Brentwood Comm. Br. 13-18, Int’l. Downtowns Assoc. Br. 4-18.

corrected”); Cal. Fire Code § 3107.9 (combustible materials); S.F. Municipal Health Code §§ 581, 596 (prohibiting public health nuisance, including “[a]ny accumulation of filth, garbage, decayed or spoiled food, unsanitary debris or waste material”). The State of California agrees. *See* Cal. Br. 20 (“Nothing in the Constitution bars cities and States from choosing to address those hazards by establishing a fair and orderly process to clear encampments from particular areas, so long as the people displaced from those encampments have some alternative place to sleep at night”) (collecting cases).

2. *California Cities Can Ensure Streets and the Public Right of Way are Safe and Accessible.*

California-based amici purport that *Johnson* would make it impossible to ensure that streets are safe and accessible for all residents—and particularly those with disabilities.³⁸ Not so. Accessibility and right of way laws are not impacted by the decision below. *See Martin*, 920 F.3d at 617 n.8 (“an ordinance barring the obstruction of public rights of way” does not run afoul of the Eighth Amendment); *Gomes v. Cnty. Of Kauai*, 481 F. Supp. 3d 1104, 1109 (D. Haw. 2020) (same).

California state and local laws require that residents ensure usable space on sidewalks and do not create dangerous impediments to street traffic—and these laws validly apply. *See, e.g.*, Cal. Penal Code § 647c (prohibiting “obstruct[ing ...] the free movement of any person on any street, sidewalk, or other public place”); S.F. Police Code §§ 22-24 (prohibiting “obstructing the free passage of any person or persons”). Unhoused residents with physical

³⁸ LA County Br. 12-16; Tozer Br. 19.

disabilities are in fact the most likely to depend on free and clear access to sidewalks.³⁹

3. *Unhoused Individuals Can Be Punished for All Genuine Criminal Offenses, Just Like Any Other Resident.*

Other California-based amici suggest that they will be hindered in their valid law enforcement aims by the decision below.⁴⁰ Again, not so. Nothing stops cities and their law enforcement agencies from enforcing every valid criminal law against unhoused individuals—including disorderly conduct, drug, and other offenses—if there is a basis to enforce them. *See, e.g.*, Cal. Penal Code § 647(c). Enforcing legitimate criminal laws is different than punishing someone *purely* because they are homeless and have nowhere else to sleep, which is all that the Ninth Circuit’s decision prohibits. *Johnson*, 72 F. 4th at 921; *Gomes*, 481 F. Supp. 3d at 1108 (“the court explained that its holding is limited to the criminalization of ‘sleeping outside on public property’”), *citing Martin*, 920 F.3d at 603-04.

The State of California notes that jurisdictions retain authority to enforce all criminal offenses for genuinely unlawful conduct. Cal. Br. 19, *citing Robinson*, 370 U.S. at 665-67 (noting the “the range of valid choice which a State might make” and “countless [other] fronts on which those evils may be legitimately attacked”).

4. *There is No Right to Camp Anywhere at Any Time—and Time, Place, and Manner Restrictions Are Appropriate.*

³⁹ *See supra* note 28, at 28 (27% have a physical disability).

⁴⁰ California State Sheriffs Br. 29; San Diego Br. 9-16; Int’l. Downtowns Assoc. Br. 4-18; Members of Congress Br. 3-7.

California-based amici decry that the decision below creates an unfettered right for unhoused individuals to sleep anywhere and everywhere, and at any time.⁴¹ False. The decision below says precisely the opposite. *Johnson*, 72 F. 4th at 915 (“the assertion that jurisdictions must now allow involuntarily homeless persons to camp or sleep on every sidewalk and in every playground is plainly wrong [...] the single restriction [is] that involuntarily homeless persons must have *somewhere* to sleep”); *Martin*, 920 F.3d at 590 (“unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so”). The State of California makes clear that all local jurisdictions retain the ability to designate reasonable time, place, and manner restrictions on public sleeping—in accordance with the decision below. Cal. Br. 19, *citing Martin*, 920 F.3d at 617.

5. *Nothing Prevents Jurisdictions from Investing in Every Solution to Address Homelessness, Including Affordable Housing, Emergency Shelter, and Social Services.*

California-based amici also express concern that the decision below denies jurisdictions the flexibility to pursue proactive approaches to homelessness.⁴² The decision below contains no such restrictions or mandates. Short of using criminal laws to punish individuals for existing in public when they have nowhere they can lawfully be, California jurisdictions retain their “broad power” to respond to the homelessness crisis in every way they deem appropriate. Cal. Br. 19, *citing Robinson*, 370 U.S. at 664. The decision below is very clear on this point. *See Johnson*, 72 F. 4th at 877 (“a city is not required to

⁴¹ Newsom Br. 6; Pacific Legal Foundation Br. 19; L.A. Br. 8.

⁴² LA County Br. 7-12; LA Chamber Commerce Br. 19-27.

provide sufficient shelter”); *Martin*, 920 F.3d at 617. Although the Eighth Amendment does not require it, cities are free to implement real solutions to homelessness, including permanent affordable housing for their residents and emergency shelter and other services for unhoused individuals—as many local jurisdictions have already sought to do.⁴³

B. Any Complained of “Confusion” Has Already Been Completely Resolved by the Ninth Circuit, and Was a Manufactured Issue to Begin With.

A small but vocal chorus of California politicians suggest that they are still “hamstrung” by the decision below. They argue they can never enforce their public sleeping bans until they build thousands of emergency shelter beds for the entire unhoused population in their jurisdictions.⁴⁴ That is patently false. The Ninth Circuit always made clear that the Eighth Amendment does “not cover individuals who *do* have access to adequate temporary shelter.” *Martin*, 920 F.3d at 617 n.8 (emphasis in original); *Johnson*, 50 F.4th at 792 n.2 (“Persons are [only] involuntarily homeless if they do not have access to adequate temporary shelter”); *see also Johnson*, 72 F.4th at 915 (“And emphatically, when an involuntarily homeless person refuses a specific offer of shelter elsewhere, that individual may be punished for sleeping in public”) (joint statement on denial of rehearing en banc). One Ninth Circuit judge has noted that, at this juncture,

⁴³ *See, e.g.*, LA County Br. 9-10.

⁴⁴ *See* S.F. Br. 2-3; Newsom Br. 9; San Bernardino Br. 6-15; Bay Area Council Br. 12; Cal. Assoc. Counties Br. 6-12; Venice Stakeholders Br. 10.

any purported confusion on this point has been politically “manufactured.”⁴⁵

The State of California agrees. The decision below allows California jurisdictions to enforce their anti-sleeping ordinances when unhoused individuals have somewhere else they can lawfully be. *See* Cal. Br. 20 (“Nor does the Constitution require cities to have enough shelter beds to account for *every* unhoused individual within their jurisdiction before city officials may enforce a restriction on sleeping outside against *any* single individual in that jurisdiction”) (emphasis in original).

C. “Administrability” Is a Red Herring and Not a Genuine Issue for California Jurisdictions.

California-based amici claimed at the certiorari stage that they face administrability challenges with the Eighth Amendment standard because they “do not know” or it is “monumentally difficult” to tell whether shelter is available on a given day. Pet. Br. 45. That suggestion is absurd. If a jurisdiction cannot identify whether it has *any* available shelter, it has no business citing unhoused individuals on the “false premise” that they have somewhere else to go. *See Martin*, 920 F.3d at 617. Nor does the Ninth Circuit require exacting precision in calculating the number of shelter beds—all that matters is that the jurisdiction know whether the specific individual subject to criminal enforcement has access to any form of shelter.⁴⁶ These so-called administrative challenges are illusory in California as a factual matter.

⁴⁵ *Coalition on Homelessness v. San Francisco*, No. 23-15087, Oral Argument (Aug. 2023), at 57:20-58:05, <https://www.youtube.com/watch?v=mhfZw15ENdI&t=3470s>.

⁴⁶ *See Coal. on Homelessness v. S.F.*, No. 23-15087, 2024 WL 125340, at *1 (9th Cir. Jan. 11, 2024).

The State of California and various California cities have already enacted laws and policies that *require* them to know the amount of available shelter on a given day, to offer that shelter to unhoused individuals, and to record who had access to shelter prior to enforcement.⁴⁷ That is all the Eighth Amendment standard requires.

In other words, there is no support for the alarmist claims that California cities are powerless to address and eliminate street homelessness or care for their impoverished residents as a result of the decision below.⁴⁸ They can and must do so. The only thing cities cannot do is intentionally banish their unhoused residents to punish them simply for being homeless—which California leaders already agree is cruel, unusual, and counterproductive.

⁴⁷ See, e.g., S.F. Police Code § 169 (the City “shall not enforce the prohibition [...] unless there is available Housing or Shelter for the person or persons in the Encampment”); Cal. Health & Safety Code § 50251 (providing millions to jurisdictions that “develop a detailed service delivery plan, including a description of how [unhoused] individuals will be served with permanent housing solutions”); *Id.* § 50251.1(c)(4) (prioritizing the “number of individuals the program will support transitioning from encampments into temporary shelters”); see also California SB 1011 (2024) (law that would require all cities in California to know “if a homeless shelter, as defined, is available to the person”).

⁴⁸ The same is true of Petitioner’s baseless alarmism, which has absolutely no support in the record below. *Johnson*, 72 F. 4th at 895 n. 35 (“There are no facts in the record to establish that *Martin* has generated ‘dire’ consequences for [Petitioner]”); *id.* at 923-924.

IV. San Francisco Politicians Spread Disinformation to Avoid Accountability for Their Failed Homelessness Response—a Spectacle Wholly Unrelated to the Narrow Decision Below.

The sensationalist drama unfolding before this Court is the result of misdirection on the part of San Francisco politicians desperate to conceal their failures from taxpayers. There has never been any real dispute or confusion on the law of what is cruel and unusual. San Francisco just does not want to be held accountable for the fact that it has not been truthful to the public about its response on homelessness—wasting millions in the process. Critically, this public spectacle has nothing to do with the narrow question presented to this Court, and the Court should decline San Francisco’s invitation to weigh in on wide-ranging issues well beyond the specific question presented. Rule 14.1(a). San Francisco agrees Petitioner has violated the Eighth Amendment. *See supra* Section II.

A. San Francisco Deceives Taxpayers About Criminalizing Homelessness—Necessitating a Preliminary Injunction Against the City for Violating Its Own Sound Policies.

San Francisco celebrates its supposedly “compassionate, services-first approach” to homelessness—including a coordinated street outreach team that is meant to provide shelter, emergency services, and affordable housing referrals to unhoused residents. S.F. Br. 15. Under this model, no one should ever be punished just for being without a home. *Id.* These are sound services-first policies that could help end homelessness. If only they were followed. The City’s own internal audit reports that “the

City’s street teams do not [...] achieve their established goals” despite millions of dollars in funding.⁴⁹

The reality is shameful. The Northern District of California found that—for years—the City did not make shelter available to unhoused residents prior to arresting them *en masse* just for sleeping in public. *Coalition on Homelessness v. San Francisco*, 647 F.Supp.3d 806, 835, 841 (N.D. Cal. 2022).⁵⁰ The City never contested this overwhelming factual record—which revealed that unhoused residents had nowhere else to go when they were punished for being homeless.⁵¹

San Francisco claims the Northern District “inserted itself as a policy maker” to change the City’s policy on

⁴⁹ See *Performance Audit of San Francisco Street Teams*, S.F. BUDGET & LEG. ANALYST (2023), at ii; David Sjostedt, *Scathing audit paints damning picture of San Francisco homeless outreach teams*, SAN FRANCISCO STANDARD (Nov. 7, 2023), <https://sfstandard.com/2023/11/07/san-francisco-homelessness-damning-report/>.

⁵⁰ See also *id.* at 841 (“SFPD has cited and arrested individuals for sleeping or lodging in public *thousands of times* [...] despite the lack of available shelter”) (emphasis added); *id.* at 835 (noting “the large body of evidence demonstrating that shelter offers are often not made”); *id.* at 835 (enforcement “took place without offers of bed space”); *id.* at 834 (San Francisco conducts enforcement “without actually knowing whether any shelter beds will be available”); *id.* at 820 (recounting “threats of citation or arrest by SFPD officers even when the individual was not offered shelter”).

⁵¹ *Id.* at 834 (“[The City] ignore[s] Plaintiffs’ considerable and direct observations of violations of [the City’s] policies, and do not provide a competing factual record from evidence within their control”). The district court’s findings were based on three years of the City’s own detailed arrest and shelter data, no fewer than 35 eyewitness declarations, and the sworn statements of three former San Francisco employees. *Id.* at 809; see also *Coal. on Homelessness*, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), ECF Nos. 9-1 through 9-9, 49, & 50-1 through 50-18.

homelessness. S.F. Br. 31. That is false. The Northern District found that San Francisco was violating its own policies. *Coalition*, 647 F.Supp.3d at 834 (“Defendants’ policy is not at issue. [...] the substance of the Enforcement Bulletin is constitutional. What is at issue is the body of detailed evidence demonstrating significant failures to comply with the policy”). This includes the City’s own law passed years before *Martin*. See S.F. Police Code § 169 (2016) (the City “shall not enforce the prohibition [...] unless there is available Housing or Shelter for the person or persons in the Encampment”). San Francisco is simply being ordered to abide by its own sound policies.

B. San Francisco Weaponizes the “Shelter Refusal” Myth—Despite an Unimpeachable Record Showing that the City Has No Shelter to Offer.

Instead of taking accountability for criminalizing homelessness—which San Francisco agrees is wrong—the City has perpetuated the harmful myth that unhoused individuals “refuse offers of shelter and services” and choose to sleep outside. S.F. Br. 8. The record shows exactly the opposite. The City’s shelter system is thousands of beds short and functionally “at capacity” every day—which forces *the majority* of the City’s unhoused residents to sleep outside because they have no access to shelter. *Coalition*, 647 F.Supp.3d at 811. The City also disbanded its waitlist with 1,000 people still actively waiting for shelter, closed its same-day shelter lines more than two years ago, and cannot ensure a shelter bed for anyone who calls the City’s hotline. *Id.* at 812.

There is also significant evidence that the City fabricates so-called “shelter refusals” to justify arresting unhoused individuals when there obviously is no shelter

available. *Id.* at 818 (the City “will often report that these individuals have declined shelter—even though HOT team does not know what shelter will be available, has not made a shelter offer to anyone at this time, and cannot answer their questions”). This practice is confirmed by the City’s own former employees.⁵²

The City’s disinformation on this point is immaterial. If an individual does in fact have access to shelter, criminal enforcement against them for sleeping in public would not violate Eighth Amendment. *See supra* Section III(B).

C. San Francisco Makes it Illegal to Exist Anywhere in Public—In Violation of its Own Correct Understanding of the Eighth Amendment.

San Francisco suggests to this Court that its laws banning public sleeping are time, place, and manner restrictions that “leave[] room within the jurisdiction where unhoused individuals may sleep outside.” S.F. Br. 15. They are wrong. The laws San Francisco enforces do not identify a single time or place where unhoused individuals can escape criminal punishment.⁵³ Dozens of witnesses made clear that unhoused people are cited and arrested across the City at all times of day and that police could not identify a single location where they could

⁵² Coal. on Homelessness, No. 4:22-cv-05502-DMR (N.D. Cal. Sept. 27, 2022), Declaration of Kaki Marshall, ECF No. 50-10, ¶ 11-23.

⁵³ San Francisco enforces state laws that categorically ban sleeping in public at all places and all times. *Coalition*, 647 F.Supp.3d at 827, *citing* Cal. Penal Code § 647(e). Regardless, San Francisco’s web of local ordinances also collectively made it illegal for unhoused people to exist *anywhere* in the City for at least 4 hours a day. *Compare* S.F. Police Code § 169, *with* S.F. Park Code § 3.13.

lawfully be.⁵⁴ And there is no disagreement *on the law*. San Francisco agrees it cannot effectively “ban sleeping outside at all times and in all places.” S.F. Br. 22. That is what the City has done.

D. There is Nothing “Compassionate” or Productive About Criminalizing Homelessness in San Francisco.

San Francisco has told this Court it agrees that banishment is not only “cruel and unusual” but “would also create perverse incentives to force unhoused individuals to migrate to [other] jurisdictions.” S.F. Br. 9; *see also Pike*, 428 Mass. at 403-05. Yet that is exactly what the City’s aim has been. Mayor Breed recently celebrated the expansion of a program that would relocate hundreds of the City’s unsheltered residents by giving them a bus ticket to somewhere else—on the false premise that they are going “home.”⁵⁵ The current District Attorney criminalizes sleeping because unhoused people “have to be made to be uncomfortable.”⁵⁶ That is the true purpose

⁵⁴ See Appellee’s Opening Brief, *Coalition on Homelessness v. San Francisco*, No. 23-15087, at 49-50, 52-53 (collecting witness accounts), <https://cdn.ca9.uscourts.gov/datastore/uploads/cases-of-interest/23-15087/23-15087-Answering-brief.pdf>.

⁵⁵ Compare *supra* Section I(D), with *Mayor Breed Delivers State of the City Address*, ABC7 NEWS (Mar. 7, 2024), at 15:25, https://www.youtube.com/watch?v=0BRg_JmjXf8; Aldo Toledo, *More S.F. homeless people would be put on buses out of the city under new proposal*, S.F. Chronicle (Nov. 27, 2023), <https://www.sfchronicle.com/sf/article/sf-homeless-bus-homeward-bound-off-the-streets-18520054.php>.

⁵⁶ Maggie Angst, *S.F. DA Brooke Jenkins faces blowback after saying homeless people should be made ‘uncomfortable’*, S.F. CHRONICLE (Dec. 13, 2023), <https://www.sfchronicle.com/sf/article/brooke-jenkins-homeless-uncomfortable-18547794.php>.

of anti-sleeping laws—to deflect blame away from politicians and towards those most impacted by the local housing crisis they caused. *Supra* Section I(C). San Francisco knows this to be both unconstitutional and counterproductive. Meanwhile, the City continues to defy every state mandate to correct its affordable housing shortage.⁵⁷ Instead of confronting their hypocrisy, City officials took direct and personal aim at the federal judge who told them to follow the City’s own lawful policies.⁵⁸ *Coalition*, 647 F.Supp.3d at 834. This behavior was both inappropriate and unbecoming.

What San Franciscans want is for the City to follow its own policies. The City must bridge the profound gap between its intentions and outcomes on homelessness.⁵⁹ That is what all San Franciscans deserve. Not political theatre at the expense of this Court and the public. These matters have nothing to do with the case at bar—

⁵⁷ See Gennaro, *supra* note 21.

⁵⁸ See Aldo Toledo, *Fight over S.F. homeless sweeps intensifies ahead of crucial court hearings*, S.F. Chronicle (Aug. 24, 2023), <https://www.sfchronicle.com/sf/article/sf-homeless-crisis-sweeps-lawsuit-aclu-breed-18310974.php> (Mayor Breed: City shouldn’t let a judge “who doesn’t even live here [...] impact our ability to do what all San Franciscans want”); Erwin Chemerinsky, *San Francisco and Newsom’s targeting of judges is a threat to judicial independence*, S.F. CHRONICLE (Aug. 30, 2023), <https://www.sfchronicle.com/opinion/openforum/article/san-francisco-newsom-judges-18338500.php>; Joe Kukura, *Irate Gavin Newsom Wants to Dox Judge Who Blocked Encampment Sweeps*, SFIST (Aug. 30, 2023), <https://sfist.com/2023/08/30/irate-gavin-newsom-wants-to-dox-judge-who-blocked-encampment-sweeps/>

⁵⁹ See Plaintiffs’ Letter to City Attorney David Chiu (Aug. 10, 2023), at 3-5, <https://lcrsf.org/wp-content/uploads/2023/08/08.10.23-Letter-to-City-Attorney-With-Links66.pdf>.

especially when California’s leaders agree Petitioner has violated the Eighth Amendment.

V. This Court Should Not Address Procedural Vehicle Questions That Extend Far Beyond the Substantive Question Presented—and California Politicians Are Anyways Wrong on the Law.

The sole question presented to this Court was whether the Eighth Amendment *substantively* protects unhoused people from the enforcement of laws that criminalize their very existence. Class certification and other *procedural* questions regarding the appropriate way to vindicate the Eighth Amendment are not before the Court. They therefore cannot be considered. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27 (1993) (even “related” and “complementary” procedural issues are not fairly included in the substantive question presented); *Yee v. Escondido*, 503 U.S. 519, 537 (1992). We nonetheless briefly respond to comments from some of California’s elected leaders who wish to make it procedurally impossible for cities to ever be held to account for flagrantly violating the fundamental constitutional rights of unhoused individuals—because they are wrong on the law.

A. Class-Wide Injunctive Relief is Appropriate.

California-based amici suggest that—even if unhoused people are systematically targeted for unconstitutional enforcement—the individualized inquiry necessary to establish whether an unhoused individual is “involuntarily homeless” precludes class treatment.⁶⁰ That is wrong. Every federal appeals court to address the question has made clear that individualized proof of class membership

⁶⁰ *See* Newsom Br. 8; S.F. Br. 14 n.8; Cal. Assoc. Count. Br. 12-19.

is unnecessary to secure class-wide injunctive relief. *See, Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016); *Shelton v. Bledsoe*, 775 F.3d 554 (3d Cir. 2015), *Shook v. El Paso Cnty.*, 386 F.3d 963 (10th Cir. 2004); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir.1972). As long as the “general demarcations of the class are clear” by virtue of the class definition—i.e. unsheltered residents who are punished for public sleeping when they have nowhere else to lawfully be— a valid class exists for injunctive relief. *Shelton*, 775 F.3d at 561, 563 (collecting cases); *Baby Neal v. Casey*, 43 F.3d 48, 54 (3d Cir.1994) (injunctive classes, by their relief, “define the relationship between the defendant and the “world at large”); *Yaffe*, 454 F.2d at 1366 (“the conduct complained of is the benchmark” for class wide relief); 1996 Advisory Note to Fed. R. Civ. Pro. 23(b)(2) (injunctive class designed for “various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, *usually one whose members are incapable of specific enumeration*”) (emphasis added); *see also Johnson*, 72 F.4th at 921 (same).

B. The Eighth Amendment Cannot Be Reduced to an Affirmative Defense.

Governor Newsom and Mayor Breed also suggest that—even if unhoused people are repeatedly targeted for unconstitutional prosecution—they have no injunctive remedy. *See Newsom Br. 8; S.F. Br. 14 n.8*. This is a naked attempt by San Francisco to continue to cite, arrest, and threaten *thousands* of unhoused individuals for sleeping in public in violation of the City’s own policies without ever facing accountability for it—as the City has done for the last several years. *Compare S.F. Br. 14 n.6, with Coalition*, 647 F.Supp.3d at 827. An affirmative defense cannot protect unhoused individuals from repeated

citations, arrests, and prosecutions that are unconstitutional in the first instance. *See Johnson*, 72 F.4th at 892. This is fundamentally inconsistent with the Eighth Amendment’s substantive protection—which “limit[s] the power of those entrusted with the criminal-law function of government” from the very outset of the criminal process. *See Ingraham v. Wright*, 430 U.S. 651, 666 (1977). The United States agrees. U.S. Br. 32 n.9.

California politicians’ desire to avoid the class action device federal courts universally agree must be available to vindicate constitutional rights—and their attempt to eliminate injunctive relief for Eighth Amendment claims altogether—is a concerning indication of their desire to violate the rights of unhoused individuals with impunity. That cannot be allowed. Regardless, these questions are not before this Court and should not be entertained. *Izumi*, 510 U.S. at 27.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

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APPENDIX A

List of *Amici Curiae*

Current & Former San Francisco Officials

Mano Raju, San Francisco Public Defender
Chesa Boudin, Former District Attorney
Kaki Marshall, Former Director of Temporary Shelter
Damon Bennett, Former Supervisor of the Homeless
Encampment Resolution Team (ERT).

San Francisco & California Civic Organizations

San Francisco Labor Council (Labor Union)
OPEIU 29 (Labor Union)
Small Business Forward (Merchants Association)
League of Women Voters California (Nonpartisan Org.)
League of Women Voters of SF (Nonpartisan Org.)
Richmond District Democratic Club (Political Club)
Harvey Milk LGBTQ Democratic Club (Political Club)
Gray Panthers of San Francisco (Political Club)
Democratic Socialists of America SF (Political Club)
Tenderloin People's Congress (Neighborhood Group)
The People's Mission Coalition (Neighborhood Group)
Westside Tenants Association (Neighborhood Group)
San Francisco Tenants Union (Advocacy Group)
Housing Rights Committee of SF (Advocacy Group)
San Francisco Rising (Advocacy Group)
Full Picture Justice (Advocacy Group)
National Harm Reduction Coalition (Advocacy Group)
PODER SF (Advocacy Group)
Western Center on Law and Poverty (Advocacy Center)
Policy Advocacy Clinic, University of California,
Berkeley, School of Law (Legal Clinic)

Homeless Legal Services, University of California, San
Francisco, School of Law (Legal Clinic)
San Francisco Pre-Trial Diversion Proj. (Serv. Agency)
Compass Family Services (Serv. Agency)
Episcopal Community Services of SF (Serv. Agency)
Larkin Street Youth Services (Serv. Agency)
Central City Hospitality House (Serv. Agency)
Community Forward SF (Serv. Agency)
San Francisco AIDS Foundation (Serv. Agency)
Harm Reduction Therapy Center (Serv. Agency)