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 GOLDWATER INSTITUTE IN SUPPORT OF PETITIONER

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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?

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute ("GI") is a public policy foundation devoted to individual freedom and limited government. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates and files amicus briefs when its or its clients' objectives are implicated. GI's Project on Homelessness devotes substantial resources to the question of municipal governments' handling of the ongoing homelessness crisis—a crisis greatly exacerbated both by the Ninth Circuit's ruling in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), and by local governments' misinterpretations of that ruling. Specifically, GI is involved in ongoing litigation in its hometown of Phoenix over the city's refusal to enforce anti-camping ordinances—a refusal the City rationalizes as necessitated by the *Martin* decision. *See Freddy Brown, et al. v. City of Phoenix*, No. CV-2022-010439 (Maricopa County Super. Ct., filed Aug. 10, 2022).[2] GI has also produced research and journalism on the ongoing homelessness problem in Phoenix and other western cities. *See* Corinne Murdock, *A Wasteland of Corpses, Living and Dead: A Devastating Inside*

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[1] Counsel for amicus affirm no counsel for any party authored this amicus brief in whole or in part, and that no person or entity, other than amicus, its members, or counsel, made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of amicus' intention to file.

[2] The parties to that case are also appearing separately as amici in support of the Petition.

Look at Phoenix's Homeless Zone, AZ Free News (Mar. 6, 2023).[3]

GI believes its experience and policy expertise will assist this Court in considering the Petition.

INTRODUCTION AND SUMMARY OF REASONS FOR GRANTING THE PETITION

The Ninth Circuit's rulings here and in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), reflect profoundly flawed reasoning, and have had massively deleterious consequences for citizens seeking to keep their communities safe and clean—as well as for the homeless themselves, who are being denied interventions that could help improve and even save their lives. The situation has reached crisis level in several cities, especially Amicus's hometown of Phoenix, Arizona—and intervention by this Court is the *only* means by which the problem can be addressed.

Even assuming that the Eighth Amendment's Cruel and Unusual Punishment Clause applies to the arrest of individuals violating municipal anti-camping ordinances,[4] the "status crime" theory the Ninth Circuit employed in these cases treats voluntary actions

[3] https://www.goldwaterinstitute.org/a-wasteland-of-corpses-living-and-dead-a-devastating-inside-look-at-phoenixs-homeless-zone/.

[4] Properly interpreted, the Amendment applies only to "punishments meted out by statutes or sentencing judges." *Hudson v. McMillian*, 503 U.S. 1, 18 (1992) (Thomas, J., concurring).

as if they were involuntary. As a result, it bars—or at least appears to bar—municipal governments from enforcing laws for the public health, safety, and welfare, due to the government's perceived failure to provide adequate taxpayer-funded services to those who engage in lawbreaking. The irrationality of this body of precedent is exemplified in cases like *Fund for Empowerment, et al. v. City of Phoenix, et al.*, CV-22-02041-PHX-GMS (D. Ariz., filed Nov. 30, 2022), where the plaintiffs include mentally competent people who have remained homeless for *three decades*, but nonetheless characterize themselves as "involuntarily" homeless for purposes of *Martin*.

The *Martin* court did say that local governments *can* still enforce anti-camping ordinances. It said that "[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible." 920 F.3d at 617 n.8. Yet in practice, *Martin*'s bizarre application of the concept of "involuntary homelessness" is difficult to square with these limitations on its holding. As the dissenters below observed, the *Martin* case "treats a shelter-beds deficit, when combined with conclusory allegations of involuntariness, as sufficient for an individual to show that he or she is involuntarily homeless," and that, in turn, entitles the person *as a matter of constitutional right*, to reside indefinitely in parks, streets, or sidewalks—in dangerous, unclean, and inhumane conditions—exempt from law enforcement intervention. App. 148a (Smith, J., dissenting).

That, at least, is how many municipal officials interpret *Martin*. Notwithstanding the caveats in that case recognizing that cities *can* continue to enforce bans on public camping, loitering, pollution, etc., these officials have taken its bizarre notion of "involuntariness" as an opportunity to shrug off their responsibilities to enforce laws that are wholesome and necessary for the public good. The result is a stark crisis in homelessness in cities such as San Francisco, Los Angeles, and Phoenix.

Phoenix's case is particularly shocking: for well over a year now, Phoenix officials have essentially operated an open-air homeless shelter in the streets of downtown Phoenix—known locally as "The Zone"—where over 750 people now reside, and at one point over 1,000. The City has conceded in court that it has done this intentionally, as a "policy choice" in response to the *Martin* ruling. The consequences have been not only the open discharge of sewage into the streets and gutters, and the physical and economic destruction of neighboring businesses, but even incidents of arson and homicide. But while police officers themselves *want* to enforce the law in The Zone, their superiors will not allow them to do so. Those superiors claim that their hands are tied by *Martin*—and continue to maintain this, despite an injunction from a state superior court, which orders the City to stop maintaining this public nuisance.

The decision in *this* case exacerbates the confusion and illogic of *Martin*. In a ruling that certainly would have astonished the drafters of the Eighth

Amendment, the Ninth Circuit found that "it is an Eighth Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep." App. 19a. Its rationale is that a person is *per se* "involuntarily" sleeping on the streets even when that person "engag[es] in conduct necessary to protect themselves [*sic*] from the elements when there [is] no shelter space available," *id.* at 5a, including even the building of makeshift shelters on public property and residence there for an indefinite period of time without any inclination to comply with the law.

That's simply not what "involuntariness" means. An involuntary act is an unavoidable act—one about which no individual can make a deliberate choice. It means, as the Ninth Circuit put it in another case, "universal and unavoidable consequences of being human." *Jones v. City of L.A.*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). But a person who chooses to live indefinitely on the streets—and during that period takes deliberate actions to maintain that mode of living—is not doing so as an unavoidable consequence of being human, and it does not become any more involuntary just because there are no shelter beds available in the city that the individual considers "adequate." People *can* choose alternatives—they can choose to obtain shelter, to seek employment, or to take advantage of the social, medical, or psychological services necessary to bring themselves into compliance with the law. Both *Martin* and

the decision below ignore this fact due to their bizarre conception of "involuntariness"—and the result is to give cities an excuse not to enforce the law; to abdicate their responsibilities and endanger the public in the process. Phoenix's "Zone" crisis is a prime example.

The result of the *Martin* case—at least as interpreted by city officials across the country—has been a startling increase in public homelessness, accompanied by a refusal by municipal officials to take action. That has led not only to the destruction of public spaces and private property, and to incidents of violence and pollution, but also to the perpetuation of inhumane conditions for the homeless themselves. Thus, for example, Phoenix has transported hundreds of homeless people to The Zone, to reside in tents on the streets in summertime weather that often tops 110°—during the COVID pandemic.

The lower court's rulings here and in *Martin* have made clear that, absent action by this Court, the Ninth Circuit will not desist from its misguided and counterproductive interpretation of the law. The Petition must be granted, this case reversed, and *Martin* overruled.

ARGUMENT

I. The *Martin* "involuntariness" theory is irrational.

The entire theory of *Martin* and of this case originates with the notion of a "status crime"—that is, a

punishment for what one *is* as opposed to what one *does*. In *Robinson v. California*, 370 U.S. 660 (1962), this Court rightly concluded that the Constitution forbids the government from establishing status crimes. To punish someone for *being* something—something one might "innocently or involuntarily" be, *id.* at 667—is obviously not only cruel and unusual, but violates the principle of Due Process of Law, because the entire principle of legal punishment for criminal acts presupposes that the accused has the capacity to make a decision to act or desist from acting. *See generally* Timothy Sandefur, *In Defense of Substantive Due Process, or The Promise of Lawful Rule*, 35 Harv. J. L. & Pub. Pol'y 283 (2012).

The distinction is between, on one hand, an act which a person can be expected not to engage in—and which the state may lawfully punish—and, on the other, "an immutable characteristic determined solely by the accident of birth" or by inescapable forces—punishment for which would "violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (citation omitted). That distinction is elemental to any rational system of law.

But the *Martin* decision fallaciously shifted from one category to the other, and deemed *voluntary* acts *involuntary*, if the individual in question is not given "adequate" taxpayer-funded social services (with "adequacy"

left undefined). 920 F.3d at 617 n.8.[5] But the idea that one is "involuntarily" homeless if the government does not give that person an "adequate" place to sleep, is illogical. An action is involuntary if a person literally cannot help it—not if the person *could* help it, but fails to do so, and the government fails to give that person some benefit. A person who leaves a bar intoxicated, and drives drunk, is not "involuntarily" engaged in drunk driving just because the government failed to provide him with a taxi or an Uber. A person who pours liquid waste into a river is not "involuntarily" polluting just because the government failed to provide him with a toxic waste removal service. A person who chooses to start a fire that gets out of control and consumes a neighbor's house is not "involuntarily" engaged in arson just because the government failed to provide him with an electric heater.

The *Martin* conception of "involuntary" is not only illogical, but plainly encompasses a political, rather than a legal, assumption—one according to which people are deemed incapable of acting responsibly, and therefore blameless, if they can ascribe their condition to the government's failure to provide them with taxpayer-funded benefits. If nothing else, that paternalism is demeaning to the homeless themselves—

[5] The decision below doubles down on this by, among other things, finding that a shelter, to be "adequate," must be "secular." App. at 53a. Obviously, given that care for the homeless has traditionally been a major concern of churches, this rules out a great many available options.

because it implicitly assumes they lack free will.[6] And it embodies a policy preference rather than neutral constitutional analysis: namely, the preference that the state take charge of people's fates, because otherwise they are incapable of taking responsibility for their own lives. Of course, one who is incapable of taking responsibility is also incapable of freedom.

A prime example of the absurd consequences of *Martin*-style "involuntariness" is provided by an ongoing lawsuit in the Arizona Federal District Court that involves The Zone. In *Fund for Empowerment, et al. v. City of Phoenix, et al.*, CV-22-02041-PHX-GMS (D. Ariz., filed Nov. 30, 2022), the plaintiffs argue that Phoenix is violating the *Martin* rule by cleaning up illegal campsites in The Zone, where hundreds of homeless people have been congregating for well over a year. Yet the plaintiffs in that case consist of a man who—according to the operative complaint—"has been chronically unsheltered off and on since 2000,"[7] and a woman who is at least sufficiently self-responsible enough to maintain a credit card account.[8]

It should be obvious that a person who has been homeless for 23 years is not sleeping on the streets as part of the " 'universal and unavoidable consequences of being human,' " *Martin*, 920 F.3d at 617 n.8 (quoting *Jones*, 444 F.3d at 1136), and that a person who can

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[6] In contemporary jargon, the assumption "denies their agency."

[7] First Amended Complaint (Doc. 45) ¶ 20

[8] *Id.* ¶ 80.

maintain a credit card account has sufficient freedom of will to make financial and other plans for her future. If these individuals can exercise that much freedom of choice, their failure to do so cannot be ascribed to who they *are*, but, rather, to the actions they have chosen to take or failed to take. Yet *Martin*-style involuntariness disregards this fact, and characterizes such people as "involuntarily" homeless based solely on the numerical formula of the number of ("adequate") shelter beds available in taxpayer-funded homeless shelters.

This is irrational. As the dissent below put it, the entire theory of "status crime" on which the *Martin* court purportedly relied, "requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person." App. at 80a (Collins, J., dissenting). That is—it requires a court to inquire as to whether a person is capable of taking responsibility for his or her acts. But no individualized assessment is being conducted in many communities in the Ninth Circuit—and the decision below appears to categorically rule it out. That is due to the absurd notion of "involuntariness" embedded in the *Martin* decision.

But, as explained in the next section, many city officials *welcome* that outcome.

II. The *Martin* "involuntariness" theory has become a device whereby city officials can excuse their refusal to enforce the law.

The situation in Phoenix's Zone offers a prime example of the chaos caused by the *Martin* theory of involuntariness. For well over a year now, the City has chosen to allow, and even to encourage, over 1,000 homeless residents to live in tents and makeshift shelters (or in no shelter) on city streets, vacant lots, and sidewalks in a large section of downtown Phoenix. Zone residents regularly defecate and urinate in the streets, gutters, and on private property; set fires—which sometimes cause tents or nearby buildings to catch fire; to loiter on or near privately owned businesses and residences; to partake of drugs and alcohol; and to engage in other criminal activities. *See The Zone*, Goldwater Institute (Sept. 15, 2023).[9] At least two human bodies—including one of an unborn fetus—have been found in The Zone. *Id.*

Not only does the city abide such behavior, it actively encourages it, both by refusing to enforce the law in The Zone, and by actually transporting homeless people from other locations in Phoenix *into* The Zone.[10] The City is not merely neglecting its responsibilities in The Zone; it is actively operating an open-air homeless shelter where residents are free to violate the law—

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[9] https://www.goldwaterinstitute.org/policy-report/homelessness/.

[10] It is generally known, also, that neighboring communities instruct homeless persons to move on to The Zone, as a cheap means of eliminating the homeless populations from their communities.

including environmental laws which prohibit the release of sewage onto public property[11]—and to continue to do so indefinitely.

This is obviously a public nuisance under Arizona law. *See Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs*., 712 P.2d 914 (Ariz. 1985); *City of Phoenix v. Johnson*, 75 P.2d 30 (Ariz. 1938). And it has given rise to two lawsuits, one in state court (*Brown, et al. v. City of Phoenix*, No. CV-2022-010439 (Maricopa Cnty. Super. Ct. (filed Aug. 10, 2022)), and one in federal court (*Fund for Empowerment, supra*). The plaintiffs in the *Brown* case have filed their own amicus brief in this case, in which they explain how Phoenix officials have used the *Martin* decision as a rationale for their refusal to enforce city and state laws against pollution, public camping, etc. In March, the Superior Court issued a preliminary injunction which found that the City has indeed "created and maintains the dire situation that currently exists in The Zone through its failure, and in some cases refusal, to enforce criminal and quality of life laws." Order Granting Preliminary Injunction, *Brown v. City of Phoenix* (Mar. 27, 2023) at 15.

Throughout that litigation, the City's position has been that its hands are tied by the *Martin* ruling. The City's attorney, for example, argued to the court that "so long as there is a greater number of homeless individuals in a jurisdiction than the number of available shelter beds, right—so homeless individuals, shelter

[11] A.R.S. §§ 49-263, 49-201, 49-206.

beds, we're putting these together—the jurisdiction cannot prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public. [This includes] public parks, public right of way."[12]

In fact, the City has argued that *Martin* and the decision below make it "unclear"[13] whether the City is even allowed to create a "structured campground" (i.e., a constructed facility where the homeless could reside temporarily while alternative arrangements are explored, as opposed to living on the streets). In other words, the City contends that these Ninth Circuit precedents are "not clear" on whether the City can construct a facility and require homeless individuals to resort to those facilities on pain of criminal punishment.[14]

At trial in the *Brown* case, the City offered an expert witness who testified as follows:

> Q. Can you explain to the Court exactly how the *Boise* decision affected and changed how providers and cities provide services to those experiencing homelessness?
>
> A. It's created an era of uncertainty. And I think that's probably why we are here today is to try and clarify, what is that.

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[12] Transcript of Oral Argument regarding Defendants' Motion to Dismiss, *Brown v. City of Phoenix* (Dec. 15, 2022), at 13.

[13] *Id.* at 29.

[14] *Id.*

> Q. Okay. So if we weren't here today and we didn't receive any guidance from the Court, would there still be that state of unclarity in the future if we weren't here today?
>
> A. To the best of my knowledge, yes.[15]

Later, when asked "is the City of Phoenix currently confused as to what is or is not legal as a result of that decision?" she answered in the affirmative.[16]

To emphasize, the City itself elicited this testimony from its own expert—to underscore its position that the *Martin* precedent has caused confusion and tied its hands with respect to The Zone crisis.

This alone militates in favor of a grant of certiorari here: to clarify whether and how municipalities can take action with respect to vagrancy and lawbreaking in their streets.

But the reality is actually worse: the City—like many municipal governments in the Ninth Circuit—actually welcomes the confusion *Martin* has caused. In part, that is because enforcing the law against homeless individuals is hard work, and often politically unpalatable, which creates a strong incentive for local politicians to disclaim their responsibility for such matters, and *Martin* and the decision below offer them an exceptionally convenient device for doing so.

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[15] Transcript of Proceedings of Bench Trial, July 11, 2023, at 172.

[16] *Id.* at 174.

This is proven by the fact that the City has gone far beyond what these decisions actually say. Despite the *Martin* court's express statement that cities *can* still enforce laws against public sleeping and camping, 920 F.3d at 617 n.8, the City has chosen to withhold law enforcement in The Zone to a far greater degree than that. The Superior Court in the *Brown* litigation concluded that the City not only chose not to arrest people for "involuntarily" residing on the streets, but also "stopped or greatly decreased enforcement of *other* health, quality of life, and even criminal laws and ordinances in The Zone," as well. Order Granting Prelim. Inj., *Brown v. Phoenix* (Mar. 27, 2023) at 3 ¶ 7. And although the *Martin* precedent would permit the City to create a structured camping area on city-owned property, to shelter the homeless until other alternatives could be arranged, the Court found that "City leaders are ***not*** considering" doing so, "despite admitting [the] viability" of this option. *Id*. at 12 ¶ 42, 20 (emphasis in original).

Even better evidence of the City's exploitation of the rulings in this case and in *Martin*, as excuses for inaction, compare the *Brown* case with the *Fund for Empowerment* case. In *Brown*—the state lawsuit against the City for illegally maintaining the "Zone"—City officials have filed multiple motions to dismiss or delay. The case was filed in August 2022; the City moved to dismiss in September 2022; opposed the plaintiffs' motion for a preliminary injunction on the same day; moved in December 2022 to stay the case or extend the filing deadlines; later moved to vacate the

trial date; and even welcomed an intervenor-defendant who sought to dismiss the case. (All, fortunately, without success.)

The City has responded to *Fund for Empowerment* quite differently. That's the federal lawsuit which seeks to block the City from taking even modest steps to enforce the law in the "Zone." That case was filed in November 2022, and the City has still never filed a motion to dismiss, abstain, or delay. The reason is clear: the City welcomes the *Fund for Empowerment* case as yet more justification for its refusal to enforce the law.

If the point were still in doubt, the City's arguments in the *Brown* case make it clear: City attorneys argued that the state court should dismiss because the City's decision to maintain The Zone was a *conscious policy choice* on the City's part, and therefore subject to the "political question" doctrine.[17] The City's refusal to enforce anti-camping laws, its attorneys said, was a deliberate "policy choice that the City of Phoenix has made."[18]

The bottom line is that *Martin* and this case have leveraged a faulty notion of "involuntariness" to conclude that people who choose to reside in public parks, on streets, on sidewalks, etc., are *per se* incapable of doing otherwise absent government providing them with shelter—and consequently that punishing such acts amounts to a "status crime." Meanwhile, receptive

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[17] Transcript of Oral Argument regarding Defendants' Motion to Dismiss, *Brown v. City of Phoenix* (Dec. 15, 2022), at 83.

[18] *Id.* at 76.

City officials have viewed these decisions as opportunities to justify their refusal to discharge their law-enforcement responsibilities.

There is no reason to imagine that anything will change absent action by this Court.

III. The homelessness problem which *Martin* and *Grants Pass* have facilitated is crippling cities.

Cities across the country—especially in the west—have experienced an explosion of homelessness, largely as a result of the dynamic described above. The *Wall Street Journal* recently reviewed data from cities nationwide and found an increase of between 9 and 13 percent since 2020. Jon Kamp & Shannon Najmabadi, *Homeless Numbers Rise in U.S. Cities*, Wall St. J. (June 19, 2023).[19] Between 2020 and the present day, the number of homeless in Phoenix has increased by nearly 25 percent. Juliette Rihl, *Arizona Has One of the Worst Homelessness Crises in the Nation, Federal Data Shows*, Ariz. Republic (Jan. 5, 2023).[20]

This crisis consists not only of people residing on the streets, but of outbreaks of disease—including typhus, typhoid fever, and tuberculosis in modern American cities, such as Los Angeles. Anna Gorman,

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[19] https://www.wsj.com/articles/homeless-numbers-rise-in-u-s-cities-fd59bc7b.

[20] https://www.azcentral.com/story/news/local/arizona/2023/01/05/federal-report-shows-arizona-has-one-of-the-worst-homelessness-crises/69778359007/.

Medieval Diseases are Infecting California's Homeless, The Atlantic (Mar. 8, 2019).[21] Public streets and sidewalks in San Francisco and other cities are covered in human excrement and used syringes. Phil Matier, *Cleaning Up S.F.'s Tenderloin Costs a Lot of Money—Soon it Might Cost Even More*, S.F. Chronicle (May 1, 2019)[22]; Bigad Shaban, et al., *Mayor Breed's First Year: Feces, Needles Complaints Decline; Trash Gripes, Homelessness Rise*, NBC Bay Area (July 10, 2019).[23]

Homelessness is associated with increases in violent crime, *see* Sophie Flay & Grace Manthey, *What is Really Going on with Homeless Crime? We Crunched the Numbers*, ABC7 (Oct. 21, 2021),[24] but it is also the case that the homeless themselves are far more likely than average to be victims of violent crime. *See* Piper McDaniel, *Homeless People are More Likely to be Victims of Violence Than Housed People*, Street Roots (July 13, 2022).[25] But City officials use *Martin* and this case as excuses to do nothing.

Homelessness is not an unpredictable malady that randomly befalls people. Although it is often claimed

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[21] https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/.

[22] https://www.sfchronicle.com/bayarea/philmatier/article/Cleaning-up-SF-s-Tenderloin-costs-a-lot-of-13808447.php.

[23] https://www.nbcbayarea.com/news/local/mayor-london-breed-first-year-in-office/154431/.

[24] https://abc7.com/feature/homeless-crime-los-angeles-data-response/10827722/.

[25] https://www.streetroots.org/news/2022/07/13/violence-conflated.

that "[o]ver the course of a year, more than a million individuals and families experience homelessness," U.S. Interagency Council on Homelessness, *State of Homelessness* (Dec. 19, 2022),[26] the reality is that most of these people are homeless for only a day or two. *See* Foundation for the Homeless, *Homeless Myths*.[27] Chronic or long-term homelessness, by contrast, is most often a result of addiction or mental illness. About a quarter of homeless individuals, in fact, suffer from serious mental illnesses. *See* U.S. Dept. of Housing & Urban Dev., *HUD 2022 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations* (Dec. 2022) at 2.[28]

Allowing people to live on the streets or in tents in a park is *not* a compassionate response to the problem. A compassionate response would consist of providing people with the care they need—including taking them into custody against their will if they are incapable of managing themselves. It would consist of what the dissent below called "an assessment of a person's individual situation." App. 80a (Collins, J., dissenting). That individualized assessment is considered irrelevant under the *Martin* theory of "involuntariness."

What's more, the law-abiding, taxpaying public deserves compassion, as well. The victims of municipalities' abdication of their law-enforcement duties aren't

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[26] https://www.usich.gov/fsp/state-of-homelessness/.

[27] https://www.foundationhomeless.org/homeless-myths-old.

[28] https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2022.pdf.

just the homeless—who certainly deserve better than to be left to live in filth in the streets of Phoenix through record-breaking summer temperatures—but also members of the community who must suffer threats, pollution, damage to their properties and the ruin of their businesses.

In March, the *New York Times* profiled Joe and Debbie Faillace, well-known Phoenix restaurant owners whose business, the Old Station Sandwich Shop, is located in The Zone; they are among the plaintiffs in the *Brown* case. Eli Saslow, *A Sandwich Shop, a Tent City and an American Crisis*, N.Y. Times (Mar. 31, 2023).[29] Surrounded by scores of tents, their restaurant has suffered a drastic decrease in customers since the City began operating The Zone. They also have been forced to deal with countless mentally ill and potentially violent homeless individuals entering their business and harassing customers and employees:

> Soon there were hundreds of people sleeping within a few blocks of Old Station, most of them suffering from mental illness or substance abuse as they lived out their private lives within public view of the restaurant. They slept on Joe and Debbie's outdoor tables, defecated behind their back porch, smoked methamphetamine in their parking lot, washed clothes in their bathroom sink, pilfered bread and gallon jars of pickles from their delivery trucks, had sex on their patio,

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[29] https://www.nytimes.com/2023/03/19/us/phoenix-businesses-homelessness.html.

> masturbated within view of their employees and lit fires for warmth that burned down palm trees and scared away customers. Finally, Joe and Debbie could think of nothing else to do but to start calling their city councilman, the city manager, the mayor, the governor and the police.

Id. This, of course, accomplished nothing, as local officials, citing *Martin* and this case, have refused to enforce the law. Police have responded to calls of violent crimes, however:

> Within a half-mile of their restaurant, the police had been called to an average of eight incidents a day in 2022. There were at least 1,097 calls for emergency medical help, 573 fights or assaults, 236 incidents of trespassing, 185 fires, 140 thefts, 125 armed robberies, 13 sexual assaults and four homicides. The remains of a 20-to-24-week-old fetus were burned and left next to a dumpster in November. Two people were stabbed to death in their tents. Sixteen others were found dead from overdoses, suicides, hypothermia or excessive heat. The city had tried to begin more extensive cleaning of the encampment, but advocates for the homeless protested that it was inhumane to move people with nowhere else to go, and in December the American Civil Liberties Union successfully filed a federal lawsuit to keep people on the street from being "terrorized" and "displaced."

Id.

People like the Faillaces have not caused the homelessness problem. Of all people involved in this awful drama, they and conscientious business and property owners like them are the most innocent. It is unjust to inflict upon them the burden of the City's own dereliction of duty. *Cf. Armstrong v. United States*, 364 U.S. 40, 49 (1960) (noting the injustice of "forcing some people alone to bear public burdens which . . . should be borne by the public as a whole").

Whether or not *Martin* and this case are correctly interpreted as having imposed a "constitutional straitjacket" on cities, App. 159a (Collins, J., dissenting), they have certainly been viewed that way by government officials who, opportunistically, find its ambivalent and fallacious conception of "involuntariness" a rationale for failing to do their duties. The result is a humanitarian crisis that cannot be resolved absent correction from this Court.

CONCLUSION

The Petition for Certiorari *must be granted*.

Respectfully submitted,

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