IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 20-35752

GLORIA JOHNSON; JOHN LOGAN, individuals,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Oregon
Case No. 1:18-cv-01823-CL
The Honorable Mark D. Clarke

AMICUS CURIAE BRIEF BY CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT-APPELLANT'S PETITION FOR REHEARING EN BANC

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I. CORPORATE DISCLOSURE STATEMENT [F.R.A.P., Rule 29(a)(4)(A), 26.1]

Amici Curiae California State Association of Counties ("CSAC") and League of California Cities ("Cal Cities") are non-profit corporations. Neither CSAC nor Cal Cities have a parent corporation, and no publicly held corporation owns 10% or more of either Association's stock.

II. AMICUS IDENTITY STATEMENT AND INTEREST IN THE CASE [F.R.A.P. Rule 29(a)(4)(D)]

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

Cal Cities is an association of 479 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases

that have statewide or nationwide significance. The Committee has identified this case as having such significance.

III. STATEMENT OF AUTHORSHIP AND FINANCIAL SUPPORT [F.R.A.P. Rule 29 (a)(4)(E)]

No party's counsel authored this amicus brief in whole or in part. No party or party's counsel contributed money intended to fund preparation or submission of this amicus brief. No one other than amicus and its counsel contributed money intended to fund preparation or submission of this amicus brief.

IV. STATEMENT CONCERNING CONSENT TO FILE [F.R.A.P. Rule 29(a)(2), Circuit Rule 29-2(a)]

All parties have consented to the filing of this brief.

V. INTRODUCTION

There is perhaps no greater challenge currently facing California's cities and counties than homelessness. Addressing this challenge cuts across almost all aspects of local government activities, including health and behavioral health, land use and housing, social services and job training, public health, code enforcement, and law enforcement. The continuing work toward addressing homelessness is critical for local governments, both for the health and humanity of the unhoused living among us and the quality of life for the entire community.

Having every possible tool available to cities and counties is necessary to make progress on this critical issue. That includes, among a myriad of other programs and services, enforcement of camping ordinances in appropriate circumstances. The panel opinion in this case, however, significantly narrows the ability to enforce camping ordinances – even in ways deemed permissible under *Martin v. Boise* – by allowing a class certification that eliminates the individualized determination of whether a person is involuntarily unsheltered. As a result, in any jurisdiction in which the unhoused population is greater than shelter beds available, plaintiffs can use class certification to enjoin enforcement of camping ordinances against unsheltered persons even in circumstances where a particular person may have options other than camping on public property.

Camping ordinances are not, by themselves, a solution to homelessness. However, they can be a useful tool in appropriate circumstances in addressing the complex conditions that exist in our homeless populations. Members of CSAC and Cal Cities have an acute interest in ensuring this tool remains available as they continue their work toward comprehensive solutions to homelessness.

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VI. ARGUMENT

A. Rehearing en banc is appropriate to consider class certification in the context of the type of Eighth Amendment Claims asserted here.

The district court in this case granted plaintiffs' motion for class certification with a class comprised of "all involuntarily homeless persons in Grants Pass." 1-ER-045. The district court went on to define what it means to be involuntarily homeless for purposes of the class certification:

> As to the "involuntary" qualifier of the proposed class, the Ninth Circuit has defined involuntary homelessness as follows: a person is involuntarily homeless when "there is a greater number of homeless individuals in [a jurisdiction] than beds available [in shelters]." *Martin v. City of Boise*, 920 F.3d 584, 617 (2019). There are more homeless individuals than shelter beds in the City of Grants Pass. Currently, the only shelters for adult homeless individuals are run by the Gospel Rescue Mission. These shelters have a total of thirty beds in a dorm for single men, four bunk rooms for single women, and twelve rooms for mothers with up to four children. The PIT Count conducted by UCAN counted 602 currently homeless individuals in Grants Pass. Therefore, there are more homeless individuals than shelter beds in the City of Grants Pass, and Plaintiffs are involuntarily homeless based upon the definition provided by *Martin*.

1-ER-051, citations to district court record omitted.

In other words, the class as it was certified by the district court in this case comes down to nothing more than a mathematical equation. If plaintiffs seeking class certification can show that there are more homeless persons

than there are shelter beds within a particular jurisdiction at a particular point in time, homelessness is considered involuntary and all homeless persons within the jurisdiction at that point in time are therefore included in the class. However, as Circuit Judge Collins noted in dissent from the panel opinion, the district court's interpretation of how the *Martin* court addressed involuntariness is in error. *Johnson v. City of Grants Pass*, 50 F.4th. 787, 814.

Martin specified that its holding was narrow, citing case law to reinforce that the established standard is that *as applied to a plaintiff*, there is "not a single place where they can lawfully be." *Martin v. City of Boise*, 920 F.3d 584, 617 (2019), *citing Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992), *and Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994). *Martin's* ruling that for homelessness to be involuntary there must be no other options available to the individual is inconsistent with the district court's definition of involuntariness that looks only to the number of unhoused individuals versus the number of shelter beds within that particular jurisdiction at a particular point in time.

A hypothetical proves the point. Even if a jurisdiction has insufficient shelter beds for the entire homeless population, there may be a shelter for individuals with no pets that regularly has empty beds, while there are no

available bed spaces for individuals with pets. Under that scenario, an individual with no pets camping in a public place in violation of an ordinance would not be there involuntarily because there is shelter space available to that person. However, an individual with pets in the same situation could be involuntarily without shelter. Under *Martin*, there would be no Eighth Amendment violation in enforcing the ordinance against the person without a pet who declines available shelter space, while there could be a violation for enforcing against the person with a pet. Yet both are included in the district court's class action injunction in this case based on nothing more than the fact that there are not enough shelter beds for the City's entire homeless population.[1]

Perhaps in recognition of this obvious problem with the district court's class certification, the majority opinion here sidesteps the district court's definition of involuntary, finding that "[i]ndividuals who have shelter or the means to acquire their own shelter simply are never class members."

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[1] And this is just one of several plausible hypotheticals. A very real scenario might also be that a particular jurisdiction has insufficient shelter beds, but a neighboring jurisdiction has available beds within a short distance. In fact, as illustrated further below in Section VI.B., regional solutions to homelessness are common and encouraged. This is particularly relevant since all states, including California, operate Continuums of Care (COC), which receive federal grant money to provide various types of housing and supportive services. 42. U.S.C. § 11381 et seq. The focus of the COC program is on "geographic areas," which are typically go beyond just one city's boundaries. See 42 U.S.C. §11386a.

Johnson v. City of Grants Pass, 50 F.4th 787, 805 (9th Cir. 2022). The panel opinion states that point even more bluntly in a footnote: "A person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter." (*Ibid.* at fn. 24.)

There are two problems with the majority opinion on this point. First, it simply does not reflect the class as it was certified by the district court below. There is nothing in the district court's class certification order stating that if a person has access to temporary shelter, they are not part of the class. Rather, the district court quite plainly made the "involuntary" determination based on nothing more than whether the City has more homeless individuals than it does shelter beds. If the majority of the panel believes that is not an accurate description of how to determine whether an individual is involuntarily homeless, it should have reversed and remanded the class certification and directed the district court to reconsider the definition of who is included in the class.

Second, the majority opinion's attempt to redefine the class as only those individuals without temporary shelter creates a "fail safe" class that is not only impermissible under the law, but is also unmanageable from the perspective of both the defendant and the court.

As this court has noted, "[t]he fail-safe appellation is simply a way of labeling the obvious problems that exist when the class itself is defined in a way that precludes membership unless the liability of the defendant is established. When the class is so defined, once it is determined that a person, who is a possible class member, cannot prevail against the defendant, that member drops out of the class." *Kamar v. Radio Shack Corp.*, 375 F.App'x 734, 736 (9th Cir. 2010). *See Ruiz Torres v. Mercer Canyons Inc*., 835 F.3d 1125, 1138 (9th Cir. 2016), *Melgar v. CSK Auto, Inc.*, 681 F.App'x 605, 607 (9th Cir. 2017).

The fail-safe class is impermissible because "its membership can only be ascertained by a determination of the merits of the case because the class is defined in terms of the ultimate question of liability. '[T]he class definition precludes the possibility of an adverse judgment against class members; the class members either win or are not in the class.'" *Rodriguez v. Countrywide Home Loans, Inc.*, 695 F.3d 360, 369-370 (5th Cir. 2012) (citations omitted).

The panel opinion class certification analysis is a classic example of this problem. In attempting to avoid the error made by the district court of creating a class that is inconsistent with the *Martin* standard, the court creates a class that requires a determination on the merits of the claim to

ascertain whether an individual is in the class. Because *Martin* found it is unconstitutional to enforce a camping ordinance against an individual when there is no viable shelter space available to that individual, defining the class as only those persons for whom there is no viable shelter space available means that determining membership in the class also resolves the ultimate question of liability, which is impermissible.

This approach was recently rejected by the Eighth Circuit in *Orduno v. Pietrzak*, 932 F.3d 710 (8th Cir. 2019). The claim in that case involved a breach of data privacy protections. Plaintiffs were seeking to certify a class comprised of individuals whose data was impermissibly obtained by defendant. Both the district court and the Court of Appeal rejected that approach, finding that plaintiff could not "solve the predominance problem by creating a so-called 'fail-safe class,' in which the class is defined to preclude membership unless a putative member would prevail on the merits. That sort of class 'is prohibited because it would allow putative class members to seek a remedy but not be bound by an adverse judgment—either those "class members win or, by virtue of losing, they are not in the class" and are not bound.' *Young v. Nationwide Mut. Ins. Co*., 693 F.3d 532, 538 (6th Cir. 2012) (quoting *Randleman v. Fid. Nat'l Title Ins. Co.*, 646 F.3d 347, 352 (6th Cir. 2011)); accord *Messner v. Northshore Univ.*

HealthSystem, 669 F.3d 802, 825 (7th Cir. 2012)." *Orduno v. Pietrzak*, 932 F.3d 710, 716 (8th Cir. 2019). Similarly here, individuals who have a shelter bed available to them would fail on their Eighth Amendment claim and by definition would also be excluded from the class.

In addition to violating the rules of class certification, such "fail-safe" classes pose practical problems as well. As the court noted in *Orduno*, a "fail-safe class is also unmanageable, see Fed. R. Civ. P. 23(b)(3)(D), because the court cannot know to whom notice should be sent." *Orduno, supra,* 932 F.3d 710 at p. 717. "Insofar as the fail-safe class is a means to establish predominance, its independent shortcomings are an alternative basis to affirm the denial of certification." *Ibid. See Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980).

This court should grant rehearing en banc to clarify an appropriate class certification in cases where an individualized determination is necessary to prove the underlying claim.

B. Local governments in California are tackling the homelessness crises through use of creative and proactive approaches, and enforcement of anti-camping ordinances is just one tool among many used to protect the health and welfare of the community, including the unhoused population.

In California, unprecedented efforts are underway to address homelessness. While the ability to enforce time, place and manner camping

restrictions on a case-by-case basis is important in addressing this difficult and pervasive problem, it is by no means the only approach being used at the State and local level. In considering the rehearing petition, this Court should keep in mind the ongoing and comprehensive homelessness programs Amici's members are undertaking.

The examples are numerous. By way of illustration, consider the following:

Major State Investments in Homelessness Programs. The State of California has recently created and provided funding for a myriad of homelessness programs, including Project Homekey, Homeless Housing, Assistance and Prevention Program, CalWorks Housing Support Program, CalWorks Homeless Assistance Program, Housing and Disability Advocacy Program, Home Safe, Bringing Families Home, Veterans Support to Self-Reliance, and more.[2] Funding for these programs can be used for non-congregate shelter, interim housing, rental assistance, permanent supportive and service-enriched housing, and diversion and homelessness prevention.[3]

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[2] State of California Business, Consumer Services and Housing Agency, *Putting the Funding Pieces Together: Guide to Strategic Uses of New and Recent State and Federal Funds to Prevent and End Homelessness* (Sept. 12, 2021) p. 5, https://bcsh.ca.gov/calich/documents/covid19_strategic_guide_new_funds.pdf (last visited Nov. 23, 2022).

[3] *Ibid.*

CARE Court. The California State Legislature adopted and the Governor signed SB 1338 [Cal. 2022 Stats Ch. 319], creating the Community Assistance, Recovery, and Empowerment (CARE) Court Program. This new program, which begins to phase in next year, will help bring some of the most difficult-to-serve populations into the system through court-adopted plans to provide them with available social services and housing. Counties and the courts are now doing the preliminary work to establish the CARE Courts, with implementation set to begin next year.

Encampment Resolution. The State of California has invested $700 million for Encampment Resolution Funding (ERF) "to support collaborative, innovative efforts to resolve encampment issues, and connect people experiencing unsheltered homelessness to supportive services and housing."[4] Notably, the FY 22-23 funds will prioritize $150 million for assisting persons living in encampments located on state right-of-ways.

Unprecedented Investments in Supportive Services. In fiscal year 2022-2023, the State of California has made an unprecedented investment of

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[4] *See* California Business, Consumer Services and Housing Agency, California Interagency Council on Homelessness, FY 22-23 Budget Summary (Sept. 1, 2022) p. 1, https://bcsh.ca.gov/calich/meetings/materials/20221017_budget_letter.pdf (last visited Nov. 23, 2022).

billions of dollars in supportive services designed to address the underlying causes of homelessness. These allocations include:[5]

- $3.1 billion to continue implementation of CalAIM, which provides incentives to build integrated, long-term services and programs clinically linked to a housing continuum for our homeless population.
- $1.5 billion over two years for the Behavioral Health Bridge Housing Program to provide additional housing and treatment for those with complex behavioral health needs.
- $1.4 billion over five years for the Medi-Cal Community-Based Mobile Crisis Intervention Services as a covered Medi-Cal covered benefit.
- $644.2 million for the Housing and Homelessness Incentive Program to fund local plans to address homelessness and housing.

Permanent Supportive Housing. Amici's members are making investments in permanent supportive housing, which provides short- or long-term rental subsidies in combination with varying levels of supportive services. For example, Los Angeles County has increased available permanent supportive housing slots to 33,592, and its placement of clients

[5] California Dept. of Finance, California State Budget Summary FY 22-23 (June 27, 2022) pp. 89-92, https://www.ebudget.ca.gov/2022-23/pdf/Enacted/BudgetSummary/HousingandHomelessness.pdf (last visited Nov. 23, 2022).

into permanent housing increased 74% on an annual basis between 2015 and 2020.[6] Similarly, the City of Woodland partnered with community non-profits and affordable housing developers to create what it calls "Woodland Micro-Neighborhood." The project is a mixed-income development of approximately 100 for-rent single and duplex micro-dwellings. The first phase of 60 micro-houses is underway, funded through a combination of federal Housing First grants and State's $2 billion No Place Like Home bond program. The project provides shelter for the most vulnerable—those who are homeless or unstably housed.[7]

Regional Approaches. Another tool being utilized by Amici's members as part of a comprehensive approach towards addressing homelessness is to coordinate regionally. One such example is the Regional Action Plan in the Bay Area. The plan was developed by a coalition of state and local elected officials, policymakers, affordable housing, social equity and economic mobility stakeholders, housing and homelessness service providers, and business and philanthropic partners across nine bay area

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[6] Los Angeles County Homeless Initiative, What We Do: Permanent Housing, https://homeless.lacounty.gov/permanent-housing/ (last visited Nov. 23, 2022).

[7] City of Woodland, Homeless Coordination: Permanent Supportive Housing, https://www.cityofwoodland.org/1045/Permanent-Supportive-Housing (last visited Nov. 23, 2022).

counties. The plan emphasizes a multifaceted approach that does not just rely on emergency shelter, but includes homelessness prevention, interim or emergency housing, permanent, deeply affordable, or permanent supportive housing, and housing subsidies.[8] As another example, the Bakersfield Kern Regional Homeless Collaborative was initially formed by the County of Kern and the City of Bakersfield to recommend solutions to end homelessness in the region. Today, the organization serves as the fiscal agent for the Bakersfield/Kern County Continuum of Care and works with the region's local governments, non-profits and others to implement evidenced-based approaches to ending homelessness, focused particularly on helping those experiencing homelessness to maintain permanent housing and access supportive services.

Navigation Centers. In 2019, the Legislature adopted AB 101 [Cal Stats. 2019 Ch. 159], which established requirements for local jurisdictions to allow Low-Barrier Navigation Center (LBNC) as a by-right use in certain zoning districts. LBNCs are a "Housing First, low-barrier, service-enriched shelter focused on moving people into permanent housing that provides temporary living facilities while case managers connect individuals

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[8] Regional Impact Council, *Regional Action Plan: A Call to Action From the Regional Impact Council* (Feb. 2021) pp.9-10, http://www.allhomeca.org/wp-content/themes/allhome/library/images/plan/210413_Regional_Action_Plan_Final.pdf (last visited Nov. 23, 2022).

experiencing homelessness to income, public benefits, health services, shelter, and housing." Cal. Gov. Code, § 65660, subd. (a). LBNCs reduce barriers to entry into temporary shelter for chronically homeless persons who have been living on the streets or in encampments. Upon entry, services are offered to help connect eligible persons to permanent housing. LBNCs have opened across the State following AB 101 to link those experiencing homelessness to available housing and other resources.[9]

Safe Camping and Parking Sites. Many California cities and counties provide safe camping sites with 24-hour security, portable bathrooms and storage. For example, the Los Angeles Homeless Services Authority, a joint powers authority created by the City of Los Angeles and the County of Los Angeles, operates 22 safe parking programs that provide vehicle dwellers

[9] *See*, e.g., City of Freemont, *Freemont Housing Navigation Center Annual Report* (Oct. 2020 – Oct. 2021) https://www.fremont.gov/home/showpublisheddocument/11009/637957303441430000 (last visited Nov. 23, 2022); City of Manteca, Office of the City Manager, Homelessness, Homeless Navigation Center https://www.ci.manteca.ca.us/Administration/homelessness/Pages/Homeless-Navigation-Center.aspx (last visited Nov. 23, 2022); Gabriel Porras, *Construction Starts on Stockton's First Navigation Center, Low-Barrier Shelter* (ABC10 June 24, 2022), https://www.abc10.com/article/news/local/stockton/construction-starts-low-barrier-shelter/103-6197fef5-1aa9-479a-838a-abfb9ce8d347 (last visited Nov. 23, 2022).

with a safe and legal place to park and sleep at night.[10] The programs provide: access to park a vehicle in a safe parking lot with onsite security and restrooms; access to have a Coordinated Entry System assessment completed; referrals and linkages to community resources; and access to case management, financial assistance and benefit connection. Continuing to be creative about how to meet the demand for such services, the Los Angeles Homeless Services Authority recently received approval from the Federal Aviation Administration to allow a safe parking program in designated parking lots at the LAX airport.[11] Camping sites are being created as well. After moving almost all the 200 residents who were camping underneath a freeway into stable housing, the City of Sacramento's "Safe Ground" program opened up a designated safe camping site with space for 60 tents that will serve up to 110 people experiencing homelessness with

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[10] Los Angeles Homeless Services Authority, LAHSA-Administered Safe Parking Sites in Los Angeles (May 25, 2022) https://www.lahsa.org/news?article=592-safe-parking (last visited Nov. 23, 2022).

[11] Susan Carpenter, *FAA Grants LAX Permission for Homeless Safe Parking Program* (Spectrum News 1 Feb. 16, 2022) https://spectrumnews1.com/ca /la-west/homelessness/2022/02/16/faa-grants-lax-permission-for-homeless-safe-parking-program (last visited Nov. 23, 2022).

access to restrooms, showers, electricity, garbage collection and staff available around the clock to connect people with services and programs.[12]

These examples serve as an important reminder that homelessness in California is a complex problem with many root causes, and it demands a comprehensive solution consisting of emergency, temporary and permanent housing coupled with a vast array of social and health care services. Even as the funding continues to be delivered to cities and counties, and more innovative programs and services come online, the ability to enforce lawful time, place and manner restrictions against a particular individual with shelter options available is a critical component to the overall well-being of the community, notwithstanding the fact that there might be more unhoused individuals than shelter beds available in a particular jurisdiction on a given night. Rehearing should be granted because the panel opinion's class certification ruling calls into question the ability to enforce such ordinances in a manner consistent with *Martin v. Boise.*

VII. CONCLUSION

[12] Giacomo Luca, *Temporary 60-Tent 'Safe Ground' Site Opens for Homeless in Miller Park* (ABC10 Feb. 7, 2022) https://www.abc10.com /article/news/local/sacramento/temporary-60-tent-safe-ground-site-miller-park/103-324e5781-f2e2-4f19-9b4c-c77bbc24ace8 (last visited Nov. 23, 2022).

The panel opinion's affirmance of the district court's class certification was in error. It not only misstates the class as defined by the district court, but also creates a "fail safe" class, which is impermissible and unworkable. Further, it calls into question the ability of local governments to enforce camping ordinances in a manner consistent with *Martin v. Boise,* which undermines the incredible efforts that are underway in cities and counties across the State to create short- and long-term alternatives to homelessness and provide health and social services to provide stability and resources to those facing chronic housing insecurity. CSAC and Cal Cities therefore urge this court to grant rehearing en banc and reconsider the court's ruling upholding class certification in this case.

Dated: November 23, 2022

Respectfully submitted,

By: /s/ *Jennifer Bacon Henning*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29-2(c)(2), I certify that the Amicus Brief by the California State Association of Counties and League of California Cities in support of the petition for rehearing en banc is proportionately spaced, has a typeface of 14 points or more and contains 4,188 words.

Dated: November 23, 2022

Respectfully submitted,

By: /s/ Jennifer Bacon Henning

Jennifer Bacon Henning, SBN 193915

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 5, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 23, 2022 By: /s/ Jennifer Bacon Henning

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