NO. 23-16123

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SACRAMENTO HOMELESS UNION, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF SACRAMENTO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
CASE NO. 22:22-cv-01095-TLN-KJN
JUDGE: HON. TROY L. NUNLEY

BRIEF OF THE CITY OF PHOENIX, THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, THE LEAGUE OF CALIFORNIA CITIES, THE LEAGUE OF ARIZONA CITIES AND TOWNS, AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF APPELLANT CITY OF SACRAMENTO

**** WITH CONSENT OF ALL PARTIES**

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DISCLOSURE STATEMENT

No *amici* is a subsidiary of any parent company. No publicly held corporation owns 10% or more of any *amici*'s stock.

September 25, 2023.

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IDENTITY OF AMICI CURIAE

The *amici* filing this brief are an Arizona municipal corporation and associations of local governments.[1] *Amici* and their members are on the front lines of efforts to remedy homelessness in the United States. Given their collective experiences, *amici* do not intend to minimize the plight of those individuals who are unsheltered and experiencing homelessness. To the contrary, *amici* fully understand that homelessness is a complex national social and economic issue that requires comprehensive and robust responses from a wide array of public, private, and non-profit institutions. Yet, *amici* also know the District Court's preliminary injunction at issue (which may be repeated) injected the federal judiciary into a delicate and complex debate about local public policy, thus overriding politically accountable local legislative representatives and officials who make difficult decisions for local governments as to the optimal allocation of local resources to effectively address this issue.

The preliminary injunction issued by the District Court violated both federalism and separation of powers, hamstrung the already difficult task of allocating scarce public resources, and gave authority over local public policy to

[1] No counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

a branch of the federal government ill-suited to the task. *Amici* are filing this brief to urge this Court to give appropriate and necessary deference to local governments and public officials in deciding how to best resolve the issue of homelessness in their communities.

The municipality and associations joining this brief are the following:

The City of Phoenix, Arizona ("Phoenix" or "City"), is the fifth largest city in the United States with an approximate population of 1,600,000 as of the 2020 Census and has an incorporated area of approximately 500 square miles.[2] It is estimated that there are more than 13,533 homeless people in Arizona.[3] In Phoenix alone, there are more than 3,333 unsheltered individuals.[4]

The International Municipal Lawyers Association ("IMLA") has been an advocate and resource for local government attorneys since 1935. Operated solely by its more than 2,500 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local

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[2] *See* https://www.visitphoenix.com/about-us/phoenix-facts/.
[3] U.S. DEP'T OF HOUS. AND URB. DEV., *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress* 16 (2022), https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf
[4] MARICOPA ASS'N OF GOV'TS, *2023 Point-in-Time (PIT) Count Report* 4 (2023), https://azmag.gov/Portals/0/Homelessness/PIT-Count/2023/2023-PIT-Count-Report-Final.pdf?ver=8CRzv7xw28C-V2G0sMdKfw%3d%3d

governments around the country on legal issues before the United States Supreme Court, the United States Courts of Appeals, and state supreme and appellate courts.

The League of California Cities ("Cal Cities") is a nonprofit corporation founded in 1898. Cal Cities is an association of 476 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, such as this case.

The League of Arizona Cities and Towns ("AZ League") is a voluntary membership organization of 91 incorporated municipalities in Arizona. The AZ League represents the interests of Arizona cities and towns before the Arizona Legislature while also providing technical and legal assistance, coordinating shared services, and organizing conferences and educational events. Like Cal Cities, the AZ League also participates in federal and state litigation that may impact the interests of its members.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of all 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 determined that this case is a matter affecting all counties.

INTRODUCTION

There is perhaps no greater challenge currently facing cities, towns, and counties within the western United States than homelessness or the plight of the unsheltered. Homelessness is a national crisis, but responsibility for providing solutions has primarily fallen at the doorsteps of city and town halls and county seats. Unfortunately, efforts by local governments to provide transitional, temporary, or permanent housing for the unsheltered are sometimes met with opposition and/or frustration from citizens who live or own businesses near a proposed facility.[5]

Addressing this challenge cuts across almost all aspects of local government operations, including health and behavioral health, land use and housing, social services and job training, public health, code enforcement, and

[5] *See, e.g.,* Maritza Dominguez, *Mesa's plan to buy homeless hotel faces resident pushback*, ARIZ. REPUBLIC, September 15, 2023. https://www.azcentral.com/story/news/local/mesa/2023/09/15/mesa-residents-oppose-plans-for-hotel-to-shelter-homeless/70837142007/

law enforcement. The continuing work toward addressing homelessness is critical for local governments at all levels, both for the health and humanity of the unhoused living among us and for the quality of life for the entire community. Local governments strive to achieve the precarious balance between preserving the public health, safety, and welfare for all residents and inhabitants and those who are unsheltered and in need of a variety of social, economic, and health services. To sustain this balance, local governments must simultaneously maintain safe public property for all to use and enjoy while providing humane assistance to those who are unsheltered.

Having every possible tool available to local governments is essential to achieving this balance and make progress on the critical issue of homelessness. It is also essential that public policy decisions on how to best address the complex challenge that is homelessness remain within the purview of local elected representatives, appointed officials, and their professional staff, who together have their fingers on the pulse of their local community and are intimately familiar with the needs of all residents. Courts should be reluctant to substitute their judgment for that of local officials on matters of public policy:

> Unlike the officials tasked with addressing homelessness, the members of our court are neither elected nor policy experts. Of course, the political process must yield to the fundamental rights protected by the Constitution, and some of federal courts' finest moments have come in enforcing the rights of politically marginal groups against the majority. But when asked to inject ourselves into a vexing and politically charged crisis, we should

> tread carefully and take pains to ensure that any rule we impose is truly required by the Constitution—not just what our unelected members think is good public policy.

Johnson v. City of Grants Pass, 72 F.4th 868, 936 (9th Cir. 2023) (denial of rehearing en banc) (Smith, J., dissenting).

Amici are concerned about the District Court's decision on appeal, because *amici's* members could find themselves in the same position as Sacramento in this case. For example, Phoenix in recent months experienced a record 55 days with high temperatures of 110 degrees or more.[6] Cities throughout California and Nevada recorded their hottest July on record in 2023.[7] The District Court expressly found that "excessive heat" may form the basis for the assertion of a "state-created danger" claim in violation of Fourteenth Amendment substantive

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[6] Aubrey Eagerton, *After a record-breaking weekend, cooler temperatures and rain chances are expected*," ARIZ. REPUBLIC, September 10, 2023. https://www.azcentral.com/story/news/local/phoenix-weather/2023/09/10/phoenix-hits-new-record-55-days-of-110-plus-temperatures/70818380007/

[7] *See* Jeff Masters and Bob Henson, *The Scorching Summer of 2023 Reaches "mind-blowing" high temperatures* (YALE CLIMATE CONNECTIONS, July 17, 2023), https://yaleclimateconnections.org/2023/07/the-scorching-summer-of-2023-reaches-mind-blowing-high-temperatures/; Las Vegas Sun Staff, *Weather Service: July Sets Record for Heat in Las Vegas* (LAS VEGAS SUN, August 1, 2023), https://lasvegassun.com/news/2023/aug/01/weather-service-record-month-for-high-temperatures/#:~:text=Las%20Vegas%20Sun,-MENU%20%7C%20September%2012&text=The%20city%20could%20match%20its,temperature%20of%20117%20on%20Sunday.&text=Tue%2C%20Aug%201%2C%202023%20(,for%203%20Climate%20Sites...&text=The%20average%20temperature%20in%20Las,Las%20Vegas%20said%20this%20morning.

due process. Such a court finding could obstruct or thwart ongoing efforts by *amici's* members, including Phoenix, to resolve homelessness in their communities.[8] Like Sacramento, *amici's* members, such as Phoenix, could be subjected to "preliminary" injunctions that continue for months on end, or even in perpetuity, based upon declarations that have not been cross-examined, because a court decides that the local government's enforcement of otherwise generally applicable municipal or county code provisions governing the general public health and welfare and use of public property or otherwise constitutional remediation of homeless encampments during extremely hot or cold weather is "affirmative action" that causes a "state-created danger."

Worse yet, a court could override the decisions of the local legislative body as to what constitutes the most effective and practical strategy for remedying homelessness locally. For example, in March and June 2023, Phoenix was ordered by the Maricopa County Superior Court in *Brown v. City of Phoenix,* Case No. CV2022-010439, a public nuisance action, to take certain actions to remove a large encampment of unsheltered persons in its downtown pursuant to a preliminary injunction. By Order dated September 20, 2023, the Superior Court

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[8] Abigail Celaya, *Maricopa County heat-associated deaths surpass 200 in 2023*, ARIZ. REPUBLIC, September 15, 2023. https://www.azcentral.com/story/news/local/arizona-weather/2023/09/15/over-200-died-in-maricopa-county-2023-exteme-heat/70862908007/

made that injunction permanent mandating that Phoenix shall complete the removal and cleanup by November 4, 2023. *See* Appendix ("App.") 1 (Under Advisement Ruling, dated September 20, 2023).

By Order dated and filed on September 13, 2023, the Eastern District for California declined to further extend the preliminary injunction against Sacramento at issue on appeal [Doc. 74]. This is a favorable outcome for Sacramento but may only be temporary as it does not moot the legal issues underlying this appeal or negate the need for this Court to review and reject the legal analysis upon which the District Court relied in issuing the original preliminary injunction in July 2022 and those that followed. Unless Sacramento successfully negotiates a resolution with Plaintiffs, it is likely effort will be made to renew the preliminary injunction when temperatures rise again next summer. Accordingly, this appeal presents a circumstance capable of repetition that could necessitate further judicial action.

Phoenix and *amici* agree with Sacramento that the District Court's original decision in July 2022 preliminarily enjoining Sacramento from taking action to remediate or remove homeless encampments under any circumstances [Doc. 22, 55] is contrary to law and should be reversed. The District Court's decision was unprecedented and was based upon a factually and legally unsupportable application of the Fourteenth Amendment "state-created danger" doctrine.

Moreover, the District Court's imposition of the preliminary injunctions was an improper application of the relief granted in *Martin v. City of Boise,* 920 F.3d 584 (9th Cir. 2019).

ARGUMENT

I. Phoenix and Sacramento face similar legal challenges.

During the summer of 2022 and again in August of 2023, Sacramento was constrained in its efforts to remove homeless encampments from public property, including areas with "critical public infrastructure," as defined in Sacramento City Code ("SCC") Chapter 8.140 (Critical Infrastructure and Wildfire Risk Area Ordinance), due to preliminary injunctions imposed by the District Court. [Docs 22, 33, 39, and 55]. The original injunction was renewed or reinstated several times until the District Court's September 13, 2023 Order, denying a request to further extend the injunction. [Doc 74]. Significantly, there was never a trial on the merits of the need for any injunctive relief. "The limited evidence before the Court comes in the form of declarations." *Sacramento Homeless Union v. County of Sacramento,* 617 F. Supp. 3d 1179, 1191 (E.D. Cal. 2022). In its September 13, 2023, Order, the District Court finally recognized and gave Sacramento credit for "the recent steps it has taken to mitigate the danger to unhoused individuals." [Doc. 74 at 4].

Because Sacramento's efforts were constrained during the summers of 2022 and 2023, it is not surprising that the continued presence of numerous encampments within the city unabated prompted the District Attorney for the County of Sacramento to file a public nuisance, private nuisance, and inverse condemnation lawsuit against the city on September 19, 2023. *See People of the State of California v. City of Sacramento,* Superior Court of the State of California County of Sacramento, Case No. 23CV008658. On this same date, a group of private businesses filed a negligence, public nuisance, private nuisance, and inverse condemnation against the city. *See Prime Auctions, LLC v. City of Sacramento,* Superior Court of the State of California County of Sacramento, Case No. 23CV008662. In addition, the city has been sued under the Americans with Disabilities Act ("ADA") for sidewalk obstructions caused by homeless encampments. *See Hood v. City of Sacramento,* Case No. 2:23-cv-00232-KJM-CKD (E.D. Cal. 2023).

Phoenix is walking a similarly treacherous legal tightrope between competing federal and state court lawsuits seeking to enjoin its actions related to homelessness in the downtown area in the vicinity of the Human Services Campus ("HSC") where approximately fifteen different non-profit organizations and government agencies provide services to homeless individuals. These competing rulings have created an unworkable legal framework for the City.

In the area approximately bounded by 7th and 15th Avenues and between Van Buren and Grant Streets, unsheltered individuals are living in encampments and temporary shelters upon public rights-of-way, sidewalks, and public open spaces. In *Fund for Empowerment v. City of Phoenix,* Case No. CV-22-02041-PHX-GMS, the District Court of Arizona entered an Order on December 15, 2022, that preliminarily enjoined Phoenix from enforcing Phoenix City Code Section 23-30(A) ("Camping Ban")[9] and Phoenix City Code Section 23-48.01

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[9] Phoenix City Code ("PCC") Section 23-30 (Camping) states:

> A. It shall be unlawful for any person to camp in any park or preserve, or in any building, facility, or parking lot or structure, or on any property adjacent thereto, that is owned, possessed and controlled by the City, except as permitted in paragraph C below.
>
> B. For the purposes of this section the term "camp" means to use real property of the City for living accommodation purposes such as sleeping activities, or making preparations to sleep, including the laying down of bedding for the purpose of sleeping, or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities. The above-listed activities constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area for living accommodation purposes regardless of the intent of the participants or the nature of any other activities in which they may also be engaging.
>
> C. The Director of the Parks and Recreation Department may, in accordance with the Parks and Recreation Department's established procedures, issue special use permits or reservations to authorize youth organizations to camp or park vehicles overnight

("Sleeping Ban"),[10] which together prohibit camping on property owned by the city and use of any public right-of-way, including a sidewalk, for lying or sleeping. The District Court based its decision in large part upon *Martin v. City of Boise, supra*. *See* App. 2 (District Court Order, filed December 16, 2022).

In *Brown v. City of Phoenix*, Maricopa County Superior Court Case No. CV2022-010439, the Superior Court issued a preliminary injunction on March 27, 2023 and signed June 12, 2023, which required Phoenix to remove hundreds of unsheltered persons from the downtown area near the HSC, ordered the Phoenix Police Department to enforce statutes, ordinances, and codes against the unsheltered, and directed that Phoenix divert city resources and funding to develop a "temporary shelter space." Thereafter, the City devised and commenced a plan to remove encampments on a block-by-block basis in the area

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> in a park or preserve. Nothing in this section shall be interpreted to prohibit camping or overnight parking sponsored by the City of Phoenix.

(Ord. No. G-3552, § 1; Ord. No. G-4660, §§ 1, 2, 2004).

[10] PCC Section 23-48.01 (Prohibited use of public right-of-way) states:

> It shall be unlawful for any person to use a public street, highway, alley, lane, parkway, sidewalk or other right-of-way, . . . for lying, sleeping or otherwise remaining in a sitting position thereon, except in the case of a physical emergency or the administration of medical assistance.

(Ord. No. G-2238, § 1).

and also to offer the unsheltered living in the encampments opportunities to relocate to temporary shelters and other housing. *See, infra,* Section III. By order dated September 20, 2023, the Superior Court converted the preliminary injunction entered on March 27, 2023, and signed on June 12, 2023, to a permanent injunction that requires Phoenix to clear the homeless encampments in the vicinity of the HSC by November 4, 2023. *See* App. 1 at 26-27. The *Brown* case originated as a public nuisance claim by residents and business owners owning property in downtown Phoenix near the HSC seeking to compel the City to eliminate the homeless encampments in the area. The Superior Court's Order, which contradicts *Boise* and *Johnson v. City of Grants Pass,* 72 F.4th 868 (9th Cir. 2023), has been appealed to the Arizona Court of Appeals. *See Brown v. City of Phoenix,* Arizona Court of Appeals, Case No. 1 CA-CV 23-0273. Notably, the Superior Court disagreed with Phoenix's interpretation of *Martin v. City of Boise*, as limiting the city's ability to enforce the Camping Ban and the Sleeping Ban near the HSC. App. 1 at 22-24.

II. The District Court's application of the "State-Created Danger" doctrine is unprecedented and should be overturned.

Phoenix and *amici* concur with Sacramento's argument that Plaintiffs did not meet their burden of establishing the right to a preliminary injunction. *See* Opening Brief ("OB") at 59-61. Injunctive relief is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such

relief." *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997)).

Plaintiffs asserted below that they were entitled to injunctive relief because the remediation of homeless encampments by Sacramento during 90-degree-plus heat was a "state-created danger" in violation of the Fourteenth Amendment substantive due process clause. *Sacramento Homeless Union,* 617 F. Supp. 3d at 1185. Citing *Martin v. City of Boise,* Plaintiffs sought an injunction "prohibiting the clearing of . . . encampments unless and until all those impacted by such actions are provided with non-congregant, accessible, safe, indoor accommodations." *Id.* at 1187.

"As a general rule, members of the public have no constitutional right to sue [public] employees who fail to protect them against harm inflicted by third parties." *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018) (quoting *L.W. v. Grubbs,* 974 F.2d 119, 121 (9th Cir. 1992)). *See also Anderson v. City of Minneapolis,* 934 F.3d 876, 881 (8th Cir. 2019) ("The due process clause is not a guarantee of certain minimal levels of safety and security and it does not impose an affirmative obligation on the State to ensure that [its citizens'] interests do not come to harm through other means." (internal citations omitted)). However, "[a]n exception to the rule applies when government employees 'affirmatively place[ ] the plaintiff in a position of danger, that is, where [their]

action[s] create[ ] or expose[ ] an individual to a danger which he or she would not have otherwise faced.'" *Hernandez*, 897 F.3d at 1133 (quoting *Kennedy v. City of Ridgefield,* 439 F.3d 1055, 1061 (9th Cir. 2006)).

Local governments do not and cannot control the weather, whether it is extremely cold or extremely hot. *See, e.g., Berry v. Hennepin County,* 2022 WL 3579747 at *9 (D. Minn., August 19, 2022) ("Defendants contend that they conducted encampment sweeps to remedy health and safety risks posed by the encampments related to inclement weather and transmission of COVID-19. ***Both inclement weather and the COVID-19 pandemic, although dangerous, were not created by the state. Any claim advanced by Plaintiffs under the federal state-created-danger doctrine, therefore, necessarily fails."*** (emphasis supplied)). For this practical reason, courts within the Ninth Circuit have only applied the "state-created danger" doctrine in cases of extreme weather where public employees have by affirmative conduct unreasonably exposed persons to extreme weather and other elements in such a manner as to cause "foreseeable" harm or injury. *See, e.g., Munger v. City of Glasgow Police Dept.,* 227 F.3d 1082 (9th Cir. 2000) (police ejected an intoxicated person from a bar into subfreezing temperatures wearing only a t-shirt and jeans who subsequently died from exposure); *Janosko v. City of Oakland,* 2023 WL 3029256 at *1 (N.D. Cal. April

19, 2023) (state-created danger due to confluence of state-of-emergency weather conditions, lack of available shelter options, and COVID).

Even though the Ninth Circuit has extended the state-created danger theory to situations involving unreasonable exposure of persons to extreme temperatures, it must be kept in mind that "[c]ourts are instructed to resist the temptation to augment the substantive reach of the Fourteenth Amendment, 'particularly if it requires redefining the category of rights deemed to be fundamental,'" and "[t]here is no fundamental right to housing." *Sanchez v. City of Fresno,* 914 F. Supp. 2d 1079, 1101 (E.D. Cal. 2012) (citing *Bowers v. Hardwick,* 478 U.S. 186, 195 (1986) and *Lindsey v. Normet,* 405 U.S. 56, 92 (1972)).

"To succeed on a state-created danger claim, a plaintiff must establish that (1) a state actor's affirmative actions created or exposed him to 'an actual, particularized danger [that he] would not otherwise have faced,' (2) that the injury he suffered was foreseeable, and (3) that the state actor was deliberately indifferent to the known danger.'" *Sinclair v. City of Seattle,* 61 F.4th 674, 680 (9th Cir. 2023) (quoting *Hernandez, supra,* 897 F.3d at 1133-34).

Plaintiffs did not sufficiently establish any of the three elements, and the District Court erred in entering the preliminary injunction based on the "state-created danger" doctrine.

A. Plaintiffs did not establish "affirmative actions" by Sacramento that placed them in "particularized" danger.

Clearing out and cleaning up a homeless encampment is "affirmative" action by a local government. However, when done for the purpose of enforcing public health, safety, and welfare laws or to reclaim public property appropriated by individuals and the government offers an alternative place for those displaced to inhabit, this is not the type of conduct that should be the basis for a "state-created danger" claim that could trigger liability for violation of substantive due process under the Fourteenth Amendment. Moreover, Plaintiffs in this case did not present evidence that cleaning and clearing of the encampments and Sacramento's offer of alternative places to inhabit caused any foreseeable harm or injury that would have been greater than if Plaintiffs had been allowed to stay in the encampments.

It cannot be disputed that homeless encampments are not "safe" places for the unsheltered. It is well-documented that encampments are rife with crime, illegal drug use, vermin, unsanitary conditions, biohazards, and piles of trash, where sexual and physical assault and even homicides occur frequently.[11] "When examining whether a state actor 'affirmatively places an individual in danger, [a

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[11] *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, THE ATLANTIC (March 8, 2019); Eli Saslow, *A Sandwich Shop, a Tent City, and an American Crisis*, N.Y. TIMES (March 31, 2023); Thomas Fuller, *Death on the Streets*, N.Y. TIMES (April 25, 2022).

court does] not look solely to the agency of the individual, nor [should it rest its] opinion on what options may or may not have been available to the individual. ***Instead, [the court must] examine whether the [state actor] left the person in a situation that was more dangerous than the one in which they found him***.'" *Cobine v. City of Eureka,* 250 F. Supp. 3d 423, 432 (N.D. Cal. 2017) (emphasis added) (quoting *Kennedy v. City of Ridgefield, supra,* 439 F.3d at 1061). *See also Hernandez,* 897 F.3d at 1133 ("the ultimate injury to the plaintiffs must be foreseeable").

Here, Sacramento attempted to relocate unsheltered persons from "encampments where [allegedly] a modicum of protection from the heat exists" to "Safe Ground" locations where there may have been less shade, but which were cleaner, more secure, offered water and food, and provided access to social services. *Sacramento Homeless Union,* 617 F. Supp. 3d at 1187. The record shows that over time, Sacramento added more facilities for the unsheltered and made improvements to better serve the homeless. *See* OB at 21-28; [Doc. 43 at 7-8 and 15-16]. On this record, it cannot be concluded that Sacramento's actions to clear homeless encampments placed Plaintiffs in a more dangerous or unsafe situation, because they were able to relocate to "Safe Ground" locations and cool themselves at public pools, splash pads, and within several public facilities. [Doc. 74 at 4; Doc. 43 at 15-16].

Admittedly, Plaintiffs' proffered declarations demonstrate that the "Safe Ground" locations may not have provided substantial shade or fully adequate cooling equipment or hydration stations. However, the unsheltered population in Sacramento suffered from inadequate shade and lack of cooling equipment and hydration stations before they were offered the option of moving to the "Safe Ground" locations. Put another way, the danger faced by the unsheltered person living in public spaces existed before the governmental entity – Sacramento – took any action. As such, the "dangers" of inclement weather and lack of shade, cooling, or hydration are not a "state-created danger" because these "dangers" exist with or without any action taken by the local government. Here, Sacramento took action to protect and safeguard the unsheltered individuals and provide some cooling stations and means for hydration. Sacramento did not create or cause the "danger;" instead, it tried to mitigate the danger.

B. Injury to Plaintiffs was not "particularized" or "foreseeable."

Because Sacramento offered alternatives to the unsanctioned encampments, it cannot be said that any injury to Plaintiffs, notwithstanding their complaints, would have been "particularized" to them and "foreseeable" to the city. To the contrary, relocating from the unsafe encampments should not have exposed Plaintiffs to "particularized" and "foreseeable" injuries caused by moving. The unsheltered within the encampments were able to set up similar

living situations at the "Safe Ground" locations and were afforded facilities to obtain relief from heat. *Amici* suggest that the true issue was that Plaintiffs were not satisfied with the alternatives offered by Sacramento, because the "Safe Ground" locations may not have been entirely "non-congregant, accessible, safe, indoor accommodations." *Sacramento Homeless Union,* 617 F. Supp. 3d at 1187.

C. Plaintiffs failed to prove and could not prove "deliberate indifference."

In light of Sacramento's efforts and expended resources to offer Plaintiffs and other unsheltered persons alternatives to unsanctioned encampments along with a variety of social services and assistance, it must be concluded that the District Court erred in finding that the city "acted with 'deliberate indifference' to a 'known or obvious danger.'" *Sacramento Homeless Union,* 617 F. Supp. 3d at 1189 (quoting *Patel v. Kent Sch. Dist.,* 648 F.3d 965, 974 (9th Cir. 2011)):

> In the instant case, Plaintiffs' declarations detail heat-related mortality and morbidity deaths and illnesses from heat exposure. . . . [T]he Court finds that the City's sweeping or clearing of encampments in extreme heat to be 'affirmative conduct' on the part of the City in placing Plaintiffs in danger. *Patel*, 648 F.3d at 974. Plaintiffs also adequately establish[ed] through [one of the declarations] that the City acted with "deliberate indifference" to the "known or obvious danger" of extreme heat.

Id. at 1193.

As emphasized by the Court in *Hernandez,* "[d]eliberate indifference is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action.' . . . It 'requires a culpable mental

state,' and the 'standard [the Court] appl[ies] is even higher than gross negligence.'" 897 F.3d at 1135 (internal citations omitted). It is a "shock the conscience" standard." *Sinclair,* 61 F.4th at 680.

No reasonable argument can be made other than that Sacramento ***did not act*** with "deliberate indifference" and ***was not*** "grossly negligent" in how it attempted to remediate the homeless encampments inhabited by Plaintiffs and others before the District Court imposed the first preliminary injunction in July 2022. [Doc. 22]. The record below shows that Sacramento ceased citywide sweeps of encampments in 2018 following this Court's decision in *Martin v. City of Boise* and had undertaken a multi-faceted approach to alleviate homelessness within the community that includes protecting areas housing "Critical Infrastructure," as defined in SCC Chapter 8.140. OB at 29-35. It strains credulity to suggest that Sacramento could have "foreseen" that any additional or severe harm would have come to Plaintiffs by being encouraged to relocate from unsanctioned, unsafe encampments which only offered a "modicum of shade" to Miller Park and other "Safe Ground" locations provided by the city. The record below only shows that Sacramento has improved its facilities and services for the unsheltered over time, which the District Court acknowledged when it lifted the preliminary injunction on September 13, 2023. [Doc. 74].

The factual circumstances of this case are very similar to *Cobine v. City of Eureka, supra*, where the Northern District of California concluded that the City of Eureka had not placed the plaintiffs in an inherently dangerous situation by forcing them to vacate encampments and offered as an alternative city-owned parking lots or temporary emergency shelter:

> However, ***considering the stringent standard for finding deliberate indifference, the Court finds here that the allegations do not confirm that the state action was the impetus that put Plaintiffs in an inherently dangerous situation.*** [ ] ***[T]he Court is bound to find that the generalized dangers of living on the street preexisted Plaintiffs' relocation from the Palco Marsh***. From the allegations in the amended complaint, it appears that the encampment residents were permitted to sleep in a City-owned parking lot or were offered temporary emergency shelter accommodations. ***The current circumstances are certainly not ideal, but the Court finds they do not amount to a deliberate indifference of placing Plaintiffs in an inherently more dangerous situation than they had faced previously***. The general circumstances of being homeless in Humboldt County cannot be minimized. Without allegations of intentional eviction during precarious weather or other facts indicating deliberate indifference to the safety and welfare of the population, the Court must dismiss the claim. ***The specific allegations here of state action regarding finding temporary shelter alternatives or moving a substantial portion of the population to a parking lot from public land does not rise to the level required by the stringent standard of deliberate indifference***.

250 F. Supp. 3d at 432 (citations omitted, emphasis supplied).

III. Many local governments, like Phoenix, have been proactively responsive to the needs of the unsheltered in their communities and would be unjustifiably constrained by a prohibition on remedial action during extreme heat.

Like Sacramento and other large cities and counties within the Ninth Circuit, Phoenix has implemented a comprehensive approach to addressing the

plight of the unsheltered in the community, frequently in partnership with other governmental agencies and non-profit organizations. In June 2020, the City Council approved a "Strategies to Address Homelessness" plan. *See* App. 3 ("Strategies to Address Homelessness" final report). The City has taken numerous actions since, including successful enhanced cleanups and engagements with Phoenix's unsheltered during summer months and amid days where the heat increased to well above 100 or even 110 degrees. Importantly, the City has not received any reports of unsheltered persons sustaining a significant heat-related injury or illness during these enhanced cleanups and associated relocation of individuals to temporary shelter.

Phoenix is justifiably concerned that, notwithstanding its own robust response to the homelessness crisis, a future court may follow the District Court's rationale in this case and improperly agree with a "state-created danger" doctrine claim under the Fourteenth Amendment alleging "foreseeable harm" due to the extreme heat in Phoenix. Such legal challenges could lead to a judicial order that requires the City to expend public resources not already allocated to this purpose by elected officials. This legal risk, of being faulted for any city action taken during excessively hot days, may also curtail the City's efforts to direct unsheltered persons to safer structured and temporary outdoor spaces that serve as a transition to permanent indoor housing. This concern is not unique to

Phoenix, as *amici's* members include many cities and counties that regularly experience extreme hot or cold temperatures.

In response to the pending competing lawsuits of *Brown* and *Fund for Empowerment,* Phoenix has and will continue to invest millions of dollars of taxpayer money to increase shelter capacity and provide resources to assist the unsheltered population. The Phoenix City Council has adopted strategies to address homelessness and assist private property owners in the downtown area.[12] One such strategy is to conduct enhanced deep cleanings of encampment areas, which have been ongoing since December 2022. Another is to close areas, especially those surrounding the HSC, to public camping after the deep cleaning. Closed areas are posted with "no camping" signs. Phoenix will endeavor to continue these efforts as part of its plan to fully comply with the Maricopa County Superior Court's September 20, 2023, Order entered in the *Brown* case.

Phoenix and other local governments must have the ability to remove tents from the sidewalk, and, as available, work with vulnerable populations to receive shelter and social services to address the underlying issues, whether substance abuse and addiction, mental health, disabilities, or other complicating factors. Some individuals may be service-resistant, preferring to live on the streets or otherwise avoid shelters, in which case there must be some ability to enforce

[12] *Strategies to Address Homelessness* (June 2020 Final Report), App. 3.

public camping laws, reserving law enforcement as a last resort to protect public property and public health and safety.

The Phoenix City Council established an Office of Homeless Solutions ("OHS") to oversee the construction of shelters, allocate funding and operational needs for shelters, and manage the litany of services provided to the homeless. OHS is a critical component of Phoenix' overall strategy to address homelessness. *See* CITY OF PHOENIX, https://www.phoenix.gov/solutions. "OHS has dedicated $140 million to homeless solutions since July 2021, with a significant portion of that funding going toward funding ongoing projects that will stretch into at least 2024." *Id.* The OHS website includes links with detailed information about Completed Projects (712 shelter beds added in 2022 and 2023), Upcoming Projects (790 shelter beds coming in 2024), Workforce Development, and Mental and Behavioral Health Services.

On September 13, 2023, OHS provided an update on the progress of their efforts to the Phoenix City Council's Subcommittee on Economic Development and Housing ("EDH"). The presentation described the block-by-block approach that has been undertaken by OHS since May 2023 to close streets to camping in the area around the HSC: "Staff from the City's Office of Homeless Solutions, HSC, Community Bridges, Inc. ("CBI") and other providers were available at each engagement effort to offer services including shelter and to assist anyone

who was unable to move their belongings on their own." Per the report, as of September 13th, "there have been eight enhanced engagement efforts completed. Staff engaged 259 individuals experiencing homelessness in the area over the span of these efforts. Of those engaged, 206 accepted indoor shelters or treatment programs, for a combined 80 percent acceptance rate." Per the report, "[t]here are approximately nine engagement efforts remaining to complete the area." Included as Appendix 4 are the agenda summary page from the September 13th EDH public meeting and the PowerPoint presentation for this agenda item.[13]

IV. Allowing and maintaining local control is the best strategy for solving homelessness in the United States.

Local governments like *amici's* members are making steady progress toward resolving the issue of homelessness in their communities, including areas like downtown Phoenix, but there remains much work to be done.[14] Homelessness is a complex problem with many moving parts. Each unsheltered person is an individual with unique needs, such as single parents with small children, the elderly or disabled, those suffering from mental health illnesses, or

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[13] CITY OF PHOENIX, Phoenix City Council Economic Development and Housing Subcommittee Meeting, YOUTUBE (Sept. 13, 2023), https://youtu.be/5LVjlecaA_o

[14] *See,* Helen Rummel, *Phoenix Estimates its Largest Homeless Encampment, "The Zone," Now Halfway Cleared,* ARIZ. REPUBLIC (Sept. 20, 2023), https://www.azcentral.com/story/news/local/phoenix/2023/09/20/phoenix-estimates-largest-homeless-camp-the-zone-halfway-cleared/70895405007/

those addicted to drugs and in need of substance abuse counseling. Thus, addressing homelessness is not a "one size fits all" proposition.

For this reason, decisions on how best to allocate limited public resources to solve this problem should be left to the informed discretion of local officials, not the courts. In this case, the District Court inappropriately substituted its judgment on this complex social issue for that of Sacramento in granting Plaintiffs' request for a preliminary injunction and preventing Sacramento from cleaning up the unsafe encampments that had been established on public property, including areas with Critical Infrastructure.

Amici urge this Court to overturn the District Court's decision and reject its application of the "state-created danger" theory, so cities and counties within the Ninth Circuit do not have their efforts to remediate homeless encampments and to address the underlying causes of homelessness stymied by the courts.

V. The District Court improperly granted the same relief as in *Martin v. City of Boise* and *Johnson v. City of Grants Pass.*

Plaintiffs below brought this action under 42 U.S.C. § 1983 alleging violation of the substantive due process clause of the Fourteenth Amendment against Sacramento for causing a "state-created danger" by removing homeless encampments during extreme heat. [Doc. 1]. However, the relief they sought by an injunction was an order "prohibiting the clearing of [ ] encampments unless and until all those impacted by such actions are provided with non-congregant,

accessible, safe, indoor accommodations pursuant to *Martin v. City of Boise*." *See Sacramento Homeless Union,* 617 F. Supp. 3d at 1187.

Even though the District Court correctly found "*Martin* has no bearing on the injunctive relief that Plaintiffs seek," *id.* at 1199, the court nonetheless entered a preliminary injunction substantively identical to the relief granted in *Martin* and *Grants Pass*:

> Based on the foregoing, the only injunctive relief Plaintiffs seek that the Court is inclined to grant is ***"prohibiting the clearing of . . . encampments unless and until all those impacted by such actions are provided with non-congregant, accessible, safe, indoor accommodations***. . . .
>
> Plaintiffs' Motion for Preliminary Injunction is GRANTED with respect to Plaintiffs' request to temporarily enjoin the City and all of its officers, agents, servants, employees, attorneys and all persons under their direction and control from clearing encampments belonging to the unhoused.

617 F. Supp. 3d at 1199-1200 (emphasis supplied).

Amici are concerned by the District Court's blurring of the lines between a claim for violation of the Cruel and Unusual Punishment clause of the Eighth Amendment and one for state-created danger under the Fourteenth Amendment. These are very distinct claims with different elements of proof, as the District Court acknowledged. *Id.* at 1199. *Amici* agree with Sacramento that this is not an Eighth Amendment case. *See* OB 15-16.

However, the text of the opinion (quoted above) leaves little doubt that the District Court believed that Sacramento should not be allowed to remove any encampments until it provided "non-congregant, accessible, safe, indoor accommodations" for every unsheltered person displaced, as was ordered in *Martin* and *Grants Pass*. The District Court did not think the "Safe Ground" locations were good enough and it went even further than *Martin* and *Grants Pass* by imposing additional requirements on the type of shelter that Sacramento must afford.

In *Martin* and *Grants Pass*, the injunction against the local governmental entity was based upon the Eighth Amendment's prohibition against Cruel and Unusual Punishment, because in those cases, the City of Boise and the City of Grants Pass, respectively, sought to enforce criminal and civil ordinances prohibiting camping on public property against certain unsheltered persons who had nowhere else to go. *See Martin,* 920 F.3d at 606-607; *Johnson v. City of Grants Pass,* 72 F.4th at 875-77. Here, Sacramento afforded an alternative to Plaintiffs when the city undertook to clear the unsanctioned encampments. Yet, by improperly applying the "state-created danger" doctrine, the District Court imposed an injunction against Sacramento similar to, and even more onerous than, the injunctions imposed and upheld in *Martin* and *Grants Pass*.

Consequently, regardless of the legal theory asserted in support of a claim (Eighth Amendment, the State-Created Danger doctrine under the Fourteenth Amendment, or some other theory), it now appears that no local government may undertake to remove or cleanup a homeless encampment. They must allow encampments to remain unless and until that local government is able to provide a non-congregant, accessible, safe, and indoor shelter alternative to every single unsheltered person affected, regardless if that person will accept the alternative. This would be an impossible standard for most local governments to meet and would further limit the ability of cities, towns, and counties to resolve the ongoing homelessness crisis.

CONCLUSION

Cities, towns, and counties within the Ninth Circuit have been struggling to walk a legal tightrope when it comes to remedying homeless encampments because of this Court's decisions in *Martin v. City of Boise* and more recently in *Johnson v. City of Grants Pass*. Local governments currently may not enforce laws prohibiting camping or sleeping upon public property unless those displaced are offered a shelter bed. Now, if the District Court's decision on appeal in this case is affirmed, it will become even more difficult for cities, towns, and counties, especially those that face extremes of hot and cold weather, to effectively deal

with the problems presented by having large homeless encampments within their communities even when alternative living arrangements are made available.

Decisions regarding how to best solve the problem of homelessness in any given community are best left to the informed discretion of local elected and appointed officials and professional staff. The federal courts are ill-equipped to make these public policy decisions; the courts are better suited to serving as constitutional scholars applying discernible rules of law when necessary.

For these reasons, *amici* City of Phoenix, IMLA, Cal Cities, the AZ League, and CSAC respectfully request that this Court reverse the decision of the Eastern District for California at issue.

RESPECTFULLY SUBMITTED this 25th day of September 2023.

JULIE M. KREIGH, CITY ATTORNEY

By * /s/ Ellen M. Van Riper*
Ellen M. Van Riper, Chief Counsel
Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1), Fed. R. Civ. App. P., I hereby certify that this Brief complies with the type-volume limitation set forth in Ninth Circuit Rule 32-1(a), Fed. R. Civ. App. P. and Rule 29(a)(5), Fed. R. Civ. App. P. This Brief contains 6,995 words, as confirmed by the word processing system used to prepare the Brief.

JULIE M. KREIGH, CITY ATTORNEY

By */s/ Ellen M. Van Riper*
Ellen M. Van Riper, Chief Counsel
Counsel for *Amici Curiae*

CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ *M. Elena Sandoval*