No. 20-55522

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANET GARCIA, ET AL.,

Plaintiffs-Appellees,

v.

CITY OF LOS ANGELES,

Defendant-Appellant.

On Appeal From the United States District Court
for the Central District of California
Case No. 2:19-cv-06182-DSF-PLA | The Honorable Dale S. Fischer

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, ASSOCIATION OF IDAHO CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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Under Rules 26.1 and 29(a)(4)(A) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* hereby states that *amici* League of California Cities, California State Association of Counties, Association of Idaho Cities, and International Municipal Lawyers Association, are all nonprofit corporations that do not issue stock and are not subsidiaries of any publicly owned corporation.

Under Rule 29(a)(4)(E), counsel for *amici curiae* hereby state that (1) no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting the brief.

Dated: October 28, 2021

s/ *Theane Evangelis*
Theane Evangelis

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The League of California Cities (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.

The California State Association of Counties 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.

The Association of Idaho Cities (AIC) was founded in 1947 and is a nonpartisan, nonprofit corporation that serves the State of Idaho's 199 cities. AIC's voting membership consists of members of Idaho's city governments.

The International Municipal Lawyers Association has been an advocate and resource for local-government attorneys since 1935. Owned 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 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.

INTRODUCTION

In deciding that a broadly worded severability clause was essentially meaningless and unenforceable, the panel majority not only got an important question of California law wrong, but did so in a context that could hardly be more serious. The majority's opinion leaves the City of Los Angeles powerless to remove the boats, RVs, mattresses, and other debris crowding its streets, sidewalks, and parks. The decision will serve to exacerbate the homelessness crisis plaguing California and neighboring states, as it will leave local governments guessing what tools can be used to keep their public areas clear and safe for their residents, and will provide fodder for additional challenges to ordinances designed to protect public health and safety like the one the majority has invalidated in this case.

Yet the problem with the majority's decision is far broader than just the homelessness crisis, as it upends the established approach to assessing severability of California laws writ large. Before now, it was settled in California that where, as here, a severability clause is included in a legislative enactment, there is a "presumption in favor of severance." *Cal. Redevelopment Ass'n v. Matosantos*, 53 Cal. 4th 231, 270 (2011).

Here, however, the majority decided that presumption was overcome by the after-the-fact statements of executive officials and speculation that the City of Los Angeles could not possibly find a place to store the many large items clogging its public areas—even though the City has thousands of vacant lots and has significant financial resources. And this judicial second-guessing of the City's express preference in favor of severability threatens to render the second-largest municipality in the country powerless to address the large items littering its public spaces—and the many safety and public-health concerns they present.

The Court should grant the City's petition for rehearing or rehearing en banc.

ARGUMENT

I. The Majority's Decision Rests on a Flawed Approach to Severability.

The City of Los Angeles has been trying for years to do something about the problem of personal property cluttering streets, sidewalks, parks, and other public spaces. A decade ago, the City passed an ordinance authorizing the destruction of personal property found on or next to a sidewalk. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1026 (9th Cir. 2012). This Court affirmed an injunction against that

ordinance's enforcement, concluding it likely infringed the property and due-process rights of homeless people. *Id.* at 1027–33.

In response to this Court's ruling, the City passed a new version of the ordinance, aiming to "balance the needs of the residents and public at large to access to clean and sanitary public areas," on the one hand, "with the needs of the individuals, who have no other alternatives for the storage of personal property, to retain access to a limited amount of personal property in public areas," on the other. L.A. Mun. Code § 56.11(1). The new ordinance is far narrower than the prior ordinance, as it targets only "Bulky Items"—mattresses, sofas, large appliances, and the like. *Id.* § 56.11(2)(c). It provides that the City "may remove and may discard any Bulky Item" stored in a public area. *Id.* § 56.11(3)(i). And to head off another decision like *Lavan*, the City included a severability clause, which provides, in the broadest possible language, that "[i]f any subsection, sentence, clause or phrase of this article is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance." *Id.* § 56.11(12).

Despite these efforts, the City's ordinance has once again been invalidated. The panel majority in this case has now held that because the ordinance contains the words "and may discard," it is unenforceable in its entirety. As the majority sees it, that phrase is "functionally inseparable" from the rest of the ordinance "in light of the structure of the ordinance" and "in practice." Opn. at 20. It is wrong on both counts.

The majority begins with a flawed interpretation of the ordinance's clear text. The words "may remove and may discard" have a clear meaning: The City may remove property and—separately—may also discard it. But, as Judge Bennett observed in his dissent, the majority decided that those permissive words actually create a "mandate"—that "may discard" really means "must discard." Opn. at 34 (Bennett, J., dissenting).

This misreading depends on the majority's view that "remove" and "discard" must amount to a "'unitary whole'" because the ordinance doesn't tell City employees what to do with Bulky Items after removing them. Opn. at 17–18. But the ordinance does just that: they are to "move Personal Property"—which is defined to include "any tangible property"—"to a place of storage." L.A., Cal. Mun. Code § 56.11(2)(j),

(5)(a). That simple commandment to store removed property resolves all of the majority's concerns about the meaning of the ordinance if the "may discard" language is excised.

No more persuasive is the majority's conclusion that the "may discard" language is "functionally inseparable in practice" from the rest of the ordinance. Opn. at 20. It depends on both a legal error and a factual one. The legal error is that the majority, citing *Acosta v. City of Costa Mesa*, 718 F.3d 800 (9th Cir. 2013), decided the severability question by looking to the statements of executive officials about the City's ability to store Bulky Items. Opn. at 20–21. But the purpose of the severability inquiry is to determine whether the *City Council* would have wanted the rest of the ordinance to be enforced if some portion of it were held invalid. *E.g.*, *Nat'l Broiler Council v. Voss*, 44 F.3d 740, 748 (9th Cir. 1994) (severability analysis under California law "focuses the inquiry on legislative intent"). One cannot answer that question by examining after-the-fact statements by officials in another branch of government altogether. In dissent, Judge Bennett wonders whether the majority has misread *Acosta*. Opn. at 30 n.5. The majority says it has not, and believes that *Acosta* required it to examine post-hoc executive

commentary to divine legislative intent. *Id.* at 21 & n.12. Whether that is a correct reading of *Acosta* (and a proper approach to assessing the severability of California statutes and ordinances) is yet another reason to rehear this case en banc.

But even if the majority were right on the law, it would still be wrong on the facts. As the majority sees it, the fact that the City has not yet dedicated space to the storage of Bulky Items means that it could not possibly do so. *Id.* at 21. That's hard to square with basic facts about the City of Los Angeles. Spanning about 500 square miles, it is one of the largest cities in the United States by land area. And the City owns much of that land—over 7,500 properties. Property Portal, L.A. Controller's Office, *available at* https://lacontroller.org/data-stories-and-maps/propertypanel/. Some of the parcels are massive, including a 17,000-acre site in Palmdale "that was acquired for a never-built airport." Frances Anderton, *Could there be new uses for city-owned land?* (KCRW, Jan. 17, 2018), *available at* https://www.kcrw.com/culture/shows/design-and-architecture/could-there-be-new-uses-for-city-owned-land. Commentators frequently bemoan the fact that the City only recently began even *tracking* these landholdings, much less putting them to use.

See, e.g., Michael H. Kelly, *Op-Ed: Why does so much city-owned land sit idle in Los Angeles?* (L.A. Times, Jun. 17, 2018), *available at* https://www.latimes.com/opinion/op-ed/la-oe-kelly-los-angeles-city-owned-land-20180617-story.html (lamenting lack of "long-term strategy for using and leveraging L.A.'s incredible wealth of city-owned land to meet our needs").

No decision of this Court should be premised on the idea that one of the largest cities in the world, with an extensive property portfolio and significant financial resources, lacks the "storage space" for large items that have been left on its streets, sidewalks, parks, and other public spaces. Opn. at 21.

II. The Majority's Approach to Severability Will Stretch Far Beyond This Case.

If allowed to stand, the majority's decision will impose unnecessary costs on communities and curtail local governments' ability to legislate for the benefit of their residents. The practical effects of the majority's decision will continue to literally spill onto the streets, sidewalks, and other public areas across the Circuit, as it creates uncertainty over what tools can be used to address the ever-widening homelessness crisis.

Severability is an important tool that allows democratically elected legislative bodies to address a broad range of issues without worrying about whether a single invalid provision will tank the entire legislative scheme. For that reason, courts in California have long recognized a presumption of severability. *See Matosantos*, 53 Cal. 4th at 270 (2011); *Hotel Emps. & Rest. Emps. Int'l Union v. Davis*, 21 Cal. 4th 585, 613 (1999); *Hollywood Park Land Co., LLC v. Golden State Transportation Fin. Corp.*, 178 Cal. App. 4th 924, 941–42 (2009). Severance is permissible, in fact, even "despite the absence of a formal severance clause." *Legislature v. Eu*, 54 Cal. 3d 492, 535 (1991). And federal courts have also long recognized that, "[a]t least absent extraordinary circumstances," courts "should adhere to the text of [a] severability . . . clause," which "leaves no doubt about what the [legislative body] wanted if one provision of the law were later declared unconstitutional." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2349 (2020) (plurality op.).

Here, the City included a broadly worded severability clause in the ordinance, signaling its preference that the ordinance should survive the invalidation of any specific provision. L.A. Mun. Code § 56.11(12). But

the majority gave no effect to that clause, incorrectly deciding that the "may discard" language meant the entire ordinance had to go. If allowed to stand, this wrongheaded severability analysis will produce negative effects well beyond the City's inability to enforce this particular ordinance.

First, application of the majority's severability analysis to other cases would diminish democratic accountability. Local governments can be directly held to account by their residents through regular elections and public meetings, among other things. Judges, especially federal judges, are not subject to the same pressures. When a court erroneously strikes down an entire ordinance, rather than simply severing an invalid provision—as the majority did here—the court is essentially adopting a legislative scheme (i.e., the *absence* of legislation), which the city or county council purposefully rejected by enacting the original law with a severability provision. *See Am. Ass'n of Pol. Consultants*, 140 S. Ct. at 2349 (plurality op.).

That is what occurred here. The majority decided that, because the City may not *destroy* Bulky Items cluttering public property under this Court's existing precedent, the entire ordinance governing Bulky Items

left in public spaces across Los Angeles was invalid. In doing so, the majority erroneously rejected the reasoned decision of a democratically elected body that it was preferable to give the City *some* tools to address the problem, even if other such tools were found to be invalid. *See S. Bay Pentecostal Church v. Newsom*, 140 S. Ct. 1613, 1613–14 (2020) (Roberts, C.J., concurring in the denial of application for injunctive relief) ("Where . . . broad limits are not exceeded," [states] should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people." (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 545 (1985)).

Second, the majority's decision will impose costs on communities and result in legislative inefficiency. It does not help the City to know that it is "free to draft a lawful version" of the ordinance. Opn. at 23. The immediate problem is that such drafting can't happen overnight. As Justice Douglas once noted, "[l]egislative power . . . is slow[] to exercise," and necessarily involves "delay while the ponderous machinery of committees, hearings, and debates is put into motion." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 629 (1952) (Douglas, J.,

concurring). When a court erroneously strikes down an otherwise valid law based on a single invalid provision, there will necessarily be a period of time—potentially a significant period, given the numerous pressing issues facing any legislative body—in which the issue sought to be addressed by the law will go unaddressed. *See, e.g.*, *Aroostook Band of Micmacs v. Ryan*, 484 F.3d 41, 62 & n.27 (1st Cir. 2007) (rejecting notion that legislature "must have preferred a void in the law" that might create "'a chaotic hiatus'" before a new law can be passed). The cost of this legislative gap will be borne directly by the community.

The majority's decision will also encourage needless complexity in the laws that do make it through that long process. City and county councils, keen to avoid the prospect of losing an entire legislative scheme whenever one portion of it is struck down, will have every incentive to pass a large number of piecemeal, single-provision ordinances. In addition to cluttering the statute books, this would cause confusion among both the public and those tasked with implementing and enforcing the laws. City and county councils may further shy away from adopting creative solutions to problems faced by their communities, or from testing out multiple means of accomplishing a legislative goal, for fear that one

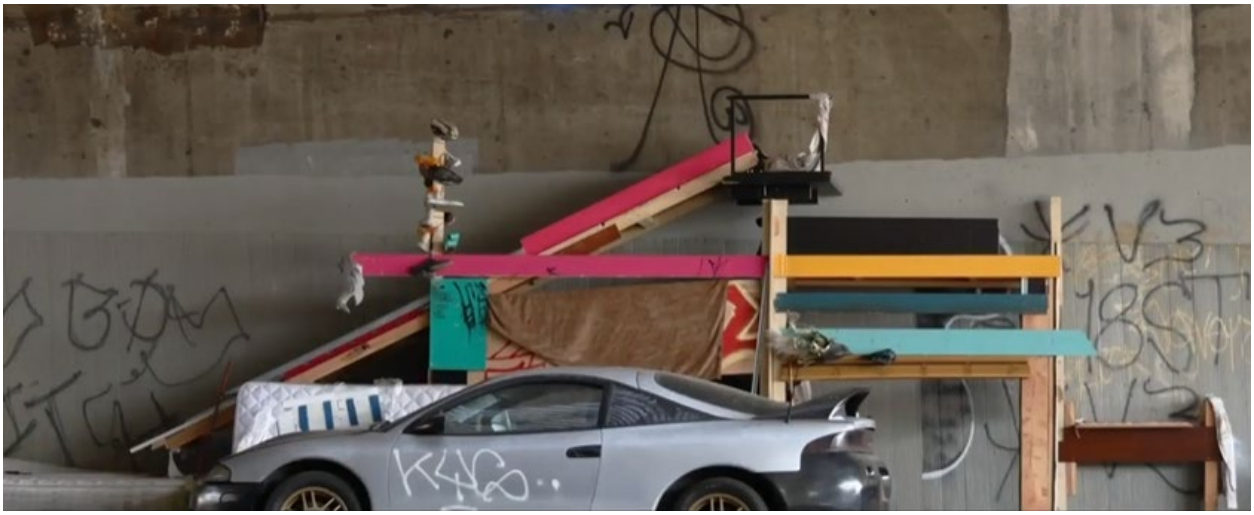
provision could bring down the entire law—effectively stopping policy innovation in municipal laboratories of democracy.

The simpler and better answer is that, in cases like this one, a severability clause means what it says: The offending language should be severed and the rest of the law preserved, absent a very good justification for departing from the presumption of severability.

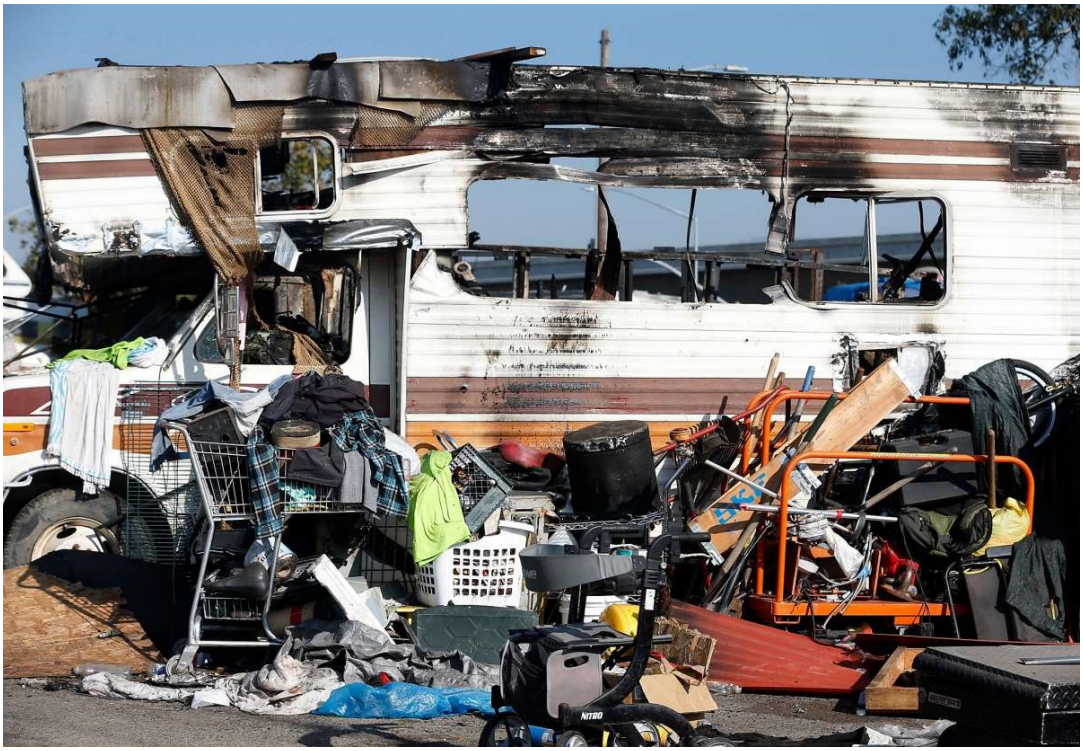
III. The Majority's Decision Is Yet Another Obstacle to the Efforts of Local Governments to Address the Effects of Spreading Encampments.

The harm that the majority's decision is likely to cause is not just abstract. It will be felt in nearly every community across the Circuit.

"[A]s the [homelessness] crisis increases in Los Angeles, so too does the number of Bulky Items stored in the city's streets, parks, and public spaces." Opn. at 37 (Bennett, J., dissenting). The fact is that public spaces across the West, long known for their beauty, are being overwhelmed by the refuse and clutter generated by the homelessness crisis. Amici can confirm the unfortunate accuracy of the dissent's characterization of the "loss of access to public parks, threats to [public] safety, and the general degradation of the[] quality of life" caused by the homelessness crisis. *Id.* at 37–38.



(Above image from Joel Grover & Josh Davis, *"McMansions" for the Homeless: Some LA Tents Are So Big They Have Showers, AC and Even Tiki Bars* (NBC Los Angeles, Nov. 11, 2020), *available at* https://www.nbclosangeles.com/investigations/mcmansion-tents-homeless-showers-kitchens-los-angeles-streets-hollywood-venice/2458552/.)



(Above image from Phil Matier, *250 Tons of debris pulled from Oakland homeless camp – that's just for starters* (San Francisco Chronicle, Nov. 5, 2019), *available at* https://www.sfchronicle.com/bayarea/philmatier/article/250-tons-of-debris-pulled-from-Oakland-homeless-14812171.php.)

(Above image from Daniel Trotta, *L.A. develops homelessness strategy, but does it have political will?* (Reuters, April 22, 2021), *available at* https://www.reuters.com/world/us/la-develops-homelessness-strategy-does-it-have-political-will-2021-04-22/.)

Bulky Items blocking sidewalks are not just an eyesore. They threaten public safety. Pedestrians, including those confined to wheelchairs, are shunted into streets where they might be hit by cars. Trash piles up and sidewalks go uncleaned because local government officials cannot navigate around the obstacles. And cases of infectious disease mount—including "some that ravaged populations in the Middle

Ages," such as typhus. Anna Gorman, *Medieval Diseases Are Infecting California's Homeless* (The Atlantic, Mar. 8, 2019), *available at* https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosis-medieval-diseases-spreading-homeless/584380/. The clutter also does nothing to help the growing problems of fires associated with homeless encampments. Over the last few years, there have been 24 a day in Los Angeles, on average, accounting for more than half of all fires requiring a response from the Los Angeles Fire Department. Doug Smith, *24 fires a day: Surge in flames at L.A. homeless encampments a growing crisis* (L.A. Times, May 12, 2021), *available at* https://www.latimes.com/california/story/2021-05-12/surge-in-fires-at-la-homeless-encampments-growing-crisis.

Although state and local governments across the Circuit are making valiant efforts to alleviate the dangerous consequences of growing encampments, while addressing the homelessness crisis's root causes, they cannot do so effectively with their hands tied behind their backs. As Chief Justice Roberts recently explained, "[o]ur Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.'" *S.*

Bay Pentecostal Church, 140 S. Ct. at 1613 (Roberts, C.J., concurring in the denial of application for injunctive relief) (quoting *Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905)). And the "'States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.'" *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996); *see also Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901) (states and local governments have a "universally acknowledged power and duty to enact and enforce all such laws . . . as may rightly be deemed necessary or expedient for the safety, health, morals, comfort, and welfare of its people").

In fact, the community-caretaking exception to the Fourth Amendment's warrant requirement specifically provides that police may seize property without a warrant in the service of "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The removal of "Bulky Items" from public streets must fall under this exception, because courts have held that much more significant seizures—of vehicles, personal property from public streets, and even personal property from inside

one's home—are all at least sometimes permitted. *See South Dakota v. Opperman*, 428 U.S. 364, 368–69 (1976) (impounding parked vehicles); *Mark v. Trokey*, 55 F. App'x 817 (9th Cir. 2003) (seizure of merchandise stored on public sidewalk); *Rodriguez v. City of San Jose*, 930 F.3d 1123, 1137–41 (9th Cir. 2019) (seizure of firearms from home of man possibly suffering mental-health episode).

But instead of addressing the constitutionality of the seizure of Bulky Items left in public spaces, the majority adopted a cramped severability analysis and decided simply to send the City back to the drawing board without any guidance on the limits of permissible legislation. This lack of guidance is especially problematic given the onslaught of litigation that state and local governments face whenever they try to formulate sensible policies in response to the homelessness crisis and the proliferation of dangerous encampments in public areas. Even settlements have not provided the certainty necessary to advance the public interest in this area, as new plaintiffs continually crop up to

challenge any negotiated status quo.[1] The resulting uncertainty over what tools can be used to respond to the homelessness crisis will hamper local governments' efforts to alleviate the disastrous impact of the crisis on communities across the Circuit.

CONCLUSION

The Court should grant rehearing, or rehearing en banc, to correct the majority's incorrect severability analysis—or, if necessary, to certify the question to the California Supreme Court.

Dated: October 28, 2021

Respectfully submitted,

s/ *Theane Evangelis*
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[1] For example, the City of Los Angeles recently reached a settlement in *Mitchell v. City of Los Angeles*, No. 2:16-cv-01750-SJO-JPR (C.D. Cal.), a case challenging the City's seizure and destruction of property located in homeless encampments in the Skid Row area of downtown Los Angeles. That settlement allowed the City to continue removing property (including Bulky Items) located in public areas. *See id.*, Settlement Agreement, Dkt. 119 (May 31, 2019) at 9–10. But several months later, the same counsel who negotiated the *Mitchell* settlement filed this case on behalf of a different group of plaintiffs, challenging *any* removal of Bulky Items by the City.

CERTIFICATE OF COMPLIANCE

Under Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(C), as well as Circuit Rule 29-2(c)(2), I certify that the foregoing *amici curiae* brief is proportionately spaced, contains 3,266 words, and is prepared in a format, type face, and type style that complies with Federal Rule of Appellate Procedure 32(a)(4)-(6).

Dated: October 28, 2021

s/ *Theane Evangelis*
Theane Evangelis

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief 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 October 28, 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: October 28, 2021

s/ *Theane Evangelis*
Theane Evangelis