IN THE SUPREME COURT

STATE OF UTAH

DANIELLE BARRANI; KADRI BARRANI; LIESA COVEY; SCOTT EVANS; JIM GRISLEY; JUAN GUTIERREZ; CLOTILDE HOUCHON; DAVID IBARRA; and RANDY TOPHAM, individuals and Utah entities, Plaintiffs/Appellants, v. SALT LAKE CITY, a Utah municipal corporation, Defendant/Appellant.	Supreme Court No. 20240346-SC On Appeal from the Third Judicial District Court Hon. Andrew H. Stone, Judge No. 230907360

BRIEF AMICUS CURIAE OF GOLDWATER INSTITUTE IN SUPPORT OF PLAINTIFFS/APPELLANTS

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INTEREST OF AMICUS CURIAE[1]

The Goldwater Institute (GI) was established in 1988 as a public policy and research foundation devoted to advancing the principles of limited government and constitutional protections. Through its Scharf-Norton Center for Constitutional Litigation, GI litigates cases and files amicus briefs when its or its clients' objectives are directly implicated. Among GI's priorities is the defense of property owners against the malfeasance of local governments—relevantly here, the refusal of cities to enforce laws against public camping, pollution, etc., relating to homeless encampments. Accordingly, GI filed amicus briefs in *Johnson v. City of Grants Pass*, No. 23-175, 2024 WL 3208072 (U.S. June 28, 2024), and *Brown v. City of Phoenix*, No. CV 2022-010439, 2023 WL 8524162 (Ariz. Super. Sep. 20, 2023). Given its history and experience regarding these issues, GI believes its perspective will aid this Court in considering this case.

SUMMARY OF ARGUMENT

The District Court erred in dismissing Plaintiff's complaint on the theory that "'a duty to all is a duty to none.'" Opinion at 9 (quoting *Lamarr v. Utah State Dep't of Transp*., 828 P.2d 535, 539 (Utah Ct. App. 1992)). Whatever appeal that slogan may have, it ignores the fact that nuisance law inherently operates on a spectrum, or as a matter of degree, rather than as a matter of hermetically sealed logical boxes. In Justice Sutherland's words, "[a] nuisance may be merely a right thing in the wrong place." *Vill. of Euclid v. Ambler Realty*

[1] Counsel for all parties received timely notice of the filing of this brief pursuant to Rule 25(a), and consented thereto pursuant to Rule 25(b)(2). No party or counsel authored the brief in whole or part, and neither they nor anyone else contributed any money intended to fund its preparation or submission.

Co., 272 U.S. 365, 388 (1926) (citation omitted). What's more, duties can originate through a defendant's awareness that harm is occurring, coupled with a refusal to do anything about it. *See, e.g., Peterson v. San Francisco Cmty. Coll. Dist.*, 685 P.2d 1193, 1196 (Cal. 1984).

The duty test established in *B.R. ex rel. Jeffs v. West*, 275 P.3d 228 (Utah 2012), weighs whether, as a matter of principle, the likelihood of harm from the City's (in)action is sufficiently high as to cross the line of reasonableness; whether the City's in the best position to take precautions against that harm, and whether there are good policy reasons to exempt it from the duty it would otherwise owe. *Id.* at 235–37 ¶¶ 25-31. Here, the answer to the first two questions is yes; to the third, no. The property in question is City-owned; the City is using it unreasonably—violating state and City law—and only it can prevent the injuries it knows are occurring. Nor are there good policy reasons for excusing it from its legal responsibilities.

No duty arose in *Lamarr* because there was no basis for the City to think the plaintiff was in any different position than the general public. 828 P.2d at 540. But here, the City is deliberately declining to enforce the law—choosing to allow illegal public camping on its property—a permission that is so open and notorious that it has become *authorization* and *participation*, and the City knows of specific harms to the Plaintiffs. Thus, this case involves no abstract or inchoate "duties to all/none." Rather, the City has the same clear, specific duty as all other property owners to avoid committing or permitting nuisances on its land.

The court below said that because the City "is effectively an adjoining landowner to every resident," Opinion at 10, it cannot have a duty to abstain from nuisances. That's perverse: one who owns more property has a *greater*, not a lesser, obligation to act reasonably. Nor has such broad immunity for cities ever been the law in Utah or elsewhere. Also, it contradicts this Court's holdings in cases like *Bingham v. Roosevelt City Corp*., 235 P.3d 730, 746–48 ¶¶ 60–68 (Utah 2010), and *Colman v. Utah State Land Bd*., 795 P.2d 622, 626–27 (Utah 1990), that government *can* be liable, in its capacity as a property owner, for damage to adjoining owners caused by actions on its own land. *See also Husband v. Salt Lake City*, 69 P.2d 491, 496 (1937) ("A municipality … does stand … in the same position as an individual in regard to its liability for injuries resulting from a nuisance of its own creation.").

Here, as in other cases of government-caused harms, the court's focus should not be on "artificial distinction[s]" but "on the real concern—'whether a governmental entity, like individuals and private entities, should be liable for an injury inflicted by it.'" *Thomas v. Clearfield City*, 642 P.2d 737, 738 (Utah 1982) (citation omitted). And the answer is that the City does have such a duty, and should be held liable for its breach.

ARGUMENT

I. The government has a duty not to commit nuisances.

Government as a property owner has the same legal obligations as other property owners: to refrain from nuisances that harm others. *See Husband*, 69 P.2d at 497 ("We see no good reason why the immunity of a municipality from liability for injuries inflicted in the exercise of its governmental functions should be extended to give immunity where the

injuries arise out of conditions created or maintained by the municipality amounting to a nuisance.").

Obviously, any private landowner who allowed or encouraged people to congregate on her land and engage in nuisance activities—including violations of Utah's laws against the illegal discharge of sewage[2]—would be liable to neighboring property owners for the harm caused. *Cf. Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs. in Ariz.*, 712 P.2d 914 (Ariz. 1985) (shelter constituted nuisance where it attracted congregation of vagrants); *Packett v. Herbert*, 377 S.E.2d 438 (Va. 1989) (car wash where customers engaged in lewd and disruptive behavior was actionable nuisance); *see also Steffensen-WC, LLC v. Volunteers of Am. of Utah, Inc.*, 369 P.3d 483, 487 ¶ 23 (Utah App. 2016) (acknowledging without deciding plausibility of similar nuisance claim). The question here is whether the City should be treated differently, just because it has deliberately chosen to let people live in its parks or on other City-owned land, in violation of its anti-camping ordinance and Utah's public nuisance statute.[3]

[2] Utah Code § 19-5-107(1)(b) defines the discharge of a pollutant which constitutes a menace to public health as a public nuisance.

[3] The court below expressed concern about "refer[ing] to unsheltered people as constituting a 'nuisance'." Opinion at 2 n.2. GI does not claim that people are a nuisance *per se*, but that the noise, odors, garbage, crimes, and other artifacts of the manner in which the unlawful campsites are operated is the nuisance. By inviting camping without providing sufficient facilities to abate the garbage and odors, safely collect and dispose of human waste, and mitigate noise and criminal behavior, the City creates a nuisance. This is true whether the campers are sheltered or not. Burning Man is held in the middle of the desert, far from businesses and residences, for a reason. See www.burningman.org

The court below said yes, finding that the City owed Plaintiffs no duty, because the duty in question is owed to the general public, and "a duty to all is a duty to none." Opinion at 9 (quoting *Lamarr*, 828 P.2d at 539). But (1) this clever-sounding phrase is more misleading than true, and (2) the concept is inapplicable here, because Plaintiffs are not asserting the kind of general obligations *Lamarr* was concerned with; they are asserting "special damages … over and above the public injury." *Padjen v. Shipley*, 553 P.2d 938, 939 (Utah 1976).

The idea that the government owes a "duty to none" is literally false—and even offensive.[4] On the contrary, the government in a constitutional democracy *certainly* owes a duty to taxpaying citizens, including Plaintiffs. The Utah Constitution declares that "all free governments are founded on their authority *for their equal protection and benefit*." Utah Const. art. I § 2 (emphasis added); *see also id.* art. I § 26 (everything in the Constitution is "mandatory" unless otherwise provided). These commands should not be treated like empty words.

As this Court explained in *Jeffs*, 275 P.3d at 234–35 ¶ 23, and reiterated in *Scott v. Universal Sales, Inc.*, 356 P.3d 1172, 1181 ¶ 29 (Utah 2015), the question of duty is resolved in an abstract and "categorical" way—in terms of policy and the risk of harm *in principle*. The *Jeffs* Court was scrupulous about setting out each step of the analysis. With respect to duty, courts first ask "whether a category of cases includes individual cases in

[4] The court below found it "problematic" to refer to the pollution, crimes, and other threats caused by a permanent encampment of the homeless as "constituting a 'nuisance.'" Opinion at 2 n.2. How much more problematic to assert that the government of a democracy owes a duty to nobody!

which the likelihood of some type of harm is sufficiently high that a reasonable person could anticipate a general risk of injury to others." 275 P.3d at 235–36 ¶ 27. Then they ask "whether the defendant is best situated to take reasonable precautions to avoid injury." *Id.*at 236 ¶ 30. Finally, they consider whether there are "policy concerns" that would justify "a categorical decision to withdraw a duty of care across the broad range of [negligence] cases." *Id*. at 237 ¶ 32. *See also Ipsen v. Diamond Tree Experts, Inc*., 2020 UT 30, ¶ 9 ("The existence of a legal duty reflects this court's conclusion, 'on the basis of the mores of the community,' that 'the sum total' of the policy considerations say that 'the plaintiff is [or is not] entitled to protection.'" (citations omitted)).

A categorical "duty to none" rule fails this disciplined analysis. It's obvious that a city's failure to abide by nuisance principles is likely to harm neighbors, and that this risk is sufficiently serious that a reasonable owner would endeavor to comply with those principles. It's even more obvious that only the City can take those steps, since the property in question is City-owned, and the City is responsible for policing. The sole remaining question is therefore whether policy considerations justify categorically exempting the City from the responsibilities other property owners bear.

The answer to that is plainly no. The people of Salt Lake City (and Utah) have already said what public policy is on this matter. They have done so through the enactment of laws against public camping, pollution, etc., and public nuisances in general. *See, e.g.*, Utah Code § 76-10-803; Salt Lake City Code 11.12.080. They have a legitimate expectation that these laws will be respected and enforced, and that expectation is *more* legitimate with respect to the government itself abiding by the law.

In fact, the "duty to none" rule is what most citizens would regard as shocking—because it hearkens back to a conception of sovereignty that this Court rejected in *Duchesne Cnty. v. State Tax Comm'n*, 140 P.2d 335, 339 (Utah 1943) ("Under the American theory of government … government is not a thing imposed upon the people from above.").

It's revealing that *Lamarr*, on which the court below relied—and which, incidentally, this Court has never endorsed—based its "duty to none" rule on *Ferree v. State*, 784 P.2d 149 (Utah 1989), which said the state owed no duty of care to a man killed by an inmate who was released from a mental hospital, because there was no evidence that the state was aware of any risk to the plaintiff specifically. *Ferree* acknowledged that "[if] officials have good reason to believe that a particular person may be jeopardized by the release of a prisoner … the result may be otherwise," *id.* at 152, and, in fact, not only was the result otherwise in *Scott*, but *Scott*—which involved quite similar facts—overruled *Ferree*'s conclusion that the state had to know of a threat to a *particular* person before any duty could arise. Instead, *Scott* followed the *Jeffs* analysis, 356 P.3d at 1177–81 ¶¶ 19-32, and concluded that *Ferree* had erred by "focus[ing] on specific factual considerations to determine whether a duty exist[s]," when instead the focus should be on "the parties' relationship in broad categorical terms." *Id.* at 1181 ¶ 30. Applying that proper, categorical analysis, *Scott* found that the state *did* have a duty, in part because although the government "had no legal relationship with Ms. Scott, it did have a custodial relationship with her attacker," and the government, "not potential victims," was "best situated to bear the loss associated with [the] injury [Ms. Scott experienced]." *Id.* at 1182 ¶ 34.

The point is that government *does* bear duties—and that the "duty to none" idea is indefensible in categorical terms, because it either reflects the notion that the City is above the law—which obviously it is not—or a policy judgment that cities should be *categorically* exempt from the duties other property owners owe their neighbors, which is contrary to both the state statutes and city ordinances.

II. Properly understood, *Lamarr* doesn't bar liability.

That, however, does not appear to be what the *Lamarr* court really meant to say. Rather, it was saying that some kinds of duties are too general to be enforced with the fine instruments of tort law. These are sometimes called "imperfect obligations." *Cf. Manwill v. Oyler*, 361 P.2d 177, 178 (Utah 1961); *Larsen v. Daynes*, 122 P.2d 429, 431 (Utah 1942). And this idea reflects the long-accepted tort law principle that duties must be duties *to* someone in order to make any sense. Simply put, the reason *Lamarr* found no duty was because there were no facts giving rise to a duty—nothing to demonstrate knowledge of any specific kind of risk, or to prove whether the city was or wasn't in a position to take precautions. Instead, the plaintiff relied on an entirely general "duty to 'control' the transient population," 828 P.2d at 538—a non-specific law-enforcement duty, which was not based on facts or circumstances relating to him specifically. *See id*. at 540.

That's why *Lamarr*'s discussion of Utah's Sidewalk Construction Act is important. *See id.* at 538. The court said that Act imposed no statutory duty on the city on which a negligence claim could be based—and then proceeded to discuss the public duty doctrine. Had there *been* such a statutory duty, the outcome would likely have been different.

Here, there *is* a statutory and common-law duty—one that should not be confused with the generalized law enforcement duty discussed elsewhere in *Lamarr*. Utah Code § 76-10-803, the common law of Utah, and the City's own ordinances, oblige it to maintain its parks and other lands free of nuisances. That duty—which is the sort of statutory duty missing in *Lamarr*—is owed to adjacent property owners and others "peculiarly affected or injured by the nuisance," *Startup v. Harmon*, 203 P. 637, 640 (Utah 1921). It's *categorically* different from general policing duties. That means *Lamarr*'s "duty to none" idea is (a) just not applicable to a tort claim based, like this one, on a *specific* duty, and (b) does not justify categorically exempting the City from the obligations all property owners must bear.

The same reasoning led this Court to hold that the government *does* owe a duty of care with respect to high-speed chases of fleeing suspects. *Day v. State ex rel. Utah Dep't of Pub. Safety*, 1999 UT 46. In doing so, it rejected reliance on *Lamarr*, because there was "[no] statute [in *Lamarr*] that imposed a duty of care on the government employee with respect to others in the particular circumstances," and because in *Lamarr* the city "[was] not, as here, acting in a continuous manner that created a direct, obvious, and imminent hazard to third persons that could have been obviated by … ceasing the conduct creating the risk." *Id.* at 1179 ¶ 23. Here, as in *Day*, there are statutes in place that prohibit the

conduct (i.e., public nuisance) and the city *is* acting in a continuous manner that creates an obvious risk of which it is aware, and which it can obviate by ceasing its wrongful conduct.[5]

What's more, courts have often held that the "public duty" rule does not apply when "a private person would be liable to the plaintiff for the acts that were committed by the government," *Kent v. City of Columbia Falls*, 350 P.3d 9, 17 ¶ 39 (Mont. 2015), or where the government itself creates the condition that gives rise to the dispute. *Shapiro v. City of Worcester*, 982 N.E.2d 516, 526 (Mass. 2013). Here, a private owner would be liable for nuisance under these facts, and the City has created the condition that harms the plaintiffs. What's more, the public duty rule exists "to ensure that governments are not saddled with *greater* liability than private actors," 18 McQuillin, *The Law of Municipal Corporations* § 53:21 (3d ed. 2018) (emphasis added)—but the liability here would be the *same* as that owed by a private actor. The public duty rule therefore cannot shield the City.

III. There's no policy justification for exemption.

Whether the government owes a duty is decided by considering "the policy [question of whether] … holding the entity liable for a breach of this duty would cause [the government] to be 'mired hopelessly in civil lawsuits ... for every infraction of the law.'" *Cope v. Utah Valley State Coll.*, 2014 UT 53 ¶ 12 (citation omitted). Nuisance, however, is a longstanding common law concept that Utah courts have employed since territorial

[5] Alternatively, the City can abate the nuisance in another fashion. As this brief is being finalized on July 23rd, downtown Salt Lake City is filling with people leaving their homes to spend the night camping on the best positions to see the Days of '47 Parade. The City has distributed portable toilet facilities and trash collection bins in anticipation of their presence.

days, and recognizing that cities bear the usual obligations with respect to the properties they own won't lead to a "hopeless mire" any more than does the liability private owners face. Cities have been traditionally subject to nuisance liability, *see, e.g.*, *Brower v. New York*, 3 Barb. 254, 254 (N.Y. Sup. Ct. 1848) ("the city … has no more right to erect and maintain a nuisance, on its lands, than a private person possesses"), and in Utah since at least *Kiesel & Co. v. Ogden City*, 30 P. 758, 759 (Utah 1892). There's no reason to think Plaintiffs' nuisance argument would open the floodgates.

The trial court said otherwise because "the City is effectively an adjoining landowner to every resident," Opinion at 10, which it thought meant the Plaintiffs' nuisance claims were just a general duty argument in disguise. But that's incorrect.

First, the City may own many properties, but that cannot exempt it from the duty to maintain those properties. On the contrary, the owner of more property has a *greater* obligation. It would be perverse to say that because a defendant holds *much* land, throughout a large portion of the community, she's *exempt* from the obligation to maintain her many properties consistently with the law, whereas the owner of only a single property does have such a duty. Other defendants have been held liable for nuisances even if they have many adjacent landowners—for example, in mass environmental litigation, such as *Freeman v. Grain Processing Corp*., 895 N.W.2d 105 (Iowa 2017), where a class of 4,000 property owners sued a business for causing pollution; the court allowed the case to proceed "[s]o long as the residents establish the emissions constituted a nuisance on each property." *Id.* at 125. Likewise, in *Rochette v. Newburgh*, 449 N.Y.S.2d 1013, 1014 (1982), a municipality and 248 landowners who owned property adjacent to a lake were

sued for allowing boat races on a lake which led to an injury; the court allowed the plaintiff to proceed to trial on a nuisance claim, which "would be predicated, under long-standing principles of common law, upon their control of the premises." *Id*. at 1015. Even roving street gangs have been deemed nuisances, despite the fact that they presumably "adjoin" countless people. *Weber Cnty. v. Ogden Trece*, 2013 UT 62 ¶ 30; *People ex rel. Gallo v. Acuna*, 929 P.2d 596, 602–05 (Cal. 1997).

And cities have frequently been held liable on a nuisance theory for failing to maintain sewage systems, even though the number of people "adjacent" to a sewage system is doubtless large. *City of Ada v. Canoy*, 177 P.2d 89, 91–92 ¶¶ 9–15 (Okla.1947); *Thomas v. Clearfield City*, 642 P.2d 737 (Utah 1982). The Georgia Supreme Court's words in the sewer case of *Rome v. Turk*, 219 S.E.2d 97, 99 (Ga. 1975), are equally appliable here: "[These parks and streets were] and [are] under the control of the city; if [the conditions thereon] be a nuisance and the city has not abated [them], no one else could; not having abated [them], the city may be said to have maintained [them] and kept [them] up, and it is thereby a continuing nuisance, for the maintenance of which the city is liable."

Equally analogous is *State v. City of Marshfield*, 259 P. 201 (Or. 1927), where Oregon's Supreme Court held a city liable for failing to take steps to put out a fire that it knew was burning in a forest it controlled. Liability sounded in nuisance, because maintaining fire-hazard conditions has long been considered a nuisance, and the city's failure "to make a reasonable effort to put it out" made it liable. *Id.* at 202. This was true even though the forest presumably abutted practically everybody in the city. Simply put, if "'[i]t is well settled that a municipal corporation, having the exclusive care and control

of the streets, is obliged to … abate all nuisances that might prove dangerous.'" *Salt Lake City v. Schubach*, 159 P.2d 149, 158 (Utah 1945) (citation omitted).

Second, the fact that the City owns the streets militates in *favor* of liability, not against it. That fact shows that the City "is best situated to take reasonable precautions." *Jeffs*, 275 P.3d at 236 ¶ 30. It would be perverse for the same factor to simultaneously weigh in favor of finding a duty and against it. What's more, the City's control over streets and parks is a public trust. Just as a city cannot give away the use of the streets to a private business, in a manner that deprives adjacent property owners of the right to use the streets—*see Brough v. Ute Stampede Ass'n*, 142 P.2d 670, 673 (Utah 1943) ("a city has under its police power the authority to regulate the public highways within its jurisdiction," but "it does not in the absence of legislation have the right to license a nuisance on a public street for purely private gain")—so it may not effectively appropriate sidewalks, parks, and other public lands to the use of the vagrant population, thereby depriving adjacent landowners of their rights. *See also Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333, 334 (1883) ("The city is clothed with power over the streets, and is charged with the duty of keeping them open for public use and free from nuisance").

Third, the obstruction of public thoroughfares has always been considered a nuisance from time immemorial, *see, e.g., Phillips v. Pasadena*, 162 P.2d 625, 626 (Cal. 1945) ("[a]nything which unlawfully obstructs the free passage or use in the customary manner of a public street is a nuisance, and any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may maintain an action for

damages or abatement"), and is expressly declared a public nuisance by Section 76-10-803(1)(c).

When a city obstructs a public road or lets a private party do so, it can be held liable in nuisance by those who suffer a particular injury therefrom. *McDowell v. Vill. of Preston*, 116 N.W. 470, 471 (Minn. 1908); *Cohen v. New York*, 21 N.E. 700, 702 (N.Y. 1889); *Franklin Wharf Co. v. Portland*, 67 Me. 46, 55–56 (1877); *cf. Kamnitzer v. New York*, 40 N.Y.S.2d 139, 141 (N.Y. App. Div. 1943) ("the city is liable for failure to keep … its streets and sidewalks in a reasonably safe condition for the use of the public and is liable for permitting … nuisances thereon."); *Milstrey v. Hackensack*, 79 A.2d 37, 41–42 (N.J. 1951) ("a municipality is liable for the creation of a nuisance in a public way by its own positive misfeasance."). Obviously, this principle is incompatible with the no-duty rule adopted below.

CONCLUSION

The judgment should be *reversed*.

Respectfully submitted this 24th day of July 2024 by:

/s/ *John P. Mertens*
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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 25(f), because it contains 4,132 words, and that it complies with Rule 21, governing public and non-public information, as it contains no non-public information.

/s/ *John P. Mertens*

CERTIFICATE OF SERVICE

I certify that on July 23, 2024 a copy of Brief Amicus Curiae of Goldwater Institute in Support of Plaintiffs-Appellants was filed by using the Court's electronic filing system and that the following were served via email:

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