

No. 19-247

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IN THE  
**Supreme Court of the United States**

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CITY OF BOISE,

*Petitioner,*

v.

ROBERT MARTIN, LAWRENCE LEE SMITH,  
ROBERT ANDERSON, JANET F. BELL, PAMELA S. HAWKES,  
AND BASIL E. HUMPHREY,

*Respondents.*

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**On Petition for a Writ of Certiorari to the  
United States Court of Appeals  
for the Ninth Circuit**

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**BRIEF *AMICUS CURIAE* OF STEPHEN EIDE  
IN SUPPORT OF PETITIONER**

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## **QUESTION PRESENTED**

Does the Cruel and Unusual Punishments Clause require courts to evaluate the quality and quantity of city shelters and other homeless services before permitting enforcement of generally applicable laws against camping and sleeping on public property that might hypothetically be applied in the future against persons who have no permanent residence?

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## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus Curiae* Stephen Eide is a Senior Fellow at the Manhattan Institute for Policy Research. He has written extensively on the subjects of public finance and social policy in National Affairs, the Wall Street Journal, CityLab, Politico, the New York Daily News, and Governing among other publications. He is also the author of over twenty policy studies on these subjects, published by the Manhattan Institute, and has a Ph.D. in political science from Boston College. *Amicus Curiae*'s interest is in seeing this Court affirm cities' ability to maintain orderly public spaces unencumbered by lower courts' use of the Eighth Amendment to intrude upon the separation of powers.

## **SUMMARY OF ARGUMENT**

Boise has quality-of-life ordinances that prohibit camping and sleeping in public spaces, with exceptions precluding enforcement when there is no available overnight shelter. Boise's homeless shelters have never been full. Pet. App. 78a. And the district court found that there was "no actual or imminent threat that either Plaintiff will be cited for violating the Ordinances." Pet. App. 71a–72a. Yet the Ninth Circuit reversed a district court's legal and factual findings to hold that Boise's homelessness policy was not good enough to permit enforcement of these laws. This is not, as the Ninth Circuit claims, a "narrow" ruling (Pet. App. 62a, 15a), but one that envisions judicial micromanagement of public policy through

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<sup>1</sup> All parties were timely notified of *amicus*'s intent to the filing of this brief, and have filed blanket consents for *amicus* briefs. No party's counsel authored any part of this brief. In addition to *amicus* and counsel, the Manhattan Institute for Policy Research funded the preparation and submission of this brief.

litigation. The Ninth Circuit requires courts not only to assess the leniency of local law enforcement agencies but also that of small non-profit shelters that operate independently of city governments. Unless smaller, poorer municipalities choose to adopt the failed and prohibitively expensive homelessness policies of New York City, Los Angeles, and San Francisco, the Ninth Circuit requires them to surrender the possibility of protecting their citizens from the health and crime problems associated with large encampments, and surrender to those encampments public spaces intended for the entire public to share. Such judicial micromanagement infringes on the separation of powers and guarantees inferior public policy. It cannot be a valid interpretation of the Eighth Amendment, and the Supreme Court should grant certiorari to reverse the Ninth Circuit's decision.

## ARGUMENT

### **I. *Martin's* logic points to an expanded role for the judiciary over homeless services systems. But the judiciary is poorly positioned to assess the adequacy of homeless services systems.**

In *Martin et al. v. City of Boise, Idaho*, the Ninth Circuit struck down two ordinances, Boise, Idaho, City Code § 5-2-3(A)(1) and § 7-3A-2(A), regulating camping and sleeping in public spaces, that Boise considered essential to its response to homelessness. The Ninth Circuit based its decision on an interpretation of the Eighth Amendment and its finding that Boise's homeless services system was inadequate to the needs of its homeless population.

*Martin* dictates that, to avoid inflicting "cruel and unusual punishments" on homeless individuals, a city

must provide them with shelter before forbidding them from setting up encampments in public spaces. But to test whether shelter is “practically available” (Pet. App. 65a) (also “realistically available” (*Id.* 62a n.8)), the Ninth Circuit emphasized that counting shelter beds is not enough. (The district court had found that “there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families.” Pet. App. 78a.) Rather, the Ninth Circuit also requires additional scrutiny of the conditions under which shelter is offered, such as whether there are time limits and any religious orientation on the part of the shelter provider, to determine whether the homeless truly have an alternative to the streets. In other words, the quality of shelter matters, not just the quantity. When homeless individuals or other advocates, empowered by *Martin* to demand less enforcement of quality-of-life ordinances or more spending on homeless services, dispute cities’ claims about the strength of existing services and programs, courts will have to adjudicate these disputes, even when the ordinances already have exceptions prohibiting enforcement when “there is no available overnight shelter.” Pet. App. 77a–78a.

In practice, therefore, *Martin* mandates broad and thoroughgoing judicial oversight of local homelessness policy. To keep local quality-of-life ordinances in line with the Eighth Amendment, the Ninth Circuit wants judges, on the “demand” side, to examine the size and character of communities’ homeless populations and, on the “supply” side, the size and character of local homeless services systems.

Courts are not competent to conduct such examinations. If *Martin* remains the law, cities’ responses to homelessness will remain constantly hampered by

litigation as judges stumble through policy details better left to be sorted out by local officials.

One of the most common debates in homeless policy is whether the homeless are on the streets by choice. Among any community's homeless population, some may have friends or family who would take them in; the "service resistant" would refuse shelter under any circumstances, often because of factors such as mental illness; and some are committed to a life on streets as a matter of principle. Even though such cohorts may represent a minority of a community's homeless population, their size may not be inconsequential at the margins. Given the pressure that *Martin* places on cities, hundreds of thousands of dollars in scarce city resources, perhaps even millions, depend on a court's determination as to whether every single homeless individual has no choice in sleeping without shelter—or just most of them. The Ninth Circuit, inadvertently or otherwise, acknowledges the challenge of "service resistance": "Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it." Pet. App. 62a n.8 (emphasis in original). The record in *Martin* speaks to the indeterminacy of some people's homeless status. Robert Martin is not even a resident of Boise but only becomes part of its homeless population when he comes to town to visit his Boise-based son. Pet. App. 75a, 40a, 49a. A judge, in seeking to ascertain the proportion between a city's homeless and available shelter beds, per *Martin*, will be hard-pressed to evaluate how many homeless have options and are thus not that city's responsibility.

Data on communities' street homeless are derived mainly from point-in-time counts performed annually or biennially by volunteers. They are at best estimates and offer limited information relevant to such pressing questions such as the degree to which any community's homeless are on streets because of untreated mental illness or a temporary disruption in their housing situation. Yet the logic in *Martin* would require judges to go beyond what the point-in-time data reveal to make sure that a city, whenever it is trying to enforce restrictions on public camping, is not undercounting the size of the homeless population genuinely eager to come in off the streets.

Turning, now, to the supply side of the equation, how can judges determine whether some cities increase homelessness by increasing their service offerings for the homeless? Some jurisdictions are more accommodating to the homeless than others.<sup>2</sup> Such disparities

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<sup>2</sup> *E.g.*, Rachel Aviv, *Netherland*, *New Yorker* (Dec. 2, 2012) (“Throughout the summer of 2009, Samantha researched the logistics of being homeless in New York, reading all the articles she could find online, no matter how outdated... In a purple spiral-bound notebook, she created a guide for life on the streets. She listed the locations of soup kitchens, public libraries, bottle-return vending machines, thrift stores, and public sports clubs, where she could slip in for free showers.”); Trisha Thadani, *A ticket out of town*, *S.F. Chronicle* (July 29, 2019) (“After years of being homeless in Iowa, 26-year-old Isaac Langford decided to give San Francisco a try. In San Francisco, he heard, social services are plentiful, anyone is welcome and the weather is pleasant.”); Amy Graff, *Is SF a friendly city for homeless? 17 people living on the street told us*, *S.F. Chronicle* (Nov. 5, 2018) (“We went out and talked to people living on the street and asked them: ‘Is San Francisco a friendly city to the homeless?’ Most everyone recognized the services the city and nonprofits provide, offering food, shelter, drug rehabilitation, job counseling, and even haircuts. These, they agreed, make the city a friendlier

between communities fuel the ongoing debate in California over the “regional” character of the homelessness crisis. Well-designed service systems move the maximum number of their clients out of homelessness while enabling homelessness among a minimal number of clients. But not all service systems may be equally well-designed. To reemphasize, the number of individuals choosing to be homeless in a city to access certain housing benefits may be in the minority. But their number matters given the unnecessary fiscal burden that courts could place on a city by demanding that it make housing available for such individuals.

Still more complicated, from the perspective of judicial competence, is the question of shelter quality. Two of Boise’s shelters are run by faith-based organizations. Both the Ninth Circuit and district court scrutinized whether potential shelter clients were somehow forced to choose between violating the law by sleeping in public or violating their consciences by being coerced into practicing a religion they found objectionable. The district court found no evidence of coercion. Pet. App. 76a–77a. But the Ninth Circuit did, though based on highly ambiguous details. *Id.* 47a–48a.

Faith-based organizations, going back many generations, have played a lead role in our nation’s response

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place and they appreciate the generosity.”); Kevin Fagan, *Bay Area homelessness: 89 answers to your questions*, S.F. Chronicle (July 28, 2019) (“Do homeless people often relocate — move to a particular city because of better services, sense of community, weather, etc.? A vast majority stay in the community they are most familiar with. That said, a small percentage may select cities where they think they will get more assistance.”); New York Post, “*Homeless by choice*”: *How this guy survives on the streets of NYC* (July 25, 2019).

to homelessness. In many communities, they still have the lead.<sup>3</sup> To suggest that references to Jesus on a shelter’s intake form or “messages and iconography on the walls” (Pet. App. 38a) might render shelter “practically [un]available” to the homeless could destabilize existing local service systems. Possible consequences include increased financial pressures on local governments to provide unequivocally secular shelter programs and a chilling effect on private faith-based organizations that had been considering starting up or expanding programs for the homeless.

A shelter’s religious orientation may be sometimes hard to distinguish from restrictions on client behavior. For example, both plaintiffs Martin and Anderson complained about not being as free to smoke as they liked in certain shelters. Pet. App. 79a, 84a. Is a shelter bed “practically available” if access to it is contingent on an individual overcoming a compulsion to drink or use drugs? Boise’s ordinances stipulate that the failure to use a shelter because of its sobriety requirements is not an excuse for sleeping in public. Pet. App. 123a–125a (Boise, Idaho, City Code §§ 5-2-3(B)(1), 7-3A-2(B)). The Ninth Circuit in *Martin* was silent on these provisions of Boise’s municipal code, having satisfied itself with sufficient evidence elsewhere of the local shelter network’s inadequacies. But given the extent of Ninth Circuit’s interpretation of the Eighth Amendment, advocates could well press other judges to find sobriety requirements to be unconstitutionally onerous. Such requirements are valuable to a homeless-shelter client who is trying to

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<sup>3</sup> Byron Johnson, William H Wubbenhorst & Alfreda Alvarez, *Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities* (Baylor Institute for Studies of Religion 2017).

get his life back together and sees the presence of intoxicated roommates as a barrier to his upward mobility. But his less motivated peers may see sobriety requirements as an entry barrier to shelter. This is not an academic thought experiment. So-called “low barrier” shelter options are enormously popular among homeless advocates, but they can be costly to operate if quality (security, service offerings, staffing levels) is a concern. San Francisco’s highly-touted “Navigation Center” model, for instance, costs around \$100 per bed per day.<sup>4</sup> How should judges adjudicate this dispute over the value of sobriety requirements? *Martin* does not say, other than to criticize Boise’s shelter offerings as too small and not variegated enough in a city of 228,000 people.

Do time limits serve a legitimate purpose in a city’s network of shelter beds? Many shelter operators would say that they do, since first of all, shelter is supposed to be temporary housing and second because time limits allow providers to grant a broad distribution of a limited public benefit. Occupying a shelter bed for months on end prevents others from using that resource. At least two of Boise’s three shelters use time limits in some form. But the Ninth Circuit was wary of the speculative possibility that someone cited for violating one of Boise’s ordinances could hypothetically be on the streets because they exceeded their time limit at one of the city’s shelters. Pet. App. 47a.

*Martin* directs courts to assess not only the constitutionality of local laws and policies but the degree of leniency in enforcing those laws and policies. Boise, of course, formally embraced leniency through its

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<sup>4</sup> Kevin Fagan, *Bay Area homelessness: 89 answers to your questions*, S.F. Chronicle (July 28, 2019).

“Shelter Protocol,” which instructed police not to enforce the camping and sleeping ordinances if all shelters were full.<sup>5</sup> The district court viewed this as sufficient to defend the ordinances’ constitutionality but the Ninth Circuit did not. Courts, following *Martin*, must assess not only the leniency of local law enforcement agencies but also that of small non-profit shelters that operate independently of city governments. Homeless service providers are not universally rigid in their implementation of rules on time limits and sobriety. Providers often walk a fine line between establishing certain norms and expectations for all their clients while also tolerating human frailty. An organization that has had in place sobriety requirements and time limits for years but allows, at its discretion, the occasional exception: how “available” are their shelter beds? Judges will find elusive an answer to that and similar inquiries into shelter providers’ operations.

## **II. The Ninth Circuit’s ruling in *Martin* is unaffordable, inequitable, and not narrow.**

No one disputes that homelessness is bad for the homeless, whose sufferings are abundantly chronicled in reports about their victimization,<sup>6</sup> rates of mortality,<sup>7</sup> and poor physical health.<sup>8</sup> But homelessness is also

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<sup>5</sup> Boise, Idaho, City Code § 5-2-3(B)(1) and § 7-3A-2(B).

<sup>6</sup> Michel R. Moore, L.A. Police Dep’t, *The Los Angeles Police Department’s 2018 Fourth Quarter Report on Homelessness* (Mar. 7, 2019).

<sup>7</sup> New York City Dep’t of Health and Mental Hygiene, *Thirteenth Annual Report on Homeless Deaths* (July 1, 2017 – June 30, 2018).

<sup>8</sup> National Health Care for the Homeless Council, *Exposure-Related Conditions: Symptoms and Prevention Strategies* (Dec. 2007).

bad for cities as a whole. Many recent surveys of the public in major cities have registered high levels of concern about homelessness.<sup>9</sup> Driving these concerns are homelessness' associations with crime, public health emergencies, and threats to cities' quality of life.

If cities are unable to affordably enforce quality-of-life laws, there will be dramatic and pernicious repercussions. Across the nation, many libraries, parks, and other public spaces have ceased to feel fully public and have instead come to resemble the private accommodations of the homeless. The commonly accepted notion that park benches, plazas, and library carrels are public property and thus should be *shared* implies that they should be used temporarily, not occupied for entire days.<sup>10</sup> Many cities are struggling

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<sup>9</sup> *E.g.*, Quinnipiac U., *New York City Mayor Gets Worst Grades On Corruption, Quinnipiac University Poll Finds; 96% Say Homelessness Is Serious Problem* (Mar. 1, 2017); Mark Baldassare *et al.*, *Californians & Their Government: PPIC Statewide Survey* 6, 11, 24 (May 2019); San Francisco Controller, *2019 San Francisco City Survey: A biennial survey of San Francisco residents* 7, 10 (May 13, 2019); San Francisco Chamber of Commerce, *Public Safety, Homelessness and Affordability are Biggest Issues in 2018 SF Chamber Poll* (Feb. 2, 2018).

<sup>10</sup> “In open-access public spaces suited to rapid turnover, norms require individual users to refrain from long-term stays that prevent others from exercising their identical rights to the same space. These norms support government time limits on the use of public parking spaces and campsites. They also underlie informal cutoff points on the use of, say, a drinking fountain on a hot day, a public telephone booth in a crowded airport, or a playground basketball court. The longer an individual panhandles or bench squats, the more likely pedestrians will sense that he is disrespecting an informal time limit.” Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *Yale L. J.* 1165, 1178 (1996) (“Ellickson”).

to retain what remains of their brick-and-mortar retail industry; small-business owners and their trade groups are among the most vocal advocates of a more robust law enforcement to homelessness.<sup>11</sup> In a July 2019 report, the New York City Metropolitan Transportation Authority cited “the continuing challenge of the homeless population” as a factor in a recent drop in sales at Grand Central Terminal, where, in each of the last three years, point-in-time surveys have found over 200 unsheltered individuals.<sup>12</sup>

Several public transit systems have recently experienced declines in ridership, promoting concerns about how to arrest that trend by improving service quality.<sup>13</sup> The Bay Area Rapid Transit system (which runs mainly between San Francisco and the East Bay) is struggling with declining levels of customer satisfaction and reports that “addressing homelessness” ranks at the top of surveys of consumer

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<sup>11</sup> Heather Knight, *Small businesses can't escape misery on SF's streets*, S.F. Chronicle (July 27, 2018).

<sup>12</sup> Metropolitan Transportation Authority, *Safety Committee Meeting Committee Book* 13 (July 2019); Metropolitan Transportation Authority, *Joint Metro-North and Long Island Committees Meeting Committee Book* 101 (July 2019).

<sup>13</sup> *E.g.*, American Public Transportation Association, *Transit Ridership Report, First Quarter 2019* (May 31, 2019); Laura J. Nelson, *L.A. is hemorrhaging bus riders — worsening traffic and hurting climate goals*, L.A. Times (June 27, 2019); Rachel Swan, *BART's end of the line surges with homeless as misery plays out each night*, S.F. Chronicle (June 22, 2019); Rachel Swan, *Violent crime on BART more than doubles in four years*, S.F. Chronicle (June 25, 2019); Phil Matier, *BART's fare-evasion collection tally: One \$95 payment on 6,000-plus tickets*, S.F. Chronicle (June 26, 2019).

complaints.<sup>14</sup> In New York City’s transit system, subway train delays caused by homelessness-related disturbances increased over 50 percent between 2014 and 2018.<sup>15</sup>

Still more seriously, the unchecked expansion of unsheltered homelessness has led to several public health crises, including streets littered with feces; used needles; and extraordinary quantities of refuse, outbreaks of infectious diseases, and rodent infestations.<sup>16</sup> San Francisco’s Tenderloin district is host to

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<sup>14</sup> Alameda County Grand Jury, *2018–2019 Alameda County Grand Jury Final Report* 123–37 (June 21, 2019); see also Laura J. Nelson, *As waves of homeless descend onto trains, L.A. tries a new strategy: social workers on the subway*, L.A. Times (Apr. 6, 2018).

<sup>15</sup> Winnie Hu, *How Subway Delays and the Homeless Crisis Are Intertwined*, N.Y. Times (June 26, 2019)

<sup>16</sup> Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California’s Homeless*, The Atlantic (Mar. 8, 2019); Gale Holland, Laura J. Nelson, and David Zahniser, *Fire at a homeless encampment sparked Bel-Air blaze that destroyed homes, officials say*, L.A. Times (Dec. 12, 2017); Gale Holland, *Hepatitis A outbreak sparks call for L.A. to give homeless people more street toilets*, L.A. Times (Sept. 26, 2017); Dakota Smith and David Zahniser, *Filth from homeless camps is luring rats to L.A. City Hall, report says*, L.A. Times (June 3, 2019); Chris Woodyard, *Los Angeles County seeks action from city on toilets, rats and trash to combat homeless crisis*, USA Today (June 8, 2019); Adam Andrzejewski, *Mapping San Francisco’s Human Waste Challenge—132,562 Cases Reported In The Public Way Since 2008*, Forbes.com (Apr. 15, 2019); Openthebooks.com, *Mapping San Francisco’s Homeless Hypodermic Needle Challenge—30,000 Case Reports Of Needles In The Public Way Since 2011* (Apr. 2019); California State Auditor, *Homelessness in California: State Government and the Los Angeles Homeless Services Authority Need to Strengthen Their Efforts to Address Homelessness* 24–25 (Apr. 2018); Los Angeles City Controller, *Report on Homeless Encampments 2* (Sept. 2017) (“As we’ve seen in San Diego and Los

40 percent of the city’s unsheltered homeless population and 56 percent of the city’s drug arrests.<sup>17</sup>

A policy response to homelessness requires consideration both for the homeless and broader public. One common approach is the regulation of conduct in public spaces through the passage and enforcement of quality-of-life ordinances. Among the varieties of conduct targeted for regulation by cities, sleeping stands out. Where one sleeps is, after all, how “homelessness” is defined.<sup>18</sup> Cities are under increasing pressure to address encampments, in particular, because of their association with public health threats and tendency to render public places unaccommodating to the non-homeless. Some western communities, such as Seattle, Portland, Orange County, and San Francisco, have seen single encampments swell to hundreds of inhabitants.

This is why Boise viewed its anti-camping and disorderly conduct ordinances as so essential to meeting its obligations to provide for the public welfare. And this is also why the Ninth Circuit’s ruling in *Martin* has raised so many concerns in other jurisdictions, including concerns about economic justice.

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Angeles County, homeless encampments can pose unique health risks that quickly escalate into health crises.”).

<sup>17</sup> Applied Survey Research, *San Francisco Homeless Count & Survey Comprehensive Report* 12 (2019); San Francisco Budget and Legislative Analyst’s Office, *Policing and Criminal Justice Costs Related to Open Air Drug Dealing in the Tenderloin, South of Market, and Mid-Market neighborhoods* 6–7 (Apr. 25, 2019).

<sup>18</sup> U.S. Dep’t of Housing and Urban Development, *HUD’s Definition of Homelessness: Resources and Guidance* (Mar. 8, 2019).

Wealthy households have ample options for leisure and transportation. They are far less threatened by disorderly streets, parks, and transit systems than are low-income households.<sup>19</sup> By the same token, wealthy cities don't have to worry as much about funding shelter.

In his Apr. 2019 dissent to the Ninth Circuit's denial of rehearing *en banc*, Judge Smith warned of a "an overwhelming financial responsibility to provide housing." Pet. App. 15a. The experience of New York City provides evidence of that prediction. New York City grants a "right to shelter" to its entire homeless population and at all times during the year.<sup>20</sup> It may well be the most unqualified right to shelter of any jurisdiction in the nation. The current cost of New York's homeless services system—meaning mostly shelter and programs designed to keep the potentially homeless out of shelter—now exceeds \$3 billion annually, or more than the city's spending on fire protection, libraries, and parks combined.<sup>21</sup> Owing to unique advantages such its status as a global financial center, New York is, for now, able to support a right to shelter. If the choice is between funding shelter at

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<sup>19</sup> "To favor the poorest may disadvantage the poor, who are as unhappy with street disorder as the rest of the population. Because residents of poor urban neighborhoods tend to make especially heavy use of streets and sidewalks for social interactions, they have an unusually large stake in preventing misconduct there." Ellickson, 105 Yale L. J. at 1189–90.

<sup>20</sup> Final Judgment by Consent, *Callahan v. Carey*, No. 79-42582 (N.Y. Cty. Sup. Ct. Aug. 26, 1981); *McCain v. Koch*, 117 A.D.2d 198, 502 N.Y.S.2d 720 (1986).

<sup>21</sup> Office of N.Y.C. Comptroller, *Comments on New York City's Fiscal Year 2020 Executive Budget Table A2* (May 23, 2019); Office of N.Y.C. Comptroller, *FY 2020 Agency Watch List Homeless Services Provider Agencies 2* (May 2019).

New York proportions or allowing encampments to proliferate, many cities whose tax bases are not as robust as New York's will have to accept the latter option. According to 2013-17 data from the American Community Survey, among localities with a population above 80,000, fifty-two have a poverty rate of 25 percent or more.<sup>22</sup>

Jurisdictions differ dramatically in the strength of their local tax bases or “fiscal capacity.”<sup>23</sup> Cities with weak fiscal capacities are already struggling to support their traditional array of municipal services—K-12 public education, public safety, maintenance of basic infrastructure, parks, libraries—and make good on their retirement-benefit and pension commitments and debt obligations.<sup>24</sup> During the Great Recession era, three major cities within the Ninth Circuit's jurisdiction went through Chapter 9 bankruptcy (Vallejo, Stockton, and San Bernardino). America's many fiscally distressed cities are in no position to embark on a massive new investment in homeless services.

Yet this is what *Martin* requires—or else the city can do nothing.

Maintaining reasonable standards of public order is a basic expectation of local self-government. To require a less affluent city to either provide housing for all its homeless or accommodate them on the

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<sup>22</sup> U.S. Census Bureau, *2013-2017 American Community Survey 5-Year Estimates: Poverty Status in the Past 12 Months, All Places* (last checked Sept. 22, 2019).

<sup>23</sup> Joshua T. McCabe, *Federalism in Blue and Red*, National Affairs (Summer 2017).

<sup>24</sup> Stephen Eide, *Rust Belt Cities and Their Burden of Legacy Costs*, Manhattan Inst. for Policy Research (Oct. 2017).

streets amounts to decreeing that that city is too poor to afford self-government.

One of the most questionable parts of the decision below is its claim to being “narrow.” Pet. App. 62a. But the purported narrowness of *Martin* is based, for the most part, on how the court is not mandating a course of action to cities but presenting them with a choice: either provide shelter beds (as defined by the court) equal to the total number of homeless in their community (as defined by the court), or accommodate encampments. Dozens of cities across the nation have some sort of prohibition on sleeping outside and few confer any kind of a right to shelter. For many of them, the obligations imposed by the Ninth Circuit will undermine prevailing standards of public order and local finances. There is thus nothing “narrow” about *Martin*.

In a footnote attempting to defend the ruling’s purported narrowness, the Ninth Circuit suggests a third option to cities: “Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible.” Pet. App.62a. This passage contemplates the possibility of cities allowing varying degrees of public disorder in specified areas or zones. This option has often proved tempting for public officials in search of quick fixes to their troubles with vagrancy and disorder. But even if a court were to find such an approach to be constitutional, decades of experience with it demonstrates its unviability. The obvious case in point is Los Angeles’s Skid Row. Decades ago, Los Angeles embraced a “containment” strategy towards its challenges with

vagrancy.<sup>25</sup> But not only did this strategy fail to “contain” the problem (Skid Row is now host to only 5-10% of the total homeless population in Los Angeles County)<sup>26</sup> the array of public health dangers currently afflicting Skid Row highlight how attempts to concentrate disorder can serve to amplify it. “The containment policy is now considered a failure.” Gale Holland, *L.A.’s homelessness surged 75% in six years. Here’s why the crisis has been decades in the making*, L.A. Times (Feb. 1, 2018).

To concentrate street homelessness is not to solve the problem. Concentrations of street homelessness are, rather, the problem itself. Boise and similar cities are trying to preempt this by preventing unmanageable and dangerous encampments from arising in the first place. If Boise and other cities across the nation lack the authority to take a preventative approach to encampments, there is truly no end in sight to the kind of street disorder that’s now such a source for disgrace for officials in Los Angeles, San Francisco, and elsewhere.

## CONCLUSION

The purpose of municipal efforts to reduce public disorder is just that: to ensure orderly standards of conduct in public spaces. The purpose is not to “arrest your way out of homelessness” or even to “end” homelessness. Whether a city manages to end homelessness will depend on many other factors beyond what it does with respect to law enforcement. None claim that

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<sup>25</sup> See generally Edward G. Goetz, *Land Use and Homeless Policy in Los Angeles*, 16 *Int. J. of Urban Regional Research* 540 (1992); Forrest Stuart, *Down, Out, and Under Arrest* 37–77 (2018).

<sup>26</sup> Los Angeles Homeless Services Authority, *2018 Homeless Count Results* (May 2018).

laws prohibiting public camping are a sufficient solution to homelessness. But legislative bodies should be permitted to conclude that they are a necessary part of a solution to homelessness.

Going back decades, certain activists have demanded that cities accommodate the desires of many homeless individuals to live in public. The Ninth Circuit, in *Martin*, ruled that the U.S. Constitution stands behind perhaps the most extreme version of this legal activism. But the panel's reasoning was flawed. This court should grant Boise's petition for a writ of certiorari to reverse that decision.

Respectfully submitted,

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