

GIBSON DUNN

Martin v. City of Boise will ensure the spread
of encampments that threaten public health and safety



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Homelessness, a crisis of staggering proportions, is growing worse every day. The alarming trend is the spread of encampments, semi-permanent tent cities that threaten the health and safety of those living in them as well as the broader community. Yet as residents, government officials, public-health experts, and law enforcement all struggle to cope with the calamity, lawsuits have hijacked the policy debate. And a recent court ruling—*Martin v. City of Boise*—will make it all but impossible for cities to curb the dangers posed by encampments—at a time when all available tools are needed to alleviate the tragic situation.

The Ninth Circuit's recent decision in *Martin v. City of Boise*

- The Ninth Circuit in *Martin v. City of Boise* held that governments may not enforce ordinances that ban public camping *unless they first provide enough shelter beds to house every person experiencing homelessness within their jurisdictions*. In the County of Los Angeles, there are nearly 60,000 homeless persons (an increase of 12% over last year). This means that the County is powerless to address public camping by *anyone* until it provides shelter for *everyone*—all 60,000. See [2019 Greater Los Angeles Homeless Count](#).
- Specifically, the Ninth Circuit held that an ordinance in Boise, Idaho, barring public camping, violated the Eighth Amendment's Cruel and Unusual Punishment Clause because it criminalizes the "status" of homelessness. The court wrote that "as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). The decision is wrong as a matter of constitutional law and conflicts with decisions of the U.S. Supreme Court holding that state and local governments may prohibit harmful conduct that threatens public health and safety.
- The *Martin* decision purports to rely on two U.S. Supreme Court decisions from the 1960s. One case, *Robinson v. California* (1962), struck down a California law that punished a person simply for being a drug "addict." In the second case, *Powell v. Texas* (1968), Justice Thurgood Marshall, for a plurality of the Court, upheld a statute outlawing public drunkenness. Together the two cases hold that government cannot punish a "status," like addiction, but that it can punish behavior that threatens public health and safety, like public drunkenness.
- In fact, the Supreme Court has never held—as the *Martin* court did—that individuals may be exempted from compliance with a generally applicable law because the conduct at issue is purportedly "involuntary." On the contrary, Justice Thurgood Marshall, writing for the plurality in *Powell*, explained that "[t]raditional common-law concepts of personal accountability and essential considerations of federalism" preclude such an interpretation of the Eighth Amendment. *Powell*, 392 U.S. 514 at 535 (plurality op.). Otherwise, there would be no "lim-

This important case is about ensuring that cities have all the tools they need to protect public health and safety.



The Ninth Circuit's decision exacerbates the current homelessness crisis from a public policy standpoint.

iting principle that would serve to prevent [the Supreme Court] from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id.* at 533.



- The Ninth Circuit held that it would violate the Eighth Amendment to criminalize so-called “involuntary actions” such as, in this case, sleeping or camping on a public sidewalk, because sleep is “biologically essential.” But as the dissent points out, by that logic, a local government could not prohibit public urination, defecation, or other conduct that government must regulate. For this reason, the Ninth Circuit’s decision is not limited to public camping ordinances but threatens a whole host of health and safety laws, including those prohibiting public urination, defecation, and public drug use. *Martin v. City of Boise*, 920 F.3d 584 at 590 (9th Cir. 2019) (Smith, J., dissenting from denial of rehearing en banc).
- The Ninth Circuit is the only federal appellate court to declare a public camping ordinance unenforceable under the Eighth Amendment. The decision effectively grants constitutional protection to encampments, thus rendering the more than 1,600 municipalities in the nine States in the Ninth Circuit powerless to curb the growth of encampments.
- The *Martin* decision actually revived an earlier Ninth Circuit decision, *Jones v. City of Los Angeles*, from 2016. That decision held that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce [a prohibition] at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public.” 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).
- About a year and a half after *Jones* was decided, the City of Los Angeles settled the underlying suit. That required the court to vacate its decision. For a decade thereafter, activists sought to get the same ruling from the court in a new decision. In the *Martin* decision, they finally did.
- As one of the dissenting judges in *Martin* explains, the Ninth Circuit’s decision will “wreak havoc on local governments, residents, and businesses” unless it is overturned by the Supreme Court. The decision stretches the Eighth Amendment beyond all recognizable limits, drastically curtails the traditional police powers of municipalities, and will ultimately exacerbate the homelessness crisis in the western

United States by tying the hands of state and local governments as they work to alleviate this urgent humanitarian crisis.

- The court’s decision is unworkable in practice. The upshot is that cities are suspending enforcement of common-sense ordinances, afraid of lawsuits and expansive liability.
 - Los Angeles will always have more individuals experiencing homelessness than shelter beds. Therefore, under the Ninth Circuit’s decision, Los Angeles County will be unable to prohibit encampments in any particular neighborhood, even if it builds new shelters with thousands of beds in that neighborhood, until it provides more than 60,000 beds to house every single person experiencing homelessness in the entire jurisdiction (a number growing by double digits annually). This would cost billions.
 - The panel said that a city *could* enforce public camping ordinances against individuals who “have the means to pay for” shelter but “choose not to.” But how is an officer, on the street, supposed to ascertain inability to pay in the moments before he makes a decision to cite an individual? One plaintiff in *Martin* stated that he lived on the street simply because he didn’t like paying rent. Or how are police supposed to know if a person in a park at night claims to be “homeless” but is in fact a drug dealer with a home? This is occurring.
- The decision is especially troubling because the City of Boise was not enforcing its ban on public camping as to any individual for whom a shelter bed was unavailable. Instead, Boise considers issuing citations for violations of its public camping ordinance only as a last resort, typically when the camping is connected to serious public health and safety concerns, such as the accumulation of trash, rotting food, and human waste, as well as rampant drug use and violence (which recently included a murder in an encampment).
- The only way to overturn the *Martin* decision is through Supreme Court review. Boise will file a petition seeking review of the decision in August 2019. Briefs in support of Boise urging the Court to grant review will be due in September 2019.

Cities need to have the ability to regulate, and even ban, encampments to protect everyone, especially the most vulnerable and in need.

The dangers of encampments

Encampments are contributing to a ***public health crisis***.

- Encampments threaten those outside as well as those inside of them—not because of the sleeping that occurs there, but because of the vandalism, defecation and urination, violent assaults and rape,

littering of contaminated blankets and uneaten food, blocking of walkways, harassment of passersby, pest infestations, open drug use, and illegal fires.

- Medieval diseases, such as typhus, as well as typhoid fever and tuberculosis, have re-emerged particularly from encampments. See Anna Gorman & Kaiser Health News, "[Medieval Diseases Are Infecting California's Homeless](#)," *The Atlantic*, March 8, 2019.
- A Deputy City Attorney in Los Angeles contracted typhus while working in City Hall. David Zahniser, "[Lawyer Files \\$5-Million Claim, Saying L.A. City Hall Rat Problem Caused Her Illness](#)," *Los Angeles Times*, April 21, 2019.
- An LAPD officer working downtown contracted typhoid fever. City News Service, "[Officer at LAPD Station in Downtown Contracts Typhoid Fever](#)," *Los Angeles Daily News*, May 30, 2019.
- According to state authorities, California is experiencing the largest person-to-person general hepatitis A outbreak in the United States since the hepatitis A vaccine became available in 1996. Furthermore, the majority of people infected in this outbreak are homeless, use illicit drugs (injected or noninjected), or both. Cal. Dep't. of Public Health, [2016-2017 Hepatitis A Outbreak Fact Sheet](#).
- Kaiser Health reports that, in Los Angeles County, 918 homeless died last year—a record number—on sidewalks, bus benches, hillsides, parking lots, riverbeds, and freeway on-ramps. These sufferers are dying because they are mentally and physically exhausted; because they are battered by the elements or poisoned by drugs; and because they almost never see a doctor. Anna Gorman and Harriet Blair Rowan, "[The Homeless Are Dying in Record Numbers on The Streets of L.A.](#)" *Kaiser Health News*, April 24, 2019. See also Derek Wang & Gil Aegerter, "[Deaths of homeless people jump in Seattle area](#)," *KUOW*, May 9, 2019.
- San Francisco received 5,874 calls reporting feces on streets and sidewalks in the first three months of 2019—about 65 calls a day—a 7% increase over the same time period last year. Phil Matier, "[Cleaning Up SF's Tenderloin Costs a Lot of Money—Soon it Might Cost Even More](#)," *San Francisco Chronicle*, May 1, 2019.
- San Francisco now has a dedicated four-person team just to clean feces five days a week. The city also contracts with a separate crew to pick up used syringes 12 hours each day. Bigad Shaban, Robert Campos, Anthony Rutanashodech, Mark Villarreal and Jeremy Carroll, "[Mayor Breed's First Year: Feces, Needles Complaints Decline; Trash Gripes, Homelessness Rise](#)," *NBC Bay Area*, July 10, 2019.



- An ever-growing number of rodents in California—particularly in Los Angeles—is being fueled by a spiking homeless population, according to a study released in July. Travis Fedschun, “[Los Angeles, California cities ‘overrun by rodents’ that pose public health epidemic, study says,](#)” *Fox News*, July 17, 2019. See also Dennis Romero and Andrew Blankstein, “[‘Typhus zone’: Rats and trash infest Los Angeles’ skid row, fueling disease,](#)” *NBC News*, October 14, 2019.
- The author of a leading history of black plague in America recently warned: “Los Angeles finds itself in unique danger of disease because of its rapidly growing homeless crisis. As more people live in closer contact with rodent fleas that can carry the plague bacterium, preventing an outbreak of one of the most frightening diseases in human history will require a stronger push to eradicate potential hosts.” David K. Randall, “[Op-Ed: Climate change could bring bubonic plague back to Los Angeles,](#)” *Los Angeles Times*, May 16, 2019.
- Many chronically homeless people are unwilling or unable to receive proper care because of serious mental illness. They often can be unaware of the fact that they are suffering from illness and in need of help. Mental illness creates distrust, paranoia, and fear, which can lead individuals to shun shelters and avoid services. The mentally ill have uncommonly high rates of victimization.
- Skid Row is L.A.’s present—but also a frightening vision of the future for other cities, like Seattle, San Francisco, and Portland, as miniature Skid Rows expand there.

**No one should
be exempt from
generally applicable
laws designed to
protect everyone.**

These encampments are **dangerous.**

- Serious crimes *against* homeless persons in Los Angeles rose dramatically between 2017 and 2018—robbery was up 89%, larceny was up 86% and rape was up 71%. See Kate Cagle, “[Crime Rate Among Homeless Skyrockets in Los Angeles,](#)” *Spectrum News* 1, May 7, 2019.
- According to Andy Bales, CEO of L.A.’s Union Rescue Mission: “There’s over a thousand registered sex offenders on the streets of Skid Row. This place is like a Petri dish for disease.” He added: “Skid Row is the worst man-made disaster in the United States. ... You can hear the violence out there right now. It’s ready to blow at any time. People get beaten, women get raped. It’s just a brutal environment.” “[Paradise Lost: Homeless in Los Angeles,](#)” *KOMO News*, June 18, 2019.
- “Tasked with cleaning up rapidly multiplying numbers of homeless encampments, Los Angeles sanitation workers have asked the city for more resources to handle a backlog of thousands of service requests. ... [S]anitation officials say they have requested \$17 million to bring on new staff trained to clean in and around encampments—up from about \$6 million this year.” “[LA sanitation needs \\$17M to keep up with homeless encampments,](#)” *Curbed LA*, Feb. 22, 2018.

- Numerous wildfires have originated from homeless encampments (whether from open fires or cigarettes). The Skirball fire that burned more than 400 acres in Los Angeles in 2017 “started as a cooking fire at a homeless encampment, according to an investigation by the Los Angeles Fire Department.” Jennifer Medina, [“Los Angeles Fire Started in Homeless Encampment, Officials Say.”](#) *The New York Times*, Dec. 12, 2017. By mid-2018, Skid Row had seen 81 tent fires, up from 59 during the entirety of 2017. Amy Pollard, [“Tent Fires Are on the Rise Among the Homeless in L.A.’s Skid Row,”](#) *Slate*, July 24, 2018.
- *NBC4* reports that L.A. firefighters are now extinguishing almost seven fires a day started at homeless encampments or tents across the city. This is a 211% increase in the number of fires from 2018. Some homeless tap into power lines to provide electricity in their tents; this can cause wires to short out and spark a fire. Firefighters say other fires begin when the homeless use stoves and barbecues in highly flammable tents. Meanwhile, hydrants are disabled by being jerry-rigged with faucets or repurposed as water pumps. Joel Grover and Amy Corral, [“Firefighters Lose Critical Tool to Battle Rise in Homeless Fires,”](#) *NBC4 News*, July 22, 2019.

Homelessness is causing extensive **environmental harm.**

- Workers cleaned thousands of pounds of human waste, and nearly 14,000 hypodermic needles, from Santa Ana River homeless encampments. Some 700 people were living in those encampments. Theresa Walker, [“Thousands of pounds of human waste, close to 14,000 hypodermic needles cleaned out from Santa Ana River homeless encampments,”](#) *The Orange County Register*, March 8, 2018.
- A California water quality control district has sought to address the toxic water that encampments create. An affiliated geologist said: “It’s a health issue. You know there’s E.coli, there’s fecal-born coliform in this water from these buckets and their toilets that are all along the stream.” Steve Large, [“Debris From Homeless Camps Ending Up In Local Waterways After Storms,”](#) *CBS Sacramento*, Jan. 9, 2018.
- According to an NBC report, “[g]arbage and human waste from homeless camps pouring into rivers and creeks are creating a pollution problem in the South Bay.” “It’s a threat to all the communities around the Bay,” said a water district official. “All the water flows through the creeks, ends up in the Bay and carries whatever trash, debris and contaminants.” Terry McSweeney, [“Pollution Problem: Water District Pulls in San Jose, County to Help Clear Homeless Camps From Creeks,”](#) *NBC Bay Area*, Feb. 9, 2016.



Criminals use encampments to prey on, and hide among, the homeless.

- In Seattle, police seized crack, heroin, meth, pills, guns, machetes, a sword, purses, tablets, cell-phones, watches, clothing, and perfume—all from a crime ring run out of tents. “[Seattle police bust drug rings in homeless camps](#),” KOMO News, May 15, 2019.
- In Los Angeles, NBC reported that gang members “hid[e] in plain sight” in Skid Row’s tents to “prey on many who live here looking for services and help.” Lolita Lopez & Phil Dreschler, “[Gangs of LA on Skid Row](#),” *NBC Los Angeles*, February 19, 2018.
- Sex trafficking is rampant among encampments and homeless communities. One journalist reported that there are “between 4,800 and 10,000 homeless minors in Los Angeles on any given night... Many will fall into, or be pressed into, sex work.” The National Runaway Switchboard believes that “one in three teens will be recruited into sex work the first 48 hours on the street,” and a U.S. Department of Health and Human Services study found that 46% of runaway and homeless youths report physical abuse. Lane Anderson, “[Saving ‘Throwaway Kids.’ in Los Angeles, sex trafficking doesn’t look like it does in the movies](#),” *Deseret News*, December 31, 2015.



Encampments harm local businesses, tourism, and residents.

- Many residents who live near encampments are experiencing the dangers of encampments. Typical is Mark Shinbane, president of Ore-Cal Corporation, in Skid Row, who has faced multiple break-ins and thefts and now spends tens of thousands of dollars replacing doors, adding fences, and cleaning needles out of drains. Bob Smiland, CEO of Inner-City Arts, a school in Skid Row, has been forced by encroaching encampments to redirect thousands into security. Students and teachers walk in the street to avoid the tents that clog the sidewalks. See *Motion to Intervene, Mitchell v. City of Los Angeles*, No. 16-CV-1750-SJO (C.D. Cal.), Doc. 120 (June 24, 2019).
- In San Francisco, Matthew Zimmerman, who runs Aspect Framing Studio and Art Gallery on Polk Street, told the *S.F. Chronicle* that “[h]eaps of trash, sleeping bags, and used syringes line the alley bordering his business.” “The last couple of years, things have gotten worse as far as the amount of people that are on the streets and the amount of open drug use is another thing that is pretty detrimental to the community,” he said. “I actually just checked my revenue from last year to this year, and

I'm down 25%." Bigad Shaban, Robert Campos, Anthony Rutanashodech, Mark Villarreal and Jeremy Carroll, "[Mayor Breed's First Year: Feces, Needles Complaints Decline; Trash Gripes, Homelessness Rise](#)," *NBC Bay Area*, July 10, 2019.

- Representatives of San Francisco's business and tourism industry are warning city officials about permanent harm to the city's reputation. "[Tourists] see the same things we see every day—the human waste on the street, the needles—and they're shocked, they're completely stunned," said the Vice President of Public Policy for SF Travel. "Unfortunately, they're going back and they're telling their friends and family about that experience and they're not coming back." Bigad Shaban, Robert Campos and Tony Rutanooshedech, "[San Francisco's \\$65 Million 'Street Cleaning' Budget Raises Concerns at City Hall](#)," *NBC Bay Area*, April, 12, 2018.
- Last year a major medical group decided to move its \$40 million convention out of San Francisco due to concerns for the safety of conventioners, including those posed by open drug use and tent encampments. Brock Keeling, "[Major medical group cancels San Francisco convention due to safety concerns](#)," *Curbed SF*, July 3, 2018.
- In downtown Los Angeles, small business owners are suffering. One purchased a small event property only to learn that proliferating tents were driving away the customers he hoped to lure for weddings. He would receive text messages such as: "I'm sorry, I really like your place, but the street is unacceptable." Benjamin Oreskes, "[Desperate to Get Rid of Homeless People, Some are Using Prickly Plants, Fences, Barriers](#)," *Los Angeles Times*, July 10, 2019.
- In Oakland, California, *CBS* reports that residents were "shocked" when an encampment arose by city permission next to a soccer field. "This is ... where kids play and you are exposing them to hazards and dangers and rodents and needles," one father said. Some of the encampment's homeless residents actually *agreed*. Susan Steimle, "[West Oakland Neighbors Shocked by City-Sanctioned Homeless Camp](#)," *KPIX 5 Bay Area*, July 2, 2019.
- The injury to tourism and business districts harms the city at large through loss of tax revenue—revenue needed to subsidize clean-up costs on the streets and shelters.

Encampments impose massive costs on communities.

- A report by the Reno City Attorney's Office found that individual clean-ups of encampments in downtown Reno and on the adjacent Truckee River ranged in cost from over



\$7,000 to \$36,000. In one five-month period, 277 needles were collected. Reno personnel gather an average of two 30-yard dumpsters of abandoned garbage a week.

- S.F. will spend a record-breaking \$72.5 million this fiscal year on street cleaning. According to the *S.F. Chronicle*, every morning a Public Works crew hits the streets at 4:30 a.m. to clean up tent camps and other items. At 5 a.m.—seven days a week—41 blocks of sidewalks and 12 alleys are manually swept by a nonprofit cleanup program that contracts with the city. At 6 a.m., mechanical sweepers start cleaning the Tenderloin. From 11 a.m. to 8 p.m., the Public Works Poop Patrol steam-cleans alleyways along lower Polk Street. From 3 p.m. to 8 p.m., Civic, another nonprofit under contract with Public Works, manually sweeps 41 blocks in the Tenderloin.



- But according to the S.F. Public Works Director: “It’s not just about the money anymore, it’s about also needing to deal with the people who are creating the problems. Cleaning the same area three, four, five times a day is not the best use of our money, but it is necessary until the behavior changes.” The *Chronicle* reports that “[s]treet people with drug and alcohol problems openly urinate and defecate in broad daylight—with no consequences.” Phil Matier, [“Cleaning Up SF’s Tenderloin Costs a Lot of Money—Soon it Might Cost Even More,”](#) *San Francisco Chronicle*, May 1, 2019.

The *Martin* ruling prevents cities from stopping the spread of encampments

- *Martin* forbids cities from enforcing common-sense ordinances that prohibit public camping, unless the city can offer acceptable shelter to **every** unhoused person in the jurisdiction. Forced clean-up or removals of encampments, in particular, are a last resort for most cities. Offers of help usually come first. Yet sometimes these law enforcement tools are necessary as the only way to urge an individual into drug treatment or into housing programs or even into the arms of family members. At other times, individuals refuse to allow clean-up crews to scrub the streets or collect biohazards. Cities must have the power to address the health and safety threats that endanger those inside and outside of the encampments that keep people on the streets. Until *Martin* is overruled, this power will be curtailed.

Cities are grappling with the complex challenge of homelessness with compassion and attempting to devise innovative solutions based on input from experts with experience in mental health, addiction, and housing issues.

- The Ninth Circuit’s decision, creating a constitutional right to camp in public, is the opposite of compassionate. It is not compassionate to ensure that the conditions that trap and sicken individuals will spread. It is not compassionate to deprive cities of any authority to urge individuals to accept help from service providers, counselors, shelters, or family. It is not compassionate to ensure that for many hurting souls, their fate is to be alone without assistance.
- Darrell Steinberg, the Mayor of Sacramento, recently observed in an op-ed in the *L.A. Times* that cities certainly need to build more shelter. But as shelter becomes available, cities need the tools to require people to accept shelter and services instead of living and dying on our streets—in Mayor Steinberg’s words, “the right to shelter must be paired with the obligation to use it.” See Darrell Steinberg, “[Op-Ed: Building more permanent housing alone won’t solve homelessness in California](#),” *Los Angeles Times*, July 17, 2019.
- The Ninth Circuit’s decision in *Martin* is the major legal impediment to this important step in the right direction because it holds that cities can’t prohibit *anyone* from camping in public until it has enough beds for *everyone*. Los Angeles raised billions of dollars to solve this problem through recent tax increases enacted via Measure H and Proposition HHH, and we need similar innovative solutions. What we don’t need is a court decision that ties the hands of cities as they struggle to deal with these challenges.

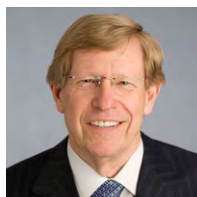


New lawsuits under the Ninth Circuit's en banc decision in *Martin* since April 2019

Advocates are already suing cities under *Martin* to block city efforts to stop encampments.

- *Shipp v. Schaaf*, No. 19-CV-01709-JST, 2019 WL 1644401 (N.D. Cal. Apr. 16, 2019)
- *Le Van Hung v. Schaaf*, No. 19-CV-01436-CRB, 2019 WL 1779584 (N.D. Cal. Apr. 23, 2019)
- *Quintero v. City of Santa Cruz*, No. 5:19-CV-01898-EJD, 2019 WL 1924990 (N.D. Cal. Apr. 30, 2019)
- *Phillips v. City of Cincinnati*, No. 1:18-CV-541, 2019 WL 2289277 (S.D. Ohio May 29, 2019)
- *Aitken v. City of Aberdeen*, No. 3:19-CV-05322-RBL, 2019 WL 2764423 (W.D. Wash. July 2, 2019)

Gibson Dunn Contacts



Theodore B. Olson
202.955.8668
tolson@gibsondunn.com



Theane Evangelis
213.229.7726
tevangelis@gibsondunn.com