



Breaking the Legal Paralysis: Combatting California's Homelessness Crisis After *Martin v. City of Boise*¹

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I. INTRODUCTION

Despite billions of dollars in allocated resources, the construction of brand new shelters, and relaxed enforcement of “quality-of-life” ordinances, the crisis of homelessness gripping the State of California has only grown more acute in recent years. More than a thousand persons experiencing homelessness died in 2020 in Los Angeles alone. And a proliferation of dangerous encampments throughout cities has contributed to a sharp uptick in crime affecting homeowners, business owners, and persons experiencing homelessness alike.

What has contributed to the rapid deterioration of conditions on the streets of the Golden State? In this article, we argue that for years municipalities have pursued a failed litigation strategy—consisting of entering into broad, sweeping settlements following setbacks in the course of litigation—that has resulted in entrenching the ever-worsening conditions playing out daily in our cities, and in Los Angeles in particular. That litigation strategy, and the concomitant retreat from enforcement of decades-old, ordinary, municipal laws, reached its apotheosis in

the wake of the Ninth Circuit's decision in *Martin v. City of Boise*, which held that municipalities could not issue criminal citations to persons sleeping in public spaces if that jurisdiction has fewer shelter beds available than persons experiencing homelessness.

Following *Martin*, what can be done in cities that currently lack enough space in shelters to house their entire population of persons experiencing homelessness, but that still wish to ensure that public spaces remain safe and sanitary for all residents? We propose that such cities simply take the courts at their word with respect to the limited scope of the *Martin* decision, mount a defense to their laws regulating public health and safety, and refuse to capitulate during the course of litigation. Even under *Martin*, the vast majority of ordinances regulating the public's use of city streets, sidewalks, and other public areas remain fully constitutional and enforceable—particularly those imposing time, manner, and place restrictions—and cities should not retreat from their defense. Furthermore, *Martin* has no effect on laws prohibiting drug dealing, violent criminal activity, and conduct that poses environmental and health hazards. Enforcement of municipal law remains an important tool for cities to use in combatting the multi-dimensional problem of homelessness and thereby wresting back their city streets from the scourge of crime, violence, and disease, thus making those cities safer for all citizens—especially those experiencing homelessness. While *Martin* does create a significant hurdle to curbing the homelessness crisis, it does not mean that municipalities must give up in the face of an increasing threat to public safety. As shown below, elected officials can find no refuge in the *Martin* decision to justify further inaction in addressing the homelessness crisis, which has torn the social contract asunder.

II. A CRISIS OF MONUMENTAL PROPORTIONS

The crisis of homelessness gripping the State of California is monumental. The most recent count, conducted in 2019, revealed that the number of unhoused Californians is in excess of 150,000 persons, which represents more than a quarter of the entire country's homeless population—double what one would expect in a State that contains roughly twelve percent of the country's population.² Over 66,000 of those individuals reside in Los Angeles County alone.³ And the coronavirus pandemic with its attendant economic downturn promises to make this crisis more acute still. By one estimate, the effects of the pandemic-driven downturn will cause “chronic homelessness” to increase by 68% in California and by 86% in Los Angeles County over the next four years.⁴

The most troubling aspect of this crisis is the fact that persons experiencing homelessness are at particular risk of death, injury, and disease. In Los Angeles County, deaths among

persons experiencing homelessness have been on the rise every year since 2014, skyrocketing from 630 in 2014 to 1,267 in 2019.⁵ Preliminary estimates for last year predict another grim milestone for Los Angeles County, with deaths among persons experiencing homelessness up over 26% through July 2020.⁶ Orange County has been on a similar trajectory, with 330 persons experiencing homelessness dying in 2020, up from just over 200 the year before.⁷ And in San Francisco, deaths among persons experiencing homelessness jumped by 123% in 2020, from 91 persons between January and September 2019 to 203 persons between January through September 2020.⁸

For those living on the streets, trapped in encampments, violence and anarchy reign supreme. In San Francisco's Tenderloin District, violent crime is up 24% with the number of tents packing the streets rising from 173 on March 13, 2020, to 416 in early June 2020.⁹ Drug dealing and use continues unabated to such a degree that there have been reports of “line[s] of people stretch[ing] down” the streets of San Francisco in what looks “like a soup kitchen line,” but which in reality is a line to acquire narcotics.¹⁰ Indeed, “[i]n the Tenderloin, SOMA, and Mid-Market neighborhoods, the homeless congregate in open-air drug markets; dealers wear gloves and masks and sell heroin, fentanyl, and methamphetamine in broad daylight.”¹¹ Residential neighborhoods have not been spared: “longtime residents describe the environment as ‘apocalyptic,’ with encampments, trash, and drug havens in every corner.”¹²

Los Angeles is no different. In the Skid Row neighborhood of downtown Los Angeles “street gangs from South Los Angeles . . . control the markets for meth, heroin, prostitution, cigarettes, and stolen goods.”¹³ This is lucrative business: “the sales of meth, heroin, and cocaine on Skid Row add up to a \$200 million annual enterprise, fueling a massive black market in everything from stolen bicycle parts to human organs.”¹⁴ As a consequence of this criminal activity, crimes *against* persons experiencing homelessness in Los Angeles increased by 24% in 2019, with a 19% increase in serious violent crime, including homicide, rape, robbery, aggravated assault, burglary, motor vehicle theft, larceny-theft, and arson.¹⁵ In Los Angeles in 2020, “fires related to homeless [we]re up 82% over the last year,” with many of the fires attributable to arson being committed by one person experiencing homelessness against the tent of another, often due to disputes over money and drugs.¹⁶

The encampments in which many unhoused persons reside have also contributed to a burgeoning public-health crisis, serving as incubators for diseases such as typhus, typhoid fever, and tuberculosis.¹⁷ In Los Angeles, mountains of trash, rotting food, and human waste around encampments have contributed to a rodent infestation that, in turn, has precipitated a sharp rise

in flea-borne typhus—up from eighteen cases in 2009 to 174 in 2018.¹⁸ These problems have only gotten more severe in recent months, as the Los Angeles City Sanitation Department has reportedly ceased conducting regular cleanups of encampments due to the coronavirus pandemic, and “[t]he result is that some city streets are littered with months of uncollected trash that’s not only attracting rodents and fleas—a longstanding problem—but now maggots are covering some sidewalks and entering buildings.”¹⁹

These public-health problems are not unique to Los Angeles. In Orange County, a February 2018 clean-up of a two mile-long encampment along the Santa Ana River that hosted more than 700 people uncovered “404 tons of debris, 13,950 needles, and 5,279 pounds of waste,” including human waste, propane, and pesticides.²⁰ And in San Francisco, hundreds of thousands of used needles litter the city’s streets—“164,264 needles [were recovered] in August [2018] alone.”²¹ Along with these syringes, so much human waste has accumulated on the streets that the city has established a “proactive human waste” unit to clean it up daily, appropriating over \$830,977 to tackle the city’s “feces problem.”²²

Local residents, business owners, and visitors have not been spared from the chaos on the streets. During 2020, the number of encampments swelled throughout Los Angeles, popping up everywhere from empty parking lots to freeway overpasses, from beaches to golf courses.²³ Residents who live near these encampments complain about a proliferation of trash, drug use, and tents.²⁴ One business owner complained about individuals tapping into his restaurant’s water and electricity supply.²⁵ A local resident reported observing a woman who routinely fights with her boyfriend in public while naked.²⁶ A local homeowner has likewise described “several incidents when I am afraid to leave my home” including an “incident with someone very high and mentally unstable on my driveway when I came home from grocery shopping that I was afraid to get out of my car and unload my groceries into my OWN HOME.”²⁷ That resident stated that, as a consequence of this conduct, “I fear for my life.”²⁸

Still another resident described an encounter with an individual who threatened to kill her and then went “on a spree and smash[ed] the windows, hoods, and roofs of at least half a dozen cars—with his body.”²⁹ Yet another said that “her 14-pound dog was attacked by a resident’s much larger dog as they walked past [a] shelter entrance.”³⁰ And conditions have deteriorated so much on the world-famous Venice Beach boardwalk that the owner of a Ben and Jerry’s ice cream shop has decided to close the business due to the proliferation of drugs

and crime, which make it impossible to attract customers or to provide a safe work site for employees.³¹

III. LEGAL IMPEDIMENTS TO CHANGE

The crisis of homelessness afflicting cities throughout California is complex, multifaceted, and has no quick fixes. But the legal impediments currently in place operate only to entrench the status quo and hinder necessary change. Sadly, this status quo is in large part the product of a self-inflicted wound, as municipalities—most notably Los Angeles—have capitulated to lawsuits designed to restrict their ability to enforce basic public safety laws. Indeed, over the past two decades, a combination of lawsuits, court decisions, and subsequent legal settlements have effectively created a de facto constitutional right to camp in public spaces and to store in that encampment unlimited amounts of personal property. This web of legal precedents and settlements has created municipal paralysis, leaving California’s local governments unable or unwilling to act and resulting in the abandonments of large swaths of cities to encampments that breed violence, crime, and disease.

A. *Jones v. City of Los Angeles*: Constitutionalizing the Right to Public Camping in Los Angeles

The story begins in 2006 with *Jones v. City of Los Angeles*.³² In *Jones*, six persons experiencing homelessness sued the City of Los Angeles, alleging that the City’s enforcement of municipal ordinances prohibiting “sit[ting], l[y]ing, or sleep[ing] in or upon any street, sidewalk or other public way” violated the Eighth Amendment of the United States Constitution, which prohibits “Cruel and Unusual Punishment.”³³ The United States District Court for the Central District of California granted Los Angeles’s motion for summary judgment, reasoning that enforcement of this commonplace municipal ordinance did not violate the Eighth Amendment because the ordinance penalized the plaintiffs for their “conduct,” not for the “status” of being homeless, as the plaintiffs had argued.³⁴

But in a first-of-its-kind opinion, the United States Court of Appeals for the Ninth Circuit reversed the district court’s decision.³⁵ Over a dissent, the panel majority held that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available [shelter] beds, the City may not enforce” its public-camping ordinance “at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public.”³⁶ The court reasoned that persons experiencing homelessness “are in a chronic state that may have been acquired ‘innocently or involuntarily’” and that “sitting, lying, and sleeping . . . are universal and unavoidable consequences of being human.”³⁷ As

a result, the Ninth Circuit held, because “human beings are biologically compelled to rest,” “criminalizing sitting, lying, and sleeping . . . criminaliz[es]” the plaintiffs’ “status as homeless individuals.”³⁸ Accordingly, the court held that the Eighth Amendment prohibits the State both from “making it an offense to be idle, indigent, or homeless in public spaces” and “criminaliz[ing] conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets of Los Angeles’s Skid Row.”³⁹

The *Jones* decision portended a sea change in the law for cities within the Ninth Circuit’s jurisdiction, most of which have had public-camping ordinances on the books for decades with nary a concern about their constitutionality. The broad rationale of the Ninth Circuit’s decision would have likely swept each of these ordinances off the books, but for the fact the parties in *Jones* entered into a settlement agreement following the Ninth Circuit’s decision, which resulted in the Ninth Circuit vacating its decision in *Jones*.⁴⁰ While the Ninth Circuit’s order vacating its opinion in *Jones* meant that cities throughout the Ninth Circuit would no longer be bound by the court’s sweeping and unprecedented decision, Los Angeles, as party to the settlement, would be. The settlement agreement essentially bound Los Angeles to the core holding of the *Jones* opinion. Indeed, the City agreed that it would not enforce its public-camping ordinance between the hours of 9:00 p.m. and 6:00 a.m.⁴¹ And the City further promised that this policy of nightly non-enforcement would remain in effect until the City constructed an additional 1,250 units of permanent supportive housing for persons experiencing homelessness.⁴² Thus, following the *Jones* settlement, the Ninth Circuit’s holding that cities may not prohibit public camping effectively became the law, at least in Los Angeles.

B. *Lavan & Mitchell*: Establishing a Constitutional Right to Store Property in Public Spaces

Whereas the *Jones* case achieved, in effect, the establishment of a de facto constitutional right to camp in public spaces—albeit only in Los Angeles and only through a court-approved settlement agreement—the next constitutional frontier was fast approaching. The epicenter of this litigation was, again, Los Angeles. In *Lavan v. City of Los Angeles*, eight persons experiencing homelessness sued the City of Los Angeles alleging that the City’s seizure and destruction of their personal property, left unattended in public areas, violated their Fourth Amendment right to be free of unreasonable searches and seizures and their Fourteenth Amendment “procedural due process” rights.⁴³ The district court agreed with the plaintiffs and issued an injunction prohibiting the City from (a) seizing property in Skid Row “absent an objectively reasonable belief

that it is abandoned, presents an immediate threat to public health and safety, or is evidence of a crime, or contraband” and (b) “destr[oying] [such] seized property without maintaining it in a secure location for a period of less than 90 days,” “[a]bsent an immediate threat to public health or safety.”⁴⁴

Over a dissenting opinion, the Ninth Circuit affirmed. The panel refused to apply the Fourth Amendment’s traditional “reasonable expectation of privacy” test and instead held that “by seizing and destroying [Plaintiffs’] unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with [Plaintiffs’] possessory interests in that property.”⁴⁵ To avoid the question whether it was reasonable for the City to *seize* items left unattended on the street, the court collapsed the inquiry and concluded that “even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City’s destruction of the property rendered the seizure unreasonable.”⁴⁶ The court further held that “homeless persons’ unabandoned possessions are ‘property’ within the meaning of the Fourteenth Amendment,” and that the City violated the plaintiffs’ Fourteenth Amendment procedural due process rights by failing to provide them with “notice” and an “opportunity to be heard” before it “seized and destroyed their property.”⁴⁷

While the court in *Lavan* was careful to disclaim the notion that the case “concern[ed] any purported right to use public sidewalks as personal storage facilities,”⁴⁸ litigants and lower courts did not see it that way. Four years later, four plaintiffs sued the City of Los Angeles, alleging that the City had been engaged in a pattern and practice of unconstitutionally seizing their property incident to arrest in violation of the Fourth and Fourteenth Amendments.⁴⁹ The district court agreed, applied *Lavan*, and issued a preliminary injunction enjoining the City from “[c]onfiscating property in Skid Row or its surrounding areas, incident to an arrest or as part of a cleanup of an area where homeless people are located, absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, is evidence of a crime, or is contraband.”⁵⁰

The City subsequently filed a motion for clarification, seeking further guidance from the district court on the scope of its injunction. In particular, the City sought clarity as to whether the injunction prohibited the City from seizing “bulky items”—such as sofas, appliances, and sheds—that were left unattended on the streets, given that a recent amendment to the Los Angeles Municipal Code specifically authorized the City to seize and destroy such items.⁵¹ The court “determined that it need not provide clarification” on that issue but went on to state that “[t]here is no exception [in its injunction] for bulky items” and if

a bulky item “does not pose” an “immediate threat to public health or safety” “then it must not be seized.”⁵²

Thereafter, Los Angeles settled *Mitchell*. Through the May 2019 settlement agreement, the City promised that, for a three-year period, it would not “seize property as part of a cleanup of an area where homeless people’s property is located, absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, is evidence of a crime, or is contraband.”⁵³ The City further agreed that it would provide “at least 24 hours advance notice” of any encampment clean up and then “provide a 30-minute warning and opportunity for individuals to remove property when a cleanup is imminent on any block about to be cleaned.”⁵⁴ As the Los Angeles Times summarized, as a result of this settlement persons experiencing homelessness “now have the right to keep a nearly unlimited amount of possessions with them on the sidewalks of skid row.”⁵⁵

C. *Martin*: The Return of Jones

While the effects of *Jones* and *Mitchell* settlements may have been cabined to Los Angeles, it would not stay that way for long. In *Martin v. City of Boise*, six persons experiencing homelessness sued the City of Boise, Idaho, alleging that their citations under Boise’s public-camping ordinances violated the Eighth Amendment’s Cruel and Unusual Punishment Clause.⁵⁶ The United States District Court for the District of Idaho granted the City of Boise’s motion for summary judgment on jurisdictional grounds, holding that the plaintiffs lacked standing to pursue these Eighth Amendment claims.⁵⁷

But the Ninth Circuit reversed. After disposing of the standing issue, the panel proceeded to the merits of the plaintiffs’ Eighth Amendment claim—even though it was not addressed by the district court in the first instance. Expressly invoking the since-vacated *Jones* decision, the court held: “we agree with *Jones*’s reasoning and central conclusion . . . and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them.”⁵⁸ From a smattering of plurality, concurring, and dissenting opinions in a 1960s United States Supreme Court case, the Ninth Circuit distilled the principle that “the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being.”⁵⁹ The Ninth Circuit reasoned that sleeping, lying, and sitting in public “is involuntary and inseparable from status—they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.”⁶⁰

Apparently recognizing the startling breadth of the legal principle just announced, the Ninth Circuit immediately set to work trying to cabin its holding. Declaring that its “holding is a narrow one,” the court stated that it was “in no way dictat[ing] to the city that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.”⁶¹ The court further explained in a footnote that its 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.”⁶² And in that same footnote the court stated that it did not mean to “suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside,” noting that “[e]ven where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside *at particular times or in particular locations* might well be constitutionally permissible,” along with “an ordinance barring the obstruction of public rights of way or the erection of certain structures.”⁶³ Instead, the court claimed that it “[h]eld only” 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.”⁶⁴

Following the panel’s decision, the City of Boise filed a petition for rehearing *en banc* asking the full Ninth Circuit to rehear the case, but that petition was denied over two separate dissents. The principal dissent, authored by Judge Milan D. Smith and joined by five other judges, explained that the panel’s decision “conflicts with reasoning underlying the decisions of other appellate courts” that have rejected Eighth Amendment challenges to laws banning similar purportedly involuntary conduct.⁶⁵ Judge Smith’s dissent also emphasized the consequences of the court’s decision, which “leaves cities with a Hobson’s choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety.”⁶⁶ But as Judge Smith explained, this choice is illusory: “Given the daily fluctuations in the homeless population, the panel’s opinion would require this labor-intensive task be done every single day,” which is “impossible” since even with thousands of volunteers devoting countless hours, it still takes three days to perform an annual count in Los Angeles—and even then “not everybody really gets counted.”⁶⁷

Following the Ninth Circuit’s refusal to rehear the case, the City of Boise sought review in the United States Supreme Court. In addition to pointing out that the Ninth Circuit’s decision was inconsistent with the decisions of other federal courts of appeals and a decision from the California Supreme Court, the City

explained how the Ninth Circuit's decision, if left undisturbed, would undermine the ability of state and local governments to protect public health and safety and would be unworkable in practice.⁶⁸ The City's petition for certiorari was supported by a diverse range of amici, including seven states, forty-one cities and counties from California, eight municipal, county, or regional organizations collectively representing tens of thousands of cities, towns, and counties, five law enforcement groups, three homelessness services providers, and eleven business groups.⁶⁹ According to the *New York Times*, the twenty amicus briefs supporting the City's certiorari petition "may have set a record for the number of such filings at this stage of a Supreme Court case."⁷⁰ Yet on December 16, 2019, the Supreme Court denied the City of Boise's certiorari petition without comment.⁷¹

IV. A PATH FORWARD

In the wake of the U.S. Supreme Court's refusal to hear *Martin v. City of Boise*, many cities, feeling as if they have little choice in the matter, have simply given up enforcement of their public-camping ordinances, with some going so far as establishing *city-sanctioned* encampments.⁷² This is not the answer. A policy of non-enforcement is precisely what has led to—and exacerbated—the ever-worsening conditions on city streets throughout California. And what is truly cruel and unusual is consigning those experiencing homelessness to living in dangerous encampments under the misguided notion that the U.S. Constitution *requires* cities to stand on the sidelines, powerless to address their unchecked growth and the dangerous conditions that have arisen around them.

While the homelessness crisis is undoubtedly a multivariate problem—implicating issues of housing,⁷³ mental illness,⁷⁴ and addiction⁷⁵—to break the legal paralysis and ensure that city streets are safe and sanitary for all, enforcement of longstanding municipal laws regulating public health and safety must be part of the equation. After all, it is axiomatic that the law has both "direct" and "indirect" effects on the behavior of those subject to it, shaping their conduct accordingly.⁷⁶ The current state of affairs perfectly illustrates this principle, with the erosion of the social contract in our cities dovetailing with the non-enforcement of municipal law.⁷⁷ It is no answer to say that encampments should be permitted under some flawed conception of "liberty." The statistics described above paint a clear picture: the unhoused living in encampments stare down death, violence, and disease on a daily basis.⁷⁸

Importantly, the *Martin* decision does not stand in the way of local governments taking concrete and meaningful steps to restore safe, clean public spaces to their cities, while at the same time protecting the rights of all citizens. Indeed, the

Ninth Circuit in *Martin* took pains to emphasize that local governments may enforce ordinances "prohibiting sitting, lying, or sleeping outside *at particular times or in particular locations*."⁷⁹ The same is true, the court noted, of "an ordinance barring the obstruction of public rights of way or the erection of certain structures."⁸⁰ Likewise, where an individual does "have access to adequate temporary shelter . . . but . . . choose[s] not to use it," ordinances regulating public camping may be enforced.⁸¹ Furthermore, *Martin* concerned only the constitutionality of ordinances imposing *criminal* penalties, such as misdemeanors; it says nothing about the constitutionality of ordinances imposing civil penalties for public camping.⁸² Accordingly, post-*Martin*, local governments can and should rely on time, manner, and place restrictions to regulate and contain the explosive growth of encampments. Moreover, there is nothing in *Martin* that prevents local governments from distinguishing between camping and other illegal conduct, such as drug dealing, assaults, theft, pollution, and other violent criminal activity when seeking to enforce the law. With *Martin* on the books, municipal governments should be *more* vigilant than ever in policing and prosecuting such conduct to secure the public health and safety. A failure of enforcement under these circumstances cannot be laid at the feet of the Ninth Circuit's decision in *Martin*; the responsibility lies solely with elected officials.

To be sure, any ordinance should be carefully crafted and narrowly tailored with the advice of counsel. And municipalities should be prepared to defend those ordinances in court against a constitutional challenge. But local governments should not be hamstrung by the Ninth Circuit's decision in *Martin*, which styled itself as a modest and "narrow" decision that merely declared unconstitutional a broadly-worded ordinance attaching criminal penalties to unauthorized public camping. Some cities have already recognized this. In San Rafael, California, for instance, the City has observed that the *Martin* decision does not forbid cities from regulating encampments through time, manner, and place restrictions.⁸³ So too has the City of Arcadia, which has signaled an intent to update its public-camping laws to "identify allowable places, times, and manners for involuntary camping."⁸⁴

Federal district courts have also recognized the limits of the *Martin* decision. In *Young v. City of Los Angeles*, for example, the court rejected a plaintiff's argument that he had stated an Eighth Amendment claim under *Martin* based on the allegation that "the City had been depriving him of his right to sleep on public streets in Los Angeles for the past three years by taking down encampments and forcing him to move."⁸⁵ The court explained that, under *Martin* "the Eighth Amendment only bars the City from criminally prosecuting Plaintiff for sleeping on public streets when he has no other place to go" and that

“[c]ourts following *Martin* have declined to expand its holding beyond the criminalization of homelessness.”⁸⁶ While the plaintiff alleged that “officers have written false tickets or reports regarding Plaintiff failing to take down a tent or that Plaintiff was loitering,” such allegations were insufficient because “Plaintiff does not allege he was criminally prosecuted or sanctioned based on these false tickets or reports.”⁸⁷ Furthermore, the court added that “it is all not clear whether the laws these citations were based on would be barred by the Eighth Amendment because an ordinance that prohibits tenting or loitering at particular times or particular locations may be permissible.”⁸⁸

Young is not an outlier. Other federal district courts in California are in agreement about the limited scope of *Martin*. For example, in *Le Van Hung v. Schaaf*, a district court in the Northern District of California held that the City of Oakland did not run afoul of *Martin* by “clean[ing] and clear[ing]” a park where an encampment was located.⁸⁹ The court noted that cleaning and clearing a park did not require the City to arrest the plaintiffs, and “while *Martin* limits localities’ ability to arrest their homeless residents for the act of living in the streets when there is nowhere else for them to go, it does [not] create a right for homeless residents to occupy indefinitely any public space of their choosing.”⁹⁰

Similarly, in *Housing is a Human Right Orange County v. County of Orange*, a district court in the Central District of California held that the City of San Clemente could not be held to have violated *Martin* based upon the allegation that its officers threatened persons experiencing homelessness with arrest.⁹¹ Mere threats were insufficient: the *Martin* decision “require[s] the initiation of the criminal process to state a claim for damages for an Eighth Amendment violation.”⁹² And in *Mahoney v. City of Sacramento*, a district court in the Eastern District of California held that Sacramento did not violate *Martin* by removing a portable toilet from an encampment, reasoning that “it is not a necessary corollary that the same right” to “engag[e] in involuntary, life-sustaining actions on public property” is at issue with respect to “the removal of [a] portable toilet.”⁹³

As the foregoing authorities indicate, local governments should not retreat from enforcement of municipal law in the wake of *Martin*. Nor does *Martin* mean that cities should capitulate in the face of setbacks during litigation, as the City of Los Angeles arguably did in *Jones* and *Mitchell*. In addition to entrenching and exacerbating the status quo, these settlements have operated in practice to blur accountability by “providing politicians some cover for their lack of solutions, [and] allowing them to ‘hide behind a federal judge.’”⁹⁴ But the public must be able to hold elected officials accountable at the ballot box, and the pattern of

litigation followed by settlement simply allows elected officials to pass the buck by laying the blame for inaction on the federal courts. There should be no such excuses after *Martin*. After all, federal district courts in California have taken the Ninth Circuit at its word and interpreted *Martin* narrowly, affording the government ample room to manage the homelessness crisis. And *Martin* certainly provides no grounds for local governments to abdicate their responsibility to vigorously enforce the portions of its criminal and civil code outlawing violent crime, drug dealing and use, and conduct creating environmental or other public health hazards. To be sure, the *Martin* decision is likely to be wielded by some to thwart city efforts to tackle the complex issue of homelessness.⁹⁵ But as post-*Martin* decisions indicate, local governments may find an ally in California’s federal courts, and they should not shrink from their duties to protect the rights of all residents to have safe and sanitary public areas.

Endnotes

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- 2 The U.S. Dep’t of Housing & Urban Dev., The 2019 Annual Homeless Assessment Report (AHAR) to Congress 12 (2019), <https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf>; Quick Facts California; United States, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/CA,US/PST045219> (stating that, as of July 2019, California had a population of 39,512,223 and the United States a population of 328,239,523).
- 3 L.A. Homeless Servs. Auth., Greater Los Angeles Homeless Count 2020, 4 (2020), <https://www.lahsa.org/documents?id=4558-2020-greater-los-angeles-homeless-count-presentation>.
- 4 Economic Roundtable, Locked Out: Unemployment & Homelessness in the Covid Economy 3 (2021), <https://economicrt.org/wp-content/uploads/2021/01/Locked-Out.pdf>.
- 5 L.A. Cty. Dep’t of Public Health, Recent Trends in Mortality Rates & Causes of Death Among People Experiencing Homelessness in Los Angeles County 6

- (2021), http://www.publichealth.lacounty.gov/chie/reports/HomelessMortality2020_CHIEBrief_Final.pdf.
- 6 *Id.* at 12.
 - 7 Ben Brazil, *More Homeless Orange County Residents Died Last Year than Any Other, Coroner Says*, L.A. Times (Jan. 7, 2021), <https://www.latimes.com/california/story/2021-01-07/homeless-deaths-orange-county>.
 - 8 Marisa Kendall, *Despite Protections, Deaths Surge in Bay Area Homeless Communities*, The Mercury News (Nov. 1, 2020), <https://www.mercurynews.com/2020/11/01/despite-protections-deaths-surge-in-bay-area-homeless-communities/>.
 - 9 Bob Egelko, *'Lives Are in Danger': Lawsuit Argues SF Needs to Clean up the Tenderloin as Coronavirus Spreads*, S.F. Chron. (May 5, 2020), <https://www.sfchronicle.com/bayarea/article/Lawsuit-San-Francisco-needs-to-clean-up-the-15245770.php>; Heather Knight, *'It's Devastating': The Tenderloin Sinks Deeper Into Misery, and No One is Coming to the Rescue*, S.F. Chron. (June 6, 2020), <https://www.sfchronicle.com/bayarea/heatherknight/article/It-s-devastating-The-Tenderloin-sinks-15321043.php>.
 - 10 Knight, *supra* note 9.
 - 11 Christopher F. Rufo, *Chaos By the Bay*, City J. (Apr. 14, 2020), <https://www.city-journal.org/san-francisco-experiment-in-lawlessness>.
 - 12 *Id.*
 - 13 Christopher F. Rufo, *The Moral Crisis of Skid Row*, City J. (Feb. 15, 2020), <https://www.city-journal.org/skid-row-los-angeles>.
 - 14 *Id.*
 - 15 Grace Matheny, *Crimes Against Homeless People Increased 245 in 2019 While Overall Crime Decreased, Crime Data Shows*, ABC 7 (Jan. 14, 2020), <https://abc7.com/lapd-crime-stats-data/5849457/>.
 - 16 Joel Grover & Josh Davis, *Venice Beach Up in Flames: Frequent Homeless Tent Fires Threaten Residents & Tourists*, NBC 4 (Oct. 10, 2020), <https://www.nbclosangeles.com/investigations/venice-beach-up-in-flames-frequent-homeless-tent-fires-threaten-residents-and-tourists/2442123/>.
 - 17 Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), <https://www.theatlantic.com/health/archive/2019/03/typhustuberculosis-medieval-diseases-spreading-homeless/584380/>.
 - 18 Cal. Dep't of Pub. Health, *Human Flea-Borne Typhus Cases in Cal.1* (2019); Dakota Smith & David Zahniser, *Filth From Homeless Camps is Luring Rats to L.A. City Hall, Report Says*, L.A. Times (June 3, 2019), <https://www.latimes.com/local/lanow/la-me-ln-rats-homelessness-city-hall-fleas-report-20190603-story.html>.
 - 19 Joel Grover & Josh Davis, *Maggots, Rodents, and Fleas: LA's Garbage Problem Is Getting Worse During the Pandemic*, NBC L.A. (Oct. 20, 2020), <https://www.nbclosangeles.com/investigations/maggots-rodents-fleas-los-angeles-garbage-problem-trash-homeless/2446368/>.
 - 20 Anh Do, *'Eye-Popping' Number of Hypodermic Needles, Pounds of Waste Cleared from Orange County Riverbed Homeless Encampment*, L.A. Times (Mar. 10, 2018), <https://www.latimes.com/local/lanow/la-me-ln-riverbed-debris-20180310-story.html>.
 - 21 Thomas Fuller, *Life on the Dirtiest Block in San Francisco*, N.Y. Times (Oct. 8, 2018), <https://www.nytimes.com/2018/10/08/us/san-francisco-dirtiest-street-london-breed.html>.
 - 22 *Id.*; Aria Bendix, *San Francisco Has a 'Poop Patrol' to Deal with Its Feces Problem, and Workers Make More than \$184,000 a Year in Salary and Benefits*, Bus. Insider (Aug. 24, 2018), <https://www.businessinsider.com/san-francisco-poop-patrolempleyees-make-184000-a-year-2018-8>.
 - 23 *Some Ask if City is Doing Enough to Keep Angelenos Experiencing Homelessness Safe in Wake of Pandemic*, CBS L.A. (Aug. 12, 2020), <https://losangeles.cbslocal.com/2020/08/12/some-ask-if-city-is-doing-enough-to-keep-angelenos-experiencing-homelessness-safe-in-wake-of-pandemic/>; *see also* Itay Hod, *Homeless Encampments Swell During Pandemic*, Spectrum News 1 (Oct. 10, 2020), <https://spectrumnews1.com/ca/la-west/homelessness/2020/10/10/homeless-encampments-reach-unprecedented-levels-amid-covid-19> (“The number of tents has mushroomed over the last six months, from a cluster of structures to a full-blown tent city”); Joel Grover & Josh Davis, *Homeless Encampments Spread to Beaches, Golf Courses As City Takes Hands-Off Approach*, NBC L.A., (Sept. 4, 2020) <https://www.nbclosangeles.com/investigations/homeless-encampments-spread-to-beaches-golf-courses-as-city-takes-hands-off-approach/2423332/>.
 - 24 Rob Hayes, *Signs of Homelessness in Los Angeles Growing Worse During Coronavirus Pandemic*, ABC 7 L.A., (July 7, 2020), <https://abc7.com/los-angeles-homeless-crisis-la-homelessness-during-coronavirus-covid-19-and/6305357/>.
 - 25 *Id.*
 - 26 *Id.*

- 27 Edward Ring, *While Venice Beach Residents Under Lockdown, Homeless and Encampments Grow and Thrive*, Cal. Globe (Mar. 26, 2020), <https://californiaglobe.com/section-2/while-venice-beach-residents-under-lockdown-homeless-and-encampments-grow-and-thrive/>.
- 28 *Id.*
- 29 *Id.*
- 30 *Id.*
- 31 Koco McAboy, *Business Owner on Venice Boardwalk Shutting Down Shop After Rise in Crime and Drugs in Area*, FOX 11 L.A. (Jan. 29, 2021), <https://www.foxla.com/news/business-owner-on-venice-boardwalk-shutting-down-shop-after-rise-in-crime-and-drugs-in-area>.
- 32 444 F.3d 1118 (9th Cir. 2006), *vacated by* 505 F.3d 1006 (9th Cir. 2007).
- 33 *Id.* at 1122–25.
- 34 *Id.* at 1125.
- 35 *Id.* at 1138.
- 36 *Id.*
- 37 *Id.* at 1136 (quoting *Robinson v. Cal.*, 370 U.S. 660, (1962)).
- 38 *Id.* at 1136–37.
- 39 *Id.* at 1137.
- 40 *Jones v. City of L.A.*, 505 F.3d 1006 (9th Cir. 2007).
- 41 *Jones v. City of L.A. Settlement Agreement*, <https://veniceupdate.com/wp-content/uploads/2018/06/Jones-Settlement.pdf>.
- 42 *Id.*
- 43 *Lavan v. City of L.A.*, 693 F.3d 1022, 1024–26 (9th Cir. 2012).
- 44 *Id.*
- 45 *Id.* at 1030.
- 46 *Id.*
- 47 *Id.*
- 48 *Id.* at 1033.
- 49 *Mitchell v. City of L.A.*, No. 2:16-cv-01750, 2016 WL 11519288, at *1 (C.D. Cal. Apr. 13, 2016).
- 50 *Id.* at *7.
- 51 *Mitchell v. City of L.A.*, No. 2:16-cv-01750, 2017 WL 10545079, at *2 (C.D. Cal. Sept. 25, 2017).
- 52 *Id.* at *2-*4.
- 53 [Proposed] Stipulated Order of Dismissal, Ex. A, ¶ 4(b) (Settlement and Release Agreement), *Mitchell v. City of L.A.*, No. 2:16-cv-01760 (C.D. Cal. May 29, 2019), ECF No. 118-1.
- 54 *Id.*
- 55 *A Court Decision Letting Homeless People Keep All Their Belongings Helps No One*, Times Editorial Bd., L.A. Times (May 31, 2019), <https://www.latimes.com/opinion/editorials/la-ed-mitchell-homeless-settlement-20190531story.html>.
- 56 *Martin v. City of Boise*, 920 F.3d 584, 606 (9th Cir. 2019).
- 57 *Id.* at 607–08.
- 58 *Id.* at 604.
- 59 *Id.* at 616.
- 60 *Id.* at 617.
- 61 *Id.* (quoting *Jones*, 444 F.3d at 1138).
- 62 *Id.* at 617 n.8 (emphasis in original).
- 63 *Id.* (emphasis added).
- 64 *Id.* at 617.
- 65 *Id.* at 593 (Smith, J., dissenting).
- 66 *Id.* at 594.
- 67 *Id.*
- 68 Petition for a Writ of Certiorari at 13–35, *City of Boise v. Martin*, 140 S. Ct. 674 (2019) (No. 19-247).
- 69 *See generally City of Boise, Idaho v. Martin*, SCOTUSblog, <https://www.scotusblog.com/case-files/cases/city-of-boise-idaho-v-martin/> (listing and linking amicus briefs in support of certiorari petition).
- 70 Adam Liptak, *Supreme Court Won't Revive Law Barring Homeless People From Sleeping Outdoors*, The N.Y. Times (Dec. 16, 2019), <https://www.nytimes.com/2019/12/16/us/supreme-court-idaho-homeless-sleeping.html>.
- 71 *City of Boise v. Martin*, 140 S. Ct. 674 (Mem) (2019).
- 72 Emilie Raguso, *Berkeley Mayor Vows to Set Up Sanctioned Homeless Camp as Willard Park Conditions Worsen*, Berkeleyside (Sept. 4, 2020), <https://www.berkeleyside.com/2020/09/04/berkeley-mayor-vows-to-set-up-sanctioned-homeless-camp-as-willard-park-conditions-worsen>; Sarah Ravani, *Sanctioned Homeless Encampments: Oakland and Berkeley Leaders Pay for Safer Spaces*, S.F. Chron. (Feb. 15, 2020), <https://www.sfchronicle.com/bayarea/article/Sanctioned-homeless-encampments-Oakland-and-15058546.php>; Jon Kawamoto, *Berkeley to Set Up Sanctioned Homeless Encampment*, The Mercury News (Jan. 22, 2020), <https://www.mercurynews.com/2020/01/22/berkeley-approves-plan-for-homeless-camp-program/>; Anna Scott, *Could the West LA VA's Tent City be a Model for Bringing Relief to LA's Unhoused?*, KRCW (Sept. 2, 2020), <https://www.kcrw.com/news/shows/greater-la/homeless-south-la-shooting-transit/tent-city-west-la-va>.
- 73 *See e.g.*, Alfred M. Clark III, *Homelessness & the Crisis of Affordable Housing: The Abandonment of a Federal Affordable*

- Housing Policy*, 25 J. Affordable Housing & Cmty. Dev. L. 85, 92–95 (2016); Nat’l Law Ctr. on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* 14 (2014).
- 74 Doug Smith & Benjamin Oreskes, *Are Many Homeless People in L.A. Mentally Ill? New Findings Back the Public’s Perception*, L.A. Times (Oct. 7, 2019), <https://www.latimes.com/california/story/2019-10-07/homeless-population-mental-illness-disability> (noting that an LA Times investigation revealed that 51% of those living on the streets suffered from mental illness).
- 75 Heather MacDonald, *San Francisco, Hostage to the Homeless*, City J. (Oct. 5, 2019), <https://www.city-journal.org/san-francisco-homelessness>; Christopher F. Rufo, *The Moral Crisis of Skid Row*, City J. (Feb. 15, 2020), <https://www.city-journal.org/skid-row-los-angeles>.
- 76 Robert E. Scott, *The Limits of Behavioral Theories of Law & Social Norms*, 86 Va. L. Rev. 1603, 1603–04 (2000); Richard H. McAdams, *The Origin, Development, & Regulation of Norms*, 96 Mich. L. Rev. 338, 349 (1997).
- 77 See Christopher F. Rufo, *Chaos By the Bay*, City J. (Apr. 14, 2020), <https://www.city-journal.org/san-francisco-experiment-in-lawlessness> (describing the rise in lawlessness in San Francisco as coinciding with a city policy described as “decarcerate decriminalize, and depolice”).
- 78 *Supra* Section I.
- 79 *Martin v. City of Boise*, 920 F.3d 584, 617 n.8 (9th Cir. 2019).
- 80 *Id.*
- 81 *Id.*
- 82 *But see Blake v. City of Grants Pass*, No. 1:18-cv-01823, 2020 WL 4209227, at *9–*10 (D. Or. July 22, 2020) (holding that *Martin’s* Eighth Amendment analysis applies to bar *civil* penalties, such as fines, for violating a public camping ordinance).
- 83 *Martin v. Boise*, City of San Rafael (Jan. 27, 2020), <https://www.cityofsanrafael.org/martin-v-boise/>.
- 84 Office of the City Manager, City of Arcadia, California, Staff Report Regarding Ordinance No. 2374 Amending Chapter 9 of The Arcadia Municipal Code Relating to Camping and Storage of Personal Property on Public Property and Determining the Ordinance is Categorically Exempt Under the California Environmental Quality Act (“CEQA”) 30 (2021), https://www.arcadiaca.gov/2021-02-16_CC_Meeting_Agenda.pdf.
- 85 *Young v. City of L.A.*, No. 2:20-cv-00709, 2020 WL 616363, at *5 (C.D. Cal. Feb. 10, 2020).
- 86 *Id.*
- 87 *Id.*
- 88 *Id.* (citing *Martin v. City of Boise*, 920 F.3d 584, 617 n.8 (9th Cir. 2019)).
- 89 No. 19-cv-01436, 2019 WL 1779584, at *4 (N.D. Cal. Apr. 23, 2019); see also *Shipp v. Schaaf*, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019) (“the City’s decision to require Plaintiffs to temporarily vacate their encampment does not, by itself, implicate any criminal sanctions that would trigger Eighth Amendment protections”); *Catchings v. City of L.A.*, No. 19-cv-9480, 2020 WL 5875100, at *7 (C.D. Cal. Aug. 7, 2020) (same); *Winslow v. City of Oakland*, No. 20-cv-01510, 2020 WL 1031759, at *3 (N.D. Cal. Mar. 3, 2020) (same).
- 90 *Le Van Hung v. Schaaf*, 2019 WL 1779584, at *4–*5.
- 91 *Housing is a Human Right Orange Cty. v. Cty. Of Orange*, No. 19-cv-388, 2019 WL 8012374, at *5 (C.D. Cal. Oct. 28, 2019).
- 92 *Id.*
- 93 *Mahoney v. City of Sacramento*, No. 2:20-cv-00258, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020); *but see id.* (extending *Martin* and holding that the City may not “prosecute or otherwise penalize” plaintiffs for urinating in public “if there is no alternative to doing so”).
- 94 ‘Extraordinary’ Hearing on L.A.’s Homelessness Crisis Held on Skid Row, KTLA 5 (Feb. 4, 2021), <https://ktla.com/news/local-news/extraordinary-hearing-on-l-a-s-homelessness-crisis-held-on-skid-row/>; see also Susan Shelley, *Los Angeles Shows the State How Not to Address Homelessness*, The Orange Cty. Reg. (June 15, 2019), <https://www.ocregister.com/2019/06/15/los-angeles-shows-the-state-how-not-to-address-homelessness/> (observing that “[t]he entire City Council and City Attorney Mike Feuer deserve blame” for the “failure to stop the growing plague of homeless encampments that are blocking the sidewalks, spilling trash and spreading rodents and disease,” and noting that “[i]t was a mistake to settle” *Jones and Mitchell*).
- 95 See, e.g., *Attorneys for Homeless Threaten to Sue to Block San Clemente Plan*, NBC 4 L.A. (May 23, 2019), <https://www.nbclosangeles.com/news/local/streets-of-shame/homeless-attorneys-threaten-to-sue-to-block-san-clemente-plan/162191/> (describing threats to use *Martin* decision to block City of San Clemente from setting up a fenced outdoor camping area for persons experiencing homelessness).