

No. 19-247

In the
Supreme Court of the United States

CITY OF BOISE,

Petitioner,

v.

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

Respondents.

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

**BRIEF OF THE BUILDING OWNERS AND
MANAGERS ASSOCIATION OF OREGON AS
AMICUS CURIAE IN SUPPORT OF
PETITIONER**

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Building Owners and Managers Association of Oregon (“BOMA Oregon”) is the leading commercial real estate membership organization in Oregon. Founded in 1915, BOMA Oregon serves more than 50 million square feet of office, retail, medical, and industrial space throughout the state. The commercial real estate industry is a significant engine of economic growth. It supplies jobs in addition to space where businesses of all sizes can operate. Through advocacy and impact litigation, BOMA Oregon promotes its core values of accountability, collaboration, engagement, ethics, leadership, and professionalism.¹

On a daily basis, BOMA Oregon’s members address the human tragedy of those experiencing homelessness. By filing this brief, BOMA Oregon desires to illustrate the current state of the homelessness crisis in Oregon and specific unforeseen consequences of the lower court’s decision.

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for any party authored this brief in whole or in part and that no person other than *amicus*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days before the due date of the intention of *amicus* to file this brief. All parties have filed blanket consents to the filing of *amicus curiae* briefs with the Clerk.

INTRODUCTION AND SUMMARY OF ARGUMENT

After emergency workers and service providers, the members of BOMA Oregon and their tenants have perhaps more contact with individuals experiencing homelessness than any other group in the State of Oregon. BOMA Oregon and its members have a long history of advocating on behalf of the homeless and of supporting policies, programs, and charitable organizations that seek to break the cycle of poverty. The Ninth Circuit's decision in *Martin v. City of Boise* offers no solutions for the homelessness crisis that has gripped much of the west coast of the United States.

First, Martin reads the Eighth Amendment's protections against cruel and unusual punishment too broadly. As predicted, the precedent is already being pressed into service to invalidate ordinances that allow municipalities to protect the health and safety of their residents.

Second, data show the depths of the homelessness crisis in Oregon, which, of the fifty states, had the third-highest rate of homelessness in 2018.² BOMA Oregon draws the Court's attention to the public-safety and sanitation problems that businesses and residents throughout the state already endure. Not only do they bear witness to the human toll exacted by the homelessness crisis, they also lose business, employees,

² U.S. Dep't of Housing & Urb. Dev., 2018 Ann. Homeless Assessment Rep. to Congress 24 (Dec. 2018), <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf> [hereinafter AHAR].

and peace of mind. *Martin* assures that conditions will deteriorate for whole communities if it remains the law of the Ninth Circuit.

Finally, the panel’s decision fails to anticipate the legal ramifications of its logic and holding. Under Oregon law and local ordinances, property owners may be subject to increased liabilities because they have fewer tools to address encampments on property that they are required to keep in good condition.

Accordingly, BOMA Oregon supports the City of Boise’s petition for a writ of certiorari.

ARGUMENT

I. THE HOLDING AND LOGIC OF *MARTIN* THREATEN MUNICIPALITIES’ ABILITY TO REGULATE UNSAFE CONDITIONS.

Two days after deciding *Martin*, the same Ninth Circuit panelists held in another case that a U.S. District Court had erred in denying a “Motion to Declare” City of Portland, Oregon’s prohibition on camping unconstitutional. *O’Callaghan v. City of Portland*, 736 F. Appx. 704, 705 (9th Cir. 2018) (Op. Berzon, Watford, & Owens, JJ.). Whereas they had held in *Martin* 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,” 902 F.3d 1031, 1035 (emphasis added), the holding underwent a subtle expansion when restated in *O’Callaghan*: “We recently held that a city ordinance *prohibiting* individuals from sleeping outside on public property may violate the Eighth

Amendment when enforced against homeless individuals who have no access to alternative shelter.” 736 F. Appx. at 705 (emphasis added) (citing *Martin*, 902 F.3d at 1035; *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)).³

The City of Boise’s petition for a writ of certiorari raises critical issues about the Eighth Amendment’s reach and practical effects on communities throughout the Ninth Circuit. Though *Martin* asserts that its “holding is a narrow one,” the decision revives language from *Jones* for the proposition “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.” *Martin*, 920 F.3d at 616 (quoting 444 F.3d at 1135).

The concerns Judge Milan Smith expressed in a dissent from the circuit’s denial of rehearing *Martin* en banc resonate with BOMA Oregon’s members:

As if the panel’s actual holding wasn’t concerning enough, the logic of the panel’s opinion reaches even further in scope. The opinion reasons that because ‘resisting the need to . . . engage in [] life-sustaining activities is impossible,’ punishing the homeless for engaging in those actions in public violates the Eighth Amendment. What else is a life-sustaining activity? Surely bodily functions.

³The original opinion in *Martin*, 902 F.3d 1031, was amended and superseded at 920 F.3d 584 (2019). The holding did not change.

Martin, 920 F.3d at 596 (M. Smith, J., dissenting from denial of rehearing en banc) (omissions in original).

By establishing such a broad precedent, Judge Smith reasoned, the panel not only doomed ordinances similar to Boise's,⁴ but other generally applicable public-health and -safety laws too. These may include prohibitions on public urination and defecation. Likewise, “[t]he panel’s reasoning also casts doubt on . . . laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is . . . sleeping in public.” *Id.*

In short, the panel “crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout [the] circuit.” *Id.* at 590.

⁴ Compare, e.g., Albany City Code §§ 7.84.210, 7.84.215 (providing that it is a violation to “camp in or upon any sidewalk, street, alley, lane, public right-of-way, park or any other publicly owned property or under any bridge or viaduct, unless otherwise allowed by declaration of the City Manager or his/her designee in emergency situations”) & Medford City Code § 5.257 (providing that it is a violation to “camp in or upon any sidewalk, street, alley, lane, public right-of-way, park, or any other publicly-owned property or under any bridge or viaduct, unless otherwise specifically authorized by this code or by declaration of the Mayor in emergency circumstances”), with Boise City Code § 9-10-02 (quoted in *Martin*, 920 F.3d at 603) (providing that it is a misdemeanor to use “any of the streets, sidewalks, parks, or public places as a camping place at any time”).

II. OREGON IS IN THE MIDST OF A HOMELESSNESS CRISIS, WHICH HAS ONLY GROWN MORE SEVERE SINCE *MARTIN*.

A. By objective measures, communities throughout Oregon have high levels of homelessness, the effects of which prejudice public health and safety.

According to the 2018 Annual Homeless Assessment Report, published by the Department of Housing and Urban Development (“HUD”), Oregon, Hawaii, and California, “had the highest rates of individuals experiencing homelessness, [each] with 50 or more individuals experiencing homelessness per 10,000 individuals.”⁵ The severity of the issue comes into greater focus at the local level. A City of Portland survey published in August 2019 revealed that respondents across every racial and age group viewed homelessness as the biggest challenge facing the city. They cited homelessness throughout the survey, including listing it “as the reason why people moved and why people did not participate in Parks programs.”⁶

Data support those respondents’ concerns. For example, the 2019 Portland State University Point-in-Time Analysis, which provides an annual count of “people . . . sleeping outdoors, in public spaces, vehicles

⁵ AHAR at 24.

⁶ City of Portland, Or. City Budget Off., 2019 Portland Insights Survey 3 (Aug. 2019), <https://www.portlandoregon.gov/cbo/article/740406>.

and places not meant for human habitation,” showed an increase in that population to 2037.⁷ That is a 22.1% increase from the last count, conducted in 2017.⁸ Moreover, due to a decrease in the number of people “in shelter and transitional housing,” the percentage of the HUD homeless population that is unsheltered increased to 50.7%.⁹

The crisis is not limited to Oregon’s most-populous city. Lane County, which includes Eugene and more rural areas, this year counted 2165 people experiencing homelessness, including 1633 unsheltered people.¹⁰ That represents a 32% year-over-year increase in the total number of people experiencing homelessness “and a 44% increase in the number of people experiencing unsheltered homelessness.”¹¹

B. BOMA Oregon members feel the effects of the homelessness crisis beyond financial considerations.

BOMA Oregon members bear a significant cost associated with unregulated camping. They lose business and now spend more on security and cleanup as the homelessness crisis reaches new extremes. But

⁷ Multnomah Cty., Or., Joint Off. of Homeless Servs., 2019 Point-in-Time Count of Homelessness in Portland/Gresham/Multnomah Cty., Or. 7, <https://bit.ly/2l0HOuU>.

⁸ *Id.*

⁹ *Id.*

¹⁰ Lane Cty., Or., 2019 Point in Time Count Rep. 3 (May 2019), <https://www.lanecounty.org/cms/one.aspx?pageId=6095987>.

¹¹ *Id.*

the concerns of BOMA Oregon members extend beyond profitability; community health and public safety are under threat too.

Members of BOMA Oregon own and manage buildings with street-level commercial storefronts all over the state. Building out one of these locales is a significant capital expenditure and a source of good jobs. One BOMA Oregon member reports that a retailer recently expressed interest in building out a large ground-floor space. After an initial analysis, however, the potential tenant scuttled the multimillion-dollar project because the near-constant presence of people sleeping in adjacent public areas proved too great a risk.

Another building manager considers certain properties “virtually unleaseable” due to the same considerations. That company has had a building in its portfolio with an 85%-plus vacancy rate for years.

Numerous businesses have already abandoned the downtown core of cities like Portland. Survey data document countless lost customers and employees due to homeless individuals who refuse to vacate nearby public spaces. Businesses that remain in downtown areas now foot the cost of additional security measures, such as reinforced doors, alarm systems, and guards. Security expenses have grown along with the homeless population. One BOMA Oregon member, for example, assumed management of a property in 2008, where a part-time security guard worked for twenty-nine hours a week, primarily greeting guests. By 2017, security services were on the premises forty-nine hours a week, and that number has now reached sixty-nine hours a

week to ensure, among other things, that people do not sleep in the building's vestibules. Businesses have also adapted how they operate—locking down facilities during business hours, closing earlier, and shifting staff responsibilities to ensure their physical safety.

Then there are the additional cleanup costs. A BOMA Oregon member, for example, reports having to engage cleaning services to clear the perimeter of a redevelopment property three times a week due to pervasive encampments there. Over the last two years, combined additional cleaning and security costs for the property—which is still not open to tenants—have totaled more than \$45,000. In 2017, another property owner spent \$5705 to clear brush from a popular area for encampments in order to allow specialized cleaning crews—for a total of more than \$3800—to haul away needles and human feces. The property owner will repeat the process this year.

Communities are now forced to manage a startling volume of dangerous waste. Crews in downtown Portland cleared 52,048, 51,886, and 55,828 biohazards, in 2016, 2017, and 2018, respectively.¹² The needle clean-up counts for the same period were 16,822, 27,787, and 38,394, respectively.¹³ This year, without adjusting for seasonal variation, crews are on

¹² Downtown Portland, Or. Clean & Safe Dist., Internal Cleaning Statistics, 2016–2019, available to Counsel; *see also* Yearly Clean & Safe Program Statistics, <http://cleanandsafepdx.com/cleaning-security/yearly-statistics.html>. The term ‘biohazard’ primarily consists of human waste.

¹³ *Id.*

track to remove 54,639 biohazards and 35,872 needles from the sidewalks and streets.¹⁴

Although the prevalence of these waste products presents clear public-health concerns, the increase of encampments of homelessness individuals threatens public safety in still more fundamental ways. Over a three-year period ended July 28, 2019, Portland Fire & Rescue “responded to a total of 1170 homeless-related fires”—on average, more than one response per day.¹⁵ People experiencing homelessness need heat to keep warm and cook. But open flames near tarps, tents, and other belongings made from synthetic materials endanger not only those who reside in encampments but also nearby structures and their occupants.¹⁶

The members of BOMA Oregon are concerned with more than the profitability of their commercial properties. Local governments need certainty that they can regulate activities that threaten the health and safety of the entire community.

¹⁴ *Id.*

¹⁵ Brittany Falkers, *Portland Fire & Rescue Has Responded to More Than 1000 Homeless-Related Fires in Last 3 Years*, KGW (July 30, 2019), <https://bit.ly/2ladKNj>.

¹⁶ For example, on December 6, 2016, a malfunctioning camp stove sparked a fire in a long-term encampment near Legacy Emmanuel Medical Center, according to Portland Fire & Rescue. Although no one was injured, the blaze damaged nearby buildings, including a law office. Everton Bailey Jr., *Malfunctioning Stove Sparks Fire, Burning Portland Homeless Camp, Neighboring House* (Oregon Live Posted Dec. 6, 2016; Updated Jan. 9, 2019), <https://bit.ly/2laj4A8>.

III. *MARTIN* PLACES BOMA OREGON MEMBERS IN AN UNTENABLE POSITION.

What if Judge Smith is correct that the “panel’s decision effectively allows homeless individuals to sleep and live wherever they wish on most public property”? *Martin*, 920 F.3d at 596 (dissenting from denial of rehearing en banc). Some police departments have already backed away from enforcing public camping ordinances as a direct result of *Martin*.¹⁷

The U.S. District Court for the District of Oregon recently certified a class seeking a declaration that the City of Grants Pass’s prohibitions on camping in public areas are unconstitutional. *See Blake v. City of Grants Pass*, No. 18-cv-01823, 2019 WL 3717800, at *7 (D. Or. Aug. 7, 2019). In part, the subject ordinances provide that “any person found in violation . . . may be immediately removed from the premises.” *Id.* at *2. Property and business owners do not have the legal authority to remove individuals from the sidewalks abutting their property—nor is it advisable for them to engage in self-help—no matter the hazard they pose.

Martin has placed owners and lessees in an untenable position between a protected group and

¹⁷ The Portland Police Bureau announced that “[i]n light [of] the United States Court of Appeals for the Ninth Circuit ruling regarding *Martin v. City of Boise*, [it] is not citing people for [violations of Portland City Code] 14A.50.020,” the public-camping ordinance. Maggie Vespa, *Portland Police Will Not Cite Homeless for Sleeping on Streets, Citing Court Ruling*, KGW (Sept. 7, 2018), <https://bit.ly/2mavRCV>. Granted, the police had enforced that provision infrequently, but the other repercussions of *Martin* cannot be overlooked.

ordinances requiring maintenance of the areas surrounding their property. Oregon law allows municipalities to shift liability to a “property owner for injuries sustained as a result of the owner’s failure to maintain” adjacent public areas. *See Sims v. Besaw’s Cafe*, 997 P.2d 201, 209 (Or. Ct. App. 2000); *see also Marsh v. McLaughlin*, 309 P.2d 188 (Or. 1957); *Olson v. Chuck*, 259 P.2 128 (Or. 1953). A number of cities, including Portland and Eugene, have enacted ordinances that do just that. *See* Portland City Code § 17.28.020(A); Eugene City Code § 7.375(2) & (3). Many of these ordinances can be read to require more than keeping sidewalks in good repair. In the state capital, Salem, “[t]he owners, lessees, and occupants [of property abutting any sidewalk are] liable to any person suffering bodily injuries or property damage as a result of any breach of a duty” to “keep such sidewalk *clean and clear* of . . . obstructions for the safe use of the public at all times.” Salem Code of Ordinances § 78.220(a) & (b) (emphasis added); *see also Harris v. Sanders*, 919 P.2d 512, 515 (Or. Ct. App. 1996) (allowing jury to decide whether landowner had failed to maintain public sidewalk free of “encumbrances . . . or other similar conditions” by not clearing “brown, wet and ‘mushy-like’” leaves plaintiff allegedly slipped on).

A person camping on the sidewalk or on the public area separating the sidewalk and the road (variously known as the curb strip, hellstrip, and grassplot, among other things) presents a significant hazard to pedestrians and individuals who rely on mobility devices for transportation. Could property owners face liability if someone were to trip over discarded bedding? Slip-and-fall injuries were plainly the

primary concern motivating enactment of such ordinances. Nevertheless, as Judge Smith noted, individuals living on the streets engage in other “involuntary conduct” and “life-sustaining activities” on adjacent property for which owners could be held responsible.

Suppose a property owner is unable to clean up an encampment on a sidewalk abutting her building, and a passerby were to suffer an injury or contract an illness due to human-waste discharge. Could a property owner be subject to liability for not maintaining the right of way in a “clean and clear” condition? This hypothetical situation is not far-fetched. Beaverton municipal ordinances, for example, do not limit property-owner exposure to the risks associated with common slipping hazards, like snow and ice; rather, property owners can be subject to liability for allowing adjacent public property to exist “in such condition as to present an *unreasonable risk of danger* to persons or property . . . for all claims arising from that condition.” Beaverton City Code § 5.05.018(D) (emphasis added).

* * *

Invalidating public-health and -safety ordinances does not help the homeless. Moreover, the limitations *Martin* places on law-enforcement officials diminishes their opportunity and leverage to direct the homeless to the services they need. The decision is ill-conceived and fails to consider the potential social and legal ramifications of its holding and underlying logic.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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