

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 A Writ Of Certiorari
To The U.S. Court Of Appeals
For The Ninth Circuit**

**BRIEF OF AMICUS CURIAE THE
DOWNTOWN DENVER PARTNERSHIP
IN SUPPORT OF PETITIONER**

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INTEREST OF AMICUS CURIAE¹

The Downtown Denver Partnership (the DDP) is a non-profit organization dedicated to building and maintaining a growing and economically healthy center city in Denver, Colorado, that is safe and equally welcoming for all. For more than 60 years, the DDP has worked with its member organizations (today, more than 750 members) and the public and private sectors to promote and invest in city planning and policies that inform and shape downtown Denver. These efforts work to achieve a vibrant, growing, and vital city center, coalescing around five core tenets: (1) *prosperity*, attracting jobs, growth, and investment; (2) *connections and walkability*, safe mobility options putting pedestrians first; (3) *diversity*, being a socially and economically inclusive place; (4) *distinctiveness*, cultivating a mosaic of urban districts; and (5) *environmentally conscious*, building a greener downtown Denver. Among the planning and policy tools the DDP supports is the City and County of Denver’s “Unauthorized Camping Ordinance,” adopted by the City in 2012.

The DDP believes this case raises important questions. At its core, it questions local governments’ ability to police, through powers traditionally delegated to

¹ Counsel for Amicus Curiae states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to the preparation or submission of this brief. Both parties have consented to its filing of this brief. Timely notice was provided to both parties.

them by the several states, matters that concern the health and safety of the public in this Country’s densest urban areas and matters that burden property and business owners striving to maintain safe and welcoming businesses in the urban core. At the same time, the DDP fears that the U.S. Court of Appeals for the Ninth Circuit’s decision will arrogate the ongoing public-policy debate surrounding homelessness, and camping ordinances, by crediting the judicially created “right to habitate” public spaces with a patina of constitutional supremacy. Such public debate was recently witnessed in Denver in May 2019, when voters soundly rejected Initiative 300, which would have repealed Denver’s Camping Ordinance. The DDP’s interest in downtown Denver, along with its involvement in the public debate over Denver’s Camping Ordinance, gives it a unique voice on issues principal to the City of Boise’s Petition.



SUMMARY OF THE ARGUMENT

The Petition in this case presents an issue that every metropolitan area in this Country should be interested in—whether, through the auspices of the Eighth Amendment’s Cruel and Unusual Punishment Clause, courts may prevent local governments from exercising their police powers to regulate health and safety concerns from sustained urban camping.

State and local governments have long had the power to regulate matters of local concern. That power unquestionably reaches issues affecting the public

health and safety of the community, which, prior to the Ninth Circuit's decision here, included health and safety issues arising from homelessness and sustained urban camping. Indeed, in 2012, Denver adopted its "Unauthorized Camping Ordinance," in response to real and immediate public health and safety issues from sustained camping in Denver's parks and public spaces, including environmentally sensitive areas like the City's waterways and green spaces. The Ordinance addresses the health and safety concerns arising from sustained camping by safeguarding Denver's public spaces while advancing Denver's goal of connecting those engaged in such camping to services and resources, including long-term housing options. Likewise, the Ordinance minimizes the impact on local business, which is crucial to Denver's economic success.

Critically here, Denver's Camping Ordinance has also prompted public dialogue and debate about how best to respond to homelessness. This exercise in democracy has drawn on interested parties, including faith leaders, neighborhood coalitions, park advocates, homeless advocates, homeless social-service providers, business groups, and residents (sheltered and unsheltered), to offer thoughtful and innovative ideas and programs to address homelessness, and to help stabilize those experiencing homelessness. Denver voters witnessed firsthand the importance of this debate last spring with Initiative 300. If passed, the Initiative would have repealed Denver's Camping Ordinance and codified a "right to habitate" the City's public spaces free from interference. Denver voters overwhelmingly

rejected the measure 81% to 19%. But, more importantly, the campaign evidenced the complexity of the homelessness crisis and the Camping Ordinance's place in that conversation. Also, through the campaign, organizations of varying interests warned of the unintended consequences of giving the public unimpeded access to Denver's public spaces and denying the government the autonomy to respond to the realities of sustained camping. Ultimately, Denver voters decided that granting the City's homeless residents a mere "right to survive on the streets" was not a dignified or real—let alone viable—solution to addressing homelessness.

The Ninth Circuit's decision threatens to do more harm than good. The decision will stifle the policy debate by disincentivizing participation, and it will eliminate a critical tool that helps focus solutions and services aimed at solving homelessness. The decision will also make government action to readdress the health and safety concerns from camping in this Country's densest urban areas needlessly difficult. And, most important, the decision will harm those experiencing homelessness by granting constitutional protection to exactly the worst option for those who are truly homeless: a license to seek refuge in dangerous encampments rather than shelters and services meant to help them exit life on the street.

The Court should grant the City of Boise's Petition and correct the Ninth Circuit's erroneous application of the Eighth Amendment in this case.



ARGUMENT

I. Cities Must Be Able to Regulate Health and Safety Concerns from Urban Camping That Affect Their Citizens and Public Spaces.

Local governments have the power to regulate issues affecting the health and safety of the city and its population, *Schneider v. New Jersey*, 308 U.S. 147, 160 (1939) (recognizing police power to “enact regulations in the interest of the public safety, health, welfare or convenience”), including “the use of public streets and sidewalks, over which a municipality must rightfully exercise a great deal of control in the interest of traffic regulation and public safety,” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969). The maxim has long been that, “by the general police power of a State, ‘persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State.’” *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 471 (1877) (quoting *Thorpe v. Rutland & Burlington R. Co.*, 27 Vt. 140, 150 (1854)); *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20 (1901) (stating police power extends to “the safety, health, morals, comfort, and welfare of its people”).

That states and localities have the power to regulate health and safety matters of local concern exists for good reason. When people elect to live in communities, particularly population-dense cities, they necessarily agree to adhere to minimum standards of civility. In that way, the citizens subordinate some of their liberty interests in the name of public health and

safety standards that benefit all. Indeed, cities across the Country face the common and evolving challenge of balancing the health and safety of the city as a whole with the needs of its inhabitants. Standards range from building codes, to environmental and sanitation regulations, to maintenance and care of public spaces, to criminal laws and enforcement. See Michelle Wilde Anderson, *The New Minimal Cities*, 123 Yale L.J. 1118, 1197–205 (2014) (discussing minimal needs of a city and observing that commitment to meaningful health, safety, and welfare measures amounts to commitment to habitability). Making constitutional violations of these basic and necessary rules of civil order won't solve the problems that burden cities; it will make them worse.

Additionally, although common elements may exist, public health and safety issues in Denver differ from those in Boise, and issues in Boise differ from those in Los Angeles. Such concerns are necessarily local. For example, one could reasonably assume that police officers in Los Angeles will never need to warn the unsheltered about an impending blizzard, but that happens regularly in Denver during the winter (and yes, occasionally in the fall and spring) months. Justice Black alluded to this in his concurrence in *Powell v. Texas*: “During all this period the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.” 392 U.S. 514, 547 (1968) (Black, J., concurring). So it is the norm has long been

“that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.” *Id.* at 548.

Of particular concern to the people of Denver is the reasonable and environmental-conscious use of its parks and public spaces for recreational, entertainment, business, and other purposes. Like Boise, Denver has been confronted with public health and safety issues emanating from sustained camping in the City’s public spaces. The issues include encampments on public sidewalks inches from busy thoroughfares that citizens and travelers use to access the heart of downtown Denver, as well as in the City’s more environmentally sensitive places, like the banks of South Platte River and some of the City’s 200 parks. Many of these parks are in the heart of the City and the only green space available to thousands of citizens, e.g., City Park, Civic Center Park, and Confluence Park.





The homeless encampments that result from sustained and unlawful camping benefit no one, particularly those individuals living in them. Encampments threaten public health and safety by serving as an incubator for disease² and exposing the most vulnerable to dangerous environments³ where crime, drug use,

² For instance, this summer there was a hepatitis A outbreak that swept through Denver's homeless population due to inadequate hygiene and sanitation. Andrew Kenney, *Threat of Hepatitis A Outbreak Among Denver's Homeless Prompts a Massive Response*, The Denver Post (July 26, 2019, 6:38 AM), <https://dpo.st/2lNiWGI>.

³ These dangers disproportionately affect women and children. One example includes the cleanup of needles and feces from a sidewalk-encampment outside a women's shelter (and playground). Allison Sylte & Noel Brennan, *Denver Public Works Said Feces, Urine and Rats Prompted Sidewalk Cleanup at Homeless Camp*, 9News.com (Oct. 29, 2018, 5:39 PM), <https://on9news.tv/2kmYk84>.

rape, and domestic violence run rampant. Further, the economic impact is substantial on both those living in encampments and society at-large. As a matter of social policy, allowing people to remain outside of the network of services and shelters—particularly when beds in shelters are available—worsens the situation and inflates the economic costs to support chronic homelessness. And it doesn't stop there: cities with little regulatory control over their public spaces face the threat of losing tourism, conventions, and other economic drivers, and force local businesses to maintain their own spaces to ensure safe, sanitary environments for their customers.

In the end, local governments must be allowed to govern the health and safety issues associated with unsheltered people choosing to call public spaces “home”—whether that status is voluntary or involuntary. And Denver did just that in May 2012, when the City adopted its “Unauthorized Camping Ordinance.” *See generally* Rev. Mun. Code of the City & Cty. of Denver § 38-86.2 (2019), <https://bit.ly/2IPjsnB>.

Subsection (b) of the Camping Ordinance makes it unlawful “to camp upon any public property^[4] except in

⁴ The Camping Ordinance defines “public property” to mean “any street, alley, sidewalk, pedestrian or transit mall, bike path, greenway, or any other structure or area encompassed within the public right-of-way; any park, parkway, mountain park, or other recreation facility; or any other grounds, buildings, or other facilities owned or leased by the city or by any other public owner, regardless of whether such public property is vacant or occupied and actively used for any public purpose.” § 38-86.2(d)(3).

any location where camping has been expressly allowed by the officer or agency having the control, management and supervision of the public property in question.” Violators may be cited or arrested. § 38-86.2(c)(1). But, before officers may cite or arrest a violator, the Ordinance prescribes a tiered de-escalation protocol focused on connecting those experiencing homelessness with an array of services and shelter options. The officer must first orally warn the violator; if the person fails to comply, the officer must then tender a written request or order to the person. § 38-86.2(c)(1). Additionally, officers are instructed to inquire if “the person is in need of medical or human services assistance, including, but not limited, to mental health treatment, drug or alcohol rehabilitation, or homeless services assistance.” § 38-86.2(c)(2). The Ordinance even goes so far as to require officers to contact outreach workers if services are needed. *Id.*

When Denver adopted the Camping Ordinance in 2012, Mayor Michael Hancock described the Ordinance as “a bold and necessary step forward to help ensure the highest level of health and safety for our entire city” and emphasized the Ordinance “will allow us to continue our compassionate and comprehensive work to connect those in need with vital services and get them to self-sufficiency.” Mayor Hancock Statement on Unauthorized Camping Law, DenverGov.org (May 15, 2012), <https://bit.ly/2maD5H7>. Mayor Hancock made clear the Camping Ordinance was intended to safeguard the health and safety of the City and its parks and public spaces, while at the same time

offering a compassionate and dignified response to homelessness. That is, advancing public health and safety *and* helping the homeless is not antipodal—they are inextricably intertwined and the Camping Ordinance furthers the conversation as to both, and in a humanitarian way.

Cities like Denver and Boise must have the autonomy to respond to city-specific idiosyncrasies, including unlawful urban camping, to better serve people experiencing homelessness, to protect the city’s economic climate and property, and to ensure the rights of all to enjoy the city’s public spaces are not disproportionately encumbered.

II. Denver’s Camping Ordinance Promotes Policy Debate and Civic Involvement to Address Homelessness.

Denver’s Camping Ordinance was the product of public debate and has elicited a continued debate among City officials, homelessness advocates, business leaders, homeless-service providers, and concerned citizens about novel and feasible solutions to address homelessness. This debate has inspired programs and resources to curtail homelessness and its effects, while at the same time preserving the integrity of Denver’s parks and open spaces. That said, the conversation about how best to serve those experiencing homelessness in Denver continues. It is a complex problem, as homelessness does not have a “one-size-fits-all” solution. But what’s critical is that the people of Denver

are actively participating in the democratic process and real solutions have resulted.

Telling of the Camping Ordinance's progress as a tool to connect Denver's homeless to community-supported services is the Denver Police Department's (the DPD) enforcement of the Ordinance. The DPD has a Homeless Outreach Unit, consisting of four officers, whose job is to implement the Camping Ordinance while utilizing direct lines to shelters, service providers, substance-abuse navigation programs, mental-health professionals, etc., to assist the homeless in finding paths off the streets. *See* Madeline Schroeder, *Denver Police Mediate Between Homeless and Residents*, Front Porch (Nov. 1, 2015), <https://bit.ly/2lFHtgZ>. That is, the Ordinance (among others) allows officers and service providers to make contact with the homeless to connect them with crucial services and resources. This important work—made possible in part by the Camping Ordinance—and the complexities of homelessness in the Denver-metro area are detailed in a short video clip: Denver Police Department, *Denver Police Homeless Outreach Unit*, YouTube (Feb. 12, 2017), <https://bit.ly/2lOOXOA>.

Criminal enforcement of Denver's Camping Ordinance is a last resort. The records from the DPD indicate the Ordinance promotes support services over criminal citation. *See* Denver Initiative 300: Impacts on the Homeless and Society by Granting Unimpeded Access to Public Space, REMI Partnership 14 (Feb. 2019), <https://bit.ly/2kdMgWE> (hereinafter REMI

Report). Since 2013, DPD officers have conducted over 11,700 checks, reaching over 18,000 people on the streets. *Id.* Of those thousands of street checks, officers only issued 32 criminal citations for violations of the Camping Ordinance (0.17% of those contacted).⁵ *Id.* Examining the statistics underlying the enforcement of the Camping Ordinance is revealing—it shows that the DPD’s dignified enforcement of the Ordinance is a mechanism to help Denver’s homeless population, particularly those who want help, not to criminalize them.

Through the ongoing democratic process, other unique and innovative programs have been developed to counteract the homelessness crisis, which have been supported and guided by community, non-profit, civic, and business groups.

- **Social Impact Bonds.** Program providing 250 housing units and intensive case-management services for the chronic homeless who frequently use Denver’s emergency services.
- **Denver Day Works.** Program coordinating and recruiting homeless individuals and connecting them to employment opportunities.
- **Co-Responder Program.** Program consisting of a two-person team comprised of an officer and behavioral health specialist to

⁵ To be sure, the Ordinance has aided officers in policing activity that is more dangerous to the community. There have been 519 arrests for outstanding warrants and 82 arrests for other violations. *See id.*

intervene on mental health-related calls to de-escalate situations that have historically resulted in arrest and to assess mental-health needs.

- **Denver Street Outreach Initiative.** Program funding 18 street-outreach workers, including behavioral-health specialists and overnight search and rescue caseworkers, to connect the homeless with services and resources. This program is funded by the DDP.
- **Storage Options.** Program expanding the available storage lockers for the homeless to store their belongings while working or taking advantage of other resources.
- **Mobile Restrooms.** Program providing mobile, full-service, public restroom facilities in downtown and the Capitol Hill areas.
- **Outreach Court.** Program giving the homeless access to court services at the Denver Rescue Mission once every other week, including to resolve municipal-level citations and warrants and to access mental-health services and Medicaid enrollment.
- **Tiny Home Pilot.** Program allowing for an 11-unit tiny home village for those experiencing homelessness.
- **Social Workers and Peer Navigators at Public Libraries.** Program staffing social workers and peer navigators at public libraries, including the Downtown Central Library, to connect the homeless with services.

- **Lawrence Street Community Center.** New center providing the homeless access to showers, bathrooms, water fountains, meals, and safe space during daytime hours.
- **New Offices.** Creation of two new public offices, Department of Housing Stability and Office of Behavioral Health Strategies, to promote and coordinate the execution of Denver's related policies.
- **Project Homeless Connect.** Annual program connecting the homeless to essential services, including medical care, employment, food, identification, and other services, like haircuts.⁶
- **Support Housing and Services Initiative.** A \$15.7 million plan to increase access to day-shelter options with direct connection to services and to provide transitional-housing vouchers to the unsheltered.⁷
- **Caring4Denver Sales Tax.** A 0.25% sales tax set to raise \$45 million annually to fund mental health and addiction services.⁸

⁶ Mayor Emphasizes Priorities in Addressing Homelessness: Health, Safety, Compassion, Dignity (and attached fact sheet), DenverGov.org (Nov. 20, 2018), <https://bit.ly/2lXOHNw>.

⁷ City Announces New Fiscal Partners to Support Housing and Homeless Services Initiative, DenverGov.org (May 24 2019), <https://bit.ly/2m4Vzsl>.

⁸ Jesse Paul, *Denver Sales Tax Hike Would Raise Millions for Mental Health Care, Substance Abuse Treatment*, The Denver Post (Apr. 5, 2018, 12:52 PM), <https://dpo.st/2ml0dTv>.

Notwithstanding the positive steps Denver has made to address homelessness, problems no doubt remain. As well, concerned citizens have continued to debate and advance the homelessness conversation, which has included an active policy debate on the efficacy of the Camping Ordinance. For instance, for the last three years, state legislators have introduced bills called “Right to Rest” acts. *See* HB19-1096, 72d Gen. Assemb., First Reg. Sess. (Colo. 2019). The act would “establish[] basic rights for people experiencing homelessness, including but not limited to the right to rest in public spaces, to shelter themselves from the elements, to eat or accept food in any public space where food is not prohibited, to occupy a legally parked vehicle, and to have a reasonable expectation of privacy of their property.” HB19-1096 at 1. The bill has been rejected each year it has been introduced. *See* Colorado Right to Rest: Concerning the Creation of the “Colorado Right to Rest Act,” Leg.Colorado.gov, <https://bit.ly/2kt5nw9> (last visited Sept. 1, 2019). The debate has likewise played out in the courts. In 2016, a group challenged Denver’s process for clearing noxious encampments. *See* Complaint, *Lyall v. City of Denver*, Case No. 1:16-cv-02155-WJM-CBS (D. Colo. Aug. 25, 2016). The case ultimately settled after the court certified class, and a fairness hearing was held this week. Order, *Lyall v. City of Denver*, Case No. 1:16-cv-02155-WJM-CBS (D. Colo. Aug. 13, 2019).

Perhaps the most illustrative example of the acuity of the continuing debate surrounding Denver’s

Camping Ordinance is that of Initiative 300. The Initiative, which would have granted rights similar to those announced by the Ninth Circuit in *Martin*—i.e., the right to rest and shelter in public places, including a right and expectation of privacy while occupying public spaces—was on the ballot in May 2019. Specifically, Initiative 300 provided voters the choice:

Shall the voters of the City and County of Denver adopt a measure that secures and enforces basic rights for all people within the jurisdiction of the City and County of Denver, including the right to rest and shelter oneself from the elements in a non-obstructive manner in outdoor public spaces, to eat, share accept or give free food in any public space where food is not prohibited, to occupy one's own legally parked motor vehicle, or occupy a legally parked motor vehicle belonging to another, with the owner's permission, and to have a right and expectation of privacy and safety of or in one's person and property?

Denver, Colorado, Initiated Ordinance 300, "Right to Survive" Initiative (May 2019), Ballotpedia, <https://bit.ly/2I58gx0> (last visited Sept. 1, 2019).

Leading to the vote on Initiative 300 was an exhaustive policy debate seeking to engage and inform the public on Denver's Camping Ordinance and the homelessness crisis in Denver, including what is already being done. Thought pieces from the various organizations warned of the unintended consequences of giving the public unimpeded access to Denver's parks

and public spaces and denying local government critical police power to safeguard against public health and safety issues that arise from sustained urban camping. *See generally* REMI Report. Critically, opposition to Initiative 300 came from many different organizations, including homeless advocacy groups. One of the groups, the Denver Homeless Leadership Council,⁹ warned: “[I]f the initiative becomes law, it will lower the prevailing standard of human welfare in our community. . . . Instead the focus will be sheer physical survival in outdoor spaces that are not suitable for human habitation” and “[i]ndividuals experiencing homelessness will remain susceptible to volatility of life on the streets—exposed to extreme climate, violence, injury, exploitation, and even death.” Homeless Leadership Council Statement on the Denver Right to Survive Initiative, Page Two (Mar. 6, 2019), <https://bit.ly/2vizjg1>. *See also* Samaritan House Joins Denver Rescue Mission in Opposing Initiative 300, Catholic Charities of Denver, <https://bit.ly/2m9HY39> (last visited Sept. 10, 2019) (“Samaritan House joins Denver Rescue Mission in urging a ‘no’ vote on Initiative 300 on the Denver ballot. Instead, civic efforts should focus on providing services to those experiencing homelessness that help them *thrive*[] and not simply survive.”).

⁹ The Denver Homeless Leadership Council is comprised of leaders from: Catholic Charities of Denver; the Colorado Coalition for the Homeless; The Delores Project; the Denver Rescue Mission; The Gathering Place; the St. Francis Center; The Salvation Army; Urban Peak; and Volunteers of America.

When Denver voters were asked to decide whether Initiative 300 was a sound policy, they overwhelmingly rejected the measure, 81% against and only 19% in favor. Denver, Colorado, Initiated Ordinance 300, “Right to Survive” Initiative (May 2019), Ballotpedia, <https://bit.ly/2I58gx0> (last visited Sept. 1, 2019). At least in Denver, the people roundly rejected an approach similar to that advanced by the *Martin* decision, with their last word being that of the counter-campaign, “We Can Do Better.”

What is critical here is not necessarily the election results of Initiative 300 or the popularity of any of the proffered “solutions” aimed at curing homelessness. Rather, through the democratic process, *the people* are debating and conversing about how best their elected shall govern the city, including how to meaningfully and thoughtfully rectify the proliferation of homelessness. This Court has “long recognized the role of the States as laboratories for devising solutions to difficult legal problems.” *Oregon v. Ice*, 555 U.S. 160, 171 (2009) (citing *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). That is exactly what many western cities are doing right now, including through urban camping ordinances, and the *Martin* decision threatens to dismantle the progress.

III. The Ninth Circuit’s Decision to Constitutionalize a “Right to Habitate” Public Spaces Will Do More Harm Than Good.

The Ninth Circuit wrongfully constitutionalized the ongoing debate around whether it is good social policy to allow the unsheltered to habitate parks and public spaces free from government interference. If uncorrected, the decision risks quelling the continuing public-policy debate about how best to serve our Nation’s homeless populations, repudiating local governments’ police power to readdress health and safety issues of local concern, and harming the homeless by incentivizing, through judicial fiat, a retreat to society’s shadows. The people—sheltered and unsheltered alike—deserve better, and this Court should correct the Ninth Circuit’s decision to the contrary.¹⁰

As outlined above, a healthy debate is taking place in Denver regarding how best to combat homelessness. The debate is supported by the City’s Camping Ordinance, which signals to the public, including those living on the streets, that Denver expects and wants more for citizens—as opposed to relegating them to the confines of unsafe and unsanitary homeless encampments. In that way, Denver has adopted and is living the message, “we can do better,” and continues to challenge

¹⁰ The Ninth Circuit’s decision is already creeping outside the Circuit, including constitutional challenges to Denver’s Camping Ordinance. *See* Motion to Dismiss at 39–47, *City of Denver v. Burton*, Case No. 19GS004399 (Denver Cty. Ct. Sept. 10, 2019) (citing *Martin* and arguing Denver’s Ordinance violates the Eighth Amendment’s Cruel and Unusual Punishment Clause).

itself and its people to stretch the bounds of imagination and ingenuity to bring forward real solutions to address the many different needs and reasons for being homeless. Is it a perfect science?—No. But Denver is making positive momentum and is changing lives in the process.

At its logical end, the Ninth Circuit’s decision undermines the policy debate. By effectively constitutionalizing a right to take up residence in public spaces, the *Martin* decision disincentivizes participation in the debate aimed at solving the complex issue that is homelessness, by rolling back an important platform and tool that brings together community leaders, including faith leaders, neighborhood coalitions, park advocates, homeless advocates, service providers, business groups, and residents (sheltered and unsheltered). As Judge Smith pointed out in his dissent from the denial of rehearing en banc, “By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.” *Martin v. City of Boise*, 920 F.3d 584, 593 (9th Cir. 2019) (Smith, J., dissenting from denial of rehearing en banc). But not only has the *Martin*-majority assumed the role of public policymakers, it has all but quieted the debate by constitutionalizing a central question—namely, whether the unsheltered have a right to make public spaces their permanent residence free from interference and help. Although well-intentioned, the decision will do more harm than good by taking the policy debate away from the people and local governments whose ambition is to

find innovative and dignified solutions to a problem that is gripping this Country.

Additionally, “the panel’s opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.” *Id.* at 590. It cannot be denied that unregulated encampments in parks and public spaces present serious and immediate public health and safety concerns, and significantly impact the economic success of cities.





To tell local governments that they cannot regulate or police the types of scenarios depicted above

without first providing shelter to every unsheltered person in the city, *see id.* at 617 (majority opinion) (“[A]s 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.”), will “wreak[] havoc” to the Country’s densest urban areas. For Denver, such judicial policy could result in the unauthorized encampment of Red Rocks Amphitheater, the Denver Zoo, or any of the City’s major urban parks, like Washington Park, City Park, and Sloan’s Lake; the contamination of the South Platte River and Denver’s other waterways with human waste; and the occupation of Denver’s business and cultural centers, leading to economic downfall. Further, it will have a cooling effect on law enforcement directed at dangerous conduct that everyone agrees is illegal, e.g., domestic violence and illicit-drug activity.

As Justice Black reminded in *Powell*, “I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with . . . difficult social problem[s].” 392 U.S. at 540–41. And, although it may seem “the present use of criminal sanctions might possibly be unwise, . . . I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.” *Id.* at 541. The same is true here. Local-elected officials must be given the autonomy to say what is legislatively wise (or not) in regulating urban

camping, and denying them that power promises to do more harm than good.

Last, and most important, the *Martin* decision does a disservice to those experiencing homelessness. The decision guarantees to perpetuate homelessness and ensure that the homeless will further retreat to the shadows of society out of reach of real assistance and the opportunity to exit the streets through access to shelters, long-term housing, and job training. As Denver learned through the implementation of the Camping Ordinance and the Initiative-300 debate, we must “strive for more than merely protecting the right of someone to survive on the streets and take action to ensure the right to safe, affordable, and long-term housing with dignity.” Press Release, Colorado Coalition for the Homeless (Mar. 6, 2019), <https://bit.ly/2lHqj2E>. Yet, constitutionalizing the right to habitate public spaces will only further the divide between those in need and those who provide services. Put differently, encampments create barriers between the homeless and service providers, such as shelters and mental-health and substance-abuse professionals who are willing and able to help. The focus must continue to be on creating and facilitating pathways for the homeless to improve their current situation, not merely banishing them to tent encampments in public spaces that pose health and safety concerns for all who use and enjoy the spaces.

To that, the *Martin* rule creates perverse incentives for local governments and the private sector in responding to the legitimate public health and safety concerns from encampments. For instance, it could

invite cities to reduce the number of public spaces available to all residents and invite industry to give up maintaining private spaces, e.g., storefronts. Still worse, cities could establish “public spaces” on the periphery of the city to isolate and contain encampments—and the concomitant health and safety concerns. History has long been marred by attempts to condemn the sick, weak, and poor to places outside the city walls. *Leviticus* 13:45–46 (New International) (“The person with such an infectious disease must wear torn clothes, let his hair be unkempt, cover the lower part of his face and cry out, ‘Unclean! Unclean!’ As long as he has the infection he remains unclean. He must live alone; he must live outside the camp.”); Jason P. Coy, *Strangers and Misfits: Banishment, Social Control, and Authority in Early Modern Germany*, in *47 Studies in Central European Histories* 1, 36 (Thomas A. Brady, Jr. & Roger Chickering eds., Brill 2008) (“Those unable or unwilling to find work . . . were denied residency and increasingly risked being identified as vagrants and expelled by the local authorities. Throughout the century, many of these unfortunates were apprehended and driven away without formal sentence or record during the periodic mass round-ups of beggars.”). To be clear, such actions are untenable; ours ought to be the most decent and compassionate age and we must continue to strive to connect those in need with aid, rather than exile them to the shadows of society to be forgotten.

Although well-meaning, the Ninth Circuit’s decision is flawed and will do more harm than good to the homeless in our major cities. The decision warrants

consideration by this Court for several reasons, none more important than it will stand as a roadblock and erode the progress cities and interested participants are making in the fight against homelessness.

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CONCLUSION

The Ninth Circuit's decision applies an unsupported view of the Eighth Amendment to limit the City of Boise's exercise of its police powers to safeguard its citizens and public property through reasonable enforcement of its camping ordinance. Without intervention by this Court, the Ninth Circuit's constitutionalization of the democratic process around camping ordinances is guaranteed to circumscribe cities' ability to respond to pressing public health and safety concerns and will make it more difficult for the homeless to find a life off the streets.

Respectfully submitted,

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