

No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, PETITIONER,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF
THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
RESPONDENTS

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF OF *AMICUS CURIAE*
OFFICE OF THE SAN DIEGO COUNTY
DISTRICT ATTORNEY IN SUPPORT OF PETITIONER**

SUMMER STEPHAN
District Attorney
LINH LAM
Deputy District Attorney
Chief,
Appellate & Training Division
VALERIE RYAN
Deputy District Attorney
Asst. Chief,
Appellate & Training Division
330 West Broadway
San Diego, CA 92101

RONALD A. JAKOB
Counsel of Record
Deputy District Attorney
330 West Broadway
San Diego, CA 92101
(619) 531-3671
ronald.jakob@sdcdca.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT.....	7
I. The Ninth Circuit’s Holdings in <i>Martin</i> and Petitioner’s Case Threat- en the Enforcement of Commonsense Fire Safety Ordinances and Arson- Related Laws that Protect Local Communities from the Ravages of Wildfires.....	9
II. The Ninth Circuit’s Extension of Eighth Amendment Protections to Unavoidable Consequences of One’s Status or Being Threatens the En- forcement of Life-Saving Laws that Can Reduce the Disproportionately High Fatality Rate of the Homeless from Fentanyl	16
CONCLUSION	20
APPENDIX	

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Johnson v. City of Grants Pass</i> , 72 F.4th 868 (9th Cir. 2023)	3, 6-8, 10, 11, 13-15, 17, 19, 20
<i>Jones v. City of Los Angeles</i> , 444 F.3d 1118 (9th Cir. 2006).....	9, 16
<i>Jones v. City of Los Angeles</i> , 505 F.3d 1006 (9th Cir. 2007).....	9
<i>Martin v. City of Boise</i> , 920 F.3d 583 (9th Cir. 2019).....	3-11 13-17, 19, 20
<i>Powell v. Texas</i> , 392 U.S. 514 (1968).....	16, 17
 STATUTES	
 CALIFORNIA HEALTH & SAFETY CODE	
Section 11350	19
Section 11550	19
 CALIFORNIA PENAL CODE	
Section 451	14
Section 452	14, 15
 SAN DIEGO MUNICIPAL CODE	
Section 63.0402	13

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
Center for Disease Control and Prevention, <i>CDC Fentanyl Fact Sheet</i> , https://www.cdc.gov/ore/pdf/CDC_Fentanyl-Fact-Sheet_General_508.pdf	17
Debbie L. Sklar, <i>SDFD Extinguishes Mission Valley Homeless Encampment Blaze</i> (November 22, 2023), Times of San Diego, https://timesofsandiego.com/crime/2023/11/22/sdfd-extinguishes-mission-valley-homeless-encampment-blaze/	12
Gary Warth, <i>San Diego’s Homeless Camping Ban May Face a Legal Challenge. Could this Case in Another City Be a Bellwether?</i> (June 17, 2023), The San Diego Union Tribune	13
Jeanne Kuang, <i>To Sweep Homeless Camps, California Cities Say They Offer Shelter. What that Really Means Is Up for Debate</i> (September 13, 2023), CAL MATTERS, https://calmatters.org/housing/homelessness/2023/09/california-homeless-camps/	10

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
Lisa Halverstadt, <i>Fentanyl Plagues San Diego's Homeless Population</i> (November 21, 2022), Voice of San Diego, https://voiceofsandiego.org/2022/11/21/fentanyl-plagues-san-diegos-homeless-population/	3, 18
Mary Payton, <i>Data Shows Explosive Growth in Homeless-Related Fire Calls</i> (October 13, 2020), NBCsandiego, https://www.nbcsandiego.com/news/local/data-shows-explosive-growth-in-homeless-related-fires/2423854/	13
Mary Plummer, <i>Fire Risks Tied to Homelessness in San Diego's Canyons Leave Residents on Edge</i> (December 10, 2019), <i>inewssource</i>	12
Mary Plummer, <i>San Diego's Homeless Tied to Nearly 13% of All Fire Dispatch Calls</i> (January 17, 2020), <i>inewssource</i> , https://inewssource.org/2020/01/17/san-diego-homeless-fire-dispatch-calls/	12
Mike Madriaga, <i>San Diego River Neighbors Worry About Homeless Fires</i> (September 13, 2022), San Diego Reader, https://www.sandiegoreader.com/news/2022/sep/13/san-diego-river-neighbors-worry-about-homeless-fir/	12

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES	Page(s)
National Risk Index for San Diego County, California, FEMA, https://hazards.fema.gov/nri/report/viewer?dataLOD=Counties&dataIDs=C06073	12
Office of the San Diego County District Attorney, <i>Homeless Individuals and Their Intersection with the Criminal Justice System</i> (November 2019 – October 2021 (March 21, 2022)	2, 15
Regina Yurrita, <i>FEMA Study Ranks San Diego County at the Top of List for Wildfire Risk</i> (July 11, 2023), CBS8, https://www.cbs8.com/article/news/local/san-diego-ranks-at-the-top-for-being-at-risk-for-wildfires/509-7b42ff71-67e3-4651-815e-6f64082cb1a4	11
Will Huntsberry, <i>Homeless Deaths Are Rising at a Much Greater Rate than Homelessness</i> (June 13, 2023), Voice of San Diego, https://voiceofsandiego.org/2023/06/13/homeless-deaths-are-rising-at-a-much-greater-rate-than-homelessness/	18

**IDENTITY AND INTEREST
OF AMICUS CURIAE¹**

Amicus Curiae, the Office of the San Diego County District Attorney (“SDCDA”), is the governmental entity which represents the People of the State of California in the criminal prosecution of felonies committed within San Diego County as well as misdemeanors in the unincorporated areas and most municipalities within the county. This responsibility includes the prosecution of arson and controlled substance offenses under California’s Penal and Health & Safety Codes. In this capacity, SDCDA’s chief mission is to ensure public safety and to pursue equal and fair justice for all individuals, including the county’s sizable homeless population.

San Diego County ranks among the highest in the nation of counties at risk for wildfires. Massive wildfires have destroyed thousands of homes and buildings, stolen the lives of its citizens, caused millions of dollars in damage, and created a heightened sensitivity and vigilance to guard against this danger. As such, San Diego County offers a unique perspective on the highly elevated arson risks connected to homelessness.

In the 24-month period between November 2019 and October 2021, a published SDCDA study showed the homeless population committed felony arson at a rate 514 times higher than the non-

¹ Pursuant to Rule 37.6, no party or party’s counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

homeless population. Office of the San Diego County District Attorney, *Homeless Individuals and Their Intersection with the Criminal Justice System November 2019 - October 2021* (March 21, 2022), Appendix A at 3a. The increased risk of fire danger from the homeless population means that the use of cooking and heating devices—whether for sustenance or warmth—and the reckless setting of fires on public lands pose a serious and recurrent threat to the safety and wellbeing of the entire community the SDCDA serves.

San Diego County also finds itself at the epicenter of the fentanyl crisis given its proximity to the nation's southern border and being identified as the largest entry point of illicit fentanyl to the rest of the nation, providing the SDCDA with significant insight into the ravages this highly addictive and deadly drug has had on the homeless population of the county. These deadly overdose outcomes warrant robust enforcement of laws related to drug possession, especially fentanyl. Enforcement of illegal drug possession is a pathway to life-saving treatment through effective Drug Courts and other treatment courts.

San Diego County's high rate of drug fatalities from fentanyl has been especially devastating to the county's homeless population primarily living in public encampments. According to San Diego County Medical Examiner data, as reported by the SDCDA in Appendix A, by midyear 2021, the risk of a homeless individual dying of a drug overdose was 118 times higher than the county's non-homeless population on

a per capita basis.² Appendix A at 7a. In the first quarter of 2022, fentanyl deaths among the homeless were 23 percent higher than the same period in 2021, causing the county board of supervisors to declare a public health crisis from illicit fentanyl. Lisa Halverstadt, *Fentanyl Plagues San Diego's Homeless Population* (November 21, 2022), Voice of San Diego, <https://voiceofsandiego.org/2022/11/21/fentanyl-plagues-san-diegos-homeless-population/>.

Although San Diego County recognizes that all the issues connected to homelessness are important, the focus of this amicus brief is on the dangers of fires and fentanyl attributable to homeless encampments. The SDCDA's experiences are significant to open a window for this Court to view the striking impact the Ninth Circuit's decisions have had and will have on the People within San Diego County—homeless and non-homeless alike—who look to the SDCDA for solutions to safeguard the community.

The majority panel opinion in Petitioner's case, *Johnson v. City of Grants Pass*, 72 F.4th 868 (9th Cir. 2023) (*Johnson*), expressly contemplates that ordinances barring the use of fire or stoves and similar critical fire prevention laws may not be permitted under the Eighth Amendment when enforced against "involuntarily homeless" individuals occupying public encampments. Additionally, the logic and reasoning of the majority panel opinions in this case and its predecessor, *Martin v. City of Boise*, 920 F.3d 583 (9th Cir. 2019) (*Martin*), are susceptible of being read to

² This statistic was derived and calculated by the SDCDA from raw data provided by the San Diego Medical Examiner's Office and then included in the SDCDA's published report contained in Appendix A.

extend Eighth Amendment protections to homeless individuals for simple possession or being under the influence of a controlled substance in public encampments where the behavior is deemed an “unavoidable consequence” of one’s condition.

As such, these Ninth Circuit decisions create confusion, and even arguably a bar, to law enforcement and prosecution of individuals occupying homeless encampments for arson and drug-related offenses. While the SDCDA endeavors to treat the homeless population with compassion and dignity through education, treatment and services, we also recognize that tying the hands of local governments attempting to mitigate the harms from wildfires and drug fatalities hurts the homeless as much as the community at large. Accordingly, SDCDA has a significant interest in seeking reversal of the Ninth Circuit panel decision in this case and the overruling of the *Martin* opinion upon which the panel’s majority relied.

SUMMARY OF THE ARGUMENT

Addressing the critical issues surrounding homelessness and the criminal justice system is a complex and monumental task. In most metropolitan areas of the United States today, homelessness and the attendant encampments have produced a humanitarian and public safety crisis. Unsafe and inhumane conditions in homeless encampments on public property in San Diego County pose a serious threat to the safety and wellbeing of their occupants as well as the general public. It is this complexity that calls for allowing local government to have full access to the legal tools necessary to permit an approach that

strives for public safety, fairness, and dignity, while also recognizing the need for more humane ways to serve homeless individuals.

Of particular concern to San Diego County is the yearly threat of devastating wildfires originating in its canyons, riverbeds, woodlands and other public lands, quickly spread by strong, dry Santa Ana winds. The overwhelming statistic that the homeless population committed felony arson at a rate 514 times higher than the non-homeless population over a two-year period is not one to be taken lightly. Enacting commonsense restrictions on conduct which presents a fire risk is therefore one of the highest priorities of local governments throughout the county. For example, the City of San Diego's unsafe camping ordinance prohibits the use of camp stoves or cooking equipment in public encampments to prevent the scourge of wildfires. These restrictions safeguard against the catastrophic impact of wildfire destruction that too often leaves families, neighborhoods, and communities suffering in the wake of wide-ranging and long-lasting damage.

It is of great concern that the majority panel decision in this case contemplates that a municipal ordinance prohibiting the use of stoves or even open fire in public encampments "may or may not be permissible" under the Ninth Circuit's novel construction of the Eighth Amendment in *Martin*. Intruding on the traditional role of local government in policymaking to protect its community, the panel majority subjects Petitioner's eminently reasonable fire prevention ordinance to an unprecedented and standardless Eighth Amendment balancing test against the interests of homeless individuals occupying public encampments.

This likewise injects confusion and uncertainty into the enforcement and prosecution of arson-related crimes such as recklessly causing a fire on public lands. Just like the bedding and cardboard enclosures addressed in Petitioner's case, the occupants of homeless encampments could assert an Eighth Amendment claim under *Johnson* and *Martin* that a fire was necessary for rudimentary protection from the elements or the preparation of food in furtherance of involuntary human needs for warmth and sustenance.

Given its proximity to the nation's southern border and being identified as the largest entry point of illicit fentanyl to the rest of the nation, San Diego has become the epicenter of the fentanyl crisis. This highly addictive and deadly drug has ravaged no community harder than the homeless population of the county. Robust enforcement of laws criminalizing public intoxication and drug possession, especially fentanyl, is warranted.

The San Diego County Medical Examiner's data showing that the risk of a homeless individual dying of a drug overdose was 118 times higher than the county's non-homeless population on a per capita basis emphasizes the need to employ local law enforcement solutions—as assessed and determined by local agencies with a deeper understanding of their own communities' overdose problems—without the overbroad constraints imposed by the Ninth Circuit.

However, the Ninth Circuit's expansive definition of involuntary conduct and status offenses as set forth in *Martin* and reaffirmed in Petitioner's case raises the specter of Eighth Amendment claims of immunity by homeless individuals occupying encampments from drug-related law enforcement actions and prosecutions. Without the option of law

enforcement intervention and a resulting criminal case, the Ninth Circuit's restraints threaten the trial court's authority to mandate drug treatment as part of a criminal prosecution for fentanyl addicts who refuse voluntary treatment or because life-saving treatment and residential services are simply not available on the streets or effectively provided through voluntary participation. Yet, these law enforcement measures provide a viable mechanism to avoid the high rates of fentanyl overdose deaths among the homeless population. The hope, of course, is to save lives.

As such, the novel Ninth Circuit decisions in this case and *Martin* represent a result-driven perversion of Eighth Amendment jurisprudence. By restricting the ability of local governments to mitigate the risk of devastating wildfires and drug fatalities, those decisions in effect expose both the homeless and local communities at large to great risks, not protection against cruel and unusual punishments within the original meaning of the Eighth Amendment.

Similarly, the holdings in these Ninth Circuit cases are not susceptible to clarification, as urged by some, since they are essentially policy determinations—a function reserved and best suited for local governments based on their particular needs and circumstances. *Johnson* should therefore be reversed and the Eighth Amendment holding in *Martin* upon which the *Johnson* majority relied overruled.

ARGUMENT

Like many other major metropolitan areas of the United States today, the proliferation of homeless

encampments on public lands in San Diego County poses a serious threat to the health, safety, and welfare of the homeless as well as the general public. Of particular concern in San Diego County is the risk of wildfires associated with these homeless encampments, which dot its dry canyons and riverbeds, as well as the disproportionately high rate of drug fatalities, primarily from fentanyl, amongst the county's homeless population.

By cloaking the conduct of homeless individuals occupying public encampments with Eighth Amendment protections as “the unavoidable consequences of one's status or being,” the Ninth Circuit in *Martin* and Petitioner's case have tied the hands of local governments in alleviating the harms and threats to public safety that are endemic to those encampments. The Ninth Circuit's expansive construction of the Eighth Amendment in *Johnson* and *Martin* can be read to immunize homeless individuals from life-saving laws prohibiting the act of possessing or being under the influence of controlled substances in public as well as enforcement of important fire safety and arson-related laws in public encampments. This unwarranted expansion of the Eighth Amendment and intrusion into the realm of public policymaking by the Ninth Circuit in a misguided and ineffective effort to help the homeless should not be allowed to stand.

The Ninth Circuit's decisions remove necessary tools from various stakeholders who must collaborate to address arson threats and the needs of homeless individuals living with substance use disorders. Reversing the Ninth Circuit's decisions allows for the development of solutions focused on the intersection of criminal justice and public safety as San Diego County

works toward common goals for its citizens. While many other tools provide humane treatment to the homeless population—like mental health services, substance abuse services, alternatives to incarceration like the San Diego County District Attorney Community Justice Initiative or Collaborative Courts, peer support, smartphone applications for services, acute crisis response teams, crisis and de-escalation training, education, and many other categories of assistance—the Ninth Circuit’s decisions must be overturned to allow law enforcement the use of other measures, within the bounds of the law and in conjunction with alternative approaches, to ensure the well-being of homeless individuals and the general public are safeguarded.

I. The Ninth Circuit’s Holdings in *Martin* and Petitioner’s Case Threaten the Enforcement of Commonsense Fire Safety Ordinances and Arson-Related Laws that Protect Local Communities from the Ravages of Wildfires

In *Martin*, a three-judge panel of the Ninth Circuit adopted from a previously-vacated opinion an argument 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 616-17, quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135-36 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007) (*Jones*). The *Martin* panel then expanded upon *Jones* to hold that “the state may not ‘criminalize conduct that is an unavoidable consequence of being homeless—namely, sitting, lying, or sleeping on the streets.’” *Id.* at 617.

From that holding, the *Martin* panel fashioned a rule 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.”³ *Martin*, 920 F.3d at 617. Relying on *Martin*, a different three judge panel of the Ninth Circuit in Petitioner’s case extended this rule to conduct related to “rudimentary protection from the elements.” *Johnson*, 72 F.4th at 896.

In relevant part, the anti-camping ordinances at issue in this case prohibited individuals from sleeping on sidewalks, streets, alleys or within doorways, or in any pedestrian or vehicular entrance on or abutting public property. *Johnson*, 72 F.4th at 876. In addition, the ordinances prohibited individuals from occupying a campsite on public property. *Id.* In defining the term “campsite,” the ordinances prohibited the use of bedding, sleeping bags, or other materials used for bedding purposes as well as the use of stoves or fires, tents, lean-tos, shacks, or any other

³ To the contrary, it was the *Martin* panel members who were likely operating under a false premise that the homeless have no choice in the matter of living in public encampments. A substantial number of homeless individuals prefer encampments to residing in shelters for a variety of reasons. Some of them “chafe at the rules” not to their liking in the shelters, such as curfews. See Jeanne Kuang, *To Sweep Homeless Camps, California Cities Say They Offer Shelter. What that Really Means Is Up for Debate* (September 13, 2023), CAL MATTERS, <https://calmatters.org/housing/homelessness/2023/09/california-homeless-camps/>. One San Diego police captain reported that during the first month of enforcing the city’s new unsafe camping ordinance only three out of 85 homeless individuals he contacted indicated that they would agree to a shelter placement. *Id.*

structure or vehicle for purposes of maintaining a temporary place to live. *Id.*

Relying on *Martin*, the panel majority found the bedding provisions violated the Eighth Amendment because they prohibited the homeless from engaging in unavoidable activity of sleeping outdoors without the “rudimentary forms of protection from the elements.” *Johnson*, 72 F.4th at 890-91, 896. Insofar as the erection of temporary structures and the use of open fire or stoves, the panel majority held “these prohibitions may or may not be permissible” under *Martin*, tasking the district court on remand to engage in a balancing test between the city’s interests in those provisions and the interests of the homeless in rudimentary protections from the elements to determine whether those provisions also violated the Eighth Amendment. *Id.* at 895.

Of course, the panel could not explain where in this Court’s Eighth Amendment jurisprudence they find recognition of any state interest in imposing cruel and unusual punishment or authority for subjecting the constitutional right to the whims of a balancing-of-interests test. See *Johnson*, 72 F.4th at 895. In any event, it is troubling that the *Johnson* panel contemplates the prospect of finding commonsense fire prevention laws concerning the use of open flames and stoves on public lands prohibited under the Eighth Amendment.

Last year, the Federal Emergency Management Agency (FEMA) ranked San Diego County as being the county most at risk for wildfires in the United States. Regina Yurrita, *FEMA Study Ranks San Diego County at the Top of List for Wildfire Risk* (July 11, 2023), CBS8, <https://www.cbs8.com/article/news/local/san-diego-ranks-at-the-top-for-being-at-risk-for->

wildfires/509-7b42ff71-67e3-4651-815e-6f64082cb1a4. FEMA placed San Diego County in the top national percentile for wildfire risk with “Very High” expected annual loss, “Relatively High” social vulnerability, and “Very Low” community resilience scores for wildfires. *National Risk Index for San Diego County, California*, FEMA, <https://hazards.fema.gov/nri/report/viewer?dataLOD=Counties&dataIDs=C06073>.

“Look at the fire hazard map for San Diego, and it’s nearly all red zones.” Mary Plummer, *Fire Risks Tied to Homelessness in San Diego’s Canyons Leave Residents on Edge* (December 10, 2019), *inewsourc*e, Appendix B at 8a. The highest risk is for approximately 40,000 homes and lots bordering the county’s brush-filled canyons. *Id.* at 9a-10a, 19a.

“[T]he situation has been exacerbated as the city grapples with a large, unsheltered homeless population, some of whom use the canyons as their home.” Appendix B at 9a. Similarly, homeless encampments near San Diego’s main riverbed—also surrounded by dry brush—is of great concern to local residents. Mike Madriaga, *San Diego River Neighbors Worry About Homeless Fires* (September 13, 2022), *San Diego Reader*, <https://www.sandiegoreader.com/news/2022/sep/13/san-diego-river-neighbors-worry-about-homeless-fir/>.

In 2019, a significant percentage of all fire dispatch calls to the San Diego Fire-Rescue Department were related to the homeless and their encampments. Mary Plummer, *San Diego’s Homeless Tied to Nearly 13% of All Fire Dispatch Calls* (January 17, 2020), *inewsourc*e,

Times of San Diego, <https://timesofsandiego.com/crime/2023/11/22/sdfd-extinguishes-mission-valley-homeless-encampment-blaze/>; Mary Payton, *Data Shows Explosive Growth in Homeless-Related Fire Calls* (October 13, 2020), NBCsandiego, <https://www.nbcsandiego.com/news/local/data-shows-explosive-growth-in-homeless-related-fires/2423854/>.

Understandably, San Diego’s unsafe camping ordinance enacted last year includes a prohibition on the use of camp stoves and cooking equipment within its definition of a public encampment. *See* San Diego Municipal Code § 63.0402 (2023). However, the majority opinions in this case and *Martin* create uncertainty about the validity of the ordinance as a whole. *See* Gary Warth, *San Diego’s Homeless Camping Ban May Face a Legal Challenge. Could this Case in Another City Be a Bellwether?* (June 17, 2023), *The San Diego Union Tribune*, Appendix C at 27a-29a.

Just like the bedding materials at the center of the *Johnson* panel’s finding of an Eighth Amendment infirmity in Petitioner’s public camping ordinances, San Diego’s ban on the use of camp stoves and cooking equipment for warmth and food preparation on public lands likely comes within the panel’s definitions of human activity that cannot be avoided and rudimentary protection from the elements. *Compare Johnson*, 72 F.4th at 890-91, 895-96. As one homeless individual told a San Diego reporter,

[F]ires are a necessity when you live outdoors. [¶] “We use fire in the canyons to eat with and to keep warm with at night,” . . . “A lot of times they’ll cover up with a tarp when it gets cold and put on every stick of clothing they got just to stay warm with. And a little candle underneath

the tarp But then you're taking the risk of burning the canyon down and yourself.”

Appendix B at 12a.

Given the *Johnson* panel's remarkable conclusion that Petitioner's ban on stoves and open fires in public encampments “may or may not be permissible” under *Martin*, San Diego's efforts to mitigate the risks of wildfires through its unsafe camping ordinance likewise faces the threat of Eighth Amendment challenges and claims of immunity if *Johnson* and *Martin* are allowed to stand and continue to govern the issue.

The two Ninth Circuit opinions likewise threaten enforcement of California's arson statutes. California Penal Code section 451 sets forth the crime of felony arson for any person who “willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure, forest land, or property.” California Penal Code section 452 provides for either felony or misdemeanor charges for reckless setting of a fire, burning, or causing to be burned, any structure, forest land or property.

In the 24-month period between November 2019 and October 2021, a published SDCDA study showed that among a homeless population of 7,296 people, a total of 162 felony arson cases were filed on homeless defendants, whereas for the remaining San Diego adult population of 2.6 million people, only 113 felony arson cases were filed for non-homeless defendants. This reflects the homeless population committing arson at a rate 514 times higher than the non-homeless population. Office of the San Diego County District Attorney, *Homeless Individuals and*

Their Intersection with the Criminal Justice System November 2019 - October 2021 (March 21, 2022), Appendix A at 3a.

Since the risk of wildfires from homeless encampments will more likely be the result of recklessness in conjunction with the use of open fires, camp stoves, cooking equipment or other incendiary devices associated with needs for sustenance and warmth, the holdings in *Martin* and *Johnson* most impact the viability of law enforcement and prosecutions under California Penal Code section 452. Will officers be subject to civil liability for attempting to enforce arson statutes where the reason for the fire was the unavoidable activity of preparing food for consumption or rudimentary protection from the elements faced by unsheltered individuals? Will such individuals be cloaked with Eighth Amendment immunity from criminal prosecution under an arson statute?

In this way, the *Martin* and *Johnson* decisions throw commonsense fire prevention laws and local government efforts to curtail the risks of wildfires into a state of uncertainty as applied to unsheltered individuals living in homeless encampments. The unprecedented and unwarranted expansion of Eighth Amendment jurisprudence mandated by those cases not only impact neighboring residents and the community at large by impeding local government efforts to reduce the risks of fires from homeless encampments, but also endanger the very occupants of those encampments. Accordingly, the majority panel opinion in *Johnson* should be reversed and the panel decision in *Martin* overruled.

II. The Ninth Circuit’s Extension of Eighth Amendment Protections to the Unavoidable Consequences of One’s Status or Being Threatens the Enforcement of Life-Saving Laws that Can Reduce the Disproportionately High Fatality Rate of the Homeless from Fentanyl

As noted, the *Martin* panel adopted from a previously-vacated opinion 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.” *See Martin*, 920 F.3d at 616, quoting *Jones*, 444 F.3d at 1135. This principle was developed by cobbling together dicta within Justice White’s concurring opinion with a dissenting opinion of Justice Fortas in *Powell v. Texas*, 392 U.S. 514 (1968) (*Powell*). *Martin*, 920 F.3d at 616.

In relevant part, Justice White wrote:

“For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. ... For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk.”

Martin, 920 F.3d at 616, quoting *Powell*, 392 U.S. at 551 (White, J., concurring in the judgment).

Writing for himself and three other dissenting justices, Justice Fortas argued that “criminal

penalties may not be inflicted upon a person for being in a condition he is powerless to change,' and that the defendant, 'once intoxicated, . . . could not prevent himself from appearing in public places.'" *Martin*, 920 F.3d at 616, quoting *Powell*, 392 U.S. at 567 (Fortas, J., dissenting).

The panel majority in Petitioner's case likewise found Justice White's concurrence combined with Justice Fortas's dissent in *Powell* to serve as authority for applying the Eighth Amendment to Petitioner's unlawful camping ordinances. See *Johnson*, 72 F.4th at 891-93.

Of course, public intoxication can be either drug or alcohol-induced and the result of the disease of drug addiction as well as alcoholism. Accordingly, the reasoning of Justice White's dicta and Justice Fortas's dissent in *Powell* would apply with equal force to the crime of being under the influence of a dangerous controlled substance in a public place such as a homeless encampment. Like its extension of unavoidable consequences of homelessness to the use of bedding in public camps by the *Johnson* panel, simple possession could be seen as an unavoidable consequence of drug use and addiction.

Due to its position on the nation's southern border and being identified as the largest entry point of illicit fentanyl to the rest of the nation, San Diego is experiencing a major crisis from the deadly drug fentanyl—an opioid 50 times stronger than heroin and 100 times stronger than morphine. Center for Disease Control and Prevention, CDC Fentanyl Fact Sheet, https://www.cdc.gov/ore/pdf/CDC_Fentanyl-FactSheet_General_508.pdf. The fentanyl crisis has hit the homeless population of the county especially hard.

In the ten-year period between 2012 and 2022, drug overdoses were the primary cause of a dramatically increasing death rate among homeless individuals in San Diego County, and “the fentanyl epidemic is behind this rise” in homeless fatalities. Will Huntsberry, *Homeless Deaths Are Rising at a Much Greater Rate than Homelessness* (June 13, 2023), Voice of San Diego, <https://voiceofsandiego.org/2023/06/13/homeless-deaths-are-rising-at-a-much-greater-rate-than-homelessness/>. In 2021, more than 200 homeless individuals in San Diego County died of fentanyl overdoses. Halverstadt, *Fentanyl Plagues San Diego’s Homeless Population*, *supra*.

According to San Diego County Medical Examiner data analyzed by and incorporated into the SDCDA report (Appendix A), by midyear 2021, the risk of a homeless individual dying of a drug overdose was 118 times higher than the county’s non-homeless population on a per capita basis. Appendix A at 7a. In the first quarter of 2022, fentanyl deaths among the homeless were 23 percent higher than the same period in 2021, causing the county board of supervisors to declare a public health crisis from illicit fentanyl. Halverstadt, *Fentanyl Plagues San Diego’s Homeless Population*, *supra*.

“Fentanyl’s life-taking power has thinned out whole encampments,” reported one formerly-homeless individual. Huntsberry, *Homeless Deaths are Rising at a Much Greater Rate than Homelessness*, *supra*. Even those not using drugs in the encampments worry about the dangers of secondary exposure to fentanyl-laced smoke. *Id.* Another individual commenting on the encampments stated, “Don’t even ask me how many dogs have been Narcan-ed They get into it and lick it up.” *Id.*

California's Health and Safety Code criminalizes the act of being under the influence as well as simple possession of a controlled substance, such as fentanyl, in a public place. *See* Cal. Health & Saf. Code §§ 11350 and 11550 (2023). Enforcement of these criminal provisions in the homeless community can serve as a helpful tool in effectively removing homeless individuals suffering from fentanyl addiction from the environment fostering use of the deadly drug. The criminal justice system can be a powerful catalyst in providing life-saving treatment and residential services that are simply not available on the streets or effectively provided through voluntary participation.

By shrouding the “unavoidable consequence[s] of one’s status or being” with the protections of the Eighth Amendment, the panel opinions in *Martin* and *Johnson* inject uncertainty and even perhaps a bar to enforcement and prosecution of individuals in homeless encampments with the offenses of possession or being under the influence of a controlled substance in a public place. These Ninth Circuit panel opinions do no favor to homeless individuals bearing the brunt of the fentanyl crisis in public encampments, as those decisions can be read to immunize those individuals from enforcement of certain drug-related laws such as California Health and Safety Code sections 11550 and 11350.

Contrary to its proclamations in *Martin* of being a “narrow” holding, 920 F.3d at 617, the Ninth Circuit’s construction of the Eighth Amendment as protecting the unavoidable consequences of being homeless has already expanded to the use of bedding materials, shelters, and incendiary devices under *Johnson*. In a not so veiled intrusion into public

policymaking, these opinions present local governments with a stark choice between providing individuals who consider themselves involuntarily homeless with judicially-determined adequate housing at public expense or allowing homeless encampments on public property that continue to pose untenable fire and drug overdose risks. *See Johnson*, 72 F.4th at 896, *Martin*, 920 F.3d at 616-17. The Ninth Circuit's misguided attempts to expand the Eighth Amendment beyond its original meaning should not be allowed to stand.

CONCLUSION

The majority panel opinion of the Ninth Circuit in Petitioner's case should be reversed and *Martin* overruled.

Respectfully submitted,

SUMMER STEPHAN
District Attorney
LINH LAM
Deputy District Attorney
Chief,
Appellate & Training Division
VALERIE RYAN
Deputy District Attorney
Asst. Chief,
Appellate & Training Division
330 West Broadway
San Diego, CA 92101

RONALD A. JAKOB
Counsel of Record
Deputy District Attorney
330 West Broadway
San Diego, CA 92101
(619) 531-3671
ronald.jakob@sdcda.org

Counsel for Amicus Curiae

March 1, 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

	Page
APPENDIX A: Office of the San Diego County District Attorney, <i>Homeless Individuals and Their Intersection with the Criminal Justice System</i> (November 2019 - October 2021) (March 21, 2022), https://www.sdca.org/content/MediaRelease/HomeLess%20Rates%20PDF%203-21-22.pdf	1a
APPENDIX B: <i>Fire Risks Tied to Homelessness in San Diego's Canyons Leave Residents on Edge</i> , Inewsource (December 10, 2019), https://inewsource.org/2019/12/10/san-diego-homeless-canyon-wildfires.....	8a
APPENDIX C: Gary Warth, <i>San Diego's Homeless Camping Ban My Face a Legal Challenge. Could this Case in Another City Be a Bellwether?</i> , San Diego Union Tribune (June 17, 2023), https://www.sandiegouniontribune.com/news/homelessness/story/2023-06-17/san-diegos-homeless-camping-ban-may-face-legal-challenge.....	24a

1a

APPENDIX A

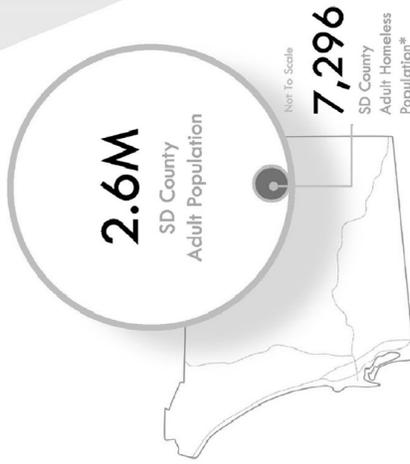
**Homeless Individuals and Their Intersection with
the Criminal Justice System**

**Using District Attorney data based on crimes
provable beyond a reasonable doubt**

November 2019 to October 2021

(24-Month Period)

Population



* Homeless Adult Population Estimates (2020)
2020 WeAllCount Results, San Diego Regional Task Force on the Homeless
<https://www.rfhisd.org/wp-content/uploads/WeAllCount.pdf>



DA's Office Case Issuing Totals (November 2019 to October 2021)



Total Adult Cases	53,163
Total Adult Cases, Homeless Defendants	8,860



2a

San Diego Population Perspective

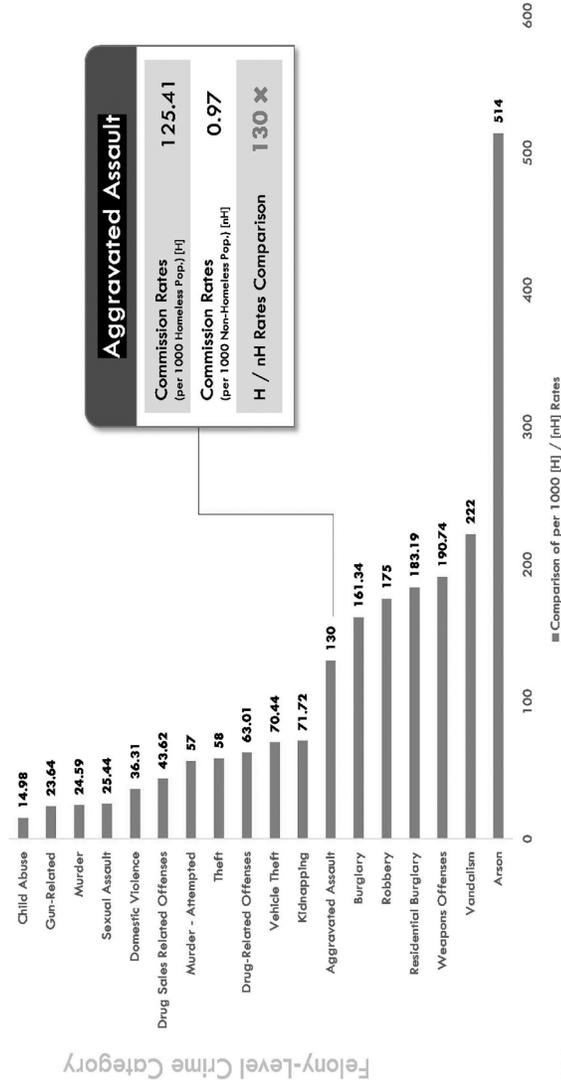
Felony-Level Crime Category (Highest Charge)	Defendant-Case Count		Comparison of per 1000 [H] vs [nH] Rates (Multiplier)
	Homeless Defendant (H)	Non-Homeless Defendant (nH)	
Aggravated Assault	915	2529	130 times
Vandalism	433	700	222 times
Robbery	386	792	175 times
Residential Burglary	282	552	183 times
Drug Sales	280	2302	44 times
Arson	162	113	514 times
Theft	130	800	58 times
Attempted Murder	27	171	57 times
Murder	21	296	25 times
Sexual Assault	12	175	25 times



Homeless Individuals and their Intersection with the Criminal Justice System (Nov 2019 to Oct 2021)

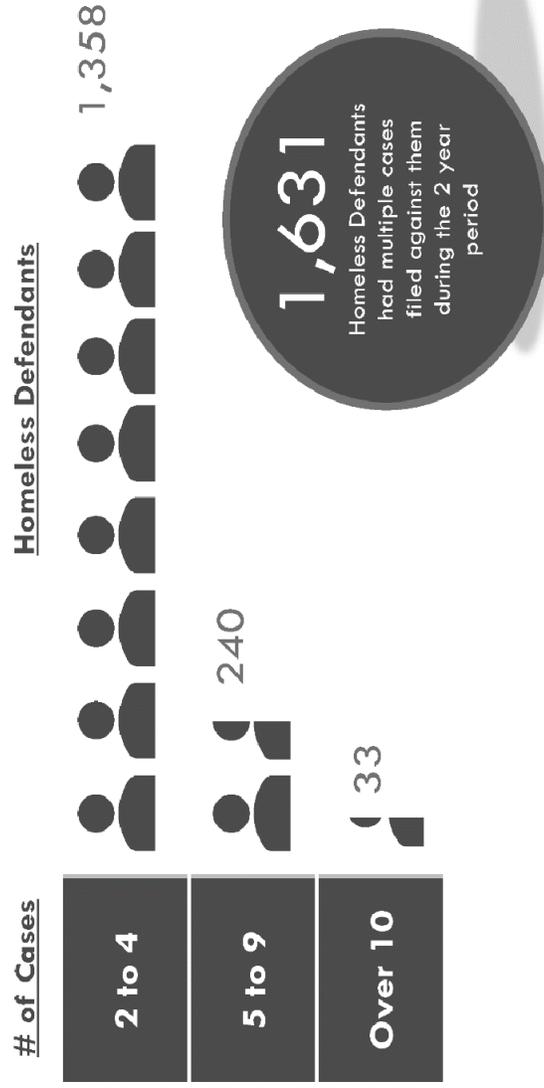
San Diego Population Perspective

Rates Comparison (Homeless vs Non-Homeless Populations)



Homeless Individuals and their Intersection with the Criminal Justice System (Nov 2019 to Oct 2021)

Homeless Defendants Recidivism



5a



6a

Homeless Victims

The increased vulnerability associated with homelessness

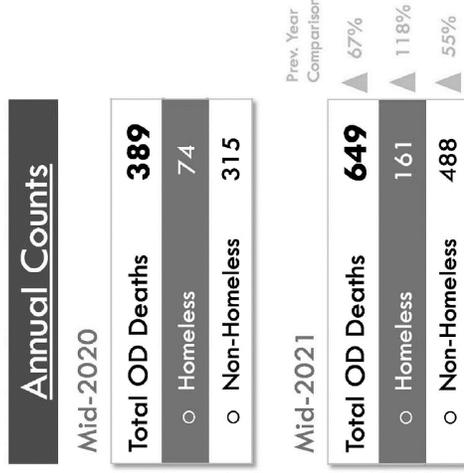
San Diego Population Perspective

Crime Category (Highest Charge)	Case Count		Comparison of per 1000 [H] vs [nH] Rates (Multiplier)
	Homeless Victim (H)	Victims Not Noted as Homeless (nH)	
Domestic Violence	171	3950	15 times
Aggravated Assault	165	4904	12 times
Robbery	44	998	15 times
Attempted Murder	13	168	27 times
Elder Abuse	11	399	10 times
Child Abuse	9	515	6 times
Sexual Assault	9	355	9 times
Murder	8	149	19 times



Drug Overdose Deaths among Homeless

- In mid-2021, homeless had **118x higher** chance of dying of a drug OD than would be expected given their population size if their OD rate were the same as that of non-homeless individuals



7a



8a

APPENDIX B

Inewssource; Fire Risks Tied to Homelessness in San Diego's Canyons Leave Residents on Edge

<https://inewssource.org/2019/12/10/san-diego-homeless-canyon-wildfires/>

by Mary Plummer

December 10, 2019



San Diego fire department crews put down a fire near Fairmont Avenue and Aldine Drive in San Diego, Oct. 15, 2019. Fire officials said it started near a homeless encampment. (Zoë Meyers/inewssource)

Look at the fire hazard map for San Diego, and it's nearly all red zones.

San Diego's landscape is dotted with hillside developments — old and new — that border scenic canyons and nature parks. The red on the map includes those brush-filled areas and signifies a very high fire danger.

The city fire department estimates the risk is

highest for about 40,000 homes and vacant lots that sit along those canyon rims and slopes, from Cabrillo Canyon in Balboa Park to Tecolote Canyon in Clairemont to North Chollas Canyon in Oak Park.

Brush and overgrown vegetation have long created fire risks in San Diego and at all times of the year, but the situation has been exacerbated as the city grapples with a large, unsheltered homeless population, some of whom use the canyons as their home.

Why this matters

Most wildland fires in the U.S. are caused by people, and nowhere in the country are more structures at risk than in California. San Diego's urban canyons and nature parks lined by homes are especially vulnerable.

Fire incident call records obtained by inewsourc prove the point: For the first nine months of this year, 11% of those calls mentioned homeless encampments.

Other public records and interviews with residents show frustration and at times anger with city officials over what's seen as serious fire hazards caused by homeless living in the brush-filled canyons.

“It's their responsibility to protect and clear our

community,” said Karen Lockshaw, who lives in Clairemont, four blocks from the Tecolote Canyon Natural Park.

Lockshaw called the city’s approach to managing brush and overgrowth an abuse of authority that puts parts of San Diego in danger of wildfires.

“It’s a matchbox,” she said. “It’s just a matter of time.”

San Diego Homes Most At Risk For Fires

The fire hazard map for San Diego is nearly all red zones, which signifies very high fire danger.

The city proactively assesses about 40,000 of the most at risk properties to ensure brush and weeds are properly cut and managed to reduce fire risk. City staff also respond to brush complaints residents submit.

This database allows you to search properties the city checks for vegetation-related fire risks. Fire officials say the vast majority are assessed proactively rather than checked after a complaint.

To submit a complaint to the city, [click here](#) or call (619) 533-4444.

To submit an infrastructure story tip to inewsource email: fixthis@inewsource.org.

<https://inewsource.github.io/tables/san-diego-fire-danger/>

Fire-related complaints filed on the city’s Get It Done app show she’s not alone.

“Illegal campsite with what appears to be some sort of campfire or cooking fire or something in Marston Canyon at the bottom of Vermont,” reads a report submitted in July.

11a

“Possibility for fires, etc. exists with homeless camps. This is NOT a campground,” reads another, reporting concerns in Balboa Park in September. “This has been previously reported but the camp has grown larger.”

“I live on the corner of Mason and Jackson and hear yelling and fighting every day,” reads another from October 2018 about a homeless encampment in Presidio Park. “There is evidence beside these camps that they are building fires next to them. Please help remove these camps as soon as possible.”

An attached photo shows a red baby stroller among the trees filled with personal belongings, and clothing hanging from a branch.

Tom Scott is a homeless veteran who said he’s lived in Balboa Park for about 15 years. He said he recognizes the conflict with residents and their fire fear.



Tom Scott looks out into Florida Canyon in Balboa Park, Nov. 18, 2019. Scott has been homeless for 40 years, and for some of those years lived in Florida

Canyon. (Zoë Meyers/inewssource)

“I understand that part and why they don’t like us down there,” Scott said. But, he added, the fires are a necessity when you live outdoors.

“We use fire in the canyons to eat with and to keep warm with at night,” he said. “A lot of times they’ll cover up with a tarp when it gets cold and put on every stick of clothing they got just to stay warm with. And a little candle underneath the tarp. ... But then you’re taking the risk of burning the canyon down and yourself.”

Nothing like that has happened this year, but small fires linked to the homeless have threatened San Diego neighborhoods — from a brush fire in October near Talmadge and Kensington to a canyon fire in July in Skyline to an April blaze that homeless people trying to keep warm started inside a section of the Cabrillo Bridge in Balboa Park.

Deputy Fire Chief Doug Perry, who oversees the city’s fire prevention efforts, said he understands the public’s concern about fire risks within city parks.

“They have a right to be worried,” he said. “The San Diego area, probably our greatest concerns even more than earthquakes are wildland fires.”

The city has made addressing homelessness a priority, he said, but added that the best solution would be to get people out of the canyon and park encampments and into some kind of housing.

“When they’re cold, they’re going to start fires,” Perry said. “Preventative-wise, we’ve got to find places for them to be housed and taken care of.”

inewssource asked for an interview with Mayor

13a

Kevin Faulconer and the head of his homeless efforts. His spokeswoman instead emailed a response to questions about fire risks associated with homeless people in the parks and canyons.

It said, in part: “If there is a potential fire risk, Mayor Faulconer has directed staff to remove that risk as quickly as possible. During peak fire season, public safety of all our residents is our number one priority and we are doing everything possible to mitigate the potential for spark.”



San Diego fire department crews put down a fire near Fairmont Avenue and Aldine Drive in San Diego, Oct. 15, 2019. (Zoë Meyers/inewsourc)

Get It Done app frustrates residents

Discarded items left from an encampment in Florida Canyon in Balboa Park are shown in this photo, Nov. 18, 2019. (*Zoë Meyers/inewssource*)

Some residents who used the Get It Done app to report people living and setting up camps in canyons and parks found the system frustrating. They told inewssource their submissions were sometimes described as closed or corrected despite the problems not being fixed. Some residents experienced long delays in getting a response from the city, and others never heard back, according to an inewssource review of the complaint data.

Lauren Williams lives in Mission Hills and is the Presidio Hills block captain for her neighborhood town council. She said she walks the trails in Presidio Park every day with her dogs and regularly files reports to the city on fire dangers related to the homeless.

“I worry about it all the time, all year round,”

Williams said.

Her fear now that it has gotten cold is that the homeless people in the park will be lighting more fires to stay warm. She'd like the city to increase lighting and adjust when police patrol so the homeless don't know when officers will be in the park.

"If Presidio Park catches fire, my home and all of our neighbors' homes are going to catch fire very quickly," Williams said.

She estimates she's submitted about 150 Get It Done requests in the past year and a half — not all are about fire dangers and the homeless — and about half were responded to or resolved. Williams said she'd like the city to be more responsive to the submissions but is glad there is an easy way to report problems. She said she's seen improvements in the park since she started using it.



Residents who have complained about homeless encampments and other illegal activity in North Chollas Community Park aren't as positive about the app.

Oak Park residents Elida Chavez and Bruce Thompson walk through North Chollas Community Park, Oct. 3, 2019. Both have raised safety concerns about the park to city officials. (Zoë Meyers/inewsource)

On Aug. 12, a resident filed two Get It Done complaints reporting homeless encampments inside the park.

Four days later, they were listed as corrected without the problems being addressed, neighbors said.

Then, on the afternoon of Aug. 25, a fire broke out in a canyon near where the encampments were reported. Firefighters stopped the blaze from spreading an hour after it was reported.

The cause was ruled undetermined, but one resident said a firefighter showed him where the fire likely originated. It was a known spot for fires lit by the homeless in the park, he said. While no one was injured and no homes were damaged, the fire alarmed the community.

Residents wrote to Faulconer in September, citing “urgent requests” that included demands for more prompt responses to fire risk reports and illegal activity, clarification on which departments handle removing homeless encampments and improvements to the Get It Done app.

“We have used GET IT DONE frequently and have typically found it useless in addressing illegal activity in our park,” reads the letter signed by Oak Park Community Council President Richard Diaz on behalf of concerned residents.

Faulconer never responded personally to the letter, but his spokeswoman said the city has taken steps to

17a

address residents' concerns. Among them: Police and workers from the Environmental Services Department cleaned up encampments, and an arborist assessed trees in the park.

Some neighbors said that's not enough and continue to call for safety improvements.

"We have gotten to a point that it's no longer just having a concern," said Elida Chavez, who has lived in the neighborhood for 45 years. "But it's gotten to the point of being angry and standing up and having a voice."



Dry brush is visible throughout North Chollas Community Park, Oct. 3, 2019. (*Zoë Meyers/inewssource*)

Bruce Thompson, another neighbor, said he continues to see evidence of problems and fire risks within the park. He described the current situation as a "bureaucratic bottleneck" that puts "people and property at risk."

A recent park cleanup located "about eight lighters,

eight empty marijuana containers, countless cigarette butts, many empty miniature cigar packages that people use to deal with marijuana so they don't get cited for smoking marijuana in public," Thompson said, plus materials used to smoke meth.

City officials acknowledge the Get It Done app needs fixes. It started as a pilot in 2016 and has had multiple updates and expansions. Another one is planned for early next year to streamline reporting of homeless encampments and directly route homeless problems to the Neighborhood Policing Division, which works with the Environmental Services Department to clear the camps.

City brush rules leave most of San Diego untouched

When it comes to fire prevention, the city's own rules present challenges.

Fire officials said up to 100 feet of clearance is required in city parks with brush and vegetation that abuts homes. Depending on where the property line is, the city and homeowner share responsibility for maintaining the land.

The regulations do not require any brush clearance beyond 100 feet, including canyon beds where some homeless live.

North Chollas Community Park, for example, was in compliance with the city's brush rules, a San Diego Fire-Rescue Department spokeswoman said.

The uneven topography where the fire originated prevented brush clearing, Tim Graham, a spokesman for the Parks and Recreation Department, said in an email. He said it wasn't "feasible to cut brush in the area as we do not have equipment that would best be used in that area."

19a

The city assesses whether homes are properly protected and checks about 40,000 high-risk properties. Almost all of them are along canyons and hillsides.



Houses are shown along the ridge line of Switzer Canyon in San Diego, Oct. 7, 2019. (Zoë Meyers/ inewsourc)

But city brush inspection records show those safety requirements are monitored infrequently.

The city employs a staff of seven to assess brush clearance compliance. From March 2017 to mid-November 2019, just 24% of sites had been inspected. Of those, 10.6% were out of compliance.

In addition to fire department inspections, the Parks and Recreation Department cuts brush and weeds in 11 areas of the city, but many residents feel it's not enough.

"I want that brush cleaned up and I want it done now," said Chavez, who lives near North Chollas

Community Park.

Her major concern, she said, is “that people are going to get hurt, that children, families, are going to get hurt, and whoever’s living in this area is going to get hurt, too. It’s about saving lives.”

This fiscal year the city budgeted for the Parks and Recreation Department to clear 509 acres. For context, San Diego has more than 40,000 acres of parkland within its boundaries.

Living among the city’s brush

Scott, the veteran who lives in Balboa Park above Florida Canyon, served in the Vietnam War. He’s 64 and said he’s been homeless for four decades. He said he was born at the Navy’s old hospital in Balboa Park, a short walk from where he now lives outdoors.

When asked how he would respond to residents worried about the homeless setting fires in the parks where they live, as he does, he said there are always two sides.

“Are they going to come feed us? They ain’t going to come down in the canyon and feed us. They ain’t going to come down there and keep us warm,” Scott said.

21a



Tom Scott cooks Ramen noodles on a stove in Balboa Park, Nov. 18, 2019. (Zoë Meyers/inewsource)

Scott said he uses a camp stove to cook with – a safer option in his mind that allows for more control of the flames. Others put wax on wood to make fires for cooking, or use bark and paper bags for kindling, he said.

When Scott sees people creating fires within the canyon, he said he tells them to shut them down. Fires in the park’s mulch are very dangerous, he said, and will burn for a long time.

“Not all of us are bad people. Just because a couple of homeless go out and do stupid things doesn’t mean all of us are that way, but they treat us all the same,” Scott said.

No one knows exactly how many homeless are living in the city’s brush-filled canyons and parks. When the annual point-in-time count is done on one night in January, volunteers are not sent into most of these

22a

areas. It's dark and a safety concern, said Kat Durant, director of operations for the San Diego Regional Task Force on the Homeless, which oversees the count.

This year's count identified 5,082 homeless people in the city, and more than half had no shelter. But Durant cautioned that the numbers are considered an undercount or minimum, because officials know they don't capture everyone.



Tiffanie Gibford holds her walking stick before going into Florida Canyon in Balboa Park, Nov. 18, 2019. Gibford has lived in Balboa Park for about six years and says she feels safer living there than in a shelter. (Zoë Meyers/inewsourc)

23a

Tiffanie Gibford said she's lived in Balboa Park for about six years, and she's seen the number of homeless increase.

"It's gotten worse," she said.

But for now, it's home to Gibford. She said she feels safer there than in a shelter, and that homeless people have campfires there every night.

* * *

APPENDIX C

The San-Diego Union-Tribune

<https://www.sandiegouniontribune.com/news/homelessness/story/2023-06-17/san-diegos-homeless-camping-ban-may-face-legal-challenge>

San Diego's homeless camping ban may face a legal challenge. Could this case in another city be a bellwether?



San Diego Mayor Todd Gloria address the City Council to urge their support on the proposed Unsafe Camping Ordinance on June 13. (Nelvin C. Cepeda/The San Diego Union-Tribune)

A trial has been scheduled for San Francisco to defend clearing homeless encampments. An attorney for a national homeless rights group said San Diego's ordinance also could be challenged.

BY GARY WARTH

SAN DIEGO – While the city of San Diego prepares to begin enforcing a ban on homeless encampments, at least one attorney says it could face a legal challenge, and another California city already is fighting to enforce its own camping prohibition.

In San Francisco, a judge has blocked police from sweeping homeless encampments from side-walks following a lawsuit filed by the Coalition on Homelessness.

The city's appeal to overturn the injunction was denied in April, and a trial is set for April 2024.

That litigation challenges whether San Francisco is abiding by the legal precedent established in a 2018 federal appeals court ruling, *Martin v. Boise*, that limits a government's ability to cite or arrest homeless people for camping on public property. The ruling is generally interpreted to mean that a city cannot cite a person who has no other place to go, such as a shelter.

The San Francisco case was briefly brought up in Tuesday's marathon San Diego City Council meeting, where the ordinance passed 5-4.

When Councilmember Kent Lee asked about the pending litigation, Chief Deputy City Attorney Heather Ferbert said the case offered little guidance in case law since it remained undecided.

Ferbert said the case questions whether the *Martin v. Boise* decision requires sufficient shelter to house the entirety of the city's unsheltered population in order to enforce a no-camping law.

In San Diego, the city has argued it can cite an individual who is camping on public land and refuses an offer of a shelter. It does not require a specific

number of vacant spots other than the one being offered to the individual.

San Francisco has slightly more emergency shelter beds than it has unsheltered people, with about 4,500 beds and about 4,400 people. The city of San Diego, however, has nearly twice as many unsheltered people as shelter beds — it funds about 1,700 shelter beds and has about 3,300 unsheltered people.

While the San Francisco case is undecided, the City Attorney's Office wrote in a recent legal memo that San Diego is on solid ground in its interpretation of *Martin v. Boise* and can enforce its encampment ban.

In the legal opinion, the city attorney agreed that cities may not prohibit people from sleeping on public property if shelter is not available under the *Martin* decision, but also said cities are allowed to cite people for other behavior, such as blocking a sidewalk.



Critics of a homeless encampment ban held signs showing their opposition to the proposal Tuesday in the hours-long hearing before a divided City Council

passed the measure. (Nelvin C. Cepeda/The San Diego Union-Tribune)

The memo also states that the Martin decision does not categorically prevent governments from prohibiting camping at particular times or in particular locations.

That interpretation would appear to leave the door open to banning camping in some places at all times, regardless of shelter bed availability. In San Diego's case, such a ban would apply within two blocks of schools, shelters, transit hubs, trolley stops, riverbeds, waterfronts, beaches and city parks.

But the memo issued a caveat: "As the courts have not established a test to evaluate the times or locations where camping may be prohibited when shelter is not available, Council should weigh the constitutional rights of unsheltered individuals against the City's need to protect public health and safety in these specific locations."

"When considering whether to ban camping in specific locations that would be applicable when shelter is not available, our office recommends the council's decision be based on facts in the record supporting a strong health and safety reason for the ban," Ferbert said Tuesday. "Council should also consider the collective impact of the specific bans and whether there is a place for people to go when shelter is not available."

Coleen Cusack, a lawyer who has defended homeless people in San Diego, said she did not want to comment on the city's ordinance just yet but would be watching the outcome of the San Francisco case for a possible precedent.

Will Knight, an attorney and decriminalization program director for the Washington, D.C.-based National Homelessness Law Center, said he sees problems with San Diego's ordinance and the city attorney's memo.

Knight notes that the memo says that to comply with the Martin decision, the city must offer a shelter bed that someone can actually accept based on their individual needs. As an example, it says the city cannot conclude it has complied if a woman is offered only a top bunk she cannot access.

Knight agrees with the example but said the memo doesn't go far enough.

The city also should take a shelter's location into account when considering whether it is adequate, he said. For instance, homeless parents may need a shelter near their child's school.

He also said that the memo shows that San Diego is going further than other cities when considering a blanket ban on encampments in certain areas because of public safety concerns.

Knight was referring to a section of the memo that reads: "Other jurisdictions have relied on Martin to ban camping in specific locations when shelter is not available, although this Office has not identified any jurisdiction that has banned camping in a broad area of the city."

The memo states that Spokane had banned camping underneath any railroad viaduct regardless of available shelter, the city of Riverside banned camping in a wildland area where houses meet or intermingle with undeveloped wildland vegetation, and Santee banned

camping in areas that threaten to discharge pollutants or waste in the San Diego River corridor.

Knight said those examples are true public safety issues, but San Diego is going beyond reason.

“The city of San Diego is taking it a mile further and saying that Martin says we can do this whenever we want, however we want,” he said.

“What are *not* legitimate public safety concerns?” he said, raising a rhetorical question. “We don’t want children to see homeless people.’ That’s the only reason to keep them away from schools. Or ‘We don’t want them in our beautiful parks.’”

Knight also pointed out another part of the memo that calls the ordinance “defensible so long as it does not unduly infringe upon the constitutional rights of unsheltered individuals for the status of being homeless and does not prohibit camping in a manner that results in unsheltered individuals having no alternative place to go.”

But the law, Knight argues, does just that, contending it criminalizes people for being poor, which is unconstitutional.

“It’s something we’d certainly oppose, because it’s definitely not a step in the right direction,” he said.

A second reading of the ordinance is expected to be heard before the City Council later this month.

Under the motion approved by the council on Tuesday, enforcement would not begin until 30 days after the opening of a new city site that will have about 130 spaces for people to legally camp. It is expected to open July 1.

* * *