# Confronting Unsheltered Homelessness in the Wake of *Martin v. City of Boise*

# ***Martin v. City of Boise***

(9th Cir. 2018) 902 F.3d 1031, superseded by

*Martin v. City of Boise* (9th Cir. 2019) 920 F.3d 584

[amending opinion and denying petition for panel rehearing and rehearing en banc]

# *Martin v. City of Boise*

**Issue**

"[W]hether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to." (*Martin*, 920 F.3d at 603.)

**Holding**

"[A]n ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors on public property, when no alternative shelter is available to them." (*Boise*, 920 F.3d at 604.) "We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is ***practically available*** in any shelter." (*Id.* at 618, emphasis added.)

# *Martin v. City of Boise*

**Holding Restated**

"We hold only that 'so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],' the jurisdiction cannot prosecute homeless individuals for 'involuntarily sitting, lying, and sleeping in public.' (Internal citation omitted.) That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter." (*Martin*, 920 F.3 at 617.)

# *Martin v. City of Boise*

**Rationale**

In *Robinson v. State of California*, the Supreme Court held a statute criminalizing the "status" of narcotics addiction unconstitutional under the Eighth Amendment. (*Martin*, 920 F.3d at 615-16.)

In *Powell v. State of Texas*, a plurality of the Supreme Court distinguished and upheld a statute criminalizing public drunkenness, interpreting *Robinson* not to preclude statutes that criminalize "involuntary conduct." (*Id.* at 616.)

Concurring in the judgment, Justice Byron White observed that it might well be impossible for an unhoused alcoholic to comply with the Texas statute, which, as applied to them, may be unconstitutional. (*Ibid.*)

# *Martin v. City of Boise*

**Rationale Continued**

In *Martin*, the Ninth Circuit read Justice White's concurrence in the judgment in *Powell* together with a four-justice dissent to extract a controlling 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." (*Martin*, 920 F.3d at 616, internal quotation marks and citation omitted.)

# *Martin v. City of Boise*

**Limitations**

"Our holding is a narrow one. . . . '[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.'" (*Martin,* 920 F.3d at 617, citation omitted.)

"Naturally, our holding does not cover individuals who ***do*** have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it. Nor do we suggest that a jurisdiction with insufficient shelter can ***never*** criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying or sleeping outside at particular times or in particular locations might well be constitutionally permissible. (Internal citation omitted.) So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures." (*Id.* at 617, n. 8, emphasis in original.)

# *Martin v. City of Boise*

**<u>Denial of Petition for Panel Rehearing and Rehearing En Banc</u>**

"On the merits, the opinion holds only that municipal ordinance that criminalize sleeping, sitting, or lying in ***all*** public spaces, when ***no*** alternative sleeping space is available, violate the Eighth Amendment." (*Martin*, 920 F.3d at 589, emphasis in original, citation omitted.)

# *Martin v. City of Boise*

**Questions Raised by Seven Cities in Orange County, California**

What does it mean for shelter to be "available?"

Where must the shelter be located?

What kind of shelter must be available, and what accommodations must it offer?

Whether and under what circumstances do a shelter's policies render it unavailable for a person experiencing homelessness?

When must a person experiencing homelessness have access to shelter?

How must shelter availability be measured?

(See Brief for Seven Cities in Orange County as Amicus Curiae, pp. 4-17, *City of Boise, Idaho v. Martin* (2019) 140 S. Ct. 674.)

# *Martin*'s Progeny

***Shipp v. Schaaf*** (N.D. Cal. Apr. 16, 2019) 379 F.Supp.3d 1033

***Aitken v. City of Aberdeen*** (W.D. Wash. July 2, 2019) 393 F.Supp.3d 1075

***Gomes v. County of Kauai*** (D. Hawaii Aug. 26, 2020) 481 F.Supp.3d 1104

# *Martin*'s Progeny Continued

***Blain v. Cal. Dept. of Transportation (CalTrans)*** (N.D. Cal. July 22, 2022, No. 3:22-cv-04178-WHO) ___ F.Supp.3d ___ [2022 WL 2919646]

***Wills v. City of Monterey*** (N.D. Cal. Aug. 1, 2022, No. 21-cv-01998-EMC) ___ F.Supp.3d ___ [2022 WL 3030528]

***Johnson v. City of Grants Pass*** (9th Cir. Sept. 28, 2022, Nos. 20-35752, 20-35881) ___ F.4th ___ [2022 WL 4492090]

# *Shipp v. Schaaf*

**Issue**

Whether the City of Oakland's temporary closure of an encampment for eight hours "to clean the site thoroughly" violates the Eighth Amendment. (See *Shipp*, 379 F.Supp.3d at 1035.)

**Holding**

Even assuming that plaintiffs face criminal sanction for failing to vacate the encampment, "remaining at a particular encampment on public property is not conduct protected by *Martin*, especially where the closure is temporary in nature." (*Id.* at 1037.)

**Rationale**

"The Ninth Circuit was clear: '[W]e in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place.' (Internal citation omitted.) This is not a case where 'homeless plaintiffs do not have a single place where they can lawfully be' within the City." (*Ibid*, citation omitted.)

# *Aitken v. City of Aberdeen*

**Issue**

Whether City of Aberdeen ordinances closing undeveloped, public property upon which approximately 100 people were camping, yet allowing them to camp upon public sidewalks outside the four-foot pedestrian access route required by the Americans with Disabilities Act, violate the Eighth Amendment. (See *Aitken*, 393 F.Supp.3d 1078-81.)

**Holding**

*Martin* does not limit the City's ability to evict homeless individuals from a particular public place . . . ." (*Id.* at 1082.)

**Rationale**

"In keeping with *Martin*'s self-proclaimed restraint, courts have been reluctant to stretch the ruling beyond its context of total homelessness criminalization. *Miralle v. City of Oakland*, for example, held that Oakland could clear out a specific homeless encampment because '*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option.'" (*Ibid*, citations omitted.)

# *Gomes v. County of Kauai*

**Issue**

Whether a County of Kauai ordinance criminalizing the acts of camping in a county park without a permit, and constructing an unpermitted structure, when the county has one homeless shelter with a capacity of 19, and approximately 500 unhoused residents, violate the Eighth Amendment. (See *Gomes*, 481 F.Supp.3d at 1106-07.)

**Holding**

"[H]ad the County of Kauai ordinance criminalized sleeping at [the park], with or without a permit, such a restriction would not by itself violate the Eighth Amendment. Instead, *Martin* applies if the locality criminalizes the homeless sleeping on public property 'on the false premise that they had a choice in the matter.' (Internal citation omitted.) Here, all that is clear from the Complaint is that Plaintiffs could not sleep at one public park on Kauai." (*Id.* at 1109.)

**Rationale**

"Unlike the ordinance considered by *Martin*, which criminalized sleeping outside on public property *anywhere* in Boise, (internal citation omitted), [the County of Kauai ordinance] is limited to public parks, not public land. Further, none of the [County of Kauai] ordinances at issue criminalizes "the simple act of sleeping outside," (internal citation omitted), or someone's status as homeless, as necessary to state an Eighth Amendment claim under *Martin*." (*Ibid.*)

# *Blain v. CalTrans*

**Issue**

Whether, by posting notice on July 15, 2022, that on July 20, 2022, CalTrans would begin to clear out the Wood Street encampment in the City of Oakland and remove individuals, possessions, and structures, CalTrans violates the Eighth Amendment. (See *Blain*, 2022 WL 2919646, at *1.)

**Holding**

"Here, Caltrans solely seeks to prohibit the plaintiffs from living on a discrete property, so the concerns in *Martin* have not been shown to be present." (*Id.* at *5.)

**Rationale**

"[T]he reason for [the *Martin*] holding is that prohibiting homeless people from sleeping in the entire city without providing shelter beds would be to criminalize something involuntary and status-based." (*Ibid*.)

# *Wills v. City of Monterey*

**Issue**

Whether City of Monterey ordinances which, taken together, criminalize camping overnight in a vehicle, tent or other structure, and obstructing any sidewalk at any time–though not sitting or lying on a commercial sidewalk overnight–when the City has insufficient shelter beds and no non-faith-based shelters for adults, violate the Eighth Amendment. (See *Wills*, 2022 WL 3030528, at *6-7.)

**Holding**

"The vast majority of individuals sleep during the evenings, not during daylight hours. The Court will not countenance that a city may constitutionally criminalize sleeping outdoors during the evenings so long as it provides some public space that is available during daytime hours. *Martin* cannot and does not stand for such a proposition." Additionally, the first of two sidewalk obstruction ordinances "presumably bars tents or bedding on sidewalks . . . " and both "plausibly bar sleeping on a sidewalk. The City characterizes these sections as 'directed to the entire obstruction of a sidewalk,' but by their express terms, these code sections do not contain any such limitation." (*Id.* at *8.)

**Rationale**

"The key question under *Martin* . . . is whether the ordinances collectively criminalize sleeping ***anywhere*** in the City (particularly in the evening, the normal sleeping period for most people), or whether the ordinances merely criminalize sleeping in certain areas within the City." (*Id.* at *7, emphasis in original.)

# *Johnson v. City of Grants Pass*

**Issue I**

Whether the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntarily homeless person's access to shelter, such that the "involuntarily homeless" may not sue a municipality as a class. (See *Johnson*, 2022 WL 4492090, at *12.)

**Holding**

"[E]ven accepting [a Grants Pass police] officer's assessment that there were approximately fifty homeless persons in the City, the numerosity requirement is satisfied. . . . Plaintiffs' claims present at least one question and answer common to the class: 'whether [the City's] custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws … against involuntarily homeless individuals violates the Eighth Amendment of the Constitution.' . . . Pursuant to the class definition, the class includes only ***involuntarily*** homeless persons. . . . The class representatives' claims and defenses are typical of the class in that they are homeless persons who claim that the City cannot enforce the challenged ordinances against them when they have no shelter." (*Id.* at *12-15, emphasis in original.)

**Rationale**

"While . . . the *Martin* litigation was not a class action, nothing in that decision precluded class actions. . . . A member of a class may sue as a representative party if the member satisfies . . . four prerequisites: numerosity, commonality, typicality, and adequacy of representation." (*Id.* at *12.)

# *Johnson v. City of Grants Pass*

**Issue II**

Whether City of Grants Pass ordinances that impose civil fines can be challenged under the Eighth Amendment when the Cruel and Unusual Punishments Clause provides post-conviction protection in criminal proceedings. (See *Johnson*, 2022 WL 4492090, at *15.)

**Holding**

"A local government cannot avoid [the] ruling [in *Martin*] by issuing civil citations that, later, become criminal offenses. . . . The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity." (*Id.* at *16.)

**Rationale**

"*Martin* held the Cruel and Unusual Punishments clause 'prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.'" (*Ibid*, citation omitted.)

# *Johnson v. City of Grants Pass*

**Issue III**

Whether *Martin* protects homeless persons from being cited under the City of Grants Pass anti-camping ordinance, which prohibits use of any bedding or similar protection from the elements. (See *Johnson*, 2022 WL 4492090, at *15.)

**Holding**

"The only plausible reading of *Martin* is that it applies to the act of 'sleeping' in public, including articles necessary to facilitate sleep. . . . The City's position that it is entitled to enforce a complete prohibition on 'bedding, sleeping bag, or other material used for bedding purposes' is incorrect." (*Id.* at *17.)

**Rationale**

"*Martin* expressed concern regarding a citation given to a woman who had been found sleeping on the ground, wrapped in blankets. (Internal citation omitted.) *Martin* noted that citation as an example of the anti-camping ordinance being 'enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements.' (Internal citation omitted.) *Martin* deemed such enforcement unconstitutional. (Internal citation omitted.) It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit 'the most rudimentary precautions' a homeless person might take against the elements.'" (*Ibid*, citation omitted.)

# City of Sacramento's Legislative Responses

# Protection of Critical Infrastructure and Wildfire Risk Areas Ordinance (Critical Infrastructure Ordinance)

**Sacramento City Code Chapter 8.140**

"The purpose of the ordinance is to mitigate the threat of fire and other potential causes of destruction and damage to, and interference with, critical infrastructure and wildfire risk areas and similarly sensitive areas, in order to protect the health, safety and welfare of the public, by authorizing the removal of persons and their personal property in, on, or near those areas." (Staff Rpt. Re: City of Sac. Ord. No. 2020-0009, pp. 2-3.)

"The proposed ordinance is an exercise of the City's authority to protect the public health, safety, and welfare as recognized by the Ninth Circuit . . . . The ordinance is geographically limited. Possible summary abatement under the ordinance does not apply to the entirety of the City. It is limited to real property upon which the presence of unauthorized personal property poses a heightened threat to the health and safety of residents. Encampments and associated personal property of unsheltered homeless persons would not be subject to such summary abatement on the remainder of property in the City." (*Id.* at p.4.)

# Critical Infrastructure Ordinance

Camping and storing personal property is prohibited:

- On, within 25 feet of, and within 25 feet of a pedestrian or vehicular entrance to, or exit from, critical infrastructure;
- On portions of a public right-of-way that, under local, state, or federal law, must remain free of obstruction to first responders;
- Within hollow sidewalks; and
- In wildfire risk areas.

(Sac. City Code, § 8.140.030, subs. A-B.)

# Critical Infrastructure Ordinance

Except for violations that pose an imminent threat to public health or safety, which the City may abate immediately, the City may abate any violation upon 24 hours' notice. (Sac. City Code, § 8.140.040, subs. A.)

Should any person willfully, prevent, delay, resist, obstruct, or otherwise interfere with the City's abatement, they are subject to enforcement action. (See Sac. City Code, §§ 8.140.050-060.)

# Critical Infrastructure Ordinance

"Critical infrastructure" is defined as "[l]evees; or [r]eal property, whether privately or publicly owned, as approved by resolution of the city council, that the city manager designates as being so vital and integral to the operation or functioning of the city that its damage, incapacity, disruption, or destruction would have a debilitating impact on the public health, safety, or welfare." (Sac. City Code, § 8.140.020.)

The City Manager has designed as critical infrastructure–and the City Council has adopted the City Manager's designation as critical infrastructure of–forty types of parcels or facilities that house vulnerable populations, government operations, utilities, healthcare providers, public safety and transportation infrastructure, and public gathering spaces. (City of Sac. Res. No. 2021-0227.)

# Emergency Shelter and Enforcement Act

**City of Sacramento Measure O (November 8, 2022)**

- Directs the City Manager to authorize new "emergency shelter spaces" equal to at least 12% of the estimated unsheltered homeless individuals in the City. After that, authorization of additional spaces is contingent upon 60% utilization of then-existing spaces. The City Manager also must perform regular outreach to homeless persons.
- Provides that "unlawful camping" on public property may not be enforced against any person until all of the following have occurred:
  - The City Manager has authorized the requisite number of emergency shelter spaces;
  - An emergency shelter space for the person is available;
  - The City has offered that emergency shelter space; and
  - The person has rejected the offer and refuses to move from the public property.
- Makes it unlawful and a public nuisance to do the following in an "encampment" (four or more persons camping together or within 50 feet of each other, without permitted power, water, or bathrooms) located on any public or private property: camp, occupy camp facilities, or use camp paraphernalia; or accumulate or fail to properly dispose of waste.

# Emergency Shelter and Enforcement Act

**City of Sacramento Measure O (November 8, 2022)**

"Emergency shelter space" means a City-authorized location providing temporary shelter or alternative sleeping space for a person experiencing homelessness until permanent shelter or housing can be obtained. "Emergency shelter space" includes the following:

- An enclosed or partially enclosed space of at least 70 square feet with a bed and roof that provides protection from the sun and rain in which a person may sleep;
- A space of at least 100 square feet in which a person may camp. The City may provide the camp paraphernalia, or the person may bring their own camp paraphernalia, according to the rules for that location. The City may permit the person to sleep in the space during designated nighttime hours and require them to vacate the space during the day, so long as each person is provided reasonable space for storage of property and possessions during the time the person is required to vacate the space; or
- A space of at least 150 square feet in which a person may park a vehicle in which they can sleep temporarily.

# Emergency Shelter and Enforcement Act

**City of Sacramento Measure O (November 8, 2022)**

- The measure creates a mechanism for residents harmed by unlawful camping or unlawful storage on City-owned property to commence administrative proceedings against the City. If the City is ordered to abate a nuisance, the resident who initiated the action could recover their costs and attorney's fees.

# Emergency Shelter and Enforcement Act

**City of Sacramento Measure O (November 8, 2022)**

- Inoperative unless and until the City and County of Sacramento approve a legally-binding memorandum of understanding that, at a minimum, memorializes the respective roles of the city and county to improve the homelessness crisis. The memorandum of understanding shall include, but not be limited to, the County's roles, responsibilities, and obligations to provide the following to homeless persons in the City who need them:
  - Mental-health services;
  - Substance-abuse services;
  - Clinical outreach and case management to refer individuals to appropriate County services, such as housing, medical, employment, social services, and drug-rehabilitation services; and
  - Child-welfare and domestic-violence services.

# City of Sacramento's Legal Challenges

# Critical Infrastructure Ordinance

While the legislative responses of public agencies throughout the Ninth Circuit have been challenged and enjoined, since its enactment by the Sacramento City Council on February 25, 2020, the Protection of Critical Infrastructure and Wildfire Risk Areas Ordinance has not been challenged.

# Emergency Shelter and Enforcement Act

On August 16, 2022, five non-profit organizations filed a petition for alternative writ of mandate and complaint for injunctive relief in Sacramento County Superior Court to prevent the City of Sacramento from presenting the Emergency Shelter and Enforcement Act to City voters on November 8, 2022.

On August 24, 2022, the Court denied the petition for alternative writ of mandate, holding that “Petitioners have not clearly demonstrated a likelihood of success on the merits, and review is disfavored in advance of an election absent patently unconstitutional or otherwise illegal provisions.”

# Challenges by the Unhoused and Advocates

On June 24, 2022, persons experiencing homelessness and their advocates alleged in a complaint filed in United States District Court for the Eastern District of California, in sum, that the City of Sacramento has unlawfully removed or relocated persons experiencing homelessness.

On July 29, 2022, the Court issued an order in which it found that plaintiffs are likely to prevail on the merits of their state-created danger claim due to the removal or relocation of persons experiencing homelessness in extreme heat, and temporarily enjoined the City of Sacramento from "clearing encampments belonging to the unhoused." On September 2, 2022, the Court issued an order extending its preliminary injunction. On September 23, 2022, the preliminary injunction terminated.

Litigation in this case is ongoing…

# Challenges by Property and Business Owners

Since September of 2021, property and business owners have alleged in four complaints filed in United States District Court for the Eastern District of California, in sum, that the City of Sacramento has unlawfully failed to remove or relocate persons experiencing homelessness.

Claims common to all four complaints include violation of due process, state created danger, private nuisance, and public nuisance.

Litigation in three of these four cases is ongoing…

Thank you!

Questions?