EIGHTH AMENDMENT — CRIMINALIZATION OF HOMELESSNESS — NINTH CIRCUIT REFUSES TO RECONSIDER INVALIDATION OF ORDINANCES COMPLETELY BANNING SLEEPING AND CAMPING IN PUBLIC. — *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

When should judges protect the people, and when should they defer to them? In countless contentious cases, courts have split: majorities invalidate laws to defend rights; dissents decry the decisions as undemocratic.[1] Recently, in *Martin v. City of Boise*,[2] the Ninth Circuit engaged in that familiar back-and-forth, this time sparring over the constitutionality of two city ordinances that banned sleeping and camping on public property. After a panel held that absolute bans violate the Eighth Amendment rights of homeless people,[3] Judge Milan Smith, dissenting from a denial of rehearing en banc, accused his "unelected[] colleagues [of] improperly inject[ing] themselves into the role of public policymaking"[4] and thereby creating chaos for "hundreds of local governments . . . and . . . millions of people."[5] But this fractious debate is belied by the panel's narrow holding, which neither protected homeless people nor precluded democratic politics. Indeed, the incremental political achievements of *Martin*'s long litigation process may prove more significant than the panel's divisive, undemocratic decision.

A decade ago, in Boise, Idaho, it was illegal to sleep in public. One ordinance banned "[o]ccupying, lodging or sleeping in any . . . place . . . without . . . permission";[6] another barred the "use [of] any . . . streets, sidewalks, parks or public places as a camping place at any time."[7] Janet Bell was cited twice, once for sitting on a riverbank with her backpack, another time for putting down a bedroll in the woods.[8] She pled

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[1] For two recent examples, compare *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015) (quoting Schuette v. BAMN, 134 S. Ct. 1623, 1637 (2014)) ("[W]hen the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding . . . democratic decisionmaking."), with *id.* at 2629 (Scalia, J., dissenting) ("A system of government that makes the People subordinate to . . . nine unelected lawyers does not deserve to be called a democracy."); and compare *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it . . . ."), with *id.* at 479 (Stevens, J., concurring in part and dissenting in part) ("In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules.").

[2] 920 F.3d 584 (9th Cir. 2019).

[3] Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584.

[4] *Martin*, 920 F.3d at 593 (M. Smith, J., dissenting from the denial of rehearing en banc).

[5] *Id.* at 594.

[6] Bell v. City of Boise, 834 F. Supp. 2d 1103, 1106 (D. Idaho 2011) (alteration in original) (quoting BOISE, IDAHO, CODE § 6-01-05(A), *invalidated by Martin*, 902 F.3d 1031).

[7] Bell v. City of Boise, 709 F.3d 890, 893 (9th Cir. 2013) (quoting BOISE, IDAHO, CODE § 9-10-02, *invalidated by Martin*, 902 F.3d 1031).

[8] Amended Complaint for Injunctive and Declaratory Relief and Monetary Damages ¶ 7, *Bell*, 834 F. Supp. 2d 1103 (No. 09-CV-540) [hereinafter Amended Complaint].

guilty and received a thirty-day suspended sentence.[9] Robert Martin, who has difficulty walking, received a citation for resting near a shelter.[10] He was found guilty at trial and charged $150.[11]

On October 22, 2009, Bell, Martin, and nine other homeless people sued the City.[12] They claimed that the enforcement of the ordinances violated their Eighth Amendment rights, criminalizing them for carrying out basic bodily functions.[13] Using § 1983,[14] they sought expungement of their records, reimbursement for fines, enjoinment of enforcement, and a declaration that the ordinances were unconstitutional.[15]

On July 6, 2011, the district court granted summary judgment to the City.[16] Retrospective relief, Magistrate Judge Bush found, was barred because the plaintiffs did not challenge their convictions in state court before bringing their federal case.[17] Prospective prohibition of enforcement, he held, was moot because there was no longer any "reasonable expectation" of an Eighth Amendment violation.[18] While he admitted that a "complete bar on sitting, lying, or sleeping in public at any time of day" would unconstitutionally criminalize homeless status,[19] Magistrate Judge Bush highlighted three limits on the ordinances — all instituted in the immediate aftermath of the case's filing. First, in November 2009,[20] the City Council redefined camping, restricting it to overnight stays on public property;[21] second, on January 1, 2010, the

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[9] *See* Answer to Plaintiffs' Amended Complaint for Injunctive Relief and Declaratory Relief and Monetary Damages ¶ XI, *Bell*, 834 F. Supp. 2d 1103 (No. 09-CV-540) [hereinafter Answer to Amended Complaint].

[10] Amended Complaint, *supra* note 8, ¶ 10.

[11] Answer to Amended Complaint, *supra* note 9, ¶ XIV. He had to pay a $75 fine and $75.50 in court costs. *Id.* In 2012, after filing a case against the city, Martin received another citation. *Martin*, 902 F.3d at 1038.

[12] *See* Amended Complaint, *supra* note 8, ¶¶ 3, 7–18. The plaintiffs also sued the City's Police Department and Police Chief, *id.* ¶¶ 19–20, but both eventually left the litigation, *see* Martin v. City of Boise, No. 09-CV-540, 2015 WL 5708586, at *1 (D. Idaho Sept. 28, 2015).

[13] *Bell*, 834 F. Supp. 2d at 1106. The plaintiffs argued that the ordinances also violated the Fourteenth Amendment's Equal Protection and Due Process Clauses, as well as equivalent portions of the Idaho Constitution. *See* Amended Complaint, *supra* note 8, ¶¶ 55–69.

[14] 42 U.S.C. § 1983 (2012). The plaintiffs also sought relief via the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202 (2012). *Martin*, 902 F.3d at 1038.

[15] *Bell*, 834 F. Supp. 2d at 1106.

[16] *Id.* at 1116.

[17] *Id.* at 1110 (summarizing the rationale of the Rooker-Feldman doctrine by explaining that "[i]f the Court were to grant . . . relief [from state court judgments], the instant lawsuit would serve as an end-run around the state court appellate process").

[18] *Id.* at 1111 (quoting Native Vill. of Noatak v. Blatchford, 38 F.3d 1505, 1509 (9th Cir. 1994)).

[19] *Id.* at 1107 (citing Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)). The Ninth Circuit held that such a bar violated the Eighth Amendment in *Jones v. City of Los Angeles*, 444 F.3d 1118, *vacated*, 505 F.3d 1006, but it vacated the opinion after the parties settled. *Bell*, 834 F. Supp. 2d at 1107 n.1.

[20] Bell v. City of Boise, 709 F.3d 890, 894 (9th Cir. 2013).

[21] *Bell*, 834 F. Supp. 2d at 1114 (citing BOISE, IDAHO, CODE § 9-10-02).

Boise Police Department issued a Special Order that prohibited enforcement of either ordinance when shelters were full;[22] third, in the same Special Order, the Department formalized its policy not to enforce either ordinance during the day.[23] The ordinances, Magistrate Judge Bush concluded, now criminalized voluntary conduct, not homeless status.[24]

In 2013, the Ninth Circuit reversed and remanded.[25] Contra the district court decision, it held that retrospective relief was possible because the plaintiffs were challenging the City's enforcement, not their state court judgments.[26] Prospective enjoinment of enforcement was not mooted either, it held, because the Special Order was only an "internal policy,"[27] not a "permanent change" to local laws.[28]

On remand, the district court, in two opinions, again granted the City summary judgment. In 2014, Magistrate Judge Bush barred retrospective relief because the plaintiffs had not contested their convictions before filing the case.[29] In 2015, he prohibited prospective relief because the City Council incorporated the Police Special Order into the City Code and thus made unconstitutional enforcement unlikely.[30]

In September 2018, the Ninth Circuit affirmed with respect to the plaintiffs' requests for retrospective relief, but it again reversed and remanded with respect to their requests for prospective relief.[31] Judge Berzon, writing for the panel,[32] began with the persistent procedural problems. First, she found that, despite the incorporation of the Special Order into the City Code, future prosecution was still possible: even on nights when beds were empty, the plaintiffs might not be able to sleep in shelters with religious or continual-stay restrictions.[33] Second, she

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[22] *Id.* at 1111.

[23] *Id.* (noting that the Special Order barred enforcement during public park hours).

[24] *Id.* at 1108–09. Magistrate Judge Bush, drawing on *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), explained, "[t]he Supreme Court draws a distinction between laws that criminalize status, which *are* unconstitutional, and laws that criminalize conduct, which *may be* constitutional." *Bell*, 834 F. Supp. 2d at 1107 (emphasis added).

[25] *Bell*, 709 F.3d at 893.

[26] *Id.* at 897.

[27] *Id.* at 900.

[28] *Id.* at 901.

[29] Bell v. City of Boise, 993 F. Supp. 2d 1237, 1239 (D. Idaho 2014). *Heck v. Humphrey*, 512 U.S. 477 (1994), requires a plaintiff seeking retrospective relief via § 1983 to show that their conviction was "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal[,] . . . or called into question by a federal court's issuance of a writ of habeas corpus," *id.* at 486–87.

[30] Martin v. City of Boise, No. 09-CV-540, 2015 WL 5708586, at *2, *5 (D. Idaho Sept. 28, 2015).

[31] Martin v. City of Boise, 902 F.3d 1031, 1049 (9th Cir. 2018).

[32] Judge Berzon was joined by Judge Watford. Judge Owens concurred in the denial of retrospective relief but insisted that prospective relief was also barred by *Heck* because declaring the ordinances unconstitutional would "necessarily demonstrate the invalidity of the plaintiffs' prior convictions." *Id.* at 1050 (Owens, J., concurring in part and dissenting in part).

[33] *Id.* at 1040–42 (majority opinion).

agreed with the District Court that retrospective relief was mostly barred by the plaintiffs' failure to contest their convictions,[34] but she found that prospective injunctive relief under § 1983 remained viable.[35] Finally, she reached the merits of the Eighth Amendment challenge. Any ordinance that allowed for the "imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter," she argued, unconstitutionally criminalized homeless status.[36] This holding, she insisted, was limited to involuntary conduct: the Eighth Amendment bars punishing a person only "for lacking the means to live out the 'universal and unavoidable consequences of being human.'"[37]

In April 2019, the Ninth Circuit denied rehearing en banc[38] over the objections of two "dramatic" dissents.[39] In a concurrence, Judge Berzon called the dissents "petitions for writ of certiorari on steroids, rather than reasoned judicial opinions."[40] Judge Bennett, in one, attacked the panel's holding as contrary to the Eighth Amendment's original meaning.[41] The ban on cruel and unusual punishment, he wrote, was meant to invalidate "*methods* of punishment," not to limit criminalization.[42]

Judge Smith, in the other, claimed the panel perverted precedent to enact its policy preferences.[43] First, he claimed, no binding precedent held that laws that criminalize involuntary conduct unconstitutionally criminalize status.[44] Second, he argued, the panel effectively invalidated prior convictions by granting prospective relief even though the Supreme Court bars that action in such cases.[45] Finally, he explained,

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[34] *Id.* at 1044.

[35] *Id.* at 1045.

[36] *Id.* at 1048.

[37] *Id.* at 1048 n.8 (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)). Judge Berzon relied on the concurrence and dissent in *Powell* to conclude that involuntary conduct constituted status and could not be criminalized. *Id.* at 1047–48.

[38] *Martin*, 920 F.3d at 588.

[39] *Id.* (Berzon, J., concurring in the denial of rehearing en banc).

[40] *Id.* Judge Berzon was criticizing dissents to denials for rehearings en banc in general, but the implication was clear. *See id.* In August 2019, the City filed a writ of certiorari that drew extensively on the dissents. *See generally* Petition for a Writ of Certiorari, City of Boise v. Martin, No. 19-247 (Aug. 22, 2019).

[41] *Martin*, 920 F.3d at 603 (Bennett, J., dissenting from the denial of rehearing en banc). Judge Bennett was joined by Judges Bea, Ikuta, and Ryan Nelson. Judge Smith joined in part.

[42] *Id.* at 602 (citing Harmelin v. Michigan, 501 U.S. 957, 977, 979 (1991) (Scalia, J., concurring)).

[43] *Id.* at 590, 593 (M. Smith, J., dissenting from the denial of rehearing en banc). Judge Smith was joined by Judges Callahan, Bea, Ikuta, Bennett, and Ryan Nelson.

[44] *Id.* at 590–92 (analyzing the opinions in *Powell* via the *Marks* rule, which gives precedential value to the opinion that used the narrowest grounds to reach a judgment in cases without a majority opinion, Marks v. United States, 430 U.S. 188, 193 (1977)).

[45] *Id.* at 597 (citing Heck v. Humphrey, 512 U.S. 477 (1994)).

the panel allowed two plaintiffs without convictions to sue for retrospective relief even though the Court allows such relief only "*after* . . . a formal adjudication of guilt."[46] The panel's precedent-stretching decision, he argued, could cause "dire . . . consequences."[47] Cities that did not "undertake [the] overwhelming financial responsibility"[48] to provide adequate shelter for and accurate counts of homeless people would be unable to enforce bans on homeless people's "defecation," "urination," and "use of hypodermic needles."[49] As a result, disease and despair would spread across the Ninth Circuit — home to some of the country's highest concentrations of homeless people.[50] "[T]he Eighth Amendment," he concluded, "is not a vehicle . . . to critique public policy choices or to hamstring a local government's enforcement of its criminal code."[51]

Did *Martin* protect homeless people or preclude democratic politics? On closer inspection, the case neither nullified the range of laws that punish homeless people, nor prevented the political process from addressing "the serious societal concern of homelessness."[52] Instead, the panel's holding is narrow enough that it may prove insignificant for homeless people in the Ninth Circuit, but the process of litigation led to positive political developments for Boise's homeless residents. Indeed, by forcing the City to account for its actions in an adversarial forum, the case created opportunities for homeless people to participate in reforming policies designed to exclude them. In this way, *Martin* suggests that debates about judicial review may be too focused on judges' decisions, missing the impact of the litigation process itself.

In their dueling opinions, Judges Berzon and Smith advanced archetypal arguments about judicial review. Judge Berzon embraced judicial supremacy to protect a vulnerable minority, whose rights, she suggested, were too easily trammeled.[53] Judge Smith insisted that the panel's intervention was illegitimate — it used the Constitution to invalidate democratic

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[46] *Id.* at 598 (quoting Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977) (emphasis added)).
[47] *Id.* at 594.
[48] *Id.*
[49] *Id.* at 596.
[50] *Id.* at 595.
[51] *Id.* at 599.
[52] *Id.* at 590.
[53] *See* Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018). Judge Berzon began her opinion with Anatole France's famous quip on the false freedom of formal equality: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread." *Id.*; *see also* Emma Kaufman, *The New Legal Liberalism*, 86 U. CHI. L. REV. 187, 198 (2019) (book review) (describing defenders of judicial review as committed to "a morality-inflected understanding of constitutional rights, a juriscentric conception of social change, and a muscular vision of courts' ability to produce that change").

decisions[54] — and ill-advised[55] — it constrained cities' efforts to aid homeless people and protect other citizens.[56] Despite their differences, then, both agree that judicial decisions are what matters.[57]

For advocates of judicial review, the *Martin* decision is likely to prove insufficiently protective. As Judge Berzon noted, "only . . . municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment."[58] Already, lower courts are following the panel's lead: under *Martin*, cities can clear homeless camps,[59] arrest those who refuse to leave,[60] and force those arrested to show that shelters are full.[61] Put simply, the panel left cities ample power to police and punish homeless people, as well as regulate and restrict their access to public space.[62]

Moreover, to effect the panel's narrow holding, cities must enact only a minor policy. To satisfy Judge Berzon's ruling that a city cannot prosecute homeless people for sleeping in public when there are more homeless people than available beds in shelters, cities need simply to create some way to know that shelters are full or, because of restrictions, effectively so. Judge Smith insisted that even this was burdensome,[63]

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[54] *Martin*, 920 F.3d at 599 (M. Smith, J., dissenting from the denial of rehearing en banc); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16–17 (1962) (describing the countermajoritarian difficulty as "when the Supreme Court declares unconstitutional a legislative act . . . [and] thwarts the will of . . . [the] people"); *cf.* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1376–86 (2006) (describing risks of legalistic reasoning creating rights that express no one's preferences).

[55] *Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from the denial of rehearing en banc). There is a rich empirical literature showing that expansive rights creation by judges can lead to destructive backlash. *See generally* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

[56] *See Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from the denial of rehearing en banc). Judge Smith seems to have in mind the use of so-called "therapeutic policing," which uses citations and threats of arrest to coerce homeless people into services. *See* FORREST STUART, DOWN, OUT, AND UNDER ARREST 6 (2016).

[57] The emphasis on decisions and their consequences is endemic to debates about judicial review. *See, e.g.*, Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1290 (2004) ("Although most normative scholars focus on justifying the judicial act of interpretation, it is actually what comes next that matters.").

[58] *Martin*, 920 F.3d at 589 (Berzon, J., concurring in the denial of rehearing en banc).

[59] Quintero v. City of Santa Cruz, No. 19-CV-01898, 2019 WL 1924990, at *3 (N.D. Cal. Apr. 30, 2019); Le Van Hung v. Schaaf, No. 19-CV-01436, 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019); Miralle v. City of Oakland, No. 18-CV-06823, 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018).

[60] Shipp v. Schaaf, 379 F. Supp. 3d 1033, 1037 (N.D. Cal. 2019).

[61] Butcher v. City of Marysville, No. 18-CV-02765, 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019).

[62] A wide range of actions short of arrest — move-along orders, citations, property destruction, threats of arrest — can dispossess, debt burden, and preclude access to services for homeless people. Chris Herring et al., *Pervasive Penality: How the Criminalization of Poverty Perpetuates Homelessness*, 66 SOC. PROBS. (forthcoming 2019) (manuscript at 15) (on file with the Harvard Law School Library); *see also* KATHERINE BECKETT & STEVE HERBERT, BANISHED 63–102 (2009) (describing Seattle's place-based restrictions as controlling homeless people without totally criminalizing them).

[63] *Martin*, 920 F.3d at 594–95 (Smith, J., dissenting from the denial of rehearing en banc).

though it undoubtedly falls well short of the expense needed to build housing, increase shelters, or pursue other options, like expanding employment, providing healthcare, or increasing benefits.[64] In short, the panel's decision undermined popular power to produce little positive change.

Why, then, does *Martin* matter? As the plaintiffs recognized, Boise wanted "to drive . . . homeless individuals out of the City" by punishing them for staying still.[65] This is a long-standing tactic: cities and towns have imposed penalties on those passing through — casual workers, day laborers, poor people — to keep them moving.[66] The case's most significant impact, then, was to limit cities' ability to push homeless people out; by allowing them to stay *somewhere* within Boise's boundaries, the panel turned homeless people into part of the City's public. In this way, Judge Berzon's decision, despite its substantive aura, is closer to a democratic-procedure-protecting judicial intervention.[67]

But, at least for Boise's homeless people, this success did not require the court's decision.[68] In fact, it's not clear that the court's decision will have any effect on Boise's actual policies.[69] Instead, it seems, the litigation itself facilitated the inclusion of homeless people in the City's political process. First, consider the immediate impact of the complaint.

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[64] *Cf. id.* at 595 n.11.

[65] Amended Complaint, *supra* note 8, ¶ 50. *See generally* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992).

[66] *See* NELS ANDERSON, ON HOBOS AND HOMELESSNESS 121 (Raffaele Rauty ed., 1998) (noting link between European vagrancy laws and American efforts to evict homeless people); Michel Foucault, Lecture at the Collège de France (Jan. 17, 1973), *in* THE PUNITIVE SOCIETY 43, 49–50 (Bernard E. Harcourt et al. eds., Graham Burchell trans., Palgrave Macmillan 2015) (2013) ("[As eighteenth-century French jurist Guillame-Francois Le Trosne noted,] the most important penalty against begging [was] banishment . . . . [F]ar from being the target of penality, the vagabond [was] its effect."); 1 KARL MARX, CAPITAL 895 (Ben Fowkes trans., Penguin Books 1990) (1867) (claiming creation of "free and rightless proletarians" was key step in capitalist development).

[67] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 87 (1980) (arguing for a "participation-orientated, representation-reinforcing approach to judicial review").

[68] In this respect, *Martin* is not unique: the Ninth Circuit vacated its nearly identical holding in *Jones* after Los Angeles agreed to amend its laws in line with plaintiffs' demands, Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007); the ACLU challenged another Boise ordinance, this one barring panhandling, and after a district court judgment against it, the City Council amended the ordinance rather than appealing, *see* George Prentice, *ACLU to Boise, After Re-write of Solicitation Ordinance: This All Could Have Been Avoided*, BOISE WKLY. (Jan. 15, 2014), https://www.boiseweekly.com/boise/aclu-to-boise-after-re-write-of-solicitation-ordinance-this-all-could-have-been-avoided/Content?oid=3039448 [https://perma.cc/Q9ZB-Z5HC].

[69] It is still unclear whether the Boise ordinances are unconstitutional, facially or as applied. *Compare Martin*, 920 F.3d at 589 (Berzon, J., concurring in the denial of rehearing en banc) ("The City [in its brief] is quite right about the limited nature of the opinion."), *and* Supplemental Brief Regarding Defendant/Appellee's Petition for Panel Rehearing & Rehearing En Banc at 2, *Martin*, 920 F.3d 584 (No. 15-35845) ("[T]he panel did *not* conclude that Boise's challenged Ordinances violate the Eighth Amendment or that the City's enforcement . . . was unconstitutional."), *with Martin*, 920 F.3d at 594 (M. Smith, J., dissenting from the denial of rehearing en banc) (describing the panel decision as "holding that Boise's enforcement of its Ordinances violates the Eighth Amendment").

Less than a month after its filing, the City Council clarified the definition of camping, narrowed the scope of police discretion, and restricted enforcement to the time between "sunset and sunrise."[70] The Police Special Order, issued two months later, restricted officers from enforcing the ordinances on nights when no shelter beds were available.[71] In 2014, the City Council voted to include these policies in the ordinances themselves.[72] All this happened without a court deciding whether the plaintiffs had standing, let alone whether the ordinances were constitutional.

And policy changes were not the only consequences of the case. For one, the litigation created a record of sworn testimony about Boise's policies: by the final filings, the City's lawyers were ready to admit that issuing camping citations, let alone pursuing convictions, should be a "last resort."[73] The case also prompted the Department of Justice to file a rare Statement of Interest criticizing the City — and pitting one level of government against another.[74] Finally, by challenging the City in a forum where they had some control over their stories, the plaintiffs spurred media coverage that questioned the City's policies, highlighted the lack of shelter beds, and, generally, reframed their struggles as city-wide concerns.[75] Again, none of this required a favorable ruling on the merits.

Maybe *Martin* wouldn't have had any collateral consequences if judges didn't sometimes make divisive, undemocratic decisions. Maybe the City needed the threat of a court's coercion to come to the table; maybe the press needed the prospect of an aggressive ruling to cover the cause. But *Martin* shows, at least, that advocates and adversaries of judicial review overemphasize how pivotal judges are. For homeless people in Boise, the decision may make no difference; the case had already facilitated sought-after reforms. Even these, though, won't come close to addressing the hardships of being homeless. What should Boise, and cities like it, do? That's something no judge can decide.

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[70] Bell v. City of Boise, 709 F.3d 890, 894 (9th Cir. 2013).

[71] *Id.*

[72] *Martin*, 920 F.3d. at 608 (Bennett, J., dissenting from the denial of rehearing en banc).

[73] *See* Supplemental Brief Regarding Defendant/Appellee's Petition for Panel Rehearing & Rehearing En Banc, *supra* note 69, at 15. After the en banc decision, the City issued a statement that read, in part: "[W]riting citations for camping is used as sparely as possible." *9th Circuit Court Denies Boise's Request in Homeless Camping Lawsuit*, IDAHO NEWS (Apr. 1, 2019), https://idahonews.com/news/local/9th-circuit-court-of-appeals-denies-boises-request-in-homeless-lawsuit [https://perma.cc/4G3Q-EW83].

[74] Statement of Interest of the United States at 4, Martin v. City of Boise, No. 09-CV-540 (D. Idaho Sept. 28, 2015).

[75] *See, e.g.*, Harrison Berry, *Camping Out in the Courts*, BOISE WKLY. (Sept. 12, 2018), https://www.boiseweekly.com/boise/camping-out-in-the-courts/Content?oid=13833987 [https://perma.cc/PK3J-VBT7]; *see also* Rachel Best, *Situation or Social Problem: The Influence of Events on Media Coverage of Homelessness*, 57 SOC. PROBS. 74, 88 (2010) (finding that "actor-promoted events," *id.* at 76, result in coverage that constructs homelessness as a structural issue rather than the product of choice).