

# A Legal Strategy for Tackling Homelessness

The Ninth Circuit's *Boise* ruling doesn't invalidate state laws against public nuisances.

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When my colleagues and I [filed a lawsuit](#) against the City of Phoenix last summer to get the city to clean up what was then America's largest outdoor homeless encampment, almost everyone thought that we would lose. The problem, we were told, was the Ninth Circuit Court of Appeals' 2018 decision in [Martin v. City of Boise](#), which held that it was unconstitutional under the Eighth Amendment to criminalize sleeping in public when a city has an insufficient number of shelter beds available. Since that decision, homeless encampments have proliferated in western U.S. cities, where the Ninth Circuit's ruling governs.

In Phoenix, the business, property, and homeowners we represent in our lawsuit testified that after the *Boise* decision, they witnessed buses arriving downtown filled with tents, which homeless advocates then passed out to the more than 1,000 individuals living on the streets in what is now called "the Zone." Our plaintiffs would call the police, but they were told that the *Boise* decision tied the city's hands.

We didn't buy it. When we filed our suit, we did not challenge the *Boise* decision; no one wants unsheltered individuals to go to jail. But we also knew that the city was using the *Boise* decision as an excuse to abdicate its responsibility for the crisis. The city's own documents acknowledge that the conditions in the Zone pose health and other hazards, and that there is "defecation in public—sometimes on private property . . . and debris, public drug use, lewd acts, theft and other property and violent crimes." The city's own cleanup crews use hazmat suits, and the city provides them with security to boot. At trial, we demonstrated that the waste and litter get dumped in storm drains and end up in state waters and retention basins. That makes them illegal discharges, in violation of state environmental laws.

Our legal theory was simple: the Ninth Circuit decision did not preempt or invalidate the numerous state laws against public nuisances. In Arizona, state law defines "[a]ny place, condition or building that is controlled or operated by any governmental agency and that is not maintained in a sanitary condition" as a "public nuisance . . . dangerous to the public health." Likewise, "[a]ny condition or place in populous areas that constitutes a breeding place for flies, rodents, mosquitoes," "[a]ll sewage, human excreta, wastewater, garbage" that have the potential to transmit disease, and any "obstruction to the free use of property" are defined as public nuisances. Not once did the city question the existence of a public nuisance on public property in the Zone. In most jurisdictions, municipalities are required by law to abate these problems, especially when they occur on public property.

The city's only serious defense was to cite *Boise*. But that decision specifically disclaimed that it required cities to allow someone to shelter in public "at any time and at any place." Surely, then,

the *Boise* decision did not allow, let alone compel, the city to permit persons to shelter in ways that constituted public nuisances, in violation of state laws.

Perhaps more importantly, we showed that the city could comply with both the public-nuisance laws and the Ninth Circuit's decision in many different ways. For example, the city seemed to interpret the ruling as saying that, if an insufficient number of beds is available for the entire unsheltered population, then it could not enforce any camping bans. But the decision says only that if any particular *individual* is involuntarily homeless because that person has nowhere to go, then the camping ban cannot be enforced as to *that* person. Beds were always available for some people in the Zone; if the city asked some people to move to shelter beds until no more beds were available, that step alone would solve a substantial part of the problem.

Furthermore, a high percentage of individuals in the Zone are “service resistant.” Many prefer living outdoors to residing in a shelter, where they cannot take pets or property or engage in drug use. Once such individuals have refused shelter offered by the city, nothing in *Boise* prevents public officials from enforcing the camping ban. And nothing in that decision prevents the city from enforcing laws against illegal drug use and public urination or defecation. Doing so would solve another piece of the problem.

Finally, we pointed out that Phoenix could do what other cities like [Santa Rosa](#) and [Denver](#) have done: erect “managed campsites” or “structured campgrounds” where laws would be enforced. At trial, the city's deputy manager testified that Phoenix was not pursuing this option because doing so “does not solve homelessness.” But the deputy city manager acknowledged that, while the city is waiting to solve homelessness, the unsheltered individuals are still out there in the Phoenix heat.

Our lawsuit was never about solving homelessness. It was about solving the humanitarian crisis that these encampments create. And solving that crisis would provide at least some temporary relief for the unsheltered population.

The judge [agreed](#), concluding that the city could indeed satisfy both *Boise* and public-nuisance laws. He has ordered Phoenix to clean up the encampments. We will see whether it does.

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