

No. 19-247

In the **Supreme Court of the United States**

CITY OF BOISE, IDAHO, *Petitioner,*

v.

ROBERT MARTIN, ET AL., *Respondents.*

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF OF AMICUS CURIAE THE CITY OF
LOS ANGELES IN SUPPORT OF GRANT OF
PETITION FOR CERTIORARI**

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TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

BACKGROUND 5

SUMMARY OF ARGUMENT 11

ARGUMENT 14

I. CERTIORARI IS WARRANTED TO PROVIDE CLARITY TO LOS ANGELES AND OTHER CITIES ACROSS THE NATION FACING THE CRISIS OF HOMELESSNESS 15

II. THE BOISE OPINION IS INCONSISTENT AND AMBIGUOUS IN WAYS THAT ARE DETRIMENTAL TO A WELL-RUN CITY 16

 A. The *Boise* Opinion Raises Daunting Practical Issues in a City the Size of Los Angeles 16

 B. Sweeping Language in *Boise* Brings Uncertainty to the City’s Duty to Maintain its Public Spaces 17

 C. The *Boise* Opinion Leaves Unresolved the Critical Question of Whether Los Angeles Must Leave Available Shelter Beds Unoccupied. 19

 D. Tentative Language in *Boise* Brings Uncertainty to the City’s Options for Regulating When and Where in the Public Right of Way Homeless Persons Dwell. . . . 20

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

<i>Jones v. City of Los Angeles</i> , 444 F.3d 1118 (9th Cir. 2006) <i>vacated</i> , 505 F.3d 1006 (9th Cir. 2007).....	<i>passim</i>
<i>Martin v. Boise</i> , 920 F.3d 584 (9th Cir. 2019).....	<i>passim</i>
<i>New York v. Ferber</i> , 458 U.S. 747 (1982).....	16
<i>New York v. O’Neill</i> , 359 U.S. 1 (1959).....	16
<i>Schneider v. State</i> , 308 U.S. 147 (1939).....	18

CODES

Los Angeles Municipal Code Sections 12.22 A.25-31.....	7
Los Angeles Municipal Code Section 56.11.....	14
Los Angeles Municipal Code Section 85.02.....	14
Los Angeles Municipal Code Sections 187.00, <i>et. seq.</i>	6

OTHER AUTHORITIES

<i>2019 Greater Los Angeles Homeless Count - City Of Los Angeles</i> (July 29, 2019), https://www.lahsa.org/documents?id=3421-2019-greater-losangeles-homeless-count-city-of-los-angeles.pdf	8
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- 2019 Point-in-Time snapshot, <https://www.latimes.com/local/lanow/lame-ln-los-angeles-homeless-count-20190122-story.html>. 12
- Freddie Mac Multifamily, *Rental Burden by Metro*, (April 2019), https://mf.freddiemac.com/docs/rental_burden_by_metro.pdf 7
- Homelessness: How We Got Here & How L.A. Is Responding*, <https://www.lamayor.org/HomelessnessCausesAndResponses> 8, 9
- <http://homeless.lacounty.gov/>. 9
- <http://worldpopulationreview.com/us-cities/newport-ri-population/>. 2
- Los Angeles Almanac, City of Los Angeles, <http://www.laalmanac.com/LA/index.php>. 5
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- N.Y.U. Furman Center, *2017 National Rental Housing Landscape*, https://furmancenter.org/files/NYU_FurmanCenter_2017_National_Rental_Housing_Landscape_04OCT2017.pdf . . . 7

Benjamin Oreskes, *For 2019 Homeless Count, Thousands of Volunteers Are Set to Deploy Across L.A.*, L.A. Times, Jan. 22, 2019, available at <https://www.latimes.com/local/lanow/la-me-ln-los-angeles-homeless-count-20190122-story.html> 6

Safe LA, Domestic Abuse Response Team (DART), <http://www.safela.org/about/dart/> 8

R. Stern and E. Gressman, *Supreme Court Practice*, (7th Edition 1993) 15, 16

Substance Abuse & Mental Health Servs. Admin., *More Than a Number: Point-in-Time Counts Are Crucial Data*, <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/point-time-counts-are-crucial-data> 5

U.S. Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia/RHI125218> 6

U.S. Dep't of Hous. & Urban Dev., *The 2018 Annual Homeless Assessment Report (AHAR) to Congress* (Dec. 2018) at 1. (Available at <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>) 1

INTEREST OF *AMICUS CURIAE*¹

Amidst a nationwide homeless crisis, the City of Los Angeles seeks clarity on the extent of its authority with respect to the conduct of individuals who dwell on City streets and, for this crucial purpose, submits this brief in support of a grant of certiorari in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). The City agrees with a central tenet of *Boise* – that no individual should be susceptible to punishment for sleeping on the sidewalk at night if no alternative shelter is available. But *Boise*'s rationale sweeps too broadly, and the internally inconsistent Opinion is unclear. By raising more issues than it resolves, the decision leaves jurisdictions like Los Angeles without the certainty necessary to balance intensely competing interests without risking costly and time-consuming litigation.

No one should be relegated to sleeping on the street. And yet, in 2018, 553,000 individuals were homeless in the United States,² with 36,300 of those homeless people residing in the City of Los Angeles.³

¹ No party nor counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or their counsel, made any monetary contribution to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of *amicus* briefs with the Clerk.

² U.S. Dep't of Hous. & Urban Dev., *The 2018 Annual Homeless Assessment Report (AHAR) to Congress* (Dec. 2018) at 1. (Available at <https://files.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf>)

³ Los Angeles Homeless Services Authority, *2019 Greater Los Angeles Homeless Count Presentation* at 5. (Available at <https://www.lahsa.org/documents?id+3421-2019-greater-los-angeles-homeless-count-city-of-los-angeles.pdf>)

Every night in Los Angeles, almost nine thousand homeless men, women, and children receive temporary shelter from a patchwork made up of dozens of private and government funded shelters and hotels.⁴ Even so, the crisis overwhelms: more than 27,000 of the City's 36,300 total homeless population are unsheltered,⁵ and dwell in the public right of way in Los Angeles – the equivalent of the entire population of the City of Newport, Rhode Island.⁶

The overarching goal of City leaders on the front lines in combating the homeless crisis is to create more temporary and permanent supportive shelter beds, and the City is spending an unprecedented amount of money to construct temporary and permanent shelters. An acute, statewide affordable housing shortage intensifies the City's challenges. The City is assessing fees to assist with affordable housing, and providing incentives to encourage private sector affordable housing development. But only with time and additional resources will enough permanent supportive housing units and temporary shelter beds be created to accommodate the 27,000 City residents who are unsheltered, and sufficient affordable housing be erected to prevent others from falling into homelessness. The City also is making strides in

⁴ Los Angeles Homeless Services Authority, *2019 Greater Los Angeles Homeless Count - Total Point-In-Time Homeless Population by Geographic Areas*. (Available at <https://www.lahsa.org/documents?id+3421-2019-greater-los-angeles-homeless-count-city-of-los-angeles.pdf>).

⁵ *Id.*

⁶ <http://worldpopulationreview.com/us-cities/newport-ri-population/>.

addressing other systemic causes of homelessness, including raising City residents out of poverty and targeting domestic violence, which is driving many women into homelessness. These efforts show some promise, but much more remains to be done.

In the meantime, the City must contend with balancing the rights and legitimate needs of a large homeless population with the rights and legitimate needs of local residents and businesses, all of whom share a single finite resource: the public right of way. Encampments with adult occupants line, and often impede, the routes that the City's children travel to and from their schools. Businesses must grapple with encampments filling the sidewalks in front of their establishments. The City struggles to persuade neighbors to overcome their fears that a new homeless shelter nearby will become a magnet for increased encampments.

The City requires clear and practical guidelines on the proper scope of its authority to strike the best possible balance in our shared public spaces. *Boise* does not give that requisite guidance. Instead, it creates ambiguity and uncertainty around a question that can tolerate neither: what are the constitutional limits to the manner in which a City may enforce its rules regarding conduct on its public sidewalks?

Boise is internally inconsistent, which makes it, by definition, unclear. On the one hand, *Boise* resurrects, and cites with approval, expansive language from the vacated decision in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) *vacated*, 505 F.3d 1006 (9th Cir. 2007), suggesting that the City may not enforce a

ban on sleeping in the public right of way at all unless and until a shelter bed exists for every homeless person in the City, a requirement – at least for the City of Boise – that was to be measured and met on a nightly basis.

On the other hand, *Boise* purports to be a “narrow” ruling, which only constrains a City from enforcing rules governing sleeping, lying or sitting on its sidewalks on a person-by-person basis, when that individual has no available alternative. *Boise* suggests that a City “might” be able to regulate where and when homeless individuals dwell in its public spaces, but articulates no standard against which to measure such hypothetical regulation, intensifying the uncertainties the decision creates.

Boise creates further, unacceptable ambiguity because its rationale sweeps so broadly, precipitating additional unanswered questions critical to a well-functioning City. *Boise*’s broad rationale impacts the ability of Los Angeles to regulate not only a homeless person’s need to sleep outdoors, but potentially other aspects of a person’s ability “to live out the ‘universal and unavoidable consequences of being human,’” providing no insight as to what those consequences might include. *Boise*, 920 F.3d at 617 n.8. Humans need to eat. Must the City allow open flame cooking in public? All humans must relieve themselves. Must the City suspend enforcement of its ban on public defecation in the absence of a certain number of public toilets? How many toilets are required?

Both the City and its homeless population are harmed by this lack of clarity. An incorrect

interpretation of *Boise* has constitutional ramifications that create unacceptable risk. Little or no enforcement leaves the City next to lawless; enforcement in the wake of *Boise* could leave the City vulnerable to litigation, which dissipates time and resources better directed to meaningful solutions. Certiorari is warranted.

BACKGROUND

Los Angeles has a vast footprint, encompassing 468 square miles, 60 miles from its northern end to its southern terminus.⁷ Although most of the homeless population historically has resided in the downtown-adjacent area known as “Skid Row,” homeless encampments now appear in every one of the City’s fifteen Council Districts.

The sheer size of Los Angeles, coupled with the number of homeless individuals living in the City, makes counting unhoused people a herculean task. As a condition of federal funding, the United States Department of Housing and Urban Development (HUD) requires all regional bodies that coordinate housing and services funding for homeless persons to conduct a count called the Point-in-Time “snapshot.”⁸ This count must be conducted annually for sheltered

⁷ Los Angeles Almanac, City of Los Angeles, <http://www.laalmanac.com/LA/index.php> (last visited Sept. 24, 2019).

⁸ Substance Abuse & Mental Health Servs. Admin., *More Than a Number: Point-in-Time Counts Are Crucial Data*, <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/point-time-counts-are-crucial-data> (last visited Sept. 24, 2019).

homeless persons, and every two years for unsheltered homeless persons. In 2019, conducting the Point-in-Time count for the Los Angeles area required the services of 7,000 volunteers, and took three days.⁹

The root causes of homelessness are varied and complex, making solutions difficult to achieve. Poverty is the obvious and most significant reason for homelessness in Los Angeles, where one in five residents lives below the poverty line.¹⁰ Los Angeles continues to see poverty-created homelessness even though it was one of the first cities in the United States to enact a local minimum wage ordinance, raising wages in Los Angeles to a minimum of \$15 per hour.¹¹

The Los Angeles affordable housing shortage – and the attendant high cost of housing – constitutes a direct cause of homelessness. The City of Los Angeles enjoys temperate weather and beach-lined shores. Los Angeles is home to the motion picture and television industries, among other industries, as well as 30 colleges and universities. Unsurprisingly, Los Angeles

⁹ Benjamin Oreskes, *For 2019 Homeless Count, Thousands of Volunteers Are Set to Deploy Across L.A.*, L.A. Times, Jan. 22, 2019, available at <https://www.latimes.com/local/lanow/la-me-ln-los-angeles-homeless-count-20190122-story.html> (last visited Sept. 24, 2019).

¹⁰ See U.S. Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/fact/table/losangelescitycalifornia/RHI125218>

¹¹ See, *Homelessness: How We Got Here & How L.A. Is Responding*, <https://www.lamayor.org/HomelessnessCausesAndResponses> (last visited Sept. 24, 2019); and see Los Angeles Municipal Code §§ 187.00, *et. seq.*, available at https://clkrep.lacity.org › onlinedocs › 14-1371_ORD_184320_6-2-16

has one of the most expensive rental markets in the nation in terms of rental rates and rental burden, meaning the percentage of total income Los Angeles residents devote to rent.¹² To increase the supply of affordable housing units, the City of Los Angeles requires developers to pay an affordable housing linkage fee,¹³ and gives density bonuses to developments that include affordable housing units.¹⁴

Beyond household economics, the effects of the federal government's decision in 1981 to end its role in providing services to the mentally ill are directly reflected in the Los Angeles homeless population. A

¹² The Los Angeles metropolitan area ranked fifth in median rent cost, and second in rent-burden among 53 US metropolitan areas. See, N.Y.U. Furman Center, *2017 National Rental Housing Landscape*, https://furmancenter.org/files/NYU_FurmanCenter_2017_National_Rental_Housing_Landscape_04OCT2017.pdf, pp. 6 and 10. See also, Freddie Mac Multifamily, *Rental Burden by Metro*, (April 2019), https://mf.freddiemac.com/docs/rental_burden_by_metro.pdf. (Los Angeles metropolitan area ranked third in most "rent-burdened" metropolitan areas).

¹³ The Affordable Housing Linkage Fee is a payment assessed on new construction to mitigate the impact of development on affordable housing; funds raised from the fee are set aside and used to construct new – and rehabilitate existing – affordable housing units.

¹⁴ Los Angeles Municipal Code Sections 12.22 A.25-31. Available at [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterigeneralprovisionsandzoning/article2specificplanning-zoningcomprehen?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles_ca_mc\\$anc=JD_12.22](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterigeneralprovisionsandzoning/article2specificplanning-zoningcomprehen?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc$anc=JD_12.22).

large number – 27 percent – of the City’s homeless residents suffers from serious mental illnesses.¹⁵

The lack of federal resources for veterans also contributes to the homeless population in Los Angeles. More than two thousand of the City’s homeless residents are veterans.¹⁶

A broad spectrum of other factors contributes to the large homeless population in Los Angeles. Countywide, 56 percent of homeless women are victims of domestic violence.¹⁷ In Skid Row, the percentage skyrockets to more than 90 percent.¹⁸ The City prioritizes assistance to victims of domestic violence by implementing the Domestic Abuse Response Teams (DART) program, which trains and pairs police officers with services providers and victim advocates. A DART team is located in each of the City’s 21 Los Angeles Police Department divisions.¹⁹

Fifteen percent of the City’s homeless individuals suffer from substance abuse issues.²⁰ The criminal

¹⁵ *2019 Greater Los Angeles Homeless Count - City Of Los Angeles* (July 29, 2019), <https://www.lahsa.org/documents?id=3421-2019-greater-losangeles-homeless-count-city-of-los-angeles.pdf>.

¹⁶ *Id.*

¹⁷ *Homelessness, supra*, <https://www.lamayor.org/HomelessnessCausesAndResponses>.

¹⁸ *Id.*

¹⁹ Safe LA, Domestic Abuse Response Team (DART), <http://www.safela.org/about/dart/> (last visited Sept. 24, 2019).

²⁰ L.A. Homeless Servs. Auth., 2019 Greater Los Angeles Homeless Count - City of Los Angeles, <https://www.lahsa.org/documents?id>

justice system has an impact as well: approximately 50 percent of Los Angeles homeless residents have a history of incarceration, negatively impacting their job prospects.²¹

Elected leaders and taxpayers in Los Angeles have taken decisive action, dramatically infusing resources to grapple with the homeless crisis. In 2016, City leaders sponsored, and City voters overwhelmingly enacted, Proposition HHH. Proposition HHH authorized the issuance of 1.2 billion dollars in bonds to finance permanent supportive housing for the City's homeless residents. Projects to create these supportive housing units with HHH funds are already under way.

Los Angeles County voters added additional resources to address homelessness when they passed Measure H. Measure H imposed a County-wide sales tax to raise 355 million dollars annually for ten years to fund homeless outreach, emergency shelters, rapid rehousing, and permanent supportive housing.²² In addition to Proposition HHH and Measure H funding, the 2019-20 Los Angeles City budget includes more than 460 million dollars to address homelessness.²³

=3421-2019-greater-los-angeles-homeless-count-city-of-los-angeles.pdf (last visited Sept. 24, 2019).

²¹ *Homelessness: How We Got Here & How L.A. is Responding*, <https://www.lamayor.org/HomelessnessCausesAndResponses> (last visited Sept. 24, 2019).

²² <http://homeless.lacounty.gov> (last visited Sept. 24, 2019).

²³ <https://www.lamayor.org/HomelessnessCausesAndResponses> (last visited Sept. 24, 2019).

This allocation of considerable resources is necessary but – certainly in the immediate term – insufficient to alleviate the current homeless crisis. The City cannot build housing or shelter for 27,000 individuals overnight. As a result, thousands of unsheltered Angelenos have no choice but to dwell in public spaces.

More than a decade ago, like Boise, the City was sued for enforcing an ordinance that banned sitting, lying, or sleeping in the public right of way.²⁴ The Ninth Circuit, in *Jones v. City of Los Angeles*, enjoined the City from enforcing its public dwelling ban, using sweeping language that permitted of no exceptions. The City settled the *Jones* case in favor of a negotiated enforcement plan, which limited public dwelling to overnight hours, and banned dwelling in a few locations, like doorways, driveways, and loading docks.

As a result of the *Jones* litigation, Los Angeles has experienced, first-hand, 11 years of grappling with the delicate balance required when public sidewalks serve two essentially incompatible functions. The sidewalks are home to thousands of unsheltered residents (and their personal belongings), while at the same time serving as the access way for wheelchair-bound pedestrians who need passable sidewalks, children who need safe passage to school, and business owners who require accessible store fronts. In this context, the Ninth Circuit's uncertain and internally inconsistent *Boise* decision hampers the City's ability to achieve the

²⁴ *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir.2006), vacated, 505 F.3d 1006 (9th Cir. 2007).

appropriate balance required to keep public spaces safe and accessible to all.

SUMMARY OF ARGUMENT

The homeless crisis in Los Angeles is just that – a crisis. First and foremost, our vulnerable homeless population is affected. But the crisis also affects every Angeleno, each of whom deserves, among other things, passable sidewalks. The lack of *clarity* of the *Boise* decision, combined with its sweeping rationale, makes more difficult the efforts of Los Angeles to *balance* the needs of its homeless residents with the needs of everyone who uses our public spaces.

Clarity: The *Boise* Opinion creates no less than four areas of uncertainty for the City.

The *first* ambiguity results from Boise’s full-throated endorsement of the broad, sweeping language of *Jones v. City of Los Angeles*. This language suggests that, until every homeless person in Los Angeles has a bed, no enforcement action against any individual homeless person is permissible, even if the City has a bed for that homeless person. *Boise*, 920 F.3d at 617. Must the City of Los Angeles create 27,000 shelter beds before taking enforcement action against a single unsheltered individual who refuses an available shelter bed in one of the City’s regional shelters, just because shelters at the opposite end of the City are full? Phrased differently, must shelter beds go empty because one is not available for every homeless person in Los Angeles? The body of the *Boise* decision fails to answer that question. A footnote purports to do so,

but, as discussed below, that footnote only creates inconsistency within the Opinion.

The *second* area of uncertainty is practical: Is Los Angeles required, like the City of Boise, to conduct a nightly count of its homeless before any enforcement can occur? As was observed by the dissenters from the Ninth Circuit's denial of *en banc* rehearing in *Boise*, the *Boise* rule is impossible to administer. In a city the size of Boise (with 125 of its 867 homeless population unsheltered) the task is difficult. *Boise*, 920 F.3d at 604. The challenge is exponentially greater in a city the size of Los Angeles (with 27,000 of its 36,300 homeless population unsheltered). Based upon the efforts required for the Point-in-Time Snapshot, Los Angeles would need 21,000 volunteers in service year-round if it were to conduct a nightly count of its homeless residents.²⁵ Even if that were possible, each night the City would have to compare the count of homeless individuals with the number of available shelter beds, by contacting scores of homeless shelters throughout the jurisdiction.

A *third* unresolved question is created by Boise's sweeping rationale which, by its logical extension, applies to more than simply the act of sleeping in public. Arguably, Boise constrains Los Angeles from regulating a person's ability "to live out the 'universal and unavoidable consequences of being human'" in public places if the person lacks a private place to live. *Boise*, 920 F.3d at 617 n.8. Boise does not elaborate on

²⁵ The 2019 Point-in-Time snapshot required 7000 volunteers and three days to complete. <https://latimes.com/local/lanow/lame-ln-los-ang-les-homeless-count-20190122-story.html>.

the specific nature of what “consequences of being human” Los Angeles can regulate, and which can it not. Like other cities, to maintain safe and sanitary conditions, Los Angeles regulates its public spaces. Conduct banned in the public right of way includes, for example, urination, defecation, and storage and use of flammable substances for cooking. Any doubt as to the ability of Los Angeles to enforce these and other rules makes our public spaces less safe and sanitary.

The *fourth* area of uncertainty relates to *Boise’s* dismissive discussion of the City’s regulatory powers, in a few lines tucked away in a footnote couched in equivocal language. *Boise* articulates no standard by which Los Angeles is to determine whether a given regulation is, in fact, constitutional. Neither Los Angeles nor any other municipality should be forced to roll the constitutional dice to find out in the first instance what does or does not pass muster, at the peril of a sweeping injunction.

Balance. Los Angeles is home to almost four million residents.²⁶ Sidewalks where many of our homeless dwell also serve as critical infrastructure for pedestrians, including disabled pedestrians, children traveling to and from school, tourists visiting the City’s many attractions, and customers and employees of the City’s numerous and various business establishments. The sidewalks belong in equal measure to everyone. During the eleven years following the *Jones* settlement, Los Angeles has refrained from nighttime enforcement

²⁶ <https://www.census.gov/quckfacts/losangelesciticacalifornia> (population estimate as of July 1, 2018 is 3,990,456) (last visited Sept. 24, 2019).

of its rules against sleeping on public sidewalks. Conditions on Los Angeles sidewalks have deteriorated. Now, in the wake of *Boise*, Los Angeles has suspended all enforcement of these rules except in critical areas like loading docks, doorways and driveways, and where necessary to ensure compliance with the Americans with Disabilities Act. The City's residents deserve to know that if City officials set reasonable limitations on when and where public dwelling occurs, those regulations will be defensible, even against the threat of litigation.

ARGUMENT

The priority for the City of Los Angeles is to find shelter for its homeless population, and Los Angeles is urgently constructing many shelters throughout the City. Until substantially more are built, however, Los Angeles recognizes that many of its homeless residents will sleep outside. Even before the Ninth Circuit's decision in *Boise*, Los Angeles had taken many steps to decriminalize conduct associated with being homeless²⁷

²⁷ The City passed an ordinance decriminalizing vehicle dwelling on City streets except during the day in residential areas, and twenty-four hours a day near schools, daycare centers and parks. L.A.M.C., § 85.02 (Jul. 2019). Available at [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterviiiittraffic?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles_ca_mc\\$anc=JD_85.02](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chapterviiiittraffic?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc$anc=JD_85.02). The City also decriminalized a homeless person's storage of up to sixty gallons of personal property in the public right of way. L.A.M.C., § 56.11, subdvs. (2)(c) & (10) (Jul. 2019). Available at [http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chaptervpublicisafetyandprotection/article6publichazards?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:losangeles_ca_mc\\$anc=JD_56.11](http://library.amlegal.com/nxt/gateway.dll/California/lamc/municipalcode/chaptervpublicisafetyandprotection/article6publichazards?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc$anc=JD_56.11) (last visited September 24, 2019).

and, pursuant to the *Jones* case settlement, ceased to enforce its ban on sleeping in public at night, except near doorways, driveways and loading docks.

Post *Boise*, the City needs clarity regarding its ability to enact and enforce regulations to balance the use of the public space by the homeless person with no other place to live and others whose interests may not always be easily compatible with those of the homeless person, like: the child who walks to school through an encampment full of adults, the local business that operates behind an unbroken line of encampments, the disabled resident whose wheelchair is blocked by an encampment. Los Angeles urgently needs clarity to uphold the rights of its homeless population while also fulfilling its mandate as the steward of public spaces to protect them for everyone.

I. CERTIORARI IS WARRANTED TO PROVIDE CLARITY TO LOS ANGELES AND OTHER CITIES ACROSS THE NATION FACING THE CRISIS OF HOMELESSNESS

Los Angeles agrees with a broad premise underlying the *Boise* decision: when a person has no place to sleep at night, sleeping at night in public should not be a crime. *Boise*, 920 F.3d at 617.

Given the nationwide scope of the homeless crisis, however, clarity on the specifics is needed urgently. Local governments across the country have similar ordinances requiring public space to remain clear. Certiorari is warranted to ensure consistency in the laws within those jurisdictions. R. Stern and E. Gressman, *Supreme Court Practice*, §§4.12, 4.13 (7th

Edition 1993), citing *New York v. Ferber*, 458 U.S. 747, 749, n.2 (1982) and *New York v. O’Neill*, 359 U.S. 1, 3 (1959) (where the Court stated it granted certiorari “inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two States and the Commonwealth of Puerto Rico”).

II. THE BOISE OPINION IS INCONSISTENT AND AMBIGUOUS IN WAYS THAT ARE DETRIMENTAL TO A WELL-RUN CITY.

A. The *Boise* Opinion Raises Daunting Practical Issues in a City the Size of Los Angeles.

While *Boise* describes its holding as “narrow,” it cites with approval the broad and sweeping language of the vacated *Jones* decision, which held “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of individual beds [in shelters], the jurisdiction cannot prosecute homeless individuals” for public habitation. *Boise*, 920 F.3d at 617. The message conveyed by this broad language is unworkable in practice. The six Ninth Circuit judges dissenting from the denial of *en banc* review of *Boise* agreed, describing the holding as leaving a city with a “Hobson’s choice,” either to “undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety.” 920 F.3d at 594. Does *Boise* mean that such a count must now be conducted nightly? Weekly? How precise must that count be?

Counting the available shelter beds is also monumentally difficult. In Los Angeles, like Boise, shelters are not owned or operated by the City; thus, “the City is wholly reliant on the shelters to self-report when they are full.” *Boise*, 920 F.3d at 609. Does *Boise* mean that Los Angeles must somehow require these independent shelters to provide a nightly count of available beds? Does Los Angeles step on constitutional toes if those shelters’ counts are inaccurate? And as Boise points out in its Petition, alternative shelter, like the home of a friend or a relative, might be available to an individual, but would never show up in a count of shelter beds. Pet. 33.

While this broad holding is unworkable even in a city like Boise, it is virtually impossible in a city like Los Angeles. Boise’s homeless population totals 867, 125 of whom are unsheltered on any given night. *Id.* at 604. Los Angeles’ homeless population totals 36,300, more than 27,000 of whom are unsheltered on any given night. Boise has three homeless shelters; Los Angeles has dozens. Even if we posit that a city like Boise could comply with the *Boise* counting requirement, a city like Los Angeles – or San Francisco, San Diego, Phoenix, and a host of others – simply cannot.

B. Sweeping Language in *Boise* Brings Uncertainty to the City’s Duty to Maintain its Public Spaces.

Boise states that a local government cannot prohibit any conduct that arises from a condition a person is “powerless to change,” or that is an “unavoidable” result of being human. *Id.* at 617. At a practical level,

this sweeping language simply is unworkable for local governments.

A key mandate for every municipality is to keep its public space safe and accessible to all of its residents. *Schneider v. State*, 308 U.S. 147, 160-161 (1939).

As this Court repeatedly has recognized, a municipality's duty is to keep public property "open and available for movement of people and property" – the "primary purpose for which the streets are dedicated" – while at the same time respecting "the constitutional liberty of one rightfully upon the street." *Schneider, supra*, 308 U.S. at 160-161. *Boise* essentially ignores this mandate by giving it merely a passing reference – in limited and ambiguous language – and only in a footnote. As the *Boise* dissent observes, and the Petition filed by the City of Boise points out, this "unavoidable consequences" language could be stretched to mean that public urination or defecation cannot be prohibited. *Boise*, 920 F3d at 596; Petition 4.

A broad array of other activities are "unavoidable consequences" of being human. Does *Boise's* language mean that a local government must allow a homeless individual to store food in the public right of way and cook with an open flame? What about urination and defecation in public? Where is a city to draw the line?

C. The *Boise* Opinion Leaves Unresolved the Critical Question of Whether Los Angeles Must Leave Available Shelter Beds Unoccupied.

The *Boise* court describes its holding as “narrow,” and footnote 8 attempts to underscore that description. Footnote 8 states in pertinent part: “Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter...but who choose not to use it. *Boise*, 920 F.3d at 617 n.8.

Notwithstanding this language, the Opinion actually leaves uncertain the answer to the practical question faced every night in Los Angeles: What are the City’s options with regard to a specific homeless individual for whom a shelter bed is available, if the bed is offered and the person refuses to use it?

That is because the footnote is at odds with the Opinion’s citation, with approval, of the sweeping language of the *Jones* case, which held 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 dwelling in public, language which is cited twice in the *Boise* Opinion. *Boise*, 920 F.3d at 604, 617. *Boise*’s citation of *Jones* raises the specter that Los Angeles can take no enforcement action until it builds another 27,000 shelter beds. Nothing in footnote 8 addresses this seeming contradiction head on.

Thus, despite *Boise*’s stated concern with the plight of homeless individuals and the purported “narrow”

nature of the holding, ironically the Opinion could make more difficult the efforts of Los Angeles to have its homeless residents occupy the shelter beds that are available, even during this current crisis. Los Angeles lacks guidance as to whether it can inform a homeless person, “It’s illegal to sleep here, sir, when we have a bed for you, and we do.” Or must it instead allow the person to continue sleeping on the sidewalk – leaving the shelter bed unused?

D. Tentative Language in *Boise* Brings Uncertainty to the City’s Options for Regulating When and Where in the Public Right of Way Homeless Persons Dwell.

Footnote 8 in the *Boise* Opinion also appears to acknowledge the regulatory power of a city like Los Angeles to create reasonable rules about when and exactly where public habitation occurs. Specifically, footnote 8 provides:

“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. [Citing *Jones*.] So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures.” *Boise*, 920 F.3d at 617.

While footnote 8 seems to give a nod to a local government’s ability to enforce its laws under certain circumstances, its conjectural language provides no real world guidance. *Boise* states only that a certain

kind of ordinance “*might well be* constitutionally permissible.” But Los Angeles needs to know: *is it*, in fact, constitutionally permissible, for example, for a city to bar homeless encampments adjacent to sensitive sites like a school or a newly constructed homeless shelter? “Might well be” tells us little – and simply invites further constitutional litigation.

The question is not hypothetical. Selecting a site for – and opening – a new homeless shelter often proves difficult in Los Angeles. Neighbors and local business owners have sometimes resisted, expressing concern that a new homeless shelter site will become a draw or magnet for encampments on the sidewalks in the area surrounding the shelter, causing the sidewalks to become impassable.

It is likely Los Angeles could more easily place shelters if it were to prohibit public dwelling on the sidewalks adjacent to newly-opened homeless shelters.²⁸ Were Los Angeles to take the invitation advanced in footnote 8 of the *Boise* Opinion and do just that, footnote 8 leaves Los Angeles open to the threat, delay and expense of litigation. Ironically, therefore, despite the Ninth Circuit’s stated concern with homeless people living in the public space, *Boise* may make it more likely that too many of our homeless population will remain there.

CONCLUSION

The City of Los Angeles strives to achieve a delicate balance on its City streets. But the *Boise* decision

²⁸ This limitation also may reduce the temptation of any shelter resident to fall back into life on the street.

undermines the City's ability to attain that balance. The Opinion's lack of clarity could place the City at risk of litigation at a time when the homeless crisis demands urgent, clear, practical, solution-oriented approaches from local government—approaches that, among many goals, assure that public sidewalks are safe and accessible for everyone, that homeless people accept available shelter and that desperately-needed shelters are more prevalent. For these reasons, the City of Los Angeles urges this Court to grant Certiorari.

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