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Litigator of the (Past) Week: In First SCOTUS Arg, Gibson Dunn's Evangelis Tackles Thorny Policy Issues Around Homelessness

By Ross Todd
July 10, 2024

Here's one indication of the U.S. Supreme Court's interest in the difficult policy questions presented in *City of Grants Pass v. Johnson*: In the case considering whether the Oregon town's public-camping ordinance violated the Eighth Amendment, oral argument clocked in at just under two-and-a-half hours.

Our Litigator of the Week, **Theane Evangelis** of **Gibson, Dunn & Crutcher** was at the podium for the city. Late last month the court handed down a 6-3 decision finding that the penalties associated with the town ordinance did not amount to cruel and unusual punishment. The decision overturned *Martin v. City of Boise*, a 2018 Ninth Circuit decision that many officials in the American West contended constrained their ability to address the homelessness crisis. Although Evangelis has argued appeals across the country, this was her first Supreme Court argument.

Lit Daily: Tell me about how you and the firm got involved in these issues. You previously filed a cert petition in the *Martin v. City of Boise* case that the *Grants Pass* decision overturned, right?

Courtesy photo

Theane Evangelis of Gibson, Dunn & Crutcher.

Theane Evangelis: We have been at the forefront of these issues for years. Five years ago, I led the effort to persuade the Supreme Court to grant review of the Ninth Circuit's decision in *Martin v. City of Boise*. We were supported by dozens of amicus briefs, and the case received widespread attention. But ultimately, the Supreme Court denied certiorari. We knew that *Martin* would tie the hands of our state and local governments on

the front lines of the homelessness crisis, and we hoped that we'd have another opportunity to bring the issue to the Supreme Court. In the meantime, I continued helping cities navigate *Martin*-based challenges to their laws and kept up my policy work in this area. I was also appointed by the Los Angeles County Board of Supervisors to the Los Angeles Blue Ribbon Commission on Homelessness. In 2022, when the Ninth Circuit issued its decision in the *Grants Pass* case, the city's cause resonated with me, and I knew it could be the perfect vehicle to take another swing at Martin.

Who all was involved in representing Grants Pass and how did you divide the labor on this matter?

I worked closely with my co-counsel on the case, **Aaron Hisel** from **Capitol Legal Services** in Salem, Oregon, and I was supported by my excellent team from Gibson Dunn. Aaron ably represented the city in the lower courts, and his deep knowledge of the facts on the ground in Grants Pass was invaluable to our appeal. My team at Gibson Dunn included my fellow partners **Jonathan Bond**, **Brad Hamburger** and **Sam Eckman**, and associates **Daniel Adler**, **Patrick Fuster**, **Lefteri Christos** and **Karl Kaellenius**. One of the great joys of this case was getting to work with this all-star team. I couldn't have done it without them.

You have argued appeals all over the country, but this was your first argument before the U.S. Supreme Court. What was your preparation like? How did it differ from your typical argument prep?

My preparation was, to put it mildly, intense. I studied historical materials from the founding to better understand the original meaning of the Eighth Amendment, delved into the history of the Supreme Court's 1962 decision in *Robinson v. California*, and explored the ways in which the Eighth Amendment, the Due Process Clause, Oregon state statutes, and common-law defenses interact and bear on this issue.

But that was just the starting point. I had to study not only the history and the law, but also the complex practical consequences of *Martin*. When I walked up to the podium on the day of the argument, I was armed with the compelling stories told by the over 80 amicus briefs that were filed in this case, the facts of the 35 lawsuits that had been filed under *Martin* against cities all over the Ninth Circuit, and the details of Grants Pass's policies. I was gratified to see 64 citations to the amicus briefs in the court's opinion, proving that the court paid close attention to them, and that they made a real difference.

As for how my preparation differed, I generally followed my usual oral argument preparation routine of moots, preparing short outlines on key issues, and brainstorming tough questions and answers. I'm also fortunate to have some of the best Supreme Court advocates in the country as my partners, and I sought advice from veterans at my firm like **Ted Olson** and **Ted Boutrous**.

We held three moots. The panel for one of the moots was composed of some of Gibson Dunn's top appellate advocates, including Ted Olson, and another was a mix of Supreme Court practitioners both inside and outside Gibson Dunn. For one of the moots, I returned to my alma mater, NYU Law School, where some of my former professors volunteered for the panel. Getting grilled by my professors at Vanderbilt Hall brought back fond memories of law school.

I also had to prepare for any manner of hypotheticals because the court was writing a rule not just for this case but also for the lower courts to apply going forward. I knew the court would be much more concerned about first principles. The court isn't strictly bound by precedent but can overrule or extend it. Respondents asked the court to extend

Robinson. But the court hadn't applied that case in six decades, and we sought to demonstrate to the court that it shouldn't do so now.

One thing that was unusual about my preparation for this case was that it happened on such an expedited timeline. The schedule was really compressed—the reply brief was filed just a week and a half before the argument. Another difference was the two-minute, uninterrupted opening argument. And there was no strict time limit, either—I was at the podium for over an hour during my opening argument alone.

There has to be pressure when arguing any case at the Supreme Court. But did you feel any added pressure about handling a landmark case on an issue of such public interest?

I definitely felt the added pressure. As our amici showed, this was an issue of critical importance to cities and states across the country. Once the Supreme Court took up the case, the stakes increased dramatically: By winning, we overturned *Martin*, but if we had lost, *Martin* would have been extended to the entire country—an outcome that would have been catastrophic.

In addition, the case was the subject of intense media attention from the beginning. It was even covered internationally. And on the eve of argument, I was shuttling back and forth between media interviews with the major outlets. The level of media attention was extraordinary and required an enormous time commitment—all while prepping for the argument.

You've been appointed by the Los Angeles County Board of Supervisors to the Los Angeles Blue Ribbon Commission on Homelessness. What's your relationship like with those in the advocacy community who disagree with the positions you've taken in this case on behalf of your government client?

My service on the commission gave me a deep understanding of the complexity of this issue for state and local governments. I saw firsthand the terrible consequences of the Ninth Circuit's decisions—they were harming the very people they were meant to help. I came to understand that, like other complex social problems, homelessness can't be solved by the courts. We need to have a robust policy debate about the issue more broadly, but debate freezes if courts take over. At argument, Chief Justice Roberts asked why the nine people sitting on the bench that day should be the arbiters of this issue rather than the local governments that are on the front lines. And the Supreme Court's opinion explained that *Martin* is a textbook example of what can go wrong when courts wade into complex issues when they are far removed from the realities on the ground.

Through my work in this area, I saw that our elected leaders who were committed to solving this problem and helping those most in need, like California Governor Gavin Newsom and San Francisco Mayor London Breed, wanted the ability to rely on camping regulations, which they firmly believed were an important tool in their policy toolbox. They understood that this issue had nothing to do with "criminalizing homelessness"—it's about saving lives. The court's decision gives cities the flexibility they need. They can choose to allow camping if that's what they think is best for their communities, but they can stop the growth of dangerous encampments if they need to. As Governor Newsom put it in his brief: "[T]here is no compassion in stepping over people in the streets, and there is no dignity in allowing people to die in dangerous, fire-prone encampments." And as Mayor Breed explained following the Supreme Court's decision, San Francisco will "continue to offer shelter, but we will not allow those who reject offers of help to remain where they are."

This case involved an important constitutional question, but it didn't present a partisan issue. Our

coalition of amici curiae was encouragingly bipartisan. It ranged from leading progressive Democrats like Governor Newsom and Mayor Breed to states like Texas and Virginia. And the editorial boards of both *The Washington Post* and *The Wall Street Journal* endorsed our position, with the *Post* editors declaring: "There is no constitutional right to pitch your tent on the sidewalk."

Fundamentally, we all want the same thing—to help those most in need. And I respect those who devote so much time to the important cause of solving homelessness. But I believe in empowering our local governments and policy experts to solve the problem, not tying their hands through lawsuits that have put federal courts in charge. That's why I have never been more optimistic about our ability to solve the homelessness crisis by getting people the help they need than I am today.

Walk me through the oral argument. Having the decision in hand now, is there anything that stands out?

What stands out to me most is how deeply the Supreme Court understood these issues. The court's decision is one of compassion, not a detached application of the law. The justices grappled—both at argument and in the opinion—with the practical consequences for the people who are living on our streets every night. And they saw that decisions like *Martin* actually harm the very people they purport to protect. The court noticed that an "exceptionally large number of cities"—thousands in all—filed amicus briefs in support of our position. And it understood that encampments are not just a housing issue—roughly 75% of people living in encampments are suffering from mental illnesses, substance-abuse issues, or both. The court paid close attention to that fact and emphasized the "complex and interconnected issues" that are the root causes of homelessness.

I was also impressed with how the court drew from the dozens of amicus briefs to tell the story of what has been happening on the ground in our cities in the years since *Martin* was decided. The court engaged with the amicus briefs at an astonishing level of depth, given the sheer quantity of briefs before it. Thousands of cities, 24 states, counties across the country, the U.S. Chamber of Commerce, the Retail Litigation Center, and leading law professors all submitted amicus briefs in support of Grants Pass. The court cited amicus briefs 64 times—a remarkably high figure. If I had to sum up the opinion, I would say that the cities on the front lines spoke, and the court listened.

What's important in this decision—and the litigation strategy you've taken more broadly—for cities and states attempting to address issues around homelessness within their communities?

Like Grants Pass, cities grappling with this crisis need to lead with compassion. It is telling that the court's opinion begins by describing Grants Pass's policies as "aim[ing] at protecting the rights, dignity, and private property of the homeless." Cities that lead with services that seek to help people experiencing homelessness get back on their feet now have the ability to ensure that offers of help are not declined by those who need them most.

What will you remember most about this matter?

What I will remember most is the tremendous sense of responsibility I felt standing at the podium on the day of the argument. Thousands of cities were counting on us. It was an honor to argue such an important case before the court. Years from now, I hope that we will look back on this watershed ruling as the turning point in our country's homelessness crisis.