No. 23-175

In the
Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
PETITIONER,

v.

GLORIA JOHNSON AND JOHN LOGAN,
ON BEHALF OF THEMSELVES AND ALL
OTHERS SIMILARLY SITUATED,
RESPONDENTS.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL COALITION FOR MEN IN SUPPORT OF RESPONDENTS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The National Coalition for Men ("NCFM") is a 501(c)(3) nonprofit organization based in San Diego, California. Founded in 1977, NCFM's mission is to end harmful discrimination and stereotypes against boys, men, their families and the women who love them. NCFM is a gender inclusive, nonpartisan, ethnically diverse organization that affects civil rights reform through advocacy, education, outreach, services and litigation.

NCFM works with individuals, organizations, employers, educators, lawmakers, colleges and universities, institutions, branches of government and policymakers to address the challenges men and women face every day, and strongly believes that due process of law is vital to a healthy America and true gender equality between men and women. NCFM has participated as *amicus curiae* in numerous matters to provide information to courts, to assist courts in deciding gender issues on the basis of fairness, law and actual facts as opposed to gender myths, gender stereotypes, and gender biased political rhetoric.[1]

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[1] Pursuant to Rule 37.6, *Amicus Curiae* affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly decided the case under existing opinions of this Court because:

- The ordinances in question deliberately target, and discriminate against, a highly vulnerable socio-economic class and compel strict scrutiny.

- The ordinances in question criminalize innocent acts necessary for the Homeless to preserve their rights to life.

- Our founders adopted the Eighth Amendment to preclude excessive punishment and proscribe punishments for non-crimes.

REASONS FOR AFFIRMING THE NINTH CIRCUIT's OPINION

Many of Petitioner's arguments are based upon a misreading of the Ninth Circuit's opinions in *Martin v. Boise*[2] and the instant case. The Petitioner's arguments are also largely based upon mistaken readings of this Court's opinions in *Powell*,[3] *R*[4] and *Weems*[5] and misconceptions regarding fundamental analysis of Eighth and Fourteenth Amendment issues.

In its opening brief, the Petitioner provides us with an erudite and sensible description of homelessness in the U.S.

> Homelessness is not an immutable characteristic or static diagnoses. [citations omitted] Rather it is a complex constellation of individualized social, economic, geographic, and other factors. Pet. App. 140a (opinion of M. Smith, J.).[6]

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[2] *Martin v. City of Boise*, 920 F.3d 584 (2019).

[3] *Powell v. State of Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968).

[4] *Robinson v. State of California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

[5] *Weems v. United States*, 217 U.S. 349 (1910).

[6] An Irish-American folk music ensemble in Boulder, Colorado offers us an artistic but equally accurate view of the homeless – a view with a human face:

"You stumble down a dirty street,

Notwithstanding the many variables attending each homeless person's experience, there are many common aspects among the homeless population.

One of those characteristics of homelessness, which is common among all homeless persons, is relentless duress.

The duress imposed on the homeless is a significant factor in Eighth Amendment analysis as the duress imposed on the homeless, which arises from the status, is a mitigating factor that limits what government can criminalize in homeless behavior.[7] The

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Your heart hung like a stone.
40 watts and vinyl stairs
A [vagrant] all alone.

…

The streets are nipping at your heels,
The future's grim and bare.
A muffled voice, a baby broods,
You offer up a prayer.

[refrain] Oh, and God be good to anyone
Who is sleep'n out tonight.
Tuck them in and keep 'em warm,
And don't turn out the light.

"*Athens Hotel*," *Lyrics*, Colcannon (1993)

[7] We employ the word duress in its broad, common law meaning: "a condition of mind produced by an improper external pressure or influence that practically destroys the free agency of a party and causes him to do an act or make a contract not of his own volition." *Herald v. Hardin,* 95 Fla. 889, 116 So. 863, 864 (1928); *Cooper v. Cooper,* 69 So.2d 881, 883 (Fla. 1954) (quoting *Herald*)

duress dictating much of the behavior of the homeless affects the legal issues as to whether the acts of the homeless are voluntary or involuntary. Golestaneh, Sara, *Pushed Into The Shadows: The Criminalization of Homelessness and its Health Consequeneces,* 4 Hous. J. Health L. & Pol'y 1 (2024).

The Ninth Circuit's opinions, and the opinions of this Court rely upon analysis from common law *lex talionis* (the law of retaliation (retribution)). In thousands of years of Western law, there are limits on what governments may criminalize in a constitutional society, and there are limits on the harm governments may impose on their own citizens. We will provide further analysis later in this brief. Section III, *infra.*

Another common characteristic among the homeless is that homelessness is involuntary. Experts agree, unanimously, that no person chooses to be homeless. Kim, Joy H., *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of choice*, 95 N.Y.U. L. Rev. 1150 (2020) "Many functional barriers deprive homeless individuals of a meaningful choice, and the Eighth Amendment prevents governments from punishing individuals for matters beyond their control").

In a few cases, homelessness may be the best option that a homeless person has, but that does not mean they are choosing to be homeless.[8]

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[8] Gourevitch, Ruth, Cunningham, Mary K., "*Dismantling the*

The need for a stable geographic place to store resources necessary for survival, and provide stability for the most basic of human needs, is a primal imperative for any human to survive. No human can survive, for long, a forced or mandated peripatetic existence. Some geographic stability is necessary for the simple human rights to life and liberty themselves.

The Ninth Circuit has properly invoked the analysis of thousands of years of jurisprudence to apply the holdings in this court's opinions to the Petitioner's approach to the homeless in their jurisdiction.

I. The Vulnerability of the Homeless Class

The central issue in this case is whether a local government can criminalize conduct that is necessary for an afflicted class' survival and in which the members engage with no culpable state of mind.

This court's opinion in *Robinson* is central to resolution of this issue. The Petitioner argues that *Robinson* is a nonce and is limited to enjoining only criminalization of a pure status. Petitioner also invokes this court's opinion in *Powell* as empowering local governments to criminalize any conduct, even if that conduct is a coerced result of a citizen's status. This reading of *Robinson* and *Powell* disregards the opinions' eloquent analysis of fundamental constitutional law. The Petitioner and its supporters dismiss that analysis as "*dicta*."

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*Harmful, False Narrative that Homelessness is a Choic*e," Urban Wire, March 27, 2019.

The holding in *Robinson* is straightforward.

> In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold. *Robinson* at 667 [footnotes omitted].

If we examine the analysis the Court applied in reaching this holding, the Court is holding that the state cannot impose criminal sanctions or accusations on someone unless they perpetrate "irregular" behavior that is (a) voluntary (b) accompanied by a culpable state of mind (*mens rea*); and (c) a culpable act (*actus reus). Id.*

The fact that the Petitioner uses a scheme of civil fines to imprison the homeless does not lessen the Constitutional protections owing to an accused who ultimately faces a jail or prison sentence for non-

payment. *Cf., Turner v. Rogers, et al.*, 564 U.S. 431 (2011) (Indigent defendant who could not pay child support, facing jail for contempt, was entitled to a defense of inability to pay). *Accord.*, *Walker v. McClain*, 768 F.2d 1181 (1985) (Indigent defendant who could not pay child support, facing jail for contempt, was entitled to court-appointed counsel for hearing on nonpayment of the civil obligation).

Notwithstanding Petitioner's assertions to the contrary, it is settled law in this Court that the Eighth Amendment applies to civil fines. *Hudson v. United States*, 522 U.S. 93 (1997) ("The Eighth Amendment protects against excessive civil fines, including forfeitures."); *Alexander v. United States,* 509 U.S. 544 (1993); *Austin* v. *United States,* 509 U.S. 602 (1993).

A. The involuntary nature of homelessness

1. Causes of homelessness

In terms of numbers the two largest causes of homelessness are unfounded *ex parté* restraining orders and loss of income.

In the domestic violence advocacy industry, the restraining orders are known as "kick out orders." *See e.g.*, O.R.S. § 107.718(b) (2024) ([On an accusation of domestic violence the court shall order] "… that the respondent be required to move from the petitioner's residence, if in the sole name of the petitioner or if it

is jointly owned or rented by the petitioner and the respondent, or if the parties are married to each other;") In Oregon, these "kick out orders" are valid for at least an entire year unless the respondent can prove that she/he is innocent of abuse and does not pose any threat of abuse.

State and local governments issue over a million of these orders each year that render the respondent homeless until she or he can prove their innocence.[9] Over one million orders are issued each year *en masse*, with almost no due process protections (such as discovery, right to counsel or a reasonable time to prepare for trial). *Cf. United States v. Rahimi*, 59 F.4th 163, 184 (5th Cir. 2023) (Judge Ho's concurring opinion). Although the vast majority (about 82%)[10] of domestic violence restraining orders are dismissed and determined to be baseless, they peremptorily render hundreds of thousands of respondents involuntarily homeless each year. *See*, David N. Heleniak, *The New Star Chamber: The New Jersey Family Court and the Prevention of Domestic Violence Ac*t, 57 Rutgers L. Rev. 1009, 1014 (2005).

The vast majority of the victims of these unfounded restraining orders are able to find alternate

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[9] Heleniak, David N., "*Shuttering the New Star Chamber: Toward a Populist Strategy Against Criminal Equity in the Family Court*," 17 Liberty Univ. Law. Rev. Article 2, Issue 2 (2023).

[10] Available at: https://www.acrosswalls.org/datasets/punishment-us-dv-synth/?otxkey=datasets-punishment-us-dv-synth&otxrp=sheet%3A+restraining+orders+nationally

housing arrangements until they can prove their innocence. Many, however, find themselves in unsheltered homeless conditions with no resources for extricating themselves from their status.

The abuse of *ex parté* restraining orders in the U.S. has been so pervasive[11] that social scientists began studying the effects of that abuse on the population in 2011.[12] Social scientists now formally refer to the abuse of "kick-out orders" and false accusations in family courts as "Legal and Administrative Violence" (LAV). The U.S. Center for Disease Control (CDC) now recognizes legal and administrative abuse as a fourth type of domestic violence. Berger JL, Douglas EM, Hines DA. *The mental health of male victims and their children affected by legal and administrative partner aggression.* Aggress. Behav. 2016 Jul;

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[11] Statistics are compiled from the National Crime Information Computer and the National Center for State Courts (NCSC) data for the year 2008. Although we were unable to locate statistic analysis for more recent years, it is reasonable to believe that the 2008 statistics in any given year would vary in direct proportion to the population of adults in the U.S.. Available at: https://www.acrosswalls.org/datasets/punishment-us-dv-synth/?otxkey=datasets-punishment-us-dv-synth&otxrp=sheet%3A+restraining+orders+nationally

[12] The field of social science has developed a system of measuring the extensive damage caused by false accusations in family courts, restraining orders and the legal system. The measurement is known as a Legal Abuse Scale (LAS). Gutowski, E.R., Goodman, L.A. *Coercive Control in the Courtroom: the Legal Abuse Scale (LAS). J* Fam Viol 38, 527–542 (2023) Available at: https://doi.org/10.1007/s10896-022-00408-3. *But see,* Witt, Markus, *The Legal abuse scale (LAS)- A cautionary tale of legal and scientific abuse* (2021) (The initial LAS is not gender neutral).

2(4):346-61.[13]

Professor Denise Hines at George Mason University reports that 73% of men who experienced female perpetrated domestic violence were victims of coercive threats from the abusive spouse to be falsely accused in the courts. 56% percent of men who experienced female perpetrated domestic violence were actually falsely accused in the court system by the abusive spouse. Hines DA, Douglas EM, Berger JL. "*A self-report measure of legal and administrative aggression within intimate relationship*s." Aggress Behav. 2015 Jul-Aug;41(4):295-309. doi: 10.1002/ab.21540. Epub 2014 May 31. PMID: 24888571.

The second most common cause for homelessness is the loss of income. Economic reports show that housing is now unaffordable to tens of millions of citizens in the U.S.. Some may subscribe to the false stereotype that people are homeless by choice and a preference to avoid employment. The economic realities, however, are that even with employment there are many people in the U.S. who are unable to earn the income necessary to pay for even basic housing. "*National Housing Market Summary*," U.S. Dept. Housing & Urb. Develop., December 2023.

The U.S. Department of Housing and Urban Development (HUD) recently reports that the housing affordability index for the U.S. population is now the lowest it has been since the turn of the century. HUD also reports that the majority of persons earning a

[13] doi: 10.1002/ab.21630. Epub 2015 Nov 1. PMID: 26522849.

median income cannot afford housing in the current economic climate. *Id.* at 6, "Rental and Homeownership Index Values" Table and graph.

2. The Scope of Homelessness in the U.S.

According to HUD, at any given time, there are about 700,000 homeless persons in the U.S. Experts agree, however, that this number is probably understated. The actual number of homeless people in the U.S. is probably around 800,000 in any given year.

It is important to make a distinction between homeless people who are sheltered, and homeless people who are unsheltered. Unsheltered persons, according to HUD, are about 10% of the homeless population. *See generally*, *A Guide to Counting Unsheltered Homeless People, U.S. Dept. Housing & Urb. Develop.*, HUD's Homeless Assistance Programs (2023) ("An unsheltered homeless person resides in: a place not meant for human habitation, such as cars, parks, sidewalks, abandoned buildings (on the street").

The City of Grants Pass is targeting **unsheltered homeless** with its scheme of ordinances. The State of Oregon has the highest concentration of homeless who are unsheltered of any state in the U.S. (65%). *The 2023 Annual Homelessness Assessment Report (AHAR to Congress), U.S. Dept. Housing & Urb. Develop*. At 54 2023.[14]

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[14] Available at:

The most striking demographic of the unsheltered homeless is that men comprise about 80-84% of the unsheltered homeless. Griffith, Cynthia, "*Men are Overrepresented and Underserved Within the Homeless Community*," Invisible People (2021).[15] This is due to many factors, including the complete absence of domestic violence shelters for men across the United States, and in jurisdictions such as the Petitioner (in which men are at least half of the victims of domestic violence). *See* Hines, Prof. Denise & Douglas Emily M., *Relative Influence of Various Forms of Partner Violence on the Health of Male Victims: Study of Help Seeking Example*, 17 Psych. Of Men and Masc. 3-16 (2016). Another factor perpetuating men in unsheltered homeless conditions is their disability due to chronic, severe, treatment-resistant depression which afflicts about 77% of the unsheltered homeless. Recent scientific advancements have proven that men are at least 4 times more medically susceptible to severe clinical depression than women due to genetic and physiological differences. *Id.*

Middle-aged and elderly men comprise the single largest growth in the homeless in recent years. Homelessness is often fatal for men over 50. Brown RT, Evans JL, Valle K, Guzman D, Chen Y, Kushel MB. Factors Associated With Mortality Among Homeless Older Adults in California: The HOPE HOME Study. *JAMA Intern Med.*2022;182(10):1052–1060. Another

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https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf

[15] Available at: https://invisiblepeople.tv/men-are-overrepresented-and-underserved-within-the-homeless-community/

significant factor in this demographic homeless acceleration is that our nation is now discharging, *en masse*, the large population of over incarcerated men who are now aged, disabled and unemployable because of criminal records.

B. The role of severe clinical depression in perpetuating unsheltered homelessness

Studies unanimously confirm that 77% of unsheltered homeless people are afflicted with disabling, severe, chronic, treatment resistant clinical depression. Contrary to many lingering misconceptions, modern science and medicine have recently uncovered that severe depression (accompanied by suicidal ideation) is not a "mental illness." Severe clinical depression is a physical illness that dictates many of the afflicted person's thoughts, emotions and perceptions. A full discussion of modern science and medicine on this subject is beyond the scope of this brief. However, Dr. Edward Bullmore, head of the Department of Psychiatry at Cambridge University provides us with insights into the new landscape of awareness as to the physiology and neuroscience of clinical depression as a physical illness. Bullmore, Prof. Edward, THE INFLAMED MIND, Short Books Ltd., Cambridge 2019.

Although beyond the scope of this brief, we request this Court's notice that a legal analysis and discussion of clinical depression, in the context of the homeless, arises almost every day in the opinions of U.S. District Courts and U.S. Courts of Appeals. This legal

analysis and discussion is now inextricably a part of the judicial landscape in American jurisprudence and *stare decisis*. *See e.g.*, *Sense v. Shinseki*, 644 F.3d 845, 874 (9th Cir. 2011) ("Veterans who are deprived of timely health care for depression are denied the opportunity to rehabilitate in a more timely manner and to avoid sinking deeper into depression and disability").

The Ninth Circuit is home to 42% of the nation's homeless population. *State of Homelessness; 2023 ed.*, National Alliance to End Homelessness 2023.[16] The issue of severe clinical depression in men, causing and perpetuating homelessness arises frequently in U.S. courts reviewing Social Security Administration denials of disability to homeless men suffering from depression. *See e.g.*, *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001) (The ALJ's decision to deny social security disability was not supported by the evidence which included: "medical diagnoses of chronic alcoholism, non- insulin dependent diabetes mellitus, history of pulmonary tuberculosis, peripheral edema, and a "mood disorder" [technical euphemism for extreme depression accompanied with suicidal ideation], secondary to chronic substance abuse and chronic alcoholism, associated with depressive features which are moderate to severe, and social stressors of homelessness").

The Petitioner and its *amici* supporters

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[16] Available at:
https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness/

relentlessly point out that there is a high degree of substance abuse among the unsheltered homeless. Some may jump to the conclusion that this is a moral failing on the part of the homeless that somehow justifies imposing harsh treatment on the unsheltered homeless. As most of the unsheltered homeless are men, it is important for the judiciary to note that modern science, in the last 5 years, has determined that substance abuse among men is genetically compelled by DNA in response to clinical depression. Seney ML, Huo Z, Cahill K, French L, Puralewski R, Zhang J, Logan RW, Tseng G, Lewis DA, Sibille E. *Opposite Molecular Signatures of Depression in Men and Women*. Biol Psychiatry. 2018 Jul 1;84(1):18-27.[17]

C. The unsheltered homeless as a suspect class.

Given all of the foregoing factors, the issue arises in this case as to whether the Petitioner targeting the unsheltered homeless in its jurisdiction presents a suspect class and invokes strict scrutiny of the Petitioner's scheme for fines and imprisonment.

We invite this Court's notice of its pronouncements on the issue of discrimination.

The courts should scrutinize any legislation

[17] doi: 10.1016/j.biopsych.2018.01.017. Epub 2018 Feb 19. PMID: 29548746; PMCID: PMC6014892. Available at [Nat'l Lib. of Medicine]:
https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6014892/

> that, *inter alia*, reflects "prejudice against discrete and insular minorities" who are not protected in the majority empowered political process. *United States v. Carolene Products Co.*, 304 U.S. 144, 154 n.4 (1938).

It is difficult to conceive of a discrete and insular minority more vulnerable and isolated from empowerment in the political process than the unsheltered homeless afflicted with poverty, severe disabilities, and an enforced struggle for survival on a daily basis. *See generally*, Rose, Henry, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question,* 34 Nova Law Review 407 (2010) (Loyola)

In the Ninth Circuit's majority opinion in *Martin v. Boise,* Judge Berzon eloquently quotes Anatole France:

> 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.

Martin v. City of Boise, 920 at 923 F.3d 584 (2019). (From "*Le Lys Rouge*." Anatole France is an exemplary writer of political irony among men of letters in French literature).

The record in this case shows that the Petitioner is deliberately using strict liability statutes to impose jail sentences on a highly vulnerable and discrete class of citizens. This compels strict scrutiny.

II. The Constitution restrains criminalization of innocent acts.

The Petitioner provides us with a cursory summary of the ordinances in question.

> Grants Pass has adopted three ordinances related to public sleeping and camping. The first prohibits sleeping "on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety." Grants Pass Municipal Code § 5.61.020(A). The second prohibits "[c]amping" on "any sidewalk, street, al- ley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct," § 5.61.030, with a "[c]ampsite" defined as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed," § 5.61.010(B). And the third prohibits camping specifically in the City's parks. § 6.46.090. Op. Br. of Pet. at 6.

The Petitioner then makes a series of assertions and arguments advancing the constitutionality of this scheme.

A. Strict Liability

It is important to note that these ordinances are strict liability. Strict liability laws were almost unknown in Western law until about the middle of the 19th Century. Francis B. Sayre, *Mens Rea*, 45 Harv. L. Rev. 974, 982–83 (1932); Albert Levitt, *Origin of the Doctrine of Mens Rea*, 17 Ill. L. Rev. 117 (1922). *See*, Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 St. John's L. Rev. 725, 726 (2004). They began as regulations for facilitating commerce, industry and building infrastructure, in the wake of the industrial revolution, by providing for nominal fines to enforce codes and regulations such as building regulations. They were restricted to nominal fines and petty offenses. In the ensuing centuries, however, strict liability statutes have proliferated at the state level even in serious crimes. *See*, A. Salzman, *Strict Liability and the United States Constitution – Substantive Criminal Law Due Process,* 24 Wayne L. Rev. 1571, 1640 (1978).

In *Robinson*, and in every case of this Court deciding the issue of criminality, this Court has followed thousands of years of common law requiring that a government can only punish a citizen if the citizen voluntarily engages in a criminal act, with a criminal state of mind. *Morissette v. United States*, 342 U.S. 246 72 S.Ct. 240 96 L.Ed. 288 (1952) (There must be some criminal mental state [*scienter*] before the government can impose any criminal liability.)

What is the crime the Petitioner is criminalizing

in this case? It is punishing a human being for possessing a blanket or sleeping bag, in public, for the sole purpose of avoiding death from hypothermia. Is that voluntary behavior or is that behavior under duress? Is it even anti-social behavior or is it simply unsightly and inconvenient to the Petitioner's sense of aesthetics? Does someone who sleeps in public, with a blanket, when they have nowhere else to go, do so with a criminal state of mind or an innocent state of mind fixed on self preservation?

The Petitioner and its supporters argue that a $600.00 civil fine is not heinous and is therefore not within the purview of the Eighth Amendment.

To a father with two children, fleeing an abusive spouse, however, $600.00 is food for him and his children for at least an entire month. $600.00 is a month of low cost shelter for him and his children, if no shelter is available. Forcing an abused Father and his children to pay a $600.00 fine for sheltering in their automobile, or for possessing blankets to keep from freezing to death is, or should be, both cruel and unusual in our enlightened society.

B. Petitioner's Arguments

Many of Petitioner's arguments, and the arguments of its *amici* supporters, rest on a misperception of the Eighth Amendment and its English predecessor in the English Bill of Rights.

The misperception implies that the Eighth

Amendment applies only to the form of punishment rather than the severity of the punishment or the power of the state to impose punishment at all.

This misperception of the Eighth Amendment is most apparent in this statement in the Petitioner's opening brief.

> b. The Eighth Amendment's English antecedent, its ratification history, and post-ratification commentary all strengthen the understanding that the Cruel and Unusual Punishments Clause regulates methods of punishment, not substantive criminal responsibility.
>
> Op. Br. of Pet. At 20.

In support of this, the Petitioner offers an example from Britain of one Mr. Titus Oates. After Parliament eliminated the death sentence for perjury as cruel and unusual punishment, Mr. Oates was convicted of perjury and the trial judge sentenced him to life in prison, with the further punishment of being pilloried in public 4 times a year, and annually whipped in public. Mr. Oates appealed to Parliament for mercy from the judge's ruling on his sentence as being cruel and unusual.

The Petitioner advances this historical anecdote to support the assertion that the English Bill of Rights, and its prohibition against cruel and unusual punishment was limited to punishments that involved cruel forms of punishment, such as whipping and pillorying.

What the Petitioner has related about Mr. Oates is not an accurate version of history.

Mr. Oates was an Anglican minister. He hated Catholics. In 21st Century colloquial English terms, he contrived a conspiracy theory about two Jesuit priests, and falsely accused them of conspiring to assassinate the King, in order to weaponize the criminal justice system against them. This became known to history as the "Popish Plot of 1678." Britannica, T. Editors of Encyclopaedia. "*Popish Plot*." *Encyclopedia Britannica*, May 29, 2022. The priests were arrested, tried for treason and executed on the sole basis of Mr. Oates' testimony.

About 7 years after the crown had executed the priests (and 15 more Catholics had been executed for treason (*aka* "Popery")), the Crown prosecutor discovered that Mr. Oates' conspiracy theory against the priests was completely false and that he had perjured.

The Crown prosecutor arrested Mr. Oates, convicted him at trial, and the judge sentenced him to life in prison, with quarterly pillorying and annual public whippings.

In Mr. Oates' appeal to Parliament for mercy, the House of Commons (mostly Anglicans) voted to relieve him of the harsh sentence.

The House of Lords, however, overrode the vote of the House of Commons and vetoed the grant of mercy.

The reasoning of the House of Lords was that since two innocent men had been executed, because of his perjury, then he deserved the punishment. In other words, the punishment fit the crime. This is the essence of the Eighth Amendment. Heinous punishments are permitted for heinous crimes (but the punishment must fit the crime and cannot exceed the crime).

In fact, heinous punishments continued in England long after the enactment of the Bill of Rights in 1689. Burning women alive for treason and publicly dissecting men alive for treason survived until the end of the eighteenth century. Heinous punishments for heinous crimes were also permitted in early states although they were less common in the colonies than in Britain.[18] Whippings continued in both America and England until about 1960. Granucci, Anthony F., *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Cal. L. Rev. 839, (1969)

The *lex talionis,* however, requires that any punishment must be measured to the crime, and, if there is no crime then any punishment is cruel and unusual.

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[18] Thomas Jefferson's draft of a Bill for sentencing guidelines in Virginia is quite gruesome. For example it provided that if a woman raped a boy or man, a hole would be drilled in the cartilage of her nose not less than one half inch in diameter. Thomas Jefferson, *A Bill for Proportioning Crimes and Punishments*, Papers 2:492—504 (1778).

C. *Weems v. United States*

In *Weems v. United States, 217 U.S. 349 (1910)*, this Court ruled on the effect that the Eighth Amendment, and the entire Bill of Rights has on substantive criminal law.

In *Weems*, a man had been convicted in a Philippine Court (then a U.S. protectorate) of making two erroneous bookkeeping errors in government books totaling about 600 pesos (about $10.80). There was no evidence in the record of any criminal culpability on his part. The Philippine statute was a strict liability statute just like the Grants Pass ordinances.

The mandatory sentence for a violation of the strict liability statute was a minimum 12-20 years in prison at "hard labor to the point of pain," lifetime parole and lifetime forfeiture of most human rights. The prison sentence (*cadena temporal*)[19] was mandatory if the convicted did not pay the fine within a particular time after conviction of the strict liability offense.

In *Weems*, this Court expressly held that there are Constitutional limitations on what a legislature may criminalize. This Court in *Weems* explained why there must be power over the legislature to restrain the legislature's criminalization of innocent acts for

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[19] *Cadena tempora*l was from Spanish law and was a holdover from the Spanish occupation of the Philippines as a colony. *Cadena temporal* was a mandatory minimum sentence of at least 12 years and one day at hard labor "to the point of pain" for conviction of any felony as well as loss of many civil rights for life, and, lifetime parole. *Weems*.

improper purposes [such as driving homeless people out of Grants Pass Oregon]

> With the power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? … Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister. *Weems* at 373.

The Grants Pass ordinances in this case are strict liability ordinances that impose a jail sentence for failure to pay, without any regard to whether the offenses charged under the ordinances are willful, voluntary or involuntary. The ordinances also impose strict liability with no burden of proof on the state for any culpable state of mind. The record in this case also shows that the Petitioner knows that homeless people cannot pay these fines. This Court, in *Weems,* held that such a statute is beyond the power of the legislature to enact with criminal penalties.

> It follows from these views that, even if the minimum penalty of *cadena temporal* had been imposed, it would have been repugnant to the bill of rights. In other words the fault is in the law, and, as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings. *Weems* at 382.

Seventy years later, this Court affirmed that there are substantive limitations on what a legislature is permitted to criminalize. *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (" … and third, it [Eighth Amendment] imposes substantive limits on what can be made criminal and punished as such, *e. g.*, *Robinson v. California*, *supra*.")

III. ***Lex Talionis*** and the Eighth Amendment

Lex talionis is the age-old term for the jurisprudence that applies to the Eighth Amendment and its predecessors. Granucci, Anthony F., *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Cal. L. Rev. 839 (1969) (This is a splendid exposition of the history and analysis pertaining to the Eighth Amendment and its predecessors. Cited in *Ingraham v. Wright,* 430 U.S. 651 n. 29). *Lex talionis* means the law of accountability or balancing. We know it in the form of many colloquial expressions that include: "An eye for an eye," "no harm, no foul" and "settling the score." *Lex talionis* permits judicial punishment and retribution but allows for mercy and does not require punishment or retribution. In addition, the *lex talionis* places limitations on judicial and legislative punishment and retribution so that the punishment does not exceed the injury from the crime committed. We invoke this concept in common terms when we use the expression: "The punishment must fit the crime." *Lex talionis* also proscribes any punishment for something that is not a crime.

Proscribing punishment for something that is not

a crime is the meaning of Justice Stewart's sentence in the holding in the *Robinson* case in which he wrote: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson* at 667. *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (" … and third, it [Eighth Amendment] imposes substantive limits on what can be made criminal and punished as such, *e. g.*, *Robinson v. California*, *supra*.")

Historians typically label the Eighth Amendment's origin as the English Bill of Rights in 1679. The Eighth Amendment was taken word for word from the same provision in the English Bill of Rights. The English Bill of Rights is the first mention of restraint on punishment in English law. The origin of the Eighth Amendment and the English equivalent is far more ancient.

Humans have a primal need for justice. The need for justice, as well as the need for retribution is an innate component of human consciousness.

The first recorded articulation of the *lex talionis* and the Eighth Amendment is in Aristotle's *Ethica Nicomachea*, Book V, ch.4, 4 (340 B.C.).

> Hence the injustice here is the inequality, the judge endeavors to equalize it: inasmuch as when one man has received and the other has inflicted a blow, or one has killed and the other been killed, the experience of suffering and perpetration of the criminal act results in inequality, but the judge endeavors to make

> them equal by the penalty or punishment he imposes, taking away the [criminal's unjust] gain.[20]

The essence of *lex talioni*s, and the Eighth Amendment, is balance. The punishment cannot exceed the crime. By necessary corollary, if there is no crime or harm, there can be no punishment.

A. *Martin v. Boi*se

The holding in *Martin* is as straightforward as the holding in this Court's *Robinson* opinion and it is based on the same analysis.

> We consider whether 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. We conclude that it does. *Martin* at 584.

The analysis that the 9th circuit applied in reaching this conclusion in *Martin* was taken from a

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[20] ὥστε τὸ ἄδικοντοῦτο ἄνισον ὂν ἰσάζειν πειρᾶται ὁ δικαστής: καὶ γὰρ ὅταν ὃ μὲν πληγῇ ὃ δὲ πατάξῃ, ἢ καὶ κτείνῃ ὃ δ᾽ἀποθάνῃ, διῄρηται τὸ πάθος καὶ ἡ πρᾶξις εἰς ἄνισα: ἀλλὰ πειρᾶται τῇ ζημίᾳ ἰσάζειν, ἀφαιρῶν τοῦ κέρδους. Bekker Number 1132a.4 [Counsel's translation paraphrasing for legal clarity Aristotle and H. 1868-1944. Rackham. 1926. *The Nicomachean Ethics*. Cambridge, Mass.: London, Harvard University Press]

previous 9th Circuit case that the Court had eventually vacated as moot due to settlement. The previous case is: *Jones v. City of Los Angeles*, 444 F.3d at 1135 (9th Cir. 2006). The panel in *Jones* noted that this Court did not decide the issue of voluntary or involuntary conduct attending a status when it decided the *Powell* decision; the panel in Jones noted that in *Powell*, this Court merely decided that there was insufficient evidence to conclude that the alcoholic afflicted person in *Powell* had acted involuntarily when he appeared intoxicated in public. The panel in *Jones* then correctly reasoned and held:

> Thus, five Justices [in the *Powell* decision] gleaned from *Robinson* the principle that "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." *Jones*, 444 F.3d at 1135 ; *see also United States v. Robertson* , 875 F.3d 1281, 1291 (9th Cir. 2017). *Martin* at 1048 (quoting *Jones*).

The Petitioner in this case argues that this Court should disregard any reading of Justice White's dissent in *Powell* because it is not the majority opinion in *Powell*. Irrespective of a majority or plurality interpreting the *Robinson* opinion, however, *Robinson* speaks for itself.

> In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or **involuntarily**.[9] We

> hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any **irregular** behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. *Robinson* at 667 [**Bold** added for emphasis]

Homelessness is involuntary. Every expert will testify that it is involuntary; it is a rational presumption that someone sleeping outdoors is doing so out of necessity. Sleeping and bundling against the cold to keep from freezing to death is not "irregular" behavior in any rational scheme of perception.

From the strength of that premise, the 9th Circuit reasoned in *Martin*:

> Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* [*Jones* at 1136] As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id.* [*Jones*] at 1137.

Martin at 1048.

The 9th Circuit's analysis in *Jones*, *Martin* and the instant case is consistent. The Petitioner and its supporters, however, are overlooking the emphasis that this Court, and lower courts, put upon the presumptions involved in criminalizing the necessary life sustaining acts of the homeless. Such over criminalization, through irrational presumptions in strict liability ordinances, immerses the homeless further in a *circulus vitiosis* (vicious circle) that severely impairs their ability to extricate themselves from homeless status. The punishment is far more than a fine to the homeless. Foscarinis, Maria, Downward Spiral: *Homelessness and its Criminalization*, 14 Yale Law & Pol. Rev. 1 (1996) (Ms. Foscarinis is a former Executive Director of the National Law Center on Homelessness & Poverty). *See*, Skolnik, Terry, *Rethinking Homeless People's Punishments*, 22 New Crim. L. Rev. 73 (2019) (Univ. of Cal.)

There is nothing in the 9th Circuit's opinions that proscribes local governments from criminalizing irregular behavior such as use of narcotics, assault, theft, or other common law crimes. The 9th Circuit merely proscribes local governments from using strict liability ordinances to punish the homeless for necessary life sustaining conduct, such as sleeping or protecting themselves from the elements. *See*, Note, *Jones v. City of Los Angeles: In Search of a Judicial Test of Anti-Homeless Ordinances*, 25 U. Minn. J. L. & Inequality 515 (2007) (This note contains a thorough analysis of the 9th Circuit's decision in the *Jones* case as well as a discussion of the presumptions relevant in Amend. VIII analysis).

B. *The Present Case*

The majority opinion in the instant case echoes the holding in *Martin*:

> 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." *Id* [*Jones* at 1138]. 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* at 1048.

The Petitioner and its supporters assert that the 9th Circuit, in formulating a bright line, has somehow acted arbitrarily. This assertion may benefit from an application of common sense and an application of elementary criminal law.

C. A Narrow Injunction

The bright line the 9th Circuit imposes on local governments addresses the strict liability that the Petitioner and its supporters want to impose on homeless persons in their jurisdiction. If the ordinances in question imposed a burden on the government entities to prove that the conduct of homeless person

sleeping in public is voluntary, as opposed to involuntary, there would be no reason for the bright line that the 9th Circuit has imposed.

The strict liability nature of these ordinances does not serve justice or public benefit. It simply weaponizes the criminal justice system to unconstitutionally address a social problem. The record in this case shows that the Petitioner's motive in this case is to target a vulnerable class by abuse of the criminal justice system.

> A city councilor made clear the City's goal should be "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." The planned actions resulting from the Roundtable included increased enforcement of City ordinances, including the anti-camping ordinances.

Johnson v. City of Grants Pass, 50 F.4th 787, 794 (9th Cir. 2022) (This is the original 9th Circuit opinion affirming the injunction of the U.S. District Court).

There is precedent in this Court for affirming the 9th Circuit's injunction in this case. In *Dombrowski v. Pfister*, 380 U.S. 479 (1962), this Court set out the guidelines for enjoining statutes that are likely to infringe on Constitutional rights. In *Dombrowski* the rights involved were First Amendment rights. However, this Court's reasoning in the *Dombrowski* case is written in such as way that it could apply to any statutory scheme that infringes on constitutional

rights.

This Court noted that it was appropriate for the lower courts to strike down statutory schemes that infringe on constitutional rights so as not to expose each individual affected by the scheme to protracted litigation in the courts

> If the rule were otherwise, the contours of regulation would have to be hammered out case by case—and tested only by those hardy enough to risk criminal prosecution to determine the proper scope of regulation. [Citation omitted]. *Dombrowski* at 487.

In its *amicus* brief, the United States asserts: "The court of appeals erred, however, in failing to require a more particularized inquiry into the circumstances of the individuals subject to the City's ordinances." *Amicus* Br. United States at 28. With due respect to the United States, the responsibility for that inquiry lies on the government, the City and the prosecution in each case. It is not an appropriate burden to place on the court of appeals. The injunction the court of appeals upholds in this case is limited to persons who are involuntarily homeless. It is incumbent on the state to prove that it is voluntary if the state wishes to criminalize such innocuous human behavior as sleeping and evading hypothermia. To quote *Dombrowsk*i:

> Here, no readily apparent construction [of the statute] suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,

> and appellants [defendants] are entitled to an injunction. *Dombrowski* at 491.

These ordinances are so vague and broad as to include any and all humans resting in public on a strict liability basis. There is no *mens rea* requirement and the proscribed behavior in the statute is so universal and common that it attacks even the most innocent in a population. The court of appeals properly struck them down and enjoined them, and the burden of inquiry as to whether the state is criminalizing involuntary conduct properly belongs on the state, not the public and the Courts.

The 9th Circuit in affirming the injunction has properly placed the burden of inquiry where it belongs, by limiting the injunction only to the involuntarily homeless, and placing the burden of proof on that issue on the state.

There are sensible alternatives to weaponizing the criminal justice system against the homeless to address the social problem of homelessness. Rankin, Sara K., *Punishing Homelessness*, 22 New Crim. L. Rev. 99 (2019) (Univ. of Cal.)

The Petitioner, for example, protests that the 9th Circuit's bright line is so onerous as to vitiate government authority over the homeless, and imposes a Herculean burden on governments to count homeless shelter beds available. ("And even if governments could reliably determine voluntariness, they lack the resources to undertake the "monumentally difficult" task of counting "available shelter beds" and

"homeless residents" on a nightly basis.") *Pet. Op. Br.* at 45.

This assertion is not grounded in actual experience. Every governing city in the United States has a dispatcher for emergency services. Jurisdictions such as Grants Pass can request (or even require by ordinance) that organizations offering beds for the homeless phone in to the dispatcher their approximate bed availability each afternoon or early evening. This process would literally consume a few minutes of a dispatcher's time. Local police are in constant contact with dispatch on a regular basis throughout each shift and the dispatcher can convey the information on available beds to the officers having an encounter with a homeless person. Many cities already have adopted this method and there are readily available protocols for local governments to adopt. Institute For Community Alliances, *Guidelines for County Beds and Units for Homeless Providers Housing Inventory Chart* (2019).[21]

The City of Los Angeles has filed an *amicus* brief in this case (in support of neither party) (March 4, 2024). In their brief, the City agrees with the 9th Circuit's holdings in *Jones*, *Martin* and the present case. The City of Los Angeles seeks this Court's clarification of a jurisdiction's duties in response to the 9th Circuit's opinions.

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[21] Available at: https://static1.squarespace.com/static/54ca7491e4b000c4d5583d9c/t/5c47a37a032be4dcbfd23309/1548198778279/HIC+Bed+Guide.pdf

One method this Court may employ to clarify the holdings in *Robinson*, *Jones*, *Martin* and the present case is to remind the Bar and the Bench that statutes (ordinances) must impose a burden on the state to prove a culpable *mens rea*. This could prevent governments from abusing the criminal justice system to address social problems. It would also be appropriate with the vulnerability of classes of persons, such as the homeless, to emphasize that, under *Robinson,* the state cannot criminalize involuntary acts.

CONCLUSION

This Court should uphold the decision of the Court of Appeals.

"Man's inhumanity to man, makes countless thousands mourn." Sir Robert Burns

Respectfully Submitted,
March 20, 24

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