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 FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND NINETEEN AFFILIATES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before this Court as direct counsel and as *amicus curiae*, including in cases interpreting and applying the Eighth Amendment. *See, e.g.*, *Moore v. Texas*, 139 S. Ct. 666 (2019); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hudson v. McMillian*, 503 U.S. 1 (1992); *Wilson v. Seiter*, 501 U.S. 294 (1991).

The ACLU of Alaska, ACLU of Arizona, ACLU of Delaware, ACLU of Hawai'i, ACLU of Iowa, ACLU of Kansas, ACLU of Kentucky, ACLU of Missouri, ACLU of Montana, ACLU of New Hampshire, ACLU of New Mexico, New York Civil Liberties Union, ACLU of Northern California, ACLU of Oklahoma, ACLU of Oregon, ACLU of South Carolina, ACLU of Southern California, ACLU of Utah, and ACLU of Washington are state affiliates of the ACLU. The ACLU and its affiliates routinely advocate for the statutory and constitutional rights of unhoused people, including through litigation in federal and state courts. The proper resolution of this case is, therefore, a matter of significant importance to the ACLU, its affiliates, and their members.

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[1] No party has authored this brief in whole or in part, and no one other than amici, their members, and their counsel have paid for the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Punishing a person for sleeping in public when they have nowhere else to go violates our Constitution's prohibition on cruel and unusual punishments. The Eighth Amendment's text, history, and tradition demonstrate that it prohibits punishments that are disproportionate to the crime. This Court has long interpreted the Amendment to that effect, and Petitioner does not dispute that proposition. Pet. Br. 23. Nor do they take issue with this Court's application of that principle, in *Robinson v. California*, 370 U.S. 660 (1962), to prohibit the criminalization of an individual's status. Pet. Br. 38–40. Amici offer this brief to underscore that the Court's well-founded proportionality jurisprudence is grounded in the text, history, and tradition of the Eighth Amendment. Amici further contend that the Court's long-settled proportionality principles govern this case and support the decision below.

The Eighth Amendment's language was imported from the English Bill of Rights, which was itself grounded in a long tradition of proportionality in punishments and an evolving common law understanding of what is "cruel and unusual." Early application by lower courts in the United States confirms that the language of the Amendment barred disproportionate penalties that were contrary to contemporary standards.

Consistent with the clause's original understanding, this Court has interpreted the cruel and unusual punishments clause for more than 100 years to prohibit disproportionate punishment. Three principles emerge from the Court's caselaw. First, a

punishment cannot be viewed in a vacuum but must be evaluated against the gravity of the offense, as understood by contemporary society. *See, e.g.*, *Solem v. Helm*, 463 U.S. 277, 290–91 (1983). Second, whether a punishment is unconstitutional also requires consideration of an individual's relative culpability, with particular concern for punishment imposed on unintentional conduct, *see, e.g.*, *Enmund v. Florida*, 458 U.S. 782, 800 (1982), as well as contemporary understanding of characteristics, such as youth or intellectual disability, that bear on culpability, *see, e.g.*, *Thompson v. Oklahoma,* 487 U.S. 815, 821–23 (1988). Third, a punishment may be disproportionate if it does not further any legitimate penological goals. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 67 (2010).

Robinson fits squarely within this Court's Eighth Amendment precedent. Like the cases that preceded and followed it, *Robinson* reaffirmed that a punishment—there, a 90-day term of imprisonment—"cannot be considered in the abstract." 370 U.S. at 667. While 90 days' incarceration is not excessive for many crimes, the Court held that it was unconstitutional when imposed for the "'status' of narcotic addiction[,]" in light of contemporaneous understandings of substance use disorders. *Id.* at 666.

Given this well-established doctrine, it is not surprising that Petitioner does not seek to challenge either the proportionality principle or *Robinson*. But Petitioner errs in contending that the decision below is an impermissible extension of those principles. The punishment imposed by Grants Pass on individuals who must sleep in public is disproportionate, because individuals with no choice cannot be said to be blameworthy, their "offense" is low-level and poses no

danger to others, and the punishment fails to advance any legitimate penological goals.

Petitioner argues that the Eighth Amendment addresses only the *method* of punishment, not what the state chooses to punish. But a proportionality analysis necessarily examines both the conduct and the penalty, as the Court's decisions in the sentencing and capital punishment settings demonstrate.

When applied to people with nowhere else to go, the ordinances in this case disproportionately punish unavoidable, life-sustaining, and fundamentally human acts. Punishing the most vulnerable among us for such behavior violates the Eighth Amendment. The decision below should be affirmed.

ARGUMENT

I. The Eighth Amendment Prohibits Disproportionate Punishments.

The Eighth Amendment's text, history, and tradition demonstrate that it prohibits disproportionate punishments. First, both the Amendment's text and its original meaning incorporate proportionality principles informed by contemporary standards and practices. Second, the Amendment's language and common understanding were adopted from parallel language in the English Bill of Rights, which itself was grounded in principles of proportionality and evolving common law standards. Finally, early American courts applied language identical or analogous to the Eighth Amendment using a proportionality analysis and contemporary standards, confirming the Eighth Amendment's original meaning.

A. The Eighth Amendment's Text and Original Meaning Prohibit Disproportionate Punishments Guided by Contemporary Standards.

Constitutional interpretation begins with the text. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "Taken together," the three clauses "place parallel limitations on the power of those entrusted with the criminal-law function of government." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (internal quotation marks and citation omitted).

The Amendment's third clause is at issue here: "nor cruel and unusual punishments inflicted." Within that clause, three words demand focus: "cruel," "unusual," and "punishments." Each of these words contributes to the phrase's idiomatic meaning. *See D.C. v. Heller*, 554 U.S. 570, 576–77 (2008) ("Normal meaning may of course include an idiomatic meaning[.]"). And each supports reading the clause to prohibit disproportionate punishments, as informed by contemporary standards and practices.

At the founding, Samuel Johnson's dictionary defined "cruel" as "[p]leased with hurting others; inhuman; hard-hearted; void of pity; wanting compassion; savage; barbarous; unrelenting" and "[b]loody; mischievous; destructive; causing pain." 4 Samuel Johnson, A Dictionary of the English Language (1773) (Johnson's Dictionary). The term inherently requires comparing the punishment to the act punished. What may be fair for a serious felony

may be a barbarous or destructive punishment for a petty offense. *See, e.g.*, *Weems v. U.S.*, 217 U.S. 349, 380–81 (1910).

"Unusual" was defined as "[n]ot common; not frequent; rare." Johnson's Dictionary, *supra*. Its inverse, "usual," referred to actions that were long-standing and in line with custom. *See id.* Government actions that were new, novel, or contrary to custom were more likely to be "unusual." *See* John D. Bessler, *The Concept of "Unusual Punishments" in Anglo-American Law: The Death Penalty as Arbitrary, Discriminatory, and Cruel and Unusual*, 13 Nw. J. L. & Soc. Pol'y 307, 326–34 (2018) (collecting usage examples); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1770–71 (2008) (*Original Meaning*) (collecting usage examples). Practices that had fallen out of common use, and were therefore no longer consistent with contemporary custom, were also considered "unusual." *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1123 (2019). Because it identifies practices outside of current custom, the term necessarily incorporates an assessment of contemporary community practices and standards.

Finally, "punishments" was defined as "[a]ny infliction or pain imposed in vengeance of a crime." Johnson's Dictionary, *supra*. The term invokes the government's use of the criminal justice apparatus and penal system.

Moreover, at the founding, the phrase "cruel and unusual punishments," adopted from the English Bill of Rights, was understood to be more than a sum of its parts. By 1791, the phrase carried a pre-existing

meaning and codified a pre-existing right. *See* John F. Stinneford, *The Original Meaning of "Cruel"*, 105 GEO. L.J. 441, 474 (2017) ("Americans shared the same common law ideology that animated adoption of the English Bill of Rights, used the same terminology, and saw the Eighth Amendment as entrenching a pre-existing right rather than creating a new one."). *Cf. Heller*, 554 U.S. at 592 ("[I]t has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right.") (emphasis in original). These well-worn words were commonly understood to incorporate a proportionality principle informed by contemporary practices.

The Eighth Amendment was included in the Bill of Rights to address objections that the lack of a "Declaration of Rights" could allow a future tyrannical government to abuse the criminal justice apparatus. *See, e.g.*, 2 The Records of the Federal Convention of 1787, at 637, 640 (Max Farrand ed., 1911) (statement of George Mason). The Framers were concerned not just with barbarous methods of punishment imposed post-conviction, but with abuse of all aspects of the penal power, including the creation of new crimes, the use of torture to extort confessions, and excessive or disproportionate punishments. For example, George Mason objected that without appropriate restraints, Congress could "constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper." *Id.* at 640. Similarly, Patrick Henry asserted that "Congress may . . . say . . . that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity." 3 The Debates In The Several State Conventions On The Adoption Of The

Federal Constitution 447 (Jonathan Elliot ed., 1836) (Elliot's Debates). And Abraham Holmes invoked the Spanish Inquisition—infamous for its practice of torture—and objected that Congress was being given the power to determine "what kind of punishments shall be inflicted on persons convicted of crimes." 2 Elliot's Debates, *supra* at 111.

The Framers might have chosen simply to list, code-like, specific forms of punishment they sought to forbid. But that approach would be easily evaded through development of new forms of penalties and would not capture the fundamental principle that punishment should meet the crime. Holmes objected that, absent a prohibition like the one eventually incorporated in the Eighth Amendment, Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline." *Id.* As constitutional scholar Charles Black explained, the clause's open-ended language was no accident, because "it is plain that [listing prohibited punishments] would have failed to implement the purpose behind the provision, for if a government were specifically shut off from nose-docking and boiling in oil, it could surely find some punishment equally cruel that was not on the list." Charles L. Black, Jr., *The People and the Court* 40 (1960). The Framers therefore adopted an intentionally broad phrase first codified in the English Bill of Rights a century before: "nor cruel and unusual punishments inflicted."

B. The Eighth Amendment's History and Tradition Confirm That It Prohibits Disproportionate Punishments Guided by Contemporary Standards.

The Eighth Amendment's prohibition on disproportionate punishment is deeply rooted in centuries of history. *See Solem*, 463 U.S. at 284–86 (examining history of proportionality and Eighth Amendment).

The principle of proportionality in punishment predates Magna Carta, which in 1215 provided that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement[.]" *Timbs*, 139 S. Ct. at 687–88 (citing § 20, 9 Hen. III, ch. 14, in 1 Eng. Stat. at Large 5 (1225)). Magna Carta required that sanctions be proportionate to the offense, taking into consideration an individual's circumstances or characteristics. *See id.* at 688. *See also* 4 W. Blackstone, *Commentaries on the Laws of England* 372 (1771) (discussing Magna Carta's "rule" that "no man shall have a larger amercement imposed upon him, than his circumstances or personal estate will bear[.]").

Magna Carta's proportionality principle was also applied to physical punishments. Thirteenth century jurist and commentator William Bracton wrote that corporal punishment must be "heavy or light depending upon whether the crimes are major or minor." 2 William Bracton, *On the Laws and Customs of England* 298 (Samuel E. Thorne, trans., Harvard Univ. Press 1968). He emphasized: "It is the duty of

the judge to impose a sentence no more and no less severe than the case demands[.]" *Id.* at 299.

And in 1615, the King's Bench applied that same proportionality principle to the length and conditions of imprisonment. *Hodges v. Humkin, the Maior of Liskerret*, 80 Eng. Rep. 1015 (K.B. 1615) ("Imprisonment ought always to be according to the quality of the offense, and so is the Statute of Magna Charta cap. 14[.]").

Similarly, the principle that laws or practices may fall out of use over time has a long history in common law. While customary laws find their authority through "long and immemorial usage, and by their universal reception[,]" 1 W. Blackstone, *Commentaries on the Laws of England* 64 (1765), "[c]ustome . . . lose[s its] being, if usage faile." Edward Coke, *The Compleat Copyholder* (1630), *reprinted in* 2 *The Select Writings and Speeches of Sir Edward Coke* 564 (Steve Sheppard ed., 2003).

The English Bill of Rights, adopted in the 17th Century, built on this history, providing that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 1 W. & M., sess. 2, ch. 2 (1688).

The punishments clause in the English Bill of Rights is inextricably entwined with the case of Titus Oates. Oates had falsely testified to an elaborate plot to assassinate the king, resulting in more than a dozen people being tried and executed. *See* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 857 (1969). He was subsequently convicted of perjury and sentenced to life imprisonment, and to be defrocked, fined, heavily whipped, and to be pilloried

four times a year for life. The Second Trial of Titus Oates, D.D. at the King's-Bench, for Perjury, A.D. 1685, in 10 *Cobbett's Complete Collection of State Trials* 1227, 1314, 1316-17 (T. Howell ed., 1811) (*Cobbett's Trials*).

Oates' sentencing inspired the cruel and unusual punishments clause in the English Bill of Rights. *See* 10 H.C. Jour. 247 (1689) (discussing Oates's case and stating that "the Commons had a particular Regard to these Judgments, amongst others, when that Declaration was first made"). And following its adoption in 1689, Oates promptly petitioned Parliament for release from judgment under the new clause. *Cobbett's Trials*, *supra* at 1317.

The House of Commons voted to reverse his judgment, asserting that Oates' sentence was "cruel," "unusual," and "of ill Example to future Ages." 10 H.C. Jour. 247 (1689). Representatives objected to the magnitude of his sentence, including his "perpetual Imprisonment[,]" asserting that it was "unusual That an Englishman should be exposed upon a Pillory, so many times a Year, during his Life[,]" and "cruel" for a man to be "whipped in such a barbarous manner, as, in Probability, would determine in Death." *Id.*

Notably, fines, imprisonment, whippings, and the pillory were all in regular use at that time. Bessler, *supra* at 387. Lawmakers objected not to those methods standing alone, but to their combination, when imposed for the crime of perjury. In the House of Commons, representatives protested that "[t]here may be a Precedent for whipping, but for all these parts in one Judgment, let any man give us a Precedent to square with that Judgment." 9 Debates

of the House of Commons, From the Year 1667 to the Year 1694, 291 (Anchitell Grey ed., 1763).

The Members of Parliament used contemporary mores as their measuring stick for disproportionality. Perjury had once been a capital offense. *See Cobbett's Trials*, *supra* at 1314 (presiding judge commenting on the historical punishment for perjury). The punishments inflicted, sparing his life, would not have been disproportionate in comparison to that historical standard. But when applying contemporary standards, representatives decried the excessive whipping, life imprisonment, and dignitary harms from repeated pillorying, and asserted that the sentence should be declared in violation of the recent Declaration of Rights and the "ancient Right of the People of *England*, that they should not be subjected to cruel and unusual Punishments[.]" 10 H.C. Jour. 247 (1689) (emphasis in original).

C. Early American Case Law Confirms That the Eighth Amendment's Language Prohibits Disproportionate Punishments Guided by Contemporary Standards.

Early decisions by state courts applying language identical or analogous to the Eighth Amendment confirm the Amendment's original meaning. This inquiry into early case law can be a "critical tool of constitutional interpretation." *Heller*, 554 U.S. at 605. Early American courts considering whether punishments were "cruel" or "unusual" did so using proportionality and contemporary standards.

In *Jones v. Commonwealth*, the Virginia Supreme Court considered that state's constitutional prohibition against "cruel and unusual punishments."

5 Va. (1 Call) 555, 557 (Va. 1799). The court overturned a sentence imposing a joint fine and imprisonment until the fine was paid, because one defendant's inability to pay would result in disproportionate punishment for the others. *Id.* at 557–58 ("[I]n every information or indictment the fine or amercement ought to be according to the degree of the fault and the estate of the defendant.").

Similarly, in *Ely v. Thompson*, the Kentucky Court of Appeals applied a proportionality analysis in holding that a statute punishing a person of color who "lift[ed] his or her hand in opposition" to a white person was unconstitutional under the state's Eighth Amendment analogue. 10 Ky. (3 A.K. Marsh) 70, 71, 74 (Ky. 1820). The court concluded that it would be "cruel" to punish someone for acts carrying no criminal culpability, such as self-defense or the defense of others. *Id.* at 72, 74. *See also Rogers v. Commonwealth*, 5 Serg. & Rawle 463, 465–68 (Pa. 1820) (considering "usual" punishments and proportionality to strike down punishment of fine and two years of imprisonment at hard labor for assault with intent to pickpocket); *Ex parte Hickey*, 12 Miss. (4 S. & M.) 751, 778, 781 (Miss. 1844) (invoking proportionality principles and surveying current law in other states to strike down common law power of courts to imprison people for contempt because it allowed for "punishment [to] be inflicted to a cruel, an unusual and excessive degree"); *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899), *aff'd*, 180 U.S. 311 (1901) ("But it is possible that imprisonment in the state prison for a long term of

years might be so disproportionate to the offense as to constitute a cruel and unusual punishment.").

In *James v. Commonwealth*, the Pennsylvania Supreme Court applied contemporary standards when determining under the common law that the ducking stool[2] had fallen out of use and therefore could no longer be imposed to punish the "common scold." 12 Serg. & Rawle 220, 231 (Pa. 1825).[3] In an analysis strikingly similar to that used by this Court today, the Pennsylvania court surveyed historical and contemporary usage of the ducking stool. The court determined that it had largely fallen into disuse, resulting in its "repeal[] by the voice of humanity, and not by positive law[.]" *Id.* at 227. The court also considered contemporary mores, noting that the public considered ducking to be a "cruel, unusual, unnatural and ludicrous judgment." *Id.* at 225. And the court traced the history of the ducking stool, again applying contemporary mores when describing with disapproval the misogynistic roots of a punishment inflicted primarily against poor women. *See id.* at 226, 230. The court held that though the ducking stool had seen some modern use, the recent examples provided "too slight a foundation on which to rest a sentence, so hostile to all the policy and humanity of our penal

[2] The punishment included being secured to a stool and "plunged three times in the water." *James*, 12 Serg. & Rawle at 225.

[3] The court did not apply the letter but the spirit of the federal and state constitutions. *James*, 12 Serg. & Rawle at 235 ("I do not take into consideration the humane provisions of the constitutions of the United States and of this state, as to cruel and unusual punishments, further than they show the sense of the whole community.").

code, and so much opposed to the sense of the community." *Id.* at 234.

II. This Court's Eighth Amendment Jurisprudence Has Firmly Entrenched the Proportionality Principle.

Consistent with its original meaning and the early practice of American state courts, this Court has long recognized the cruel and unusual punishments clause as prohibiting disproportionate punishments, informed by contemporary standards and practices.

As early as 1910, the Court recognized that at the core of the right to be free from cruel and unusual punishments is the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems*, 217 U.S. at 367. And the Court has always required this proportionality principle to be informed by society's changing mores. *See, e.g.*, *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (citing *Weems* for the proposition that the scope of the Eighth Amendment's words are "not static"). The Court has continued to apply these same principles for more than a century. *See, e.g.*, *Miller v. Alabama*, 567 U.S. 460, 469–70 (2012) (explaining that the "concept of proportionality" is "central to the Eighth Amendment" and must be viewed "according to the evolving standards of decency that mark the progress of a maturing society" and citing to *Weems* and *Trop*) (alterations, citations, and quotation marks omitted).

A. The Court Has Embraced the Proportionality Principle for More Than a Century.

The Eighth Amendment's proportionality principle was first articulated in Justice Field's

dissent in *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892). The majority did not reach the issue, but Justice Fields explained that the Eighth Amendment prohibited "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* While the punishment at issue in that case—54 years of hard labor—might be appropriate for "felonies of an atrocious nature," it was excessively severe when applied to the defendant's conviction for unlawfully selling alcohol. *Id.*

In 1910, the Court fully embraced this proportionality principle in *Weems*, where, for the first time, it found a sentence—fifteen years of hard labor in chains and permanent loss of civil liberties for falsifying an official document—to be cruel and unusual punishment. 217 U.S. at 365–66, 381. The Court rejected the view that the Eighth Amendment proscribes only "inhuman and barbarous" methods of punishments, *id.* at 368, emphasizing instead "a precept of justice that punishment for crime should be graduated and proportioned to [the] offense," *id.* at 367. Applying this principle, the Court considered whether "[t]he purpose of punishment," including preventing crime and furthering "reformation," could be fulfilled by a less severe punishment, as well as whether the punishment was in line with other contemporary sanctions and was proportional to the culpability of the defendant. *Id.* at 381–82.

Weems explained that the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378. Otherwise, the Eighth Amendment's protections

"would have little value and be converted by precedent into impotent and lifeless formulas." *Id.* at 373.

In its next major cruel and unusual punishments case, *Trop v. Dulles*, the Court reviewed the constitutionality of a statute that stripped military deserters of their citizenship. 356 U.S. at 87–88. The plurality reaffirmed that the right is "not static," but prohibits punishment that is contrary to the "evolving standards of decency that mark the progress of a maturing society." *Id.* at 101. Articulating the proportionality principle, the Court explained that "[f]ines, imprisonment and even execution may be imposed *depending upon the enormity of the crime* . . . ." *Id.* at 100 (emphasis added). And, again, the Court emphasized the punishment's mismatch to the culpability of a defendant, whose conduct "may be prompted by a variety of motives—fear, laziness, hysteria or any emotional imbalance." *Id.* at 91.

Thus, by 1958, the Court had established that the cruel and unusual punishments clause requires consideration of a punishment's proportionality to the offense, as informed by current societal standards.

Over the following six decades, the Court consistently employed this proportionality principle in its Eighth Amendment length-of-sentence, death penalty, and conditions of confinement cases. *See, e.g.*, *Miller*, 567 U.S. at 469–70 (holding that mandatory juvenile life without parole violates the Eighth Amendment and stating that "'[t]he concept of proportionality is central to the Eighth Amendment.' And we view that concept less through a historical prism than according to 'the evolving standards of

decency that mark the progress of a maturing society'") (citations omitted); *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (prohibiting the execution of people with intellectual disabilities and stating that the Court has "repeatedly applied [*Weems*'s] proportionality precept" and "a claim that punishment is excessive is judged not by the standards that prevailed in 1685 . . . but rather by those that currently prevail"); *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (holding that the cruel and unusual punishments clause prohibits "gratuitously allowing the beating or rape of one prisoner by another," because it impermissibly adds punishment to "'the penalty that criminal offenders pay for their offenses against society'" and "serves no 'legitimate penological objectiv[e],' any more than it squares with 'evolving standards of decency'") (citations omitted).

The Court also consistently located this proportionality principle in the text, history, and tradition of the Eighth Amendment. For example, in *Solem*, the Court examined the constitutional text and history, tracing the principle of proportionality from Magna Carta through the adoption of the Eighth Amendment to conclude that proportionality is "deeply rooted" in history and that the Framers "intended to provide . . . the right to be free from excessive punishments." *Solem*, 463 U.S. at 284, 286, 287–88. Moving on to precedent, it found that "[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century." *Id.* at 286. *See also Roper v. Simmons*, 543 U.S. 551, 560–61 (2005) (interpreting the clause "according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design," to support

"the propriety and affirm[] the necessity of referring to 'the evolving standards of decency that mark the progress of a maturing society' to determine which punishments are so disproportionate as to be cruel and unusual") (citing *Trop*, 356 U.S. at 100–101).[4]

B. The Court Has Identified Three Core Considerations in Implementing the Cruel and Unusual Punishments Clause.

In applying the proportionality demand of the Eighth Amendment, the Court has consistently relied on three critical considerations. *First*, punishments must be evaluated in light of the seriousness of a particular offense, as viewed by current society. *See, e.g.*, *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (looking to "recent events evidencing the attitude of state legislatures and sentencing juries" to hold that, while permissible for murder, capital punishment was disproportionate to the crime of rape); *Solem*, 463 U.S. at 296, 297 n.22 (holding life without parole disproportionate to a crime that "involved neither violence nor threat of violence to any person" and was "one of the most passive felonies a person could commit"); *Kennedy v. Louisiana*, 554 U.S. 407, 420

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[4] Justice Scalia surveyed this same history and concluded that the Eighth Amendment contains *no* proportionality principle. *See Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991) (opinion of Scalia, J.). But Justice Scalia's analysis has never been endorsed by a majority of this Court. And it has been rejected by legal historians, who describe it as "deeply—even fatally—flawed[,]" "eschew[ing] any historical analysis" and instead "rel[ying] solely on abstract logic." *Original Meaning*, *supra*, at 1759, 1764. *See also* Michael J. Zydney Mannheimer, Harmelin's *Faulty Originalism*, 14 Nevada L.J. 522 (2014) (refuting Scalia's conclusions).

(2008) (concluding, in light of evolving societal standards, that "[t]hough the death penalty is not invariably unconstitutional," it is disproportionate to non-homicide crimes).

Second, the Court has evaluated the "severity of the punishment in question" by looking to the "culpability of the offenders at issue in light of their crimes and characteristics." *Graham*, 560 U.S. at 67; *see also Enmund*, 458 U.S. at 801 (holding that a defendant's "punishment must be tailored to his personal responsibility and moral guilt"); *Thompson,* 487 U.S. at 821–23 (prohibiting execution for offenses committed under age sixteen after finding that "indicators of contemporary standards of decency confirm our judgment that such a young person is not capable of acting with the degree of culpability that can justify the ultimate penalty").

Third, the Court has considered whether the punishment "serves legitimate penological goals." *Graham*, 560 U.S. at 67. This is because "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71. In *Atkins*, for example, the Court examined whether the execution of intellectually disabled individuals would "measurably advance the deterrent or the retributive purpose of the death penalty." 536 U.S. at 319–21. Unpersuaded, the Court held, "in the light of our 'evolving standards of decency' . . . such punishment is excessive." *Id.* at 321.[5] *See also*

[5] The Court also considers culpability in its evaluation of the fit between the punishment and the penological goal of retribution. *See Atkins*, 536 U.S. at 319 ("With respect to retribution—the interest in seeing that the offender gets his 'just deserts'—the

Enmund, 458 U.S. at 798 (asserting that a punishment that does not "measurably contribute[]" to recognized penological goals "'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment") (citation omitted); *Ewing v. California*, 538 U.S. 11, 29 (2003) ("[O]ur proportionality review of Ewing's sentence must take [the legitimate penological] goal into account."); *Farmer*, 511 U.S. at 833; *Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

III. *Robinson* Fits Squarely Within This Unbroken Understanding of the Cruel and Unusual Punishments Clause.

While Petitioner describes *Robinson v. California* as an "outlier," Pet. Br. 38, it does not ask this Court to reconsider, much less reverse, that decision. In fact, *Robinson* is fully consistent with the Court's longstanding proportionality approach to the Eighth Amendment: It holds, in effect, that it is disproportionate to punish someone for the status of being addicted to drugs.

The *Robinson* Court invalidated a 90-day term of imprisonment for the offense of "be[ing] addicted to the use of narcotics." 370 U.S. at 660, 667. Central to *Robinson*'s holding is the premise that a punishment "cannot be considered in the abstract." *Id.* at 667. Applying this principle, *Robinson* held that any punishment for the "'status' of narcotic addiction," was cruel and unusual. *Id.* at 666.

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severity of the appropriate punishment necessarily depends on the culpability of the offender.").

Robinson's reasoning reflects the same critical considerations present in the Court's prior Eighth Amendment cases. *First*, the Court made clear that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual," but only when applied to the crime of "addiction." *Id.* at 667.

Second, the Court considered the punishment in light of the diminished culpability of the individual, who may have "innocently or involuntarily" become addicted to narcotics and who is not "guilty of any antisocial behavior." *Id.* at 666–67. The *Robinson* Court evaluated culpability "in the light of contemporary human knowledge," citing recent scientific journal articles. *Id.* at 666, 667 n.9.[6]

Third, the Court considered whether less punitive approaches could better serve the state's goals of "discouraging the violation" of narcotics trafficking laws and furthering the "general health or welfare of its inhabitants." *Id.* at 664–65. The disproportionality of the punishment was informed by the fact that the state could achieve its ends through "a range of" less punitive measures, including "public health education," and "ameliorat[ing] the economic

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[6] *Robinson* is in line with this Court's cases finding that certain punishments are always disproportionate when applied to a particular "class of offenders." *Miller*, 567 U.S. at 470. *See, e.g., Roper*, 543 U.S. at 578 (death penalty for juveniles); *Graham*, 560 U.S. at 82 (life without parole for non-homicide offenses committed by juveniles); *Miller*, 567 U.S. at 470 (automatic life without parole for juveniles); *see also Jones v. Mississippi*, 593 U.S. 98, 107–08 (2021) (describing "cases where the Court has recognized certain eligibility criteria, such as sanity or a lack of intellectual disability, that must be met before an offender can be sentenced to death") (citing *Ford v. Wainwright*, 477 U.S. 399 (1986) and *Atkins*, 536 U.S. 304).

and social conditions under which those evils might be thought to flourish." *Id.*

Petitioner's characterization of *Robinson* as an outlier relies on dicta from *Ingraham v. Wright*, which describes *Robinson* as belonging to a distinct category of cases that "impose[] substantive limits on what can be made criminal and punished as such." 430 U.S. 651, 667 (1977).[7] More often, however, the Court has recognized *Robinson* as embodying the proportionality principle at the center of its cruel and unusual punishments jurisprudence. In *Gregg*, for example, the Court cited *Weems*, *Trop*, and *Robinson* as examples of the Court's focus on excessiveness. 428 U.S. at 171–72. In *Solem*, the Court described *Robinson* as applying the same "principle of proportionality" endorsed in *Weems* "to invalidate a criminal sentence," emphasizing its refusal to consider the punishment "in the abstract." 463 U.S. at 287 (citing *Robinson*, 370 U.S. at 667). And in *Atkins*, the Court cited *Robinson* as an example of the Court's repeated application of the "proportionality precept." 536 U.S. at 311.

As noted above, Petitioner does not question *Robinson*, and its validity is not at issue here. As the discussion above makes clear, that is for good reason. *Robinson* is consistent with this Court's precedent, because punishing someone for a status that is beyond

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[7] The *Robinson* Court's consideration of the substantive crime at issue does not remove it from this line of precedent. As early as 1878, the Court described the cruel and unusual punishments clause as constraining the "legislative power" to "define offences." *Wilkerson v. Utah*, 99 U.S. 130, 133 (1878). *See also Weems*, 217 U.S. at 378 (the "legislative power to define crimes and fix their punishment" is subject to constitutional prohibition).

their control is inherently excessive and, therefore, cruel and unusual.

IV. The Decision Below Is Consistent with This Court's Proportionality Jurisprudence Under the Eighth Amendment.

The decision below correctly holds that "it is an Eighth Amendment violation to criminally punish involuntarily homeless persons for sleeping in public if there are no other public areas or appropriate shelters where those individuals can sleep." Pet. App. 19a.[8] Under this Court's longstanding precedent, the punishment is disproportionate to the "crime."

The punishment imposed by Grants Pass cannot be considered "in the abstract." *Robinson*, 370 U.S. at 667. Rather, it must be viewed in relation to the gravity of the offense, "the culpability of the offenders at issue in light of their crimes and characteristics," and whether it furthers a legitimate penological purpose. *Graham,* 560 U.S. at 67.

Here, the non-violent, victimless "offense" of sleeping in public where one has no alternative is not sufficiently grave to warrant punishment. The culpability of the *Grants Pass* plaintiff class is minimal at worst. They "do not 'have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free.'" Pet. App. 14a n.2 (quoting *Martin v. City of Boise*, 920 F.3d 584, 617

[8] The ordinances at issue in *Grants Pass "*prohibit individuals from sleeping in any public space in Grants Pass while using any type of item that falls into the category of 'bedding' or is used as 'bedding.'" Pet. App. 177a. *See also* Amicus Br. of U.S. at 8.

n.8 (9th Cir. 2019)). They therefore invariably must violate the City's prohibition on sleeping in public. *See Enmund*, 458 U.S. at 800 ("[A] defendant's intention-and therefore his moral guilt-[is] critical to 'the degree of [his] criminal culpability,' and the Court has found criminal penalties to be unconstitutionally excessive in the absence of intentional wrongdoing.") (citations omitted) (third alteration in original). The Ninth Circuit's prohibition on punishing individuals who have no access to shelter for sleeping in public is thus supported by the "mismatch[] between the culpability of [the] class of offenders and the severity of [the] penalty." *Miller*, 567 U.S. at 470.

The Grants Pass punishment regime also "lack[s] any legitimate penological justification" and is therefore "by its nature disproportionate to the offense." *Graham*, 560 U.S. at 71. Because individuals with no access to shelter have no choice but to sleep in public, punishing them for doing so does not further retribution or deterrence. Retribution "very much depends on the degree of [a person's] culpability," and so is not furthered by punishing those who have no choice but to violate the ordinances at issue. *Enmund*, 458 U.S. at 800. Likewise, a person cannot be deterred from something they are powerless to change. Incapacitation is also irrelevant for a low-level, non-violent offense resulting in, at most, a short stint in jail. And, far from furthering rehabilitation, imposing unaffordable fines, jail time, and criminal records only makes it harder to obtain employment and stable housing. *See* Amicus Br. of U.S. at 3–4. The only goal these ordinances further, as stated by the Grants Pass City Council President, is "'to make it uncomfortable enough for them in our city so they [referring to homeless individuals] will want to move on down the

road.'" Pet. App. 168a (citation omitted, alteration in original). But our Constitution does not tolerate such punishments that, in intent and reality, "treat members of the human race as nonhumans, as objects to be toyed with and discarded." *Furman v. Georgia*, 408 U.S. 238, 270–73 (1972) (Brennan, J., concurring).

Petitioner's argument to the contrary is unpersuasive. It concedes, as it must, that the Eighth Amendment contains a proportionality principle, *see* Pet. Br. 23, but argues that courts may only consider the *method* of punishment and inquire whether that method is barbarous, *id.* at 16. But Petitioner's methods-only argument is untethered from the Eighth Amendment's text, history, and tradition, which squarely demonstrate that the punishments clause does not limit itself to certain methods of punishment in the abstract, but incorporates a proportionality principle informed by contemporary standards. *Supra* Section I.

Similarly, Petitioner does not ask the Court to reconsider *Robinson, see* Pet. Br. 40, but maintains that the decision below is an impermissible extension of *Robinson*'s "rule against status crimes" to "conduct-based prohibitions." *Id.* at 37. As described above, however, *Robinson* applies the same proportionality principles and considerations found throughout this Court's Eighth Amendment jurisprudence. That same proportionality precept supports the Ninth Circuit's holding in the decision below. No extension of *Robinson*, or any other case, is required.

Like the 90-day imprisonment in *Robinson*, the fines and jail time imposed by Grants Pass, are "not, in the abstract, . . . punishment[s] which [are] either cruel or unusual," *Robinson*, 370 U.S. at 667, but they

are disproportionate as applied to minor "crimes" like sleeping in public or being addicted to narcotics, where enforced against individuals who cannot avoid breaking the law. Petitioner's insistence on a status/act distinction obscures the broader principle at play—penalties are "unconstitutionally excessive in the absence of intentional wrongdoing." *Enmund,* 458 U.S. at 800 (citing *Robinson*, 370 U.S. at 667; *Weems*, 217 U.S. at 363; *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980)).

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Since 1910, this Court has cautioned that the legislature's "great, if not unlimited," power "to give criminal character to the actions of men," risks becoming a "potent instrument of cruelty." *Weems*, 217 U.S. at 372. Laws that criminalize homelessness are no exception. Under these circumstances, "[t]he Judiciary has the duty of implementing the constitutional safeguards that protect individual rights." *Trop*, 356 U.S. at 103. Here, that means applying the Court's longstanding and deeply rooted Eighth Amendment doctrine of proportionality to uphold the decision below.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

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Respectfully submitted,

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