No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS,

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 OF PROFESSOR JOHN F. STINNEFORD AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MATTHEW A. SCHWARTZ
Counsel of Record
AUSTIN P. MAYRON
BETHANY S. LABRINOS
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4197
schwartzmatthew@sullcrom.com

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INTEREST OF AMICUS CURIAE[1]

John F. Stinneford is a professor of law at the University of Florida Levin College of Law who has written extensively about the history and original meaning of the Eighth Amendment. His published works include: *Experimental Punishments*, 95 Notre Dame L. Rev. 39 (2019); *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441 (2017); *Death, Desuetude, and Original Meaning*, 56 Wm. & Mary L. Rev. 531 (2014); *Punishment Without Culpability*, 102 J. Crim. L. & Criminology 653 (2012); *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899 (2011); and *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739 (2008) (cited in *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123 (2019)). Professor Stinneford regularly submits *amicus curiae* briefs in cases implicating the original meaning of the Eighth Amendment, including *Kahler* v. *Kansas* (No. 18-6135), and *Hope* v. *Harris* (No. 21-1065).

Parts of this brief have been drawn and adapted from the above-referenced articles. Professor Stinneford submits this brief to provide the Court with historical context regarding the original public meaning of the Cruel and Unusual Punishments Clause of the Eighth Amendment and its application to vagrancy laws in the United States.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents constitutional questions of exceptional importance regarding whether municipal ordinances that impose fines for sleeping or camping in certain public places violate the Cruel and Unusual Punishments Clause of the Eighth Amendment. This brief addresses the history and original meaning of the Cruel and Unusual Punishments Clause and applies that meaning to the vagrancy laws at issue in this appeal.

The Cruel and Unusual Punishments Clause, as it was originally understood, prohibits cruel innovation in punishment. As a matter of original meaning, a punishment is "cruel" if it is "unjustly harsh," and "unusual" if it is "contrary to long usage." Taken as a whole, the Cruel and Unusual Punishments Clause prohibits punishments that are unjustly harsh in light of longstanding prior practice.

Vagrancy laws, such as the laws at issue in this appeal, have enjoyed long usage dating back hundreds of years, and have not fallen out of common use. Moreover, the imposition of fines for vagrancy is a traditional form of punishment no more harsh than prior practice. Petitioner's laws thus do not violate the Cruel and Unusual Punishments Clause as originally understood.

ARGUMENT

PETITIONER'S VAGRANCY LAWS DO NOT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE.

This is an easy case under the original meaning of the Cruel and Unusual Punishments Clause. The Clause was originally understood to prohibit punishments that are unjustly harsh in light of longstanding

prior practice. Anti-vagrancy laws similar to the ordinances in this case have been common in the English and American legal systems since at least the fourteenth century. Such laws have frequently imposed punishments much harsher than the fines authorized by the challenged ordinances. Because such fines are not unjustly harsh in light of longstanding prior practice, they are not "cruel and unusual." U.S. CONST. amend. VIII.

There is no need for the Court to decide whether the Cruel and Unusual Punishments Clause prohibits only particular methods of punishment or also prohibits disproportionate punishments. The fines authorized by these ordinances are no harsher than the punishments traditionally given for the same or similar offenses and are thus proportionate.[2] Nor is it necessary for the Court to determine whether the Clause imposes any limits on the legislature's power to punish conduct that is not wholly voluntary, because the conception of "involuntariness" adopted by the court below is inconsistent with the "[t]raditional common law concepts of personal accountability," *Powell* v. *Texas*, 392 U.S. 514, 535 (1968) (plurality opinion), that inform the original meaning of the Clause.[3]

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[2] *See* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 909 (2011).

[3] For example, the court below classified persons who had access to religiously affiliated shelters but chose to sleep outside as "involuntar[y]" violators. *Johnson* v. *City of Grants Pass*, 72 F.4th 868, 877 (9th Cir. 2023). More generally, the idea that a person's choice to violate the law is "involuntary" because the state has failed to provide a good or service that would reduce the violation's perceived necessity appears to have little basis in the Anglo-American legal tradition. *Cf.* Stinneford, *Punishment Without Culpability*, 102 J. Crim. L. &

A. The Eighth Amendment Prohibits Punishments That Are Unjustly Harsh in Light of Longstanding Prior Practice.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[4] At the time of ratification, the Eighth Amendment had, and was publicly understood to have, a pre-existing legal meaning. Under that meaning, the Cruel and Unusual Punishments Clause prohibits cruel innovations—punishments that are unjustly harsh in light of longstanding prior practice. By contrast, punishments that are consistent with longstanding prior practice—"usual" punishments—are constitutional because the customs of a free people are presumptively just and reasonable.

The Cruel and Unusual Punishments Clause was modeled after the Virginia Declaration of Rights of 1776,[5] and the English Bill of Rights of 1689,[6] both of

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Criminology 653, 659–60, 663–64, 687–97 (2012) (discussing the relationship between voluntariness, culpability, and constitutional criminal law).

[4] U.S. CONST. amend. VIII.

[5] VA. CONST. OF 1776, § 9, *in* 7 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3812, 3814 (Francis Newton Thorpe ed., 1909).

[6] The English Bill of Rights, adopted in 1689, contains the first known use of the phrase "cruell and unusuall [p]unishments." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne (1688), 1 W. & M., c. 2, *in* 6 THE STATUTES OF THE REALM 142, 143 (1819).

which were understood as restatements of a longstanding common-law prohibition in both England and the United States.[7]

The word "unusual" was a term of art derived from the common law.[8] Although many lawyers today think of the common law as judge-made law, it was traditionally described as the law of "custom" and "long usage." A practice could be considered part of the common law if it was used throughout the jurisdiction for an extended period of time, even though it was never ordered by statute or royal decree.[9] This was so because "long usage" was thought to assure that the practice

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[7] John F. Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L.J. 441, 465 (2017) [hereinafter, "Stinneford, *Cruel*"]; John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1758–59 (2008) [hereinafter, "Stinneford, *Unusual*"].

[8] Stinneford, *Cruel*, at 469; Stinneford, *Unusual*, at 1745.

[9] *See, e.g.*, 1 EDWARD COKE, INSTITUTES OF THE LAWES OF ENGLAND (1628), *reprinted in* 2 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 577, 701 (Steve Sheppard ed., 2003) ("And note that no custome is to bee allowed, but such custome as hath bin used by title of prescription, that is to say, from time out of minde."); 1 WILLIAM BLACKSTONE COMMENTARIES, *67 ("[I]n our law the goodness of a custom depends upon it's having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary."); James Wilson, Of Municipal Law (1791), *in* 1 THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. (Bird Wilson ed., 1804), *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON [hereinafter, "Collected Wilson"], 549, 570 (Mark David Hall & Kermit L. Hall eds., 2007) ("Some writers, when they describe that usage, which is the foundation of common law, characterize it by the epithet *immemorial*. The parliamentary description is not so strong. 'Long use and custom' is assigned as the criterion of law, 'taken by the people at their free liberty, and by their own consent.' And this criterion is surely sufficient to satisfy the principle: for consent is certainly proved by long, though it be not immemorial usage.").

was just, reasonable, and enjoyed the consent of the people. As Justice Wilson observed in his famous Lectures on Law, "long customs, approved by the consent of those who use them, acquire the qualities of a law."[10]

An "unusual" practice, on the other hand, was an innovation that conflicted with rights established through long usage. A practice could be unusual if it was new or foreign to the common law system, or if it was a revival of a practice "that had 'fall[en] completely out of usage for a long period of time.'"[11] For example, in 1769, when the British Parliament sought to revive a statute that had long been abandoned, which would have enabled American protesters to be tried in England and vitiate the traditional right of trial in the vicinity of the offense, the Virginia House of Burgesses described this threatened action as "new, *unusual*, . . . unconstitutional and illegal."[12] In 1788, Patrick Henry similarly complained that the lack of common law constraints contained in the new United States Constitution would make the federal government itself nothing more than a series of "new and *unusual* experiments."[13] Similarly, George Mason—one of the princi-

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[10] James Wilson, Of the Common Law (1791), *reprinted in* Collected Wilson, 749, 759 (quoting J. Inst. 1.2.9.). *See also* Stinneford, *Unusual*, at 1771–92 (describing Edward Coke's and William Blackstone's writings concerning the normative power of long usage).

[11] *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123 (2019) (citing and quoting Stinneford, *Unusual*, at 1770–71, 1814).

[12] Wednesday, the 17th of May, 9 Geo III. 1769, *in* JOURNALS OF THE HOUSE OF BURGESSES, 1766–69, at 215 (John Pendleton Kennedy ed., 1906) (emphasis added).

[13] Patrick Henry, Speech to the Virginia Ratifying Convention for the United States Constitution (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FED-

pal drafters of the Virginia Declaration of Rights a decade earlier—expressed concern that the lack of common law constraints in the new Constitution would empower Congress to "constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper."[14]

The terms "cruel" and "unusual" in the Eighth Amendment are conceptually linked. The word "cruel" states an abstract moral prohibition against punishments that are unjustly harsh. "Unusual" provides the concrete reference point that enables courts to determine whether the prohibition has been violated. If the punishment is significantly harsher than the baseline established by longstanding prior practice, it is cruel and unusual.

Taken as a whole, the text of the Cruel and Unusual Punishments Clause prohibits punishments that are unjustly harsh in light of longstanding prior practice. Practices used throughout the jurisdiction for a very long period of time are constitutional. Practices that are significantly harsher than longstanding prior practice are cruel and unusual.

B. The Punishments Imposed by Petitioner's Vagrancy Laws Are Consistent with Longstanding Prior Practice.

Vagrancy laws enjoy longstanding use and acceptance, and therefore do not violate the Cruel and Unusual Punishments Clause.

ERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 172 (Jonathan Elliot ed., J. B. Lippincott Co. 2d ed. 1891) (emphasis added).

[14] George Mason, Objections to This Constitution of Government (Sept. 15, 1787), *in* 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 637, 640 (Max Farrand ed., 1911) (emphasis added).

The history of vagrancy laws can be traced back at least to the mid-fourteenth century, with the enactment of the Statute of Labourers.[15] Under this statute, "[w]andering or vagrancy . . . became a crime. A man must work where he happened to be, and must take the wages offered him on the spot, and if he went about, even to look for work, he became a vagrant and was regarded as a criminal." James Fitzjames Stephen, 3 A HISTORY OF THE CRIMINAL LAW OF ENGLAND 267 (1883).

Similar laws continued to be enacted throughout English history, often imposing harsh punishments on persons found to violate them. *See, e.g.*, Vagabonds Act 1530, 22 Hen. VIII, c. 12 (authorizing whipping and pillorying); Vagrancy Act 1536, 22 Hen. VIII, c. 25 (adding ear-cropping and execution as penalties for recidivists); Vagrancy Act 1547, 1 Edw. VI, c. 3 (authorizing branding with the letter 'V' and two years of enslavement). "Even after the English Declaration of Rights in 1689, anti-vagrancy enforcement was regular and the permissible punishments severe." *Coal. on Homelessness* v. *City & Cnty. of San Francisco*, 90 F.4th 975, 987 (9th Cir. 2024) (Bumatay, J., dissenting). For example, in the eighteenth century, the British Parliament enacted laws allowing "idle Persons" to be conscripted into the Royal Navy, or sentenced to hard labor, incarceration, or public whipping. *See* Navigation Act 1703, 2 & 3 Anne c. 6; Vagrants Act 1713, 13 Anne c. 26; *see also* Justices Commitment Act 1743, 17 Geo. II, c. 5.

Punishment for vagrancy was part of the American legal tradition as well. *See City of Chicago* v. *Morales*, 527 U.S. 41, 103 (1999) (Thomas, J., dissenting) ("The

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[15] C.J. Ribton-Turner, A HISTORY OF VAGRANTS AND VAGRANCY AND BEGGARS AND BEGGING 43–44 (1887).

American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy."). "At least ten of the original colonies implemented such laws by the end of the 1700s." *Coal. on Homelessness*, 90 F.4th at 987 (Bumatay, J., dissenting) (citing *Morales*, 527 U.S. at 103 n.2 (Thomas, J., dissenting)). Those laws punished various forms of vagrancy—without regard to voluntariness—by punishments ranging from fines to whipping and imprisonment.

New York. The 1721 "Act to prevent vagrant and idle Persons, from being a Charge and Expence to any [of] the Counties, Cities, Towns, Manors, or Precincts within this province" punished vagrancy by whipping.[16]

Georgia. The 1764 "Act for the punishment of vagabonds and other idle and disorderly persons," together with its 1788 amendment, authorized the destruction of the offender's shelter and punished offenders with imprisonment and whipping.[17]

Pennsylvania. The 1767 "Act to prevent the mischiefs arising from the increase of vagabonds, and

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[16] *See* LAWS OF THE COLONY OF NEW YORK 56–61, ch. 410 (James B. Lyon ed., 1894). The New York law applied to any "Stranger [suspected] to be of Insufficient abilities, or likely to become a charge and burthen to the City, Town, Mannor [sic] or Precinct in which Such Stranger then is," who "return[ed] into this Province" after being removed. *Id.* at 57–58.

[17] *See* A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 98–100, 376–77 (Robert Watkins & George Watkins eds., 1800). The Georgia law applied to, among others, "all . . . idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employment or honest labor." *Id.* at 376.

other idle and disorderly persons, within this province," punished vagrancy by imprisonment in a workhouse or jail and/or hard labor.[18]

Virginia. A 1776 amendment to an "[a]ct for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor" authorized the imprisonment of vagrants, as well as forced labor, for up to a year on "row gallies" or other vessels.[19]

Connecticut. The 1784 "Act for restraining, correcting, suppressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work" punished vagrancy with imprisonment in a workhouse and "moderate whipping."[20]

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[18] *See* 1 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA 433, 434, ch. 55 (Matthew Carey & J. Boren eds.,1767). The Pennsylvania law applied to "all persons who, not having wherewith to maintain themselves and their families, live idly and without employment, and refuse to work, for the usual and common wages given to other labourers in the like work in the city, township or place, where they then are." *Id.* at 434.

[19] *See* 9 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 216–17 (William Waller Hening ed., 1821). The Virginia law applied to "all able bodied men who shall neglect or refuse to pay their publick county and parish levies, and who shall have no visible estate whereon sufficient distress may be made for the same." *Id.* at 217.

[20] *See* 1 THE PUBLIC STATUTE LAWS OF THE STATE OF CONNECTICUT 686, 688–691, tit. 176, ch. 1, §§ 7, 21 (1808). The Connecticut law applied to "all rogues, vagabonds, sturdy beggars, and other lewd, idle, dissolute, profane and disorderly persons, that have no settlement in this state." *Id.* § 7.

North Carolina. The 1784 "Act for the restraint of Idle and Disorderly Persons" authorized the imprisonment of a person deemed to be a vagrant for a term "not exceeding ten days."[21]

Massachusetts. The 1787 "Act for suppressing and punishing rogues, vagabonds, common beggars, and other idle, disorderly and lewd persons" punished vagrancy by hard labor in a workhouse.[22]

South Carolina. The 1787 "Act for the promotion of Industry, and for the suppression of Vagrants and other Idle and Disorderly Persons" created penalties for vagrancy, including imprisonment, up to one year of indentured labor, and whipping.[23]

Rhode Island. The 1796 "Act for the better ordering of the Police of the Town of Providence, and of the Work–House in said Town," punished vagrancy by a term of labor of up to one month in a work house.[24]

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[21] *See* 24 ACTS OF THE NORTH CAROLINA GENERAL ASSEMBLY 597, 597–98, ch. 34. (Apr. 19, 1784 – June 3, 1784). The North Carolina law applied to "any person or persons who have no apparent means of subsistence . . . who shall be found sauntering about neglecting their business, and endeavouring to maintain themselves by gaming or other undue means." *Id.*

[22] *See* ACTS AND LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 623, 623–26, ch. 54 (1893). The Massachusetts law applied to "all rogues, vagabonds & idle persons" including "common pipers[,] fidlers, runaways, stubborn servants or children, common drunkards, common night walkers, pilferers, wanton & lacivious [sic] persons, in speech, conduct or behavior." *Id.* at 624.

[23] *See* 5 THE STATUTES AT LARGE OF SOUTH CAROLINA 41–44 (Thomas Cooper ed., 1839). The South Carolina law applied to, among others, "all persons wandering from place to place without any known residence . . . who have no visible or known means of gaining a fair, honest, and reputable livelihood." *Id.* at 41.

[24] *See* THE PUBLIC LAWS OF THE STATE OF RHODE-ISLAND AND PROVIDENCE PLANTATIONS 362, 364–65 (1798). The Rhode Island law applied to "any transient person or persons . . . if likely to become chargeable." *Id.* at 362–63.

Vermont. The 1797 "Act . . . for the punishment of idle and disorderly persons" permitted "any justice of the peace, on complaint made in writing, [to] commit to the house of correction, to be kept and governed . . . any vagrant, lewd, idle or disorderly person" for "a term not exceeding three months."[25]

Vagrancy laws remained common throughout the nineteenth, twentieth, and twenty-first centuries.[26] For example, in 1852, the State of Kentucky enacted a vagrancy law that punished vagrancy with a term of indentured servitude, not to exceed one year.[27] Similarly, in 1855, the Territory of Kansas enacted a vagrancy law which authorized punishments including imprisonment and a term of up to six months of indentured labor.[28]

As of 2021, forty-eight out of fifty states (plus Washington, D.C.) had some form of law punishing vagrancy.[29] Four states had laws restricting camping in public state-wide, and another fifteen states had laws

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[25] *See* 1 THE LAWS OF THE STATE OF VERMONT 383, 389–90, § 13 (1808). The Vermont law applied to "any stranger, who shall have come to reside in such town or place, and has not gained a legal settlement therein . . . [and] has already, or is likely to become chargeable to such town or place." *Id.* at 384.

[26] *See, e.g.*, 1 STATUTES AT LARGE OF THE STATE OF NEW YORK 585, 585–86, ch. XX, § 1 (John W. Edmonds ed., 1863); 1 THE STATUTES OF ILLINOIS 398, § 138 (Samuel H. Treat, Walter B. Scates & Robert S. Blackwell eds., 1866).

[27] *See* 2 THE REVISED STATUTES OF KENTUCKY 451, 452–53, ch. 104, § 4 (Richard H. Stanton ed., 1852).

[28] *See* THE STATUTES OF THE TERRITORY OF KANSAS 784, 748–49, ch. 161, § 4 (1855).

[29] NATIONAL HOMELESSNESS LAW CENTER, HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 7 (Nov. 2021), *available at* https://tinyurl.com/Handcuffs2021.

restricting camping in particular public places.[30] Moreover, a 2019 survey of 187 cities across the country found that 107 cities (57%)—ranging from Little Rock, Arkansas to Los Angeles, California—imposed restrictions on camping in particular public places, and seventy-two cities (39%) prohibited sleeping in certain public places.[31] For example, in New Hampshire, it is prohibited to "pitch a tent or place or erect any other camping device or sleep on the ground within the public right-of-way or on public property" without permission.[32] Violations of the New Hampshire law may be punished with a fine of up to $1,000.[33] Similarly, Texas maintains a state-wide ban on "camp[ing] in a public place" without permission, and classifies such offenses as Class C misdemeanors, which are punishable by a fine of up to $500.[34]

Against this backdrop, Petitioner's vagrancy laws—which impose fines up to $695 for repeat violations—do not violate the Cruel and Unusual Punishments Clause. Vagrancy laws enjoy long and continuous usage, dating back hundreds of years and throughout the entire history of the United States, from the colonial era to the present. The punishments imposed by Petitioner's laws are no more harsh—and, in fact, are much more lenient—than the baseline established by prior practice. Thus, as a matter of the original meaning of the Cruel and Unusual Punishments Clause, Petitioner's laws are not unconstitutional.

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[30] *Id.*

[31] NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 105–06 (Dec. 2019), *available at* https://tinyurl.com/Handcuffs2019.

[32] *See* N.H. Rev. Stat. § 236:58 (2024).

[33] *See* N.H. Rev. Stat. §§ 236:59, 651:2.III-a (2024).

[34] *See* Tex. Pen. Code §§ 12.23, 48.05 (2024).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

MATTHEW A. SCHWARTZ
Counsel of Record
AUSTIN P. MAYRON
BETHANY S. LABRINOS
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, NY 10004
(212) 558-4197
schwartzmatthew@sullcrom.com

Attorneys for Amicus Curiae
Professor John F. Stinneford

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