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 OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring that the freedoms guaranteed by the Eighth and Fourteenth Amendments are interpreted as robustly as their text and history demand, and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Attempting to get rid of its homeless residents, the City of Grants Pass began punishing them for being in public with as little as a blanket to protect themselves from the elements, even if they had nowhere else to go. Pet. App. 16a. The avowed goal was to make things "uncomfortable enough" to force homeless people to flee the city. *Id.* at 17a.

One way to describe that would be "hard-hearted," "void of pity," and "wanting compassion." Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (defining "cruel"). This type of extreme ordinance, which penalizes actions that homeless people simply cannot avoid, is also "not common." *Id.* (defining "unusual"); *see* Resp. Br. 40-41.

By punishing people for conduct they cannot avoid, Grants Pass's ordinances violate the original meaning of the Eighth Amendment, which has always protected against disproportionate punishments that exceed an

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

offender's culpability. As this Court's precedent recognizes, inflicting *any* punishment is disproportionate when people have no choice but to commit the prohibited offense.

That principle is not "new." Pet. Br. 11. In 1689, the English House of Lords overturned a criminal sentence on the ground that it violated the Eighth Amendment's precursor in the Declaration of Rights, after hearing argument that the effect of the sentence was "to punish for not doing an impossibility." *Case of Earl of Devonshire*, 11 How. St. Tr. 1353, 1366 (Parl. 1689). William Blackstone later explained that the common law prohibited punishment "[w]here the action is constrained by some outward force," such as "compulsion or necessity." 4 *Commentaries on the Laws of England* 21-22 (1791). "An involuntary act" could not "induce any guilt," because "the only thing that renders human actions . . . culpable" is "the concurrence of the will, when it has its choice either to do or to avoid the fact in question." *Id.* at 20-21.

In America, where most of the newly independent states banned cruel and unusual punishment in their constitutions, the nation's future Attorney General remarked that these provisions embodied the axiom "[t]hat every penalty should be proportioned to the offence," and that excessive punishment was therefore "a cruel and tyrannical act." William Bradford, *An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania* 3-5 (1793). And when a magistrate ordered a free person of color to be punished for acting "in self defense," the court ruled that the authorizing statute violated the state's cruel-punishments clause, *Ely v. Thompson*, 10 Ky. 70, 73-74 (1820), reflecting the consensus that these clauses shielded an offender from punishment "beyond the real measure of his own

offence," *Jones v. Commonwealth*, 5 Va. 555, 558 (1799).

Indeed, the rule that punishment must not exceed a person's culpability but "should fit the nature of the offence," J.C. Holt, *Magna Carta* 230 (1965), traces back to Magna Carta, which outlawed penalties for both "trivial" and "serious" offenses "except in accordance with the degree of the offence," *id.* at 323 (quoting Magna Carta ¶ 20). Centuries later, that rule was reaffirmed in the English Declaration of Rights, before being replicated in the Eighth Amendment—the only section of our Constitution directly copied from that source.

Grants Pass claims that the Eighth Amendment outlaws only "cruel and unusual *methods* of punishment." Pet. Br. 16. "The first problem with this argument is that it's foreclosed by precedent." *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019). This Court's first decision invalidating a sentence under the Eighth Amendment recognized that it prohibits not only "torture and the like," but any sentence that is "disproportionate to the offense." *Weems v. United States*, 217 U.S. 349, 368 (1910). This Court's second decision doing so likewise refused to confine the Amendment to "primitive torture" and reiterated that the permissibility of a punishment depends "upon the enormity of the crime." *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion). This Court's third decision invalidating a sentence again rested on proportionality, disallowing even short jail terms for a status that could be acquired "involuntarily." *Robinson v. California*, 370 U.S. 660, 667 (1962).

For more than a century, therefore, this Court has consistently recognized that "proportionality is central to the Eighth Amendment" and that punishment "must be directly related to the personal culpability of

the criminal offender." *Graham v. Florida*, 560 U.S. 48, 59, 71 (2010) (quoting *Tison v. Arizona*, 481 U.S. 137, 149 (1987)).

Grants Pass's argument "fails for another independent reason: It is inconsistent with the original and historical understanding of the Eighth Amendment." *Bucklew*, 587 U.S. at 136. Contrary to the city's claim, the English provision that the Eighth Amendment copied was not focused on "methods of torture and execution." Pet. Br. 3. Instead, it reaffirmed the common law's ancient rule of proportionality, which prohibited criminal sentences that exceeded an offender's culpability.

The Declaration of Rights was a reassertion of "ancient rights and liberties," 1 Wm. & M., sess. 2, c. 2 (1689), that "was only declaratory of the old constitutional law," Blackstone, *supra*, at 379. And in 1689, objections to physical torture were not part of the common law but were in fact relatively novel. Lois G. Schwoerer, *The Declaration of Rights, 1689*, at 93 (1981). None of the penalties inflicted on Titus Oates—whose notorious sentence inspired the cruel and unusual punishments clause—were considered inherently cruel or off-limits at the time. Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969). Indeed, whipping and worse penalties like mutilation and grizzly ritual executions remained in use into the nineteenth century. Leonard W. Levy, *The Origins of the Bill of Rights* 234-37 (1999).

What Parliament condemned was imposing Oates's harsh punishments "for the crime of perjury." *Second Trial of Titus Oates*, 10 How. St. Tr. 1227, 1325 (Parl. 1689). His sentence was viewed as "contrary to law and ancient practice," *id.*, because the common law safeguard from disproportionate penalties meant "that

no misdemeanour should be punished more severely than the most atrocious felonies," 1 Thomas Babington Macaulay, *The History of England from the Accession of James II*, at 487 (1849). Inflicting such extreme sanctions for perjury was "excessive and therefore illegal." Schwoerer, *supra*, at 93; *accord Case of Samuel Johnson*, 11 How. St. Tr. 1339, 1351 (Parl. 1689) (condemning as "cruel and illegal" a sentence similar to Oates's that was also imposed "for a misdemeanor").

The Eighth Amendment, in turn, is nearly "an exact transcript" of its English predecessor, 3 Joseph Story, *Commentaries on the Constitution of the United States* 750 (1833), and was meant to incorporate that safeguard and its long-established meaning as a bulwark against oppression by the new federal government.

Americans in the Founding era began claiming common law liberties "as their birthright," *Van Ness v. Pacard*, 27 U.S. 137, 144 (1829), in response to oppressive Parliamentary legislation. After Independence, a majority of states mimicked the English Declaration of Rights by banning "cruel and unusual," "cruel or unusual," or simply "cruel" punishment—all of which were understood to convey "the same declarations in substance." 2 James Kent, *Commentaries on American Law* 12 (3d ed. 1836). Courts interpreted these provisions as a guarantee against punishing a person "beyond the real measure of his own offence." *Jones*, 5 Va. at 558. The Eighth Amendment was ratified to impose the same limit on the federal government, notwithstanding objections that it might empower courts to prohibit what were then commonly accepted forms of punishment. *See* 1 Annals of Cong. 782-83 (1789) (Rep. Livermore).

Even if construed without reference to history, the Eighth Amendment's language makes clear that it

serves the same function as its English predecessor: guarding against disproportionate punishment that exceeds an offender's culpability. *See Harmelin v. Michigan*, 501 U.S. 957, 976 n.6 (1991) (Scalia, J.) (calling this a "reasonable" interpretation of the text). Contemporary dictionaries defined actions as "cruel" when they exceeded a standard of restraint, and some expressly referenced affliction that was imposed "without necessity." Noah Webster, *An American Dictionary of the English Language* (1828). "Unusual" had the same meaning as today—uncommon—which does not resolve whether a punishment must be uncommon in general or only for a particular offense, or whether the baseline for comparison comes from historical or contemporary practices. The Amendment's history, moreover, supports reading the words "cruel" and "unusual" together as expressing a unitary concept, an approach that aligns this phrase with the Amendment's other key word: "excessive."

Text and history thus corroborate what precedent has long recognized: the Eighth Amendment "proscribes punishment grossly disproportionate to the severity of the crime." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). And when a person literally cannot avoid conduct that the government has made illegal, *any* punishment is disproportionate. *See Robinson*, 370 U.S. at 666-67.

That rule applies here. This case is not about "what can be criminalized," Pet. Br. 13, but rather whether Grants Pass may punish people who literally cannot avoid violating its ordinances because they lack shelter. Under *Robinson* and *Powell v. Texas*, 392 U.S. 514 (1968), the answer is no. *See id.* at 551 (White, J., concurring in the result) (focusing on whether it is "impossible" to avoid a violation); *id.* at 532 (plurality opinion) (similar).

This result is also compelled by the broader rule that "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). When there is *no* culpability because there is no choice, penological justifications vanish and punishment becomes unconstitutionally gratuitous.

Finally, Grants Pass's effort to harass its homeless residents into exile finds no support in traditional vagrancy laws. Rather than place impossible demands on long-time residents to expel them, those laws targeted able-bodied newcomers who burdened the local poor relief system by refusing to accept lawful employment. The true antecedents of the city's ordinances are instead the post–Civil War Black Codes, which used the pretext of vagrancy to coerce a disfavored population into submission—often in ways strikingly similar to Grants Pass's ordinances. The Fourteenth Amendment was ratified largely to eliminate those laws by applying the Eighth Amendment to the states.

In sum, constitutional text and history offer no support for Grants Pass's ordinances. The decision below should be affirmed.

ARGUMENT

I. The Eighth Amendment's Original Meaning Prohibits Disproportionate Punishment that Exceeds an Offender's Culpability.

A. The Common Law Safeguard Against Excessive Punishment

The Eighth Amendment was "taken almost verbatim from the English Declaration of Rights," *Harmelin*, 501 U.S. at 966 (Scalia, J.), and is virtually "an exact transcript" of its predecessor, Story, *supra*, at 750. And this English model was itself a reaffirmation

of "ancient rights and liberties," 1 Wm. & M., sess. 2, c. 2 (1689), including "the longstanding principle of English law that the punishment should fit the crime," Richard L. Perry, *Sources of Our Liberties* 236 (1959). "That is, the punishment should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged." *Id.* Centuries before torture first came under criticism in the late sixteenth century, Schwoerer, *supra*, at 92-93, the common law guaranteed proportionality for both monetary and bodily punishments. The cruel and unusual punishments clause of 1689 was "a reiteration of the English policy against disproportionate penalties." Granucci, *supra*, at 860.

The Anglo-Saxon penal code centered around payments to victims that were carefully proportioned to an offense's gravity. *See* William McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 284-85 (2d ed. 1914). After the Norman Conquest, the replacement of this detailed scheme with discretionary amercements paid to the sovereign—the antecedent to modern fines—opened the door to excessive and oppressive penalties. *Id.* at 285-87.

That problem grew so severe that "three chapters of Magna Carta were devoted to the rule that 'amercements' may not be excessive," *Solem v. Helm*, 463 U.S. 277, 284 (1983) (footnote omitted), but rather "should fit the nature of the offence," Holt, *supra*, at 230. Most notably, Magna Carta declared that a layperson "shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity." Holt, *supra*, at 323 (quoting Magna Carta ¶ 20). Noblemen and the clergy likewise could be penalized "only in accordance with the nature of the offence." *Id.* (quoting ¶ 21). This principle of proportionality "was

repeated and extended in the First Statute of Westminster." *Solem*, 463 U.S. at 284-85.

"These were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." *Id.* at 285. "A writ for the enforcement of the clause emerged," and history records "successful petitions for such writs, designed to set aside excessive fines." Granucci, *supra*, at 846. One such petition argued that a fine "exceeded the just penalty of the offence, especially when there was no delinquency." 3 Matthew Paris, *English History from the Year 1235 to 1273*, at 444 (1854).

Magna Carta's rule against excessive fines "was extended to physical punishments, and by the opening of the fifteenth century, the idea that the punishment should fit the crime—should not be excessive—was fixed." Schwoerer, *supra*, at 92. As Henry of Bracton's treatise explained, both "pecuniary as well as corporal punishment" had to be "no more and no less severe than the case demands," taking into account "the enormity of the offence." 2 *Bracton on the Laws and Customs of England* 299-300 (George Woodbine ed., 1968); *accord* Boyd C. Barrington, *The Magna Charta and Other Great Charters of England* 199 (1900) (quoting fourteenth-century source describing the common law as allowing punishment only "according to the nature and extent of the offence" and forbidding a person from being destroyed "for a trifling matter").

"When prison sentences became the normal criminal sanctions, the common law recognized that these, too, must be proportional." *Solem*, 463 U.S. at 285. For instance, the King's Bench released a prisoner for having vulgarly insulted a mayor, declaring that under Magna Carta "imprisonment ought always to be according to the quality of the offence." *Hodges v. Humkin*, 80 Eng. Rep. 1015, 1016 (K.B. 1615).

B. The English Declaration of Rights

By 1689, the prohibition on "excessive or extreme" sentences was "[t]he conventional English objection" to illegal punishments. Levy, *supra*, at 232-33. In contrast, limits on barbarous "methods of punishment" had not yet developed. Schwoerer, *supra*, at 93. The cruel and unusual punishments clause of the Declaration of Rights reaffirmed the ancient safeguard against disproportionate punishment that exceeded an offender's culpability.

In 1688, long-running Parliamentary disputes with King James II, including over his judges' use of "excessive bail," "excessive fines," and "illegal and cruel punishments," 1 Wm. & M., sess. 2, c. 2 (1689), led the aristocracy to invite future monarchs William and Mary to supplant him. Upon their arrival in England, James fled the country, after which Parliament presented the Declaration of Rights to William and Mary while offering them the throne. *See id.* The Declaration was later codified as the Bill of Rights. *See* Schwoerer, *supra*, at 267-79.

The cruel and unusual punishments clause was primarily inspired by the infamous case of Titus Oates, as well as other cases involving sentences that were outlandishly severe for misdemeanor offenses. The clause's clear purpose was to reaffirm the common law by preventing punishment "disproportionate for the offense and offender at hand," Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 Wm. & Mary Bill Rts. J. 475, 510 (2005), not to outlaw any particular "methods of torture and execution," Pet. Br. 3. None of the penalties inflicted in these cases were considered unacceptable in isolation. All continued in use for more than a century afterward. What was objectionable was their excessive severity in relation to the offenses for which they were imposed.

Convicted of perjury in 1685 after fabricating a Catholic plot against the monarchy, Titus Oates was sentenced to "(1) a fine of 2,000 marks, (2) whipping, (3) life imprisonment, (4) pillorying four times a year for the rest of his life, and (5) defrocking." Schwoerer, *supra*, at 93; *see* 10 How. St. Tr. at 1316-17. After the Glorious Revolution, he petitioned Parliament for release in 1689. While the House of Lords rejected his petition, a minority dissented, calling this sentence "cruel, barbarous, and illegal," in violation of the new Declaration of Rights, which reaffirmed the common law by permitting neither "cruel nor unusual punishments." *Id.* at 1325. Agreeing, the House of Commons wrote that Oates's sentence exemplified the "cruel and unusual Punishments" against which the clause was directed. In fact, "the Commons had a particular Regard to these Judgments, amongst others, when that Declaration was first made." 10 H.C. Jour. 247 (1689).

Oates's penalties were condemned as "cruel, barbarous, and illegal," 10 How. St. Tr. at 1325, not because any of them were "universally impermissible," but because they were excessive and disproportionate to his offense, Stacy, *supra*, at 510. Only one of them (defrocking) was considered beyond a common law court's power to impose. *See* 10 How. St. Tr. at 1325. Individually, these punishments "were not considered inherently barbaric," and were recognized as "appropriate for graver crimes than perjury." David B. Hershenov, *Why Must Punishment Be Unusual as Well as Cruel to Be Unconstitutional?*, 16 Pub. Affairs Q. 77, 85 n.34 (2002). Each continued to be applied long afterward, "sometimes by those who enacted the Bill of Rights." *Id.* "None of the punishments inflicted upon Oates amounted to torture." Granucci, *supra*, at 859. Indeed, "severe floggings and sentences of life imprisonment were not unusual," and "whipping continued

as a punishment in England well into the twentieth century." Levy, *supra*, at 237.

The problem was inflicting these harsh penalties for Oates's particular offense. As the dissenting Lords wrote, "there is no precedents to warrant the punishments of whipping and committing to prison for life, *for the crime of perjury*." 10 How. St. Tr. at 1325 (emphasis added). Although Oates's perjury had led to the deaths of innocent people, it "was, in the eye of the law, merely a misdemeanour." Macaulay, *supra*, at 484. "The tribunal, however, was desirous to make his punishment more severe than that of felons or traitors." *Id.*; *see* 1 Joseph Chitty, *Practical Treatise on the Criminal Law* 489-90 (Edward Earle ed., 1819) (Oates's case illustrates "instances in which the most cruel punishments were inflicted on misdemeanors inferior to felony").

This blatant disproportionality is what made Oates's punishment "contrary to law and ancient practice, and therefore erroneous." 10 How. St. Tr. at 1325. The judges "were undoubtedly competent to inflict whipping, nor had the law assigned a limit to the number of stripes. But the spirit of the law clearly was that no misdemeanour should be punished more severely than the most atrocious felonies." Macaulay, *supra*, at 487. Sentencing Oates to these "extravagant" penalties, 10 H.C. Jour. 249 (1689), for the crime of perjury was "excessive and therefore illegal," Schwoerer, *supra*, at 93.

Two similar cases confirm that the Eighth Amendment's English model embodied the longstanding rule against disproportionate punishment that exceeded an offender's culpability. *Cf.* 10 H.C. Jour. 247 (1689) (Oates's sentence, "amongst others," inspired the clause).

In 1686, the Reverend Samuel Johnson was convicted on a misdemeanor charge of seditious libel. Much like Oates, he was sentenced to be defrocked, to stand three times in the pillory, "to be whipt by the common hangman from Newgate to Tyburn," and to remain in prison until he paid 500 marks, "which they knew was the same [as] perpetual imprisonment, since he was not able to pay." 11 How. St. Tr. at 1350 & n.*. Like Oates, Johnson later petitioned for reversal, and in 1689, the House of Commons resolved that the judgment against him, "upon an information for a misdemeanor, was cruel and illegal." *Id.* at 1351. As with Oates, defrocking was said to tread on ecclesiastical authority, *id.* at 1353, but the rest of his punishments were "cruel and illegal" only because of their excessive severity "for a misdemeanor," *id.* at 1351; *see* Schwoerer, *supra*, at 93.

Similarly, in 1687, after the Earl of Devonshire pleaded guilty to a misdemeanor of assault, he was sentenced to pay a fine of £30,000 (a massive amount) and "be committed to the King's-bench till it be paid." 11 How. St. Tr. at 1357. In 1689, he challenged both "[t]he excessiveness of the fine" and "[t]he commitment till it be paid." *Id.* His advocate urged the House of Lords that courts could impose fines only "in a much less degree than they have done in this case." *Id.* at 1363. Moreover, even though courts could order imprisonment for failing to pay a fine, this power to imprison also had limits: "for if the fine be immoderate, or else he has not the money then ready," then "to commit for not paying the fine into court is not justifiable," because "*it is to punish for not doing an impossibility*." *Id.* at 1366 (emphasis added); *see id.* (quoting the maxim that "the law does not compel one to do impossible things").

The House of Lords judged the sentence "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land." *Id.* at 1372. This language echoed that used to condemn Oates's sentence, "because both punishments suffered from the same defect: they were disproportionate to the crime." John F. Stinneford, *Rethinking Proportionality under the Cruel and Unusual Punishments Clause*, 97 Va. L. Rev. 899, 937 (2011).

Notably, the Johnson and Devonshire cases highlight the inextricability of excessive monetary penalties (like fines) and excessive physical punishments (like imprisonment). If courts "may commit the party to prison till the fine be paid, and . . . set so great a fine as is impossible for the party to pay into court, then it will depend upon the judges pleasure, whether he shall ever have his liberty." 11 How. St. Tr. at 1363. Even though the Declaration of Rights used the word "excessive" for bail and fines, while employing the more emotionally charged "cruel and unusual" for punishments, its authors did not confer *less* protection from physical penalties like imprisonment than from purely monetary penalties like fines. They prohibited all punishments that were "disproportionate in severity to the crime, and therefore, illegal. In sum, the intent of the framers was consistent with ancient custom and law." Schwoerer, *supra*, at 94.[2]

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[2] The cruel and unusual punishments clause might also have been inspired by the "Bloody Assize," the treason trials conducted by Chief Justice Jeffreys in 1685 after a failed rebellion. If so, that only further confirms its lack of focus on *methods* of punishment. The penalties inflicted there, including gruesome execution by drawing-and-quartering, were not new, and they remained in use until the nineteenth century. Granucci, *supra*, at 855-56. The objection to these sentences was also their lack of

C. The Eighth Amendment

The Eighth Amendment is virtually "an exact transcript" of its English predecessor. Story, *supra*, at 750. Its text was borrowed from the Virginia Declaration of Rights of 1776, which copied the English version word-for-word.

By adopting the language of the English provision wholesale, the Framers incorporated into the nation's charter that safeguard, which was long understood to include protection from disproportionate punishment that exceeded a person's culpability.

1. American Adoption of the Safeguard Against Excessive Punishment

Although Americans began restraining punishment in the early colonies, *see* Mass. Body of Liberties ¶ 46 (1641), the concept firmly took root during the Revolutionary era, as Americans resisted Parliamentary abuses by asserting their liberties under "the common law of England," Kent, *supra*, at 6, which they claimed "as their birthright," *Van Ness*, 27 U.S. at 144. Eventually, Americans "[r]esolved" that they were "entitled to the common law of England" as a shield against laws that were "subversive of American rights." Declaration and Resolves of the First Continental Congress (Oct. 14, 1774); *see* 3 *Works of John Adams* 466-67 (1851 ed.) (decrying "new crimes" with "prodigious penalties" under the 1765 Stamp Act).

After Independence, the states adopted declarations of rights to prevent their own legislatures from violating common law liberties. Virginia's influential version addressed punishments by reproducing the

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proportion. *See, e.g.*, Levy, *supra*, at 234 (describing young boy convicted of seditious libel who was sentenced to seven years' imprisonment with flogging every other week).

English Declaration of Rights word-for-word: "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Va. Decl. of Rights § 9 (1776).

A majority of states followed suit with bans on "cruel and unusual," "cruel or unusual," or simply "cruel" punishment. *E.g.*, N.Y. Bill of Rights § 8 (1787) ("cruel and unusual"); Del. Decl. of Rights § 16 (1776) ("cruel or unusual"); Pa. Const. art. 9, § 13 (1790) ("cruel"). Significantly, these various formulations all were "understood as referring to a single concept." Stacy, *supra*, at 505; *see* Kent, *supra*, at 12 (these clauses conveyed "the same declarations in substance, and nearly in the same language"); *see also* Northwest Ordinance § 14, art. 2 (July 13, 1787) ("no cruel *or* unusual punishments shall be inflicted" (emphasis added)).

While some states also included explicit guarantees of proportionality in sentencing, *e.g.*, N.H. Const. pt. 1, art. 18 (1784) ("All penalties ought to be proportioned to the nature of the offence."), these provisions were understood as reinforcing the bans on cruel and unusual punishment. *Cf.* Stinneford, *supra*, at 958 (noting that redundancy was typical in early American constitutions as "a means of protecting against possible loopholes" in an era when personal rights had largely been unwritten). As the nation's future Attorney General explained, it was an axiom "[t]hat every penalty should be proportioned to the offence," because punishing beyond what is "absolutely necessary . . . is a cruel and tyrannical act." Bradford, *supra,* at 3. Some states endorsed this principle in "express" terms, while others "content[ed] themselves with generally declaring, 'that cruel punishments ought not to be inflicted.'" *Id.* at 4. But "does not this involve the same principle, and implicitly prohibit every penalty which

is not evidently necessary?" *Id.* at 4-5; *accord Jones v. Commonwealth*, 5 Va. 555, 558 (1799) (construing statutory requirement of proportionality as imposing the same limit as the punishments clause in the state declaration of rights).

In sum, the choice of the early American states to replicate the language of the English Declaration of Rights "is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments." *Solem*, 463 U.S. at 286.

That is how courts interpreted these provisions. Virtually every case before the Civil War construed them as prohibiting excessive punishments. *See* Stinneford, *supra*, at 942-52; *e.g.*, *Ex parte Hickey*, 12 Miss. 751, 778 (Miss. Err. & App. 1844) (statute permitting indefinite imprisonment for contempt was unlawful because it allowed "punishment [to] be inflicted to a cruel, an unusual and excessive degree"). Especially relevant here, courts held it cruel and unusual to punish offenders beyond their level of culpability, declaring that "no addition, under any pretext whatever was to be imposed, upon the offender, *beyond the real measure of his own offence*." *Jones*, 5 Va. at 558 (emphasis added).

If people could not be blamed *at all* for their conduct—because they had no choice—then any punishment was disproportionate and therefore unconstitutionally cruel. Thus, where a law authorized magistrates to punish a free person of color for "raising his hand in opposition to a white person," even "in self defense," enforcement of this law violated the state's cruel-punishments clause when the white person "was attempting wantonly to violate his or her person." *Ely v. Thompson*, 10 Ky. 70, 73-74 (1820). When a law punishes someone who acts "to save him or herself

from death or severe bodily harm, all men must pronounce the punishment cruel indeed." *Id.* at 74.

2. The Bill of Rights

The Eighth Amendment was adopted to apply the same safeguards to the federal government. Its sparse legislative history does not support construing the Cruel and Unusual Punishments Clause more narrowly than the identical text in the English Declaration of Rights and the earlier state constitutions.

In attacking the original Constitution, Patrick Henry and Abraham Holmes conjured up the specter of the federal government employing "tortures" and "racks and gibbets," invoking the Spanish Inquisition and other civil-law regimes. 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 447 (Jonathan Elliot ed., 1836); 2 *id.* at 111. But two speakers' focus on that threat during the ratification fight does not mean the Amendment was generally understood as limited to barbarous physical torments. A hyperbolic emphasis on "worst case scenarios" is an obvious strategy "for a polemicist waging a battle." Hershenov, *supra*, at 86. And it would be perverse to read the Eighth Amendment as offering *less* protection than the English prototype that Americans so deliberately mimicked, based on the rhetorical flourishes of two Antifederalists.

Even if "the prospect of tortures" was indeed a significant concern, that alone does not indicate a lack of concern "with non-torturous excessiveness." *Id.* George Mason noted that torture "was *included* in" Virginia's punishments clause, 3 *Elliot's Debates* 452 (emphasis added), not that the clause reached no further. And even objections to torturous punishment largely center around its lack of proportion: torture inflicts "*unnecessary* cruelty," *Wilkerson v. Utah*, 99 U.S.

130, 136 (1878) (emphasis added), that "cruelly *super-adds* pain . . . without a legitimate penological reason," going "*so far beyond what [is] needed* . . . that [it] [can] only be explained as reflecting the infliction of pain for pain's sake," *Bucklew*, 587 U.S. at 134, 137 (emphasis added).

Moreover, it is not true that Joseph Story "thought the prohibition of cruel and unusual punishments likely 'unnecessary' because no 'free government' would ever authorize 'atrocious' methods of execution." *Id.* at 131 (quoting Story, *supra*, at 750). Story actually speculated that the *entire* Eighth Amendment might be unnecessary—not just the Cruel and Unusual Punishments Clause—and he did not mention executions at all, much less methods of execution. *See* Story, *supra*, at 750. He described the "atrocious" conduct of the Stuarts only generically: "a demand of excessive bail," "[e]normous fines and amercements," and "cruel and vindictive punishments." *Id.* at 750-51.

Indeed, when the Eighth Amendment was debated in the First Congress, no one mentioned "dredging up archaic cruel punishments." *Bucklew*, 587 U.S. at 142. Quite the contrary. Only one speaker discussed specific penalties the Clause might prohibit, and instead of citing the inquisitorial tortures of Europe or the drawing-and-quartering of English executions, he worried that the Clause might outlaw punishments that were then commonly accepted: hanging, whipping, and cutting off ears. *See* 1 Annals of Cong. 782-83 (1789) (Rep. Livermore).

With almost no additional discussion, the Clause "was agreed to by a considerable majority," *id.*, despite complaints that it placed too much discretion in the courts, *see id.* Extended debate was unnecessary because the Framers were simply replicating a cherished and longstanding English safeguard.

3. The Text of the Eighth Amendment

As history shows, the most salient aspect of the Cruel and Unusual Punishments Clause to the Founding generation was not the meaning of its individual words in isolation, but rather its careful replication of the English Declaration of Rights. Americans adjusted its wording only to strengthen it—replacing "ought not" with the more decisive "shall not."

But even if the Framers had drafted the Amendment from scratch, the words they chose amply express the same meaning that its English predecessor was long understood to have: a safeguard against punishment that exceeds an offender's culpability.

As Justice Scalia put it, the Amendment's language "bears the construction" that it provides "a form of proportionality guarantee," making this a "reasonable" interpretation of the text. *Harmelin*, 501 U.S. at 976 & n.6 (Scalia, J.). And that is an understatement. If one tried to identify a single-word synonym that best captures the combined meanings of "cruel" and "unusual," one could hardly do better than the word "excessive."

In the Founding era, the word "cruel" had "a less onerous meaning" than today, simply meaning "severe or hard." Granucci, *supra*, at 860. Samuel Johnson's definition included "hard-hearted," "void of pity," and "wanting compassion." *A Dictionary of the English Language* (6th ed. 1785). He defined "cruelty" as an "[a]ct of intentional affliction," *id.*, which certainly describes Grants Pass's effort to make homeless people "uncomfortable enough" to flee the city, Pet. App. 17a.

Noah Webster likewise defined "cruel" as "[d]isposed to give pain to others, in body *or mind*." *An American Dictionary of the English Language* (1828) (emphasis added). He also defined it as "willing . . . to

. . . vex or afflict" and as "destitute of pity, compassion or kindness." *Id.* "Cruelty" meant "any act intended to torment, vex or afflict, or which actually torments or afflicts*, without necessity*." *Id.* (emphasis added).

All of these definitions indicate severity in relation to some standard or principle of restraint that is being exceeded. Some of them explicitly reference affliction that is out of proportion because it is "without necessity." *Id.*

"Unusual" had the same meaning as today: "Not common; not frequent; rare." Johnson, *supra*; *accord* Webster, *supra.* As applied to punishment, this definition does not resolve whether a penalty must be uncommon in general or only for a particular offense. *See* Stacy, *supra*, at 512. Nor does it resolve "the time frame to be used as a baseline," that is, "whether a punishment must be 'unusual' in relation to those used in 1791, now, or both." *Id.* at 486 n.45.

The Amendment's history, moreover, supports reading the words "cruel" and "unusual" together, "not as two separate requirements, but as a single complex expression." Samuel L. Bray, *Necessary and Proper and Cruel and Unusual: Hendiadys in the Constitution*, 102 Va. L. Rev. 687, 712 (2016). At the Founding, "the two terms were apparently seen as interlocked," Kent Greenawalt, *Interpreting the Constitution* 119 (2015), and the phrases "cruel and unusual," "cruel or unusual," and "cruel" all were understood to convey the same idea. *See supra* at 16; *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 87 (2018) ("context can overcome the ordinary, disjunctive meaning of 'or'"). The Clause "may be read as a hendiadys in which the second term modifies the first," as in "uncommonly cruel." Bray, *supra*, at 706, 718. That reading prohibits "punishments that show a degree of cruelty that is rare, as measured against some baseline." *Id.*

When "cruel and unusual" is construed as "a unitary concept," Stacy, *supra*, at 475, as the Founders apparently regarded the phrase, its meaning aligns with the Eighth Amendment's other key word: "excessive." That word meant two things: "Beyond *the common proportion* of quantity," Johnson, *supra* (emphasis added)—which recalls "unusual"—and "Vehement beyond measure in . . . dislike," *id.*, which recalls "cruel." Johnson provides a telling example from Ecclesiastes: "Be not *excessive* toward any." *Id.* Webster's definitions also illuminate the connection between "excessive" and uncommonly cruel. They include "beyond the bounds of justice, fitness, propriety," "unreasonable," and, most notably, "Vehement; violent; as *excessive* passion." Webster, *supra*.

The Clause also should be read in light of the company it keeps—the "parallel limitations," *Solem*, 463 U.S. at 289, on excessive fines and bail. Viewed in full, the Amendment's "whole inhibition is against that which is excessive." *O'Neil v. Vermont*, 144 U.S. 323, 340 (1892) (Field, J., dissenting). This textual approach is strongly buttressed by history: these three clauses were not yoked together for the first time in Madison's draft Amendments, but instead were linked from the start.

It does not undermine this reading that the Amendment uses "cruel and unusual" (not "excessive") in relation to punishments. In 1689, as now, the word "cruel" had an emotional dimension befitting a provision that did more than regulate monetary amounts, like the limits on excessive bail and fines. And in the Declaration of Rights, which restrained judges rather than legislatures, the word "unusual" also had a connotation of "illegal," *see* 1 Wm. & M., sess. 2, c. 2 (using the variation "illegal and cruel punishments"), because some of the penalties to which it responded were not

only excessive but were unlawful for other reasons as well. *See supra* at 11-13.

Moreover, the phrase "cruel and unusual" was not "an exceedingly vague and oblique way" of imposing a limit on excessive punishment. *Harmelin*, 501 U.S. at 977 (Scalia, J.). Contemporary dictionaries show otherwise. *See supra*. And early American legal sources frequently used "cruel and unusual" to describe punishment with a severity unwarranted by its provocation. *E.g.*, *State v. Norris*, 2 N.C. 429, 440-41 (Super. L. & Eq. 1796) (responding to a provocation by beating the offender "in a cruel or unusual manner," rather than with "a punishment proportionable to the offence," is murder); *see* Stinneford, *supra*, at 938-42 (other examples). Finally, if the Framers wanted only to ban certain methods of physical mistreatment, they obviously could have said *that* more directly too. *E.g.*, Mass. Body of Liberties ¶ 46 (1641) (prohibiting "bodily punishments" that are "barbarous").

II. Inflicting Any Punishment for Conduct that Is Impossible to Avoid Is Unconstitutionally Disproportionate.

A. As shown above, text and history corroborate what precedent has long recognized: the Eighth Amendment "proscribes punishment grossly disproportionate to the severity of the crime." *Ingraham*, 430 U.S. at 667. Indeed, that is the Amendment's "central substantive guarantee." *Montgomery v. Louisiana*, 577 U.S. 190, 206 (2016). Although this guarantee is applied deferentially and interferes with legislation only rarely, it has an important baseline: when a person literally cannot avoid conduct that the government has made illegal, *any* punishment is disproportionate.

That rule applies here. This case is not about "what can be criminalized." Pet. Br. 13. Nothing

prevents Grants Pass from prohibiting the conduct covered by its ordinances. The question is whether the city may punish people who literally cannot avoid violating those ordinances because they have nowhere else to go.

The answer is no. That result flows inexorably from *Powell v. Texas*, 392 U.S. 514 (1968), and *Robinson v. California*, 370 U.S. 660 (1962). It also is compelled by the broader rule that "the severity of the appropriate punishment necessarily depends on the culpability of the offender." *Atkins*, 536 U.S. at 319. When there is *no* culpability because there is no choice, penological justifications vanish and punishment becomes gratuitous.

B. *Robinson* was a proportionality case. While ninety days' imprisonment is not cruel or unusual "in the abstract," it cannot be used to punish merely having an addiction, "because such a sanction would be excessive." *Atkins*, 536 U.S. at 311 (citing *Robinson*, 370 U.S. at 666-67). No matter how light the punishment in the abstract, *any* penalty is disproportionate for a status that can be acquired "innocently or involuntarily." *Robinson*, 370 U.S. at 667 & n.9 (citing addiction arising from medical prescriptions). Punishing someone who has no culpability is like punishing someone for having a disease, *id.* at 666, which offends the guarantee of proportionality: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

Powell confirmed *Robinson*'s focus on situations involving a true absence of choice. The defendant in *Powell* was not literally forced by any physical reality to engage in the prohibited conduct—being drunk in public. For the plurality, it was insufficient that an alcoholic may lack the "willpower to resist" temptation. *Powell*, 392 U.S. at 518. Extending the concept

of involuntariness that far would mean venturing into metaphysically uncertain terrain concerning free will. *Id.* at 521-26.

Some Justices proposed limiting *Robinson* to the criminalization of status, *e.g.*, *id.* at 548 (Black, J., concurring), but that view failed to garner a majority. Justice White's concurrence rejected a simple act/status distinction, *id.* at 550 n.2, resting firmly instead on the concept of volition. While granting that some alcoholics might truly be compelled to drink, *id.* at 551 & n.3, he explained that those "with a home or financial resources" were not forced to be drunk *in public*. *Id.* at 549-50. There was no evidence that the defendant "was unable to stay off the streets." *Id.* at 554. But the Eighth Amendment *would* prohibit punishing someone in his position for whom "avoiding public places" was "impossible." *Id.* at 551; *see id.* at 532 (plurality opinion) (the defendant could have avoided punishment by remaining "in the privacy of his own home").

The decisive question under *Powell* and *Robinson* is thus whether individuals have a choice to engage in the act for which they are punished.

That analysis all but dictates the result below. The "undisputed" record shows the plaintiffs to be homeless "involuntarily," and the ordinances therefore "prohibit [them] from engaging in activity they cannot avoid." Pet. App. 31a-32a, 46a. Those ordinances are therefore "unconstitutional as applied to them." *Id.* at 54a.

C. This holding is also compelled by other precedent applying the Eighth Amendment's proportionality guarantee.

Across a range of areas, this Court has held that punishment "must be directly related to the personal

culpability of the criminal offender." *Graham*, 560 U.S. at 71 (quotation marks omitted). This rule protects juveniles and the mentally disabled because their "diminished culpability" makes them "less deserving of the most severe punishments," "even when they commit terrible crimes." *Miller v. Alabama*, 567 U.S. 460, 471-72 (2012) (quotation marks omitted). It also protects anyone whose culpability for a specific offense does not merit the severity of the punishment. *Compare Enmund v. Florida*, 458 U.S. 782, 797 (1982) (robbery participant who does not kill or intend to kill cannot be executed), *with Tison*, 481 U.S. at 158 ("reckless indifference to human life" is sufficient).

The implication here is obvious. When there is no choice whatsoever, there can be no culpability. While the penalties Grants Pass imposes are far less severe than in the cases above, so is the offense being punished—being found in public with as little as a blanket. Any punishment for that conduct is excessive when the person being punished has nowhere else to go. No penological function is served by punishing individuals who are powerless to avoid violations.

Indeed, the city knows that. The inability of homeless people to escape its penalties is the reason Grants Pass believes those penalties will force them into exile. "There may be involved no physical mistreatment, no primitive torture," but the avowed goal—at least as far as the city is concerned—is the "destruction of the individual's status in organized society." *Trop*, 356 U.S. at 101.

D. Historic vagrancy laws do not justify Grants Pass's effort to exile its homeless residents.

To start, there is no Founding-era evidence that the Eighth Amendment was understood to permit all longstanding punishments. On the contrary, the only

person to discuss the specifics of the Amendment's scope in 1789 argued the opposite: that it jeopardized commonly accepted practices like whipping. *See supra* at 19. No general-use or legal dictionaries support the claim that "unusual" was a term of art meaning "contrary to long usage." John F. Stinneford, *The Original Meaning of Unusual: The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U.L. Rev. 1739, 1767 (2008). Indeed, there seems to be no direct evidence at all that the Framers read the Amendment that way—even in an article pressing that claim. *See id.* The first articulation of a long-usage reading apparently came in 1868, when Thomas Cooley offered it as a tentative suggestion repeatedly caveated by the word "probably" and without supporting citations. *A Treatise on Constitutional Limitations* 329-30 (1868). This Court never adopted that reading.

Regardless, historic vagrancy laws did not punish people for failing to do the impossible. American vagrancy laws were patterned on the English model and similarly targeted individuals "who, although able to work, failed to do so." Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 Tul. L. Rev. 631, 638-40 & n.49 (1992). These laws cannot be understood apart from the "elaborate system of poor law relief" of which they were "the criminal aspect." 3 James Fitzjames Stephen, *History of the Criminal Law of England* 274, 266 (1883). Because local officials "had the responsibility of providing relief for local needy residents," they could return newcomers to their own communities and penalize those who "refused to work although able to do so." Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 616 (1956).

Even at the height of their severity, historic vagrancy laws targeted only the "able-bodied" poor, the "sturdy" beggars who could work but chose not to. Stephen, *supra*, at 269-72. In contrast, the "impotent poor" who could not support themselves received "licenses to beg." *Id.* at 270, 272. Thus, rather than penalize people for failing to satisfy impossible demands, traditional vagrancy laws were designed "to punish those persons only who really preferred idleness to parish relief." *Id.* at 275. These laws aimed to prevent poor people from migrating from town to town, while Grants Pass's ordinances aim to do the opposite.

The true antecedents of Grants Pass's unyielding measures are the post–Civil War Black Codes, which similarly used vagrancy as a pretext to coerce a vulnerable, disfavored population into submission—not to exile homeless people, but to force recently emancipated people back onto the plantations. *See* Cong. Globe, 39th Cong., 1st Sess. 1123 (1866) (Rep. Cook) ("Vagrant laws have been passed; laws which, under the pretense of selling these men as vagrants, are calculated and intended to reduce them to slavery again . . . in punishment of crimes of the slightest magnitude."); *id.* at 783 (Rep. Ward) ("courts have sold the freedmen into slavery . . . under some pretense of punishing him for vagrancy or something else equally absurd"); S. Exec. Doc. No. 39-6, at 129 (1867) (recounting arrests and imposition of forced labor "on various pretexts, mostly for vagrancy").

The similarities are striking. Southern cities, for instance, used fines and imprisonment to punish Black Americans for being found in town or on the streets: "no negro or freeman shall be allowed to come within the limits of the town . . . without special permission," or "shall be found on the streets . . . after ten o'clock." Cong. Globe, 39th Cong., 1st Sess. 516-17 (quoting

ordinance); *see* S. Exec. Doc. No. 39-6, at 192 (quoting law fining Black Americans who were "found unlawfully assembling themselves together"). Like Grants Pass, Southern governments made impossible demands to ensnare the targets of their animus: "one of the States requires the freedmen to have a residence and a home . . . but it forbids the renting or purchasing of land to them outside of the large towns. What is the poor freedman to do? Go into the highway? There he is a vagrant to be arrested." Cong. Globe, 39th Cong., 1st Sess. 340 (Rep. Wilson).

The Fourteenth Amendment sought to eliminate such laws by requiring state and local governments to obey the Eighth Amendment. *See id.* at 2764-65 (Sen. Howard); *id.*, 2d Sess. 811 (1867) (Rep. Bingham). Under the original meaning of both Amendments, Grants Pass may not banish homeless people by punishing them for conduct they cannot avoid.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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