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 CRIMINAL LAW AND PUNISHMENT SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are legal scholars whose work centers on substantive criminal law and criminal punishment. Their work bears directly on the important questions raised by this case about the nature and limits of criminal punishment under the Eighth Amendment.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

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Amici file this brief solely as individuals and not on behalf of any institution with which they are affiliated. Affiliations are provided solely for the purpose of identification.

INTRODUCTION

To satisfy the Eighth Amendment's requirement of proportionality, criminal punishment must appropriately reflect the culpability of the relevant offense. In many cases, the proportionality inquiry can be complex. But in some cases, like this one, disproportionality is plain to see because criminal punishment has been imposed on something that is not culpable at all. No punishment is proportional to something that is innocent. As this Court said in *Robinson v. California*, 370 U.S. 660 (1962), "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

Like the "crime" of having a common cold, homelessness is not culpable, and thus not deserving of criminal punishment of any kind. This Court has already recognized that poverty and homelessness are innocent, and the City of Grants Pass does not contend otherwise. That resolves the case: The plaintiffs in this case were punished even though they did not do anything wrong. Under *Robinson*, that is the clearest example of disproportionality.

Troublingly, the record indicates that the plaintiffs were punished not because they acted culpably, but because city officials wanted to drive homeless people out of town. Rather than tailoring criminal punishment to reflect the culpability of a crime, officials in Grants Pass used the harshness of punitive

sanctions instrumentally to "make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road." JA 114. This is a fundamental misuse of the power of criminal punishment. Punitive sanctions cannot be used as a tool to harm or drive away an unpopular group.

This Court has long recognized that criminal punishment cannot be imposed on something innocent like homelessness. Such punishment is especially suspect when its apparent purpose is to cause pain for the sake of pain, in order to banish unpopular groups from town. This Court need only recognize these basic limits on the power of criminal punishment to affirm the judgment below.

ARGUMENT

I. Under The Eighth Amendment, Criminal Punishment Cannot Be Imposed On Innocent Conduct.

Perhaps the most fundamental limit on criminal punishment is that it cannot be imposed on innocent conduct. Criminal punishment, by definition, is reserved for criminal conduct—conduct that, by its nature, is culpable and thus deserving of punishment. *See Morissette v. United States*, 342 U.S. 246, 251 (1952) ("Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand."). Thus, it has long been recognized that no criminal punishment is appropriate for conduct that is wholly innocent. *See* Oliver Wendell Holmes, Jr., *The Common Law* 50 (1881) ("[A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to

bear."); 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 431 (1882) ("[A criminal act] must be sufficient in amount of evil to demand judicial notice.").

This Court has applied this basic limit on the power of criminal punishment in a variety of contexts. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 520 (1948) ("Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained."); *City of Chicago v. Morales*, 527 U.S. 41, 57 (1999) (invalidating ordinance that failed "to distinguish between innocent conduct and conduct threatening harm"); *Lambert v. California*, 355 U.S. 225, 229 (1957) (reversing conviction for failure to register where "her default was entirely innocent"); *Staples v. United States*, 511 U.S. 600, 610 (1994) (emphasizing "the particular care we have taken to avoid construing a statute" in a way that would "criminalize a broad range of apparently innocent conduct"); *United States v. Bishop*, 412 U.S. 346, 360 (1973) ("It is not the purpose of the law to penalize . . . innocent errors."). Across different doctrines, the bottom line has been the same: Criminal punishment cannot be imposed on innocent conduct.[2]

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[2] This Court has sometimes invoked the rule against punishing innocent conduct under the void-for-vagueness doctrine and the presumption of *mens rea*. Such doctrines can be a way to avoid addressing directly the question of whether criminal punishment can be imposed on innocent conduct. *See Morales*, 527 U.S. at 57 (assuming "the city cannot conceivably have meant to criminalize" innocent conduct); *Liparota v. United States*, 471 U.S. 419, 426 (1985) (interpreting criminal statute narrowly to avoid "criminaliz[ing] a broad range of apparently innocent

That limit is reflected in the Eighth Amendment, which sets the Constitution's most direct restrictions on "the government's power to punish." *Austin v. United States*, 509 U.S. 602, 609 (1993). The Eighth Amendment mandates that any criminal punishment must be proportional to the particular crime at issue. *See Solem v. Helm*, 463 U.S. 277, 284 (1983) (prohibiting "sentences that are disproportionate to the crime committed"); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (requiring "some relationship to the gravity of the offense that [a punitive fine] is designed to punish"). That requirement can only be satisfied when criminal punishment is applied to criminal conduct—offenses, like theft, fraud, and murder, that are by their nature culpable, and thus warrant criminal punishment of some kind. *See Atkins v. Virginia*, 536 U.S. 304, 319 (2002) ("[T]he severity of the appropriate punishment necessarily depends on the culpability of the offender."); *see also Bajakajian*, 524 U.S. at 338 (emphasizing the offender's lack of culpability: "he is not a money launderer, a drug trafficker, or a tax evader"). As

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conduct"). Such avoidance is not possible here, however, because the ordinances are not vague about their scope or susceptible to a narrowing construction; Grants Pass has consistently maintained that the ordinances penalize something wholly innocent. *See* Pet. App. 57a ("[W]e hold simply that it is unconstitutional to punish simply sleeping *somewhere* in public if one has nowhere else to do so." (cleaned up)). The question, therefore, is whether criminalizing something innocent like homelessness exceeds "the government's power to punish" under the Eighth Amendment. *Austin v. United States*, 509 U.S. 602, 609 (1993); *see Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 278 (4th Cir. 2019) (discussing "independent Eighth Amendment concerns" separate from vagueness).

Grants Pass acknowledges, under the Eighth Amendment, "criminal penalties may be inflicted only if" there is "some *actus reus*"—*i.e.*, some "*wrongful* deed." Brief for Petitioner 32; Black's Law Dictionary (11th ed. 2019) (emphasis added).[3]

This Court's proportionality cases typically concern conduct that is culpable to some degree. *See, e.g.*, *Solem*, 463 U.S. at 296 (considering a minor financial crime by a repeat offender); *Miller v. Alabama*, 567 U.S. 460, 465-68 (2012) (robbery and murder by juvenile offenders). In such cases, the proportionality inquiry can be complex because it requires weighing the relative culpability of the offense and the offender against the harshness of the

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[3] Typically, both *actus reus* and *mens rea* are required to ensure the requisite minimum of culpability. *See Morissette*, 342 U.S. at 251. This Court has sometimes relaxed the requirement of *mens rea* for so-called "public welfare offenses," *i.e.*, offenses involving "potentially dangerous conduct" that has historically been closely regulated. *Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 522 (1994); *see Liparota*, 471 U.S. at 433 (discussing "conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety"). In these limited cases, the type of conduct, alone, may be sufficient to ensure a minimum level of culpability. *See, e.g.*, *Liparota*, 471 U.S. at 433 ("[O]ne would hardly be surprised to learn that possession of hand grenades is not an innocent act."). That is not the case here, as homelessness is not a dangerous or closely regulated behavior. And regardless of whether *mens rea*, specifically, is required, the ordinances apply criminal punishment in the absence of culpability of any kind—neither an evil-meaning mind nor an evil-doing hand. *See* Dist. Ct. ECF 63-5 at 15 (officer noting violations of the ordinance involved "No Culpable Mental State"); JA 93 ("Woke Jerry Lee up from a dead sleep. He was again sleeping in the van. He was cited for camping in the city limits and told to vacate the van.").

punishment, with deference to legislative "judgments about the appropriate punishment for an offense." *Bajakajian*, 524 U.S. at 336; *Graham v. Florida*, 560 U.S. 48, 69 (2010) (discussing the limited culpability of the offender based on his age and "the nature of the crime"); *Harmelin v. Michigan*, 501 U.S. 957, 1004 (1991) (Kennedy, J., concurring) (noting that "[t]he severity of petitioner's crime brings his sentence within the constitutional boundaries"). Even so, this Court has recognized that punishments violate the Eighth Amendment when they fail to reflect properly the level of culpability involved. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 571 (2005) ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished."); *Solem*, 463 U.S. at 296 (emphasizing that the crime was "among the less serious offenses"); *see also Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (noting that proportionality would likely be violated if harsh criminal punishment were imposed on conduct like overtime parking).

This case is unusual—and straightforward—because it concerns conduct that is not culpable at all. In such cases, the proportionality question is simple. No punishment is proportional for someone who has done nothing wrong. In *Robinson v. California*, 370 U.S. 660 (1962), this Court held that the State could not punish a condition, like drug addiction, that "may be contracted innocently or involuntarily." *Id.* at 667. Because merely having an addiction is not culpable, no punishment—not even "one day in prison"—could be proportional. *Id.* (comparing addiction to "the 'crime' of having a common cold"). *Robinson* recognized that punishing something innocent is the clearest example of disproportionality.

II. The Grants Pass Ordinances Punish Homelessness, Which This Court Has Already Recognized Is Innocent And Not Deserving Of Any Criminal Punishment.

That principle from *Robinson* applies here because the Grants Pass ordinances punish something this Court has already recognized is innocent: homelessness. That condition "may be contracted innocently or involuntarily," and does not reflect culpability. *Robinson*, 370 U.S. at 667. Thus, it is something for which no criminal punishment is proportional.

This Court has already recognized that poverty and the homelessness that results from it are not culpable. In *Edwards v. California*, 314 U.S. 160 (1941), for example, this Court struck down a California statute making it a crime to transport an "indigent" person into the State. *Id.* at 176-77. In doing so, this Court explained that it cannot be "seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence,'" as prior attempts to criminalize indigence had assumed. *Id.* at 177. "Poverty and immorality," this Court made clear, "are not synonymous." *Id.*

Similarly, in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), this Court invalidated an ordinance prohibiting conduct attendant to poverty like "nightwalking," "neglecting all lawful business," being "able to work but habitually living upon the earnings of" others, and being "habitual loafers." *Id.* at 156 n.1, 158. The Court emphasized that the ordinance made "criminal activities which by modern standards are normally innocent." *Id.* at 163. And the

Court reiterated *Edwards*'s recognition that being indigent is no crime; people can fall on hard times for reasons entirely beyond their control. *Id.* at 163 & n.5.

Because homelessness is not culpable, punishing it serves none of the legitimate purposes of criminal punishment. The ordinances do not, for example, advance a retributive purpose because homelessness does not reflect any culpability warranting retribution. *See Tison v. Arizona*, 481 U.S. 137, 149 (1987) ("The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."). The ordinances also have no deterrent effect because homeless people living in Grants Pass have no choice but to "sleep *somewhere* in public" using blankets or bedding "if one has nowhere else to do so." Pet. App. 57a; *see* JA 109 (describing the discovery of "a homeless individual who is repeatedly picked up for trespassing after hours, in severe distress outside in the frigid air," who "disclosed fear that he would be arrested and trespassed again for being outside"). And the ordinances do not prevent violations through incapacitation or rehabilitation. To the contrary, the ordinances cause violations by further impoverishing the homeless, with fines starting at $295 and rising as high as $1,250 per violation. *See* JA 134 (describing a $295 fine for "lying down on a friend's mat" given to a person who is "still homeless" and "unable to pay"); JA 182 (owing "more than $5000 in fines").

For the "offense" of not having enough money even to afford a $50 motel room on a cold night, homeless people are fined hundreds, if not thousands, of dollars. Such punishment is "purposeless and needless," and thus violates the Eighth Amendment's requirement of

proportionality. *Enmund v. Florida*, 458 U.S. 782, 798 (1982); *cf. Timbs v. Indiana*, 586 U.S. ___, 139 S. Ct. 682, 687-88 (2019) (noting that the Magna Carta prohibited economic sanctions disproportionate to "the wrong" and that would "deprive [a person] of his livelihood"). "It simply is not a crime to be unemployed, without funds, and in a public space. To punish the unfortunate for this circumstance debases society." *Parker v. Mun. Judge of City of Las Vegas*, 427 P.2d 642, 644 (Nev. 1967); *see Alegata v. Commonwealth*, 231 N.E. 201, 207 (Mass. 1967) ("Idleness and poverty should not be treated as a criminal offence.").

Importantly, Grants Pass does not contest that homelessness is innocent and not deserving of criminal punishment. *See* Brief for Petitioner 7 (noting department policy acknowledging that "[h]omelessness is not a crime"). That concession is sufficient to resolve this case. Because homelessness is not culpable, no punishment—not even "one day in prison"—could be proportional. *Robinson*, 370 U.S. at 667.[4]

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[4] Given Grants Pass's concession, this case does not implicate closer questions about defining innocent conduct. In *Powell v. Texas*, 392 U.S. 514 (1968), for example, this Court divided over whether public intoxication was the kind of wrongful conduct for which criminal punishment may be appropriate. A plurality concluded that it was, because it "may create substantial health and safety hazards" and "offends the moral and esthetic sensibilities of a large segment of the community." *Id.* at 532 (opinion of Marshall, J.); *see also Pervear v. Commonwealth*, 72 U.S. (5 Wall.) 475, 480 (1866) (citing the "manifold evils of intemperance"). The dissent disagreed, arguing that the statute punished chronic alcoholics for "being in a condition which [they] had no capacity to change or avoid." *Powell*, 392 U.S. at 568

Rather than dispute that homelessness is innocent, Grants Pass claims that the ordinances do not punish homelessness at all, characterizing them instead as "generally applicable prohibitions against the act of camping on public property." Brief for Petitioner 4. But the ordinances explicitly single out the homeless by defining a "campsite" as "any place where bedding, sleeping bag, or other material used for bedding purposes" is placed "for the purpose of *maintaining a temporary place to live*." Pet. App. 172a (emphasis added). Thus, what separates prohibited conduct from permissible conduct is a person's intent to "live" in public spaces. Infants napping in strollers, Sunday afternoon picnickers, and nighttime stargazers may all engage in the same conduct of bringing blankets to public spaces, but they are exempt from punishment because they have a separate "place to live" to which they presumably intend to return. *See* Dist. Ct. ECF 63-7 at 2 (officer testifying that "laying on a blanket enjoying the park" would not violate the ordinances); Dist. Ct. ECF 63-5 at 5-6 (officer testifying that bringing a sleeping bag to look at the stars would not be punished); *id.* at 6 (officer testifying that someone would, however, violate the ordinance if he did not "have another home to go to").[5] As a result, the Deputy Chief of Police

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(Fortas, J., dissenting). This Court need not decide whether compulsive conduct such as drug or alcohol use may ever be treated as innocent in order to resolve this case. *See* Brief for Petitioner 5 (casting a parade of horribles about compulsive conduct that are not implicated here).

[5] Indeed, using blankets to stay warm in public spaces is celebrated, not criminalized, when it occurs outside this Court. *See* Elise Hu, *100 Hours On The Supreme Court's Sidewalk: Camping Out For A Seat To History*, NPR (Mar. 24, 2013),

Operations acknowledged that he was not aware of "any non-homeless person ever getting a ticket for illegal camping in Grants Pass." Dist. Ct. ECF 63-4 at 16. By their plain text and their pattern of enforcement, the ordinances are not generally applicable; they criminalize being homeless.

Next, Grants Pass attempts to distinguish *Robinson* by arguing that the ordinances punish the conduct of camping, rather than the status of homelessness. Brief for Petitioner 37. But phrasing the ordinances to prohibit "conduct" like using a blanket to stay warm does not change the basic flaw of the ordinances: They impose criminal punishment on something that is not criminal. There is nothing culpable about falling asleep, or using a blanket to stay warm, in a public place when you "have nowhere else to go." Pet. App. 172a, 186a; JA 108-09 ("They are not choosing to live on the street or in the woods. It is that there simply are not nearly enough affordable places for people to live or find shelter."); Dist. Ct. ECF 63-1 at 12 (city official describing "below freezing" temperatures); *see also Helling v. McKinney*, 509 U.S. 25, 32 (1993) (noting shelter is a basic need); *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (noting warmth is a basic need). Thus, whether the "crime" is fairly described as conduct or not, the ordinances' punishment is fundamentally disproportionate.

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https://www.npr.org/sections/thetwo-way/2013/03/24/175195917/100-hours-on-the-supreme-court-s-sidewalk-camping-out-for-a-seat-to-history; *Camp SCOTUS: Georgetown Law Students Pull All-Nighters Outside the Supreme Court*, Georgetown Law School (Nov. 18, 2022), https://www.law.georgetown.edu/news/camp-scotus-georgetown-law-students-pull-all-nighters-outside-the-supreme-court/.

Grants Pass also suggests that Oregon's necessity defense avoids any concern of overcriminalization. *See* Brief for Petitioner 41. But if the necessity defense immunizes anyone who violates the city's ordinances because they are homeless, then Grants Pass should not be pressing this appeal at all. The Ninth Circuit only enjoined enforcement of the ordinances against people who "sleep[] *somewhere* in public" using blankets or bedding "if one has nowhere else to do so." Pet. App. 57a. Grants Pass should have no interest in challenging that decision if it genuinely believes that homeless people are covered by the necessity defense. Yet those are exactly the people against whom Grants Pass has enforced the ordinances for years, and against whom Grants Pass seeks to enforce the ordinances going forward.[6]

Finally, Grants Pass argues that the ordinances are necessary to address problems it associates with homelessness: "violent crime, drug overdoses, disease, fires, and hazardous waste." Brief for Petitioner 47. But those issues can already be addressed directly:

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[6] Oregon's necessity defense is also no answer to the basic problem that the ordinances criminalize innocent conduct. The State's necessity defense provides a justification for conduct that *is* criminal based on a "choice of evils." *State v. McPhail*, 359 P.3d 325, 329 (Ore. Ct. App. 2015). The defense exempts otherwise culpable conduct when the conduct is "necessary as an emergency measure to avoid an imminent public or private injury," if the injury is "of such gravity that . . . the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute." Ore. Rev. Stat. § 161.200(1). Homelessness is not culpable; it needs no justification because it is not something for which criminal punishment is appropriate in the first place, as this Court recognized in *Edwards* and *Papachristou*.

Under the district court's injunction, the city retains the authority to prohibit and punish every act that could conceivably be an appropriate subject of punishment—"littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence." Pet. App. 200a. And that injunction may be further modified if Grants Pass identifies other culpable conduct it needs to address. *See* Pet. App. 55a (remanding for consideration of narrowing the injunction).[7] What Grants Pass cannot do is punish people for the blameless "offense" of being homeless. *See* Brief for Respondents 13 ("It is difficult to imagine a more blameless offense than resting outside with a blanket to survive the cold when you have nowhere else to go."); *id.* at 28-29.

III. Rather Than Serving Any Legitimate Penological Purpose, The Ordinances Were Used To Banish The Homeless.

The use of criminal punishment in this case is especially troubling because it appears that the ordinances were never meant to impose an appropriate punishment proportional to culpable conduct. To the contrary, disproportionality was the point. The record indicates that the ordinances' excessive harshness was used instrumentally to drive homeless people out of Grants Pass.

Officials in Grants Pass previously tried to get homeless people to leave town by buying them bus tickets, only for them to return "with a request from

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[7] The Ninth Circuit also preserved Grants Pass's ability to create "a regime of purely civil infractions." Pet. App. 57a-58a.

the other location to not send them there." Pet. App. 17a; *see* JA 114. At a community roundtable in 2013, officials discussed taking that approach one step further and simply driving homeless people out of town "and leaving them there." JA 113. That idea was rejected, however, because of concerns with "liability" and "the legality of detaining someone without charging them with a crime." *Id.*

Accordingly, officials changed tack. One city councilor announced that "the point is to make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road." JA 114; *see* Pet. App. 17a. Another city councilor stated that "until the pain of staying the same outweighs the pain of changing, people will not change." JA 119. He suggested that "some people need an external source to motivate that needed change." *Id.* He wondered aloud if "[m]aybe they aren't hungry enough or cold enough." JA 122.

Following these "mean-spirited" discussions, JA 106, city officials stepped up enforcement of the ordinances against "Transients," *i.e.*, the homeless. *See* JA 71, 77; *see also* JA 107 (describing "increase in recent years of fines and convictions against homeless individuals"). In doing so, officials delivered a clear message: "[T]here is nowhere in Grants Pass" that homeless people "can legally sit or rest." JA 180-81; *see* Dist. Ct. ECF 63-4 at 18 (deputy police chief testifying that a person could not use a sleeping bag or other bedding anywhere on public property without violating the ordinances); *id.* at 24 (same as to sleeping in a vehicle). The police even told one homeless person explicitly to "leave town." JA 181.

Using punitive sanctions to drive unwanted individuals out of town is an egregious misuse of criminal punishment. This Court has repeatedly held that criminal punishment cannot be used as a tool to cause pain "for the sake of pain." *Baze v. Rees*, 553 U.S. 35, 48 (2008); *see Taylor v. Riojas*, 592 U.S. 7, 8-9 (2020) (finding "obvious cruelty" in the deliberate use of degrading and dangerous prison conditions). Nor can punishment be used to target or harm an unpopular group. *See Furman v. Georgia*, 408 U.S. 238, 245 (1972) (Douglas, J., concurring) ("[I]t is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."). As the Solicitor General notes, such punishment "is akin to a form of banishment, a measure that is now generally recognized as contrary to our Nation's legal tradition." Brief for the United States as *Amicus Curiae* 21.

This is not the first time a government has used its power to "try to fence out" the poor or the homeless. *Shapiro v. Thomas*, 394 U.S. 618, 631 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974). In *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), this Court held that an Arizona statute prohibiting indigent people from receiving emergency medical care at county hospitals unless they established one year of residency violated the right to travel because it denied people "a basic necessity of life." *Id.* at 259, 261-62. The Court noted that "[t]he denial of medical care is all the more cruel in this context" because it punished "indigents who are often without the means to obtain

alternative treatment." *Id.* at 261. And the Court made clear: "[T]o the extent the purpose of the [statute] is to inhibit the immigration of indigents generally, that goal is constitutionally impermissible." *Id.* at 263-64; *cf. Saenz v. Roe*, 526 U.S. 489, 511 (1999) ("The States . . . do not have any right to select their citizens.").

So too is it constitutionally impermissible to use criminal penalties to "make it uncomfortable enough for [homeless people] in our city so they will want to move on down the road." JA 114. States and local governments have ample authority to use criminal punishments to serve legitimate ends related to culpable conduct. Their "power to punish" does not extend, however, to imposing criminal sanctions on innocent conduct, for the purpose of causing pain and suffering, in the hopes of banishing an unpopular group from town. *Austin*, 509 U.S. at 610; Brief for Respondents 32 ("[P]olicymakers are not free to inflict punishment on a disfavored group of people in order to make them leave the community."). This Court need only reaffirm these basic limits on criminal punishment to resolve this case.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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