No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,

v.

GLORIA JOHNSON, ET AL., 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 PROFESSORS WILLIAM P. QUIGLEY, JEFFREY ADLER, ERWIN CHEMERINSKY, MARTHA DAVIS, HELEN HERSHKOFF, STEPHEN LOFFREDO, NANTIYA RUAN, AND LAURENCE H. TRIBE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI* CURIAE[1]

Amici are legal scholars and historians with expertise in the history of vagrancy laws in the United States. They appear in their personal capacities and provide their affiliation for identification purposes only. By virtue of their scholarship, pedagogy, and public writings, they have a strong professional interest in the outcome of this matter. *Amici* include:

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INTRODUCTION & SUMMARY OF ARGUMENT

As Respondents explain, the Ordinances adopted by the City of Grants Pass violate the Eighth Amendment. *See Robinson v. California*, 370 U.S. 660 (1962). The City and its *amici* seek to escape that conclusion in part by arguing that the Ordinances are supported by a history and tradition of vagrancy laws. *See* Pet. Br. 42-43; Stinneford Amicus Br. at 7; Pacific Research Institute Amicus Br. at 5. These arguments based on tradition are meritless for two fundamental reasons.

First, the tradition of English and Founding-era vagrancy laws does not support the Ordinances because that tradition is not "relevantly similar." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 29-30 (2022). Whereas the City and its *amici* rip solitary provisions out of early statutes and offer them as historical analogues, that approach results in a massively inaccurate and acontextual description of Founding-era tradition.

Early vagrancy laws were significantly different than the Ordinances in their purpose, scope, and structure. None imposed standalone bans on sleeping in public. Instead, they created cohesive, wide-ranging legal frameworks to achieve three essential goals: (a) affording basic aid to local residents who were unable to work; (b) mandating banishment of poor migrants back to their original settlements; and (c) ensuring adequate labor supply by imposing forced labor

(or imprisonment) on those who could work but chose not to do so. The Ordinances do none of these things. It makes a mockery of tradition-based analysis for the City and its *amici* to disregard almost the entirety of the relevant tradition—including rules meant to ensure that people did not end up involuntarily unhoused—while insisting that an isolated fragment of tradition supports it. The Ordinances function to punish and banish unhoused persons in Grants Pass, regardless of whether they are locals or migrants, regardless of whether they are able to work or find shelter, and regardless of whether the City otherwise adequately provides for its poor. This scheme would be unrecognizable to the Founding generation and bears no material resemblance to the tradition of vagrancy laws associated with that period.

Second, this case exemplifies the very good reasons why Eighth Amendment jurisprudence looks not to 1791 or 1868, but instead to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality). Vagrancy laws have played a starring role in many of the most disturbing, discriminatory, and abusive exercises of government power throughout American history. This is hardly the sort of tradition worthy of resurrection. To the contrary, it is a tradition offensive in many ways to modern standards of liberty, equality, and decency.

It is therefore damning, rather than helpful, for the City and its *amici* to invoke the long history of vagrancy statutes in support of its position. Early vagrancy laws rested on pernicious and indefensible moral judgments of poverty—a perspective that

equated it with criminality and pestilence and dealt with it on those terms. The Nation has rightly rejected that Elizabethan outlook. *See Edwards v. California*, 314 U.S. 160, 177 (1941) ("Poverty and immorality are not synonymous."). Through the Reconstruction Amendments, the Nation has also rejected draconian punishments and extreme arbitrariness central to "traditional" American enforcement of vagrancy statutes. *See, e.g.*, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162-70 (1972). And over the past century, the Nation has confronted (with decidedly mixed success) the use of vagrancy law as the tip of the spear in efforts to subordinate racial and ethnic minorities, political and labor activists, social nonconformists, and women and sexual minorities.

The City and its *amici* invoke the history of vagrancy laws as a boon to their position. But that tradition offers no real support—at least, not when taken seriously and read in context. Moreover, the tradition of vagrancy provisions in this Nation is one that counsels extreme hesitation. Vagrancy laws have long been used to oppress, punish, and banish politically unpopular groups. That is not a history to be proud of. The City's effort to target and exile unhoused people through a particularly extreme vagrancy law thus evokes a sordid tradition—one that offers no succor for its unlawful Ordinances.

ARGUMENT

I. HISTORY AND TRADITION DO NOT IN FACT SUPPORT THE ORDINANCES

The City and its *amici* contend that the constitutionality of the Ordinances is supported by a history

and tradition of analogous laws. *See* Pet. Br. 42-43; *see also* Stinneford Amicus Br. at 7; Pacific Research Inst. Amicus Br. at 5. They are mistaken. None of the historical analogues invoked are "relevantly similar" to the Ordinances. *Bruen*, 597 U.S. at 29-30.

For tradition to constitute a legitimate basis for judicial decision-making, it must at least reflect an accurate and contextualized understanding of past practice. But that is not what the City and its *amici* offer. Instead, they cherry-pick text from centuries-old statutes and disregard the broader legal frameworks within which such vagrancy laws were embedded.

Simply put, there is no tradition of standalone bans on involuntarily sleeping in public. While there have long been vagrancy laws, they were materially different in scope and purpose than the Ordinances. Those early vagrancy laws were part of an interconnected web of legal rules that governed support for the local poor, that contemplated swift banishment of poor migrants, and that ensured adequacy of the local labor force by imposing forced work on those who were voluntarily idle.

Unlike the Ordinances, those early provisions did not simply punish unhoused people based on the status of being unhoused (or conduct intertwined with that status). Instead, they reflected a cohesive approach to poor relief and labor economics. Their objectives and operation were therefore unlike the Ordinances in virtually every significant respect, and their discrete provisions regulating the use of public spaces cannot sensibly be treated as freestanding precedents without regard to that vital context. Treating this past practice as supporting the Ordinances would thus do

violence to the historical record and reflect a fundamental misunderstanding of relevant legal traditions.

A. Early Vagrancy Laws Reflected Cohesive Efforts to Address Poverty and Migration

Unlike the Ordinances—which reflect a targeted legal attack on the unhoused—early vagrancy laws reflected a broad social purpose: alleviating the effects of poverty by providing basic aid to those who were unable to work (or otherwise considered deserving of social support). *See* William P. Quigley, *Five Hundred Years of English Poor Laws, 1349-1834: Regulating the Working and Nonworking Poor*, 30 Akron L. Rev. 73, 101 (1996) [hereinafter *Five Hundred Years*]; Margaret K. Rosenheim, *Vagrancy Concepts in Welfare Law*, 54 Calif. L. Rev. 511, 514-16 (1966).

As far back as the Statute of Laborers in England, the nonworking poor who were unable to work were treated more leniently and permitted to beg. *See Five Hundred Years*, *supra*, at 95, 101. By the 16th Century, laws regulating vagrancy "were accompanied by mandates to offer publicly administered charity as a substitute means of support for the 'deserving poor.'" Philip Harvey, *Joblessness and the Law Before the New Deal*, 6 Geo. J. on Poverty L. & Pol'y 1, 12 (1999); *see also* William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 Stan. L. & Pol'y Rev. 101, 103 (1998) (the "poor unable to work were assisted") [hereinafter *Backwards into the Future*]. These early vagrancy laws reflected a "definite assumption by government of responsibility for the care of persons in economic distress." Harvey, *supra*, at 12 (citation omitted).

To avoid overly burdening localities with poor relief requirements, England enacted "laws of settlement" permitting removal of the newly arrived poor. Pursuant to one such law, a person could be removed if they "arrived within the last forty days" and "need[ed] relief or might [] need [] it in the future." *Five Hundred Years*, *supra*, at 103. That same law was amended to allow newcomers if they possessed "a certificate from [their] previous parish showing they would accept responsibility … if [they] needed relief." *Id.* at 105.

States followed these traditions during the Founding era, enacting vagrancy laws alongside mandates to localities to offer poor relief to settled residents. *See* Harvey, *supra*, at 21-22; William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. Rich. L. Rev. 111, 114, 141-50 (1997) [hereinafter *Reluctant Charity*]. "All colonial poor laws acknowledged a public responsibility to provide for the impoverished neighbor who was unable to work." William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. Rev. 35, 54 (1996) [hereinafter *Work or Starve*]. Such local responsibility included providing the "worthy poor" with a stipend, food, clothing, housing or other shelter, and other necessities. *See id.* at 60-64; *Reluctant Charity*, *supra*, at 151-60; *see also* Act for Relieving and Ordering of Idiots, Impotent, Distracted and Idle Persons (1784), in FIRST LAWS OF CONNECTICUT 98-100 (John D. Cushing ed., 1982); Act for the Relief of the Poor (1775) in 1 FIRST LAWS OF DELAWARE, ch. CCXXV, 545 (John D. Cushing ed., 1981).

As in England, some localities sought to minimize their obligations to the poor by restricting who was

allowed to settle in their jurisdiction. *See Reluctant Charity*, *supra*, at 140 ("Early American poor laws continued one of the foundations of English and colonial poor law, the law of settlement."); Marcus Wilson Jernegan, *The Development of Poor Relief in Colonial New England*, 5 Soc. Serv. Rev. 175, 178-80 (1931). Under these laws, individuals who were currently poor (or likely to become "[c]hargeable" financial burdens to the local government) were not welcome to settle in town and could be removed back to their last settlement. *E.g.*, 61 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND, MAY 24-JUNE 22, 1768, at 492 (J. Hall Pleasants ed., 1944). These vagrancy laws thus sought to "exclude poor people of other areas from any assistance and allowed non-local poor people to be expelled, removed, or banished from the community." *Reluctant Charity*, *supra*, at 140. Some states bolstered these laws by authorizing aggressive official efforts to prevent residents from descending into poverty. Connecticut, for example, instructed towns to "diligently inspect into the affairs and management of all persons in their town" to ensure that household finances were not being mismanaged. *Reluctant Charity*, *supra*, at 121 (internal quotation marks omitted); Kenneth L. Kusmer, *Down and Out, On the Road: The Homeless in American History* 20-21 (2002).

In these respects, early English and American vagrancy laws were not standalone bans on sleeping in public. Instead, they were cohesive efforts to address poverty and migration—and it was within this framework that some laws regulated the use of public spaces. There is no basis in the historical record to treat those provisions as effectively severable from the entire legal structure and public policy in which they

were embedded. Yet that is what the City and its *amici* do in asking the Court to treat them as a tradition supporting the Ordinances, which differ drastically in their objectives and operation from early vagrancy laws.

B. Early Vagrancy Laws Also Reflected Cohesive Efforts to Address Labor Economics

The historical tradition on which the City and its *amici* seek to rely is also inapposite for another reason: it was concerned in major part with regulating labor and the economy, and it singled out *voluntary* rather than *involuntary* choices not to work in its repudiation of willful "idleness." *See* Rosenheim, *supra*, at 513 ("Vagrancy control had a clear economic objective."); *see also* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603, 609 (1956) (defining vagrant as "an idle person who is without visible means of support and who, although able to work, refuses to do so").

This economic focus started in 1349 with the English Statute of Laborers, which addressed the "severe labor shortage" caused by the Black Plague. 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, 635 (1992). Aside from death, England associated this labor shortage with (1) laborers who worked only for increased wages and (2) people who would rather beg than work. Harvey, *supra*, at 4. Thus, "vagrancy laws emerged in order to provide the powerful landowners with a ready supply of cheap labor." William J. Chambliss, *A Sociological Analysis of the Law of Vagrancy*, 12 Soc. Probs. 67, 77 (1964). The Statute, like

other poor laws in England, provided for "(a) settlement of the able-bodied in their own parish, and provision of work for them there; (b) relief of the aged and infirm, ie, those who could not work; [and] (c) punishment of those of the able-bodied who would not work." *Ledwith v. Roberts* [1936] 3 All ER 570 (AC) at 593-94.

Under the Statute of Laborers, therefore, "every able-bodied person without other means of support was required to work for wages fixed at the level preceding the Black Death; it was unlawful to accept more, or to refuse an offer of work," or to move to another community in hope of higher wages or better working conditions. Foote, *supra*, at 615; *see also Backwards into the Future*, *supra*, at 102; Rosenheim, *supra*, at 513; Harvey, *supra*, at 4.

That tradition endured well past the Black Plague and took root in the early American states, which used vagrancy laws to "control workers in a changing political economy." Risa L. Goluboff & Adam Sorensen, *United States Vagrancy Laws*, *in* OXFORD RESEARCH ENCYCLOPEDIAS, AMERICAN HISTORY 2 (2018) [hereinafter *United States Vagrancy Laws*]; *see also* Simon, *supra*, 638-39. Many states initially continued the English tradition of unsympathetic labor regulation, *Work or Starve*, *supra*, at 69, and adopted vagrancy laws that punished "idleness" and compelled able-bodied people to work, often for artificially low wages, *Reluctant Charity*, *supra*, at 119-40.

In Georgia, for instance, the legislature decreed as follows: "[A]ble-bodied persons, not having some visible property, or who do not follow some honest employment, sufficient for the support of themselves and for their families (if any), and who shall be found loitering

and neglecting to labor for reasonable wages … shall be deemed and adjudged vagabonds." DIGEST OF THE LAWS OF THE STATE OF GEORGIA 569 (Horatio Marbury & William H. Crawford eds., 1802). Under Georgia law, such a "vagabond" could be acquitted if he had gainful employment or signed up for military service. *Id.* If not, he was put to forced labor for one year, with wages applied towards supporting his family and "paid to the [worker] himself." *Id.*

Similarly, South Carolina targeted "sturdy beggars" and others who "le[d] idle and disorderly lives." A DIGEST OF THE LAWS OF SOUTH CAROLINA 415-16 (Benjamin James ed., 1822). In cases brought under this statute, jurors "inquire[d] in what manner, and by what means, the person accused gains his, or her, livelihood, and maintains his, or her, family." *Id.* at 417. If the jury concluded that the person was unable to support themself, despite being able-bodied, their labor would be auctioned off to the public for a year. *Id.*

Like many early American vagrancy laws, these statutes prohibited "idle" living. That is, they made it a crime to be poor and able to work, yet to have no "honest" employment. *See Reluctant Charity*, *supra*, at 164-68 (analyzing Founding-era vagrancy laws).

This focus on idleness sharply distinguishes these laws from the Ordinances. Early American law was concerned with those who were able to work but chose not to do so; it offers no support for punishing (and effectively banishing) involuntarily unhoused people, which does nothing to address the economic or labor market concerns animating early vagrancy statutes.

C. History Does Not Support the Ordinances

As should now be clear, the Ordinances are not supported by legal tradition. In arguing otherwise, the City and its *amici* fail to grapple with the purpose and operation of the very vagrancy traditions they invoke.

First, the Ordinances are not about aid to the poor and do not exist within a cohesive poor-relief scheme. They do not require Grants Pass to provide shelter, food, clothing, and other aid to unhoused individuals—even those who, like Gloria Johnson, have long resided in Grants Pass. To the contrary, the City has recently attempted to make it *harder* for poor residents to obtain support: on March 12, 2024, the City Council approved (but the Mayor vetoed) an ordinance that would have made it harder for aid groups to provide assistance to the unhoused population of Grants Pass.[2]

Second, the Ordinances are not about addressing the challenges posed by migration from out-of-towners, and do not require poor visitors to return to their original "settlements." In fact, Gloria Johnson is a Grants Pass resident who lost her home. Grants Pass *is* her "settlement," and yet she is subject to the banishment that accompanies the Ordinances. Of course, one reason why the Ordinances do not focus on migration—and one reason why the tradition of vagrancy laws is

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[2] Isabela Lund, *Grants Pass Mayor Vetoes Ordinance That Would Make It Harder to Help Homeless*, NewsWatch 12 (Mar. 13, 2024), https://www.kdrv.com/news/housing-crisis/grants-pass-mayor-vetoes-ordinance-that-would-make-it-harder-to-help-homeless/article_297e06da-e0c9-11ee-a445-2b82c4d3ec93.html.

inapposite—is that such restrictions were invalidated in *Saenz v. Roe*, 526 U.S. 489 (1999).

Third, the Ordinances do not aim to regulate labor or punish idleness. On their face, the Ordinances are not limited to "idle" persons (who choose not to work).[3] Nor are they limited to the "voluntarily" unhoused. And they do not include any of the Founding-era labor obligations that vagrancy laws imposed on idleness—likely because such requirements would flagrantly violate the Reconstruction Amendments.

Finally, whereas the Ordinances punish sleeping in public where unhoused individuals have no choice, sleeping was not vagrancy under most early laws. *See In re Jordan*, N.W. 1087, 1087 (Mich. 1892) ("Sleeping in a barn one night and going about the township is not 'vagrancy,' under any definition that we can find in the law."). In fact, *not* sleeping during the night was deemed suspicious. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 333-34 (2001) (describing English night-walker laws); 4 William Blackstone, Commentaries on the Laws of England 171 (1769).

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In the early American states, the guiding principle behind vagrancy statutes was "[h]elp [n]eighbors,

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[3] A recent study by the University of Chicago found that "40.4 percent of the unsheltered population [in the United States] had at least some formal employment in the year they were observed as homeless." Bruce D. Meyer et al., *Learning About Homelessness Using Linked Survey and Administrative Data*, Becker Friedman Inst. for Econ. at 2 (June 23, 2021), https://bfi.uchicago.edu/wp-content/uploads/2021/06/Learning-About-Homelessnessv2.pdf.

[e]xpel [s]trangers." *Reluctant Charity*, *supra*, at 140. The Ordinances do not participate in that tradition—and instead reflect a philosophy of "help no one, expel every poor person." These significant differences in purpose, function, and scope underscore what this Court recognized decades ago—namely, that "the theory of the Elizabethan poor laws no longer fits the facts." *Edwards v. California*, 314 U.S. 160, 174 (1941). History and tradition offer no support for the Ordinances and, if anything, firmly undercut their asserted validity.

II. THE TRADITION OF VAGRANCY LAWS OFFENDS MODERN UNDERSTANDINGS OF LIBERTY, EQUALITY, AND DECENCY

For the reasons given in Part I, an exclusively historical analysis offers no support to the Ordinances. But this Court has long rejected a myopic focus on past practice in its Eighth Amendment jurisprudence. To the contrary, the Eighth Amendment's prohibition on cruel and unusual punishments "is determined not by the standards that prevailed when the Eighth Amendment was adopted in 1791" but instead derives from "'the evolving standards of decency that mark the progress of a maturing society.'" *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Trop*, 356 U.S. at 101); *accord Miller v. Alabama*, 567 U.S. 460, 469-70 (2012).

This case exemplifies the compelling reasons why the Court has not confined Eighth Amendment analysis to the world of the Framers. History teaches that the legal tradition invoked by the City and its *amici*—the tradition of vagrancy laws—is profoundly offensive to core constitutional values. It is shot through

with moral judgments of the poor that this Nation (and this Court) rejected decades ago; it reflected a view of the state's power to impose forced labor that was jettisoned by the Reconstruction Amendments; it stood at the center of post-Civil War efforts to resurrect slavery through the so-called Black Codes; and it has long been invoked to target disfavored minorities in flagrant violation of First and Fourteenth Amendment guarantees.

The City and its *amici* rip discrete lines out of early American vagrancy statutes and ignore context essential to understanding those provisions or assessing whether they are appropriate analogues for the Ordinances. Then they commit yet another fundamental error: they erase centuries of lived experience that weigh decisively against reliance on this tradition to authorize the *de facto* banishment of all unhoused persons. Under any credible conception of decency in a maturing society, vagrancy laws should be condemned, not revitalized as a basis for outlawing homelessness.

A. Early Vagrancy Laws Were Based on Offensive Moral Judgments of the Poor

In *Edwards v. California*, this Court articulated a crucial principle of modern social and political understanding: "Whatever may have been the notion then prevailing, we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a moral pestilence." 314 U.S. at 177 (citations omitted). Simply put, "[p]overty and immorality are not synonymous." *Id.* Laws premised on a belief that poor persons are despicable or unworthy collide with that insight.

But vagrancy laws were deeply grounded in a far-reaching moral condemnation of poverty. "A dominant justification for vagrancy laws had always been explicitly moral: such laws were intended to eliminate, or at least suppress, vice—crimes of moral failing, crimes consisting more of violations of community norms than of direct and material harms to persons or property." Risa L. Goluboff, *Vagrant Nation: Police Power, Constitutional Change, and the Making of the 1960s* 148 (2016) [hereinafter *Vagrant Nation*].

In England, vagrancy laws were animated by beliefs that "if people remained poor it was because of their own bad decisions" or because "poor people are sinful." *Five Hundred Years*, *supra*, at 106. For the ruling class, moral judgments of the poor served as effective channels not only for regulating the flow and demand of labor, but also for maintaining firm social control.

Similarly, American vagrancy laws "were premised on the immorality of idle poverty and targeted those who failed to work or remain in their prescribed place." *United States Vagrancy Laws*, *supra*, at 3; *see also* Nantiya Ruan, *Corporate Masters & Low-Wage Servants: The Social Control of Workers in Poverty,* 24 Wash. & Lee J. Civ. Rts. & Soc. Just. 103, 110 (2017). Vagrants were punished to express moral disapproval of their status—and to prevent the future crimes that were expected to flow inevitably from that "mode of life." *District of Columbia v. Hunt*, 163 F.2d 833, 835 (D.C. Cir. 1947); *see also* Larry Cata Becker, *Medieval Poor Law in Twentieth Century America*, 44 Case W. Rsrv. L. Rev. 871, 959-60 (1994) ("Vagrants, beggars, and the idle in general, were characterized as social

deviants, and as such were to be suppressed by the imposition of criminal penalties…").

Moved by moral condemnation of poverty—and by a belief that poverty was equivalent to future criminality—states used vagrancy statutes as a "punitive mechanism of social control over the displaced poor." Simon, *supra*, at 640 n.56; *see also* Chambliss, *supra*, at 75 ("The control of criminals and undesirables was the *raison de etre* of the vagrancy laws in the U.S. This is as true today as it was in 1750."). Connecticut, for instance, penned a statute characterizing the wandering poor as "guilty of profane and evil discourse, and other disorders, to the corruption of manners, the promotion of idleness, and the detriment of good order and religion." *Reluctant Charity, supra,* at 122. And South Carolina linked vagrancy with suspicion: "Every person of suspicious character coming to settle in any county or parish within this State, shall be deemed a vagrant…." *Id.* at 165.

Sometimes, this moral judgment was taken so far as to pathologize poverty. In *Mayor of New York v. Miln*, this Court permitted New York to limit paupers from arrival by ship, declaring: "We think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence…." 36 U.S. 102, 142-43 (1837). By likening people in poverty to infectious diseases, states claimed unbridled authority to burden, criminalize, imprison, and banish the poor. Not only was this useful for removing state responsibility and complicity in the circumstances that led to poverty,

but it was also effective in casting the poor as pariahs unable to participate in political or social life.

A moral condemnation of poverty and joblessness thus underwrote early American vagrancy statutes. And this Nation has since rejected that moral outlook as a basis for criminalizing and punishing our neighbors who are experiencing poverty. *See Edwards*, 314 U.S. at 177; *Parker v. Municipal Judge of City of Las Vegas*, 83 Nev. 214, 216 (1967) ("It simply is not a crime to be unemployed, without funds, and in a public place," and "[t]o punish the unfortunate for this circumstance debases society."); *Alegata v. Commonwealth*, 353 Mass. 287, 297 (1967) ("Idleness and poverty should not be treated as a criminal offence.").

Accordingly, the moral judgment at the heart of the tradition cited by the City and its *amici* is at odds with evolving standards of decency that define modern society. Our Nation has come far in challenging the antiquated notion that poverty should be the basis for reprehensible moral judgments or assumptions of criminality. The City and its *amici* seek to dust off outdated vagrancy provisions while pretending that society has not changed in the interim. They are wrong.

B. Early Vagrancy Laws Granted Unchecked Powers to Punish the Poor with Impunity

The City and its *amici* also fail to appreciate that the tradition of vagrancy laws was upended by the Reconstruction Amendments. As explained in Part I, English and early American vagrancy laws sought to address a range of related issues: poverty, migration, labor, idleness, economics, and morality. Regulations of vagrants were inextricably intertwined with that

broader framework, which mixed aid and banishment with incarceration and forced labor. In very practical respects, the state's power to require work—and to dictate wages and terms on penalty of imprisonment—was central to the design of vagrancy laws. Therefore, the ratification of the Reconstruction Amendments, notably including the 13th Amendment, imposed a fundamental rejection of the political and economic project that animated early vagrancy laws.

Early American vagrancy laws generally involved penalties ranging from forced labor to fixed wages to imprisonment. *See Five Hundred Years*, *supra*, at 85 (describing "compulsory work; reduced compensation and control of wages; imprisonment as penalty for quitting work before the term ended; and stiff enforcement through a special justice system created to hear disputes over the statute"). In practice, these punishments could be draconian and violent. Some states committed the idle poor to workhouses, where they effectively became involuntary servants and faced "shackles, whipping, and withdrawal of food." *Reluctant Charity, supra,* at 122. In other states, the poor were incarcerated and held captive until they posted bond. *Id.* at 125. If they (predictably) failed to post bond, they would be leased "for service to a private party for up to one year" or given "thirty lashes" before being freed. *Id.* Indenture, whipping, and banishment were common mechanisms by which early states with

vagrancy laws controlled persons in poverty. *Id.* at 167.[4]

Today, these forms of punishment are unthinkable under the Reconstruction Amendments. The Thirteenth Amendment decisively rejected the imposition of compulsory labor. *See, e.g.*, *Thompson v. Bunton*, 117 Mo. 83, 22 S.W. 863 (1893) (striking down law allowing vagrants to be auctioned off to highest bidder). And the Fourteenth Amendment not only repudiated the notion that certain classes of Americans are without full enjoyment of constitutional rights, but also forbade restrictions on freedom of movement. *See Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) ("[T]he purpose of inhibiting migration by needy persons into the State is constitutionally impermissible."). In combination, the Thirteenth and Fourteenth Amendments kicked the legs out from the legal restrictions that defined vagrancy statutes.

The Fourteenth Amendment invigorated due process and imposed that legal duty on the states. Over time, it became apparent that state vagrancy laws offended this principle, not only in the punishments that they authorized but also in their indeterminate scope and highly arbitrary application.

This Court confirmed as much in *Papachristou v. City of Jacksonville*, 405 U.S. at 162. There, Jacksonville police officers used a Florida vagrancy law to

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[4] Similarly, the Articles of Confederation expressly excluded "paupers" and "vagabonds" from the privileges and immunities clause and the guarantee of "free ingress and egress to and from any other state." Foote, *supra*, at 616.

"regulate and harass any number of socially marginal groups who failed—by choice or coercion—to comply with middle-class norms of behavior." Risa L. Goluboff, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 Stan. L. Rev. 1361, 1364 (2010) [hereinafter *Dispatch from the Supreme Court Archives*]. This Court unanimously struck down the Florida law, holding it void for vagueness because it failed to provide fair notice and allowed "arbitrary and erratic arrests and convictions." *Papachristou*, 405 U.S. at 162. As the Court explained, the state-level vagrancy law impermissibly constituted "a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 170 (internal quotation marks omitted). The Court reiterated its important *Edwards* holding that "the theory of the Elizabethan poor laws no longer fits the facts," elaborating that "[t]he conditions which spawned these laws may be gone, but the *archaic* classifications remain." *Id.* (emphasis added).

As scholars have noted, *Papachristou* reflected "new understandings about the meaning of the Constitution in a new era of social and cultural pluralism, an era in which many thought that the Constitution should provide protection for difference and should constrain the authority of the police to treat difference as danger." *United States Vagrancy Laws*, *supra*, at 9. Since *Papachristou*, this Court has repeatedly invalidated later iterations of vagrancy laws for violating the Fourteenth Amendment. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (plurality opinion);

Kolender v. Lawson, 461 U.S. 352, 353-54 (1983); *cf. Timbs*, 139 S. Ct. at 688-89 (history of "draconian fines for violating broad proscriptions on 'vagrancy' and other dubious offenses").

The City and its *amici* turn to early vagrancy laws to justify draconian punishment of the poor in our own time. But the Constitution and this Court have long rejected core premises of vagrancy laws, defeating any claim that they accord with standards of decency.

C. Post-Civil War Vagrancy Laws Were Used to Attempt to Resurrect Slavery

The fate and function of vagrancy statutes following the Reconstruction Amendments further caution against treating them as part of our continuing legal traditions. *But see* Pacific Research Inst. Amicus Br. at 11-12 (invoking laws from "around the time of the adoption of the Fourteenth Amendment"). As this Court has rightly recognized, "vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery." *Morales*, 527 U.S. at 54 n.20 (plurality). That history remains relevant to any legal assessment of whether vagrancy statutes constitute a tradition that may support the Ordinances—and to any analysis of whether laws like the Ordinances, which participate in this lineage, accord with standards of decency.

After the Civil War, many states enacted so-called Black Codes to "subjugate newly freed slaves and maintain the prewar racial hierarchy." *Timbs*, 139 S. Ct. at 688. Vagrancy statutes featured prominently in those efforts. Almost immediately after the Civil War, Mississippi enacted a vagrancy statute requiring all

adult "freedmen, free negroes and mulattoes" to quickly enter the first of an indefinite series of annual labor contracts. Act to confer Civil Rights on Freedmen, and for other purposes (1865), in LAWS OF THE STATE OF MISSISSIPPI, ch. 4, 82-83 (Jackson ed., 1866). Those who failed to obtain "lawful employment or business" were "deemed vagrants" and subject to a $50 fine and ten days' imprisonment. Act to Amend the Vagrant Laws of the State (1865), in LAWS OF THE STATE OF MISSISSIPPI, ch. 6, § 2, 90. If convicted and unable to pay their fines, violators were forcibly "hire[d] out" to whoever would pay the fine. *See id.* § 5, 92.

Other Southern States followed suit. *See* William Cohen, *Negro Involuntary Servitude in the South, 1865–1940: A Preliminary Analysis*, 42 J.S. Hist. 31, 47 (1976) ("[A]ll the former Confederate states except Tennessee and Arkansas passed new vagrancy laws in 1865 or 1866" because such laws provided a "way of forcing blacks to sign labor agreements."); *see also* Daniel A. Novak, *The Wheel of Servitude: Black Forced Labor After Slavery* 2-8 (1978). The vast majority of Southern states provided for the "hiring out" of offenders, which kept formerly enslaved persons in a state of quasi-slavery. Cohen, *supra*, at 47; *see also* Novak, *supra*, at 1-8; Michelle Alexander, *The New Jim Crow* 28 (2010). Vagrancy was also cited as a justification for lynchings. *See* Stewart E. Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882-1930*, 47 (1995).

In practice, these Black Codes defined "vagrant" so broadly as to cover "virtually every [B]lack [person] in the postwar South." Glenn B. Manishin, *Section 1981: Discriminatory Purpose or Disproportionate Impact?*,

80 Colum. L. Rev. 137, 158 (1980); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 410 n.2 (1982) (Marshall, J., dissenting) (Black Codes "were vague and broad enough to encompass virtually all Negro adults."). Although most of these "vagrancy [laws] were facially neutral, even Congress plainly perceived all of them as consciously conceived methods of resurrecting the incidents of slavery." *Gen. Bldg. Contractors*, 458 U.S. at 386-87.

Justices of this Court have thus recognized time and again that post-Civil War vagrancy laws were enforced to reinstitute and maintain slavery. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2227 (2023) (Sotomayor, J., dissenting) (post-emancipation vagrancy prosecutions were part of a "system of free forced labor [that] ... was designed to intimidate, subjugate, and control newly emancipated Black people"); *id.* at 2266 (Jackson, J., dissenting) ("[V]agrancy laws criminaliz[ing] free Black men who failed to work for White landlords" were a "race-linked obstacle[] that the law … laid down to hinder the progress and prosperity of Black people" in the post-Reconstruction South.); *City of Greenwood v. Peacock*, 384 U.S. 808, 850 (1966) (Douglas, J., dissenting) ("Vagrancy laws were … enforced so as to reduce free men to slaves 'in punishment of crimes of the slightest magnitude,' laws which declare men vagrants because they have no homes and because they have no employment in order to retain them still in a state of real servitude.") (citation omitted).

In light of this deeply problematic history, reliance on post-Civil War vagrancy statutes is deeply flawed

as a basis for modern jurisprudence. This background also demonstrates—once again—that the broad tradition of vagrancy laws in the United States is unworthy of a constitutional safe harbor. The Ordinances are rooted in poisoned soil and should not be upheld.

D. Vagrancy Laws Have Historically Been Enforced to Target Disfavored Minorities

There is a fourth and final reason why the tradition of vagrancy laws is unhelpful to the Ordinances: police have historically "used these laws to demarcate who was out of place in a given community—who was denied full respect for their mobility, their autonomy, their lifestyle, or their beliefs." *Dispatch from the Supreme Court Archives*, *supra*, at 1371. In other words, vagrancy laws have long been enacted with discriminatory purposes and enforced in discriminatory ways. "Communists, labor union members, civil rights demonstrators, poor people, hippies, gays and lesbians, women, Native Americans, Vietnam War protestors, young, urban, minority men, and other minorities and dissidents" have all been the targets of vagrancy law enforcement throughout our history. *Id.* at 1372; *see also* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960) (vagrancy arrests fall on "minority groups … who do not have the prestige to prevent an easy laying-on of hands by the police"). That story offers overwhelming cause for skepticism in analyzing this latest vagrancy provision.

Racial and Ethnic Minorities. As with the roots of vagrancy laws themselves, using vagrancy laws to target disfavored racial and ethnic minorities can be traced back to England. "At various moments, the Irish, whom the English accused of loose morals,

popery, and filth, and the Roma … [] came in for special attention." *Vagrant Nation*, *supra*, at 115.

The same pattern has held true in America, where states "aggressively passed vagrancy laws regulating the whereabouts, livelihoods, and lives of their minority residents." *Id.* We have described the post-Civil War Black Codes in Part II.C. That was not the only discriminatory use of vagrancy laws in the 19th century. In California, the 1850 Act for the Government and Protection of Indians allowed for the indenturing of Native American adults and children, treating "vagrant" Native Americans as property to be auctioned to the highest bidder. *See* Kimberly Johnston-Dodds, *Early California Laws and Policies Related to California Indians*, California Research Bureau 5-10 (2002); *see also* Kayley Berger, *Surveying the Golden State (1850-2020): Vagrancy, Racial Exclusion, Sit-Lie, and the Right to Exist in Public*, 16 Cal. L. Hist. 209, 212-14. Later, California's Antivagrancy Act of 1855—notoriously referred to as the "Greaser Act"—effectively restricted the movement of Californians of Mexican descent. Berger, *supra*, at 215.

This discriminatory use of vagrancy laws continued well into the twentieth century, with "states and localities [using] vagrancy laws against African Americans" in part "to thwart efforts to move out of back-breaking and poorly paid agricultural jobs." *Vagrant Nation*, *supra*, at 116 ("[I]t became something of a regional pastime to enact vagrancy laws with new provisions and stricter penalties."). In Atlanta, a newspaper "admonished the police, 'Cotton is ripening. See that the "vags" get busy.'" *Id.* at 117. Vagrancy laws were also used to reinforce norms against race mixing.

Thus, "so-called sundown towns" used vagrancy laws to keep out minorities—along with signs announcing, "Whites Only within City Limits after Dark." *Id.* at 115. Police used vagrancy laws to punish any form of racial mixing, from interracial marriage to the presence of white women in Black bars. *See id.* at 117.

In sum, vagrancy laws have been used from their inception to subordinate and control racial and ethnic minorities. *See id.* at 115 ("Latinos, Chinese Americans, Japanese Americans, [] Native Americans, [and] Native Hawaiians" have all been targets of vagrancy laws in the United States.). The Court should not give Grants Pass license to do the same—or to target new groups—with its Ordinances.

Civil Rights Activists and Political Minorities. Going hand-in-hand with their use as a tool for racial oppression, vagrancy laws have been weaponized repeatedly to target civil rights activists (particularly those combatting Jim Crow). *See Vagrant Nation*, *supra*, at 112-46. In the 1950s and 1960s, Southern officials frequently employed vagrancy laws to suppress the civil rights movement. *Id.* Activists were arrested broadly and indiscriminately, capitalizing on the laws' vagueness, which required little to no criminal conduct for an arrest. *See* Risa Goluboff, *Blowing in the Spring Winds: Before Black Lives Matter, Vagrancy Laws Plagued Black Americans for Decades. Then the Civil Rights Movement Happened*, Slate (Mar. 2, 2016) [hereinafter *Blowing in the Spring Winds*].

For instance, in 1958, three Montgomery ministers were arrested for vagrancy in Birmingham, Alabama, while aiding Reverend Fred Shuttlesworth, a prominent civil rights leader. *See Vagrant Nation*, *supra*, at

112. Despite having legitimate reasons for their presence, they were detained under the pretense of lacking "proper identification," showcasing how these laws were twisted to suppress civil rights activism. *Id.* Bull Connor, the police commissioner, openly admitted to using vagrancy laws as an excuse to arrest them—notoriously stating, "Down here we make our own law…. I had [the Montgomery ministers] picked up on a charge of vagrancy until we could find out what they were doing here…." *Id.* at 120. In Arkansas, the attorney general similarly announced his plans to use vagrancy laws to thwart civil rights efforts, while a Georgia sheriff threatened to use vagrancy laws against workers for the Student Nonviolent Coordinating Committee. *See id.* And in 1964, in Hattiesburg, Mississippi, two schoolteachers from New York City were charged with vagrancy while participating in integration efforts. *See id.* at 120-21. The goal of these vagrancy arrests was clear: "[T]o expel outsiders and thwart the [civil rights] movement." *Id.* at 122.

Union organizers have similarly faced the misuse of vagrancy laws in efforts to silence their political agenda. In the late 19th and early 20th centuries, the burgeoning labor movement posed a risk that workers would challenge the socio-economic status quo. Employers and their allies swiftly labeled union organizers and striking workers as "tramps, bummers, and vagrants," weaponizing vagrancy laws as tools of suppression. *See id.* at 16; *see also* Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 Colorado L. Rev. 667, 670 (2004) ("[V]agrancy law was used to define the rights of labor in the North to organize, protest, withhold labor, and bargain with employers.").

This was a nationwide practice. Across diverse locales, from the mines of Telluride, Colorado, to the textile mills of South Carolina, authorities systematically employed vagrancy laws to stifle labor organizing and free speech. *See Vagrant Nation*, *supra*, at 16. "Vagrancy law was used relentlessly … to force [workers] to accept employment at proffered wages, to break up strikes and other protests, and to undermine their attempts at radical unionization." White, *supra*, at 670-71; *see also Gurtov v. Williams*, 105 S.W.2d 328, 329 (Tex. 1937).

Vagrancy laws have also been discriminatorily invoked against a wide range of nonconformist groups—perhaps most famously the hippies. To many Americans in the 1960s and 1970s, "hippies represented the deterioration of the family, the workplace, and the church—the bedrocks of democracy and capitalism." *Vagrant Nation*, *supra*, at 232. In their increasingly desperate attempts to control the hippies, "law enforcement turned—no surprise here—to ever-elastic vagrancy laws…." *Id.* at 236. "[P]olice arrested hippies for vagrancy in places like Bronson, Florida; Cambridge Springs, Pennsylvania; South Padre Island, Texas; Vancouver, Canada; Timbrook, Louisiana; and Atlanta, Georgia. In some places, they eventually had to suspend such arrests because the jails were already full of hippie vagrants." *Id.* at 236-37.

As history demonstrates, vagrancy laws have been deployed as a tool to regulate unpopular political speech. From civil rights activists to anti-war protestors, and from labor organizers to hippies, states have invoked ever-flexible vagrancy laws to silence dissident views. This troubled record further undermines

any reliance on the history and tradition of vagrancy laws to uphold the Ordinances today.

Women and Sexual Minorities. Vagrancy laws have been used throughout history to coercively regulate the behaviors and lives of women. "Arrests of women for defying conventional mores of female sexuality … were a mainstay of vagrancy enforcement for hundreds of years." *Vagrant Nation*, *supra*, at 150. Some of these laws were used to target "prostitutes and allegedly promiscuous women," *id.* at 151, but even being out in public was considered inherently suspect, *id.* at 150. This meant that "working-class, ethnic, and minority women who neither subscribed to the chastity ideal nor had the luxury of staying out of public spaces found themselves policed by vagrancy laws." *Id.*

Broad vagrancy laws also captured women whose only offense was having questionable means of support—especially women who were unmarried, widowed, or without a male guardian. *See* Seth Rockman, *Women's Labor, Gender Ideology, and Working-Class Households in Early Republic Baltimore*, 66 Pa. Hist.: J. of Mid-Atlantic Studies 174, 182 (1999). Some 19th century laws treated some women as vagrants unless they were indentured or "married to … or widowed by a man with a legal settlement." Kristin O'Brassill-Kulfan, VAGRANTS AND VAGABONDS: POVERTY AND MOBILITY IN THE EARLY AMERICAN REPUBLIC 16 (2019); *see also, e.g.*, Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 Criminology 209, 221 (1989) ("[W]omen unaccompanied by their husbands [] were routinely vagged.").

Relatedly, vagrancy laws played a key role in the historical targeting of sexual minorities. Vagrancy often served as a pretext for mass arrests at gay bars, revealing a systematic effort to criminalize sexual minorities. *See Vagrant Nation*, *supra*, at 46-47. Violations of sodomy laws were hard to prove, so police turned to vagrancy laws. "Gay men were more frequent targets of 'vag lewd' arrests than lesbians, as the police often found them liaising in public spaces—bars, parks, beaches, public restrooms, transportation depots." *Id.* at 47; *see also, e.g.*, *People v. De Curtis*, 63 Misc. 2d 246, 247-48 (App. 2d Dep't 1970). But women were not spared: they risked vagrancy arrests "simply when standing in front of a lesbian bar or by dressing or looking too masculine." *Vagrant Nation*, *supra*, at 47 (quotations omitted). Vagrancy laws have also been used as a tool in "cross-dressing bans" to target gender non-conforming populations. *See* Kate Redburn, *Before Equal Protection: The Fall of Cross-Dressing Bans and the Transgender Legal Movement, 1963–86*, 40 L. & Hist. Rev. 679, 680 (2022).

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The City and its *amici* invoke history and tradition to justify the Ordinances, but that effort is unjustified and self-defeating. Vagrancy laws are not an appropriate historical analogue for the Ordinances. And from their very inception—in both their purpose and application—vagrancy laws have functioned in ways that offend our evolving standards of decency, liberty, and equality. For centuries, vagrancy statutes have been deployed as tools of control and discrimination to target anyone considered "other." The impoverished. Racial and ethnic minorities. Labor organizers. Political

dissidents. Nonconformists. Women. LGBTQ people. And the list goes on. The City of Grants Pass wants to add the unhoused to that list. This Court should not allow it to do so. It should instead reaffirm that there is no safe harbor to be found in the abhorrent and painful history of vagrancy laws in the United States.

CONCLUSION

The Court should affirm the judgment below.

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