

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,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF FORMERLY INCARCERATED,
CONVICTED PEOPLE AND FAMILIES
MOVEMENT, THE SHRIVER CENTER ON
POVERTY LAW, AND NATIONAL CONSUMER
LAW CENTER AS *AMICI CURIAE* IN SUPPORT
OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Formerly Incarcerated, Convicted People and Families Movement (“FICPFM”) is a national movement of people with criminal records and their families. They speak about the need to end mass incarceration—America’s current racial and economic caste system. To that extent, FICPFM is committed to transforming society by transforming the criminal legal system. FICPFM works in and with a community of over 50 civil and human rights organizations led by policy experts, subject matter experts, organizers, thought-leaders, artists, healers and attorneys who have, or are close to family members with, conviction histories. FICPFM works not only to ensure alternatives to incarceration and criminalization, but also to address the collateral consequences of living with a conviction. They do so by restoring civil rights to those who have had them taken away. Currently, FICPFM leads the national #Housing4All Campaign, a national coalition of grassroots organizations advocating to end housing discrimination against people with criminal records.

The Shriver Center on Poverty Law is a national non-profit working toward economic and racial justice. Over nearly 60 years, the Chicago-based organization has secured hundreds of law and policy victories with and for people experiencing economic instability in Illinois and across the country. As a central focus of its housing

1. Pursuant to Sup. Ct. R. 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, its members, or its counsel made a monetary contribution to its preparation or submission.

equity and racial justice work, the Shriver Center works closely with advocates and directly impacted communities to enhance housing access for those with criminal records. For example, the Shriver Center leads the Partnership for Just Housing, a national forum of organizations that operate at the nexus of housing and criminal justice. The Shriver Center also sits on FICPFM's #Housing4All steering committee. More locally, the Shriver Center is a member of the Illinois Reentry Council, has been instrumental in passing and enforcing the Cook County Just Housing Amendment which limits the discretion of housing providers to exclude tenant applicants based on their criminal records, and has brought federal litigation challenging municipal Crime Free Nuisance Ordinances.

Since 1969, the non-profit National Consumer Law Center ("NCLC") has used its expertise in consumer law to work for consumer justice and economic security for low-income and other disadvantaged people in the United States. NCLC works with non-profit and legal services organizations, private attorneys, policymakers, federal and state governments, and courts across the nation to stop exploitative practices, help financially stressed families build and retain wealth, and advance economic fairness. Through its Criminal Justice Debt and Reintegration Project, NCLC uses advocacy, litigation, and education to challenge harmful practices at the intersection of criminal and consumer law. Its work addresses policies that criminalize poverty and strip wealth from communities of color, as well as policies that prevent consumers with criminal records from securing jobs and housing.

SUMMARY OF ARGUMENT

People with criminal records have an especially hard time securing housing. In fact, “Formerly incarcerated people are almost 10 times more likely to be homeless than the general public.” Lucius Couloute, *Nowhere to Go: Homelessness Among Formerly Incarcerated People*, Prison Policy Initiative (Aug. 2018), <https://www.prisonpolicy.org/reports/housing.html>. This effect is even more pronounced for people who have experienced multiple terms of incarceration. *See id.* By subjecting involuntarily homeless people to fines and imprisonment for criminal trespass, ordinances like the ones in Grants Pass (“the City”) force an already vulnerable population into an endless cycle of homelessness and punishment. Doing so implicates the Constitutional rights of those targeted by these ordinances.

Amici here acknowledge that local governments have available a wide variety of tools to make their public spaces safe and accessible to their residents. But making criminals of people forced to sleep in the park—involuntarily homeless people—is not a constitutionally permissible tool. By exacting punishments that cannot advance a “legitimate penological justification” in “any substantial way,” and by punishing people based on their involuntary status and inflicting injury grossly disproportionate to the underlying “offense,” anti-sleeping ordinances fail to comply with the Eighth Amendment’s prohibition against cruel and unusual punishment. *See Ingraham v. Wright*, 430 U.S. 651, 667 (1977); *Graham v. Florida*, 560 U.S. 48, 71 (2010), *as modified* (July 6, 2010); *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983).

Ordinances like the City's violate the Eighth Amendment's prohibition against cruel and unusual punishment for three reasons. First, anti-sleeping ordinances, which prohibit involuntarily homeless people from sleeping outside, neither serve a "legitimate penological justification" nor offer a "good-faith effort" to address harms associated with homelessness. *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Graham*, 560 U.S. at 71. By saddling homeless people with new criminal records, anti-sleeping ordinances necessarily create additional barriers to housing and trap those affected in a cycle of homelessness and punishment. Rather than meeting any permissible objective, anti-sleeping ordinances impose "unnecessary and wanton infliction of pain" upon the homeless population until they "move on down the road." *Hope v. Pelzer*, 536 U.S. 730, 737 (2002); Resp'ts Br. in Opp'n to Pet. for Writ of Cert., at 6. This renders such ordinances unconstitutional. *See Graham*, 560 U.S. at 71; *see also, e.g., Hudson*, 503 U.S. at 7 (key question is "whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.").

Second, the City's anti-sleeping ordinances punish homeless people for their involuntary status, rather than for a cognizable criminal act. *See Robinson v. California*, 370 U.S. 660, 667 (1962). These ordinances place people with criminal records in an impossible situation. Government policy itself often encourages or forces housing providers to refuse housing to people with criminal records, thus leaving people with no choice but to sleep in public spaces. It is cruel and unusual for the State to prevent people with criminal records from obtaining housing and then punish them for sleeping outside. *See Robinson*, 370 U.S. at 665-67.

Third, beyond trapping people into a cycle of homelessness, anti-sleeping ordinances result in additional collateral consequences, which make the punishment grossly disproportional to the violation. People punished under anti-sleeping ordinances face consequences which can include inability to vote, inability to renew a driver's license, probation revocation, and prolonged incarceration. These collateral punishments, on top of the fines and incarceration imposed on involuntarily homeless people under anti-sleeping ordinances, are "by [their] nature disproportionate" to the underlying "offense," which consists not of "antisocial or disorderly behavior," but merely of sleeping outside when there is no option to sleep inside. *Robinson*, 370 U.S. at 666; *Graham*, 560 U.S. at 71; *see also Weems v. United States*, 217 U.S. 349 (1910) (disproportionate collateral consequences weigh in favor of finding Eighth Amendment violation).

ARGUMENT

I. Anti-Sleeping Ordinances Lack A Penological Purpose, And Instead Punish The State Of Being Homeless.

This section explains how criminal convictions and fines create substantial barriers to housing, and thus how criminalizing the act of public sleeping violates the Eighth Amendment. By necessarily exacerbating the very problems anti-sleeping ordinances purport to address, anti-sleeping ordinances lack a penological purpose. *See Solem*, 463 U.S. at 297 n.22; *see infra* Part I.D. These ordinances are not designed to legitimately address harms associated with homelessness. Rather, they merely punish the status of being homeless in the hopes that unhoused individuals grow so "uncomfortable" that they leave town. *See infra* Part I.E.

Homelessness begets incarceration, and incarceration begets homelessness. *See Reducing Criminal Justice System Involvement Among People Experiencing Homelessness*, U.S. Interagency Council on Homelessness, 1 (Aug. 2016), https://devserver.usich.client.innoscale.net/sites/default/files/document/Criminal_Justice_Involvement_08_2016.pdf. Regardless of “which came first,” anti-sleeping ordinances fail to serve a “legitimate penological justification.” *See Graham*, 560 U.S. at 71. Rather, “local policies and measures that criminalize homelessness and its associated behaviors—like sleeping outdoors—only perpetuat[e] the cycle of criminal justice involvement and homelessness.” *Reducing Criminal Justice System Involvement*, *supra*, at 1; *see also* Madeline Bailey et al., *No Access to Justice: Breaking the Cycle of Homelessness and Jail*, Vera Inst. of Just., 2 (Aug. 2020), <https://www.vera.org/downloads/publications/no-access-to-justice.pdf>. Indeed, “The relationship between homelessness and criminal justice involvement is . . . bi-directional—homelessness increases the risk of criminal justice involvement, and vice versa In order to end homelessness, we must reduce the number of people who enter the criminal justice system from homelessness and prevent homelessness among people leaving criminal justice settings.” *Reducing Criminal Justice System Involvement*, *supra*, at 1-2.

More specifically:

The crisis [of homelessness] is perpetuated by a legal system that criminalizes . . . behaviors associated with homelessness, fails to account for the ways in which people who are homeless face impossible odds within the legal process,

and then releases them back into the community with even more obstacles than they faced before [A]fter release from jail or prison, a person's prior criminal justice involvement creates even more barriers to overcoming homelessness. People reentering the community after incarceration must navigate the challenges of finding viable housing or shelter space with a criminal conviction, while simultaneously facing increased restrictions on employment eligibility for the same reason.

Bailey, *supra*, at 1-2.

According to a recent study of homelessness in California, "Nineteen percent of all participants entered homelessness directly from an institutional setting; 8% entered from a prolonged jail stay and 6% from a prison stay. Of those who entered from institutional settings, 67% had been homeless when they entered that setting." Margot Kushel & Tiana Moore, *Toward a New Understanding: The California Statewide Study of People Experiencing Homelessness*, Benioff Homelessness and Housing Initiative, U. of Cal. S.F., 35 (June 2023), https://homelessness.ucsf.edu/sites/default/files/2023-06/CASPEH_Report_62023.pdf (footnote omitted).

Reflecting on the cycle of homelessness and punishment caused by these ordinances, an FICPFM member who first became homeless as a teenager stated as follows:

A lot of times when people are getting arrested . . . for being homeless . . . they wind up with a criminal record worse than someone actually

committing a crime. It becomes a revolving door. [The] people [that] say[] “we don’t want these homeless people living in public spaces” are putting them in the prison system . . . and then putting them right back in the street again These are not cats and dogs that are just running stray. These are human beings If you lock me up today, unless you give me [somewhere to sleep], I’m going right back to the street again After a certain amount of arrests [for being homeless], it builds you a criminal record It’s like you’re building a record for me I’m getting rearrested back and forth from day one Now you’re making it hard for me . . . [w]hen I get myself together [N]ow I come in for a job interview but now I’ve been arrested two weeks ago or a month ago [so I’m less likely to get the job] . . . You’re messing up people’s lives even when I’m trying to get it together . . . [W]hile [homeless people are] applying for things to be more sufficient in their life . . . we are making it harder.²

A. Criminal Records Prevent People from Accessing Housing.

Anti-sleeping ordinances first fail to serve a valid penological purpose because, by creating new criminal records, they prevent people from accessing housing. *See* Valerie Schneider, *The Prison to Homelessness Pipeline*:

2. Interview of anonymous FICPFM Member 1 (Mar. 14, 2024).

Criminal Record Checks, Race, and Disparate Impact, 93 Ind. L.J. 421, 431 (2018) (“Regardless of the nature of the crime, its recency, or its relation to an individual’s likelihood to fulfill his or her obligations as a tenant, such criminal records (or in many cases, even an arrest record with no ultimate conviction) have often served as an absolute bar to finding housing. . . .”). Anti-sleeping ordinances create and perpetuate the cycle of homelessness by exposing people to fines and criminal sanctions simply for being homeless, which in turn makes it harder to find housing. By making it increasingly difficult for people to access housing, anti-sleeping ordinances leave them with no place to go except the very places where the City criminalizes their existence.

Both unassisted (private market) and assisted (federally subsidized) housing providers resist renting to people with criminal records, including those with the types of records generated by anti-sleeping ordinances. *See infra* Parts I.A.1-2; Schneider, *supra*, at 431; *see also An Affordable Home on Reentry: Federally Assisted Housing and Previously Incarcerated Individuals*, Nat’l Hous. Law Project, 5 (2018), <https://www.nhlp.org/wp-content/uploads/Reentry-Manual.pdf> (“Estimates of the number of people likely to be excluded from federally-subsidized housing due to an arrest or criminal record are staggering.”). As stated by a respondent to an FICPFM survey, “I gave up applying to places once I realized the reality—that almost all landlords have blanket bans against people with legal system involvement.”³ Even shelters may exclude people with a record of violating anti-

3. Statement by anonymous FICPFM Survey Respondent (July 2022).

sleeping ordinances. Thus, by saddling unhoused people with criminal records and punishment, anti-sleeping ordinances prevent those sleeping outside from finding a place to sleep inside.

1. Convictions Under Anti-Sleeping Ordinances Create Barriers to Access in the Private (Unassisted) Housing Market.

Potential tenants are systematically denied access to unassisted housing because of their criminal records. The records generated by anti-sleeping ordinances thus prevent people from accessing housing in the private market.

The vast majority of landlords in the private housing market use criminal background checks. *See* Ariel Nelson, *Broken Records Redux: How Errors by Criminal Background Check Companies Continue to Harm Consumers Seeking Jobs and Housing*, Nat'l Consumer Law Ctr., 8 n.19 (Dec. 2019), <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf> (citing survey of 689 landlords, 90% of whom conduct background checks on all prospective tenants); Schneider, *supra*, at 431. These background checks are not just a procedural formality. Rather, private housing providers often use these records to screen out applicants with criminal records. *See* Schneider, *supra*, at 431; Jung Hyun Choi et al., *The Real Rental Housing Crisis Is on the Horizon*, Urb. Inst. (Mar. 11, 2022), <https://www.urban.org/urban-wire/real-rental-housing-crisis-horizon> (nearly forty percent of 1,100 surveyed landlords stated criminal history was one of the most important factors when screening prospective tenants). *See also* Rebecca Vallas &

Sharon Dietrich, *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records*, Ctr. for Am. Progress, 19 (Dec. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/12/VallasCriminalRecordsReport.pdf>.

Applicants with even extremely minor records are algorithmically screened out of housing. *See, e.g., Conn. Fair Hous. Ctr. v. Corelogic Rental Prop. Sols., LLC*, 369 F. Supp. 3d 362, 367-68 (D. Conn. 2019) (disabled applicant automatically rejected from housing due to dismissed misdemeanor theft charge); *see also* Chi Chi Wu et al., *Digital Denials: How Abuse, Bias, and Lack of Transparency in Tenant Screening Harm Renters*, Nat'l Consumer Law Ctr., 12-13 (Sept. 2023), https://www.nclc.org/wp-content/uploads/2023/09/202309_Report_Digital-Denials.pdf (forty-six percent of private landlords rarely or never review underlying criminal background check results, relying instead on consumer reporting agencies to make opaque recommendations which tend to treat all legal system involvement the same).

In a recent state-wide survey of unhoused people in California, more than one-third of those interviewed stated that their criminal record posed a barrier to finding such housing. Twenty-one percent said it posed a significant barrier. *See Kushel, supra*, at 79.

Potential tenants with criminal records are thus forced to spend what little money they have on rental applications only to face constant rejection. One person stated: “There’s so many times of just applying and not even hearing a phone call back to even say that you’re not

even accepted . . . If they don't want to have me there, why have me fill out the application and all that? . . . they were charging like \$35.00 credit checks and stuff each time, each application . . . After so many times of trying, you just give up because that money is just going to them for nothing when they know their answer already." *Id.*

These problems have led some municipalities to pass laws that prohibit landlords from refusing to rent to a person with a criminal record unless there is evidence that the person actually poses a threat to management's or other residents' health, safety, or the right to quiet enjoyment. In Cook County, Illinois, where more than one million residents have criminal records, the Cook County Board of Commissioners passed the "Just Housing Amendment" to Section 42-38 of the Cook County Human Rights Ordinance. This amendment prohibits housing discrimination based on an individual's covered criminal history and requires landlords to perform an individualized assessment of an otherwise qualified individual's criminal conviction history prior to denying their application for housing. See *Just Housing Amendment to the Human Rights Ordinance*, Cook County Government, <https://www.cookcountylil.gov/content/just-housing-amendment-human-rights-ordinance> (last visited Mar. 21, 2024). Unfortunately, such laws are rare, but they highlight and attempt to address a very real problem that exacerbates the homeless crisis: people with criminal records, including those who were convicted of minor crimes, have trouble securing housing. See *50-State Comparison: Limits on Use of Criminal Record in Employment, Licensing & Housing*, Restoration of Rts. Project, <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncomparison-of-criminal-records-in-licensing->

and-employment/ (last visited Mar. 26, 2024) (only a handful of states prohibit discrimination based on criminal records in rental applications without individualized analysis).

2. Criminal Trespass Convictions Create Barriers to Access in the Subsidized Housing Market.

Because the vast majority of homeless individuals cannot afford market rents, federally-subsidized housing programs that allow residents to pay reduced rents are an important part of the solution to the homelessness crisis. Unfortunately, a criminal record—even for seemingly minor offenses like criminal trespass—can prevent a homeless individual from securing subsidized housing. Federal regulations authorize public housing authorities (PHAs) and the owners of Section 8 project-based developments to create preferences for homeless individuals—*see, e.g.*, HUD Gen. Program Requirements, 24 C.F.R. § 5.655(c)(5) (2000), HUD Regulations, 24 C.F.R. §§ 960.206(b)(5) (2023), 982.207(b)(5) (2016). However, PHAs and owners maintain broad discretion to exclude applicants based on their criminal backgrounds. *See, e.g.*, 42 U.S.C. § 13661(c), HUD Regulations, 24 C.F.R. §§ 960.203(c)(3) (2016), 982.553 (2016); *see also Connecting People Returning from Incarceration with Housing and Homelessness Assistance*, U.S. Interagency Council on Homelessness, 1, 3 (Mar. 2016), https://www.usich.gov/sites/default/files/document/Reentry_Housing_Resource_Tipsheet_Final.pdf (“PHAs and other housing providers . . . use their flexibility to adopt strict screening policies that go beyond the federal regulations and can lead to the exclusion of formerly incarcerated individuals from

homes.”). In fact, PHAs are incentivized to exclude people with criminal records from the programs they administer: “Under the Public Housing Assessment System (PHAS), PHAs that have adopted policies, implemented procedures and can document that they successfully screen out and deny admission to certain applicants with unfavorable criminal histories *receive points*.” HUD Regulations, 24 C.F.R. § 960.203(b) (emphasis added).

Some PHAs automatically deny housing assistance to those recently punished under anti-sleeping ordinances from housing assistance. *See, e.g., Admissions and Continued Occupancy Policy for the Public Housing Program: 2022 Update*, S. Nev. Reg’l Hous. Auth., 2-21 (2022), <https://www.snvrha.org/docs/Acop.pdf> (1-year exclusion for trespass conviction); *Chapter 3 Eligibility: HCV Administrative Plan*, Fairfield Metro. Hous. Auth., 3-15, <https://www.fairfieldmha.org/hcv-administrative-plan/chapter-3-eligibility/download> (last visited Apr. 1, 2024) (exclusion following two convictions for criminal trespass and/or other specified offenses within a 3-year period); *Tenant Selection Criteria*, Hous. Auth. of Jackson Cnty., Or., 2 (Aug. 9, 2020), <https://hajc.net/wp-content/uploads/2021/01/Tenant-Selection-criteria-80-income-english.pdf> (exclusion from subsidized housing if applicant has municipal fines exceeding \$1,000); *see also Administrative Plan for the Holyoke Housing Authority’s Section 8 Housing Choice Voucher Program*, Appendix B, Holyoke Housing Authority (last visited Apr. 1, 2024) (3-year exclusion for misdemeanors). A person who is successively cited for sleeping outside—which can happen as quickly as twice in one morning—can find themselves incarcerated and, upon release, completely barred from accessing public housing. *See* J.A., Decl. of Debra Blake in

Supp. of Pls.’ Mot. for Summ. J., at 181. These denials from subsidized housing exacerbate the cycle of homelessness and punishment. People with criminal records are denied subsidized housing, forced into homelessness, and then punished for being homeless, saddling them with a new criminal record which may serve to exclude them from subsidized housing in the future.

Subsidized housing programs exist to provide “low-income” and “very low-income” people with affordable dwelling units. *See* HUD Gen. Program Requirements, 24 C.F.R. § 5.653(b) (2000) (Section 8 project-based programs), and HUD Regulations 24 C.F.R. §§ 960.201(a) (2024) (public housing), 982.201(b) (2024) (housing choice voucher program). Many of the financially-eligible individuals are homeless, but a criminal record (even for a minor offense like criminal trespass) can prevent them from accessing the only housing they can afford. *See An Affordable Home on Reentry, supra*, at 5.

3. Criminal Trespass Convictions Prevent Individuals from Accessing Emergency Shelters.

A conviction for criminal trespass can serve to exclude homeless individuals from homeless shelters. *See, e.g.*, Dep. of Donald Dixon, *McArdle v. City of Ocala*, No. 5:19-cv-00461 (M.D. Fla., June 30, 2020), ECF No. 102-5, 81-95 (several homeless people entirely barred from a shelter in Ocala, Florida for one year after receiving trespass convictions for violating Ocala’s anti-sleeping ordinance). Indeed, having a criminal record of any kind can prevent individuals from gaining access to emergency homeless shelters.

Shelters throughout the West Coast often employ rigorous screening requirements. The Good News Rescue Mission in Redding, California asks those seeking shelter to disclose “all pending legal issues,” specifically asking “Do you currently have any court cases/warrants or outstanding fines?” *2024 Recovery Program Digital Application*, Good News Rescue Mission, <https://gnrm.org/new-life-recovery-application/> (last visited Mar. 18, 2024). Not only can the shelter reject an applicant for having a criminal record; the shelter can reject applicants who fail to disclose a record or outstanding fines: “There will be a criminal background check. Please disclose your legal history to the best of your ability. Providing false information and/or omitting important information is a choice to not enter the program.” *Id.* Thus, if someone seeking shelter does not know they have outstanding fines under an anti-sleeping ordinance, they may be excluded from the shelter for a failure to disclose.

In spite of the increasing rates of homelessness, municipalities across the country routinely propose imposing mandatory criminal background checks for emergency shelters in their communities, effectively ensuring that people with criminal records are forced to live outside. One low-barrier homeless shelter in Portland, Oregon lost community support when it refused to require criminal background checks for occupants. *See* Megan Johnson, *Neighborhood Group Rescinds Support for Safe Rest Village on SW Naito*, KGW8 News (May 6, 2022), <https://www.kgw.com/article/news/local/homeless/safe-rest-village-background-checks-buffer-zones/283-8019bf56-f7b7-49ad-8e40-af2ec20ccba6>. Though shelters have different entry policies, any criminal record—even one comprised entirely of misdemeanor criminal

trespass—can reduce an individual’s ability to access shelter.

B. Criminal Records Prevent People from Affording Housing by Restricting Employment Opportunities.

By encumbering people with criminal records and prison sentences, anti-sleeping ordinances make it more difficult for people to find the work necessary to afford housing.

Unemployment rates are particularly high for formerly incarcerated people. One study estimates that this rate is 27.3% (compared to 5.8% of the general public) and several points higher than the general rate of unemployment during the Great Depression. *See* Lucius Couloute & Daniel Kopf, *Out of Prison & Out of Work: Unemployment Among Formerly Incarcerated People*, Prison Pol’y Inst. (July 2018), <https://www.prisonpolicy.org/reports/outofwork.html>. Individuals with criminal records are only half as likely to get a callback or a job offer when compared to those without criminal records. *See* Devah Pager & Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*, Nat’l Crim. Just. Reference Serv., 4 (Oct. 2009), <https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf>. People with a history of incarceration also face depressed wages and credit scores compared to peers without records. *See* Terry-Ann Craigie et al., *Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality*, Brennan Ctr. for Just., 14 (Sept. 15, 2020), <https://www.brennancenter.org/our-work/research->

reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal (formerly incarcerated people face “an annual income reduction of around 52 percent”); Abhay P. Aneja & Carlos F. Avenancio-Leon, *No Credit for Time Served? Incarceration and Credit-Driven Crime Cycles*, 11 (Oct. 2021), https://static1.squarespace.com/static/59dc0ec564b05fea9d3dfee3/t/61a9102c44a4206b1b6a7c81/1638469689452/IncarcerationAccessToCredit_v10072021.pdf&sa=D&source=docs&ust=1710860323589740&usg=AOvVaw0mm8Hcwr0dg-_S78rwun-g (one year of incarceration accounts for a credit score decrease of approximately 57 points, which can prevent individuals from securing mortgages for housing or car loans for transportation to work).

Employers, like landlords, rely on screening technologies that often treat all criminal convictions the same. See Marina Duane et al., *Criminal Background Checks: Impact on Employment and Recidivism*, Urban Inst., 1-3 (Mar. 2017), <https://www.urban.org/sites/default/files/publication/88621/criminal-background-checks-impact-on-employment-and-recidivism.pdf>. Even a conviction for a minor offense like criminal trespass can therefore prevent an individual from finding work. See Wu et al., *supra*, at 7; see also Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. Davis L. Rev. 277, 287 (2011) (“even when there is no legal barrier to housing or employment for the individual, there is an effective bar.”); see also, e.g., *Frequently Asked Questions About Background Checks*, Or. Dept. of Hum. Servs., <https://www.oregon.gov/odhs/background-checks/pages/faq.aspx> (last visited Mar. 3, 2024) (“Any criminal conviction *could* potentially be disqualifying, regardless of how long ago it

happened. This includes felonies, misdemeanors, military crimes or international crimes.”). Arrest or conviction under an anti-sleeping ordinance can therefore prevent a homeless person from earning the income necessary to afford stable housing. *See Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities*, Nat’l Law Ctr. on Homelessness & Poverty, 64 (Dec. 2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

Further, when a homeless person with a job is arrested and incarcerated for harmless behavior like sleeping in a public park, they will often miss work—perhaps for an extended period of time—and will likely get fired. *See, e.g., No Safe Place: The Criminalization of Homelessness in U.S. Cities*, Nat’l Law Ctr. on Homelessness & Poverty, 32 (2014), https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf. Even when someone does not remain incarcerated pretrial or is not sentenced to incarceration, a homeless person who exercises their constitutional right to defend against the criminal charge may be required to attend multiple court hearings, missing additional time at work. *See id.* Finally, fees associated with resolving a criminal case can amount to hundreds, or even thousands, of dollars. Without the resources to pay, homeless people may be subject to additional jail time, interrupting employment even after a criminal case has been closed. *See Housing Not Handcuffs, supra*, at 64.

C. Civil Fines Prevent Individuals with Criminal Records from Affording Housing.

Addressing homelessness through the imposition of fines is like trying to extinguish a fire with gasoline. Per a

2019 study in Seattle, “people with legal debt experienced nearly two additional years of homelessness” Bailey, *supra*, at 7. Instead of deterring someone from sleeping outside when they have nowhere else to sleep, a fine can only impose additional financial burdens that make it harder to find housing, thus perpetuating the cycle of homelessness and punishment which exacerbates the homelessness crisis. As stated by one individual working with an FICPFM member-organization:

I wasn’t homeless by choice The reasons simply are because of the lack of affordable living accommodation, . . . the lack of shelters and beds in those shelters What begins as a negative experience in being homeless becomes exacerbated with the onslaught of tickets, fines [T]he thought of ever getting off the streets becomes muddled as we are now allocating monies that could have been intrinsic to solving the problem for myself.⁴

Fines often deplete whatever money an unhoused person has been saving, can damage their credit, can lead to automatic exclusions from subsidized housing, and can even cause exclusions from shelters. *See, e.g.*, Carolyn Carter et al., *Collecting Criminal Justice Debt Through the State Civil Justice System: A Primer for Advocates and Policymakers*, Nat’l Consumer Law Ctr., 3 (May 2021), https://www.nclc.org/wp-content/uploads/2022/09/Rpt_CJ_Debt_State_Civil_Justice_System.pdf; *supra* Parts I.A.2-3. Fines also create substantial procedural burdens that can be particularly detrimental to maintaining stable employment. In a survey of individuals with outstanding

4. Interview of anonymous FICPFM Member 2 (Mar. 2024).

finances in Washington State and in Illinois, numerous individuals said that paying court fees represented a major barrier to finding a job, or keeping a job they already had. See Michele Cadigan & Gabriela Kirk, *On Thin Ice: Bureaucratic Processes of Monetary Sanctions and Job Insecurity*, RSF: The Russell Sage Found. J. of the Soc. Scis., 125 (Mar. 2020), <https://www.jstor.org/stable/10.7758/rsf.2020.6.1.05>.

Like other seemingly minor punishments, fines create unanticipated and unnecessary problems for homeless individuals. A failure to pay such fines can lead to criminal penalties, including incarceration. See April D. Fernandes et al., *Monetary Sanctions: A Review of Revenue Generation, Legal Challenges, and Reform*, 15 Ann. Rev. L. & Soc. Sci. 397, 404 (2019).

By fining and criminalizing homelessness, the City all but ensures that involuntarily homeless individuals will have nowhere to go but the City's parks and other public places.

An ordinance which fines and imprisons people for sleeping outside cannot meaningfully address homelessness and its symptoms, especially in a City with few, if any, shelters. Rather, anti-sleeping ordinances create a cycle of homelessness and punishment, where cities punish the unhoused for being homeless, and these punishments make it harder for them to find and afford housing. The City's ordinances, thus, are not designed "in . . . good-faith" to address homelessness, but to "maliciously and sadistically . . . cause harm" to unhoused people until they leave Grants Pass. See *Wilkins v. Gaddy*, 559 U.S. 34,

37 (2010); *see also Trop v. Dulles*, 356 U.S. 86, 102 (1958) (“banishment [is] a fate universally decried by civilized people.”). Because the ordinance “is unlikely to advance the goals of our criminal justice system in any substantial way,” it is offensive to the Eighth Amendment. *Solem*, 463 U.S. at 297 n.22.

D. Because the Crime of Sleeping in Public Actually Exacerbates the Problems of Public Sleeping, It Metes Out a Punishment Disproportionate to the Crime.

The Eighth Amendment mandates that criminal law “must respect the human attributes even of those who have committed serious crimes.” *Graham*, 560 U.S. at 59. In *Graham*, the Supreme Court declared that “a [punishment] lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Id.* at 71. It is significant that the Court made this pronouncement in the context of the punishment for the repeated act of armed robbery. Even for such a serious crime, the Court considered the human attributes of the criminal—his age—in determining that the punishment had no penological purpose.

There may be no attribute more universally human than the need for sleep. This Court now must examine a crime imposed on those individuals who, like all humans, must sleep, but who have no place but the public space in which to obtain their rest. Any such ordinance cannot pass Eighth Amendment muster. Given the involuntary nature of the act, the City’s decision to criminalize it does not meaningfully express the community’s moral outrage—the point of retribution. More importantly, it exacerbates, not deters, the problems of public sleeping. By entrenching

the problems of homelessness, the criminalization of sleeping in public offers no incapacitation or rehabilitation. Therefore, under the analysis mandated by *Graham*, the ordinances at issue here “lack[] any legitimate penological justification” and therefore are, by “[their] nature disproportionate to the offense.” *Graham*, 560 U.S. at 71.

As such, far from serving a legitimate end, anti-sleeping ordinances merely criminalize the involuntary status of being homeless. The susceptibility of people with existing criminal records to punishment under anti-sleeping laws aptly articulates this point. Not only do people with criminal records face overwhelming economic and sociological barriers to housing, but many states and municipalities enact laws designed to exclude or remove people with criminal records from housing. These laws effectively force individuals with criminal records to live outside. Punishing individuals with criminal records for being homeless after forcing them to live outside through measures like Crime Free Nuisance Ordinances punishes “innocent[]” and “involuntary” status in violation of the Eighth Amendment. *Robinson*, 370 U.S. at 667.

Crime Free and Nuisance Ordinances (“CFNOs”) increase the likelihood that people with criminal records will be forced to sleep outdoors. *See* Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 Mich. L. Rev. 173, 175-76, 207 (2019). CFNOs force or incentivize landlords to run criminal background checks for prospective tenants, and, in turn, to broadly exclude people with criminal records from housing. *See id.* at 175-76, 191-93, 197, 201-02. These ordinances also incentivize landlords to use a “crime-free lease addendum” that gives the landlord broad discretion to evict entire households for alleged

illegal conduct. Jenna Prochaska, *Breaking Free From “Crime Free”: State-Level Responses to Harmful Housing Ordinances*, 27 Lewis & Clark L. Rev. 259, 270 (2023). In some municipalities, “any alleged criminal activity committed within the city limits by the tenant, a member of the tenant’s household, or even a guest is deemed a violation of the crime-free lease addendum Some [CFNOs] go as far as *encouraging eviction upon a single violation . . .*” Archer, *supra*, at 194-95 (emphasis added). CFNOs, in fact, often punish landlords for failing to evict households who come into contact with the criminal justice system, even in innocent ways. See Prochaska, *supra*, at 267-70. Some municipalities even maintain databases that alert landlords in real time to any alleged criminal activity by a tenant. See Archer, *supra*, at 192-93. The one-two punch of CFNOs and anti-sleeping ordinances exclude people with criminal records from housing and then punish them for being homeless.

Government policies like CFNOs keep people with records out of housing, and anti-sleeping ordinances effectively “make[] the ‘status’ of” homelessness “a criminal offense,” such that “the offender may be prosecuted ‘at any time before he’ . . .” is able to secure shelter. *Robinson*, 370 U.S. at 665-66. It is especially offensive for the government to punish someone for homelessness after enacting policies to exclude that person from housing. See *id.* at 665-67; cf. *Sorrells v. United States*, 287 U.S. 435, 445 (1932) (“When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by . . . inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor.”).

E. Criminalizing Sleeping in the Park Equals Criminalizing the State of Being Homeless.

Humans must sleep. Therefore, there is no daylight between being involuntarily homeless and sleeping in public places such as parks. To criminalize sleeping in a park is to criminalize the status of being homeless. This is especially true for people with criminal records who face especially pronounced barriers to housing, including barriers such as CFNOs and exclusionary PHA policies imposed by the government itself. Penalizing someone for sleeping in a park on a piece of cardboard because they have nowhere else to go is synonymous with penalizing homelessness itself. This directly violates the prescription of *Robinson*, 370 U.S. at 666-67. Like a narcotics addiction, homelessness can be “contracted innocently or involuntarily.” *Id.* at 667. A local ordinance “which imprisons a person thus afflicted as a criminal . . .” inflicts a cruel and unusual punishment. *Id.* Of course, there are steps municipalities should take to address homelessness and its associated harms. But these steps must operate within the bounds of the Constitution and must thus stop short of punishing people for being homeless.

II. It Is Unconstitutionally Cruel To Punish People With Additional Collateral Consequences For Innocent “Conduct.”

It is cruel and unusual to punish people with nowhere to go for sleeping outside. *See Robinson*, 370 U.S. at 667. In addition to barriers to housing and employment created by imprisonment and fines, those punished under anti-sleeping ordinances are subject to an array of additional collateral consequences. These consequences

are especially dire for those with a previous record or currently on parole or probation.

A. Anti-Sleeping Ordinances Produce Broad Collateral Consequences.

A conviction under an anti-sleeping ordinance comes with serious collateral consequences, as the consequences of civil fines, misdemeanor conviction, or imprisonment are severe and far reaching. *See* Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 Hofstra L. Rev. 171, 171 (2017) (“There is no such thing as a low-stakes misdemeanor.”); *Argersinger v. Hamlin*, 407 U.S. 25, 48 n.11 (1972) (Powell, J. concurring) (“A wide range of civil disabilities may result from misdemeanor convictions”; providing examples) (citations omitted).

For example, parents, and especially mothers, facing incarceration face a dramatically increased risk of losing custody of their children. *See* Cary Aspinwall, *Mom Is In jail: What Happens to Her Kids?*, U. S. Cal. Annenberg, Ctr. for Health Journalism (July 10, 2017), <https://centerforhealthjournalism.org/our-work/reporting/mom-jail-what-happens-her-kids>.

Prosecution under anti-sleeping ordinances can jeopardize one’s immigration status. “Any criminal history,” especially repeated criminal history even for minor crimes, can negatively affect one’s immigration status. *Policy Manual*, U.S. Citizenship & Immigr. Servs., Ch. 8, <https://www.uscis.gov/policy-manual/volume-1-part-e-chapter-8> (last visited Apr. 1, 2024). For immigrants with certain criminal records, incarceration under an anti-sleeping ordinance results in automatic

deportation. 8 U.S.C. § 1182(a)(2)(B) (mandatory entry and visa denial for multiple convictions adding up to more than 5 years of incarceration).

In several states, one cannot vote while incarcerated for any misdemeanor. *Guide to State Voting Rules That Apply After a Criminal Conviction*, U.S. Dep’t of Just., Civ. Rts. Div., 8, 11, 19, 25, 44 (July 1, 2023), https://www.justice.gov/d9/2024-01/voting_with_a_criminal_conviction_7.6.23.pdf.

Fines imposed pursuant to anti-sleeping ordinances also have dire collateral consequences even beyond limiting individuals’ ability to find housing, pay rent and maintain stable employment. *See supra* Part I.C. For instance, court-imposed fines can trigger escalating debt, incarceration for failure to pay, changes in immigration status, the loss of driver’s licenses, and deprivation of the right to vote. *See Access to Justice Spotlight: Fines and Fees*, U.S. Dep’t of Just., Office for Access to Just., 3 (2023), <https://www.justice.gov/d9/2023-11/doj-access-to-justice-spotlight-fines-and-fees.pdf>; *see, e.g.*, Beth A. Colgan, *Wealth-Based Penal Disenfranchisement*, 72 Vand. L. Rev. 55, 59 n.12 (Jan. 2019) and *Clemency Application Information*, Fla. Comm’n on Offender Rev. (2014), <https://www.fcor.state.fl.us/restoration.shtml> (people with criminal records in Florida must pay off civil fines to restore right to vote).

B. The Impact of These Collateral Consequences for People with Existing Convictions is Especially Severe.

Though punishments under anti-sleeping ordinances are cruelly imposed on anyone who is involuntarily homeless, the consequences are especially harsh for people with pre-existing criminal records.

In a recent state-wide study from California, nearly one-third of participants reported that they were incarcerated while homeless. *See Kushel, supra*, at 64-65. The authors of the study concluded that the relatively brief periods of incarceration for these homeless individuals reflected the revolving door-like nature of the problem: incarceration, even for minor offenses, increases the risk of homelessness, while homelessness increases the risk of incarceration. *See id.* This cycle is especially damaging to individuals with criminal records.

Criminal trespass convictions are especially harmful for homeless individuals who are on parole or probation. In the same California study cited above, thirteen percent of the homeless individuals who were interviewed were on parole or probation. *See id.* “Arrest and conviction” for violating an anti-sleeping ordinance constitutes a likely parole/probation violation which “will almost certainly result in reincarceration.” Dallas Augustine & Margot Kushel, *Community Supervision, Housing Insecurity, & Homelessness*, *Annals Am. Acad. Pol. & Soc. Sci.*, Author Manuscript, 10 (May 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9762769/pdf/nihms-1852437.pdf>. In many states, the revocation of parole or probation can lead to the offender being incarcerated for the remainder of the original sentence, or even for the duration of the maximum

sentence available for the original crime. *See Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, Human Rights Watch, 15-16 (July 2020), https://www.hrw.org/sites/default/files/media_2020/07/us_supervision0720_web_1.pdf.

Revocation proceedings often mean periods of prolonged pre-hearing detention. As opposed to criminal defendants who are subject to pre-trial detention only if there is evidence that they pose a threat to public safety or will not return to court, those accused of violating parole or probation are regularly held on “detainers,” sometimes for significant periods, before their initial court appearances. *See id.* at 90. Detainers override all other pre-trial release determinations. *See id.* Accordingly, even if someone on parole or probation is arrested for a criminal offense and a judge authorizes their release, the accused will remain in jail until at least their first revocation proceeding. *See id.*

Parole and probation violations bring negative consequences that go beyond incarceration. For example, under federal law, such violations can render people ineligible for benefits under the Supplemental Nutritional Assistance and Supplemental Security Income programs. *See* Dep’t of Agriculture Regulations, 7 C.F.R. § 273.11(n) (2019); Soc. Sec. Admin. Handbook § 2120, https://www.ssa.gov/OP_Home/handbook/handbook.21/handbook-2120.html#:~:text=You%20may%20not%20receive%20SSI,violation%20of%20probation%20or%20parole (last visited Apr. 1, 2024).

Convictions under anti-sleeping ordinances can also lead to sentencing enhancements. For example, under the City’s municipal code, the prosecutor has discretion

to charge defendants with a Class A misdemeanor for trespass in violation of the anti-sleeping ordinances. *See* Grants Pass, Or. Mun. Code, § 5.57.030(E) (2023) (“A prosecuting attorney may elect to treat any misdemeanor as a Class A violation pursuant to ORS 161.566.”). Convictions for Class A misdemeanors in Oregon can trigger sentencing enhancements. *The Oregon Sentencing Guidelines Grid*, State of Oregon, <https://www.oregon.gov/cjc/resources/documents/guidelinesgrid.pdf> (last visited Mar. 21, 2024).

In addition to penalties associated with parole violations and reincarceration, court fines often prevent individuals from expunging offenses from their criminal records. In Oregon, expungement is expensive. Assuming an individual is able to navigate expungement proceedings without hiring an attorney, expungement generally requires the payment of all outstanding fines related to the offense, plus a payment of \$81 to the State Police. *See* Or. Rev. Stat. Ann. § 137.225(1)(a), (2)(d) (West 2022). This means that individuals with only criminal trespass misdemeanors on their records will have to pay hundreds, if not thousands, of dollars to clear their record of offenses they incurred simply for existing in the City. It is unsurprising, then, that in a survey of 569 expungement seekers, nearly 40 percent reported owing fines they were unable to pay. *See* Jenny Montoya Tansey & Katherine Carlin, *Closing the Delivery Gap*, Code for Am., 23 (May 2018), <https://s3-us-west-1.amazonaws.com/codeforamerica-cms1/documents/Closing-the-Delivery-Gap.pdf>. Without expungement, these individuals will never be able to shed their livelihood-damaging criminal record. Such collateral consequences render punishment under anti-sleeping ordinances that much

more disproportionate to the underlying “offense” of sleeping in public while having nowhere else to go—*i.e.*, of being homeless.

CONCLUSION

Punishments inflicted without a legitimate penological justification are cruel and unusual. Here, the City punishes homeless individuals by banishing them from Grants Pass in a way that can only increase homelessness and its symptoms, thus failing to advance any legitimate penological goal. Furthermore, the City punishes people for their status as involuntarily homeless individuals. The extent to which these punishments cause suffering to those affected makes their constitutional infirmity that much clearer. This suffering is especially great for those individuals with criminal records that predate their citation and conviction under the City’s anti-sleeping ordinances.

The City and its *amici* argue that, by ruling for respondents, the Court would limit the tools at the disposal of municipalities to address homelessness. *See, e.g.*, Br. for Pet’r, at 47. Simply put, however, anti-sleeping ordinances that impose criminal sanctions do not, cannot, and are not even designed to decrease homelessness or its symptoms. Instead, by creating new criminal records, anti-sleeping ordinances make it more likely that people will become and stay homeless. This paradox renders the laws unconstitutional, and it demonstrates that ruling for respondents will not reduce the tools available to the City or its *amici*. An array of policy alternatives are all still available, and the Court’s decision will not affect the availability of those policies.

The City must address homelessness in a manner permitted by the Constitution. Just as the City cannot address homelessness by imprisoning unhoused people without trial, the City cannot address homelessness in a way that violates the Eighth Amendment. Consequently, all the Court would do by affirming is confirm that cities may not use unconstitutional policies in addressing issues related to homelessness.

Respectfully submitted,

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