Nos. 20-35752 & 20-35881

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBRA BLAKE, et al.,

Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Oregon
Case No. 1:18-cv-01823-CL
Hon. Mark D. Clarke

MOTION FOR LEAVE TO FILE BRIEF OF PUBLIC JUSTICE, ACLU OF NORTHERN CALIFORNIA, ACLU OF SOUTHERN CALIFORNIA, ACLU OF OREGON, INSTITUTE FOR JUSTICE, NATIONAL CENTER FOR LAW AND ECONOMIC JUSTICE, AND RUTHERFORD INSTITUTE AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES

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In accordance with Federal Rule of Appellate Procedure 29(a)(3), Public Justice, ACLU of Northern California, ACLU of Southern California, ACLU of Oregon, Institute for Justice, National Center for Law and Economic Justice, and Rutherford Institute respectfully move for leave from the Court to file the accompanying amicus curiae brief. The proposed amici have endeavored to obtain the consent of all parties to the filing of the brief before moving the Court for permission to file the proposed brief. *See* 9th Cir. R. 29-3. Plaintiffs-Appellees Debra Blake et al. consent to the filing of this brief; Defendant-Appellant the City of Grants Pass takes no position on this motion.

In support of their motion and pursuant to Federal Rule of Appellate Procedure 29(a)(3), the proposed amici states their interest in this case and the reasons why the accompanying amici curiae brief is desirable and relevant to its disposition.

INTERESTS OF PROPOSED AMICI CURIAE

1. **Public Justice** is a national legal advocacy organization that effects systemic change by combining impact litigation with education, outreach, and policy advocacy. Through its Debtors' Prison Project, Public Justice uses strategic litigation—including damages class actions, constitutional claims, and consumer protection laws—to combat the criminalization of poverty. Public Justice currently represents hundreds of people who were unconstitutionally jailed for failure to pay

fines and fees without counsel and without any determination that they had the means to pay. Public Justice's Debtors' Prison Project seeks to obtain financial compensation for victims whose rights were violated, establish key protections against the financial exploitation and incarceration of indigent criminal defendants trapped in a cycle of debt and poverty, and create incentives to compel governments and their for-profit partners to abandon predatory practices.

2. The **American Civil Liberties Union of Northern California**, the **American Civil Liberties Union of Southern California**, and the **American Civil Liberties Union of Oregon** (together "ACLU Affiliates") are regional affiliates of the American Civil Liberties Union (ACLU), a national nonprofit, nonpartisan organization dedicated to furthering the principles of liberty and equality embodied in the state and federal constitutions. The ACLU Affiliates have a long-standing interest in advancing economic and racial justice and decriminalizing poverty in their respective states. In particular, the ACLU Affiliates have acted as direct counsel and as amici to safeguard constitutional guarantees of equal protection and due process for unhoused people and Black and Brown people, who are disproportionally represented in and impacted by the criminal legal system.

3. The **Institute for Justice** (IJ) is a nonprofit, public interest law firm committed to greater judicial protection of individual rights. As part of that

mission, IJ routinely brings cases challenging unconstitutional systems of fines, fees, and forfeitures, including directly representing Tyson Timbs in the cases bearing his name at the U.S. and Indiana Supreme Courts.

4. The **National Center for Law and Economic Justice** (NCLEJ) advances economic justice for low-income individuals and communities across the country through impact litigation, policy advocacy, and support of grassroots organizing. NCLEJ has worked extensively to challenge unfair and disproportionate debt collection practices that perpetuate inequality, criminalize poverty, and harm marginalized communities.

5. The **Rutherford Institute** is an international nonprofit organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom, ensuring that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed to persons by Constitution and laws of the United States.

DESIRABILITY AND RELEVANCE OF PROPOSED BRIEF

6. The proposed amicus brief will address issues that are relevant to the disposition of this appeal. Here, the district court held that the fines prescribed by

the Grants Pass ordinances at issue violate the Excessive Fines Clause because "the conduct for which [the Plaintiffs] face punishment is inseparable from their status as homeless individuals," and "[a]ny fine is excessive if it is imposed on the basis of status and not conduct." ER 28. The proposed amici will argue that, in determining the proper scope of the Excessive Fines Clause's protections, this Court should look to cases construing the Cruel and Unusual Punishments Clause's "standard of gross disproportionality." *United States v. Bajakajian*, 524 U.S. 321, 336 (1998). In analyzing proportionality, the Supreme Court has recognized that "categorical bans on sentencing practices" can be drawn "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller v. Alabama*, 567 U.S. 460, 470 (2012). Applying that approach here, this Court should conclude that the Excessive Fines Clause categorically bars imposing fines on unhoused individuals for conduct that is inseparable from the status of homelessness.

8. The proposed amici's participation at the merits stage of this appeal is warranted. As detailed above, the proposed amici are nonprofit organizations engaged in advocacy on the improper use of fines, fees, and forfeitures by state and local governments, a practice that has generated financial incentives for abuse, exacerbated racial inequities, undermined public safety, and led to devastating impacts on low-income people, their families, and society at large. Thus, the

proposed amici have a direct interest in proper interpretation of the Excessive Fines Clause.

8. The proposed amici are not parties to this action and certify that the brief was not authored, in whole or in part, by either party's counsel; that no party or party's counsel contributed money to fund the preparation or submission of the brief; and that they know of no person who contributed money that was intended to fund preparation or submission of this brief. Fed. R. App. P. 29(a)(4)(E).

9. Amici's proposed brief is timely because amici are filing this motion and the accompanying brief on June 8, 2021. Fed. R. App. P. 29(a)(6). The proposed brief complies with the applicable word limits because it contains 5,041 words. Fed. R. App. P. 29(a)(5).

June 8, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 8, 2021, the foregoing document was served on all parties or their counsel of record through CM/ECF system.

June 8, 2021

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae Public Justice, ACLU of Northern California, ACLU of Southern California, ACLU of Oregon, Institute for Justice, National Center for Law and Economic Justice, and Rutherford Institute are nonprofit entities that do not have parent corporations. No publicly held corporation owns 10 percent of more of any stake or stock in amici curiae.

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STATEMENT OF AMICI CURIAE[1]

Amici curiae Public Justice, ACLU of Northern California, ACLU of Southern California, ACLU of Oregon, Institute for Justice, National Center for Law and Economic Justice, and Rutherford Institute are nonprofit organizations engaged in advocacy on the improper use of fines, fees, and forfeitures by state and local governments, a practice that has generated financial incentives for abuse, exacerbated racial inequities, undermined public safety, and led to devastating impacts on low-income people, their families, and society at large. The identities and interests of amici curiae are further detailed in the attached motion.

INTRODUCTION

The Excessive Fines Clause of the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian*, 524 U.S. 321, 327–28 (1998) (quoting *Austin v. United States*, 509 U.S. 602, 609–10 (1993)). This constitutional protection stems directly from the Magna Carta's centuries-old guarantee that "[a] Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019) (alteration in original) (citation omitted). In

[1] No party's counsel authored this brief in whole or in part, and no person other than the amicus curiae, its members, or its counsel contributed money to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4).

other words, the severity of a fine (what English common law called an "amerce[ment]") must depend on the nature of the offense (i.e., "the manner of the fault"). *Id.*

Consistent with this "venerable lineage," *id.*, the Supreme Court has recognized that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the [fine] must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. Thus, a penalty "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." *Id.* As this Court recently emphasized, "[t]his right to be free from excessive governmental fines is not a relic relegated to the period of parchments and parliaments, but rather it remains a crucial bulwark against government abuse." *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020).

It is hard to imagine a situation in which this "crucial bulwark against government abuse," *id.*, is needed more than here. Facing a sharp rise in homelessness common to many localities, the City of Grants Pass opted for a set of hefty, unpayable punitive fines to punish its unhoused residents for necessary, life-sustaining acts. For the mere human act of sleeping, resting, and protecting themselves from the elements, these people—who already cannot afford housing or other necessities of life—are saddled with ever-increasing amounts of debt, as well

as intrusive debt collection efforts, the threat of driver's license suspensions, and irreparably damaged credit, among other harms. By any measure, these severe fines are grossly disproportionate to the seriousness of Plaintiffs' conduct. This Court should therefore affirm the district court's holding that the Grants Pass ordinances, as applied to the Plaintiff class, violate the Excessive Fines Clause.

ARGUMENT

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII. "Taken together, these Clauses place 'parallel limitations' on 'the power of those entrusted with the criminal-law function of government.'" *Timbs*, 139 S. Ct. at 687 (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 263 (1989)).[2] Here, the district court properly recognized that, under this Court's decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), the Eighth Amendment's Cruel

[2] *Timbs*'s reference to "criminal law" here does not suggest, as the City argues in its pending petition for initial hearing en banc, that the Eighth Amendment is limited only to crimes under state law. *Cf.* City Pet. for Hearing En Banc at 10. As the Supreme Court has explained, "[t]he purpose of the Eighth Amendment . . . was to limit the government's power to punish," no matter if that punishment is imposed civilly or criminally. *Austin*, 509 U.S. at 609. As a result, the Eighth Amendment's protections apply even in civil contexts, because "[t]he notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law." *Id.* (quoting *United States v. Halper*, 490 U.S. 435, 447–48 (1989)).

and Unusual Punishments Clause prohibits the City from punishing its unhoused residents "for engaging in the unavoidable acts of sleeping or resting in a public place when they have nowhere else to go." ER 24. As Plaintiffs correctly contend, "*Martin* controls the outcome of this case." Appellees' Br. at 23.

At the same time, however, the City's decision to use financial penalties as punishment for the violations implicates another crucial Eighth Amendment protection: the Excessive Fines Clause, which "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *Bajakajian*, 524 U.S. at 328 (quoting *Austin*, 509 U.S. at 609–10). Here, the district court held that the fines prescribed by the Grants Pass ordinances violate the Excessive Fines Clause because "the conduct for which [Plaintiffs] face punishment is inseparable from their status as homeless individuals" and "[a]ny fine is excessive if it is imposed on the basis of status and not conduct." ER 28.

The district court was correct. In determining the proper scope of the Excessive Fines Clause's protections, this Court must look to cases construing the Cruel and Unusual Punishments Clause's "standard of gross disproportionality." *Bajakajian*, 524 U.S. at 336. And in analyzing proportionality, the Supreme Court has recognized that "categorical bans on sentencing practices" can be drawn "based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller v. Alabama*, 567 U.S. 460, 470 (2012). Applying that

approach here, this Court should conclude that—as with the Punishments Clause—the Excessive Fines Clause categorically bars imposing fines on unhoused individuals for conduct that is inseparable from their status of homelessness. This Court should affirm.

I. The Excessive Fines Clause categorically bars fines imposed on homeless individuals for unavoidable, life-sustaining conduct.

In *Bajakajian*, the sole U.S. Supreme Court case directly addressing the scope of the Excessive Fines Clause's protections, the Court held that a fine "violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense." 524 U.S. at 334. But because "[t]he text and history of the Excessive Fines Clause . . . provide[d] little guidance as to how disproportional a punitive [fine] must be to the gravity of an offense in order to be 'excessive,'" *Bajakajian* adopted the more familiar "standard of gross disproportionality articulated in [its] Cruel and Unusual Punishments Clause precedents." *Id.* at 335–36.

Since *Bajakajian*, this Court has had little opportunity to consider how this "standard of gross disproportionality," *id.*, imported from Punishments Clause cases, would apply to the Excessive Fines Clause. Although this Court has recognized that "*Bajakajian* does not mandate the consideration of any rigid set of factors," it has generally "looked to factors similar to those used by the Court in *Bajakajian* in . . . Excessive Fines Clause cases." *United States v. Mackby*, 339

F.3d 1013, 1016 (9th Cir. 2003).[3] Those factors, while helpful in the federal criminal-forfeiture context that *Bajakajian* arose from, may not be as determinative in cases involving other kinds of fines, types of offenses, or categories of offenders. *See Pimentel*, 974 F.3d at 921–23 (recognizing that "Excessive Fines Clause claims generally arise in the criminal forfeiture context" and that some of the *Bajakajian* factors are "not as helpful to our inquiry as [they] might be in criminal contexts"). For that reason, this Court should take up *Bajakajian*'s instruction that the Excessive Fines Clause incorporates principles established under the Punishments Clause's "standard of gross disproportionality." 524 U.S. at 335–36.

In that Punishments Clause context, the Supreme Court has recognized that the Eighth Amendment sometimes imposes "categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty." *Miller*, 567 U.S. at 470. The Supreme Court has, for example, held that certain sentences are always grossly disproportionate—and thus violate the Punishments Clause—when applied to juvenile offenders. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 578 (2005) (death penalty); *Graham v. Florida*, 560 U.S. 48, 82 (2010) (life without parole for nonhomicide offenses). Similarly,

[3] As discussed *infra* Part II, the district court's conclusion also aligns with this Court's application of the so-called *Bajakajian* factors.

the Court has held that capital punishment is categorically impermissible for defendants with intellectual disabilities. *See Atkins v. Virginia*, 536 U.S. 304, 318 (2002).

Because the Excessive Fines Clause incorporates the Punishments Clause's "standard of gross disproportionality," *Bajakajian*, 534 U.S. at 335–36, this Court should similarly conclude that a fine can be unconstitutionally excessive as applied to certain offenses committed by "a class of offenders." *Miller*, 567 U.S. at 470. In other words, the status of a particular class of offenders may render a fine categorically excessive, regardless of an individual's other circumstances. And applying that approach here confirms that the district court was correct in holding that the Excessive Fines Clause prohibits the City from fining individuals for conduct directly stemming from their homelessness. ER 27–28.

A. Any fine imposed on indigent, unhoused persons is grossly disproportionate to their culpability for the acts of sleeping, resting, and protecting themselves from the elements.

In determining whether the Punishments Clause imposes a "categorical ban on sentencing practices," the Supreme Court looks first to whether there is a "mismatch[] between the culpability of [the] class of offenders and the severity of [the] penalty." *Miller*, 567 U.S. at 470. For the reasons discussed below, this Court should recognize such a mismatch here.

First, the Supreme Court weighs how severe the penalty is when applied to the class of people at issue. *Miller*, for example, invalidated sentencing schemes imposing mandatory life without parole, reasoning that such a sentence "is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Id.* (quoting *Graham*, 560 U.S. at 70). "A 16-year-old and a 75-year-old each sentenced to life without parole receive the same punishment in name only." *Graham*, 560 U.S. at 70.

On the other side of the scale, the Supreme Court considers "the culpability of the offenders at issue in light of their crimes and characteristics." *Id.* at 67. Thus, in concluding that juveniles have diminished culpability in *Roper*, *Graham*, and *Miller*, the Court gave special consideration to their "lack of maturity and . . . underdeveloped sense of responsibility" of juveniles, as well as their "vulnerab[ility] . . . to negative influences and outside pressures." *Miller*, 567 U.S. at 471 (quoting *Roper*, 543 U.S. at 569–70). Similarly, in *Atkins*, the Court emphasized that "[b]ecause of their disabilities in areas of reasoning, judgment, and control of their impulses," defendants with intellectual disabilities "do not act with the level of moral culpability that characterizes the most serious adult criminal conduct." 536 U.S. at 306.

The same type of clear mismatch is present here. To begin with, common sense dictates that *any* monetary sanction is severe punishment for an unhoused individual who is already unable to afford dignified housing and is struggling to pay for other necessities of life. And, as the record before the district court showed, "[w]hen the fines remain unpaid, the additional collection fees are applied and the fines still remain unpaid, subjecting plaintiffs to collection efforts, the threat of driver license suspensions, and damaged credit that makes it even more difficult for them to find housing, exacerbating the homeless problem in Grants Pass." ER 27–28.

Indeed, the fine imposed here—$295 or, more likely, $537.60 after collection fees are "inevitably assessed," as the district court found, ER 28—would be difficult for a large swath of everyday Americans to bear, let alone those experiencing homelessness. A recent report by the Federal Reserve found that nearly 40% of *all* American adults would be unable to immediately cover an unexpected $400 expense. Bd. Governors of the Fed. Reserve Sys., *Report on the Economic Well-Being of U.S. Households in 2019*, at 21 (2020), https://www.federalreserve.gov/publications/files/2019-report-economic-well-being-us-households-202005.pdf. When imposed on individuals in Plaintiffs' shoes, who already struggling to make ends meet, such a sanction can have even more devastating effects.

Moreover, fines that are imposed at a fixed amount, as here, are inherently regressive—that is, they are "more punitive for poorer individuals than for wealthier individuals." Council of Econ. Advisors, *Fines, Fees, and Bail: Payments in the Criminal Justice System That Disproportionately Impact the Poor* 1 (2015), https://obamawhitehouse.archives.gov/sites/default/files/page/files/1215_cea_fine_fee_bail_issue_brief.pdf. So, just as a juvenile offender will serve "more years and a greater percentage of his life in prison than an adult offender," *Graham*, 560 U.S. at 70, the same dollar amount will impose a more severe punishment on an already-indigent, unhoused individual than other members of the community. Such a monetary sanction is "the same punishment in name only." *Id.*

Individuals experiencing homelessness also lack culpability for the conduct proscribed by the Grants Pass ordinances. For starters, the ordinances, which the district court rightly termed "quality of life laws," ER 9, prohibit conduct that no one would call serious. These acts do not involve violence, physical injury, financial loss, or any of the other hallmarks of serious crime. *See Solem v. Helm*, 463 U.S. 277, 292–93 (1983) ("[T]here are widely shared views as to the relative seriousness of crimes."). Sleeping is not, of course, illegal as a general matter; it is illegal only for those that are unhoused in Grants Pass and have no place else to go.

At bottom, the "offenses" for which Plaintiffs have been punished involve the "universal and unavoidable consequences of being human." *Martin*, 920 F.3d

at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006)). As in *Martin*, the essence of Plaintiffs' claim is that they had no meaningful housing option but to exist in public. *See id.* In fact, as the district court found, all alternative shelter options proffered by the City provided only the illusion of choice, given their poor conditions, strict rules, distant location, or unreliable availability. ER 11–12. Thus, "[t]he mathematical ratio in the record as it currently stands is 602 homeless people (with another 1,017 on the verge of homelessness) in Grants Pass and, on the other side of the ledger zero emergency shelter beds. The numbers are clear, overwhelming and decisive." ER 20. As a logical matter, then, these individuals have no real choice but to violate the City's ordinances. *See Martin*, 920 F.3d at 617. It is a cornerstone principle of American criminal law that culpability exists only when a defendant has a meaningful choice in the matter. *See* Oliver Wendell Holmes, Jr., *The Common Law* 54 (1881) ("[I]t is felt to be impolitic and unjust to make a man answerable for harm, unless he might have chosen otherwise."); *see also* Model Penal Code § 2.01(1) ("A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable."). Plaintiffs did not.

What's more, Plaintiffs' purported crimes are life-sustaining activities that are inseparable from their housing status. ER 28. Indeed, the City's attempt to

target its unhoused residents in order to drive them away is the exact kind of abuse the Excessive Fines Clause was intended to protect against. As the Supreme Court has recognized, excessive fines have long been used to punish status—fines were used, for example, in seventeenth0century England to "harass . . . political foes, and indefinitely detain those unable to pay" in seventeenth-century England, and after the Civil War to "subjugate newly freed slaves and maintain the prewar racial hierarchy" through the Black Codes' "broad proscriptions on 'vagrancy' and other dubious offenses." *Timbs*, 139 S. Ct. at 688–89. By fining the class members based on their unhoused status alone, the City's "quality of life laws," ER 9, follow in these errant footsteps.[4]

The upshot is that the City seeks to impose unduly severe sanctions against individuals lacking any criminal culpability for conduct that is both harmless and quintessentially human. There can be no doubt that the fines imposed are unconstitutionally excessive.

The Supreme Court has also recognized that the Excessive Fines Clause guards against the danger that "[e]xorbitant tolls undermine other constitutional liberties." *Timbs*, 139 S. Ct. at 689. Here, as the district court held, the fines imposed on Plaintiffs burden other constitutional rights. *See* ER 28–29 (noting that the fines imposed "violate Plaintiffs' procedural due process rights").

B. Fining persons for conduct directly stemming from homelessness cannot be justified by any legitimate penological goals.

To determine whether a categorical bar on a sentencing practice is appropriate, the Supreme Court also considers whether the punishment "serves legitimate penological goals"—that is, whether the penalty can be justified by "retribution, deterrence, incapacitation, [or] rehabilitation." *Graham*, 560 U.S. at 67, 71. Although "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion," the Supreme Court has held that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 71. Here, the absence of any traditional penological justification for punishing class members confirms that the City's severe fines are grossly disproportionate to the offenses at issue.

In *Miller*, the Court prohibited life-without-parole sentences for juveniles in all but the rarest of cases, reasoning that "the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes." 567 U.S. at 472. "[T]he case for retribution is not as strong with a minor as with an adult" because of juveniles' lessened culpability. *Id.* (quoting *Graham*, 560 U.S. at 71). By the same token, deterrence is not furthered, because the characteristics of juveniles "make them less likely to consider punishment." *Id.* And finally, "a child's

capacity to change" undermined any argument that incapacitation and rehabilitation justified life-without-parole sentences for juveniles. *Id.* at 472–73.

Imposing monetary sanctions on unhoused individuals for these types of offenses similarly "lack[s] any legitimate penological justification." *Graham*, 560 U.S. at 71.[5] Start with retribution. As noted above, the conduct at issue stems directly from homelessness, and homelessness is an involuntary status. Culpability is therefore lacking. Given this absence of culpability, a fine levied against an unhoused person cannot be justified by retribution. *See Miller*, 567 U.S. at 472.

Similarly, deterrence is an inadequate justification, because the offenses at issue involve the "universal and unavoidable consequences of being human" that Plaintiffs cannot forgo. *Martin*, 920 F.3d at 617 (quoting *Jones*, 444 F.3d at 1136). People cannot be deterred from necessary, life-sustaining conduct. Indeed, this common-sense premise likely underlies the City's stated purpose in enacting the ordinances—"mak[ing] it uncomfortable enough for [homeless residents] in our city so they will want to move on down the road." ER 368. Because its unhoused residents cannot be deterred from sleeping or resting, the City seeks to punish them until they decide to move on. But as the Supreme Court has recognized in another

[5] It is doubtful that incapacitation can ever justify imposing a fine, given that the purpose of the Excessive Fines Clause was to ensure that fines "not be so large as to deprive [an offender] of his livelihood." *Browning-Ferris*, 492 U.S. at 271. Thus, any fine that is so severe as to incapacitate an offender is likely unconstitutional.

context, it is "constitutionally impermissible" to regulate with the intent to "inhibit the immigration of indigents generally" because the government would prefer not to have them around. *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263–64 (1974); *see also O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) ("Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty."); *In re Levenson*, 587 F.3d 925, 931 (9th Cir. 2009) ("[S]ome objectives—such as a bare desire to harm a politically unpopular group—are not legitimate state interests." (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 447 (1985))).

Finally, as the district court recognized, rehabilitation cannot justify a fine imposed against those who are homeless because a monetary sanction will only hinder an unhoused person's ability to secure housing and financial stability:

> Quality of life laws erode the little trust that remains between homeless individuals and law enforcement officials. This erosion of trust not only increases the risk of confrontations between law enforcement and homeless individuals, but it also makes it less likely that homeless individuals will cooperate with law enforcement. Moreover, quality of life laws, even civil citations, contribute to a cycle of incarceration and recidivism. Indeed, civil citations requiring appearance in court can lead to warrants for failure to appear when homeless people, who lack a physical address or phone number, do not receive notice of relevant hearings and wind up incarcerated as a result. Moreover, unpaid civil citations can impact a person's credit history and be a direct bar to housing access in competitive rental markets where credit history is a factor.

ER 39–40 (footnotes omitted); *see also* Jessica Mogk et al., *Court-Imposed Fines as a Feature of the Homelessness-Incarceration Nexus: A Cross-Sectional Study of the Relationship Between Legal Debt and Duration of Homelessness in Seattle, Washington, USA*, 42 J. Pub. Health 107 (2020), https://pubmed.ncbi.nlm.nih.gov/31162577/ (finding that fines are strongly correlated with an increased likelihood of continued homelessness).

* * *

In sum, the fines that the City seeks to impose are, as applied to the Plaintiff class, grossly disproportionate and cannot be justified by legitimate penological goals. This Court should therefore affirm the district court's conclusion that the ordinances violate the Excessive Fines Clause.

II. The *Bajakajian* factors likewise compel the conclusion that imposing fines on class members for these human, life-sustaining acts would violate the Excessive Fines Clause.

As noted above, in addressing Excessive Fines Clause claims, this Court has often looked to "four factors in weighing the gravity of the defendant's offense: (1) the nature and extent of the crime, (2) whether the violation was related to other illegal activities, (3) the other penalties that may be imposed for the violation, and (4) the extent of the harm caused." *United States v. $100,348.00 in U.S. Currency*, 354 F.3d 1110, 1122 (9th Cir. 2004). As this Court has recognized, these factors arose from the criminal-forfeiture context, *see Pimentel*, 974 F.3d at 921–23, and

thus implicate different concerns than the poverty-related minor offenses at issue. Even so, all four factors weigh heavily in favor of finding gross disproportionality here.

First, "the nature and extent of the underlying offense" typically turns on "the violator's culpability." *Id.* at 922. "[I]f culpability is low, the nature and extent of the violation is minimal." *Id.* at 923. Being homeless, Plaintiffs will inevitably find themselves outdoors and in need of rest. Plaintiffs cannot be said to be culpable for the quintessentially human conduct that the City seeks to punish. As the district court put it, "the decisive consideration is that Plaintiffs are being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry." ER 27. And, as already noted, the proscribed conduct cannot be considered serious. *Cf. Solem*, 463 U.S. at 292–93. Thus, this factor favors a finding of gross disproportionality. *See Pimentel*, 974 F.3d at 923.

The second and third factors lead to the same conclusion. There is no suggestion that the conduct at issue—the basic human behavior of sleeping or resting—relates to other illegal activities. There are also no other penalties that can be imposed for the conduct at issue. Oregon law does not prohibit individuals from sleeping in public places. Indeed, the record suggests that the City enacted the

ordinances at issue precisely because no other laws targeted this conduct. *See* ER 373.

Fourth and finally, the extent of the harm is nonexistent. Although this inquiry typically includes "how the violation erodes the government's purposes for proscribing the conduct," *Pimentel*, 974 F.3d at 924, this Court cannot give weight to the government's impermissible interest in "mak[ing] it uncomfortable enough for [homeless residents] in our city so they will want to move on down the road," ER 368. The Constitution forbids reliance on such motivations. *See Mem'l Hosp.*, 415 U.S. at 263–64; *O'Connor*, 422 U.S. at 575; *Levenson*, 587 F.3d at 931. And even if the City's intent in enacting the ordinances at issue were instead in pursuit of public health and safety, that goal is not furthered by the City's attempts to punish Plaintiffs. On the contrary, as the district court recognized, "[l]aws that punish people because they are unhoused and have no other place to go undermine cities' ability to fulfill this obligation." ER 39. For the reasons highlighted by the district court, this type of government regulation results in a series of detrimental effects that damage, rather than further, public health and safety. *See* ER 39–40.

Taken together, these factors confirm that the gravity of the offenses at issue are substantially outweighed by the severity of the fines imposed. This Court should therefore conclude that the fines that the City seeks to impose are unconstitutionally excessive.

III. The City has forfeited the erroneous argument that Eighth Amendment claims cannot be raised until after the prosecutorial process has concluded.

On appeal, the City argues for the first time that an Eighth Amendment claim cannot be raised until after the prosecutorial process has concluded. Because this argument was not raised below, this Court should decline to address it. *See Robinson v. Am. Home Mortg. Servicing, Inc.* (*In re Mortg. Elec. Registration Sys., Inc.*), 754 F.3d 772, 780 (9th Cir. 2014) ("Generally, arguments not raised in the district court will not be considered for the first time on appeal.").

In any event, this Court has already considered and rejected this argument. In *Martin*, the defendant city argued that addressing the plaintiffs' Eighth Amendment claim was improper because it focused on future, rather than already-imposed, punishment. 920 F.3d at 613. This Court disagreed, explaining that the Constitution "'imposes substantive limits on what can be made criminal and punished as such.'" *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 667 (1977)). When plaintiffs mount a challenge alleging that the government has exceeded those substantive limits, the Court held, that claim implicates "the criminal law process as a whole, not only the imposition of punishment postconviction." *Id.* (quoting *Jones*, 444 F.3d at 1128).

Likewise, in *Pimentel*, plaintiffs sued the City of Los Angeles, arguing that the fines and late payment penalties resulting from parking meter violations

violated the Excessive Fines Clause. 974 F.3d at 920. They sought both damages for the allegedly excessive fines and an injunction against future enforcement. This Court addressed the plaintiffs' claim for prospective relief against enforcement of these fines with no suggestion that the challenge was inappropriate because the fines had yet to be imposed. *See id.* Other courts have similarly recognized that Excessive Fines Clause claims can be asserted prospectively. *See, e.g.*, *Towers v. City of Chicago*, 173 F.3d 619, 624–26 (7th Cir. 1999) (considering an affirmative claim for prospective relief based on the Excessive Fines Clause but rejecting it on the merits).

This makes sense. "If conviction were a prerequisite for such a challenge, 'the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Eighth Amendment] cannot be subject to the criminal process." *Martin*, 920 F.3d at 614 (quoting *Jones*, 444 F.3d at 1129). Permitting prospective challenges therefore prevents an end-run around these critical Eighth Amendment protections.

Moreover, as a practical matter, it would make little sense to wait until after the criminal process has concluded to raise these claims. The City deems "[a]ny person violating any of the provisions or failing to comply with any of the mandatory requirements of any provision of this code"—including the antihomelessness ordinances in this case—as "guilty of a Violation." Grants Pass,

Or., Mun. Code § 1.36.010(A), https://www.grantspassoregon.gov/316/Municipal-Code. The municipal code also specifies that the "Base Fines" "*shall* be $75" for violations of the antisleeping ordinances and "*shall* be $295" for the other violations at issue. *Id.* § 1.36.010(J)–(K) (emphases added).[6] If a person chooses to challenge the citation, she has no right to trial by jury or an attorney. *See id.* § 1.36.010(B). To require Plaintiffs, without the assistance of counsel, to subject themselves to a process after which a set fine is ministerially imposed is to "force resort to an arid ritual of meaningless form." *Staub v. City of Baxley*, 355 U.S. 313, 320 (1958). Such an empty gesture should not be a prerequisite to seeking Eighth Amendment relief.

In short, even if the City had not forfeited this argument, this Court should reject it. Plaintiffs' prospective claim for relief was properly asserted under the Eighth Amendment.

[6] Contrary to the City's assertions, the municipal code does not confer judges with "discretion over the amount of the fine." Opening Br. at 17. Instead, the code permits only two one-time reductions: "[u]pon a plea of guilty to a 1st offense for the particular violation" and "[u]pon a plea of guilty to a 2nd offense for the same violation." Grants Pass, Or., Mun. Code § 1.36.010(J)–(K). Under principles of Oregon statutory interpretation, "the expression of one thing implies the exclusion of others," *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1193 (Or. 2014), thereby suggesting that no other exceptions are permitted.

CONCLUSION

For the reasons stated above and those given in Plaintiffs-Appellees' brief, this Court should affirm the district court and hold that the City's ordinances violate the Eighth Amendment as applied to unhoused individuals.

June 8, 2021

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(a)(5), and Ninth Circuit Rule 32-1(a) because this brief contains 5,041 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), as calculated by Microsoft Word 2016. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a) because this brief has been prepared in proportionally spaced typeface using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on June 8, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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