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, Medford (Hon. Mark D. Clarke)
Dist. Ct. No. 1:18-cv-01823-CL

BRIEF OF AMICUS CURIAE FINES AND FEES JUSTICE CENTER IN SUPPORT OF PLAINTIFFS-APPELLEES AND FOR AFFIRMANCE

Seth Wayne
Kelsi B. Corkran
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9042
sw1098@georgetown.edu
kbc74@georgetown.edu

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

ARGUMENT 3

I. Fines assessed against homeless individuals are punitive, harmful, and serve no legitimate government purpose. 3

II. The City's argument that homeless individuals are not punished because they may seek shelter outside of Grants Pass is unavailing. 9

III. The Eighth Amendment Excessive Fines Clause prohibits fines that exceed what an individual can pay based on their financial circumstances. 14

IV. Class treatment is critically important where individuals suffer systemic violations of their civil rights yet are poorly positioned to individually vindicate these claims in court. 18

CONCLUSION 21

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

CERTIFICATE OF BRIEF IN PAPER FORMAT

TABLE OF AUTHORITIES

Page(s)

Cases

Aptheker v. Sec'y of State,
378 U.S. 500 (1964) 11

Blake v. City of Grants Pass,
No. 1:18-cv-01823-CL, 2020 WL 4209227 (D. Or. Jul. 22, 2020) 4

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 19

Browning-Ferris Indus. v. Kelco Disposal, Inc.,
492 U.S. 257 (1989) 15, 18

Brunson v. Bd. of Trs.,
311 F.2d 107 (4th Cir. 1962) 19

Catron v. City of St. Petersburg,
658 F.3d 1260 (11th Cir. 2011) 13

City of Chicago v. Morales,
527 U.S. 41 (1999) 13, 15

Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC,
442 P.3d 94 (Colo. 2019) 17

Edwards v. California,
314 U.S. 160 (1941) 10

Johnson v. City of Cincinnati,
310 F.3d 484 (6th Cir. 2002) 12

Kennedy v. City of Cincinnati,
595 F.3d 327 (6th Cir. 2010) 13

Kent v. Dulles,
357 U.S. 116 (1958) 11

Kolender v. Lawson,
461 U.S. 352 (1983) 11

Lutz v. City of York,
899 F.2d 255 (3d Cir. 1990) 12

Martin v. City of Boise,
920 F.3d 584 (9th Cir. 2019) 3, 9

Mem'l Hosp. v. Maricopa Cnty.,
415 U.S. 250 (1974) 10

Nunez by Nunez v. City of San Diego,
114 F.3d 935 (9th Cir. 1997) 12

Papachristou v. City of Jacksonville,
405 U.S. 156 (1972) 11

Pimentel v. City of Los Angeles,
974 F.3d 917 (9th Cir. 2020) 4, 16

Pottinger v. City of Miami,
810 F. Supp. 1551 (S.D. Fla. 1992) 13

Potts v. Flax,
313 F.2d 284 (5th Cir. 1963) 19

Ramos v. Town of Vernon,
353 F.3d 171 (2d Cir. 2003) 12

Robinson v. California,
370 U.S. 660 (1962) 9

Scott v. Illinois,
440 U.S. 367 (1979) 20

Shapiro v. Thompson,
394 U.S. 618 (1969) 10, 12

State v. Timbs,
134 N.E.3d 12 (Ind. 2019) 17

Stoner v. Miller,
377 F. Supp. 177 (E.D.N.Y. 1974) 12

Timbs v. Indiana,
139 S. Ct. 682 (2019) 4, 15, 16, 18

United States v. Aguasvivas-Castillo,
668 F.3d 7 (1st Cir. 2012) 17

United States v. Bajakajian,
524 U.S. 321 (1998) 16

United States v. Dubose,
146 F.3d 1141 (9th Cir. 1998) 16

United States v. Viloski,
814 F.3d 104 (2d Cir. 2016) 17

United States v. Wheeler,
254 U.S. 281 (1920) 11

Walters v. Reno,
145 F.3d 1032 (9th Cir. 1998) 19

Williams v. Fears,
179 U.S. 270 (1900) 11

Statutes

Alaska Stat. § 28.15.181(g) 7

Ariz. Rev. Stat. § 28-144 7

Ariz. Rev. Stat. § 28-1601(A) 7

City of Grants Pass Mun. Code § 1.36.010 ..... 4, 20

City of Grants Pass Mun. Code § 5.61.010 8

City of Grants Pass Mun. Code § 5.61.020 8

City of Grants Pass Mun. Code § 5.61.030 8

City of Grants Pass Mun. Code § 6.46.090 8

City of Grants Pass Mun. Code § 6.46.350 20

Rules & Regulations

Final Supplementary Rules on Public Land in Oregon and Washington,
70 Fed. Reg. 48584 (Aug. 18, 2005) 14

Other Authorities

Bd. of Governors of the Fed. Rsrv., *Report on the Economic Well-Being of U.S. Households in 2017* 4, 5

Beth A. Colgan, *Reviving the Excessive Fines Clause*,
102 Calif. L. Rev. 277 (2014) 15

Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*,
65 U.C.L.A. L. Rev. 2 (2018) 4

Elina Turunen & Heikki Hiilamo, *Health Effects of Indebtedness: A Systematic Review*,
14 BioMed Cent. Pub. Health 489 (2014) 7

Erin Roark Murphy, *Transportation and Homelessness: A Systematic Review*,
28 J. Soc. Distress & Homelessness 96 (2019) 21

Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment 19

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 1 (2019) 6

K. Rambo, *Lawmakers pass bill to prevent Oregonians from losing driver's licenses if they can't afford to pay fines*, The Oregonian (Jun. 26, 2020) 7

Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* (Sept. 2009) 21

Oregon Community Foundation, *Homelessness in Oregon: A Review of Trends, Causes, and Policy Options* (2019) 6

Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. Kan. L. Rev. 325 (2017) 19

Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595 (2015) 4

U.S. Dep't of Hous. & Urb. Dev., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* (2018) 6

U.S. Dep't of Hous. & Urb. Dev., *The 2020 Annual Homeless Assessment Report (AHAR) to Congress* (2021) 5

William Blackstone, Commentaries on the Laws of England (1769) 16

William N. Evans et al., *The Impact of Homelessness Prevention Programs on Homelessness*, 353 Science 694 (2016) 7

INTEREST OF AMICUS CURIAE

The Fines and Fees Justice Center (FFJC) is a national center for advocacy, information, and collaboration on effective solutions to the unjust and harmful imposition and enforcement of fines and fees in state and local courts. FFJC's mission is to create a justice system that treats individuals fairly, ensures public safety, and is funded equitably. FFJC advocates for reform in all 50 states, including Oregon, by working with impacted communities and justice system stakeholders.[1]

CORPORATE DISCLOSURE STATEMENT

FFJC is a nonprofit organization with no parent corporation and in which no person or entity owns stock.

INTRODUCTION

In Grants Pass, Oregon, the City government has put in place a series of ordinances that make it illegal to engage in the essential functions of life if you do not have a place to live. These ordinances carry hefty fines for violations like using any object as a barrier between oneself and the ground while sleeping. The intended effect of these ordinances is to make people without homes "uncomfortable enough

[1] In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae certifies that (1) this brief was authored entirely by counsel for amicus curiae and not counsel for any party, in whole or in part; (2) no party or counsel for any party contributed money to preparing or submitting this brief; and (3) no person other than amicus curiae contributed money to the preparation or submission of this brief. No party objects to the filing of this brief. (Appellees have consented to the filing of this brief and Appellant has declined to take a position.)

in [Grants Pass] so that they will want to move on down the road." ER 368. As applied to members of the class certified by the district court—involuntarily homeless persons who have no choice, given the lack of shelter options, but to sleep outside if they are to remain in Grants Pass—these ordinances violate the Eighth Amendment. The record shows that enforcement of these ordinances has led to hundreds of tickets issued to people without homes, sometimes amounting to thousands of dollars in fines. Because class members who cannot afford to pay for a place to sleep also typically cannot afford to pay these fines, they are often subject to even greater amounts imposed as late fees.

Amici write to address four separate issues raised by the decision in the district court and the Parties' briefs. First, ordinances that impose fines and fees on unhoused people who cannot afford to pay them are enormously harmful to those people, perpetuate cycles of poverty and homelessness, and do not promote public safety or any other legitimate government purpose. Second, the district court was correct in discounting places outside Grants Pass in its count of available shelter spaces, because forced relocation is constitutionally suspect and leads to adverse consequences for displaced persons and the community as a whole. Third, this Court should embrace the view that ability to pay is a factor in the proportionality test under the Excessive Fines Clause, as such a reading is supported by constitutional history and Supreme Court jurisprudence. And finally, the district court was correct in certifying the class, as the class action vehicle under Federal Rule of Civil Procedure

23(b)(2) was designed to address systemic problems that cannot be practicably addressed by individual litigants, particularly litigants like class members here who because of their poverty do not have ready access to counsel or the courts.

For these reasons and those that follow, amicus curiae FFJC urges this Court to affirm the district court's decision below.

ARGUMENT

I. Fines assessed against homeless individuals are punitive, harmful, and serve no legitimate government purpose.

As the district court found, this case is governed by *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019). Grants Pass's ordinances effectively prohibit the act of living outside in a city where many individuals are unable to secure adequate shelter because of their poverty. As applied to individuals without homes living in Grants Pass, the ordinances serve no legitimate government purpose, are punitive in nature, and cause immense harm. The effect of these ordinances is counterproductive to the harm they purport to address: they make individuals *less* likely to secure or maintain stable housing. Far from serving an interest in public safety, these laws maintain class members in a cycle of poverty. Amici urge this Court to consider the harmful effects of the ordinances, in particular from the punitive fines levied on individuals who are unable to pay, in its determination of whether the City is in violation of the Eighth Amendment.

Fines like those levied by Grants Pass are often substantial on their face and become even more oppressive over time due to the addition of late fees or collection fees when not paid on time.[2] Tamar R. Birckhead, *The New Peonage*, 72 Wash. & Lee L. Rev. 1595, 1603 (2015). In Grants Pass, a violation of one of the ordinances prohibiting "camping" results in a fine of $295, City of Grants Pass Mun. Code (GPMC) § 1.36.010(J), and a violation of any of the other anti-homeless ordinances results in a fine of $75, *id.* § 1.36.010(K). While either of these amounts would alone impose a significant financial burden on a homeless individual, the addition of collection fees can substantially increase these amounts to as much as $537 or $160, respectively. *Blake v. City of Grants Pass*, No. 1:18-cv-01823-CL, 2020 WL 4209227, at *5 (D. Or. Jul. 22, 2020). These amounts would be a significant burden for many individuals in the United States, not just people without homes. A 2018 report by the Federal Reserve determined that—even before the COVID-19 epidemic—four in ten adults in the United States would have difficulty covering an unexpected expense of $400, and would have to go into debt or sell personal property to pay. Bd. of Governors of the Fed. Reserve, *Report on the Economic Well-Being of U.S. Households in*

[2] Although not discussed in the District Court or raised by the City on appeal, these "collection fees" remain subject to the Excessive Fines Clause because they are at least "partially punitive." *See Timbs v. Indiana*, 139 S. Ct. 682, 689-90 (2019); Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 U.C.L.A. L. Rev. 2, 35-40 (2018). This Court recently held that a late payment fee like those at issue here are subject to the Excessive Fines Clause. *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020).

2017, at 21 (May 2018), https://perma.cc/LR2F-TVB5. Nearly 30 percent of those who would have difficulty paying—more than 10 percent of all American adults—said they would not be able to pay at all. *Id.* This is particularly true for people who are already unable to afford a place to sleep at night.

Although these court-imposed debts have a deleterious effect on all homeless individuals, they may impose a particular harm on people who are temporarily homeless by preventing them from securing housing. Contrary to common conceptions of homelessness, many homeless individuals only experience short, temporary periods of homelessness before they are able to re-secure stable housing. In Oregon, of the 14,655 individuals who experienced homelessness in 2020, only 4,123 individuals (or 28 percent of the homeless population) were "chronically homeless," defined as being either continuously homeless for one year or more, or intermittently homeless for a total of twelve months or more across at least four separate periods during the previous three years. U.S. Dep't of Hous. & Urb. Dev., *The 2020 Annual Homeless Assessment Report (AHAR) to Congress* 2, 92 (2021). This means that people temporarily experiencing homelessness make up the great majority (72 percent) of the homeless population in Oregon. *Id.* at 92. Imposing punitive fines on those experiencing temporary homelessness does not aid in solving the long-term homelessness problem in cities like Grants Pass. Instead, such fines increase the debt burden on homeless individuals, forcing them to put their limited funds toward fines instead of basic needs and lowering their likelihood of re-securing housing.

These fines accordingly serve little function other than to perpetuate the cycle of homelessness. Indeed, one of the main effects of fines levied on individuals experiencing homelessness is, perversely, to impair their already-precarious access to housing. In general, legal fines are associated with an increase in the duration of homelessness. *See* 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 1 (2019) (finding that homeless adults with debt from legal fines experienced nearly two additional years of homelessness compared to similar homeless adults with no debt from legal fines). By saddling homeless people with increasing levels of debt that they do not have the means to pay, local governments also damage individuals' credit scores, decreasing the pool of available housing options. *See* U.S. Dep't of Hous. & Urb. Dev., *A Pilot Study of Landlord Acceptance of Housing Choice Vouchers* 38-39 (2018) (finding that approximately one in five landlords who place conditions on the acceptance of rental assistance vouchers set credit score requirements); *see also* Oregon Community Foundation, *Homelessness in Oregon: A Review of Trends, Causes, and Policy Options* 48 (2019) (proposing that local governments in Oregon alter their affordable housing screening guidelines to stop limiting eligibility based on credit scores). Moreover, until just last year, people who could not afford to pay fines and fees in Oregon had their driver's licenses suspended, making it even more difficult for them to obtain or maintain employment, access social services or medical services, or

perform other functions basic to modern life. K. Rambo, *Lawmakers pass bill to prevent Oregonians from losing driver's licenses if they can't afford to pay fines*, The Oregonian (Jun. 26, 2020), https://perma.cc/J3F9-27HH. License or vehicle registration suspensions for nonpayment of fines and fees still take place in Alaska and Arizona. *See* Alaska Stat. § 28.15.181(g); Ariz. Rev. Stat. §§ 28-144; 28-1601(A). All of these issues are compounded by the negative mental health impact of chronic indebtedness on those with unmet financial obligations. Elina Turunen & Heikki Hiilamo, *Health Effects of Indebtedness: A Systematic Review*, 14 BioMed Cent. Pub. Health 489 (2014) (finding a relationship between unmet debt obligations and serious health effects, including suicidal ideation and depression).

For those individuals who succeed in securing stable housing, fines they incurred while experiencing homelessness operate to divert funds from maintaining that housing and securing other basic life needs, increasing the likelihood that they will lose their housing again. For many very low-income individuals, it takes only a small amount of money to mitigate the risk of homelessness. *See* William N. Evans et al., *The Impact of Homelessness Prevention Programs on Homelessness*, 353 Science 694, 698 (2016). Avoiding housing loss can produce significant public cost savings, taking into account the many adverse effects of homelessness on individuals and their communities. *Id.* Anti-homeless fines do the opposite. By burdening formerly homeless individuals with debt, anti-homeless fines *deplete* the limited funds individuals have on hand, limiting their ability to remain in stable housing. The

ultimate effect of fines like those levied by Grants Pass is to force low-income individuals to use money they could have otherwise used to obtain or maintain housing to pay off court debts, thereby perpetuating the poverty that caused the ordinance violations in the first place.

These effects could be mitigated if Grants Pass offered places for involuntarily homeless individuals to safely sleep without violating the ordinances. But as the district court concluded, Grants Pass lacks adequate shelter housing to provide a space for each resident experiencing homelessness at any given time. Moreover, a close look at the ordinances demonstrates that outside the limited shelter beds, there are *no* legal resting areas on *any* public property within city limits. A homeless individual who needs to rest under a blanket or in a sleeping bag is forbidden from doing so on sidewalks, streets, alleyways, stoops, parks, benches, under bridges, or on "any other publicly-owned property." GPMC §§ 5.61.010, 5.61.020, 5.61.030. A homeless individual who owns a car cannot rest in their car in the parking lot of a public park overnight. *Id.* § 6.46.090. These ordinances effectively function as a city-wide prohibition of homelessness, backed by the imposition of punitive fines, with devastating and counter-productive effects on class members.

Fines imposed on homeless individuals for engaging in involuntary, life-sustaining activities like sleeping make homeless persons less likely to obtain and maintain secure housing and serve to keep involuntarily homeless individuals in an inescapable cycle of poverty and criminal punishment. The only apparent purpose

served by these ordinances it to drive Grants Pass's homeless residents out of the City by punishing their very existence. As the district court found and this Court should affirm, such a scheme violates the Eighth Amendment.

II. The City's argument that homeless individuals are not punished because they may seek shelter outside of Grants Pass is unavailing.

As explained by the district court, punishment of involuntary conduct inherent to homelessness is unconstitutional status-based punishment in violation of the Eighth Amendment. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019); *Robinson v. California*, 370 U.S. 660, 666-67 (1962). Under *Martin*, ordinances that punish homelessness are unconstitutional when the number of shelter beds in the relevant jurisdiction is inadequate to serve a City's homeless population on any given night. As the district court found here, "[t]he record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds." ER 22. The City argues that Grants Pass's ordinances pass muster under *Martin* because individuals who are homeless in the city may leave and camp on federal, county, or state land. The district court appropriately rejected this argument, holding that

> [t]his remarkable argument not only fails under *Martin* but also sheds light on the City's attitude towards its homeless citizens. Essentially, Grants Pass argues that it should be permitted to continue to punish its homeless populations because Plaintiffs have the option to just leave the City.

ER 20-21. The district court was correct. But there are additional reasons to reject the City's argument, because policies that seek to force individuals to leave a given

jurisdiction are constitutionally suspect for other reasons, and ultimately are widely harmful in their effects.

The Supreme Court has consistently recognized the constitutional importance of both allowing unfettered travel within the United States and prohibiting states from impeding migration based on the avoidance of undesirable social policy consequences. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (holding that states violated the Equal Protection Clause by denying welfare assistance to residents who had not lived in the state for at least one year); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 257-61 (1974) (holding that a state violated the Equal Protection Clause by denying publicly funded non-emergency hospitalization or medical care to indigent residents who had not lived in the state for at least one year); *Edwards v. California*, 314 U.S. 160, 173-75 (1941) (holding that a state statute prohibiting the transportation of indigent people into the state unconstitutionally impeded interstate commerce). As stated in *Edwards*, "none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons . . . across its borders." 314 U.S. at 173.

Although the Supreme Court's jurisprudence has largely been confined to interstate rather than intrastate disputes, the underlying principle remains the same. As the Supreme Court has explained, "[f]reedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, ... may be as close to the heart of the individual as the

choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." *Kent v. Dulles*, 357 U.S. 116, 126 (1958). This right is deeply grounded in our history and way of life. The Supreme Court has noted that as early as the Articles of Confederation, state citizens "possessed the fundamental right, inherent in citizens of all free governments, peacefully to dwell within the limits of their respective states, *to move at will from place to place therein*, and to have free ingress thereto and egress therefrom." *United States v. Wheeler*, 254 U.S. 281, 293 (1920) (emphasis added); *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (noting that statute requiring those wandering the streets to provide police upon request with identification "implicates consideration of the constitutional right to freedom of movement"); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (describing "'wandering or strolling' from place to place" as "historically part of the amenities of life as we have known them"); *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964) ("The freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful . . . . Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.") (Douglas, J., concurring); *Williams v. Fears*, 179 U.S. 270, 274 (1900) ("[T]he right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of free transit from or *through the territory of any state* is a right secured by the 14th Amendment and by other provisions of the Constitution.") (emphasis added).

Although this Court has declined to resolve the question of whether there is a fundamental right to intrastate travel, *Nunez by Nunez v. City of San Diego*, 114 F.3d 935, 944 n.7 (9th Cir. 1997), it has determined that there is a fundamental right to "free movement" that is burdened by a local curfew ordinance. *Id.* at 948. A number of other courts have expressly recognized that the prohibition on impeding travel applies whether that travel is between states, within a state, or within a specific locality. *See, e.g.*, *Ramos v. Town of Vernon*, 353 F.3d 171, 176 (2d Cir. 2003) ("The right to intrastate travel, or what we sometimes . . . refer to as the right to free movement, has been recognized in this Circuit."); *Johnson v. City of Cincinnati*, 310 F.3d 484, 498 (6th Cir. 2002) ("In view of the historical endorsement of a right to intrastate travel and the practical necessity of such a right, we hold that the Constitution protects a right to travel locally through public spaces and roadways."); *Lutz v. City of York*, 899 F.2d 255, 268 (3d Cir. 1990) ("[T]he right to move freely about one's neighborhood or town . . . is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'") (citation omitted); *Stoner v. Miller*, 377 F. Supp. 177, 180 (E.D.N.Y. 1974) ("It is immaterial whether travel is interstate or intrastate.").

Just as "inhibiting migration by needy persons . . . is constitutionally impermissible," *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969), driving impoverished individuals *out of* one's locality or preferred location is constitutionally suspect. As Justice Stevens observed (joined by Justices Souter and Ginsburg), "[i]t is apparent that an individual's decision to remain in a public place of his choice is as much a part

of his liberty as the freedom of movement inside frontiers that is a 'part of our heritage.'" *City of Chicago v. Morales*, 527 U.S. 41, 54 (1999) (plurality opinion); *see also Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011) ("Plaintiffs have a constitutionally protected liberty interest to be in parks or on other city lands of their choosing that are open to the public generally."); *Kennedy v. City of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) ("it is clear that Kennedy had a liberty interest 'to remain in a public place of his choice'"). At least one court has found that charging homeless persons for violating ordinances meaningfully identical to those at issue here unconstitutionally infringes on those persons' right to travel. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992) ("[T]he City's enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel."). Grants Pass should not be able to barricade itself through draconian ordinances intended to render life impossible for people without houses within its borders, nor should it be permissible to use punishment by fines to force homeless individuals into neighboring localities and states.

By punishing homeless individuals for their status of being homeless, Grants Pass, by its own admission, promotes the exodus of homeless individuals to areas outside of the city limits. Appellant's Br. 6-8 (describing federally managed lands, county parks allowing overnight camping, and a state-maintained parking lot rest area, all of which are outside Grants Pass city limits, as areas in which class members

should be expected to sleep). As this Court found with respect to the curfew ordinance in *Nunez*, these ordinances burden class members' freedom of movement. The district court was accordingly correct to determine that this forced relocation—itself constitutionally suspect—does not provide a safety valve under *Martin* for a city that lacks available places to sleep within its boundaries.[3]

III. The Eighth Amendment Excessive Fines Clause prohibits fines that exceed what an individual can pay based on their financial circumstances.

The fines imposed upon class members under Grants Pass's ordinances are also unconstitutionally excessive under the Eighth Amendment Excessive Fines Clause. This Court should adopt standards for excessiveness that include a proportionality analysis balancing (1) the harshness of the punishment; (2) the severity of the offense; and (3) the individual's culpability. As a necessary component of determining the harshness of the punishment, courts must consider the effect the penalty will have on the person on whom they are imposed; and particularly, whether those economic sanctions will destroy an individual's livelihood or condemn them to perpetual poverty. Here, the fines and fees are excessive under any analysis because

[3] The availability of other nearby places to reside may otherwise be illusory. Grants Pass suggests that homeless individuals could move onto federally managed lands outside of Grants Pass rather than remain in the city limits, *see* Appellant's Br. 6-7, yet the federal government could opt to enforce its existing regulations at any point, which currently prohibit "establish[ing] occupancy . . . or otherwise us[ing] public lands for residential purposes." Final Supplementary Rules on Public Land in Oregon and Washington, 70 Fed. Reg. 48584, 48586 (Aug. 18, 2005).

they stem from unavoidable conduct for which members of the plaintiff class bear no culpability. Amici urge this Court to determine that the fines and fees imposed by Grants Pass fail because that they have a disproportionate and excessively harmful effect on the homeless persons that make up the plaintiff class.

A reading of the Excessive Fines Clause that includes consideration of the individual's financial circumstances as part of a proportionality test comports with the clause's history. Under the original meaning of the Excessive Fines Clause, "excessiveness" incorporated consideration of the financial circumstances of the person receiving the fine. The language of the Eighth Amendment derives from the Virginia Declaration of Rights, the English Bill of Rights, and the Magna Carta, which required that "economic sanctions 'be proportioned to the wrong' and 'not be so large as to deprive [an offender] of his livelihood.'" *Timbs v. Indiana*, 139 S. Ct. 682, 687-88 (2019) (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)); *see also* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277, 335 (2014) ("[T]he idea of saving defendants from persistent impoverishment was a guiding principle reaching back to the days of the Magna Carta and the English Bill of Rights, and enduring through the ratification of the Eighth Amendment."). Furthermore, William Blackstone, recognized as the "preeminent authority on English law for the founding generation," *Timbs*, 139 S. Ct. at 695 (Thomas, J., concurring) (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)), described the excessive fines prohibition in England as requiring that "no man shall have a larger amercement imposed upon him,

than his circumstances or personal estate will bear." *Timbs* 139 S. Ct. at 688 (quoting 4 William Blackstone, Commentaries on the Laws of England 372 (1769)).

In *Timbs*, the Supreme Court acknowledged that including the individual's financial circumstances in the determination of excessiveness was well established at the time the Constitution was written and recognized its current relevance, but the Court reserved the inclusion of wealth or income considerations within the proportionality assessment underlying the Excessive Fines Clause as an open question of law. *Timbs*, 139 S. Ct. at 687-88 (identifying the historical relevance of considering financial means when assessing whether a fine is excessive but issuing a holding on narrower grounds); *see also United States v. Bajakajian*, 524 U.S. 321, 340 n.15 (1998) (leaving open the question of whether "wealth or income are relevant to the proportionality determination" in the sense that forfeiture would "deprive [the defendant] of his livelihood" because the argument was not raised). This Circuit, too, has deferred the question of whether to incorporate wealth or income considerations into its Eighth Amendment proportionality assessment. *See, e.g.*, *Pimentel v. City of Los Angeles*, 974 F.3d 917, 925 (9th Cir. 2020) (declining to incorporate a "means-testing requirement" for an excessive fines claim involving parking tickets because it was a "novel question" in the Circuit); *United States v. Dubose*, 146 F.3d 1141, 1146 (9th Cir. 1998) (declining to incorporate a hardship inquiry for an excessive fines claim involving criminal restitution orders). In this case, however, the question of economic

proportionality is squarely presented and the factual circumstances of the class warrant the Court's reassessment of the argument.

Other circuits have adopted wealth or income considerations in their proportionality assessments, particularly where a punitive fine or fee "effectively deprive[s] the defendant of his or her future livelihood." *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 16 (1st Cir. 2012); *see also United States v. Viloski*, 814 F.3d 104, 111-12 (2d Cir. 2016) ("Whether a forfeiture would destroy a defendant's livelihood is a component of the proportionality analysis" under the Excessive Fines Clause). The same is true of state Supreme Courts, including the Indiana Supreme Court on remand in *Timbs*. *State v. Timbs*, 134 N.E.3d 12, 36 (Ind. 2019) ("[T]he owner's economic means . . . is an appropriate consideration for determining [the punishment's] magnitude."). Indeed, as the Indiana Supreme Court explained, "[t]o hold the opposite would generate a new fiction: that taking away the same piece of property from a billionaire and from someone who owns nothing else punishes each person equally." *Id.*; *see also Colo. Dep't of Lab. & Emp. v. Dami Hosp., LLC*, 442 P.3d 94, 102 (Colo. 2019) ("[C]ourts considering whether a fine is constitutionally excessive should consider ability to pay in making that assessment.").

The fines Grants Pass imposes on homeless individuals operate to deprive these individuals of their basic needs like food, water, and shelter, and perpetuate their inability to obtain or maintain future housing. *See* discussion *supra* Section I. This case accordingly presents a straightforward application of the historical underpinnings

of the Eighth Amendment: fining homeless individuals will *necessarily* "deprive [these individuals] of [their] livelihood," *Timbs*, 139 S. Ct. at 687-88 (quoting *Browning-Ferris*, 492 U.S. at 271), by leaving them with depleted funds or oppressive debt burdens when they are by definition struggling to access basic shelter. In short, even if Grants Pass's anti-homeless ordinances do not constitute unconstitutional status-based punishment, they still violate the Eighth Amendment Excessive Fines Clause by imposing a punishment that is excessive in light of the means of the homeless persons who are subject to these ordinances and excessive with respect to the harm they cause.

IV. Class treatment is critically important where individuals suffer systemic violations of their civil rights yet are poorly positioned to individually vindicate these claims in court.

Finally, class treatment is necessary in this case to vindicate the civil rights of the individuals impacted by Grants Pass's anti-homeless ordinances. Much of the City's opening brief contends that regardless of the merits of the underlying claims, the district court erred by certifying a class. Appellant's Br., pp. 37 *et seq.* This is mistaken. The class action procedural device, and Federal Rule of Civil Procedure 23(b)(2) in particular, have long been used to promote the vindication of the civil rights of people seeking relief from systemic harms who would not ordinarily have the resources or ability to individually bring suit. Originating as a "mechanism for those fighting racial oppression to act collectively," the ability to aggregate individual claims and seek broad injunctive relief was critical to the success of early racial desegregation

claims. Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. Kan. L. Rev. 325, 329-33 (2017). The drafters of the modern Rule 23 expressly recognized this in the advisory committee notes, stating that "[i]llustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration." Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment; *see also Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998) (recognizing that Rule 23(b)(2) "was adopted in order to permit the prosecution of civil rights actions"). Citing to cases like *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963), and *Brunson v. Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), in which school boards attempted to manufacture individualized processes in school assignments to thwart school desegregation class actions in the aftermath of *Brown v. Board of Education*, 347 U.S. 483 (1954), the advisory committee recognized the importance of crafting the modern Rule 23(b)(2) to allow for the use of class actions to combat systemic harms without requiring every person affected to serve as a litigant, even if there were individualized aspects to the overall unconstitutional regime. Fed. R. Civ. P. 23(b)(2) advisory committee's note to 1966 amendment; *see* Malveaux, 66 U. Kan. L. Rev. at 334-40.

Like the civil rights cases underpinning the development of the modern Rule 23, the constitutional issues addressed in this case affect individuals but are ultimately systemic in nature. Assessing Grants Pass's web of ordinances through singular cases would miss the overarching function of the ordinances in achieving a de facto

prohibition of homelessness within city limits. Although the individual consequences to class members who violate Grants Pass's anti-homeless ordinances range from monetary fines to exclusion orders, and may proceed to criminal trespass convictions, GPMC §§ 1.36.010, 6.46.350, each punishment operates to ensure that people without homes effectively have their existence criminalized in Grants Pass. Separate determinations about whether any given individual's homeless status on any given night is actually involuntary fail to account for the far-reaching consequences of practices this Court found to be unconstitutional in *Martin* and are present in Grants Pass. For example, if there are only 100 shelter beds for an involuntarily homeless population of 1,000 people, it is possible that any individual litigant could obtain shelter on any given night, but such an analysis would miss the point that the great majority of class members have no safe place to sleep. This would create the kind of piecemeal injustice that Rule 23(b)(2) was designed to avoid.

Homeless individuals also face significant barriers to pursuing their civil rights claims in court on an individual basis, making it imperative that the class action device remain available to them as one of the few avenues for vindicating their civil rights. In this case, the class of homeless individuals subject to Grants Pass's anti-homeless ordinances have no right to state-provided counsel, even if they receive fines or exclusion orders for violating the ordinances. *Scott v. Illinois*, 440 U.S. 367, 373-74 (1979) (holding that defendants have no right to counsel under the Sixth Amendment unless their sentence includes the possibility of incarceration). Because class members

are currently experiencing homelessness, they are likely to have an extremely limited ability to obtain individual representation to institute civil rights challenges to these ordinances, despite the significant, punitive impact the ordinances and fines have on their lives. *See* discussion *supra* Section I (discussing the substantial harm fines inflict on homeless individuals in obtaining and maintaining housing and other basic life needs). Government-funded legal services are inadequate to resolve this gap.[4] Homeless individuals are also especially limited in their ability to attend regular court hearings due to their precarious living situation and unpredictable access to transportation. *See* Erin Roark Murphy, *Transportation and Homelessness: A Systematic Review*, 28 J. Soc. Distress & Homelessness 96 (2019). Without the option to pursue these types of claims on a class-wide basis, systemic violations of the constitutional rights of homeless individuals would go unaddressed.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm the decision of the district court below.

[4] *See, e.g.* Legal Services Corporation, *Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans* 2-3 (Sept. 2009), https://perma.cc/S9WC-ARRH (only half of individuals seeking legal representation from LSC-funded legal aid are able to be served).

Respectfully submitted,

/s/ Kelsi B. Corkran

Kelsi B. Corkran
Seth Wayne
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Tel.: 202-662-9042
Fax: 202-661-6730
sw1098@georgetown.edu
kbc74@georgetown.edu

Attorneys for Amicus Curiae

June 2021

CERTIFICATE OF COMPLIANCE

I certify that this document complies with the type-volume limitation set forth in Federal Rules of Appellate Procedure 29(a)(5) & 32(a)(7)(B) because it contains 5,560 words, exclusive of the portions of the brief that are exempted by Rule 32(f).

I certify that this document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point roman-style Garamond font.

/s/ Kelsi B. Corkran
KELSI B. CORKRAN

CERTIFICATE OF SERVICE

I hereby certify that on June 8, 2021, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Kelsi B. Corkran
KELSI B. CORKRAN