No. 23-175

# In The Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

*Petitioner,*

v.

GLORIA JOHNSON AND JOHN LOGAN,
ON BEHALF OF THEMSELVES AND
ALL OTHERS SIMILARLY SITUATED,

*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## *AMICUS CURIAE* BRIEF OF OREGON QUAKERS: THE SOUTH MOUNTAIN FRIENDS MEETING AND THE MULTNOMAH MONTHLY MEETING; DANIEL T. SATTERBERG, KING COUNTY PROSECUTING ATTORNEY (RETIRED); RICHARD HARRUFF, M.D., Ph.D., FORMER CHIEF MEDICAL EXAMINER OF THE SEATTLE/KING COUNTY MEDICAL EXAMINER'S OFFICE; THE SEATTLE/KING COUNTY COALITION ON HOMELESSNESS; AND THE WOMEN'S HOUSING, EQUALITY AND ENHANCEMENT LEAGUE (WHEEL), IN SUPPORT OF RESPONDENTS

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## *AMICI CURIAE* SUBMIT THIS BRIEF IN SUPPORT OF RESPONDENT JOHNSON

### INTEREST OF *AMICI CURIAE*[1]

The South Mountain Friends Meeting ("SMFM"), a branch of the Religious Society of Friends, commonly known as "Quakers," is located in Ashland, Oregon.[2] The Multnomah Friends Meeting ("MFM") is located in Portland, Oregon.[3]

Established in England in 1653, the Quaker faith was brought to the United States by William Penn. The duty to provide food, clothing, and shelter to the unsheltered and the hungry, taught by Jesus, is one source of the central Quaker belief that there is that of God in every person. *Matthew* 25:31-46. This case raises the legal question of whether making it unlawful to cover oneself with a blanket when sleeping on public property is cruel and unusual punishment forbidden by the Eighth Amendment. This is also a question of spiritual importance to all Quakers, and of particular importance to SMFM members since some

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[1] This brief was not authored in whole or in part by counsel for any party. No person or entity, other than the *amici* themselves, made a monetary contribution to the preparation or submission of this brief.

[2] *See* https://www.ashlandquakers.org/our-meeting."Our meeting supports, endorses, and/or participates in . . . Advocating for local homeless people. https://www.ashlandquakers.org/what-we-do.

[3] *See* https://multnomahfriends.org.

of them live in Grants Pass, Oregon, which is about 40 miles northwest of Ashland.

Daniel T. Satterberg, now retired, served four terms as the elected King County Prosecuting Attorney in Seattle, Washington from 2007 to 2023. While in office, he recognized that "Jail time is not the solution to homelessness," and promoted other solutions.[4]

Dr. Richard Harruff, now retired, served as the Chief Medical Examiner of King County, Washington for 23 years. He supervised and conducted autopsies on hundreds of homeless individuals, promoted studies examining the causes and risks of their deaths, and co-authored a report on the health risks that they face.[5]

The Women's Housing, Equality and Enhancement League ("WHEEL"), founded in 1993, is a grass-roots organization of homeless/formerly homeless women to give voice and leadership to homeless women and to develop and support shelters. In 2000, WHEEL founded Women in Black, an organization which holds silent vigils of remembrance for homeless

[4] KIRO NewsRadio, February 13, 2020, https://mynorthwest.com/1718616/dan-satterberg-homelessness-drug-addiction-solution/.

[5] Scott, R., Marchand, M., Stover, B., Causey, K., Harruff, R. & Hagopian, A, "Without shelter, people die: disproportionate mortality among King County's homeless population, 2009-2019," *Journal of Social Distress and Homelessness*, 2019.

women who have died outside or by violence in King County.[6]

The Seattle/King County Coalition on Homelessness ("SKCCH"), is a coordinating force on budget and policy decisions which directly affect the lives of people who are homeless and their communities. SKCCH mobilizes the community to challenge systemic causes of homelessness and advocate for housing justice, and advances reasonable solutions and program models for the protection and strengthening of the civil rights and dignity of people who are homeless and poor. It also works to support legislation that promotes housing, human services, and the public good at the local, state, and federal levels. For many decades, SKCCH was responsible for organizing the One Night Count in King County, which was the largest community-led count of unsheltered people in the United States.

## SUMMARY OF THE ARGUMENT

"[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – e.g., food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment." *Helling v. McKinney*, 509 U.S. 25, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), quoting *Deshaney v. Winnebago County Dept. of*

[6] *See* https://fallenleaves.org/history/; https://fallenleaves.org/topics/dedications/.

*Social Services*, 489 U.S. 189, 199-200, 109 S.Ct. 998, 1005-1006, 103 L.Ed.2d 249 (1989). In this case, the City of Grants Pass has done exactly that. By making it illegal for unsheltered people to cover themselves with a blanket while they sleep, the City has rendered them unable to care for themselves. *Cf. Estelle v. Gamble*, 429 U.S. 97, 103-104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (recognizing "the common-law view that . . . the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself").

The unsheltered do not contend that Grants Pass must provide them with blankets or bedding. They do contend, however, that Grants Pass cannot make it illegal for them to use their own blankets when they lie down to sleep. Grants Pass deprives them of the ability to care for their own "basic human needs" by denying them the ability to care for themselves by insulating their bodies from the cold. *Helling*, at 32.[7] As this Court has recognized, "warmth" is a basic human need. *Wilson v. Seiter*, 501 U.S. 294, 304, 111 S.Ct. 2321, 115 L.Ed.2d 271 (1991). When the weather is exceptionally cold, unsheltered people cannot protect themselves from the danger of being frozen to death. By depriving them of any ability to provide such essential self-care, the City "has transgresse[d] the substantive limits . . . set by the Eighth Amendment." *Helling*, at 32.

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[7] *See Johnson v. City of Grants Pass*, 72 F.4th 868, 917, n.2 (9th Cir. 2023) (joint statement of Judges Silver and Gould regarding denial of rehearing), citing *Rico v. Ducart*, 980 F.3d 1292, 1298 (9th Cir. 2020) ("Sleep is not a voluntary act but an 'identifiable human need[ ].").

Grants Pass has not and cannot provide any constitutionally permissible basis for forcing unsheltered people to sleep without "protection from the elements while sleeping within the City's limits." *Johnson v. City of Grants Pass*, 72 F.4th 868, 875 (9th Cir. 2023). The City's real objective was to banish the homeless from Grants Pass. As one city councilor bluntly stated, "the City's goal should be 'to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road.'" *Id*. at 876. But over sixty years ago this Court held that banishment was a cruel and unusual punishment that Congress could not impose even for an extremely serious offense such as wartime desertion. *Trop v. Dulles*, 356 U.S. 86, 103, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958). Grants Pass "police officers bought homeless persons bus tickets out of town" but the persons bussed out returned to Grants Pass. *Johnson*, 72 F.4th at 876. Once this effort to induce the homeless to emigrate failed, the City stepped up its enforcement of the anti-sleeping and anti-camping ordinances trying to literally freeze them out of Grants Pass. Respondents brought suit challenging these cruel laws for violating the Eighth Amendment.

## THE CHALLENGED ORDINANCE

The language of Grants Pass' anti-camping ordinance cloaks the reality of its scope. By calling it an "anti-camping" law, the City conjures up images of people clustered around a fire roasting marshmallows and singing songs. Although the ordinance does cover

conventional outdoor recreational campers who spend the night in tents and RVs, it also covers much more. It defines the prohibited conduct as "occupy[ing] a campsite" and it defines the term "campsite" as to include "any place" where one sleeps with any "bedding" material. GPMC §5.61.010(B). Thus, the ordinance makes it unlawful to sleep on the ground on any public property while covered with a blanket.

Normally, the term "camper" is used to refer to a person who temporarily lives in a structure of some kind, and sometimes it refers to a motor vehicle that contains a space designed for sleeping. *See American Heritage Dictionary of the English Language* 269 (4th ed. 2000).[8] But Grants Pass' "anti-camping" ordinance specifically states that the term "campsite" includes "any place where *bedding, sleeping bag, or other material used for bedding purposes* . . . is placed," regardless of "*whether or not* such place incorporates the use of any tent, lean-to, shack, or any other structure. . . ." GPMC §5.61.010(B) (italics added). Thus, a person who merely lies down on the ground on any public property and covers himself with a blanket violates the ordinance because that constitutes the act of occupying a place with "bedding." GPMC §5.61.030. Even lying on the ground after covering oneself with dead leaves is prohibited if the leaves are being used "for bedding purposes."

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[8] "n. camper 1. One that camps, such as a person lodging temporarily in a tent or cabin. 2a. A motor vehicle with space and equipment, either in a rear compartment or in an attached trailer, for sleeping and simple housekeeping."

Recognizing that everyone has to sleep somewhere, Grants Pass tailored its general anti-camping ordinance so that it only prohibited sleeping with something to cover one's body:

> According to the City, "in direct response to *Martin v. Boise*, the City amended [the anti-camping ordinance] to make it clear that the act of 'sleeping' was to be distinguished from the prohibited conduct of 'camping.' " The City meant to "make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks."

*Johnson*, 72 F.4th 868, 878 (9th Cir. 2023). They just were prohibited from keeping themselves warm by using a blanket, or anything else that constituted "bedding."

## ARGUMENT

### 1. A law which increases the risk of death by hypothermia by rendering a person unable to protect himself transgresses the substantive limits of the Eighth Amendment.

When it is cold, sleeping outdoors without anything to cover one's body is not only uncomfortable, it's often so uncomfortable that sleeping is impossible. And if the temperature is cold enough, it can kill a person. It is no secret that unsheltered people die from hypothermia and that exposure to extreme cold and rain

increases the risk of death and causes physical pain and suffering.

When government officials are deliberately indifferent to the "unnecessary and wanton infliction of pain contrary to contemporary standards of decency," the fact that such treatment is "not formally imposed as a sentence for a crime," does not alter the fact that it constitutes cruel and unusual punishment. *Helling v. McKinney*, 509 U.S. 25, 25, 32, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993). "[T]o make out an Eighth Amendment claim," a litigant must establish both a subjective and an objective component. *Helling*, 509 U.S. at 30. With respect to the objective factor, a litigant must show that the governmentally imposed deprivation is "sufficiently serious." *Wilson*, 501 U.S. at 298, citing *Rhodes v. Chapman*, 452 U.S. 337, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981). For example, the Constitution "does not mandate comfortable prisons," *id*. at 349. But it does forbid depriving a person of "the minimal civilized measure of life's necessities." *Id*. at 347. A minimum amount of warmth is one of life's necessities. When a person's core body temperature falls below a certain minimum, that person dies.

To meet the subjective requirement, "[i]f the pain inflicted is not formally meted out as punishment by [a] statute or [a] sentencing judge," a litigant must also show that the governmental actor imposing it acted with "a sufficiently culpable state of mind" which this Court has termed "deliberate indifference." *Wilson*, at 297 & 300. The unsheltered residents of Grants Pass can and have shown both.

### a. Unhoused people face significant risks of death due to hypothermia.

Hypothermia is a potentially fatal condition which occurs when there is a drop in body core temperature below 35°C. Turk, E., "Hypothermia," 6 *Forensic Science, Medicine & Pathology*, 106-115 (2010). It carries a significant risk of death with >70% mortality with core temperature of 30 °C, increasing to 90% at 26 °C. Byard, R.W. & Bright, F.M. "Lethal hypothermia," 14 *Forensic Science, Medicine & Pathology* 421–423 (2018). Death likely results from a combination of events such as ventricular fibrillation or asystole, initiated or exacerbated by hypoxia, myocardial ischemia, increased circulating catecholamines and electrolyte derangements. *Id.* Medical professionals agree, and public health data long ago confirmed, that because they are unsheltered and spend much of their time outdoors, that homeless people are exceptionally vulnerable to death by hypothermia.

For example, researchers conducted a nine-year study of emergency room patient records and coroner's records from Toronto in order to examine the association between meteorological conditions and hypothermic injury or death among homeless individuals. The results show that 25% of all hypothermic injuries and 20% of hypothermic deaths were attributed to individuals experiencing homelessness. Zhang, P., et al., "Cold Weather Conditions and Risks of Hypothermia Among People Experiencing Homelessness: Implications for Prevention Strategies," *International Journal of Environmental Research & Public Health* (2019) 6, 3259.

Another study in New York reported a similar proportion of deaths (18%) and hospital admissions (24%) to occur among individuals who were homeless. Lane, K., et al., Burden and Risk Factors for Cold-Related Illness and Death in New York City, *International Journal of Environmental Research & Public Health*, (2018) 15, 632. Researchers in Seattle/King County, Washington, found that the homeless comprise a disproportionately large share of hypothermia deaths. Scott, R., et al., "Without shelter, people die: disproportionate mortality among King County's homeless population, 2009-2019," *Journal of Social Distress and Homelessness*, 2019.

A 2010 survey found that "[s]even hundred people experiencing or at risk of homelessness are killed from hypothermia" each year in the United States.[9] These hypothermia-related deaths are part of the broader "18,000 people who died homeless over five years in encampments, on sidewalks or in shelters" across the United States.[10] In King County, Washington, an estimated 32 unhoused people died due to hypothermia between 2005 through 2016.[11]

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[9] "Winter Homeless Services: Bringing Our Neighbors in from the Cold," *National Coalition for the Homeless* (2010), https://nationalhomeless.org/wp-content/uploads/2014/02/Winter_weather_report.pdf.

[10] *The Guardian*, "'Homelessness is lethal': US deaths among those without housing are surging," (Feb. 7, 2022), https://www.theguardian.com/us-news/2022/feb/07/homelessness-is-lethal-deaths-have-risen-dramatically.

[11] Dixon, T, King County Medical Office, *Hypothermia Deaths Due to Environmental Exposure in King County,*

The grim reality that unhoused people face was illustrated in the recent cold weather of January 2024. In fact, "40 deaths nationwide have been attributed to the frigid weather" in one particularly cold January 2024 week.[12] Five people died in Seattle, Washington that same month during a stretch of days during where the temperatures fell well below freezing.[13] Oregon's most populous county, Multnomah County, housed more than 1,200 people in warming shelters during a January 2024 winter storm, but four unhoused people still died during that cold snap.[14]

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*Washington* H119 (2018), Community Health Services Division, Seattle/King County Public Health.

[12] *The Associated Press*, "Icey winter blast gripping US blamed for deaths from coast to coast," (Jan. 18, 2024), https://apnews.com/article/us-winter-weather-snow-freezing-low-temperatures-42af2b394779d51b61a7330e9046419f.

[13] *The Seattle Times*, "At least 5 people died from hypothermia during Seattle cold snap," (Jan. 18, 2024), https://www.seattletimes.com/seattle-news/law-justice/at-least-5-people-died-from-hypothermia-during-seattle-cold-snap/; *see also KUOW*, "Homeless people in Seattle endure brutal winter cold, 'one night at a time'," (Jan. 12, 2024), https://www.kuow.org/stories/homeless-people-in-seattle-endure-brutal-winter-cold (noting that two King County, Washington residents living in their vehicles died of hypothermia in December 2023 and that "[p]eople experiencing homelessness and living outside are the most at risk of dying from extreme weather like below freezing temperatures.").

[14] *OPB*, "Portland ice storm drew unprecedented need from unhoused people," (Jan. 17, 2024), https://www.opb.org/article/2024/01/17/portland-ice-storm-drew-unprecedented-need-from-unhoused-people/.

Unhoused people face these dangers even in typically warm climates. In Los Angeles, California, "[a]t least 14 unhoused people froze to death on the streets of Los Angeles in 2021, . . . marking a sharp increase in reports of hypothermia fatalities and a grim sign of how dire the region's homelessness catastrophe has become."[15] This "death toll is significantly higher than previous years, with six reported hypothermia deaths in 2020, nine in 2019, seven in 2018 and three in 2017."[16] And at least six unhoused people in Houston, Texas died during a February 2021 winter storm.[17]

In *Hudson v. McMillan*, 503 U.S. 1, 18-20, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992), this Court recognized that the prohibition against cruel punishment encompasses more than just deprivations which are inflicted as part of a criminal sentence. It also protects against governmental "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle*, 429 U.S. at 106. The need to keep one's core body temperature from falling below 35°C is a "serious medical need." The mere fact that one cannot

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[15] *The Guardian*, "At least 14 unhoused people froze to death in LA last year, records reveal," (Oct, 4, 2022), https://www.theguardian.com/us-news/2022/oct/04/hypothermia-deaths-of-unhoused-in-los-angeles-rise-sharply.

[16] *Id.*

[17] *The Texas Tribune*, "At least six people experiencing homelessness died during the winter storm. That number could rise." (Feb. 22, 2021), https://www.texastribune.org/2021/02/22/texas-winter-storm-homeless-deaths/.

know if a particular sleeping person will die tonight or sometime later does not alter the fact that the *risk* of death satisfies the objective component of the Eighth Amendment. Exposure to environmental tobacco smoke increases the *risk* of developing serious health problems in the future. The fact that one cannot know which individual will develop those health problems, or when they will develop, does not insulate them from Eighth Amendment scrutiny. *See*, *e.g.*, *Helling*, 509 U.S. at 33-34 (court may not deny relief to inmates "on the ground that nothing yet ha[s] happened to them,"); *Hutto v. Finney*, 437 U.S. 678, 682, 98 S.Ct. 2565, 2569, 57 L.Ed.2d 522 (1978) (inmates exposed to other inmates who had infectious diseases entitled to an Eighth Amendment remedy even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed), cited in *Helling*, 509 U.S. at 33.

**b. Deliberate indifference: The wanton and unnecessary infliction of both pain and the risk of death.**

The homeless also easily satisfy the subjective component of the Eighth Amendment test. It cannot plausibly be maintained that the members of the Grants Pass City Council are unaware that there is a risk of death from hypothermia when people are exposed to extremely cold weather. Those who are normally sheltered – those who live in houses and apartments – are well aware that it is not just the

homeless who are at risk of death from hypothermia. People hiking in the Siskiyou or Cascade Mountains, or simply lost in the nearby Rogue River Wilderness, die from hypothermia all the time and their tragic deaths are reported by media.[18] One need not be an emergency medicine physician, or acquainted with a homeless person, to know this.

Deliberate indifference to an uncomfortable condition does not always constitute cruel and unusual punishment. For example, this Court held that the practice of "double celling" inmates was not unconstitutional because it is only "the 'unnecessary and wanton infliction of pain' that violates the Eighth Amendment." *Wilson*, 501 U.S. at 298, citing *Rhodes*, at 346. Sometimes the infliction of injury or pain is necessary, such as when a prison guard has to shoot an inmate in order to quell a prison riot. *See Whitley v. Albers*, 475 U.S.

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[18] *See Ashland News,* "Medford man's body found on Ashland trail, Autopsy says he died of hypothermia," (March 1, 2024), https://ashland.news/medford-mans-body-found-on-ashland-trail/; KPIC4, "Kim died of exposure, hypothermia" (Dec. 7, 2006), https://kpic.com/news/local/kim-died-of-exposure-hypothermia-11-13-2015; KTVL10, "Human life should be valued: Some say small Oregon town hypothermia death preventable" (March 2, 2023), https://ktvl.com/newsletter-daily/some-say-gold-beach-hypothermia-death-preventable-curry-county-tina-kotek-homelessness-emergency-order; *The Oregonian*, "Hypothermic man rescued from Siskiyou Mountains cliff after woman spots skid marks," (May 18, 2019), https://www.oregonlive.com/pacific-northwest-news/2019/05/happy-camp-woman-spots-skid-marks-hypothermic-man-rescued-from-siskiyou-mountains-cliff.html.

312, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986). "In contrast, the State's responsibility to attend to the medical needs of prisoners does not ordinarily clash with other equally important governmental responsibilities." *Wilson*, at 302, quoting *Whitley*, at 320.

In the present case, the Johnson plaintiffs are not prisoners and there is no need to quell a disturbance and no reason to deprive unsheltered people who must sleep outdoors on public property of blankets. The enactment of a law that increases their risk of death from hypothermia is completely "unnecessary and wanton."

#### c. This Court has previously recognized that denying a person protection against low temperatures can constitute cruel and unusual punishment.

In discussing the inquiry into "wantonness," this Court recognized that "the medical care a prisoner receives is just as much a 'condition' of his confinement as the food he is fed, *the clothes he is issued, the temperature he is subjected to in his cell*, and the protection he is afforded against other inmates." *Wilson*, 501 U.S. at 303 (italics added). In prison, the State controls the clothes an inmate wears and the bedding he uses to cover himself when he sleeps. Consequently, the combination of "a low cell temperature at night combined with a failure to issue blankets" constitutes an Eighth Amendment violation. *Id.* at 304. An inmate cannot provide his own blanket. He depends on prison authorities to provide one. In this situation, because

imprisonment renders the inmate "unable to care for himself," a prison that fails to provide a blanket when it is unusually cold "fails to provide for his basic human needs," and consequently "transgresses the substantive limits on state action set by the Eighth Amendment." *Helling*, at 32. *See*, *e.g.*, *Henderson v. DeRobertis*, 940 F.2d 1055 (7th Cir. 1991) (failure to provide prisoner with blankets manifesting deliberate indifference to freezing temperatures constituted cruel and unusual punishment, jury verdict for prisoners upheld); *McCray v. Burrell*, 516 F.2d 357, 365-66 (4th Cir. 1975) (Eighth Amendment violation found where prisoner, forced to sleep nude with "no blankets or other bedding" on a bare mattress); *Maxwell v. Mason*, 668 F.2d 361, 363 (8th Cir. 1981) (affirming finding that confinement for fourteen days in a cell with no clothing except undershorts and no bedding except a mattress violated Eighth Amendment); *Corselli v. Coughlin*, 842 F.2d 23, 27 (2nd Cir. 1988) (reversing summary judgment for prison officials where inmate alleged that he was "exposed to bitterly cold temperatures for approximately three months . . . when . . . it was so cold [that] there was ice in the toilet bowl").

In this case, Grants Pass rendered Johnson (and all the other unsheltered homeless people of Grants Pass) "unable to care for [her]self," not by failing to provide her with a blanket, but by making it unlawful for her to use a blanket when she sleeps on the ground. Prohibiting the use of a blanket that a person has is just as effective as making it impossible for a person to obtain a blanket. And it is just as cruel when it

happens in a public park or on a public sidewalk as when it happens in a government-owned building such as a jail.

### 2. Constant exposure to the elements indirectly leads to significantly shorter lives.

GPMC §5.61.010(B), the Grants Pass ordinance penalizing the use of any "bedding, sleeping bag, or other material used for bedding purposes" amplifies unhoused peoples' exposure to the elements. This increased exposure leads in turn to death from causes *other* than hypothermia because chronic exposure to harsh weather places a strain on the human body in several ways.

Unsheltered people simply don't live as long as people who are housed. Although most unsheltered people do not die from hypothermia, chronic exposure to bitter cold weakens their entire bodily defenses against many diseases and ends up cutting years off their lives. "In contrast to the average American who dies at 78.6 years, homeless individuals die much younger."[19] A study conducted by the University of Washington's School of Public Health analyzed 1,271 deaths of homeless individuals encompassing all recorded King County homeless deaths over a ten-year period and found that the average age at death was 44.8 years for females and 49.9 years for males.[20] "[N]on-elderly people who have experienced

[19] R. Scott, et al., *supra*, at 1 (*see* footnote 5).

[20] *Id*.

homelessness face 3.5 times the mortality risk of people who are housed, accounting for differences in demographic characteristics and geography."[21]

For the unsheltered, as for everyone else, there are many causes of death, including homicide, suicide, natural death, injury (or accidental) death, and drug-or-alcohol induced death.[22] A King County, Washington study found that about 20% of all "injury" deaths were caused by hypothermia.[23] But death need not come from hypothermia on the same night or day that exposure to extreme cold conditions occurred. *Cf. Dixon v. Godinez*, 114 F.3d 640, 643 (7th Cir. 1997) ("A condition which might not ordinarily violate the Eighth Amendment may nonetheless do so if it persists over an extended period of time. . . . [T]he cold of which Dixon complains persisted for months, winter after winter.") "Cold temperatures need not imminently threaten

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[21] Meyer, B., et al., *Life & Death at the Margins of Society; The Mortality of the U.S. Homeless Population*, National Bureau of Economic Research (November 2023). *See also* O'Connell, J., "Premature Mortality in Homeless Populations: A Review of the Literature" *National Health Care for the Homeless Council*, (2005), https://santabarbarastreetmedicine.org/wp-content/uploads/2011/04/PrematureMortalityFinal.pdf.

[22] *See generally*, Sturgis, R. & Donovan, N.J., (2010)*, Winter Homeless Services: Bringing Our Neighbors in from the Cold*, https://www.homelesshub.ca/resource/winter-homeless-services-bringing-our-neighbors-cold; Biem, et al., *Out of the Cold: Management of hypothermia and frostbite*, Canadian Medical Association Journal, 2003, 168(3), 305-311, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC140473/

[23] Scott, et al., *supra* at 7.

inmates' health to violate the Eighth Amendment." *Id.* at 644.

The long-term impact of chronic exposure to extremely cold temperatures exacerbates many health risks other than hypothermia. There are "disparities in physical health between housed and homeless persons in samples drawn from homeless adults living in shelters, jailed inmates, individuals reporting HIV-positive status, and patients using [Health Care for the Homeless] clinics."[24] "Chronic health conditions such as high blood pressure, diabetes, and asthma become worse because there is no safe place to store medications properly."[25] By penalizing the use of blankets or other "bedding material," Grants Pass will only exacerbate these risks for unhoused people.

In sum, depriving an unsheltered person of a blanket or a sleeping bag is not just a health risk on the night the deprivation is suffered. It has a continuing effect. The practice of compelling people to suffer exposure to cold weather for prolonged periods of time has a cumulative, life-shortening effect. In fact, the first-named class representative to bring the lawsuit now before the court, Debra Blake, died while this case was pending in the court below. *Johnson*, 72 F.4th at 883.

[24] C. Zlotnick, et al. (2013) *Health Care for the Homeless: What We Have Learned in the Past 30 Years and What's Next*, American Journal of Public Health, 103(S2) at S199, https://www.researchgate.net/publication/258034415.

[25] *Homelessness & Health: What's the Connection?*, National Health Care for the Homeless Council (2019) at 1, https://nhchc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf.

On a September morning in 2019, Grants Pass police officers "issued citations to Debra Blake and Carla Thomas for being in Riverside Park . . . with sleeping bags and belongings spread around themselves." *Id.* at 882 n.13. Blake did not die of exposure that morning. But she did die 3 years later at age 62.[26] It's a good bet that years of sleeping out in cold weather brought her an earlier death than she would otherwise have had if she had not been without shelter.

### 3. Exposure to extreme cold and sleep deprivation are forms of torture.

"[P]unishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden by the Eighth Amendment." *Baze v. Rees*, 553 U.S. 35, 48, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), quoting *Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L.Ed. 345 (1878). This Court has repeatedly held that the Amendment is *not* limited to physically torturous punishments. *Estelle*, 429 U.S. at 102 ("[T]he Amendment proscribes more than physically barbarous punishments." *Estelle v. Gamble*, 429 U.S. at 102. Nor is it confined to punishments which have "historically" been viewed as barbarous. *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

But even if this Court were to adopt the more restrictive historical approach favored by some members

[26] Debra Blake Obituary, Stephens Family Chapel, https://www.legacy.com/us/obituaries/name/debra-blake-obituary?id=5778477.

of this Court,[27] the punishment suffered as a result of being deprived of blankets or bedding material *is* torturous. The ordinance not only inflicts *physical* pain and suffering by forbidding the unsheltered to cover themselves with anything when they sleep on public ground. In addition, the ordinance inexorably leads to cumulative sleep deprivation ("SD") which is *also* a form of torture.

As cases such *Wright v. McMann*, 387 F.2d 519 (2d Cir. 1967) show, sleeping while exposed to extreme cold is not only difficult, it is often simply impossible. In *McMann*, a deputy warden placed inmate Wright in a "strip cell" as punishment for an alleged violation of a prison regulation. *Id*. at 521. Wright was stripped entirely naked and confined for eleven days in this cell. *Id.* "[T]he windows in front of his confinement cell were opened wide throughout the evening and night hours of each day during subfreezing temperatures causing [Wright] to be exposed to the cold air and winter weather without clothing or other means of protecting himself. . . ." *Id.*

> [H]e was forced to sleep completely nude on the cold rough concrete floor and . . . the cell was so cold and uncomfortable that it was impossible for him to sleep for more than an hour or two without having to stand and move about in order to keep warm.

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[27] *See*, *e.g.*, *Baze v. Rees*, 553 U.S. at 94-101 (Thomas, J., concurring).

*Id.* at 521-22. Like inmate Wright, homeless Grants Pass residents also violate a regulation – in this case GPMC §5.61.010 – whenever they sleep with "bedding material" on ground owned by the City.

In *McMann*, the district court dismissed the inmate's cruel and unusual punishment claim. But the Second Circuit reversed and remanded the case, holding "that if the allegations in the complaint are proved, [the inmate] has been subjected to cruel and unusual punishment proscribed by the Eighth Amendment." *Id.* at 528 (Lumbard, Chief Judge, concurring). Pointing to *Weems*, where this Court held that 12 years of hard labor was an unconstitutional punishment for the offense in question, the *McMann* Court expressly noted that Wright's Eighth Amendment claim was not foreclosed simply because requiring a person to sleep naked in a cold winter environment was not historically viewed as a barbarous punishment:

> Historically, the Eighth Amendment's ban on cruel and unusual punishment was aimed at preventing a recurrence of torture and barbarous punishments, such as pillorying, disemboweling, decapitation, and drawing and quartering – all too prevalent during the reign of the Stuarts. [Citation]. By the nineteenth century the provision was believed obsolete because the punishments sought to be exterminated had long passed. In 1910, however, the Supreme Court revitalized the prohibition against cruel and unusual punishment. Noting that "a principle, to be vital, must be capable of wider application than the mischief

> which gave it birth," the Court held that the Eighth Amendment "is not fastened to the obsolete but may acquire new meaning as public opinion becomes enlightened by a humane justice."

*McMann*, at 525, quoting *Weems*, 217 U.S. at 373.

Noting the "difficulty" of "defin[ing] with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted," this Court has repeatedly acknowledged that "it is safe to affirm that punishments of torture . . . are forbidden by [the Eighth] Amendment." *Weems*, 217 U.S. at 370. Because "[t]ime works changes, brings into existence new conditions and purposes," *id.* at 373, this court refused to limit the Amendment's prohibition to torturous practices that had been employed by English sovereigns. Acknowledging "that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation," *id.* at 372, this Court held that Weems' sentence violated the Eighth Amendment because in addition to imprisonment Weems was required to "always carry a chain at the ankle, hanging from the wrist, [and] shall be employed at hard and painful labor." *Id.* at 381.

In the present case, the challenged law inflicts torture on the unsheltered in *two* ways. First, as noted above, by depriving them of even the rudiments of protection against cold weather, it inflicts physical pain. Freezing to death is a painful process and injuries short of death by hypothermia, such as frostbite and sometimes the accompanying injury of loss of fingers

or toes, also cause severe pain. *Del Raine v. Williford*, 32 F.3d 1024, 1035 (7th Cir. 1994) (rejecting contention "that frostbite, hypothermia, or a similar infliction" is a requirement for a claim of cruel and unusual punishment).

The law of any civilized society prohibits depriving the poor of whatever clothing or covering they use to protect themselves against the cold when they sleep. The Book of Deuteronomy, which was recorded more than 2,500 years ago, protected the poor from exactly this type of deprivation. Moses instructed the people that if a poor man provided his outer cloak as collateral for a loan – because he had no other property he could use as collateral – the lender was required by the law to give it back to him every night so that the poor borrower could wear it as protection against the cold.

> When thou dost lend thy brother any thing, thou shalt not go into his house to fetch his pledge.
>
> Thou shalt stand abroad, and the man to whom thou dost lend shall bring out the pledge abroad unto thee.

And if the man be poor, thou shalt not sleep with his pledge:

> In any case *thou shalt deliver him the pledge again when the sun goeth down, that he may sleep in his own raiment*, and bless thee: and it shall be righteousness unto thee before the LORD thy God.

*Deuteronomy* 24:10-13 (italics added).

Although this Court has not decided a case involving forced exposure to extreme cold, in *Hope v. Pelzer*, 536 U.S. 730, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), this Court affirmed the Court of Appeals' determination that the punishment imposed upon an inmate constituted an "obvious" Eighth Amendment violation. *Id.* at 738. After wrestling with and exchanging vulgar remarks with a correctional officer, the inmate was shackled to a hitching post and left there for approximately seven hours while the hot sun burned his skin. *Id.* at 734-35. During this ordeal he was given water only once or twice and given no bathroom breaks. *Id*. "Despite the clear lack of an emergency situation, [the prison guards] knowingly subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7-hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." *Id.* at 738. This Court found that such conduct amounted to the gratuitous infliction of "wanton and unnecessary pain that our precedent clearly prohibits." *Id*. citing *Trop v. Dulles*, 356 U.S. at 100. If the prolonged exposure to a burning sun is cruel and unusual, even when there is no suggestion that such exposure might cause death, then clearly it violates the Eighth Amendment to prohibit an unsheltered person from protecting himself from prolonged exposure to the freezing cold under conditions where death from hypothermia might, and often does, result.

Sleep deprivation ("SD") is also a form of torture. Regardless of whether it is the bitter cold weather, or the constant interruption of sleep that results from being incessantly awakened by law enforcement officers and told that they cannot sleep in their cars, or on the ground with a blanket, the unsheltered suffer constant SD as a result of the Grants Pass ordinance.[28]The United States has long recognized the use of SD as a form of illegal torture. Article 7 of *The International Covenant on Civil and Political Rights* ("ICCPR") ratified by Congress on June 8, 1992, defines torture as any act by which "severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . intimidating or coercing him . . . when [it] is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

The U.S. Army acknowledges that it intentionally uses SD as an interrogation technique. Conscious of the fact that ICCPR prohibits torture, after facing public criticism of its targeted SD program, the Army

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[28] *See Decl. Debra Blake in Support of Plaintiffs' Motion for Class Certification*, ¶5 (District Court Case No. 1:18-cv-01823-CL, Dkt. #26) ("I have been repeatedly awakened by Grants Pass police while sleeping and told that I need to get up and move. I have been told by Grants Pass police that I should leave town."). Similarly, Respondent John Logan, lived in Grants Pass for four years until he finally left to avoid just such sleep interruption: "During that time, he was 'awakened by City of Grants Pass police officer and told that I cannot sleep in my truck anywhere in the city and ordered to move on.' To avoid those encounters, Logan 'usually sleep[s] in [his] truck just outside the Grants Pass city limits.'" *Johnson*, 72 F.4th at 884 n.16.

adopted a policy which limits the duration of a course of SD. In somewhat unclear language, the Army's written policy allows it to deprive a detainee of sleep for a period of thirty days, provided the detainee gets at least four hours of sleep a night during that period, and allows for repeated use of such thirty-day periods provided there is authorization for such an extension. D. Sharuk, *No Sleep for the Wicked: A Study of Sleep Deprivation as a Form of Torture*, 81 MARYLAND LAW REVIEW 694, 697 (2022). According to the Army, this restriction ensures that the Army's use of SD will not cross the line and become illegal torture.

The cognitive, psychological, and physiological effects of SD are well recognized. Modern studies have confirmed that sufficient sleep is a necessary for healthy brain function, and that SD impairs the immune system, decreases cognitive function, memory and learning, and is essential for metabolic homeostasis.[29] SD impairs the body's ability to achieve cellular clearance of neurotoxic metabolites produced in the brain,[30] including those associated with neurodegenerative diseases like Alzheimer's and Parkinson's.[31] It is

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[29] Bishir, M., et al., *Sleep Deprivation and Neurological Disorders*, Biomedical Research International, Vol. 2020, Article 5764017, at 2, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7755475/.

[30] *Id.* at 5.

[31] "SD . . . plays a crucial role in the pathogenesis of AD [Alzheimer's]". *Id.* at 6. "[M]olecular, neurochemical, and imaging data demonstrate a close link between SD and PD [Parkinson's]."

also associated with high blood pressure, diabetes, heart disease, stroke, and certain cancers.[32]

Soldiers and military prisoners, however, often suffer extreme SD under combat conditions or in the course of interrogation after capture. Consequently, retrospective studies of soldiers and military prisoners who have experienced SD have been conducted.[33] In these studies, SD has been associated with an increased risk of suicide, depression,[34] and attention deficit disorder.[35] Soldiers who averaged less than six hours of sleep every twenty-four hours were 4.7 times more likely to develop PTSD than soldiers who averaged more than that.[36] More recently, retrospective studies of homeless people have discovered the same

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[32] *See generally* Katano, et al., *Relationship Between Sleep Duration and Clustering of Metabolic Syndrome Diagnostic Components*, 4 DIABETES, METABOLIC SYNDROME & OBESITY: TARGETS & THERAPY 119 (2011), https://www.tandfonline.com/doi/full/10.2147/DMSO.S16147

[33] "The research on sleep deprivation, sleep debt, and disrupted sleep is, understandably, of particular interest to the U.S. military. . . ." Sharuk, *supra*, at 726.

[34] *See*, *e.g.*, Iacopino, V. & Xenakis, *Neglect of Medical Evidence of Torture in Guantanamo Bay: A Case Series*, 8 PLOS MED., April 2011, at 3, https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1001027#:~:text=This%20case%20series%20of%20medical,and%20mock%20execution%20and%20disappearance.

[35] Sharuk, *supra*, at 727.

[36] *Fighting Soldier Fatigue*, WRAIR'S INVESTIGATOR'S DISPATCH, https://ww2w.wrair.army.mil/sites/default/files/2019-06/Behavioral_Health_and _Sleep.pdf.

relationships.[37] Thus, there is clear medical support for the conclusion which courts began drawing decades ago: "[S]leep undoubtedly counts as one of life's basic needs." *Harper v. Showers*, 174 F.3d 716, 720 (5th Cir. 1999). The proposition that SD imposes both physical and mental pain is indisputable.

The question of whether SD constitutes cruel and unusual punishment hinges upon whether its infliction amounts to an "unnecessary and wanton" infliction of suffering for no plausible penological purpose. Several courts have recognized that under some circumstances it can. In *Harper*, for example, an inmate alleged that prison guards were deliberately moving him to a different cell at least once a week, so that he was continually placed in a cell next to psychiatric patients whose constant screaming made it impossible for him to sleep, and that the guards were doing this deliberately in order to prevent him from sleeping. Harper claimed this constituted cruel and unusual punishment. The district court dismissed his suit for injunctive relief on the ground that it was frivolous. But the Court of Appeals reversed that dismissal, found an abuse of discretion, and held that if Harper proved his allegations then he had a meritorious Eighth Amendment claim. *Id.* at 720. *Accord Mammana v. Federal Bureau of Prisons*, 934 F.3d 368, 374 (3d Cir. 2019) (holding that "sufficient sleep" is one of "life's necessities" and reversing dismissal of inmate's

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[37] Corning, M., *Sleep Disturbance in the Homeless Population: The Relationship between Homelessness, Sleep and Health*, https://digitalcommons.lib.uconn.edu/srhonors_theses/128/.

Eighth Amendment claim where he alleged that he was stripped of his clothes and placed in an uncomfortably cold cell lit by a bright light that was left on 24 hours a day, thereby making it so he could "hardly sleep" and "when he did fall asleep he would wake up frequently shivering"); *Walker v. Schult*, 717 F.3d 119, 122 & 126 (2d Cir. 2013) (recognizing that "sleep is critical to human existence," inmate plausibly alleged Eighth Amendment violation for sleep deprivation where he got "almost no sleep" because of constant screaming "all night" by other inmates).

### 4. Banishment is cruel and unusual punishment.

Finally, an ordinance that makes it unlawful for the unsheltered to use even rudimentary protection against the cold when sleeping on the ground has the effect of banishing the homeless from the city. Grants Pass will respond that it has not made it *per se* illegal for them to sleep within the city; it has only made it *per se* illegal for them to sleep on public property *while using a blanket or other bedding material*. Thus, they have a choice, they can obey the law and sleep on the ground on public property so long as they do not cover themselves with anything to protect them from the snow, rain, and the cold air. Alternatively, they can choose to leave the city and reside elsewhere. Since they can choose to stay and freeze, they are not being expelled from Grants Pass.

But this argument ignores the nearly inescapable result that being put to such a choice necessarily leads to. In order to avoid banishment from the city, the unsheltered have to choose to expose themselves to a risk of death by hypothermia and a host of other assorted health hazards. Those who choose to leave the city, rather than run these risks and suffer the pain of bitter cold and sleep deprivation, have quite effectively been banished. While they have not been banished by the sentencing order of a court, they have been banished indirectly by an ordinance that forces them to choose banishment if they want to escape serious health risks and pain.

This Court has held that banishment, when imposed as punishment, even for the most severe crimes, is excessive punishment which violates the Eighth Amendment. In *Trop*, this Court held that stripping a man of his citizenship was cruel and unusual punishment even when it was imposed as punishment for the crime of wartime desertion. Although there was "no physical mistreatment, no primitive torture" involved, the Court held that this punishment was constitutionally excessive because it completely deprived the convicted person of any rights at all and left him vulnerable to being deported and permanently banished. 356 U.S. at 101. Similarly, in *Kungys v. United States*, 485 U.S. 759, 791, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988), Justice Stevens observed that "the revocation of [the] petitioner's citizenship – a punishment that is tantamount to exile or banishment – is patently excessive."

"This punishment is offensive to cardinal principles for which the Constitution stands." *Trop*, 358 U.S. at 102. Denationalization was held unconstitutional precisely because it *could* result in "banishment, a fate universally decried by civilized people." *Id*. Even though being stripped of one's citizenship did not *automatically* lead to deportation and exile, this Court held that the mere *threat* of banishment was unconstitutional. *Id.*

If banishment from one's country is cruel and unusual punishment, then banishment from one's native city is also. Banishment cuts one off from one's established community of friends and family. Just because a person is unsheltered that does not mean they do not have a "home." If one has lived in a town or city for years, that town is home, even if one has no house or apartment to take shelter in. Plaintiffs Blake, Johnson and Logan were residents of Grants Pass. Grants Pass was their home, even though they had no structure of their own to sleep in. If banishment is a punishment that Congress has no power to impose, *Trop*, 356 U.S. at 103, then surely it is also a punishment that the City of Grants Pass is powerless to enact. And if banishment is a constitutionally excessive punishment for wartime desertion, surely it is also constitutionally excessive when imposed for the offense of sleeping on public ground with bedding material.

The Grants Pass City Council passed this challenged ordinance for the purpose of making things so uncomfortable for the unsheltered that they would "move on down the road" and quit their city altogether.

*Johnson*, 72 F.4th at 876. To this end, they enacted an ordinance that has no legitimate purpose. No public good is served by forcing the unsheltered to sleep without even rudimentary protection against the elements. The only legislative purpose behind this ordinance was to inflict enough pain and misery on people like Gloria Johnson that they would decide to leave Grants Pass. Nearly a century ago, this Court recognized that it was unconstitutional to make it illegal for poor people to move into a jurisdiction. *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941). Trying to drive poor people out is no more constitutionally acceptable than trying to fence them out. Indeed, it is worse, because it is cruel to exile people from the community where they have lived for years. *See generally* Simon, H., *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TULANE L. REV. 631, 655 ("[T]he announced enforcement of a ban on sleeping on public land throughout San Francisco constitutes effective banishment of the homeless from that city.").

It is true, of course, that Grants Pass' ordinance does not authorize a municipal judge to impose a sentence or penalty of banishment from the city as a punishment for sleeping on the ground with a blanket. But the law is designed to accomplish the goal of banishment indirectly. It is a well-established principle that government cannot do indirectly what it cannot do directly. *See*, *e.g.*, *Williams v. Illinois*, 399 U.S. 235, 243-244, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) ("A statute permitting a sentence of both imprisonment and fine

cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly."). But that is exactly what Grants Pass' anti-sleeping ordinance has done.

## CONCLUSION

The *Johnson* Respondents have met both prongs of the test for a violation of the Eighth Amendment established by this Court in its prior cases. This Court should reject the City's contention that its decisions in *Estelle*, *Wilson* and *Helling* should be overruled and should affirm the decision issued below because the city, with deliberate indifference, subjects the homeless to serious risk of death. The challenged ordinance also constitutes torture, and effectively forces the unsheltered to accept banishment as the price they must pay to avoid torture and serious health risks.

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Respectfully submitted,

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