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

BRIEF OF FINES AND FEES JUSTICE CENTER, RUTHERFORD INSTITUTE, AND STREET DEMOCRACY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

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.

The Rutherford Institute is a nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute provides legal assistance at no charge to individuals whose constitutional rights have been threatened or violated and educates the public about constitutional and human rights issues affecting their freedoms. The Rutherford Institute works tirelessly to resist tyranny and threats to freedom by seeking to ensure that the government abides by the rule of law and is held accountable when it infringes on the rights guaranteed by the Constitution and laws of the United States.

Street Democracy (SD) is an anti-poverty nonprofit law firm that provides holistic defense to people drowning in poverty and advocates for a legal

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

system that doesn't criminalize misfortune. SD founded Street Outreach Court Detroit, a specialty court which removes the crushing burden of court-imposed fines and fees from homeless people who are engaged in services like job training, education, or mental health treatment. Via Functional Sentencing, SD aims to normalize the deflection of status "offenses" to the in-community providers that actually address its root cause.

As entities that engage in substantial advocacy and litigation work to protect Americans from excessive fines, *amici* write to ensure that the Court does not lose sight of the district court's important—and unchallenged—judgment that Petitioner's ordinances impose unconstitutionally excessive fines. Although Petitioner has tried to excise and downplay the excessive fines issue in this case, it stands as a firm independent ground supporting the challenged injunction.

Because the district court's injunction can be sustained solely by its unchallenged excessive fines holding, *amici* urge the Court to dismiss the writ of certiorari as improvidently granted. This important question was not meaningfully pressed by the City before the Ninth Circuit, and was certainly not passed on by that court. Far from a "vestigial" issue, as the City would have it, defining the proper reach of the Excessive Fines Clause has critical importance for protecting the most vulnerable Americans and guiding public policy throughout the nation. One day, the Court should address it. But not in this case, because Petitioner's abandonment of the issue precludes the Court from doing so here.

INTRODUCTION AND SUMMARY OF ARGUMENT

No matter how the Court resolves the question presented under the Cruel and Unusual Punishments Clause, it would not cast doubt on the district court's judgment that it is constitutionally excessive to exact multi-hundred-dollar fines for the unavoidable and innocent act of succumbing to sleep in a public place when you have nowhere else to go, and using some shred of material as "bedding." The district court's independent holding on that distinct claim reflected a straightforward application of well-established precedent under the Excessive Fines Clause. Petitioner has made no argument otherwise, either in the Ninth Circuit or here.

As the district court noted, moreover, the fined individuals—who cannot afford shelter—are almost certain to be unable to pay hundreds of dollars in fines. As a result, imposing such fines takes what few resources homeless people in Grants Pass might have for food, shelter, and other basic needs, and only fosters longer periods of homelessness. The devastating effect of the fines confirms the correctness of the district court's judgment. A central historical underpinning of the Excessive Fines Clause, going back to the Magna Carta, is to save individuals from ruinous fines that serve to financially benefit the state.

This crucial protection provided by the Excessive Fines Clause is not a mere tag-along to the Cruel and Unusual Punishments Clause. It is an important and independent shield for individual liberty. The district

court's judgment therefore appropriately treats it as an independent ground of decision. Despite Petitioner's attempts to minimize the issue, the protection from excessive fines is not coextensive with the protection from cruel and unusual punishments, and the issues do not rise and fall together.

Petitioner's backhanded invitation to treat the Excessive Fines Clause as an automatically following "afterthought" to the Cruel and Unusual Punishments Clause should be declined. Consideration of the Excessive Fines Clause (and its interaction with the Cruel and Unusual Punishments Clause) should be saved for a case where it is briefed, not forfeited like this one.

Given Petitioner's abandonment of the excessive fines issue, this Court need not—and under principles of party presentation, should not—rule on that alternative basis for affirmance. Instead, because that judgment is a freestanding ground to sustain the injunction—whatever the result of the Court's inquiry into the contours of the Cruel and Unusual Punishments Clause—the Court should dismiss the writ of certiorari as improvidently granted.

ARGUMENT

I. The District Court's Injunction Can Be Sustained On Its Unchallenged Excessive Fines Holding Alone.

A. The District Court Applied Well-Settled Precedent to Hold the City's Fines Excessive.

Petitioner acknowledges (Br. 10) that Respondents challenged the ordinances on two distinct grounds. Either can sustain the district court's injunction. Separate and apart from its holding under the Cruel and Unusual Punishments Clause, the district court also held that enforcement of the ordinances violates the Excessive Fines Clause. Pet. App. 187a-191a. That decision, on which Petitioner "present[ed] no meaningful argument" in the Ninth Circuit, *id.* at 56a, and sought no review here, *see* Pet. i, rests on firm ground.

As the Court recently made clear, in a unanimous opinion, the "[p]rotection against excessive punitive economic sanctions secured by the [Excessive Fines] Clause" is "both 'fundamental to our scheme of ordered liberty' and 'deeply rooted in this Nation's history and tradition.'" *Timbs v. Indiana*, 139 S. Ct. 682, 689 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)). Accordingly, the Clause limits the power of state and local governments "to extract payments … as punishment for some offense." *Id.* at 687 (quoting *United States v. Bajakajian*, 524 U.S. 321, 327-28 (1998)). A fine is unconstitutional if

it is both punitive and excessive. *Bajakajian*, 524 U.S. at 334.

The district court rightly held that the mandatory minimum fine of $295 that Grants Pass issued to homeless people for sleeping in public spaces while using a blanket or any "other material … as bedding"—which the ordinance terms "camping," GPMC § 5.61.010 (Pet. App. 221a)—met both criteria for excessiveness.

1. To determine if a fine is punitive (as opposed to remedial or compensatory), courts look to whether the fine is tied to punishment for a legal violation. *Bajakajian*, 524 U.S. at 328; *Austin v. United States*, 509 U.S. 602, 619-20 (1993). Labeling a fine "civil" is immaterial; the "'notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.'" *Austin*, 509 U.S. at 610 (quoting *United States v. Halper*, 490 U.S. 435, 447-48 (1989)). If a fine is intended to "serv[e] in part to punish," meaning it at least partially is intended to "'serv[e] either retributive or deterrent purposes,'" then it is punitive—regardless of whether the penological objective is a legitimate one. *Id.* at 610 (quoting *Halper*, 490 U.S. at 448); *see also Tyler v. Hennepin Cnty.*, 143 S. Ct. 1369, 1381 (2023) (Gorsuch, J., concurring) (Even a scheme with "a predominantly remedial purpose" is punitive, unless it "cannot fairly be said *solely* to serve a remedial purpose.") (citation omitted).

Under this well-settled test, the fines Grants Pass levies against homeless class members can only be seen as punitive. As the district court noted, Pet. App. 189a, the municipal code describes fines for code

violations as "punishment." GPMC § 1.36.010(C) (specifying default maximum fine for code violations "[e]xcept in cases where a different punishment is prescribed"). Moreover, as the district court also found, the minutes from a 2013 meeting where the city adopted a plan to increase enforcement of the relevant ordinances establish that the fines were "intended to deter homeless individuals from residing in Grants Pass." Pet. App. 189a. Serving as deterrence and with "no remedial purpose," the fines are punitive. *Id.*

2. The fines are also excessive. The "touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Bajakajian*, 524 U.S. at 334. A fine that is "grossly disproportional to the gravity of [the] offense" violates the Excessive Fines Clause. *Id.* Although the Court has not delineated a complete list of factors for assessing proportionality, and *Bajakajian* does not purport to establish the bounds of the analysis, the Court there considered the nature of the offense, *id.* at 338, whether "the violation was unrelated to any other illegal activities," *id.* at 338, the other penalties that may be imposed for the violation, *id.*, and the extent of the harm caused, *id.* at 339.

a. In holding that the fines here are "grossly disproportionate" under the *Bajakajian* factors, Pet. App. 189a-190a, the district court followed a well-worn path.

The two anti-"camping" ordinances carry an automatic presumptive minimum fine of $295. *Id.* at

188a.[2] When unpaid, this mandatory minimum fine increases to $537.60 because of "collection fees." *Id.* Effectively this means the fine is $537.60, because "collection fees are inevitably assessed." *Id.* at 190a. Grants Pass police have no discretion as to the amount of the fine, which is "auto-filled" into the citations upon issuance. *Id* at 188a.

On the other side of the balance, these multi-hundred-dollar fines are imposed for each "unavoidable, biological, life-sustaining act[] of resting or sleeping" in a public space using any material beyond clothing to stay dry or warm—such as lying down on a piece of cardboard placed over snow-covered ground. *Id.* at 178a, 190a.

The "nature of the offense" is thus merely living as a homeless person who has nowhere else to go within Grants Pass—which, especially in freezing temperatures, necessarily requires sleeping in a public place with some protection from the elements. *See* Resp. Br. 15-18. Living within Grants Pass while homeless is wholly unconnected to any illegal activity. The district court's unchallenged holding that a fine of $295 is grossly disproportionate to the gravity of this "offense" follows from a straightforward application of this Court's excessive fines precedent.

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[2] The fine for illegal sleeping is $75, increasing when unpaid to $160 with collection fees. *Id.* Because the only class representative with standing to challenge the anti-sleeping ordinance had died while the appeal was pending, the Ninth Circuit vacated and remanded the district court's judgment on the anti-sleeping ordinance. *Id.* at 30a, 34a

b. The correctness of the district court's excessive fines holding is only reinforced by a more fulsome analysis of proportionality—which considers the harshness of the punishment, including the economic effect the penalty will have on the person fined, consistent with the historical roots of the Excessive Fines Clause.

Although considering it to be an open question "whether the ability to pay the fine would be relevant to the excessiveness inquiry," Pet. App. 189a n.11, the district court noted that because Respondents "do not have enough money to obtain shelter," they "likely cannot pay these fines," *id.* at 190a. As a result, they "are subjected to collection efforts, the threat of driver license suspensions, and damaged credit that makes it even more difficult for them to find housing." *Id.*

The district court's finding about the overbearingly harsh effect of the fines comports with wider experience throughout the Nation that amici have observed in other cases. Many other jurisdictions also subject individuals to bench warrants, arrests, new fees, and incarceration for mere nonpayment of the underlying fines or fees. *See* Dick M. Carpenter, *et al.*, Inst. for Justice, *Municipal Fines & Fees* (Apr. 30, 2020), https://tinyurl.com/2wv6aukc (47 states permit incarceration for nonpayment); Maria Rafael, Vera Inst., *Paying the Price: New Mexico's Practice of Arresting and Incarcerating People for Nonpayment of Court Debt* 4 (Feb. 2024), https://tinyurl.com/yvyk7pc4.

As the United States Department of Justice has explained in a "Dear Colleague" letter to state and local courts and law enforcement agencies,

"[u]nhoused individuals—who are unable to afford a place to live or sleep—are unlikely to be able to pay any fine or fee." U.S. Department of Justice, Dear Colleague, at 5 n.15 (Apr. 20, 2023) (citing study finding "fewer than one in four unhoused adults with debt from legal fines had ever made a payment on them"). Fining "a person who is unhoused can destabilize that person and can further obstruct their ability to satisfy basic needs." *Id.* The upshot is that individuals who are fined are likely to be homeless for longer. *Id.*

The history of the Excessive Fines Clause confirms the propriety of analyzing whether fines exceed an individual's financial capacity. Under the original meaning of the Clause, "excessiveness" incorporated consideration of the financial circumstances of the person receiving the fine. The Eighth Amendment's language 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*, 139 S. Ct. at 687-88 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989)). The "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." Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Calif. L. Rev. 277, 335 (2014).

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)). "The right against excessive fines traces its lineage back in English law nearly a millennium, and from the founding of our country, it has been consistently recognized as a core right worthy of constitutional protection." *Timbs*, 139 S. Ct. at 698 (Thomas, J., concurring).

Timbs reviewed this history, reserving the question of whether the Clause necessarily required consideration of wealth or income within the proportionality assessment. *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 Bajakajian*, 524 U.S. at 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).

Since *Timbs*, a "number of modern state and federal courts have joined the chorus of legal scholars to conclude that the history of the clause … strongly suggest[s] that considering ability to pay is constitutionally required." *Seattle v. Long*, 493 P.3d 94, 112 (Wash. 2021); *see also, e.g.*, *People v. Cowan*,

47 Cal. App. 5th 32 (2020); *Dep't of Labor & Emp't v. Dami Hosp., LLC*, 442 P.3d 94, 101 (Colo. 2019) (History and precedent constitute "persuasive evidence that a fine that is more than a person can pay may be 'excessive' within the meaning of the Eighth Amendment."). The Indiana Supreme Court reached the same result on remand in *Timbs*. *State v. Timbs,* 134 N.E.3d 12, 36 (Ind. 2019) (*Timbs II*) ("[T]he owner's economic means … is an appropriate consideration for determining [the punishment's] magnitude."). As that 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*.

Even before *Timbs* flagged this important issue, courts across the country have adopted ability-to-pay considerations in their proportionality analysis, 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). "Whether an otherwise proportional fine is excessive can depend on, for example, … the effect of the fine on the defendant's ability to be self-sufficient." *State v. Goodenow*, 282 P.3d 8, 17 (Or. App. 2012). Although consideration of ability to pay is not universal nationwide, *see, e.g.*, *State v. O'Malley*, 169 Ohio St. 3d 479 (Ohio 2022), there is substantial and growing recognition that the

"historical roots of the Excessive Fines Clause reveal concern for the economic effects a fine would have on the punished individual." *Timbs II*, 134 N.E.3d at 37; *see also Commonwealth v. 1997 Chevrolet & Contents Seized from Young*, 160 A.3d 153, 188 (Pa. 2017); *Stuart v. Dep't of Safety*, 963 S.W.2d 28, 36 (Tenn. 1998).

The fines Grants Pass imposes on homeless individuals are plainly excessive under this more comprehensive analysis. They operate to deprive these individuals of their basic needs like food, water, and shelter. The cascading negative effects are especially grave for the far too many unaccompanied children experiencing homelessness. *See* Dear Colleague Letter, at 2 ("Children subjected to unaffordable fines and fees often suffer escalating negative consequences from the justice system that may follow them into adulthood."); Nat'l Alliance to End Homelessness, *Youth and Young Adults* (Dec. 2023), https://tinyurl.com/y279m5wm (nearly 10% of unaccompanied youth experiencing homelessness are under age 18). The harm is equally grave for the children of homeless adults whose ability to feed, shelter, and clothe their families is impeded by unpayable fines. *See* Colgan, *Reviving*, at 330-32 (describing founding era statutes and cases considering effect of fines on offender's family); Megan Comfort, *"A Twenty-Hour-a-Day Job": The Impact of Frequent Low-Level Criminal Justice Involvement on Family Life*, 665 Ann. Am. Acad. Pol. & Soc. Sci. 63, 67 (2016) (describing impact on families of "frequent, low-level criminal justice involvement").

Fining homeless individuals hundreds of dollars for the unavoidable need to sleep also perpetuates their inability to obtain or maintain future housing. In the short term, legal fines are associated with an increase in the duration of homelessness. *See* Street Democracy, *What If Courts Were Designed to Provide Opportunity Instead of Punishment*, at 2-3 (2018), https://tinyurl.com/3jzhx8tz (finding nearly 60% of those under 150% of the federal poverty guidelines who were ordered to pay fines experienced some type of housing instability within the next 3 months); 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, 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). In the longer term, increasing levels of debt arising from fines that homeless individuals lack the ability to pay also damages individuals' credit scores, further 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).

Fining homeless individuals will necessarily "deprive [these individuals] of [their] livelihood," *Timbs*, 139 S. Ct. at 688 (quoting *Browning-Ferris*, 492 U.S. at 271), by leaving them with depleted funds

or oppressive debt burdens when they are already (by definition) struggling to access basic shelter. The district court's holding on this claim was correct and provides an independent basis for sustaining the injunction here.

B. Excessive Fines Impose a Distinct and Grave Constitutional Injury.

As Petitioner does not dispute (Br. 29), the district court's injunction rests on its unchallenged excessive fines judgment as well as its application of the Cruel and Unusual Punishments Clause. So regardless of how the Court answers the Question Presented, it will neither disturb the district court's holding that the fines are excessive, nor the district court's injunctive remedy. Petitioner's veiled suggestions that the issues are intertwined (without squarely so arguing) do not bear scrutiny and violate the canon of surplusage. *See Marbury v. Madison*, 1 Cranch 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect."). Petitioner's approach would give short shrift to the crucial and independent constitutional protection from excessive fines, which "has been a constant shield throughout Anglo-American history" going back to the Magna Carta. *Timbs*, 139 S. Ct. at 689; *see also State v. Timbs*, 169 N.E.3d 361, 366 (Ind. 2021) (on remand finding the proportionality analysis under the Excessive Fines Clause to be distinct from the standard developed under the Cruel and Unusual Punishment Clause).

1. At the certiorari stage (but not in its merits briefing), Petitioner argued the excessive fines

judgment was not independent, but "an afterthought that rose or fell with" the judgment under the Cruel and Unusual Punishments Clause. Pet. Cert. Reply 11. But the part of the Ninth Circuit's decision cited by Petitioner reveals only that *Petitioner* treated the excessive fines issue as an afterthought, "present[ing] no meaningful argument on appeal." Pet. App. 56a.

The district court, however, conducted an independent assessment, and reached a detailed and well-reasoned independent judgment about the excessiveness of the fines, applying precedent specific to the Excessive Fines Clause. Pet. App. 187a-191a. Sensibly so, because even if Petitioner can constitutionally punish the status of being homeless—by punishing sleeping in public spaces with any material protecting yourself from the elements when you have nowhere else to go—it is a logically and historically distinct question whether the amount of the fine is excessive in relation to the "conduct" of engaging in basic, unavoidable, life-sustaining activity.

As part of assessing whether $295 fines are grossly disproportionate to the gravity of the offense, the district court reasoned that "[a]ny fine is excessive if it is imposed on the basis of status and not conduct." Pet. App. 190a. Because the conduct for which Respondents face punishment— "sleep[ing] outside beneath a blanket because they cannot find shelter"—is "inseparable from their status as homeless individuals," the court noted that it was "beyond what the City may constitutionally punish." *Id.* This statement, which merely recognizes the unsurprising proposition that a disproportionate punishment is

also a disproportionate fine, does not make the excessive fines judgment "rise and fall" with the resolution of the question presented. Even if the Court determines that it is constitutionally permissible under the Cruel and Unusual Punishments Clause to impose *some* punishment for the "act" of sleeping on a piece of cardboard in a public space when there is no alternative, it does not follow that it is constitutionally permissible under the Excessive Fines Clause to impose a multi-hundred dollar fine, on individuals who cannot possibly pay it, for engaging in an unavoidable life-sustaining act. The district court's excessive fines judgment was no mere "afterthought."

2. In its merits briefing, Petitioner takes a different tack, arguing that if fines are subject to constitutional scrutiny under the Cruel and Unusual Punishment Clause, it would render the Excessive Fines Clause a "dead letter." Pet. Br. 29. This does not follow as a matter of logic. Just because both clauses "limit the power of those entrusted with the criminal-law function of government," *Browning-Ferris Indus.*, 492 U.S. at 263, by no way means that the scope of their limits are coextensive. A fine could be unconstitutional under one clause but not the other. For example, a fine that is not so disproportionate as a general matter to be cruel and unusual punishment could nonetheless be excessive if the effect is to make it impossible for a person to care for their basic needs or the needs of their family.

More fundamentally, Petitioner's glib suggestion that the clauses are coextensive assumes away key differences between the purposes and history of the

two clauses at the Founding. Although the Court in *Bajakajian* arguably "import[ed] the Cruel and Unusual Punishment Clause's gross disproportionality test into its Excessive Fines Clause analysis," there are textual and historical reasons why the proportionality analyses are not the same under both clauses. *See* Colgan, *Reviving, supra*, at 281, 319-24. Historical evidence indicates the founding generation "had an expansive understanding of relevant factors when it came to the fair imposition of fines," including not just consideration of facts related to the offense, but also "offender characteristics related to culpability," and the "fine's effect on the offender and his family." *Id.* at 324. Moreover, the express prohibition on "excessive" fines, which textually commands proportionality, reflects a heightened concern for the potential abuse of fines. *See* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L.Q. 833, 860 n.106 (2013).

Finally, the burdens of production and persuasion regarding the excessiveness of a fine are not necessarily the same between the two clauses. *See* Beth A. Colgan, *The Burdens of the Excessive Fines Clause*, 63 Wm. & Mary L. Rev. 407, 410-11 (2021). And assignment of burdens matters a great deal. Of relevance here, it would be preposterous to presume that homeless individuals have the resources to pay one $295 fine, never mind a $537 one (after collection costs)—much less several such fines. But if burdens of production and persuasion on excessiveness are placed solely on those who are fined, the system would

effectively embody just such an unworkable presumption.

Some *amici* in support of Petitioner have put the burden issue before the Court under the Cruel and Unusual Punishments Clause, arguing that individuals bear the burden to prove that any punishment is cruel and unusual, by way of an affirmative defense. *See* Amicus Br. of Dist. Att'y Sacramento Cnty. 34-36. There are reasons to doubt that contention, but whatever the answer for cruel and unusual punishments, *see* Resp. Br. 48-51 (explaining why related questions are outside the scope of the petition), that argument does not pass muster under the Excessive Fines Clause. A fine imposes harm the moment the fine is imposed, when the clock starts running on the myriad consequences of nonpayment—escalating amounts for collection costs, risks of arrest and imprisonment for nonpayment, and more. Fines thus must be non-excessive from the moment of their imposition—when the ticket is written (and the mandatory minimum amount, in the case of the Grants Pass ordinance, auto-filled). The prospect of relief at some later date does not redress the harm.

Because of the immediate harm, the state (and specifically, the citing officer) should be required, before the fine is imposed, to determine that the individual likely has an ability to pay—especially when, as here, mandatory minimum fines are directed at a specific group of individuals who are highly unlikely to have resources. This is workable; law enforcement officers routinely assess basic facts to determine questions like probable cause because the

constitution requires it. When a person is homeless, imposing a large fine is constitutionally valid only if officers can point to objective, reliable facts that indicate, contrary to the norm, the person has resources to pay. Otherwise, the constitutional harm is locked in and impossible to truly unwind. Officers would often be unable to impose fines on homeless people. But that is as it should be under the Excessive Fines Clause. As the Court has recognized, it is tempting to overemploy fines—"in a measure out of accord with … penal goals"—for several reasons, including that "'fines are a source of revenue,' while other forms of punishment 'cost a State money.'" *Timbs,* 139 S. Ct. at 689 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 979, n.9 (1991)). Obliging the state to engage in some proportionality assessment at the outset helps guard against this tendency, and protects the specific interests shielded by the Excessive Fines Clause.

The answer could vary under the Cruel and Unusual Punishments Clause. This brief highlighting of distinctions between the clauses is necessarily truncated because—due to Petitioner's forfeiture—the scope and meaning of the Excessive Fines Clause is not presented and has not been briefed in this case. Skimming the surface of these important issues is meant only to show why the Court should decline Petitioner's subtle invitation to minimize the distinct and crucial protections against excessive fines in this case.

The issues are not so entangled as Petitioner suggests, but to the extent the interaction between the clauses is relevant, the Court's assessment of that

interaction should await a case that actually presents the excessive fines question. As shaped by Petitioner's litigation choices, this case decidedly does not. There is therefore every reason to dismiss the writ of certiorari as improvidently granted, as further discussed below. *Cf. Bd. of Trs. v. Garrett*, 531 U.S. 356, 360 n.1 (2001) (dismissing a "portion of the writ as improvidently granted" where question presented arguably encompassed constitutional issue related to both Title I and Title II of the Americans with Disabilities Act but no party briefed the statutory scope of Title II).

Overall, Petitioner's approach gives short shrift to the crucial and independent ways that the Excessive Fines Clause shields individual liberty. The "protection against excessive fines has been a constant shield" for "good reason," because "[e]xorbitant tolls undermine other constitutional liberties." *Timbs*, 139 S. Ct. at 689. It is not an afterthought to the protection against cruel and unusual punishments. The district court's holding that the city violated the Excessive Fines Clause reflects a serious and independent—as well as unchallenged—unconstitutional intrusion on Respondents' liberty.

II. Because The Excessive Fines Violation Is An Independent Basis To Sustain The Judgment, The Writ Should Be Dismissed As Improvidently Granted.

Because the district court correctly held that fining someone hundreds of dollars for sleeping outside with any sort of material, when she has nowhere else to go, is

punitive and excessive, in violation of the Excessive Fines Clause, the Court should strongly consider dismissing the writ of certiorari as improvidently granted.

No party need request such a dismissal; it "is a matter exclusively within the discretion of the Court," and the Court has often dismissed *sua sponte*. Stephen M. Shapiro et al., Supreme Court Practice § 5.15, at 5-55 (11th ed. 2019). A common reason is when review "of the question upon which certiorari was granted may prove unnecessary because the judgment below was clearly correct on another ground." *Id.* at 5-54; *see, e.g.*, *Montana v. Imlay*, 506 U.S. 5, 5 (1992) (Stevens, J.) (concurring in dismissal as improvidently granted where "no matter which party might prevail in this Court, the respondents' terms of imprisonment will be the same"); *The Monrosa v. Carbon Black Export*, 359 U.S. 180, 183 (1959).

The district court's unchallenged excessive fines judgment is an ample reason for dismissing the petition as improvidently granted. It is beyond question, not only because it is correct, but also because Petitioner forfeited their opportunity to appeal it. Pet. App. 56a. It has been preserved by Respondents throughout this litigation. Pet. Br. 10 (acknowledging Respondents' excessive fines claim); Pet. App. 187a-190a (deciding the claim); Br. in Opp. 34 (arguing "resolution of the question presented would have no bearing on the legal rights of the parties" because even if Petitioner prevails, "the injunction would remain intact on grounds the City has not adequately preserved"). Although at the

certiorari stage, Petitioner contended the excessive fines claim would rise and fall with the claim under the Cruel and Unusual Punishments clause, Pet. Cert. Reply 11, Petitioner did not renew that argument in its opening brief and has thus (doubly) forfeited any contention that the excessive fines clause is not an independent ground to sustain the injunction. *See Republic of Arg. v. NML Capital, Ltd.*, 573 U.S. 134, 140, n.2 (2014) ("We will not revive a forfeited argument simply because the petitioner gestures toward it in its reply brief."). And any such argument, in all events, would be flat wrong. *See* Section I.B, *infra*.

The United States suggests (Br. 27 n.7) that if the Court does not affirm, it should remand for the Ninth Circuit to consider the excessive fines claim. But remand would be a fruitless exercise. Not only did the Ninth Circuit already recognize that Petitioner made "no meaningful argument" on excessive fines, Pet. App. 56a, Petitioner did not dispute the forfeiture at the certiorari stage. Respondents argued in opposition to certiorari that Petitioner "forfeited that issue on appeal," Br. in Opp. 4, and Petitioners did not dispute their forfeiture in reply, merely asserting the issue was "vestigial." Pet. Cert. Reply 11. It is not "vestigial"—it is an independent holding based on a distinct, and important, constitutional injury. Regardless, "vestigial" is no defense for forfeiting the issue. In such circumstances, remand would not permit consideration of a live but unresolved issue, but merely give Petitioner another bite at the apple it discarded as part of a litigation strategy to focus the courts on a single question.

* * * * *

As Respondents and the United States agree, the City's criminalization of the involuntary state of being homeless is a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause. Although the Ninth Circuit did not reach the issue, the imposition of multi-hundred-dollar fines for unavoidable, life-sustaining "conduct" is also a plain violation of the Excessive Fines Clause, as the district court held. Because that second holding is an independent basis for sustaining the judgment, the Court should dismiss the case as improvidently granted. To do otherwise would yield a purely advisory opinion. But if the Court chooses not to dismiss the case, the Court should make clear that, whichever way it rules on the question presented, the Cruel and Unusual Punishment Clause is distinct from the Excessive Fines Clause, and the injunction remains in effect based on the separate and independent violation of the Excessive Fines Clause.

CONCLUSION

The judgment should be affirmed, or in the alternative, the case should be dismissed as improvidently granted.

Respectfully submitted.

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