

No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON, ET AL., ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

**BRIEF OF UNITED STATES CONFERENCE OF
CATHOLIC BISHOPS AS *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE *AMICUS CURIAE*¹

The United States Conference of Catholic Bishops (USCCB) is a nonprofit corporation whose members are the active Catholic Bishops in the United States. The USCCB provides a framework and a forum for the Bishops to teach Catholic doctrine, set pastoral directions, and develop policy positions on contemporary social issues. The USCCB advocates and promotes the pastoral teaching of the U.S. Catholic Bishops in such diverse areas of the Nation's life as the free expression of ideas, fair employment and equal opportunity for the underprivileged, immigration, protection of the rights of parents and children, the sanctity of life, and the importance of education. Values of particular importance to the USCCB include the protection of the dignity and wellbeing of vulnerable and disadvantaged persons who lack access to adequate shelter, and the proper development of this Court's jurisprudence in that regard.

SUMMARY OF ARGUMENT

It has long been central to western tradition and Catholic teaching that homeless people should not be punished merely because they lack shelter. As Pope Francis has emphasized, "The Son of God came into this world as a homeless person. The Son of God knew what it was to start life without a roof over his head." Pope Francis further explained, "I can imagine

¹ No counsel for any party authored this brief in whole or in part, and no party, counsel, or person other than amicus, its members, and its counsel contributed money to fund the preparation or submission of this brief.

Joseph, with his wife, about to have a child, with no shelter, no home, no place to stay. ... And those of us who have a home, a roof over our heads, would ... do well to ask: Why do these, our brothers and sisters, have no place to live? Why are these brothers and sisters of ours homeless?”²

This embracing view of homeless people has been in the mainstream of western tradition and Catholic teaching for centuries, including at the time that the Constitution and the Bill of Rights were adopted. It has long been part of a broad and enduring consensus. To take only one example, the Catholic catechism in use at the time of the Founding (the “Carroll Catechism”) called on individuals, as a fundamental duty, to “harbour the harbourless”³—to provide shelter for the homeless. That is a far cry from criminal sanctions for the crime of lacking a home, of being “harbourless.”

In short, the contention that the government may impose criminal punishments on homeless people precisely *because of* their homelessness deeply conflicts with settled western and Catholic understandings for

² Pope Francis, *Visit to the Charitable Center of St. Patrick Parish and Meeting with the Homeless: Greeting of the Holy Father* (Sept. 24, 2015), https://www.vatican.va/content/francesco/en/speeches/2015/september/documents/papa-francesco_20150924_usa-centro-caritativo.html.

³ *A Catechism or, Short Abridgment of Christian Doctrine, Newly Revised for the Use of the Catholic Church in America* 53 (Baltimore, Geo. Dobbin & Murphy Printers 1809) (“*Carroll Catechism*”). “The *Carroll Catechism* (1785) adopted Richard Chaloner’s 1759 abridgement of the Douway Catechism (1649) written by Henry Tuberville (c. 1607-1678).” 1 Robert L. Fastiggi, *New Catholic Encyclopedia* 102 (Supp. 2010).

many centuries. It is likewise inconsistent with the views of the Founding generation and with current constitutional principles.

In stark contrast with these long-held understandings, the City of Grants Pass has in substance made it a crime to be homeless within its borders. *See* Resp. Br. 15-18. That criminal punishment regime is cruel and unusual under any sound meaning of that phrase, and a violation of the Eighth Amendment.

In this brief, amicus USCCB will respectfully bring two points to the Court's attention. First, Catholic teachings and western tradition demonstrate that permitting the criminalization of homelessness would be a sharp, unwarranted, and deeply troubling departure from our heritage. Second, a decision confirming that criminalizing homelessness is cruel and unusual punishment would not open the floodgates to expansive Eighth Amendment claims; such a holding would reflect only a narrow application of settled precedent and principles.

ARGUMENT

For centuries, the humane treatment of homeless individuals has been integral to Catholic teachings and western tradition.

At its most fundamental, this precept commands that the homeless should not be punished merely because they lack shelter. But the City of Grants Pass has made it a crime to be homeless without access to shelter within its borders. Criminalizing homelessness conflicts with the Catholic Church's longstanding teaching on homelessness and punishment—principles embedded in western tradition and shared by the Founding generation. They formed the backdrop

against which the Eighth Amendment was adopted. The City's ordinances are so antithetical to these bedrock understandings that they are cruel and unusual today, and would have been viewed that way at the time of the Founding.

Criminalizing homelessness is inconsistent with Catholic teaching and western tradition; it reflects punishment that is severely disproportionate; and it violates the Eighth Amendment's prohibition on cruel and unusual punishment. A holding rejecting the City's effort to impose criminal penalties on homeless people for being homeless, moreover, need not break any new ground; it fits easily within existing precedent.

I. Criminalizing homelessness conflicts with Catholic teaching, western tradition, and the Eighth Amendment.

The Catholic Church, consistent with western tradition, has long taught that the homeless are to be helped, not punished. It also has long taught that punishments must be proportional to the crimes for which they are imposed. Underlying both teachings is a simple principle: respect for human dignity. The City's punitive laws cannot be squared with this principle.

A. Criminalizing homelessness is inconsistent with Catholic teaching and western tradition.

The Catholic Church long has taught the importance of embracing and aiding people who lack homes. Amicus USCCB recognizes that views on appropriate policy responses to homelessness may vary and that people of good will may disagree on

particular policy choices. But imposing criminal penalties for being homeless without access to shelter is not merely a policy choice. It sharply conflicts with settled, important, and long-held understandings.

The Catholic Church teaches that “the dignity of the human person is the foundation of a moral vision for society.”⁴ There are few threats greater to human dignity than homelessness. “[H]omelessness ... undermines the life and dignity of so many ... who lack a decent place to live.”⁵ Those in our communities who lack basic shelter “are unable to live a dignified life.”⁶

The need for shelter is not merely an economic issue, but “a moral and ethical [one] demanding a

⁴ U.S. Conference of Catholic Bishops, *Life and Dignity of the Human Person*, <https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/life-and-dignity-of-the-human-person> (last visited Apr. 1, 2024).

⁵ Catholic Bishops of the U.S., *Homelessness and Housing: A Human Tragedy, A Moral Challenge* 1 (Mar. 24, 1988), <https://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/upload/Homelessness-and-Housing-A-Human-Tragedy-A-Moral-Challenge.pdf>.

⁶ See Pontifical Commission *Justitia et Pax*, *What Have You Done to Your Homeless Brother?* § III(2), <http://theolibrary.shc.edu/homeless2.htm> (last visited Apr. 1, 2024); see also Catholic Bishops of the U.S., *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* viii (1986), https://www.usccb.org/upload/economic_justice_for_all.pdf (“when people ... must go hungry and homeless, they are being denied basic rights”); Catholic Bishops of the U.S., *The Right to a Decent Home: A Pastoral Response to the Crisis in Housing* ¶7 (Nov. 20, 1975), <https://www.usccb.org/resources/right-decent-home-pastoral-response-crisis-housing-november-20-1975>.

response.”⁷ Society must ensure that access to shelter is protected.⁸ This requires that society be “indignant” in the face of “human suffering.”⁹ It is not enough to be “indifferent” to homelessness.¹⁰ Society “has a responsibility to act effectively to help meet the needs of those who lack adequate housing.”¹¹ That requires “providing the conditions where human life [is] not undermined, but enhanced” to ensure the “protect[ion] [of] the life and dignity of every person.”¹²

These teachings, reflecting widely held views, stand in stark and irreconcilable conflict with the audacious position that a person somehow may be *criminally punished* for being homeless. They demonstrate that such punishment for lacking shelter is an extreme outlier, far outside the longstanding western tradition.

⁷ *The Right to a Decent Home: A Pastoral Response to the Crisis in Housing*, *supra*, ¶72.

⁸ *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy*, *supra*, at viii; U.S. Conference of Catholic Bishops, *A Place at the Table* (Nov. 13, 2002), <https://www.usccb.org/resources/place-table>.

⁹ See Pope Francis, *Encyclical Letter Fratelli Tutti* ¶68 (Oct. 3, 2020), https://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20201003_enciclica-fratelli-tutti.html.

¹⁰ *Id.*

¹¹ *The Right to a Decent Home: A Pastoral Response to the Crisis in Housing*, *supra*, ¶70.

¹² *Homelessness and Housing: A Human Tragedy, A Moral Challenge*, *supra*, at 3 (quoting Pope Paul II, *Letter to Pontifical Commission Justitia et Pax* (Dec. 8, 1987)).

The Church’s messages of the importance of respecting human dignity are not new. “From the time of the earliest Christian communities, the Church has always shown a preference for the poor, the needy, the outcasts of society, in her social and charitable works.”¹³ Indeed, “concern for those in need” has always been “an essential dimension of [the Catholic] faith.”¹⁴ This “essential dimension” is reflected in the circumstances of Jesus’s birth; when there is “no room in the inn,” the Catholic response is to offer help, not to punish those who lack a safe place to stay.¹⁵ And it is reflected in the Carroll Catechism in common usage at the time of the Founding: that catechism highlighted, as a paramount obligation, the need to “harbour the harbourless.”¹⁶

Other prominent Founding era pronouncements by the Church express this same concern with aiding, not punishing, those who lack life’s necessities. The widely distributed Catechism of the Council of Trent, for example, emphasized the need “to relieve the wants of the poor, to feed the hungry, to give drink to the thirsty, to clothe the naked,” as well as “the great

¹³ *What Have You Done to Your Homeless Brother?*, *supra*, at Introduction ¶2.

¹⁴ *The Right to a Decent Home: A Pastoral Response to the Crisis in Housing*, *supra*, ¶72.

¹⁵ *Homelessness and Housing: A Human Tragedy, A Moral Challenge*, *supra*, at 9; see also Pope Francis, *Visit to the Charitable Center of St. Patrick Parish and Meeting with the Homeless: Greeting of the Holy Father*, *supra*.

¹⁶ *Carroll Catechism*, *supra*, at 53.

necessity of ... being really and practically liberal to the poor.”¹⁷

Consistent with widely shared western tradition, the core of Catholic teachings for many centuries has been that those lacking shelter should be embraced and aided. Criminal punishment for being homeless is far outside—and plainly inconsistent with—this venerable and fundamental understanding.

B. Criminalizing homelessness is inconsistent with proportionate punishment.

More generally, principles of human dignity also underlie the Church’s teachings on criminal punishment. These teachings, again widely shared in the western tradition, further highlight the extreme, aberrant nature of criminalizing homelessness.

The Catholic Church’s approach to punishment “begins with the recognition that the dignity of the human person applies to both victim and offender.”¹⁸ To that end, it is rooted in proportionality and aimed at correcting behaviors that are harmful to others. In the Church’s view, “[l]egitimate public authority has the right and the duty to inflict punishment,” provided

¹⁷ *The Catechism of the Council of Trent* 256, 268 (A. McHugh, O.P. & Charles J. Callan, O.P., trans. 1923), <https://www.saintsbooks.net/books/The%20Roman%20Catechism.pdf>.

¹⁸ U.S. Conference of Catholic Bishops, *Responsibility, Rehabilitation, and Restoration: A Catholic Perspective on Crime and Criminal Justice* (Nov. 15, 2000), <https://www.usccb.org/resources/responsibility-rehabilitation-and-restoration-catholic-perspective-crime-and-criminal>.

it is “*proportionate* to the gravity of the offense.”¹⁹ In other words, the Catholic view on punishment is that “the severity of a punishment should be a function of the seriousness of the offense.”²⁰ Under Catholic teaching, punishment is not to be imposed for punishment’s sake. Instead, the end goal should be, “as far as possible,” to “contribute to the correction of the guilty party.”²¹ This approach ensures the respect for human dignity that Catholic teaching demands, without sacrificing the important goal of “protecting people’s safety.”²²

Principles of human dignity accordingly play a central role in Catholic teachings on the need for proportionality in criminal punishment. They also have long animated western thinking on criminal punishment. History teaches that the importance of proportionality was well known by, and influential for, the Founding generation. John Hancock, for example, decried punishments that worked “indignit[ies] to human nature”; he emphasized that “[d]egrees of guilt demand degrees of [p]unishment.”²³ Thomas Jefferson rejected

¹⁹ *Catechism of the Catholic Church* § 2266 (2d ed. 2019), <https://www.usccb.org/sites/default/files/flipbooks/catechism/548/> (emphasis added).

²⁰ Dora W. Klein, *The Dignity of the Human Person: Catholic Social Teaching and the Practice of Criminal Punishment*, 60 *Loy. L. Rev.* 1, 8 (2014) (citation and quotation marks omitted).

²¹ *Catechism of the Catholic Church*, *supra*, § 2266.

²² *Id.*

²³ John D. Bessler, *Cruel & Unusual: The American Death Penalty and the Founders’ Eighth Amendment* 54 (2012). As argued by the Constitutional Accountability Center, the

“cruel and sanguinary laws” in favor of those “proportioned to the offense.”²⁴ Thomas Paine wrote in 1791 (the year the Eighth Amendment was ratified) that “sanguinary punishments ... corrupt mankind”; proportionality was necessary if governments were to respect “humanity.”²⁵ James Madison maintained that “[w]e ought to proportion the terror of punishment to the degree of offense.”²⁶ James Wilson emphasized, “Let the punishment be proportioned—let it be analogous—to the crime.”²⁷ William Bradford likewise stated that the penalty “should be proportioned to the offen[s]e,”²⁸ and Dr. Benjamin Rush believed that punishments should be in “proportion to crimes.”²⁹

This Court has time and again recognized that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (citation omitted); *see also, e.g., Roper v. Simmons*, 543 U.S. 551, 560 (2005) (the Eighth Amendment “reaffirms the duty of the government to respect the dignity of all persons”); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (to be consistent with the “basic concept underlying the Eighth Amendment,” punishments “must accord with the dignity of man”) (quotation marks omitted).

proportionality principle also finds support in English common law. Constitutional Accountability Ctr. Br. 7-9.

²⁴ Bessler, *supra*, at 144.

²⁵ *Id.* at 108.

²⁶ *Id.* at 122.

²⁷ *Id.* at 52.

²⁸ *Id.* at 86 (emphasis omitted).

²⁹ *Id.* at 69.

Accordingly, this Court has interpreted the Eighth Amendment to reflect the principle of proportionality—the idea that punishments are cruel and unusual if they are “disproportionate to the offense involved.” *Gregg*, 428 U.S. at 169; *see also, e.g., Graham v. Florida*, 560 U.S. 48, 59 (2010); *Solem v. Helm*, 463 U.S. 277 (1983); *Weems v. United States*, 217 U.S. 349, 367 (1910).

As recognized by the Catholic Church, by the Founding generation, and by this Court’s decisions, proportionality in criminal punishment is an essential element of respecting human dignity. Imposing criminal punishments on people because they lack shelter—*i.e.*, because they seek to simply exist—is drastically disproportionate. It is thus an affront to human dignity that conflicts with Catholic teachings, western tradition, and the understandings of the Founding generation.

C. Criminalizing homelessness is cruel and unusual.

The ordinances at issue prohibit, among other things, “sleep[ing] on public sidewalks, streets, or alleyways at any time,” and using “bedding, [a] sleeping bag, or other material used for bedding purposes” on “any ... publicly-owned property.” Pet. App. 221a-222a. The City’s goal in enforcing those ordinances against the homeless was “to make it uncomfortable enough for [homeless persons] ... so they will want to move on down the road.” *Id.* at 17a. The escalating penalties include criminal punishment. *Id.* at 16a-17a. The City’s ordinances thus penalize homeless individuals for existing in Grants Pass while lacking shelter—the defining characteristic of the status of being homeless. The penalties are cruel and unusual.

Whether one relies on the Founding generation's understanding or on contemporary understanding, imposing criminal punishments on homeless individuals simply for being homeless is self-evidently cruel and unusual. The fact that the Grants Pass punishments are imposed for the bare attributes of homelessness—being publicly present and sleeping with a blanket in public places when one has no home and there are no shelters to house him or her—makes no difference to that analysis. Any punishment merely for being homeless, or for the attributes of being homeless, is severely disproportionate to the charged offense.

The City has opted for cruelty over humanity not only by advising its homeless residents that they are not welcome, but by imposing punishment because they lack a home to sleep in. Gloria Johnson, for example, was told that it was “illegal” for her to sleep in her van “anywhere in Grants Pass city limits,” even though she had nowhere else to sleep. J.A. 2(¶8). Debra Blake was told that there was “nowhere in Grants Pass that” she, as a homeless person, was “legally” allowed to “sit or rest.” J.A. 180-181(¶5). And CarrieLynn Hill, another homeless resident of Grants Pass, was convicted of trespassing simply for her presence in a public park. J.A. 133-134(¶3). All of this was part of a coordinated effort by the City to make the homeless so “uncomfortable” that they “will want to move on down the road.” J.A. 114. These punishments are not meant to correct or address improper actions; rather, by design, they impose pain and suffering on those who lack the basic necessities of life.

These efforts by the City go far beyond the mere indifference to human suffering that, under Catholic

teaching and the western tradition, is itself troubling. *Supra*, pp. 4-8. The City has done far worse than simply remaining idle; it has instead actively and self-consciously sought to *exacerbate* the suffering of its already struggling homeless residents by making them more “uncomfortable” than they already are. Pet. App. 17a. That exacerbation of human suffering through criminal punishments is cruel and unusual.

Strikingly, the City’s ordinances impose severe sanctions for involuntary conduct that is blameless—behavior that is necessary for any homeless person to remain alive. That necessarily renders those punishments disproportionate to the purported “offense” under Catholic teachings and related western understandings going back centuries.³⁰

That the City’s ordinances would have been abhorrent to the Founders’ understanding, as they are to the Catholic Church’s, is not undercut by the historical vagrancy and poor laws cited by the City. Pet. Br. 34. In the City’s view, that “state and local governments [have] restricted sleeping and camping on public property” since the Founding somehow means that the Founders would have found the City’s efforts to punish people for their mere status as homeless persons in Grants Pass to be permissible. *See id.* at 42. But those laws show nothing of the sort. Rather than reflexively punish those without shelter in an attempt to remove them from their communities, as the City has done here, those laws called for “[l]ocal

³⁰ The USCCB does not agree with the Ninth Circuit’s Establishment Clause reference, Pet. App. 19a, but that does not obscure the core issue presented in this Court—whether a city may criminalize homelessness.

communities [to] support[] their poor who were unable to work.”³¹ In fact, consistent with Catholic sentiment, “[a]ll colonial poor laws acknowledged a public responsibility to provide for the impoverished neighbor who was unable to work.”³² Far from supporting the City, the historical statutory schemes governing the poor further evidence the Founding era’s deep-seated respect for human dignity.

Amicus USCCB has long been concerned and apprehensive that we, as a society, may adopt novel and “often dehumanizing” approaches to “the poorest among us.”³³ Grants Pass’s ordinances are a vivid example of a new approach that is dehumanizing and dangerous. The ordinances ignore the reality that homeless persons are, in fact, persons whose humanity and existence are entitled to respect—not only under Catholic teaching, but under the views of human dignity that were held by the Founding generation and that underlie the Eighth Amendment. Such an assault on human dignity—deliberately inflicted on those most in need among us—has been cruel and unusual since well before 1791, and it remains cruel and unusual today.

³¹ William P. Quigley, *Work or Starve: Regulation of the Poor in Colonial America*, 31 U.S.F. L. Rev. 35, 36 (1996).

³² *Id.* at 54.

³³ *Homelessness and Housing: A Human Tragedy, A Moral Challenge*, *supra*, at 7.

II. A holding that criminalizing homelessness is cruel and unusual would not open the floodgates to expansive Eighth Amendment claims.

Affirming the judgment below would not require a departure from this Court’s previous decisions. Nor would it open the floodgates to expansive Eighth Amendment claims. Both *stare decisis* and principles deeply embedded in western tradition (including at the Founding) compel a ruling in favor of respondents here. The Court need only faithfully apply its precedents and those traditional principles to hold that criminalizing homelessness violates the Eighth Amendment.

A straightforward application of this Court’s decision in *Robinson v. California*, 370 U.S. 660 (1962), resolves this case. In *Robinson*, this Court considered a state law that criminalized being addicted to narcotics. It held that individuals cannot be punished on the basis of their status. *Id.* at 667. In doing so, the Court noted that “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.” *Id.* In this case, the supposed conduct at issue—resting or shielding oneself from the elements in a public place—is not only a plain proxy for the status of homelessness, but also the *sine qua non* of homelessness. It is conduct that Gloria Johnson and other homeless residents of Grants Pass are utterly unable to control.

That principle governs here. Although Grants Pass’s ordinances do not explicitly criminalize the status of homelessness, their effect is precisely the same. On their face, the ordinances prohibit “sleep[ing] on public sidewalks, streets, or alleyways at any time,”

Pet. App. 221a, and using ‘bedding, [a] sleeping bag, or other material used for bedding purposes’ on “any ... publicly-owned property.” Pet. App. 221a-222a. As noted, lacking access to indoor shelter is the defining characteristic of homelessness, *see, e.g.*, 42 U.S.C. § 11302, and the homeless are unmistakably the ordinances’ target. In localities where shelter is not available, homeless individuals have no choice but to sleep outside. U.S. Br. 20. That Grants Pass’s ordinances theoretically allow individuals to sleep on some public property so long as they forego all bedding also does not alter their status-based character. *See* Pet. App. 221a-222a. Homeless individuals in Grants Pass must choose between violating the ordinances or sleeping outside without any bedding to protect themselves from the elements, even if it is raining, snowing, or below freezing. That is no choice at all—one cannot meaningfully choose to forgo the basic necessities of life any more than one can choose whether to “hav[e] a common cold.” *Robinson*, 370 U.S. at 667. Grants Pass’s ordinances punish homeless individuals solely for being homeless.

This Court’s decision in *Powell v. Texas*, 392 U.S. 514 (1968), does not compel a different result. There, the plurality emphasized that the defendant had not been convicted for being addicted to alcohol but had instead been convicted for his voluntary choice of drinking alcohol and “get[ting] drunk in public.” *See id.* at 535. Drinking alcohol is far different from sleeping outside with a blanket. As the plurality in *Powell* noted, it could not conclude that “chronic alcoholics in general” or the defendant specifically “suffer[ed] from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts.” *Id.*

at 535. The same cannot be said of homeless individuals. Sleeping outside with a blanket or other form of protection, as opposed to sleeping outside with no protection whatsoever, is not a “voluntary” choice because forgoing protective material can be life-threatening—people without access to indoor shelters are at the mercy of the elements.³⁴ Nor is the act of sleeping itself voluntary—sleep is a basic requirement of human survival, and individuals without access to indoor shelter have no option but to sleep outside.

This Court need not extend *Robinson* to conclude that Grants Pass’s ordinances are cruel and unusual. Laws and ordinances imposing criminal punishment for sleeping outside with protective materials criminalize the very status of being homeless and make it impossible for homeless individuals to live within that jurisdiction. A straightforward application of *Robinson* permits this Court to issue a narrow ruling affirming the judgment below without breaking any new ground.

Punishing people merely for lacking access to an indoor shelter to sleep in would have been considered cruel and unusual at the time of the Founding. The same holds true today. Accordingly, concluding that criminalizing homelessness is cruel and unusual would do nothing more than confirm that a harsh new criminal regime addressed to homelessness—a

³⁴ See Ctrs. for Disease Control & Prevention, *Prevent Hypothermia & Frostbite* (Nov. 2, 2023), <https://www.cdc.gov/disasters/winter/staysafe/hypothermia.html> (noting that “[v]ictims of hypothermia are often ... the homeless” and that hypothermia “can occur even at cool temperatures (above 40 °F) if a person becomes chilled from rain, sweat, or submersion”).

punitive regime fundamentally at odds with long-time traditions and understandings, including at the time of the Founding—cannot be countenanced. It would not mark any change in Eighth Amendment jurisprudence. It would merely reiterate what the Founders knew to be true—that people cannot be punished for lacking shelter.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted.

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