No. 19-247

IN THE

Supreme Court of the United States

CITY OF BOISE, IDAHO,

Petitioner,

vs.

ROBERT MARTIN, et al.,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the enforcement of generally applicable laws against camping on public property violate the Cruel and Unusual Punishments Clause when applied to persons who have no permanent residence and cannot obtain space in a shelter but who have made no further showing of necessity?

2. Does the Cruel and Unusual Punishments Clause of the Eighth Amendment apply to the issuance of citations by police, or is it limited to punishments imposed after conviction of a crime?

3. Does a federal court properly proceed to the merits of Question 1 when the state appellate courts have not had an opportunity to determine how to apply state-law defenses to this situation, which may obviate the constitutional question?

4. Does a single-Justice concurring opinion in this Court combined with a four-Justice dissent in the same case form a precedent, binding on all the courts of the Nation, in cases presenting facts distinguishable from those that were before this Court in that case?

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INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

1. Both parties have filed blanket consents for *amicus* briefs.

   Counsel of record for all parties received notice at least 10 days prior to the due date of CJLF's intention to file this brief.

   No counsel for a party authored this brief in whole or in part. No person or party other than *amicus curiae* CJLF made a monetary contribution to its preparation or submission.

This case involves an injunction against enforcement of an ordinance needed to maintain public order. It was patterned on a section of a law drafted to replace the old vagrancy laws with a constitutional alternative, a law widely copied throughout the country. The disorder that follows when police are not allowed to enforce such laws ultimately leads to more serious crime. This breakdown in society is contrary to the interests of victims of crime and the law-abiding public that CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The City of Boise, Idaho, like many jurisdictions throughout the country, has ordinances that prohibit camping on public property. See Pet. for Cert. 6. Six plaintiffs who are or have been homeless brought suit in Federal District Court claiming that application of the ordinances to homeless people without access to shelters violates the Eighth Amendment. See App. to Pet. for Cert. 35a.

All six of the plaintiffs have been convicted at least once of violating one or both of the ordinances. See *id*., at 40a. None of the plaintiffs appealed their convictions. See *id*., at 54a. They evidently did not raise an Eighth Amendment challenge as a defense in the trial court. See *id*., at 91a.

After protracted litigation, by 2009 only two plaintiffs remained, and the two sides made cross motions for summary judgment and dispositive relief. See *id*., at 69a-70a. The District Court granted the defendants' motion and denied the plaintiffs', terminating the case in the defendants' favor.

The Court of Appeals reversed the grant of defendants' motion as to prospective relief and as to retro-

spective relief regarding citations that never culminated in a criminal judgment. See *id*., at 65a.[2] The court interpreted *Robinson* v. *California*, 370 U. S. 660 (1962), and *Powell* v. *Texas*, 392 U. S. 514 (1968), as establishing that, just as a person cannot be criminally punished for his status, so he cannot be punished for involuntary conduct which is inseparable from that status. See App. to Pet. for Cert. 59a-62a. The Court of Appeals further held that this prohibition is not limited to punishment following conviction but extends to "the initiation of the criminal process." *Id*., at 56a. The Court of Appeals denied rehearing en banc, *id*., at 2a, six judges dissenting. *Id*., at 6a.

SUMMARY OF ARGUMENT

The Cruel and Unusual Punishments Clause is directed only at the kinds and possibly the amounts of punishment that can be imposed upon conviction of a crime. As originally understood, it has nothing to do with the legislature's decision regarding the definition of crimes, and it has nothing to do with the initiation of criminal proceedings. Those limitations must be found elsewhere in the Constitution. *Robinson* v. *California* erred in placing its restriction under the Eighth Amendment, and while it need not be overruled it should not be extended to new territory.

The old vagrancy laws did present constitutional problems under other provisions, and disorderly conduct laws were drafted as reforms to eliminate those problems. The Boise disorderly conduct law at issue in this case is copied from a leading reform. It avoids the old problem by focusing on conduct, not status.

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2. The Court of Appeals affirmed as to retrospective relief regarding judgments in completed cases. See *ibid*.

The Eighth Amendment applies only to punishment imposed following conviction, not to any actions occurring pretrial, as indicated by multiple precedents of this Court. The Court of Appeals' holding to the contrary is clear error.

A federal court should not enjoin enforcement of a state or local enactment as unconstitutional when interpretation of it by state courts might avoid the constitutional problem. There are two state-law defenses possible in this case: the state's general necessity defense and the ordinances' built-in shelter availability defense. The panel's disagreement with how the police interpret the latter defense in issuing citations is no excuse for not allowing the state appellate courts to interpret it first. Cases should be allowed to proceed through the appeal process to obtain authoritative interpretation of state and local law from state courts before a federal court issues an injunction.

The disagreement between the panel and the rehearing dissenters over the interpretation of *Powell* v. *Texas* illustrates a major problem that only this Court can resolve. The rule of *Marks* v. *United States* on interpretation of precedents with no majority opinion is unclear, causing confusion and wildly conflicting interpretations across many areas of law. This Court has a responsibility to clarify how its precedents are to be interpreted and applied. It fails in its central mission when its precedents are so unclear that they produce such broad conflict. The Court has passed on multiple opportunities over many years to clarify the *Marks* rule, but the issue should not be evaded any longer.

ARGUMENT

I. Disputes over the substantive definition of crimes and defenses should not be shoehorned into the Eighth Amendment.

In *Kansas* v. *Carr*, 577 U. S. __, 136 S. Ct. 633, 644, 193 L. Ed. 2d 535, 546 (2016), the defendants complained that they had been tried jointly rather than separately, a frequently occurring issue in criminal procedure. See generally 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 17.2 (4th ed. 2015). Because it was a capital case, however, the murderous brothers claimed a violation of the Eighth Amendment. This Court declined to extend that provision into this new territory. "Whatever the merits of defendants' procedural objections, we will not shoehorn them into the Eighth Amendment's prohibition of 'cruel and unusual punishments.' " *Carr*, 136 S. Ct., at 644, 193 L. Ed. 2d, at 547. The constitutional claim, if they had one, came under due process. *Id*., 136 S. Ct., at 644-645, 193 L. Ed. 2d, at 547-548.

The same response is warranted here. The Eighth Amendment provides, "nor [shall] cruel and unusual punishments [be] inflicted." Whatever debates may rage over the original understanding of "cruel" and "unusual," see, *e.g.*, *Harmelin* v. *Michigan*, 501 U. S. 957, 966-985 (1991) (opinion of Scalia, J.); *id*., at 1009-1011 (White, J., dissenting),[3] the clause on its face

3. See generally Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal. L. Rev. 839 (1969); Stinneford, The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation, 102 Nw. U. L. Rev. 1739 (2008); Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. __ (forthcoming), online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3453350.

applies only to punishments, not convictions.[4] See Gardner, Rethinking *Robinson v. California* in the Wake of *Jones v. Los Angeles*: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment," 98 J. Crim. L. & Criminology 429, 476-477 (2008) (cited below as "Gardner").

Only once, in an era when the original understanding received less attention and commanded less respect than it does now, has this Court found an Eighth Amendment restraint on the legislative authority to define the elements and defenses of substantive criminal law. That was in *Robinson* v. *California*, 370 U. S. 660 (1962), a decision that could have reached the same result on different grounds. See Part I-B, *infra*, at 9-10. That mistake should be limited to the narrow and rare circumstances of the case, a pure "status" offense with no *actus reus*. See *Powell* v. *Texas*, 392 U. S. 514, 544-545 (1968) (Black, J., concurring). *Robinson* should never be expanded.

A. The Original Understanding.

The essential outline of the history of the Cruel and Unusual Punishments Clause is well known. The clause was copied verbatim from the English Bill of Rights of 1689 to the Virginia Declaration of Rights of 1776 to the Eighth Amendment to the United States Constitution. See Granucci, 57 Cal. L. Rev., at 840; Stinneford, 102 Nw. U. L. Rev., at 1748.

The English provision was enacted in response to excesses during the reign of the then-recently overthrown King James II. See 4 W. Blackstone, Commentaries 372 (1st ed. 1769). The case of the "notorious

4. And most certainly not citations. See Part II-A, *infra*, at 13-14; *cf*. App. to Pet. for Cert. 55a-56a.

perjurer" Titus Oates was especially prominent. See *Harmelin*, 501 U. S., at 968-971; Granucci, *supra*, at 857-859. While there is room for disagreement as to some aspects of this history, see Stinneford, *supra*, at 1762, n. 135 (disputing part of Granucci's reading), there can be no dispute that the definitions of crimes played no part in the debate. For the Oates case, particularly, no one could doubt that perjury was and should be a serious crime. The dispute was all about whether the punishment was legal for the crime and supported by precedent, see *Harmelin*, at 971, or as Stinneford contends, consistent with "long usage." See Stinneford, at 1763.

Even more pertinent to the American constitutional question, though, are the debates on the ratification of the Constitution. The Anti-Federalists complained that it contained no bill of rights and noted the lack of a "cruel and unusual" prohibition. The Bill of Rights was adopted, in part, as a kind of national reconciliation with those who had opposed the Constitution. See 1 Annals of Cong. 448-449 (1789) (statement of Rep. Madison).

The strongest evidence of the nature of the Anti-Federalists' objection on this point is found in the Massachusetts and Virginia Conventions. In Massachusetts, delegate Holmes complained that Congress was "nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes ...." 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 111 (2d ed. 1836). He was not concerned on this point with the definition of federal crimes.

In Virginia, the fiery Patrick Henry expressly focused on punishment and not on crimes. "*In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by.* But when

we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." 3 J. Elliot 447 (emphasis added). Without the equivalent of Virginia's provision, he warned, Congress might import the practices of continental Europe "in preference to that of the common law," with "tortures, or cruel and barbarous punishment." See *ibid*. The distinction between the definitions of crimes and the punishments for them could hardly be stated any more clearly.

The authority to decide what is a crime and what is not lies at the heart of the legislative power. The notion that the Cruel and Unusual Punishments Clause removed any part of that authority from the legislative branch is contrary to both the plain language and the unmistakable history of that provision.

B. The Robinson Anomaly and the Powell Retrenchment.

Robinson v. *California*, 370 U. S. 660 (1962), was an odd case in many ways. Unknown to this Court, the case had been moot the whole time the Court was considering the merits; Robinson had died the previous summer. See *Robinson* v. *California*, 371 U. S. 905 (1962) (Clark, J., dissenting from denial of rehearing).[5] Considered as a whole, the California statutory system for drug abuse was "a comprehensive and enlightened program" for its day. See *Robinson*, 370 U. S., at 679 (Clark, J., dissenting); *id*., at 687-688 (White, J., dissenting). It seems like a strange case to take up to make the "status offense" point when there were much more common status offense statutes in force throughout the country: vagrancy laws. See Part I-C, *infra*.

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5. Mootness defeats subject matter jurisdiction. See *Genesis HealthCare Corp*. v. *Symczyk*, 569 U. S. 66, 78 (2013).

While proof of use was not strictly required for a conviction, the *Robinson* Court had to stretch to imagine a scenario where a person could be prosecuted for being an addict without having violated the law against illegal use. Perhaps an addict had just arrived from out of state and not yet gotten his first in-state fix. See *Robinson*, 370 U. S., at 667. This sounds more like a hypothetical from a law school Socratic dialogue than an inquiry into the actual workings of criminal justice. There is no reason to believe that the facts of *Robinson* bear any resemblance to this hypothetical. See *id*., at 681-682 (Clark, J., dissenting); *id*., at 686-688 (White, J., dissenting). In effect, the *Robinson* Court declared the statute unconstitutional on its face because it could conceive of a hypothetical where it would be unconstitutional as applied, even though from the evidence it appeared to be constitutionally applied to Robinson. That is backwards under the approach developed in the years since *Robinson*, at least outside the First Amendment context. See *United States* v. *Stevens*, 559 U. S. 460, 472-473 (2010).

The oddest aspect of all, though, was the *Robinson* Court's resort to the Cruel and Unusual Punishments Clause to strike down a status offense. Justice White called it "novel" and suggested that "the present Court's allergy to substantive due process" might be the reason to resort to the Eighth Amendment. See *Robinson*, 370 U. S., at 689 (dissent); Gardner, *supra*, at 436, 482. Of course, many people believe that a revulsion for substantive due process is not an allergy at all but the jurisprudential immune system's correct response to a genuine, threatening infection. See, *e.g.*, *Timbs* v. *Indiana*, 586 U. S. __, 139 S. Ct. 682, 692, 203 L. Ed. 2d 11, 21-22 (2019) (Thomas, J., concurring in the judgment) (slip op., at 2-3). For those who share this view, the Equal Protection Clause is a possible alternative justification for the result in *Robinson*. An addict was

treated differently from a nonaddict under the 1962 California law for who he was and not for anything he had been shown to have done. That might be a stretch, but it would not be nearly as great a stretch as the one the *Robinson* Court actually made.

Robinson might have signaled " 'the demise of the criminal law,' " Gardner, at 430 (quoting Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, 147-148, n. 144 (1962)), but it did not. At least it hasn't yet. In *Powell* v. *Texas*, 392 U. S. 514, 533 (1968), Justice Marshall, writing the plurality opinion, interpreted *Robinson* to bar only status crimes with no *actus reus*, not reaching the *mens rea* question of how to treat acts that are claimed to be involuntary. The perennial question of how to interpret a decision with no majority opinion is once again presented in this case with regard to *Powell*, see Part III, *infra*, at 19-21, but courts other than the Ninth Circuit have generally declined to extend *Robinson* in the manner advocated by the *Powell* dissent. See Gardner, at 443, and authorities cited.

C. Vagrancy Laws.

This Court's unwillingness to take a broad interpretation of *Robinson* can be seen in its approach to vagrancy cases in the years following. In *Robinson* itself, Justice Clark noted that " 'status' offenses have long been known and recognized in the criminal law," citing a passage of Blackstone discussing vagrancy laws. 370 U. S., at 684. Yet *Papachristou* v. *Jacksonville*, 405 U. S. 156 (1972), invoked the void-for-vagueness doctrine to invalidate a common type of vagrancy law, even though some of the defendants had been convicted of what are plainly status crimes: "vagabonds" and "common thief." See *id*., at 158; Gardner, at 443, n. 64.

Two years before *Robinson*, Professor Arthur Sherry of U. C. Berkeley published an influential law review article on vagrancy laws. "There is little dissent from the conclusion that the vagrancy law is archaic in concept, quaint in phraseology, a symbol of injustice to many and very largely at variance with prevailing standards of constitutionality." Sherry, Vagrants, Rogues and Vagabonds–Old Concepts in Need of Revision, 48 Cal. L. Rev. 557, 566 (1960) (cited below as "Sherry"). The constitutional problem came from a then-recent decision of the California Supreme Court, *In re Newbern*, 53 Cal. 2d 786, 350 P. 2d 116 (1960). Anticipating both *Papachristou* and *Powell*, *Newbern* struck down the "common drunk" portion of the vagrancy statute as unconstitutionally vague while allowing the prisoner to be retried on the drunk-in-public charge. *Id*., at 797, 350 P. 2d, at 123-124.

Sherry believed the solution was simple, at least in concept. The constitutional problem could be entirely cured by "drafting legislation having to do with conduct rather than status," Sherry, *supra*, at 567, the view of the *Powell* plurality eight years later. Sherry unwisely asserted the ease of fixing the problem before a legislative subcommittee and was promptly drafted as draftsman. *Id*., at 568.

Sherry's second draft of a disorderly conduct law to replace the antiquated vagrancy law is printed in the article at pages 569-572. It was adopted with minor changes by the California Legislature the next year. See Cal. Stats. 1961, ch. 560, § 2. The final section, the one relevant to this case, remains largely intact as California Penal Code § 647(e), declaring guilty of disorderly conduct one "[w]ho lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it."

Boise City Code § 5-2-3(A)(1), one of the ordinances at issue in this case, is largely a copy of this law. See App. to Pet. for Cert. 64a, 123a. The law claimed to be unconstitutional in this case is actually the *reform* drafted and enacted to "harmonize with notions of a decent, fair and just administration of criminal justice and ... at the same time make it possible for police departments to discharge their responsibilities in a straightforward manner without the evasions and hypocrisies which so many of our procedural rules force upon them." Sherry, *supra*, at 567.

The petition for certiorari explains why the Court of Appeals' decision is bad policy, harmful to our cities and their people, see Pet. for Cert. 26-35, and we understand that other *amicus* briefs will expand on that point. The decision is also contrary to the plain language of the Eighth Amendment, contrary to the meaning of that amendment as understood at the time of its adoption, and based on a deviation from constitutional principles that ought not be expanded beyond its original boundaries. The genuine constitutional problem of the old vagrancy laws was fixed long ago with carefully considered reforms that provided the basis of the very laws under attack now. These reasons would be more than sufficient for this Court to take up this case for full review. But there are more.

II. The Court of Appeals violated principles of judicial restraint and federalism by deciding a constitutional question when state courts might have applied state law to avoid it.

"Normally this Court ought not to consider the Constitutionality of a state statute in the absence of a controlling interpretation of its meaning and effect by the state courts." *Arizonans for Official English* v.

Arizona, 520 U. S. 43, 75 (1997) (quoting *Poe* v. *Ullman*, 367 U. S. 497, 526 (1961) (Harlan, J., dissenting) (internal quotation marks and brackets omitted)). This principle applies full force to this case, yet the Court of Appeals breezed right past it. Had the question of necessity at the root of the constitutional dispute been presented to state appellate courts in the normal course of proceedings, the federal question might never have arisen.

A. The Correct Constitutional Question.

To understand the predicate question of state law and how it should have been resolved, it is first necessary to recognize a clear error in the Court of Appeals' opinion. The panel's holding that the Cruel and Unusual Punishments Clause can be violated pretrial is so clearly erroneous as to be summarily reversible. See App. to Pet. for Cert. 23a-24a (Smith, J., dissenting from denial of rehearing en banc); *id*. 32a-34a (Bennett, J., dissenting from denial of rehearing en banc).

" 'The primary purpose of [the Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the method or kind of *punishment* imposed for the violation of criminal statutes….' " *Ingraham* v. *Wright*, 430 U. S. 651, 667 (1977) (quoting *Powell* v. *Texas* plurality) (emphasis added; alterations in original). This Court's pre-*Ingraham* cases "demonstrate [that] the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after* it has secured a formal adjudication of guilt in accordance with due process of law." *Id*. at 671-672, n. 40 (emphasis added).[6]

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6. The cases cited and discussed in reaching this conclusion are *United States* v. *Lovett*, 328 U. S. 303, 317-318 (1946), *Trop* v. *Dulles*, 356 U. S. 86 (1958), and *Kennedy* v. *Mendoza-Martinez*,

The issue before the *Ingraham* Court did not involve the distinction between postconviction punishment and pretrial criminal matters, as the Court of Appeals panel noted, see App. to Pet. for Cert. 56a, so these statements are *obiter dicta*. But that does not negate the principle that *Ingraham* expressed. *Ingraham* does not stand alone. The pretrial versus postconviction distinction is presented in the earlier cases noted in the opinion and in later cases. *Whitley* v. *Albers*, 475 U. S. 312, 319 (1986), invoked the *Ingraham* footnote 40 "after" language quoted above in an Eighth Amendment case involving use of force against prison inmates. *Graham* v. *Connor*, 490 U. S. 386, 398-399 (1989), quoted it again for its holding that the Fourth and not Eighth Amendment applies to a pretrial use of force, distinguishing *Albers*. *Kingsley* v. *Hendrickson*, 576 U. S. __, 135 S. Ct. 2466, 2475, 192 L. Ed. 2d 416, 428-429 (2015), reiterated the *Graham* distinction, again citing the *Ingraham* footnote limiting the Eighth Amendment to postconviction punishment.

At this point, it is no longer seriously debatable that the Cruel and Unusual Punishments Clause applies only to punishment imposed after conviction. To the extent the Court of Appeals' opinion is contrary, it is clear error on the merits. The debatable constitutional question is whether the *Robinson* rule extends to a sentence following a conviction for an act that is the involuntary product of the defendant's status.

B. Federalism and Untested State and Local Laws.

This brings us back to the federalism question raised by Justice Harlan in *Poe* and the Court in *Arizonans for Official English*, quoted *supra*, at 12. Should a federal court address the correct constitutional question raised

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372 U. S. 144, 162-167, 186, and n. 43 (1963).

by this case when the state appellate courts have not yet had a chance to decide whether state law really does authorize punishment in these circumstances?

There are two reasons why Idaho law might not authorize punishment in circumstances creating a substantial federal constitutional question. First, Idaho law recognized the necessity defense long before any of the events at issue in this case. See *State* v. *Hastings*, 118 Idaho 854, 801 P. 2d 563 (1990). Second, both of the challenged ordinances now have exceptions for nights with no "available overnight shelter." See App. to Pet. for Cert. 123a-125a.

In *Hastings*, an Idaho resident who used medical marijuana claimed the necessity defense. See 118 Idaho, at 854-855, 801 P. 2d, at 563-564. The Idaho Supreme Court found that the defense as it existed at common law was available in Idaho under a statute incorporating the common law. *Id*., at 856, 801 P. 2d, at 565.

> "The elements of the common law defense of necessity are:
>
> 1. A specific threat of immediate harm;
>
> 2. The circumstances which necessitate the illegal act must not have been brought about by the defendant;
>
> 3. The same objective could not have been accomplished by a less offensive alternative available to the actor;
>
> 4. The harm caused was not disproportionate to the harm avoided." *Id*., at 855, 801 P. 2d, at 564.

Like many legal doctrines, this one leaves room for interpretation in individual cases. In *State* v. *Meyer*, 161 Idaho 631, 633, 389 P. 3d 176, 178 (2017), the court was presented with a case of a Washington resident with a medical marijuana prescription who drove through

Idaho on his way to California. The court found that Meyer had not presented sufficient evidence to satisfy the third prong, less offensive alternative, because he might have used another pain medication for the short duration of his Idaho stay, even if somewhat less effective. See *id*., at 635-636, 389 P. 3d, at 180-181.

The California Supreme Court suggested that a necessity defense might be available in a camping ordinance case in *Tobe* v. *City of Santa Ana*, 9 Cal. 4th 1069, 1088, and n. 8, 892 P. 2d 1145, 1155, and n. 8 (1995).[7] Could the Idaho courts apply the necessity defense to disorderly conduct ordinances like Boise's to reach a more finely tailored accommodation of competing interests than the Ninth Circuit's simplistic, meat-axe approach of simply asking whether shelter space is available?[8] We do not know. None of the plaintiffs appealed their convictions. See App. to Pet. for Cert. 54a. *Amicus's* searches have not turned up any relevant opinions.

Then there is the defense now built into the ordinances themselves. The Court of Appeals opinion takes issue with how the *police* are interpreting and applying

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7. Notwithstanding footnote 8, it was actually *amicus* CJLF who first suggested it. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Tobe* v. *City of Santa Ana*, Cal. Sup. Ct., No. S038530, pp. 26-29, online at http://www.cjlf.org/briefs/TobeA.pdf.

8. To what extent does a person claiming a necessity to camp in a public place have a duty to minimize the imposition on other users of public places? Does a homeless person have any obligation to take reasonable steps (considering any impairments he may have) toward correcting the problems that render him homeless, such as seeking employment if able to work or seeking treatment if disabled by addiction? The necessity defense could be developed to address issues such as these.

the defense *pretrial*. See App. to Pet. for Cert. 46a-49a. But this is an Eighth Amendment case, and what matters is how *courts* decide when and whether the defendants in criminal cases can be *punished* for camping on the sidewalks, as discussed in Part II-A, *supra*. The normal course of development of the criminal law is for the police and trial courts to receive guidance from the appellate courts via appeals in criminal cases. Yet in this case, the constitutional question is before a federal court in a civil case when the predicate state-law question has never been addressed (as far as we can determine) in a single reported state-court appellate decision.

Idaho provides extensive appellate review in misdemeanor cases. The defendant may appeal a conviction in the Magistrate Court to the District Court. See Idaho Crim. Rule 54(a)(1)(A). If affirmed, the defendant has a second appeal as of right to the Supreme Court, see Idaho Rule App. 11(c)(10), which may retain the case or assign it to the Court of Appeals. See Idaho Rule App. 108. If assigned, the decision of the Court of Appeals is subject to discretionary review in the Supreme Court. See Idaho Rule App. 118. There is no evident reason why the platoon of lawyers representing plaintiffs in this civil case[9] could not have taken one or more criminal appeals instead. "[D]uring the first three months of 2015, the Boise Police Department issued over 175 ... citations" for violating the ordinances at issue. App. to Pet. for Cert. 49a (panel opinion). There was certainly no shortage of available cases.

The doctrine of *Pullman* abstention is named for *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S.

9. The PACER docket for the District Court case lists nine attorneys for the plaintiffs over the course of the litigation.

496 (1941). In a nutshell, the decision whether to abstain turns on four factors:

> "(i) resolution of a state law question in a particular way would avoid the necessity to decide a federal constitutional question; (ii) the relevant state law was unclear; (iii) resolution of the federal constitutional question adversely to the defendants might generate 'needless friction' with state policies; and (iv) 'the federal constitutional question "touche[d] a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to adjudication is open." ' " R. Fallon, J. Manning, D. Meltzer, & D. Shapiro, The Federal Courts and the Federal System 1059 (6th ed. 2009).

All four factors favor abstention here. The preceding discussion establishes that the state law is unclear and might obviate the federal constitutional question. The policy issues are discussed in Judge Smith's dissent, App. to Pet. for Cert. 15a-23a, and the Petition for Certiorari at pages 26-35. We understand they will also be addressed by other *amici*.

Pullman abstention has its critics, and its usage has varied over the years, but it is not dead. See, *e.g.*, *Expressions Hair Design* v. *Schneiderman*, 581 U. S. __, 137 S. Ct. 1144, 1148-1149, 197 L. Ed. 2d 442, 447-448 (2017) (Court of Appeals abstained under *Pullman* as to part of case, and petitioner did not seek review of that part). Very often, certification of a question to the state courts is preferable, largely to avoid the delay of a full round of state-court litigation followed by a return to federal court. See *Arizonans for Official English* v. *Arizona*, 520 U. S., at 75-76; *Expressions Hair Design*, 137 S. Ct., at 1156-1157, 197 L. Ed. 2d, at 456-457 (Sotomayor, J., concurring in the judgment).

Certification works best for discrete questions of law for which a straightforward answer can be given. The interpretation of "available overnight shelter" in the ordinances in this case might be appropriate for a certified question. See App. to Pet. for Cert. 123a-125a. Questions involving the application of a broad principle to varying facts are less appropriate for a certified question. If, in 1960, a court had certified a question to this Court asking "in what circumstances is a search or seizure 'unreasonable' for the purpose of the Fourth Amendment" the Court could not have given an answer as comprehensive as the body of law on that question developed in the years to follow. See, *e.g.*, *Illinois* v. *Gates*, 462 U. S. 213, 238-239 (1983) (totality of the circumstances for probable cause). The circumstances in which necessity justifies camping on public property despite the ordinances in this case likely requires fact-specific development, and abstention would be better than certification.

Whether certification or abstention was the proper course, however, proceeding to the merits of the federal constitutional question despite the existence of state-law defenses never interpreted or applied by the state courts was certainly not proper. It is reversible error.

III. This case provides a much-needed opportunity to clarify the confusing "narrowest grounds" rule of *Marks* v. *United States*.

The panel opinion in this case counted votes among the concurring *and dissenting* opinions in *Powell* v. *Texas*, 392 U. S. 514 (1968), to find a principle which supposedly compels a conclusion in a case of conduct that is an unavoidable consequence arising from a condition, App. to Pet. for Cert. 61a-62a, a set of facts that was not before the Court in *Powell*. See 392 U. S.,

at 549 (White, J., concurring in the judgment). Remarkably, no authority is cited for this mode of interpreting a precedent of this Court with no majority opinion. Judge Smith, dissenting from denial of rehearing en banc, does discuss *Marks* v. *United States*, 430 U. S. 188 (1977), and finds it compels the opposite conclusion. See App. to Pet. for Cert. 9a-11a. Given the confused state of the *Marks* rule, though, no one can say if his application of it is correct. Therein lies a serious problem.

The *Marks* rule, this Court has said more than once, can be "more easily stated than applied" to some decisions. *Nichols* v. *United States*, 511 U. S. 738, 745-746 (1994); *Grutter* v. *Bollinger*, 539 U. S. 306, 325 (2003) (quoting *Nichols*). On both of these occasions, this Court ducked the *Marks* question, saying it was not "useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols*, at 745-746; *Grutter*, at 325 (quoting *Nichols*). In *Hughes* v. *United States*, 584 U. S. __, 138 S. Ct. 1765, 1771-1772, 201 L. Ed. 2d 72, 79-80 (2018), *Marks* questions were expressly among those the Court granted certiorari to decide, and it still ducked them.

Amicus respectfully submits that it is not only useful for this Court "to pursue the *Marks* inquiry ... when it has ... baffled and divided the lower courts," it is *essential* to do so. This Court alone has the option to simply throw up its hands and decide the issue *de novo* whether there is a Supreme Court precedent or not. Every other court in the Nation faced with a federal question must determine whether there is a Supreme Court precedent on point and, if so, follow it. See *Cook* v. *Moffat*, 46 U. S. (5 How.) 295, 308 (1847); *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982) (*per curiam*).

Providing a uniform rule for other courts to follow is more than important; it is the principal reason this

Court was created in the first place. See J. Story, Commentaries on the Constitution of the United States § 827, pp. 589-590 (abridged ed. 1833) (reprint 1987). *Marks* is a meta-rule, a rule for determining what the rule is. Clearing up the confusion on an issue that arises so often in so many different areas of law is a matter of exceptional importance. The fact that such a question is difficult is not a reason to evade it.

The limited space allowed for petition-stage *amicus* briefs does not permit an explanation of our view of the correct answer here. The essence of the approach is given in our brief in *Grutter* v. *Bollinger*, *supra*, which is available at http://www.cjlf.org/program/briefs/Grutter.pdf. Whether this Court adopts our approach or another, it needs to adopt one.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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