No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

vs.

GLORIA JOHNSON AND JOHN LOGAN, on Behalf of Themselves and All Others Similarly Situated,

Respondents.

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 CERTIORARI

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QUESTION PRESENTED

Does the enforcement of generally applicable laws regulating camping on public property constitute "cruel and unusual punishment" prohibited by the Eighth Amendment?

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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. Counsel of record for all parties received notice of CJLF's intention to file at least 10 days prior to the due date of 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. 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 Grants Pass, Oregon, like many jurisdictions throughout the country, has ordinances that prohibit camping or sleeping on public property and related matters. Appendix to Petition for Writ of Certiorari 221a-224a ("App."). Three plaintiffs sued for declaratory and injunctive relief from enforcement of the ordinances, App. 208a, and class certification for a class of "involuntarily homeless" persons. The district court granted the certification, App. 220a, and subsequently granted a "complicated mix of relief." App. 24a. This included a declaration that enforcement of "the anti-sleeping and anti-camping ordinances against class members 'violates the Eighth Amendment'" and injunctions against enforcement of the anti-camping ordinance in most city parks, against enforcement of that ordinance in the daytime except upon 24 hours notice, and against enforcement of that ordinance at night entirely. App. 24a-25a.

A divided panel of the Ninth Circuit largely upheld the district court's ruling on the premise that the Ninth Circuit's decision in *Martin* v. *City of Boise*, 920 F. 3d 584 (CA9 2019)[2] was binding precedent. App.

2. *Martin* was originally published at 902 F. 3d 1031 (2018) and amended the following year. The panel opinion in the present case cites both versions.

14a-15a, n. 3. The panel majority did require the district court to narrow its injunction to "enjoin enforcement of those ordinances only against involuntarily homeless person for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available." App. 57a. "Involuntarily homeless" was defined as persons who "do not 'have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free.' See *Martin*, 920 F.3d at 617 n.8." App. 14a, n. 2.

The *Martin* definition of "involuntarily homeless" does not include any requirement that the person be taking any action within his or her ability to not be homeless, such as seeking employment or seeking treatment for any mental or addictive conditions that preclude employment. Judge Collins, in dissent, protested that the class certification effectively eliminated any individualized inquiry as to whether a particular person was "involuntarily homeless" even by *Martin*'s expansive definition. App. 79a-81a.

The Ninth Circuit denied rehearing en banc by a narrow vote over multiple strong dissents. See Petition for Writ of Certiorari 12-15 ("Pet.").

SUMMARY OF ARGUMENT

The decision in this case exacerbates a conflict between a United States Court of Appeals and the highest court of a state within the circuit. The two courts came to opposite conclusions on the extension of *Robinson* v. *California* to allegedly necessary acts and on the need for individual assessment of necessity. This kind of conflict presents a particularly strong case for resolution by this Court. It is bad enough when federal law means different things in different states

or circuits, but it is much worse when federal law means different things in different courts within the same state, issuing orders that affect the same people.

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 decisions 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 *Martin* v. *Boise* was copied from a leading reform. It avoided the old problem by focusing on conduct, not status. The Grants Pass ordinance similarly addresses only acts.

The disagreement in the opinions regarding rehearing en banc 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. The issue should not be evaded any longer.

ARGUMENT

I. This case exacerbates a conflict between the Court of Appeals and the highest court of a state within the circuit on an important issue.

This Court's rules recognize that an important factor in favor of granting a writ of certiorari exists when "a United States court of appeals ... has decided an important federal question in a way that conflicts with a decision by a state court of last resort." Supreme Court Rule 10(a). That situation exists here. See Pet. 17. The problem is particularly acute when the two courts have jurisdiction over the same territory, i.e., when the state is within the circuit. Federal district courts within California are bound to follow the precedents of the Ninth Circuit, while the state trial and intermediate appellate courts are bound to follow the precedents of the California Supreme Court. See *Auto Equity Sales, Inc.* v. *Superior Court*, 57 Cal. 2d 450, 455, 369 P. 2d 937, 940 (1962). Enforcement of the same law by the same officer under the same circumstances may be legal and a duty in one court and illegal and a constitutional violation in another court. The officers and the people of a state should not be subjected to such legal whipsawing.

The conflict was created when the Ninth Circuit decided *Martin* v. *City of Boise*, 920 F. 3d 584, 616-617 (CA9 2019), endorsing an Eighth Amendment theory rejected by the California Supreme Court in *Tobe* v. *City of Santa Ana*, 9 Cal. 4th 1069, 1104-1106, 892 P. 2d 1145, 1166-1167 (1995). The conflict between the two has intensified with the present decision's elimination of any individualized assessment of necessity beyond its expansive definition of being "involuntarily homeless." See App. 88a-89a, and n. 12 (Collins, J.,

dissenting); *id*., at 146a (M. Smith, J., dissenting from denial of rehearing en banc).

The California Supreme Court rejected the simplistic logic that would yield such an expansive rule. The court noted that despite the petitioners' declarations "it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations." *Tobe*, 9 Cal. 4th, at 1105, 892 P. 2d, at 1167. That is, in evaluating necessity and voluntariness on the part of one claiming a right to violate an otherwise valid law, courts must make an individual assessment. That assessment is not limited to available alternates at the instant but also to choices that the person made leading up to the claimed necessity.

Tobe is congruent with the necessity defense, which is not available to persons who are culpable in creating the emergency that they claim as an excuse. See *People* v. *Pepper*, 41 Cal. App. 4th 1029, 1035, 48 Cal. Rptr. 2d 877, 880 (1996); 2 W. LaFave, Substantive Criminal Law § 10.1(d)(6), pp. 177-178 (3d ed. 2018).

By no stretch of interpretation could *Powell* v. *Texas*, 392 U. S. 514 (1968), be extended to encompass a holding that the *Robinson* rule reaches the punishment of an act with no individual showing of necessity. The facts of that case were that Powell was convicted for an act, not a status, *id*., at 532-533 (plurality opinion), with no individual showing of necessity for the "in public" element of the offense. *Id*., at 553-554 (White, J., concurring in the result). On those facts, his *Robinson* claim was denied, and his conviction was affirmed. By claiming that the individual inquiry is built into the definition of the class, see App. 39a-41a, the panel majority effectively moves the burden on determining individual necessity to the officers

charged with enforcing the ordinance, with a possible contempt citation if they are mistaken. As Justice White in *Powell* and the *Tobe* court recognized, the burden of proof of necessity is on the defendant.

The importance of the issue is described in the certiorari petition at pages 30 to 35, the dissenting opinions cited there, and, we expect, in other *amicus* briefs filed concurrently with this one. Suffice it to say here that homelessness is a difficult, complex social problem that is not going to be solved by simplistic approaches or throwing money at the problem. See, e.g., Sandberg, San Francisco's "Housing First" Nightmare, City Journal (Apr. 28, 2022), https://www.city-journal.org/article/san-franciscos-housing-first-nightmare (all Internet materials as last visited September 20, 2023). The last thing cities need as they grapple with this problem is a legal straitjacket of the kind the Ninth Circuit has imposed.

II. The Eighth Amendment, properly understood, has no bearing on the substantive definition of crimes and defenses.

In *Kansas* v. *Carr*, 577 U. S. 108, 122 (2016), the defendants complained that they had been tried jointly rather than separately, an issue of criminal procedure. 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.'" *Id*., at 123. The constitutional claim, if they had one, came under due process. *Ibid*.

The same response is warranted here. The Eighth Amendment provides, "nor [shall] cruel and unusual

punishments [be] inflicted." Debates rage over the original understanding of "cruel" and "unusual." See, *e.g.*, *Bucklew* v. *Precythe*, 587 U. S. ___, 139 S. Ct. 1112, 1122-1124, 203 L. Ed. 2d 521, 531-534 (2019); 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. 131, 138-142 (2019). Whatever uncertainty there may be in those terms, though, the clause on its face unambiguously applies only to punishments, not the definition of crimes.

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 II-B, *infra*, at 12. 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 perjurer" Titus Oates was especially prominent. See *Harmelin* v. *Michigan*, 501 U. S. 957, 968-971 (1991); 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, at 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).[3] Considered as a whole, the California statutory system for drug abuse was "a comprehensive and enlightened

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

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 II-C, *infra*.

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). 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) (slip op., at 2-3) (Thomas, J., concurring in the judgment). 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, 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, 430 (2008) (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 15-17, but courts other than the Ninth Circuit have generally declined to extend *Robinson* in the manner advocated by the *Powell* dissent. See Pet. 16-24.

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. *City of 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, *supra*, 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). 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), struck down in *Martin* v. *City of Boise*, was largely a copy of this law. The law held unconstitutional in that case was 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 ordinances in the present case, App. 221a-224a, were drafted more recently, but they share the basic reform of addressing conduct rather than status.

The petition for certiorari explains why the Court of Appeals' decision is bad policy and harmful to our cities and their people, see Pet. 30-35, and we expect that other *amicus* briefs will expand on that point. The decision and the *Martin* decision are 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 are more than sufficient for this Court to take up this case for full review, but there is another reason concerning widespread confusion in the interpretation of this Court's precedents.

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

The Ninth Circuit in *Martin* v. *City of Boise*, 920 F. 3d 584, 616 (CA9 2019), 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. Remarkably, no authority is cited for this mode of interpreting a precedent of this Court with no majority opinion. The *Martin* panel appeared to be relying on the misapplication of *Marks* in the Ninth Circuit's earlier, vacated decision in *Jones* v. *City of Los Angeles*, 444 F. 3d 1118, 1135-1136 (CA9 2006), vacated as moot, 505 F. 3d 1006 (CA9 2007). The Ninth Circuit panel majority in the present case took *Martin* as given, App. 14a-15a, n. 3, and reiterated *Jones*'s dubious interpretation of the *Marks* rule as applied to *Powell*. App. 49a-50a.

The panel majority's treatment of *Martin* as binding was correct under the circuit's rules regarding panels and precedents, but it was also a situation that cried out for en banc review. App. 93a-94a (Collins, J., dissenting). Yet en banc review was denied over strong dissents. See Pet. 12-13. The Ninth Circuit's en banc review process failed to rein in a rogue panel decision, making review by this Court necessary when it need

not have been. This is not the first time, and regrettably it is not likely to be the last.

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, 201 L. Ed. 2d 72 (2018), *Marks* questions were expressly among those the Court granted certiorari to decide, yet it still decided that deciding them was "unnecessary." *Id*., 138 S. Ct., at 1772, 201 L. Ed. 2d, at 80. Most recently, the Court debated *Marks* questions in *Ramos* v. *Louisiana*, 590 U. S ___, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2020), but the Court was fractured over the rule for interpreting fractured opinions. See *id*., 140 S. Ct., at 1403-1404 (slip op., at 17-19) (plurality); *id*., at 1416-1417, n. 6 (slip op., at 11-12, n. 6) (Kavanaugh, J., concurring in part); *id*., at 1430-1431 (slip op., at 9-12) (Alito, J., dissenting).

Amicus respectfully submits that it is not only useful and necessary for this Court "to pursue the *Marks* inquiry ... when it has ... baffled and divided the lower courts," it is *essential* to do so. The reason why is the distinction between "horizontal" and "vertical" *stare decisis*. See *Ramos*, *supra*, 140 S. Ct., at 1416, n. 5 (slip op., at 10, n. 5) (Kavanaugh, J., concurring in part). 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 *ibid.*; *Cook* v. *Moffat*, 46 U. S. (5 How.) 295, 308 (1847); *Hutto* v. *Davis*, 454 U. S. 370, 375 (1982) (*per curiam*). This Court can simply cut the Gordian knot, but none of the others has a sword; they must untie the knot. With only vague and confusing guidance, they are doing so in markedly different ways. Compare *Jones* v. *City of Los Angeles*, 444 F. 3d, at 1135-1136, with *Planned Parenthood of Ind. & Ky.* v. *Box*, 991 F. 3d 740, 743-750 (CA7 2021), vacated and remanded on other grounds, 142 S. Ct. 2893, 213 L. Ed. 2d 1107 (2022).

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 https://www.cjlf.org/program/briefs/Grutter.pdf. Other approaches may be found in *Planned Parenthood of Ind. & Ky. v. Box*, 991 F. 3d, at 743-750, and in the three separate opinions in this Court in *Ramos*, discussed *supra*, at 16. Whether this Court adopts our approach or another, it needs to adopt one.

CONCLUSION

The petition for writ of certiorari should be granted.

September, 2023

Respectfully submitted,

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