No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
Petitioner,
vs.

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

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

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the enforcement of generally applicable laws regulating camping on public property constitutes "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 protect the interests of victims of crime and the law-abiding public in an effective system of justice that deters crime, appropriately punishes the perpetrators, and maintains public order.

The decision in this case gravely impairs the ability of local governments to maintain any semblance of public order. The resulting problems of sanitation, drug dealing, and crime degrade the quality of life and ultimately contribute to a downward spiral of society, leading to increasing disorder and crime. These results are contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Only a brief summary is needed to frame the issues in this brief. Five years ago, the Court of Appeals for the Ninth Circuit decided *Martin* v. *City of Boise*, 902 F. 3d 1031 (2018). The following year, the panel amended the opinion upon denial of rehearing and rehearing en banc. *Martin* v. *City of Boise*, 920 F. 3d 584 (CA9 2019). The majority of the divided panel held that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Id*., at 604. The panel

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

majority claimed to find the principle compelling this result from the combination of Justice White's concurrence in the result and the dissent in *Powell* v. *Texas*, 392 U. S. 514 (1968). See *id*., at 616-617. This Court denied certiorari. *City of Boise* v. *Martin*, 140 S. Ct. 674, 205 L. Ed. 2d 438 (2019).

In the present case, the panel majority extended *Martin* to civil citations which may lead to a criminal violation upon repeat violations. The district court certified a class of "involuntarily homeless" persons with involuntariness defined solely on the present ability to afford shelter or access free shelter. *Johnson* v. *City of Grants Pass*, 50 F. 4th 787, 792, n. 2 (CA9 2022). There is no requirement that the person be making best efforts to become employed or to accept treatment for any mental or addictive conditions that preclude employability. The panel found the case "governed in large part by *Martin*" and "mostly affirmed" the district court's decision. *Id*., at 798.

Judge Collins dissented from the panel decision. Judges O'Scannlain, Wallace, Callahan, Bea, Ikuta, Bennett, R. Nelson, Bade, Collins, Lee, Bress, Forrest, Bumatay, VanDyke, and M. Smith dissented from denial of rehearing en banc. App. to Pet. for Cert. 5a, 7a. This Court granted certiorari on January 12, 2024.

SUMMARY OF ARGUMENT

The decision in this case and *Martin* v. *City of Boise* rest on the theory that *Powell* v. *Texas* extended the precedent of *Robinson* v. *California* to prevent a government from punishing an act if the defendant lacked the capacity to refrain from committing it. That theory is unsupportable.

Robinson v. *California* has no basis in the Eighth Amendment as it was understood at the time of its adoption. Fidelity to the original meaning of the Constitution is not merely a philosophy or one method of several modes of interpretation. It goes to the heart of the legitimacy of judicial review of statutes. Striking down a state statute or local ordinance that is consistent with the constitutional provision as originally understood is a violation of the people's right of self-government and of the Tenth Amendment. While this alone does not require *Robinson* to be overruled in this case, it should not be extended.

Powell v. *Texas* does not control the outcome of this case. Decisions without an opinion of the Court are precedents, even those with no opinion at all, but the scope of those precedents is limited. The rule of *Marks* v. *United States* provides a rule for cases with no majority where one opinion states a rule governing a set of cases including the decided case which a majority agree should be decided the same. *Marks* does not, however, authorize creating a rule by combining concurring and dissenting opinions regarding cases materially different from the case decided. Where no opinion can be classified as "narrowest" in the sense of *Marks*, the precedent is found more from the result than from abstract and possibly conflicting rules stated in the various opinions. *Powell* thus set a precedent only for situations where the law has an *actus reas* requirement and the defendant had the capacity to refrain from at least one element. For other situations, *Powell* sets no precedent.

A plurality opinion becomes a precedent, however, when it is accepted by a subsequent opinion of the Court. The Court accepted the *Powell* plurality as authoritative in *Kahler* v. *Kansas*, and that opinion, not the concurrence, is now established law.

The Eighth Amendment has no application to this case.

ARGUMENT

I. *Robinson* has no basis in the Eighth Amendment and should not be extended.

The Court of Appeals' decision in the present case rests on *Martin* v. *City of Boise*, 920 F. 3d 584 (CA9 2019). *Martin* rests on an extrapolation from *Robinson* v. *California*, 370 U. S. 660 (1962), which it found to be "compelled" by the splintered decision in *Powell* v. *Texas*, 392 U. S. 514 (1968). *Martin*, 920 F. 3d, at 616-617. If this extrapolation is neither compelled by *Powell* nor appropriate for the Court to make in this case, the basis of the Court of Appeals' decision collapses. In this part, *amicus* CJLF will explain why *Robinson*'s departure from the real Eighth Amendment should not be extended, even by a fraction of an inch. In Part II, *amicus* will explain why *Powell* did not set a precedent extending *Robinson*.[2]

A. Original Understanding and the Eighth Amendment.

The simplest question in this case is whether the decisions in *Martin* and the present case conform to the "[c]onstitutional text, history, and tradition" of the Eighth Amendment. See App. to Pet. for Cert. 123a-124a (O'Scannlain, J., dissenting from denial of rehear-

2. The Ninth Circuit's rule is also bad policy, and it hinders rather than helps local governments struggling to deal with the intractable problems that underlie homelessness. We expect these issues to be thoroughly covered in other briefs and do not address them here. See also Larkin, Camping and the Constitution, Geo. J.L. & Pub. Pol'y (forthcoming), https://ssrn.com/abstract=4686429 (Jan. 24, 2024 draft, at 15-27).

ing en banc). They do not. See Brief for the Criminal Justice Legal Foundation as *Amicus Curiae* in Support of the Petition for Certiorari 8-10; Brief for Petitioner 16-24, 38-40; Larkin, *supra*, at 5-8. The question is not even seriously debatable. Plaintiffs made no attempt at the certiorari stage to defend the decisions on an original understanding basis. Their discussion of the Eighth Amendment issue begins with *Robinson* in 1962 and says not a word about anything earlier or any authority discussing the original understanding. See Brief in Opposition 21-24.

The panel decision in this case dismissed the issue in a footnote by relying on the binding precedential effect of *Marti*n. See App. to Pet. for Cert. 18a, n. 5. Of course, *Martin* is not binding on the en banc Ninth Circuit or this Court. The joint opinion of Judges Gould and Silver defending denial of rehearing en banc tries to avoid the issue with the curious claim that the historical record must be presented to the district court first. See App. to Pet. for Cert. 105a-106a. While both parties must have the chance to brief an issue, to be sure, this opinion cites no authority for the remarkable propositions that appellate courts cannot examine history for themselves and that trial court fact-finding is required. The opinion then asserts that original understanding[3] is "beside the point" because this Court "has made clear 'text, history, and tradition' is not the correct method when assessing Eighth Amendment claims." *Id*., at 106a.

The latter assertion tees up two questions. First, whether the Eighth Amendment is exempt from the method that this Court has applied to other constitu-

3. While "original understanding" and "text, history, and tradition" may not be entirely synonymous, any difference is immaterial for the purpose of this case. *Robinson* is indefensible under either formulation.

tional provisions in recent years. Second, if not, how to deal with precedents that are clearly contrary to the original understanding.

In *Crawford* v. *Washington*, 541 U. S. 36 (2004), this Court jettisoned the standard that had governed Confrontation Clause issues for nearly a quarter century. See *id*., at 75 (Rehnquist, J., concurring in the judgment). The basis for doing so was that the precedent was contrary to the original understanding of that clause. *Id*., at 60-62. The *Crawford* Court did not say that the correctness of that mode of interpreting the Constitution depends on which provision is being interpreted. No reason for such a distinction is apparent. In the years since, the Court has applied this principle to other provisions of the Constitution. See *Alleyne* v. *United States*, 570 U. S. 99, 103 (2013) (Sixth Amendment Jury Clause, trial on mandatory minimum,"original meaning"); *Ramos* v. *Louisiana*, 590 U. S. ___, 140 S. Ct. 1390, 1395, 206 L. Ed. 2d 583, 589 (2020) (slip op., at 4) ("what the term 'trial by an impartial jury ...' meant at the time of the Sixth Amendment's adoption"); *N. Y. State Rifle & Pistol Ass'n* v. *Bruen*, 597 U. S. 1, 34 (2022) (*Bruen*)[4] (Second Amendment); *Jones* v. *Hendrix*, 599 U. S. 465, 482-483 (2023) (Suspension Clause, scope of writ of habeas corpus "when the Constitution was drafted and ratified").

Bruen explicitly states that the principle applies across the board. " 'Constitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.' " 597 U. S., at 34 (quoting *District of Columbia* v. *Heller*, 554 U. S. 570, 634-635 (2008))

4. Cases later than 584 U. S. (2018) are cited to the Reporter's page proofs as posted on the Court's website as of February 27, 2024, when available. The content and pagination may be different when the case is published.

(emphasis added by *Bruen*). This is not a matter of mere philosophy or a debate as to which mode of interpretation is preferable. This is a fundamental matter of principle. It goes to the heart of the legitimacy of judicial review of statutes.

The people have the right to structure their government as they see fit, delegating powers and setting limits on those powers. See *Marbury* v. *Madison*, 5 U. S. (1 Cranch) 137, 176 (1803). The structure is "designed to be permanent," *ibid*., at least until the people choose to amend or replace it. The Constitution is "unchangeable by ordinary means," *id*., at 177, i.e., means other than a constitutional amendment or a new constitution. That is why a statute contrary to the Constitution is void, and that is the sole legitimate basis for a court to declare a statute void. See *ibid*.

In the case of state legislation, the Tenth Amendment makes it explicit. If a power has neither been delegated to the federal government nor prohibited to the States by the Constitution, then the States or the people still have it. U. S. Const., Amdt. 10. The States may, of course, delegate some legislative authority to local governments. When a court strikes down a state statute or local ordinance that the Constitution, as understood at the time of the adoption of its various provisions, did not disable States from enacting, the court is *violating* the Constitution, not upholding it. In such a decision, the court is violating the people's right of self-government and violating the Tenth Amendment.

In defense of this violation of the right of self-government, Judges Gould and Silver trot out the old warhorse from Chief Justice Warren's plurality opinion in *Trop* v. *Dulles*, 356 U. S. 86, 101 (1958): "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of

a maturing society." See App. to Pet. for Cert. 106a. This rhetorical flourish, in isolation, is often invoked by those who wish to vest courts with a roving commission to strike down punishments they disagree with and even, as in this case, strike down substantive laws. In context, though, it is nowhere near so broad. The paragraph in which that sentence appears notes that "traditional penalties," including execution, may be imposed but warns of going outside the traditional bounds. See *id*., at 100.

A better citation for the point would have been *Miller* v. *Alabama*, 567 U. S. 460, 469-470 (2012). In that case, the Court itself quoted the *Trop* statement out of context and noted the lack of attention to history in the Court's Eighth Amendment cases. That was an accurate statement of what the Court had actually done in capital cases and juvenile murderer cases from *Furman* v. *Georgia*, 408 U. S. 238 (1972), to and including *Miller*. *Miller* made no case, however, that the Court's four decade departure from the inconvenient constraint of respecting the people's right of self-government was legitimate. See generally Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L. 131 (2019).

More recently, however, we have seen an indication that text and history may become more important in the Court's interpretation of the Eighth Amendment. In *Bucklew* v. *Precythe*, 587 U. S. ___, 139 S. Ct. 1112, 1122, 203 L. Ed. 2d 521, 531-532 (2019) (slip op., at 8), an extended examination of "the original and historical understanding of the Eighth Amendment" was the first order of business in evaluating the issue. That understanding was dispositive. "Mr. Bucklew's argument fails for another independent reason: It is inconsistent with the original and historical understanding of the Eighth

Amendment on which *Baze* and *Glossip* rest." *Id*., 139 S. Ct., at 1126, 203 L. Ed. 2d, at 536 (slip op., at 16). Since *Bucklew*, other decisions have noted the split between earlier Eighth Amendment cases and the originalist view but have not found it necessary to resolve it. See *United States* v. *Briggs*, 592 U. S. ___, 141 S. Ct. 467, 473, 208 L. Ed. 2d 318, 325-326 (2020) (slip op., at 8-9); *United States* v. *Tsarnaev*, 595 U. S. 302, 318, n. 2 (2022).

Neither *Trop* nor *Miller* nor the large body of non-originalist Eighth Amendment cases precludes the use of "text, history, and tradition" or "original understanding" for the interpretation of the Eighth Amendment in this case. This approach is a matter of principle and a matter of legitimacy. The Court applied it fairly recently in *Bucklew*. The Eighth Amendment precedents in this case should be viewed through the lens of the original understanding. That does not automatically call for overruling precedents contrary to the original understanding, as we will discuss below, but it calls for restraint against any further inroads on the people's right of self-government.

B. Respecting v. Extending Precedents.

On many occasions, a litigant has called for the logic of a precedent to be extended to new territory, but the Court has had doubts about the precedent itself. Those doubts may be sufficient for the Court to decline the extension, even while not overruling the precedent. For example, as the emphasis in Fourth Amendment cases was shifting from physical trespass to protection of privacy, the Court declined to extend a "trespass" precedent. "We find no occasion to re-examine *Goldman* [v. *United States*, 316 U. S. 129 (1942)] here, but we decline to go beyond it, by even a fraction of an inch." *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

Goldman was eventually overruled in *Katz* v. *United States*, 389 U. S. 347, 353 (1967).

As another example, *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was a hotly disputed decision from the day it was rendered. In *Dickerson* v. *United States*, 530 U. S. 428, 443-444 (2000), the Court declined to overrule *Miranda* based solely on *stare decisis* considerations. Conspicuously absent was any affirmation that the decision correctly reflected the original meaning of the Fifth Amendment. Yet the Court has declined to extend *Miranda* on several occasions, both before and since *Dickerson*. See, e.g., *Moran* v. *Burbine*, 475 U. S. 412, 424 (1986) (attorney seeking to contact suspect in custody); *Vega* v. *Tekoh*, 597 U. S. 134, 152 (2022) (civil § 1983 suit).

The decision to overrule a precedent involves many considerations. See *Dobbs* v. *Jackson Women's Health Organization*, 597 U. S. 215, 266-268 (2022). Reliance and the extent to which a precedent has become embedded in established practice are among the most important factors. See *id*., at 268; *Dickerson*, 530 U. S., at 443. A decision not to extend a precedent is less weighty. No one has a legitimate reliance interest in a mere expectation that a precedent might be extended to new territory.

There is no need to consider overruling *Robinson* in this case, and the occasion may never arise. There is no discernable effort to enact pure "status" offenses with no *actus reus*, like the statute in *Robinson*. If such a law is enacted, it may be time to justify the same result under a different and more appropriate provision of the Constitution. See, e.g., 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, 432 (2008). For now, it is enough to limit *Robinson*'s

aberrant application of the Eighth Amendment to that type of statute. See *Powell* v. *Texas*, 392 U. S. 514, 533 (1968) (plurality opinion). *Robinson*'s Eighth Amendment holding ought not be extended "by even a fraction of an inch."

II. *Powell* v. *Texas* sets no precedent supporting the Court of Appeals' decision.

A. Precedents, Results, and Material Facts.

Given that *Robinson* v. *California*, on its face, applies only to laws that punish status as such, the key question is whether *Powell* v. *Texas*, 392 U. S. 514 (1968), established a precedent that supports the plaintiffs' position in this case. This question requires an examination into the nature of precedent, particularly in cases that do not produce a single reasoned explanation of the Court's judgment joined by a majority of the Court concurring in that judgment.

The essence of precedent is that a new case which is like a previously decided case should be decided the same way. "A solemn decision upon a point of law, arising in any given case, becomes an authority in a like case ...." 1 J. Kent, Commentaries on American Law *475 (8th ed. 1854). That is the easy part. The hard part is deciding which cases are alike and which are different in important aspects, given the infinite variations in the complete facts of real cases. See D. Chamberlain, The Doctrine of Stare Decisis: Its Reasons and Extent 11-15 (N. Y. St. Bar Assn. 1885); Schauer, Precedent, 39 Stan. L. Rev. 571, 577 (1987). A useful discussion for this purpose can be found in a classic law review article by Cambridge Professor Arthur L. Goodhart, Determining the Ratio Decidendi of a Case, 40 Yale L. J. 161 (1930). Goodhart examined and rejected the propositions that the *ratio decidendi* can be found in either the abstract

statement of the rule in the opinion or in the unexplained facts of the case itself. Instead, the precedent consists of the material facts of the case and the result based on them. The rule is that any case with the same material facts must yield the same result. Cases which differ in their material facts are not controlled by the precedent. The critical question is which facts are material. "It is by his choice of the material facts that the judge creates law." Goodhart, *supra*, at 169.

Goodhart's thesis need not be accepted as a universal definition of precedent to be considered here. It is useful in distilling the precedent set by a multi-judge court in the absence of a majority opinion, with the added element that it is the material facts that caused a majority to reach the result that matter. Bearing this in mind, we examine several variations on the no-majority opinion theme with this Court's statements about their precedential effect.

The simplest case is the affirmance by an equally divided court. Given that a majority has not agreed on a result, we would not expect any precedent to be set, and that is indeed the rule. See *Neil* v. *Biggers*, 409 U. S. 188, 192 (1972).

A precedent *is* set, however, when a decision is affirmed summarily without an opinion or when an appeal from a state court is dismissed for lack of a substantial federal question without an opinion. Such dispositions were common before 1988, when many decisions on the constitutionality of statutes were included in this Court's mandatory appellate docket. See S. Shapiro et al., Supreme Court Practice § 2.1, p. 2-6, n. 13 (11th ed. 2019). Despite the absence of any explanation whatever, the result was a precedent, and it was binding on all lower courts. *Hicks* v. *Miranda*, 422 U. S. 332, 343-345 (1975). The precedent is limited to "the precise issues presented and necessarily decided

by those actions," *Mandel* v. *Bradley*, 432 U. S. 173, 176 (1977), which may be difficult to determine. *Ibid*. "The precedential significance of [a] summary action ... is to be assessed in the light of all the facts," however, and if material facts of a later case are different, the earlier summary decision is not binding precedent. *Id*., at 177.

For this reason, any assertion that a fractured decision with no coherent rationale sets no precedent at all cannot be sustained. A conflict in reasoning of the judges concurring in the result cannot logically produce a lesser precedent than one with no reasoning at all. Thus *Apodaca* v. *Oregon,* 406 U. S. 404 (1972), was consistently treated as a precedent by this Court and other courts for nearly half a century. See *Edwards* v. *Vannoy*, 593 U. S. 255, 265-266 (2021). With no difference in material facts, deciding the *Ramos* case differently required a finding that the criteria for overruling had been met. See *Ramos* v. *Louisiana*, 590 U. S. ___, 140 S. Ct. 1390, 1416-1417, n. 6, 206 L. Ed. 2d 583, 613, n. 6 (2020) (slip op., at 11-12) (Kavanaugh, J., concurring in part).

The material facts of *Powell* v. *Texas*, *supra*, that caused a majority to reject the Eighth Amendment claim were that (1) the statute in question punished an act, not a status, see *Powell*, 392 U. S., at 533-534 (plurality); *id*., at 541-542 (Black, J., concurring), and (2) there was no proof that Powell had any compulsion to be in public while drunk. *Id*., at 549-550 (White, J., concurring in the result). The precedent established by the result would therefore require the same result when similar statutes were similarly applied.

Justice White also expressed an opinion that a different statute applied to different facts would be unconstitutional if it punished drug use alone by an addict who could not resist. See *Powell*, 392 U. S., at 548-549. That would be consistent with the view of the

four dissenting Justices. See *id*., at 558-559.[5] That hypothetical, however, was not the case before the court. If those facts arose in a future case, it would be a distinguishable case. As in *Mandel* v. *Bradley*, 432 U. S., at 176-177, a court presented with such a case would not be constrained in its decision by the precedent set by the result in *Powell*.

B. The Marks Rule and the Irrelevance of Dissents.

A constraint requiring decision for the plaintiffs in this case could flow from *Powell* only if a statement in a concurring opinion could combine with a statement in a dissenting opinion to set a precedent that would control in a case with facts materially different from the case actually decided. See *Martin* v. *City of Boise*, 920 F. 3d, at 616. That kind of rulemaking sounds more like legislation than setting precedents. The judicial power is the power to decide cases, see U. S. Const., art. III, § 2, and rules are announced in the course of explaining why a court reaches the result it does in the case before it.

In *Marks* v. *United States*, 430 U. S. 188 (1977), this Court created a precedent about precedent for interpreting cases with no majority opinion. Somewhat ironically, the test was taken from an opinion that was

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5. Even assuming that a necessity defense is required under some provision of the Constitution, none has been made in this case. Plaintiff Gloria Johnson said that her Social Security check was insufficient to obtain housing, yet she has not applied for the program enacted to address this very problem, Supplemental Security Income (SSI). See J. A. 1, 14. Plaintiff Debra Blake stated that she lost her job ten years ago, J. A. 180, but said nothing about why she has been unable to find new employment or any efforts she has made. See *Tobe* v. *City of Santa Ana*, 9 Cal. 4th 1069, 1088, and n. 8, 1104, and n. 19, 892 P. 2d 1145, 1155, and n. 8, 1166, and n. 19 (1995) (no need to address necessity as no case made).

itself not a majority, the lead opinion in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), the year before. In no uncertain terms, the *Marks*/*Gregg* rule excludes dissents from the calculus. "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members *who concurred in the judgments* on the narrowest grounds….' " *Marks*, at 193, quoting *Gregg*, at 169, n. 15 (emphasis added).

The operation and the limitations of the *Marks* method may be seen in these two cases, the precedents they interpreted, and the preexisting state of the law in each. *Gregg* involved capital punishment. In 1971, this Court rejected the argument that the unfettered discretion statutes in effect throughout the country at the time were "offensive to anything in the Constitution." *McGautha* v. *California*, 402 U. S. 183, 207 (1971). The constitutionality of capital punishment *per se* had been declared beyond doubt earlier in *Trop* v. *Dulles*, 356 U. S. 86, 99-100 (1958) (plurality opinion). Yet the following year nearly all of the death penalty statutes in the country were struck down in a case with five individual opinions, *Furman* v. *Georgia*, 408 U. S. 238 (1972).[6] Seeking order from the chaos, the lead opinion in *Gregg* found the holding of the case in the positions of Justices Stewart and White, "who concurred in the judgment on the narrowest grounds." *Gregg*, 430 U. S., at 169, n. 15.

These positions were narrowest in the sense that they defined a set of statutes which a majority of the Court agreed were unconstitutional—those imposing a

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6. For more on this history, see Scheidegger, Tinkering with the Machinery of Death: Lessons from a Failure of Judicial Activism, 17 Ohio St. J. Crim. L., at 133-138, 142-151.

sentence of death at the discretion of the jury with no limits or guidance. See *Gregg*, 430 U. S., at 188-189, and n. 36. That is undeniably a narrower rule and a smaller departure from preexisting law than the position that all death penalty statutes are unconstitutional, the position of Justices Brennan and Marshall, but it produces the same result as to statutes within its set. *Furman* did not create any precedent regarding statutes outside that set, i.e., mandatory or guided discretion statutes. Those issues had to be decided by *Gregg* and its companion cases.

Marks is similar. *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), appeared to take a broader view of the First Amendment protection of pornography than the preexisting precedent of *Roth* v. *United States*, 354 U. S. 476 (1957). But did *Memoirs* establish a precedent protecting defendants from retroactive application of a subsequent contraction, and if so how broad was that umbrella? See *Marks*, 430 U. S., at 192-193. The *Memoirs* plurality view was that pornography was protected unless it was "utterly without redeeming social value" while two concurring justices believed there were no limits at all. See *id*., at 191, 193. Again, the "narrower grounds" opinion defined a subset of cases on which a majority agreed.

The cases where the *Marks* rule is difficult to apply are those that do not follow this pattern. The plurality and the concurrence state rules that have implications beyond the case before the Court on which there is not an agreement of a majority of the Court that also concurs in the result of the case being decided. The dust-up in *Ramos* v. *Louisiana* arose from a similar situation. The plurality opinion in *Apodaca* v. *Oregon*, 406 U. S. 404, 410 (1972), implies that Congress could authorize less-than-unanimous juries in federal criminal cases, while Justice Powell's concurrence in the result,

expressed in a companion case, would have resurrected the view that the incorporated provisions of the Bill of Rights apply differently in state and federal courts. See *Johnson* v. *Louisiana*, 406 U. S. 356, 369-373 (1972); *Ramos* v. *Louisiana*, 140 S. Ct., at 1398, 206 L. Ed. 2d, at 592-593 (slip op., at 8-9). Accepting either of these views in their entirety would have disrupted established law in areas beyond the question actually presented in *Apodaca*.

Edwards v. *Vannoy*, 593 U. S. 255, 261 (2021), cites *Timbs* v. *Indiana*, 586 U. S. ___, ___, n. 1, 139 S. Ct. 682, 687, n. 1, 203 L. Ed. 2d 11, 16, n. 1 (2019) (slip op., at 3), and *McDonald* v. *Chicago*, 561 U. S. 742, 766, n. 14 (2010), as viewing Justice Powell's opinion as controlling. However, both of those footnotes clearly refer only to the holding on the specific issue of jury unanimity and reject any application of the opinion's partial incorporation theory beyond that issue. The opinion was "controlling" only in the result in that case, not beyond it to distinguishable cases.

Where the *Marks* shoe does not fit, it may be best to treat the case as one where no opinion fully explains the result and apply the rule for cases with no opinion at all, i.e., the summary dispositions discussed in Part II-A, *supra*. When the Court is divided that badly, it is better to cast relatively little in the concrete of precedent and leave broader questions for a later day when the Court can give a coherent answer.

Apodaca necessarily decided that a 10-2 or 11-1 jury in a state criminal case was constitutional, and that remained the law until *Ramos* overruled it. See *Edwards* v. *Vannoy*, 553 U. S., at 265-266. *Powell* v. *Texas* necessarily decided that a drunk-in-public law can be enforced against one who has made no showing he was compelled to be in public while intoxicated, and that is all it holds. *Powell* did not, by its own force, set a

precedent that applies to the present, distinguishable case, just as the summary decision at issue did not set a controlling precedent in *Bradley*. See *supra*, at 13. However, *Powell* itself is not the last word, and we now turn to that point.

C. Pluralities Accepted by a Subsequent Majority.

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the plurality opinion is not the narrowest of the opinions concurring in the judgment. Justice Blackmun's opinion would have limited the constitutional requirement to the specific mitigating circumstance in the case, "the degree of the defendant's participation in the acts leading to the homicide and the character of the defendant's *mens rea*." *Id*., at 616. Yet this Court has never applied the *Marks* rule to *Lockett*, and the plurality opinion remains the law to this day. See, e.g., *United States* v. *Tsarnaev*, 595 U. S. 302, 318-320 (2022) (distinguishing but not questioning *Lockett*).[7]

Similarly, in *Teague* v. *Lane*, 489 U. S. 288 (1989), it is not at all clear that the plurality opinion is on the narrowest grounds. Justice Stevens did not agree with the modification to Justice Harlan's proposed rule, particularly as applied to capital cases. See *id*., at 321-322 (opinion concurring in part and concurring in the judgment). Yet this Court has never applied *Marks* to *Teague*, and the *Teague* rule as stated in the plurality opinion is established law today, except for a minor modification in *Edwards* v. *Vannoy*, 595 U. S. 255, 272 (2021).

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7. This is despite the opinion's lack of any genuine constitutional basis, see *id*., at 318, n. 2, and the decades-long chaos this line of cases has generated. See *Abdul-Kabir* v. *Quarterman*, 550 U. S. 233, 265-267 (2007) (Roberts, C.J., dissenting).

In these two cases, a subsequent opinion of the Court embraced the earlier plurality opinion without discussion of *Marks* or even mention of the narrower concurrence. *Eddings* v. *Oklahoma*, 455 U. S. 104, 110-112 (1982); *Penry* v. *Lynaugh*, 492 U. S. 302, 313-314 (1989). There is nothing improper in this. Under the view of *Marks* explained in Part II-B, *supra*, the narrow rule is precedent only within the scope of majority agreement. In a case that falls outside that scope, including a different kind of mitigation in *Eddings* and a capital case in *Penry*, there is no binding precedent, and the Court is free to choose the broader view, as in these two cases, or the narrower view, as in *Gregg* v. *Georgia*. See *supra*, at 15, 16.

We can infer from the subsequent, unqualified reliance on the plurality opinions in *Lockett* and *Teague* that once an opinion of the Court has fully embraced such an opinion, the plurality limitation is removed. That is also the case with *Powell* v. *Texas*.

In *Kahler* v. *Kansas*, 589 U. S. ___, 140 S. Ct. 1021, 1027, 206 L. Ed. 2d 312, 321 (2020) (slip op., at 6), the Court was once again confronted with a claim that a State had violated the Constitution by imposing criminal liability in circumstances where it was beyond the defendant's capacity to conform, i.e. "moral incapacity." In rejecting this claim, the opinion of the Court quoted and followed the discussion in *Powell* v. *Texas* regarding the authority of the States to resolve the difficult questions of criminal responsibility. "Within broad limits, *Powell* thus concluded, 'doctrine[s] of criminal responsibility' must remain 'the province of the States.' " *Id*., 140 S. Ct., at 1028, 206 L. Ed. 2d, at 322 (slip op., at 7).

Even though Kahler had claimed a different constitutional provision for federalization of "doctrines of criminal responsibility," the Court did not seem to

consider that significant. *Kahler* endorsed the *Powell* plurality's view on where the federal/state line is drawn. That eliminates any claim that any other opinion in *Powell* retains precedential force to the contrary. *Martin* erred in deciding to the contrary, and the Court of Appeals in this case erred in following *Martin*.

There is no precedent that requires extending the Eighth Amendment to govern this case. Making such an extension as a new rule in this case has no justification in the text or history of the Eighth Amendment. See *supra*, at 4.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

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Respectfully submitted,

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