No. 23-175

In the Supreme Court of the United States

CITY OF GRANTS PASS, PETITIONER

v.

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

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PROFESSORS PETER W. LOW AND JOEL S. JOHNSON AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

PETER W. LOW
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.,
Charlottesville, VA 22903

JOEL S. JOHNSON
Counsel of Record
PEPPERDINE UNIVERSITY
CARUSO SCHOOL OF LAW
24255 E. Pacific Coast Hwy,
Malibu, CA 90263
310-506-7531
Joel.Johnson@pepperdine.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Constitution:

Miscellaneous:

Page

Miscellaneous—continued:

In the Supreme Court of the United States

No. 23-175

CITY OF GRANTS PASS, PETITIONER

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF PROFESSORS PETER W. LOW AND JOEL S. JOHNSON AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

INTEREST OF AMICI CURIAE

Peter W. Low is the Hardy Cross Dillard Professor of Law Emeritus at the University of Virginia School of Law. Joel S. Johnson is an Associate Professor of Law at the Pepperdine Caruso School of Law. The interest of amici curiae is the sound development of constitutional criminal law. This brief draws on their article, Peter W. Low & Joel S. Johnson, *Changing the Vocabulary of the Vagueness Doctrine*, 101 Va. L. Rev. 2051 (2015) (Low & Johnson).[1]

[1] No counsel for a party authored any part of this brief. Nor did anyone, other than counsel of record and his academic institution, financially contribute to preparing or submitting this brief. The brief reflects only the views of amici, not those of their academic institutions.

SUMMARY OF ARGUMENT

In resolving the question presented in this case, this Court should affirm the constitutional requirement that all crime must be based on conduct. But in doing so, the Court should clarify that the conduct requirement—a limit on state power to define the rules of criminal liability—is properly rooted as a principle of due process, rather than one of cruel and unusual punishment. The conduct requirement is a sound and important constitutional limitation on legislative crime creation, but it has always been a poor fit for cruel-and-unusual-punishment doctrine, which is otherwise focused on methods and proportionality of punishment. The requirement is more defensible as a due process principle that undergirds this Court's void-for-vagueness doctrine.

ARGUMENT

THE CONSTITUTIONAL REQUIREMENT THAT ALL CRIME MUST BE BASED ON CONDUCT SHOULD BE UNDERSTOOD AS A DUE PROCESS PRINCIPLE

This Court's decision in *Robinson* v. *California*, 370 U.S. 660 (1962), stands for the proposition that it is unconstitutional to convict for a crime where no conduct of any kind is involved, with the result that criminal liability may not be imposed on the basis of mere status. *Id.* at 667. This conduct requirement is embedded in both prior and subsequent decisions by this Court, and properly so, as a constitutional limit on state power to define the rules of criminal liability.

Curiously, however, the *Robinson* Court grounded the conduct requirement in the Eighth Amendment's ban on "cruel and unusual punishment," U.S. Const. Amend. VIII; see 370 U.S. at 667, a basis with which

the requirement has always had an uneasy relationship. The parties in *Robinson* barely mentioned the Eighth Amendment in their briefs, see pp. 5-6, *infra*, and the *Robinson* majority's approach was arguably motivated by an over-aversion to producing a holding that resembled substantive due process, see *id.* at 689 (White, J., dissenting) (suggesting that the majority's "allergy" to substantive due process led to its "novel" Eighth Amendment rationale); Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1071 (1964) (suggesting that the *Robinson* majority turned to the Eighth Amendment "[i]n search for euphemism" while seeking to avoid the language of substantive due process).

Yet the conduct requirement has an independent and more defensible constitutional basis. Indeed, some of this Court's due process decisions finding statutes void for vagueness—from both before and after *Robinson*—are best understood as applications of the conduct requirement. See Low & Johnson 2080-84.

The question presented in this case relates to the scope of the conduct requirement. Regardless of how the Court answers that question, it should use this opportunity to affirm the conduct requirement while making clear that it is properly understood as a due process principle. Clarifying the conduct requirement's place in constitutional law would provide lower courts with helpful guidance, reducing the risk in future cases of unwarranted cruel-and-unusual-punishment analysis disconnected from the methods or proportionality of punishment.

A. The Eighth Amendment Is A Poor Basis For The Conduct Requirement

1. a. *Robinson* concerned a conviction under a California statute providing that "[n]o person shall * * * be addicted to the use of narcotics." 370 U.S. at 660 n.1. The Court found the statute unconstitutional because it permitted punishment for the status of being an addict, famously adding that "[e]ven one day in prison would be" unconstitutional "for the 'crime' of having a common cold." *Id.* at 667. The Court rooted that constitutional holding in the Cruel and Unusual Punishment Clause. *Ibid.*

b. Justice Harlan concurred, but not on an Eighth Amendment ground. *Robinson*, 370 U.S. at 678-79. He seemed to view the issue in substantive due process terms, concluding that criminalizing "addiction alone"—*i.e.*, "a compelling propensity to use narcotics"—would amount to an "arbitrary imposition" of State power by effectively imposing "criminal punishment" on the basis of "a bare desire to commit a criminal act." *Id.* at 679 (Harlan, J., concurring).

c. Justice White dissented, based on a disagreement with the majority about the facts in the record. *Robinson*, 370 U.S. at 685-89. But he also expressed concern that the majority's Eighth Amendment rationale "bristle[d] with indications of further consequences." *Id.* at 688 (White, J., dissenting). "If it is 'cruel and unusual punishment' to convict [Robinson] for addiction," he explained, "it is difficult to understand why it would be any less offensive * * * to convict him for use on the same evidence of use which proved he was an addict." *Id.* at 688-89 (White, J., dissenting). Justice White went on to suggest that the majority's "novel" application of the Eighth Amend-

ment flowed from its "allergy" to substantive due process, *id.* at 689 (White, J., dissenting); see Low & Johnson 2064 n.43 (characterizing Justice White's dissent as "accus[ing] the [majority] of disguising a substantive due process holding in cruel and unusual punishment clothing").

2. The *Robinson* majority's Eighth Amendment rationale was far from inevitable based on the way the case had been litigated and in light of pre-existing cruel-and-unusual-punishment doctrine.

a. Robinson's opening brief was not a model of clarity or focus: it argued that the statute violated the Fourteenth Amendment for *eight* distinct reasons. See Appellant Br. 10-31, *Robinson*, 370 U.S. 660 (No. 554) (arguing that the statute was unconstitutional because it punished mere status, punished involuntary status, punished a condition of mental and physical illness, was vague, violated double jeopardy, infringed upon freedom of movement, constituted an ex post facto law, and imposed cruel and unusual punishment); see also *id.* at 32-45 (raising additional Fourth Amendment and procedural arguments). The cruel-and-unusual-punishment argument—the last of these eight arguments—did not appear until page 29 and accounted for only two-and-half pages of a lengthy and wandering brief. See *id.* at 29-31; see also Low & Johnson 2062 n.36 (observing that the brief "consisted of forty pages of rambling statements").[2]

---

[2] Robinson's lawyer had previously represented Lambert in *Lambert* v. *California*, 355 U.S. 225 (1957). In that case, "[h]e made such a mess of his brief" that "the Court ordered reargument and appointed an amicus to present argument on behalf of Lambert." Low & Johnson 2062 n.36 (citing Peter W. Low & Benjamin Charles Wood, Lambert *Revisited*, 100 Va. L. Rev.

The State seemed to view the Eighth Amendment argument as a throwaway, rebutting it in a single paragraph of its own brief. Appellee Br. 22-23, *Robinson*, 370 U.S. 600 (No. 554). The State's brief focused on defending its position that the California statute was "not violative of the Fourteenth Amendment merely because it punishes the existence of a *status*, addition [sic] to narcotics, rather than an act or omission," asserting that "[p]unishment of status has always been an accepted concept of English and American jurisprudence" and identifying vagrancy statutes as permissible examples. *Id.* at 8, 11-13.

Based on the briefs, it would have been hard to predict that the *Robinson* majority would rely on the Eighth Amendment to reject the State's argument that mere status could be punished. 370 U.S. at 667.

b. Justice White was correct to characterize the Eighth Amendment rationale of *Robinson* as "novel." 370 U.S. at 689 (White, J., dissenting). Before *Robinson*, the Cruel and Unusual Punishment Clause had been applied only to certain methods of punishment or to punishment overly disproportionate to the severity of the crime. See Martin R. 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, 433 (2008).

1603, 1609 n.21 (2014)). In *Robinson*, the attorney's misconduct overshadowed the brief's poor quality: although Robinson died before the attorney had filed the jurisdictional statement, the attorney "told the Court during oral argument that Robinson was on probation." See *id.* (noting that "[t]he Court denied rehearing after it learned that it had been misled" and that the attorney "was subsequently disbarred for independent misconduct").

In light of that history, commentators of the day understood *Robinson* to have "sweepingly redefined" cruel and unusual punishment, Michael R. Asimow, *Constitutional Law: Punishment for Narcotic Addiction Held Cruel and Unusual*—Robinson *v.* California *(U.S. 1962)*, 51 Cal. L. Rev. 219, 220 n.7 (1963), insofar as it "impose[d]" a "substantive limit[] on what can be made criminal and punished as such," *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977) (describing *Robinson*); see Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 645 (1966) (characterizing *Robinson* as "novel"). Some early commentators expressed the view that *Robinson* was best understood as reflecting "due process guarantees." Gary V. Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 Stan. L. Rev. 322, 392-93 (1966); see Packer 1071. Understandably, *Robinson* "birthed an avalanche of scholarly speculation about the future directions that its holding might take." Low & Johnson 2062 (collecting sources).

3. The Court's subsequent decision in *Powell* v. *Texas*, 392 U.S. 514 (1968), addressed the possibility of extending *Robinson*.

In *Powell*, the Court upheld the punishment of a chronic alcoholic for being drunk in public. 392 U.S. at 536-37. A four-Justice plurality reasoned that the conviction comported with *Robinson* because the statute punished conduct and Powell had engaged in that conduct. See *id.* at 532 (Marshall, J., plurality). Any involuntariness caused by chronic alcoholism did not raise an issue of constitutional dimension. Extending *Robinson* to reach that issue, the plurality explained, would risk making the Court, "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate

arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country." *Id.* at 533 (Marshall, J., plurality).

Five Justices disagreed. Four of them dissented, reading *Robinson* to prohibit criminal conviction for an act over which the defendant has no control. See *Powell*, 392 U.S. at 554-70 (Fortas, J., dissenting). The fifth—Justice White—concurred in the judgment. See *id.* at 548-54. He read the *Robinson* majority opinion (from which he had dissented) in the same way as did the *Powell* dissenters, but agreed in result with the plurality because no evidence showed that Powell lacked control over the "in public" part of his behavior. *Id.* at 548-49 (White, J., concurring in the judgment); see also Low & Johnson 2063 n.41 (describing how Justice Fortas initially penned his opinion for a five-Justice majority before Justice White switched his vote (citing Earl C. Dudley, Jr., *An Interested Life* 160-63 (2009))).

Despite the apparent support from five Justices, the broader reading of *Robinson* that would prohibit prosecution for conduct over which the defendant had no control has gone "nowhere" before this Court in subsequent decades. Low & Johnson 2063 n.41. While lower courts have debated the implications of *Robinson* and *Powell* taken together—as this case illustrates—this Court has never settled the issue. Importantly and independently of this debate, however, the Court *has* invalidated convictions for violating a constitutionally based conduct requirement. See pp. 10-13, *infra*. The conduct requirement is now firmly and independently embedded as a constitutional constraint on crime definition.

B. The Conduct Requirement Is Separately Rooted In The Due Process Clause

The Eighth Amendment is not the sole constitutional basis for the conduct requirement. Although this Court has not announced that the conduct requirement meets the "high bar" for due process principles that limit "state rule[s] about criminal liability," *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1027 (2020), the requirement plainly promotes due process values by ensuring a basic tenet of fair notice—that individuals are entitled to a reasonable opportunity to avoid criminal punishment simply by refraining from engaging in the offending conduct,[3] see *Johnson* v. *United States*, 576 U.S. 591, 595 (2015) (explaining that due process requires a penal statute to provide "fair notice of the conduct it punishes").[4]

More subtly, as a doctrinal matter, the conduct requirement undergirds due process decisions—from both before and after *Robinson*—in which this Court

---

[3] For crimes of omission, fair notice requires notice of a duty to act and that a breach of that duty constitutes a crime.

[4] In the context of federal penal statutes, current operation of the conduct requirement and its companion "correlation requirement," see n.5, *infra*, also advances the longstanding separation-of-powers principle that "legislatures and not courts should define criminal activity," *United States* v. *Bass*, 404 U.S. 336, 348 (1971); see *United States* v. *Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); cf. Joel S. Johnson, *Vagueness and Federal-State Relations*, 90 U. Chi. L. Rev. 1565, 1570 (2023) ("In [vagueness] cases involving federal laws, the Court's focus is whether indeterminate statutory language effectively delegates the legislative task of defining prohibited conduct to someone other than the legislature.").

has found statutes void for vagueness. Indeed, it is one of two "deeply embedded" constitutional principles that explain the outcomes of the Court's vagueness decisions not involving fundamental rights. Low & Johnson 2053, 2060.[5]

1. Consider *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939), a vagueness decision pre-dating *Robinson* by more than two decades.

In *Lanzetta*, the Court found void for vagueness a statute that made it a crime to "be a gangster." 306 U.S. at 452. The statute defined that term as "[a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State." *Ibid.*

The Court's opinion in *Lanzetta* began by articulating the traditional rhetoric of the vagueness doctrine, stating that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes" and that "[a]ll are entitled to be informed as to what the State commands or forbids." 306 U.S. at 453. But the essence of its holding came in the concluding paragraph, which explained that the statute's vague language rose to the level of a due process violation because it ultimately "condemn[ed] no act or omission." *Id.* at 458.

---

[5] The second principle—"the correlation requirement"—is that a criminal prohibition's "established meaning" must "defensibl[y] and predictabl[y] correlat[e]" with "the conduct to which it is applied." Low & Johnson 2053; see also John Calvin Jeffries Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L. Rev. 189, 190 (1985) (describing the "principle of legality," which "forbids the retroactive definition of criminal offenses").

In other words, the statute was constitutionally deficient because it "fail[ed] to identify any conduct" that triggered its application. Low & Johnson 2080; see *id.* at 2081 (observing that the statute merely "incorporate[d] past conduct for which the defendant may already have been punished" without making "reference to proof of present conduct"). The "vice" in *Lanzetta* was thus "exactly the vice in *Robinson*, and the cure [was] the same in both cases"—overturning a conviction under a state law that failed to respect the constitutionally imposed conduct requirement. *Id.* at 2080; see also John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 Denv. U. L. Rev. 241, 340 (2002) (noting that the *Lanzetta* Court found the statute void for vagueness in part because it prohibited mere status).

Both decisions "protect[ed] individual liberty by requiring that criminal statutes punish identifiable conduct," but they did so by "different theoretical routes." Low & Johnson 2081. In *Robinson*, the Court reached that result by holding that the statute imposed cruel and unusual punishment; in *Lanzetta*, the Court did so by deeming the statute impermissibly vague. Yet the trigger for both routes was the same—the statute's failure to meet the conduct requirement.

2. A post-*Robinson* example is *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

Papachristou is perhaps this Court's most well-known vagueness decision and is often rightly cited for the proposition that the goal of the doctrine is to ensure fair notice and prevent arbitrary enforcement. See, *e.g.*, *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1212 (2018) (noting that the vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct the statute proscribes" (citing *Papachristou*, 405

U.S. at 162)); *Colautti* v. *Franklin*, 439 U.S. 379, 390 (1979) (noting that a penal statute is "void for vagueness" if it is "so indefinite that 'it encourages arbitrary and erratic arrests and convictions'" (quoting *Papachristou*, 405 U.S. at 162)).

For some of the *Papachristou* defendants,[6] the essence of the constitutional defect in their convictions was precisely the same as that in *Robinson* and *Lanzetta*—a failure to meet the conduct requirement by a statute that criminally prohibited mere status.

Papachristou involved eight separate defendants convicted under a vagrancy ordinance. 405 U.S. at 156. Three of the convictions violated the conduct requirement: one defendant was charged with "being a 'common thief' because he was reputed to be a thief"; another was charged with "vagrancy—common thief"; and the third was charged with "vagrancy—vagabond[]." *Id.* at 157, 159-60. The stipulated facts showed no indication that any of the three engaged in conduct to support the charges. See Low & Johnson 2082-83 (describing the record in more detail).

Although the Court articulated a void-for-vagueness rationale to overturn the convictions, it "could easily" have relied on *Robinson*, "without ever mentioning the vagueness doctrine." Low & Johnson 2084; see Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 Colum. L. Rev. 551, 601 (1997) (noting that *Papachristou* could have been decided based on *Robinson* rather than the vagueness

---

[6] The other convictions in *Papachristou* violated the second requirement that also undergirds the void-for-vagueness doctrine. See Low & Johnson 2083-84 (analyzing the remaining convictions as violations of the correlation requirement); n.5, *supra*.

doctrine); Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 Rutgers L. Rev. 1289, 1308 (1990) (recognizing that the ordinance in *Papachristou* "criminalized status as such").

* * * * *

As *Lanzetta* and *Papachristou* illustrate, the vagueness doctrine relies on due process fairness principles that provide a sound basis for the conduct requirement.

C. The Conduct Requirement Should Be Explicated As A Due Process Principle

In light of the conduct requirement's importance, its shaky Eighth Amendment footing, and its independent due process foundation in prior cases, the Court should take this opportunity to explain that the requirement is best understood as derived from due process principles.

The Court could accomplish that result by simply recognizing that the conduct requirement undergirds the due process void-for-vagueness doctrine and thus already has a constitutional basis distinct from *Robinson*. See pp. 9-13, *supra*. Or it could go a step further and clarify that the conduct requirement meets the "high bar" for due process principles that limit "state rule[s] about criminal liability," *Kahler*, 140 S. Ct. at 1027, because it is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *ibid.* (quoting *Leland* v. *Oregon*, 343 U.S. 790, 798 (1952)); see also Low & Johnson 2063 n.42 (observing that "[t]he fundamental nature of requiring conduct as the basis for criminal punishment is longstanding and well established" (collecting sources)).

Either approach would clarify not only the conduct requirement's place in constitutional law, but also its relation to other issues that arise in the criminal process.

When applied through the vagueness doctrine, the conduct requirement gives fair notice and guards against arbitrary enforcement by requiring that criminal legislation identify specific behavior that can trigger criminal prosecution. See pp. 9-13, *supra*. This limitation focuses on the front end of a criminal prosecution—on the text of the statute on which a prosecution is based.[7] Importantly, it does not speak to the *nature* of the conduct that is subject to prosecution or the context in which it occurs. It requires only that a criminal prosecution be based on some conduct.

If specific conduct is to receive constitutional protection, that protection must come from some other source. A statute that criminalized worshiping at a particular church or endorsing a particular political candidate would satisfy the due process conduct requirement. But it would plainly run afoul of other constitutional provisions.

The protection against cruel and unusual punishment is analogous. It has traditionally focused on back-end issues, on the method or proportionality of punishment following a criminal conviction. Significantly, a punishment deemed cruel and unusual will

---

[7] The correlation component of the vagueness doctrine, see n.5, *supra*, supplements the fair-notice and arbitrary-enforcement protection by requiring that both law enforcement personnel and courts initiate criminal proceedings based on behavior that is defensibly and predictably correlated to the language of that legislation. See Low & Johnson 2065-79. This is also a front-end limitation: it focuses on whether the text of the statute correlates with the behavior on which actions toward prosecution are taken.

typically be based on a statute that satisfies the due process conduct requirement. A mandatory life sentence for littering would be cruel and unusual, to be sure, but conviction for such an offense would not violate the due process conduct requirement.

The conduct requirement stands alone. Questions about when or whether a particular punishment can be imposed based on a conviction for that conduct should be independently analyzed on their own terms.

CONCLUSION

Regardless of the outcome in this case, the Court should use it as an opportunity to explicate the conduct requirement as a due process principle.

Respectfully submitted.

PETER W. LOW
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Rd.,
Charlottesville, VA 22903

JOEL S. JOHNSON
Counsel of Record
PEPPERDINE UNIVERSITY
CARUSO SCHOOL OF LAW
24255 E. Pacific Coast Hwy,
Malibu, CA 90263
310-506-7531
Joel.Johnson@pepperdine.edu

FEBRUARY 2024