No. 23-175

# In The Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,
*Petitioner,*

v.

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

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

## BRIEF OF PROFESSOR MICHAEL J.Z. MANNHEIMER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


MICHAEL J.Z. MANNHEIMER
SALMON P. CHASE
COLLEGE OF LAW
NORTHERN KENTUCKY
UNIVERSITY
518 NUNN HALL
HIGHLAND HEIGHTS, KY
41099

RICHARD A. SIMPSON
COUNSEL OF RECORD
ELIZABETH E. FISHER
WILEY REIN LLP
2050 M STREET NW
WASHINGTON, DC 20036
(202) 719-7000
RSIMPSON@WILEY.LAW


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*Counsel for Amicus Curiae*

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## INTEREST OF *AMICUS CURIAE*[1]

Michael J. Zydney Mannheimer is a Professor of Law at Salmon P. Chase College of Law, Northern Kentucky University,[2] where he teaches courses in, among other things, criminal law and procedure and the death penalty. Professor Mannheimer has a particular scholarly interest in the original understanding of the Cruel and Unusual Punishments Clause of the Eighth Amendment, as demonstrated by his works (in reverse chronological order): *Eighth Amendment Federalism,* in *The Eighth Amendment and Its Future in a New Age of Punishment* (William Berry & Meghan Ryan, eds.) (Cambridge Univ. Press 2020); Harmelin*'s Faulty Originalism*, 14 Nev. L.J. 522 (2014); *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 69 (2012); *Self-Government, the Federal Death Penalty, and the Unusual Case of Michael Jacques*, 36 Vt. L. Rev. 131 (2011); *Proportionality and Federalism: A Response to Professor Stinneford*, 97 Va. L. Rev.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party other than amicus or his counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] The views expressed herein are those of the individual amicus, not of any institutions or groups with which he is affiliated.

Online 51 (2011); and *When the Federal Death Penalty Is "Cruel and Unusual,"* 74 U. Cin. L. Rev. 819 (2006).

Professor Mannheimer also has a scholarly interest in the recognition of an "impossibility constraint"—a bar on the State's requiring that persons perform the impossible on pain of criminal sanction—as a basis for some of the Court's decisions that have been reached on other grounds. *See Vagueness as Impossibility*, 98 Tex. L. Rev. 1049 (2020). As a result of his research, Professor Mannheimer has concluded that the "impossibility constraint" provides a much better fit for this Court's decisions in *Robinson* and *Powell* than the Eighth Amendment's Cruel and Unusual Punishments Clause.

## SUMMARY OF ARGUMENT

The Eighth Amendment prohibits "cruel and unusual punishments." U.S. Const. amend. VIII. It says nothing about a State's authority to pass substantive laws regulating criminal conduct. In *Robinson v. California*, 370 U.S. 660, 667 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), however, the Court incorrectly used the Eighth Amendment to curtail the State's authority to define criminal conduct. Outside those two decisions, this Court has never held that the Eighth Amendment limits a State's power in this way. Moreover, *Robinson*'s and *Powell*'s interpretation ignores the history of the Eighth Amendment and is, in fact, contrary to the purposes underlying the Amendment.

That said, the outcomes in *Robinson* and *Powell* are ultimately correct. Rather than addressing the laws in those cases under the rubric of the Eighth Amendment, the Court should have recognized that laws that require people to do the impossible offend due process. This "impossibility constraint" likewise explains the tensions lower courts have had when addressing laws like the one at issue in this case that require some citizens under at least some circumstances to do the impossible. The Court should accordingly reverse and remand this case for further proceedings consistent with the recognition of an impossibility constraint.

## ARGUMENT

### I. The *Robinson* and *Powell* Courts incorrectly held that the Eighth Amendment imposes constraints on what conduct a State may make criminal.

The Eighth Amendment imposes a constraint on what punishments the government may impose for criminal conduct. Other than in *Robinson* and *Powell*, this Court has never suggested that the Eighth Amendment limits the government's authority to decide what is criminal. Both this Court's earlier precedents and the original understanding of the Eighth Amendment belie any notion that the Amendment has a role in deeming a State's regulatory and criminalization decisions unconstitutional.

#### A. *Robinson* and *Powell* are outliers in holding that the Eighth Amendment circumscribes the State's authority to make criminalization decisions.

1. In *Robinson v. California*, this Court held for the first time that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits States from criminalizing certain conditions or statuses. 370 U.S. 660, 667 (1962). There, the defendant challenged a California statute that made it a crime to be addicted to the use of narcotics. *Id.* at 660. The Court asserted that criminalizing a medical

condition such as addiction "would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 666 (citing *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)). The majority, therefore, held the California law unconstitutional, famously asserting that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

The *Robinson* Court reached its conclusion without any historical analysis regarding the original meaning of the Cruel and Unusual Punishments Clause. And it could offer only one of its precedents, *Louisiana ex rel. Francis v. Resweber*, to support its holding.[3] *Id.* at 666 (citing *Resweber*, 329 U.S. 459).

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[3] The Court's reliance on the Eighth Amendment in *Robinson* is peculiar because it had never explicitly ruled that the Eighth Amendment applied to the States at all. The *Robinson* Court brushed past that question and wrote as if it were settled law—an assumption that did not go unnoticed by legal scholars. *See* Kent Greenawalt, *Uncontrollable Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 Colum. L. Rev. 927, 928 n.10 (1969) ("*Robinson* is the first square holding that the eighth amendment's protection against cruel and unusual punishment is made applicable against the states by the fourteenth amendment. Why the point is assumed rather than discussed is not clear."). As noted above, the Court cited only *Resweber*, *see Robinson*, 370 U.S. at 666, which simply assumed incorporation of the Eighth Amendment against the States for sake of argument. *See Resweber*, 329 U.S. at 462 (footnote

In Justice White's dissent, he remarked that the Court's new-found interpretation of the Clause was "so novel that [he] suspect[ed] the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached . . . rather than to its own notions of ordered liberty." *Id.* at 689 (White, J., dissenting).

2. Examination of this Court's earlier Eighth Amendment decisions confirms the novelty of the *Robinson* Court's interpretation. Dating back to 1878, the Court had discussed the meaning of the Clause only in the context of allegedly unconstitutional punishments that the federal government and federal territories imposed on defendants whose convictions were assumed to be constitutional. For example, the Court in *Wilkerson*

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omitted) ("To determine whether or not the execution of the petitioner may fairly take place . . . we shall examine the circumstances under the assumption, but without so deciding, that violation of the principles of the . . . Eighth Amendment[], as to . . . cruel and unusual punishment, would be violative of the due process clause of the Fourteenth Amendment."). Therefore, whatever the Court had to say about incorporation in *Resweber* is dicta. The sudden, one-sentence conclusion in *Robinson*—that the Eighth Amendment binds the States—contrasts with the comprehensive treatment this Court has given to the incorporation question in contemporary cases such as *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020) (covering fifty pages in the Supreme Court Reporter); *Timbs v. Indiana*, 139 S.Ct. 682 (2019) (sixteen pages); and *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (202 pages).

*v. Utah* rejected a claim that death by firing squad as punishment for murder violated the Cruel and Unusual Punishments Clause. 99 U.S. 130, 134–35 (1878). Similarly, the Court in *Weems v. United States* addressed whether a fifteen-year sentence of "hard and painful labor" for the crime of falsifying records constituted cruel and unusual punishment. 217 U.S. 349, 364 (1910). And in *Trop v. Dulles*, the Court addressed whether denationalization was cruel and unusual punishment for the crime of wartime desertion. 356 U.S. 86, 101 (1958). None of those decisions ultimately questioned the authority of the government to make the conduct at issue criminal.

Even in cases where the Eighth Amendment was assumed to apply to the States by incorporation through the Fourteenth Amendment, the Court assessed only the constitutionality of punishment without assessing the authority of the States to criminalize the regulated conduct. In *O'Neil* v. *Vermont*, for example, the Court rejected the claim that the punishment of confinement for nearly fifty-five years and a fine of $6,638 was excessive for a conviction on 307 counts of selling intoxicated liquors. 144 U.S. 323, 330 (1892). Likewise, in both *In re Kemmler*, 136 U.S. 436 (1890) and *Resweber*, 329 U.S. 459 (1947), the Court rejected claims regarding methods of execution for the crime of murder. In each of these cases, the State's authority to criminalize the underlying conduct was not questioned.

3. Since *Robinson*, this Court has addressed a *Robinson*-type Eighth Amendment argument only once: *Powell v. Texas*, 392 U.S. 514 (1968). There, the defendant was charged with the crime of public intoxication. *Id.* at 517 (plurality opinion). He argued that, under this Court's decision in *Robinson*, convicting him of that crime would violate the Cruel and Unusual Punishments Clause because he suffered from chronic alcoholism. *Id.* at 531. In a splintered decision, the Court held that the State's public intoxication law did not violate the Cruel and Unusual Punishments Clause, even though the law was being enforced against a habitual alcoholic.[4] *Id.* at 531–32.

The *Powell* plurality did not overturn *Robinson*, but it did limit *Robinson*'s scope, distinguishing *Robinson* on the ground that punishing behavior was different from punishing "mere status." *Id.* at 532. The plurality wrote that imposing criminal penalties requires that the defendant actually "commit[] some *actus reus*," thereby acknowledging that it may be

[4] Given the Court's fragmented decision, scholars and courts have debated which decision in *Powell* is controlling—Justice Marshall's plurality or Justice White's concurrence in the result—with most concluding that the former controls. Erik Luna, *The Story of* Robinson*: From Revolutionary Constitutional Doctrine to Modest Ban on Status Crimes*, in *Criminal Law Stories* 76–77 (Donna Coker & Robert Weisberg eds., 2013). This Brief remains agnostic as to that question because the impossibility constraint provides the right framework for resolving the challenge in *Powell* in any event.

unconstitutional to criminalize truly involuntary behavior. *Id.* at 533. However, the plurality could not conclude that, based on then-existing medical knowledge, chronic alcoholics suffered from an "irresistible compulsion to drink and to get drunk in public." *Id.* at 535. Powell accordingly could not establish that his conduct fit within that category of truly involuntary behavior.

Notably, the plurality acknowledged "that the [Cruel and Unusual Punishments Clause] has always been considered, and properly so, to be directed at the *method or kind of punishment* imposed for the violation of criminal statutes." *Id.* at 531–32 (emphasis added). It went on to state that "the nature of the conduct made criminal is ordinarily relevant only to the fitness of the *punishment* imposed." *Id.* at 532 (emphasis added) (footnote omitted) (citing *Trop*, 356 U.S. 86; *Resweber*, 329 U.S. 459; *Weems*, 217 U.S. 349). In fact, the plurality stressed the dangers of *Robinson*'s encroachment into substantive criminal law. *Id.* at 533 ("*Robinson* . . . brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, 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 536 ("The doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting

adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.").

Justice White cast the deciding vote, concurring in the result only. He disagreed with the plurality's distinction between status and conduct, opining that "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 548 (White, J., concurring in the result) (citation omitted). He thus agreed with the dissent that an alcoholic cannot constitutionally be punished for drinking if he has "an irresistible urge to" drink, even though drinking is undoubtedly conduct. *Id.* at 549. By contrast, "[t]he drinker who was not compelled to drink" may be punished for being intoxicated because he "could have avoided drinking in the first place, could have avoided drinking to excess, and need not have lost the power to manage his movements." *Id.* at 552 n.4.

Justice White recognized that, while Powell's intoxication may have been compelled, he had "made no showing that he was unable to stay off the streets on the night in question." *Id.* at 554 (footnote omitted). Accordingly, even if there is a constitutional right to be free from punishment for conduct that is involuntary, Justice White concluded that the record was insufficient to show that Powell's appearance in

public, as opposed to his intoxication, was involuntary. *Id.* at 551.

Like *Robinson*, *Powell* contains no analysis regarding the history of the Eighth Amendment. Indeed, even the dissent, which would have held that *Robinson* applied, made no mention of the original meaning of the Eighth Amendment. Instead, Justice Fortas advanced a laundry list of policy rationales for invalidating Texas's criminal law under the Eighth Amendment. *Id.* at 565 (Fortas, J., dissenting) ("If all of this effort, all of this investment of time and money, were producing constructive results, then we might find satisfaction in the situation despite its cost. But the fact is that this [enforcement of the laws against drunkenness] accomplishes little that is fundamental.") (quoting Francis Allen, *The Borderland of Criminal Justice* 8–9 (1964)).

Ultimately, neither the *Robinson* nor the *Powell* Courts consulted the origins of the Eighth Amendment in concluding that the Cruel and Unusual Punishments Clause encompasses a right not to be convicted of some crimes at all. As discussed in further detail below, had they done so, they would have recognized that, in 1791, the Framers did not understand the Amendment to include that right.

### B. The original understanding of the Eighth Amendment was to prohibit certain punishments, not to encroach on governmental authority to make regulatory and criminalization decisions.

The text, history, and purpose of the Eighth Amendment establish that its aim is to prohibit cruel and unusual punishments after a defendant has been convicted of a crime. It does not define or limit the government's ability to determine what conduct is a crime. This makes the Eighth Amendment a poor tool to assess the laws at issue in *Robinson*, *Powell*, and this case.[5]

1. By its plain terms, the Eighth Amendment prohibits the imposition of "cruel and unusual punishments." U.S. Const. amend. VIII. Its text says nothing about governmental authority to determine what constitutes a crime.

Nor was it originally understood to limit the State's ability to define what is a crime. Rather, the Eighth Amendment was originally understood as a limitation on punishments, primarily aimed at

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[5] The parties dispute whether this case involves a civil penalty or a criminal punishment, an issue as to which Amicus takes no position. Assuming for the sake of argument that it is a criminal punishment, the Eighth Amendment nonetheless says nothing about whether making the conduct criminal violates the Constitution.

preventing the federal government from imposing barbaric or uncommon punishments. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citing Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 842 (1969)) (opining that, when the Eighth Amendment was drafted and the several States ratified it, the original public meaning of the Cruel and Unusual Punishments Clause was to "proscribe . . . methods of punishment").

That understanding harks back to the Eighth Amendment's inception. The Amendment was originally derived from the English Bill of Rights of 1689, which prohibited "cruell and unusuall punishments." 1 W. & M. sess. 2 c. 2 (1689). That provision was drafted in direct response to the cruel sentencings imposed against the King's enemies by the infamous Lord Chief Justice Jeffreys of the King's Bench. *Harmelin v. Michigan*, 501 U.S. 957, 967–69 (1991) (plurality opinion) (citations omitted); Granucci, 57 Calif. L. Rev. at 855–60. Importantly, though, the provision was never considered a defense to the substantive crime for which a defendant had been convicted. *Harmelin*, 501 U.S. at 977–79.

The drafters of the Virginia Declaration of Rights of 1776 copied the language from the English Bill of Rights of 1689 to prohibit "cruel and unusual punishments." Va. Declaration of Rights § 9 (1776). Then, the drafters of the Eighth Amendment lifted that same language verbatim from the Virginia

Declaration of Rights. Granucci, 57 Calif. L. Rev., at 840; John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1740 (2008). Accordingly, the language of the Eighth Amendment bears much the same meaning as the identical language from the 1689 English Bill, including its focus on barring certain methods of punishment.

2. Although the subject of some dispute, it is also likely that the Clause was understood in 1791 as containing a proportionality requirement. This is in large part because of the horrific sentence imposed on Titus Oates that included lengthy annual whippings as a punishment for perjury, which is one of the undisputed historical precursors to the prohibition on cruel and unusual punishments in the English Bill of Rights. The sentence imposed on Oates was criticized not only because of the methods of punishment prescribed but also because of their severity in light of the crime for which Oates was convicted. Michael J. Zydney Mannheimer, Harmelin*'s Faulty Originalism*, 14 Nev. L.J. 522, 527 (2014); *see* Stinneford, 102 Nw. U. L. Rev. at 1761. Indeed, this Court has recognized that the Clause forbids some punishments based on proportionality principles. *Lockyer v. Andrade*, 538 U.S. 63, 72–73 (2003); *Harmelin,* 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in the judgment); *Rummel v. Estelle,* 445 U.S. 263, 271–72 (1980).

3. Finally, the Cruel and Unusual Punishments Clause contained a federalism component. Any historical analysis of the Eighth Amendment requires that it be read with serious consideration of the motivations and policy views of the Anti-Federalists, who were the primary proponents of its ratification. The Anti-Federalists were, of course, concerned with protecting state sovereignty. This motivated their demand for the Bill of Rights in general. Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 Iowa L. Rev. 68, 99 (2012). In this regard, Anti-Federalist Melancton Smith, during the New York ratification convention, articulated a fear that the powers given to the federal government would lead to the diminution of the state governments, rendering them inconsequential. *See* Speech by Melancton Smith (June 25, 1788), *in* 6 *The Complete Anti-Federalist* 164, 166 (Herbert J. Storing ed., 1981).

The Anti-Federalists were relatedly concerned with securing state control over criminal law to protect against potential abuses by the central government. Mannheimer, 98 Iowa L. Rev. at 90. The idea that federal statutes may supersede and displace state criminal law raised alarms for the Anti-Federalists because of potential infringement upon the criminal procedure safeguards that state law afforded defendants. *Id.* at 103. Indeed, Anti-Federalist leader, George Mason, expressed a concern that, without the Eighth Amendment, the "State

Legislatures [will] have no Security for the Powers now presumed to remain to them," because Congress could create "new Crimes" and "inflict unusual and severe Punishments," threatening the then-existing state monopoly on criminal justice. George Mason, *Objections to the Constitution of Government Formed by the Convention* (1787), *reprinted in* 2 *The Complete Anti-Federalist* 13. Thus, the preservation of state sovereignty was also a primary motivation for the Anti-Federalists' demand for the Eighth Amendment. Mannheimer, 98 Iowa L. Rev. at 99.

In particular, the Framers valued state autonomy in setting criminal laws. The Anti-Federalists predicted that federal and state criminal law would overlap. And because of the preemption doctrine as expressed in the Supremacy Clause, the federal criminal law would render state powers useless. *Id.* at 103. To obviate these concerns, the Eighth Amendment serves as a hinderance to the federal government in punishing alleged offenders in a way or in a proportion unknown to state law. *Id.* at 105. Thus, maintaining local control of criminal justice was a major motivation for the right to be free from cruel and unusual punishments. *Id.* at 107.

A proper originalist understanding of the Eighth Amendment reveals that it is both a limitation on punishments and a structural shield against federal interference with substantive state criminal law. That is, to the extent that the Amendment forbids criminalization decisions at all, at most it

might forbid the federal government from condemning as criminal conduct that is non-criminal under state law.

4. *Robinson* and *Powell* wholly departed from this original understanding of the Cruel and Unusual Punishments Clause. Instead of focusing on the history of the Eighth Amendment, the *Robinson* and *Powell* decisions summarily ignored it. In doing so, the Court trod upon new territory, setting dangerous precedent that effectively supersedes the purposes behind the Amendment.[6]

Rather than focusing on punishment and proportionality, those Courts addressed substantive state criminal laws. Not only did those cases represent an entirely new approach to Eighth Amendment jurisprudence, but their reasoning was also antithetical to the purposes of the Eighth Amendment, thereby encroaching on state primacy in the criminal law domain. Accordingly, the interpretation of the Eighth Amendment in *Robinson*

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[6] Had the Court looked at the history behind the Fourteenth Amendment, its failure to grapple with the original meaning of the Eighth Amendment would have made sense because the real issue in those cases was whether the impossibility constraint, a due process limitation on the ability of the government to make conduct criminal, discussed below, precluded punishing the acts at issue. But having precipitously incorporated the Eighth Amendment through the Fourteenth, the Court apparently felt no need to address the latter separately.

and *Powell* undercuts the protections that the Amendment was designed to safeguard.

Legal scholars have criticized *Robinson*, in particular, for its failure to engage in a meaningful Eighth Amendment analysis. Herbert Packer wrote that *Robinson* flew in the face of "an entire lack of precedent for the idea that a punishment may be deemed cruel not because of its mode or even its proportion but because the conduct for which it is imposed should not be subjected to the criminal sanction." Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1071 (1964). Second Circuit Judge William Hughes Mulligan later wrote of *Robinson* that "whether a certain act should be a crime and whether the punishment should fit the crime are entirely separate inquiries." William Hughes Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 Fordham L. Rev. 639, 644 (1979) (footnote omitted); *see also* 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, 461 (2008) ("It . . . remains a mystery why the Court chose the Eighth Amendment as the vehicle to address the problem posed in *Robinson*.") (footnote omitted); Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 Buff. L. Rev. 783, 802 (1974) ("It is questionable whether *Robinson* really presented an eighth amendment issue . . . . [T]he

application of the eighth amendment to the nature of the conduct made criminal, instead of the method or kind of punishment, represented a unique use of the amendment's protection.").

In short, *Robinson*'s and *Powell*'s interpretation of the Eighth Amendment as a limitation on governmental criminalization decisions was inconsistent with precedent, finds no support in original meaning, and has been roundly criticized by scholars. It therefore ought to be disavowed.

## II. *Robinson* and *Powell* are better understood as instantiations of a centuries-old, due process-based constraint on requiring the impossible.

The criticisms of *Robinson* and *Powell* are best addressed by recognizing that the outcome in those cases should have been based, not on the Eighth Amendment, but on a due process right not to be subjected to punishment for a status the person cannot avoid or for conduct the person is powerless to control. Common law principles and scholarship dating back centuries support this "impossibility constraint." Further, the notion that the law ought not compel citizens to do the impossible is an idea supported not only by the common law, but also by common sense.[7]

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[7] Within the modern practice of law, the existence of an "impossibility constraint" finds its greatest support in the

1. Lord Edward Coke first articulated the principle in 1610 in *Dr. Bonham's Case*, when he wrote that if "an Act of Parliament is . . . *impossible to be performed*, the common law will controul it, and adjudge such Act to be void." (1610) 77 Eng. Rep. 646, 652; 8 Co. Rep. 113b, 118a (emphasis added). For Lord Coke, this requirement flowed naturally from his foundational belief that laws must be constrained by "common right and reason[.]" *Id.*; *see also* Ian Williams, Dr. Bonham's Case *and 'Void' Statutes*, 27 J. Legal Hist. 111, 111 (2006) ("The dominant view of *Bonham's Case* is that it was decided primarily on grounds of the interpretation of repugnant or impossible statutes, including Coke's remark as to the common law controlling acts of parliament.").

Sir William Blackstone, in his *Commentaries*, echoed the earlier thinking of Lord Coke. For Blackstone, "acts of parliament that are impossible to

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common-law contractual doctrine of impossibility. Under this doctrine, a party's contractual obligations are excused when the performance of those obligations has been rendered impossible. *See* 30 R. Lord, *Williston on Contracts* § 77:2 (4th ed. 2021) (footnote omitted) ("Contract performance is excused when unforeseeable action makes performance objectively impossible."); Restatement (Second) of Contracts § 261 (Am. L. Inst. 1981) ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.").

be performed are of no validity." 1 William Blackstone, *Commentaries* *91.

Likewise, legal theorists have generally embraced the idea that laws ought not require the impossible. *See, e.g.*, Lon L. Fuller, *The Morality of Law* 38–39 (arguing that one "route[] to disaster" for a legal system is to require "rules that require conduct beyond the powers of the affected party"); Peter Rijpkema, *The Rule of Law Beyond Thick and Thin*, 32 L. & Phil. 793, 802 (2013) ("In order for rules to be able to guide good behavior, they cannot require the impossible."); *What is the rule of law*, American Bar Association, https://www.americanbar.org/advocacy/rule_of_law/what-is-the-rule-of-law/ (last visited Feb. 18, 2024) ("If laws become impossible—or even difficult—to follow, the respect of citizens for the law will begin to erode.").

Professor Fuller explored the ways in which citizens might respond to laws requiring the impossible through a fable about a King "Rex." Fuller, *The Morality of Law* 34. In this fable, Fuller imagined that Rex wrote laws that gave citizens "ten seconds" to report to the throne when summoned, made it a crime to "to cough, sneeze, hiccough, faint or fall down in the presence of the king," and "made treason not to understand, believe in, and correctly profess the doctrine of evolutionary, democratic redemption." *Id.* at 36. Fuller then famously wrote about the citizens' petition in response to King Rex's laws, in which they argued that "[t]o command what cannot be done is not to make law; it is to unmake law, for a command that

cannot be obeyed serves no end but confusion, fear and chaos." *Id.* at 37.

Together, Coke, Blackstone, and Fuller stand for the proposition that requiring the impossible is a violation of due process—a foundational principle rooted in the common law. Coke, one of the first to articulate this basic legal precept, heavily influenced both Americans of the founding generation and those of the Reconstruction era. James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. Chi. L. Rev. 1321, 1357 (1991) (calling Coke "by far the seventeenth-century lawyer most influential on the American Revolutionaries"). While perhaps surprising that this Court has never forthrightly announced such a rule, a re-reading of *Robinson* and *Powell* shows that such a constraint was precisely what the Court was getting at.

2. The impossibility constraint is similar to other common legal doctrines. To draw an analogy, it has been suggested that the ability of a person to practice self-defense is a matter of constitutional right. *See District of Columbia v. Heller*, 554 U.S. 570, 636 (2008) ("[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table. These include the absolute prohibition of handguns held and used for self-defense in the home."). Nevertheless, it would be unthinkable to deem a prohibition on murder unconstitutional for the mere fact that, under particular circumstances, a person may lawfully defend her home and its occupants with deadly force. In many ways, self-

defense is its own version of an impossibility constraint because it is available only if the use of force was necessary; that is, if it was impossible to avoid using force. *E.g.*, *Commonwealth v. Houston*, 127 N.E.2d 294, 296 (Mass. 1955) (collecting cases) (discussing that the person asserting self-defense must have believed that "no other means [than the use of force] would suffice to prevent such harm").

Many criminal-law defenses, like self-defense and duress, require a fact-intensive inquiry by the trier of fact and, in the first instance, the court, to determine whether the defense fits the facts of the case. The success of those defenses may turn on particular circumstances such as whether the actor was free from fault in bringing about the need to violate the law and whether lawful alternatives were possible. In the vast majority of cases, the impossibility doctrine is no different; whether a statute can constitutionally be applied to a particular person under particular circumstances will depend on who that person is and what those circumstances are. In the event the defendant successfully establishes an impossibility defense, the appropriate outcome is that the law cannot be constitutionally applied to that defendant. The constitutionality of the law, however, remains unchanged.

## III. The impossibility constraint better addresses the concerns underlying *Robinson*, *Powell*, and this case.

*Robinson*, *Powell*, and this case all deal with laws that are impossible for at least some people to comply with at least some of the time. If no one to whom the law is addressed could comply with it, as in *Robinson*, the law itself is facially unconstitutional based on the impossibility constraint. If at least some people to whom the law is addressed could comply, as in *Powell* and in this case, the law should stand, but it cannot be enforced against those individuals who had no choice but to violate it.

1. As discussed above, *Robinson* held that a State cannot enact laws that purport to punish individuals because of a "status" or "condition." 370 U.S. at 662. Although *Robinson* reached the right result, it cannot be defended on Eighth Amendment grounds because that Amendment has no application to confining a State's ability to enact substantive law. Instead, the impossibility constraint offers a workable and doctrinally proper framework.

Notably, the *Robinson* Court recognized that addiction is essentially a disease. The Court expressed profound concern over a State's decision to criminalize such a condition or status. *Id.* at 666 (noting the similarity to a State attempting "to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease").

The Court's concerns are well taken because, for anyone with such a condition, it would be impossible to comply with the law.

The Court was correct to hold that convicting an addict of being an addict is unconstitutional. However, that is not because doing so imposes a cruel and unusual punishment, but, rather, because it is impossible for the addict to comply. Foundational notions of due process preclude imposing any punishment under those circumstances.

The law at issue in *Robinson* is itself facially unconstitutional because only an addict could be convicted of violating it—but no addict could ever comply with it. The analysis is, therefore, the same as it would be with a law requiring everyone to be over six feet tall: only a person under six feet tall could be convicted of violating it—but no person under six feet tall could comply with it.

2. For similar reasons, *Powell* cannot be justified on Eighth Amendment grounds. It is, likewise, best explained by recognizing an impossibility constraint.

Setting aside the question of which opinion in *Powell* is controlling, Justice White's concurrence, even more so than the Court's plurality opinion and the Court's opinion in *Robinson*, seems to endorse the idea of an impossibility constraint. *Powell*, 392 U.S. at 548 (White, J., concurring in the result) (emphasis added) (citation omitted) ("If it cannot be a crime to

have an irresistible compulsion to use narcotics . . . I do not see how it can constitutionally be a crime to yield to such a compulsion."). Indeed, Justice White appeared to believe that convicting homeless alcoholics for public intoxication would be unconstitutional because it would be impossible for them to comply with the law. *Id.* at 551. The impossibility constraint would thus explain Justice White's concurrence. The same reasoning explains the outcome of the plurality opinion, even though it did not so clearly recognize the existence of an impossibility constraint.

The key distinction between the impossibility constraint in *Robinson* and *Powell* is that a facial challenge to the statute in *Powell* on impossibility grounds would be unfounded because some people to whom the law applied could comply with it. As Justice White explained:

> For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment . . . [but] [t]hese prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.

*Id.* at 551–52 (footnote omitted).

According to Justice White's logic, it is only a subcategory of alcoholics—those who are also homeless—who might be able to defend against conviction on impossibility grounds. In this way, any non-status-based offenses must be challenged on individual grounds as a defense to the prosecution.

3. As demonstrated by application of the impossibility constraint in *Robinson* and *Powell*, unless a directive is impossible for everyone to obey, or at least impossible for a discernible segment of the community to obey under all circumstances, application of the impossibility constraint is extraordinarily fact specific. Under the impossibility constraint, Respondents' facial challenge to the City's ordinances must fail because, rather than a general bar on the enforceability of the law, it can be invoked only as a defense to a particular criminal prosecution.

In this regard, the impossibility constraint helps explain the anomalies in the Ninth Circuit's reasoning in both *Martin* and this case. For example, the Ninth Circuit in *Martin* limited its holding by writing that the statute there was unconstitutional *only on nights when the local shelters are full*. *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019). But a statute isn't constitutional only on Mondays, Wednesdays, and alternate Fridays; it is either constitutional or it isn't.

That logic applies with equal force here. Some in Grants Pass are perfectly able to comply with the camping ordinance. Should those people renounce the

comfort of their beds for the fresh air of the park, their actions must be considered culpable. The law punishes their indiscretion, and rightfully so. Others, however, have no bed to renounce and yet sleep is a physical requirement. In such a case, they may take cover under the Fourteenth Amendment's impossibility constraint. It is undeniable that some people, under some circumstances, are unable to comply with Grants Pass's ordinance. That is not, however, an indictment of its constitutionality under the Eighth Amendment, but rather the consequence of a deeply embedded due process protection—the impossibility constraint.

## CONCLUSION

For the foregoing reasons, Amicus respectfully urges the Court to reverse the decision below.

Respectfully Submitted,

MICHAEL J.Z. MANNHEIMER
SALMON P. CHASE
COLLEGE OF LAW
NORTHERN KENTUCKY
UNIVERSITY
518 NUNN HALL
HIGHLAND HEIGHTS, KY
41099

RICHARD A. SIMPSON
COUNSEL OF RECORD
ELIZABETH E. FISHER
WILEY REIN LLP
2050 M STREET NW
WASHINGTON, DC 20036
(202) 719-7314
RSIMPSON@WILEY.LAW

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*Counsel for Amicus Curiae*