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CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 2003

JUNE 14 THROUGH SEPTEMBER 30, 2004

TOGETHER WITH OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

END OF TERM

FRANK D. WAGNER

REPORTER OF DECISIONS

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Errata

480 U. S., at 422, line 11 from bottom: Delete "was" and substitute "were Kip Steinberg and" before "Bill Ong Hing".

539 U. S., at 353, line 20: Delete "*(per curiam)*".

540 U. S., at 939, line 4 from bottom: Delete "proceed *in forma pauperis*" and substitute "file a brief as *amicus curiae*".

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.
DAVID H. SOUTER, Associate Justice.
CLARENCE THOMAS, Associate Justice.
RUTH BADER GINSBURG, Associate Justice.
STEPHEN BREYER, Associate Justice.

OFFICERS OF THE COURT

JOHN D. ASHCROFT, Attorney General.
THEODORE B. OLSON, Solicitor General.[1]
PAUL D. CLEMENT, Acting Solicitor General.[2]
WILLIAM K. SUTER, Clerk.
FRANK D. WAGNER, Reporter of Decisions.
PAMELA TALKIN, Marshal.
JUDITH A. GASKELL, Librarian.

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[1] Solicitor General Olson resigned effective July 9, 2004. See *post*, p. v.

[2] Mr. Clement became Acting Solicitor General on July 10, 2004.

SUPREME COURT OF THE UNITED STATES

Allotment of Justices

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective September 30, 1994, viz.:

For the District of Columbia Circuit, William H. Rehnquist, Chief Justice.

For the First Circuit, David H. Souter, Associate Justice.

For the Second Circuit, Ruth Bader Ginsburg, Associate Justice.

For the Third Circuit, David H. Souter, Associate Justice.

For the Fourth Circuit, William H. Rehnquist, Chief Justice.

For the Fifth Circuit, Antonin Scalia, Associate Justice.

For the Sixth Circuit, John Paul Stevens, Associate Justice.

For the Seventh Circuit, John Paul Stevens, Associate Justice.

For the Eighth Circuit, Clarence Thomas, Associate Justice.

For the Ninth Circuit, Sandra Day O'Connor, Associate Justice.

For the Tenth Circuit, Stephen Breyer, Associate Justice.

For the Eleventh Circuit, Anthony M. Kennedy, Associate Justice.

For the Federal Circuit, William H. Rehnquist, Chief Justice.

September 30, 1994.

(For next previous allotment, and modification, see 509 U. S., p. vi, and 512 U. S., p. v.)

RESIGNATION OF THE SOLICITOR GENERAL

SUPREME COURT OF THE UNITED STATES

THURSDAY, JUNE 29, 2004

Present: CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE SOUTER, JUSTICE THOMAS, JUSTICE GINSBURG, and JUSTICE BREYER.

THE CHIEF JUSTICE said:

The Court at this time wishes to note for the record that Theodore Olson has been serving as the Solicitor General since June 11, 2001. The Court recognizes the significant responsibilities that were placed on him to represent the government of the United States before this Court and to perform other important functions during difficult times. On behalf of my colleagues, I thank you General Olson for a job well done. You have our sincere appreciation and best wishes for the future.

TABLE OF CASES REPORTED

NOTE: All undesignated references herein to the United States Code are to the 2000 edition.

Cases reported before page 901 are those decided with opinions of the Court or decisions *per curiam*. Cases reported on page 901 *et seq.* are those in which orders were entered. Opinions reported on page 1301 *et seq.* are those written in chambers by individual Justices.

CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 2003

ELK GROVE UNIFIED SCHOOL DISTRICT ET AL. *v.* NEWDOW ET AL.

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

No. 02–1624. Argued March 24, 2004—Decided June 14, 2004

Petitioner school district requires each elementary school class to recite daily the Pledge of Allegiance. Respondent Newdow's daughter participates in this exercise. Newdow, an atheist, filed suit alleging that, because the Pledge contains the words "under God," it constitutes religious indoctrination of his child in violation of the Establishment and Free Exercise Clauses. He also alleged that he had standing to sue on his own behalf and on behalf of his daughter as "next friend." The Magistrate Judge concluded that the Pledge is constitutional, and the District Court agreed and dismissed the complaint. The Ninth Circuit reversed, holding that Newdow has standing as a parent to challenge a practice that interferes with his right to direct his daughter's religious education, and that the school district's policy violates the Establishment Clause. Sandra Banning, the child's mother, then filed a motion to intervene or dismiss, declaring, *inter alia*, that she had exclusive legal custody under a state-court order and that, as her daughter's sole legal custodian, she felt it was not in the child's interest to be a party to Newdow's suit. Concluding that Banning's sole legal custody did not deprive Newdow, as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child, the Ninth Circuit held that, under California law, Newdow retains the right to expose his child to his particular religious views even if they contra-

Syllabus

dict her mother's, as well as the right to seek redress for an alleged injury to his own parental interests.

Held: Because California law deprives Newdow of the right to sue as next friend, he lacks prudential standing to challenge the school district's policy in federal court. The standing requirement derives from the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary. *E. g., Allen* v. *Wright*, 468 U. S. 737, 750. The Court's prudential standing jurisprudence encompasses, *inter alia*, "the general prohibition on a litigant's raising another person's legal rights," *e. g., id.*, at 751, and the Court generally declines to intervene in domestic relations, a traditional subject of state law, *e. g., In re Burrus*, 136 U. S. 586, 593–594. The extent of the standing problem raised by the domestic relations issues in this case was not apparent until Banning filed her motion to intervene or dismiss, declaring that the family court order gave her "*sole* legal custody" and authorized her to "exercise legal control" over her daughter. Newdow's argument that he nevertheless retains an unrestricted right to inculcate in his daughter his beliefs fails because his rights cannot be viewed in isolation. This case also concerns Banning's rights under the custody orders and, most important, their daughter's interests upon finding herself at the center of a highly public debate. Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. Their interests are not parallel and, indeed, are potentially in conflict. Newdow's parental status is defined by state law, and this Court customarily defers to the state-law interpretations of the regional federal court, see *Bishop* v. *Wood*, 426 U. S. 341, 346–347. Here, the Ninth Circuit relied on intermediate state appellate cases recognizing the right of each parent, whether custodial or noncustodial, to impart to the child his or her religious perspective. Nothing that either Banning or the school board has done, however, impairs Newdow's right to instruct his daughter in his religious views. Instead, he requests the more ambitious relief of forestalling his daughter's exposure to religious ideas endorsed by her mother, who wields a form of veto power, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. The California cases simply do not stand for the proposition that Newdow has a right to reach outside the private parent-child sphere to dictate to others what they may and may not say to his child respecting religion. A next friend surely could exercise such a right, but the family court's order has deprived Newdow of that status. Pp. 11–18.

328 F. 3d 466, reversed.

Syllabus

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, C. J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, and in which THOMAS, J., joined as to Part I, *post*, p. 18. O'CONNOR, J., *post*, p. 33, and THOMAS, J., *post*, p. 45, filed opinions concurring in the judgment. SCALIA, J., took no part in the consideration or decision of the case.

Terence J. Cassidy argued the cause for petitioners. With him on the briefs was *Michael W. Pott.*

Solicitor General Olson argued the cause for the United States as respondent under this Court's Rule 12.6 in support of petitioners. With him on the briefs were *Assistant Attorney General Keisler*, *Deputy Solicitor General Clement*, *Deputy Assistant Attorney General Katsas*, *Patricia A. Millett*, *Robert M. Loeb*, *Lowell V. Sturgill*, and *Sushma Soni.*

Michael A. Newdow, *pro se*, argued the cause and filed a brief as respondent.*

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*Briefs of *amici curiae* urging reversal were filed for the State of Texas et al. by *Greg Abbott*, Attorney General of Texas, *R. Ted Cruz*, Solicitor General, *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach* and *Don R. Willett*, Deputy Attorneys General, *Peter C. Harvey*, Acting Attorney General of New Jersey, and *Gerald J. Pappert*, Acting Attorney General of Pennsylvania, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Gregg D. Renkes* of Alaska, *Terry Goddard* of Arizona, *Mike Beebe* of Arkansas, *Bill Lockyer* of California, *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.*, of Florida, *Thurbert E. Baker* of Georgia, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Phill Kline* of Kansas, *A. B. "Ben" Chandler* of Kentucky, *Richard P. Ieyoub* of Louisiana, *G. Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Mike Hatch* of Minnesota, *Mike Moore* of Mississippi, *Jeremiah W. "Jay" Nixon* of Missouri, *Mike McGrath* of Montana, *Jon Bruning* of Nebraska, *Brian Sandoval* of Nevada, *Peter W. Heed* of New Hampshire, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Roy Cooper* of North Carolina, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Patrick C. Lynch* of Rhode Island, *Henry McMaster* of South

JUSTICE STEVENS delivered the opinion of the Court.

Each day elementary school teachers in the Elk Grove Unified School District (School District) lead their classes in

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Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, *Peg Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; for the American Civil Rights Union by *John C. Armor* and *Peter Ferrara;* for the American Jewish Congress by *Marc D. Stern* and *Norman Redlich;* for the American Legion by *Eric L. Hirschhorn* and *Philip B. Onderdonk, Jr.;* for the Bipartisan Legal Advisory Group of the United States House of Representatives by *Geraldine R. Gennet, Kerry W. Kircher,* and *Michael L. Stern;* for the Catholic League for Religious and Civil Rights et al. by *Edward L. White III* and *Charles S. LiMandri;* for the Center for Individual Freedom by *Renee L. Giachino;* for the Christian Legal Society et al. by *Gregory S. Baylor, Kimberlee Wood Colby,* and *Stuart J. Lark;* for Citizens United Foundation by *William J. Olson* and *John S. Miles;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman, Edwin Meese III,* and *Phillip J. Griego;* for Focus on the Family et al. by *Benjamin W. Bull, Jordan W. Lorence, Kevin H. Theriot, Robert H. Tyler,* and *Patrick A. Trueman;* for Grassfire.net by *John G. Stepanovich;* for the Institute in Basic Life Principles et al. by *Bernard P. Reese, Jr.;* for the Knights of Columbus by *Kevin J. Hasson, Anthony R. Picarello, Jr., Roman P. Storzer, Carl A. Anderson, Paul R. Devin,* and *Robert A. Destro;* for Liberty Counsel et al. by *Mathew D. Staver* and *Rena M. Lindevaldsen;* for the National Education Association by *Robert H. Chanin* and *Jeremiah A. Collins;* for the National Jewish Commission on Law and Public Affairs by *Nathan Lewin, Alyza D. Lewin, Dennis Rapps, David Zwiebel,* and *Richard B. Stone;* for the National Lawyers Association Foundation by *Dennis Owens* and *Robert C. Cannada;* for the National School Boards Association by *Lisa A. Brown, Erin Glenn Busby, Julie Underwood,* and *Naomi Gittins;* for the Pacific Justice Institute by *Peter D. Lepiscopo;* for the Pacific Research Institute et al. by *Sharon L. Browne* and *Russell C. Brooks;* for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden;* for the United States Senate by *Patricia Mack Bryan, Morgan J. Frankel, Grant R. Vinik,* and *Thomas E. Caballero;* for Wallbuilders, Inc., by *Barry C. Hodge;* for Senator George Allen et al. by *Jay Alan Sekulow, Stuart J. Roth, Colby M. May, James M. Henderson, Walter M. Weber, Joel H. Thornton, John P. Tuskey,* and *Laura B. Hernandez;* for Sandra L. Banning by *Kenneth W. Starr, Robert R. Gasaway, Ashley C. Parrish, Stephen W. Parrish,* and *Paul E. Sullivan;* for Senator John Cornyn et al.

a group recitation of the Pledge of Allegiance. Respondent, Michael A. Newdow, is an atheist whose daughter participates in that daily exercise. Because the Pledge contains the words "under God," he views the School District's policy as a religious indoctrination of his child that violates the First Amendment. A divided panel of the Court of Appeals for the Ninth Circuit agreed with Newdow. In light of the obvious importance of that decision, we granted certiorari to review the First Amendment issue and, preliminarily, the question whether Newdow has standing to invoke the jurisdiction of the federal courts. We conclude that Newdow lacks standing and therefore reverse the Court of Appeals' decision.

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by *Mr. Cornyn, pro se;* for Idaho Governor Dirk Kempthorne et al. by *L. Michael Bogert* and *David F. Hensley;* and for Congressman Ron Paul et al. by *Richard D. Ackerman* and *Gary G. Kreep.*

Briefs of *amici curiae* urging affirmance were filed for American Atheists by *Paul Sanford;* for the American Humanist Association et al. by *Elizabeth L. Hileman;* for Americans United for Separation of Church and State et al. by *David H. Remes, Ayesha Khan,* and *Steven R. Shapiro;* for the Anti-Defamation League by *Martin E. Karlinsky, Martin S. Lederman, Steven M. Freeman, Michael Lieberman, Frederick M. Lawrence, Howard W. Goldstein,* and *Erwin Chemerinsky;* for Associated Pantheist Groups by *Michael C. Worsham* and *Dov M. Szego;* for Atheists for Human Rights by *Jerold M. Gorski;* for Buddhist Temples et al. by *Kenneth R. Pierce;* for the Church of Freethought by *Keith Alan;* for the Council for Secular Humanism by *Edward Tabash;* for the Freedom From Religion Foundation, Inc., by *Robert Reitano Tiernan;* for Historians and Law Scholars by *Steven K. Green* and *Steven G. Gey;* for Religious Scholars and Theologians by *Peter Irons;* for Rob Sherman Advocacy by *Richard D. Grossman;* for Seattle Atheists et al. by *Gary D. Borek;* for United Fathers of America et al. by *Mr. Gorski;* for Rev. Dr. Betty Jane Bailey et al. by *Douglas Laycock;* for Christopher L. Eisgruber et al. by *Lawrence G. Sager;* and for Barbara A. McGraw by *Ms. McGraw, pro se.*

Briefs of *amici curiae* were filed for Atheists and other Freethinkers by *Dean Robert Johansson;* for the Atheist Law Center by *Pamela L. Sumners* and *Larry Darby;* for the Common Good Foundation et al. by *Keith A. Fournier* and *John G. Stepanovich;* for Thurston Greene by *Mr. Greene, pro se;* for Joseph R. Grodin by *Neal Katyal* and *Richard A. Epstein;* and for Mister Thorne by *Ronald K. Losch.*

I

"The very purpose of a national flag is to serve as a symbol of our country," *Texas* v. *Johnson*, 491 U. S. 397, 405 (1989), and of its proud traditions "of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations," *id.*, at 437 (STEVENS, J., dissenting). As its history illustrates, the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles.

The Pledge of Allegiance was initially conceived more than a century ago. As part of the nationwide interest in commemorating the 400th anniversary of Christopher Columbus' discovery of America, a widely circulated national magazine for youth proposed in 1892 that pupils recite the following affirmation: "I pledge allegiance to my Flag and the Republic for which it stands: one Nation indivisible, with Liberty and Justice for all."[1] In the 1920's, the National Flag Conferences replaced the phrase "my Flag" with "the flag of the United States of America."

In 1942, in the midst of World War II, Congress adopted, and the President signed, a Joint Resolution codifying a detailed set of "rules and customs pertaining to the display and use of the flag of the United States of America." Ch. 435, 56 Stat. 377. Section 7 of this codification provided in full:

> "That the pledge of allegiance to the flag, 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation indivisible, with liberty and justice for all', be rendered by

[1] J. Baer, The Pledge of Allegiance: A Centennial History, 1892–1992, p. 3 (1992) (internal quotation marks omitted). At the time, the phrase "one Nation indivisible" had special meaning because the question whether a State could secede from the Union had been intensely debated and was unresolved prior to the Civil War. See J. Randall, Constitutional Problems Under Lincoln 12–24 (rev. ed. 1964). See also W. Rehnquist, Centennial Crisis: The Disputed Election of 1876, p. 182 (2004).

> standing with the right hand over the heart; extending the right hand, palm upward, toward the flag at the words 'to the flag' and holding this position until the end, when the hand drops to the side. However, civilians will always show full respect to the flag when the pledge is given by merely standing at attention, men removing the headdress. Persons in uniform shall render the military salute." *Id.*, at 380.

This resolution, which marked the first appearance of the Pledge of Allegiance in positive law, confirmed the importance of the flag as a symbol of our Nation's indivisibility and commitment to the concept of liberty.

Congress revisited the Pledge of Allegiance 12 years later when it amended the text to add the words "under God." Act of June 14, 1954, ch. 297, 68 Stat. 249. The House Report that accompanied the legislation observed that, "[f]rom the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). The resulting text is the Pledge as we know it today: "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U. S. C. § 4.

II

Under California law, "every public elementary school" must begin each day with "appropriate patriotic exercises." Cal. Educ. Code Ann. § 52720 (West 1989). The statute provides that "[t]he giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy" this requirement. *Ibid.* The Elk Grove Unified School District has implemented the state law by requiring that "[e]ach elementary school class recite the pledge of allegiance to the

flag once each day."[2] Consistent with our case law, the School District permits students who object on religious grounds to abstain from the recitation. See *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943).

In March 2000, Newdow filed suit in the United States District Court for the Eastern District of California against the United States Congress, the President of the United States, the State of California, and the School District and its superintendent.[3] App. 24. At the time of filing, Newdow's daughter was enrolled in kindergarten in the School District and participated in the daily recitation of the Pledge. Styled as a mandamus action, the complaint explains that Newdow is an atheist who was ordained more than 20 years ago in a ministry that "espouses the religious philosophy that the true and eternal bonds of righteousness and virtue stem from reason rather than mythology." *Id.*, at 42, ¶ 53. The complaint seeks a declaration that the 1954 Act's addition of the words "under God" violated the Establishment and Free Exercise Clauses of the United States Constitution,[4] as well as an injunction against the School District's policy requiring daily recitation of the Pledge. *Id.*, at 42. It alleges that Newdow has standing to sue on his own behalf and on behalf of his daughter as "next friend." *Id.*, at 26, 56.

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[2] Elk Grove Unified School District's Policy AR 6115, App. to Brief for United States as Respondent Supporting Petitioners 2a.

[3] Newdow also named as defendants the Sacramento City Unified School District and its superintendent on the chance that his daughter might one day attend school in that district. App. 48. The Court of Appeals held that Newdow lacks standing to challenge that district's policy because his daughter is not currently a student there. *Newdow* v. *U. S. Congress*, 328 F. 3d 466, 485 (CA9 2003) *(Newdow III)*. Newdow has not challenged that ruling.

[4] The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U. S. Const., Amdt. 1. The Religion Clauses apply to the States by incorporation into the Fourteenth Amendment. See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

The case was referred to a Magistrate Judge, whose brief findings and recommendation concluded, "the Pledge does not violate the Establishment Clause." *Id.*, at 79. The District Court adopted that recommendation and dismissed the complaint on July 21, 2000. App. to Pet. for Cert. 97. The Court of Appeals reversed and issued three separate decisions discussing the merits and Newdow's standing.

In its first opinion the appeals court unanimously held that Newdow has standing "as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." *Newdow* v. *U. S. Congress*, 292 F. 3d 597, 602 (CA9 2002) *(Newdow I)*. That holding sustained Newdow's standing to challenge not only the policy of the School District, where his daughter still is enrolled, but also the 1954 Act of Congress that had amended the Pledge, because his " 'injury in fact' " was " 'fairly traceable' " to its enactment. *Id.*, at 603–605. On the merits, over the dissent of one judge, the court held that both the 1954 Act and the School District's policy violate the Establishment Clause of the First Amendment. *Id.*, at 612.

After the Court of Appeals' initial opinion was announced, Sandra Banning, the mother of Newdow's daughter, filed a motion for leave to intervene, or alternatively to dismiss the complaint. App. 82. She declared that although she and Newdow shared "physical custody" of their daughter, a state-court order granted her "exclusive legal custody" of the child, "including the sole right to represent [the daughter's] legal interests and make all decision[s] about her education" and welfare. *Id.*, at 82, ¶¶ 2–3. Banning further stated that her daughter is a Christian who believes in God and has no objection either to reciting or hearing others recite the Pledge of Allegiance, or to its reference to God. *Id.*, at 83, ¶ 4. Banning expressed the belief that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views. *Id.*, at 85, ¶ 10. Ban-

ning accordingly concluded, as her daughter's sole legal custodian, that it was not in the child's interest to be a party to Newdow's lawsuit. *Id.*, at 85. On September 25, 2002, the California Superior Court entered an order enjoining Newdow from including his daughter as an unnamed party or suing as her "next friend." That order did not purport to answer the question of Newdow's Article III standing. See *Newdow* v. *U. S. Congress*, 313 F. 3d 500, 502 (CA9 2002) *(Newdow II)*.

In a second published opinion, the Court of Appeals reconsidered Newdow's standing in light of Banning's motion. The court noted that Newdow no longer claimed to represent his daughter, but unanimously concluded that "the grant of sole legal custody to Banning" did not deprive Newdow, "as a noncustodial parent, of Article III standing to object to unconstitutional government action affecting his child." *Id.*, at 502–503. The court held that under California law Newdow retains the right to expose his child to his particular religious views even if those views contradict the mother's, and that Banning's objections as sole legal custodian do not defeat Newdow's right to seek redress for an alleged injury to his own parental interests. *Id.*, at 504–505.

On February 28, 2003, the Court of Appeals issued an order amending its first opinion and denying rehearing en banc. *Newdow* v. *U. S. Congress*, 328 F. 3d 466, 468 (CA9 2003) *(Newdow III)*. The amended opinion omitted the initial opinion's discussion of Newdow's standing to challenge the 1954 Act and declined to determine whether Newdow was entitled to declaratory relief regarding the constitutionality of that Act. *Id.*, at 490. Nine judges dissented from the denial of en banc review. *Id.*, at 471, 482. We granted the School District's petition for a writ of certiorari to consider two questions: (1) whether Newdow has standing as a noncustodial parent to challenge the School District's policy, and (2) if so, whether the policy offends the First Amendment. 540 U. S. 945 (2003).

III

In every federal case, the party bringing the suit must establish standing to prosecute the action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth* v. *Seldin*, 422 U. S. 490, 498 (1975). The standing requirement is born partly of "'an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.'" *Allen* v. *Wright*, 468 U. S. 737, 750 (1984) (quoting *Vander Jagt* v. *O'Neill*, 699 F. 2d 1166, 1178–1179 (CADC 1983) (Bork, J., concurring)).

The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake. Even in cases concededly within our jurisdiction under Article III, we abide by "a series of rules under which [we have] avoided passing upon a large part of all the constitutional questions pressed upon [us] for decision." *Ashwander* v. *TVA*, 297 U. S. 288, 346 (1936) (Brandeis, J., concurring). Always we must balance "the heavy obligation to exercise jurisdiction," *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 820 (1976), against the "deeply rooted" commitment "not to pass on questions of constitutionality" unless adjudication of the constitutional issue is necessary, *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U. S. 101, 105 (1944). See also *Rescue Army* v. *Municipal Court of Los Angeles*, 331 U. S. 549, 568–575 (1947).

Consistent with these principles, our standing jurisprudence contains two strands: Article III standing, which enforces the Constitution's case-or-controversy requirement, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies "judicially self-imposed limits on the exercise of federal jurisdiction,"

Allen, 468 U. S., at 751. The Article III limitations are familiar: The plaintiff must show that the conduct of which he complains has caused him to suffer an "injury in fact" that a favorable judgment will redress. See *Lujan*, 504 U. S., at 560–561. Although we have not exhaustively defined the prudential dimensions of the standing doctrine, we have explained that prudential standing encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Allen*, 468 U. S., at 751. See also *Secretary of State of Md.* v. *Joseph H. Munson Co.*, 467 U. S. 947, 955–956 (1984). "Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U. S., at 500.

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U. S. 586, 593–594 (1890). See also *Mansell* v. *Mansell*, 490 U. S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law"); *Moore* v. *Sims*, 442 U. S. 415, 435 (1979) ("Family relations are a traditional area of state concern"). So strong is our deference to state law in this area that we have recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees." *Ankenbrandt* v. *Richards*, 504 U. S. 689, 703

(1992). We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving "elements of the domestic relationship," *id.*, at 705, even when divorce, alimony, or child custody is not strictly at issue:

> "This would be so when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.' Such might well be the case if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." *Id.*, at 705–706 (quoting *Colorado River*, 424 U. S., at 814).

Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, *e. g.*, *Palmore* v. *Sidoti*, 466 U. S. 429, 432–434 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.[5]

As explained briefly above, the extent of the standing problem raised by the domestic relations issues in this case was not apparent until August 5, 2002, when Banning filed

[5] Our holding does not rest, as THE CHIEF JUSTICE suggests, see *post*, at 19–22 (opinion concurring in judgment), on either the domestic relations exception or the abstention doctrine. Rather, our prudential standing analysis is informed by the variety of contexts in which federal courts decline to intervene because, as *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), contemplated, the suit "depend[s] on a determination of the status of the parties," *id.*, at 706. We deemed it appropriate to review the dispute in *Palmore* because it "raise[d] important federal concerns arising from the Constitution's commitment to eradicating discrimination based on race." 466 U. S., at 432. In this case, by contrast, the disputed family law rights are entwined inextricably with the threshold standing inquiry. THE CHIEF JUSTICE in this respect, see *post*, at 21–22, misses our point: The *merits* question undoubtedly transcends the domestic relations issue, but the *standing* question surely does not.

her motion for leave to intervene or dismiss the complaint following the Court of Appeals' initial decision. At that time, the child's custody was governed by a February 6, 2002, order of the California Superior Court. That order provided that Banning had "'*sole* legal custody as to the rights and responsibilities to make decisions relating to the health, education and welfare of'" her daughter. *Newdow II*, 313 F. 3d, at 502. The order stated that the two parents should "'consult with one another on substantial decisions relating to'" the child's "'psychological and educational needs,'" but it authorized Banning to "'exercise legal control'" if the parents could not reach "'mutual agreement.'" *Ibid.*

That family court order was the controlling document at the time of the Court of Appeals' standing decision. After the Court of Appeals ruled, however, the Superior Court held another conference regarding the child's custody. At a hearing on September 11, 2003, the Superior Court announced that the parents have "joint legal custody," but that Banning "makes the final decisions if the two . . . disagree." App. 127–128.[6]

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[6] The court confirmed that position in a written order issued January 9, 2004:

"The parties will have joint legal custody defined as follows: Ms. Banning will continue to make the final decisions as to the minor's health, education, and welfare if the two parties cannot mutually agree. The parties are required to consult with each other on substantial decisions relating to the health, education and welfare of the minor child, including . . . psychological and educational needs of the minor. If mutual agreement is not reached in these areas, then Ms. Banning may exercise legal control of the minor that is not specifically prohibited or is inconsistent with the physical custody." App. to Reply Brief for United States as Respondent Supporting Petitioners 12a.

Despite the use of the term "joint legal custody"—which is defined by California statute, see Cal. Fam. Code Ann. § 3003 (West 1994)—we see no meaningful distinction for present purposes between the custody order issued February 6, 2002, and the one issued January 9, 2004. Under either order, Newdow has the right to consult on issues relating to the

Newdow contends that despite Banning's final authority, he retains "an unrestricted right to inculcate in his daughter—free from governmental interference—the atheistic beliefs he finds persuasive." *Id.*, at 48, ¶ 78. The difficulty with that argument is that Newdow's rights, as in many cases touching upon family relations, cannot be viewed in isolation. This case concerns not merely Newdow's interest in inculcating his child with his views on religion, but also the rights of the child's mother as a parent generally and under the Superior Court orders specifically. And most important, it implicates the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution.

The interests of the affected persons in this case are in many respects antagonistic. Of course, legal disharmony in family relations is not uncommon, and in many instances that disharmony poses no bar to federal-court adjudication of proper federal questions. What makes this case different is that Newdow's standing derives entirely from his relationship with his daughter, but he lacks the right to litigate as her next friend. In marked contrast to our case law on *jus tertii*, see, *e. g.*, *Singleton* v. *Wulff*, 428 U. S. 106, 113–118 (1976) (plurality opinion), the interests of this parent and this child are not parallel and, indeed, are potentially in conflict.[7]

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child's education, but Banning possesses what we understand amounts to a tie-breaking vote.

[7] "There are good and sufficient reasons for th[e] prudential limitation on standing when rights of third parties are implicated—the avoidance of the adjudication of rights which those not before the Court may not wish to assert, and the assurance that the most effective advocate of the rights at issue is present to champion them." *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 80 (1978). Banning tells us that her daughter has no objection to the Pledge, and we are mindful in cases such as this that "children themselves have constitutionally protectible interests." *Wisconsin* v. *Yoder*, 406 U. S. 205, 243

Newdow's parental status is defined by California's domestic relations law. Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located. See *Bishop* v. *Wood*, 426 U. S. 341, 346–347 (1976). In this case, the Court of Appeals, which possesses greater familiarity with California law, concluded that state law vests in Newdow a cognizable right to influence his daughter's religious upbringing. *Newdow II*, 313 F. 3d, at 504–505. The court based its ruling on two intermediate state appellate cases holding that "while the custodial parent undoubtedly has the right to make ultimate decisions concerning the child's religious upbringing, a court will not enjoin the noncustodial parent from discussing religion with the child or involving the child in his or her religious activities in the absence of a showing that the child will be thereby harmed." *In re Marriage of Murga*, 103 Cal. App. 3d 498, 505, 163 Cal. Rptr. 79, 82 (1980). See also *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 268–270, 190 Cal. Rptr. 843, 849–850 (1983) (relying on *Murga* to invalidate portion of restraining order barring noncustodial father from engaging children in religious activity or discussion without custodial parent's consent). Animated by a conception of "family privacy" that includes "not simply a policy of minimum state intervention but also a presumption of parental autonomy," 142 Cal. App. 3d, at 267–268, 190 Cal. Rptr., at 848, the state cases create a zone of private authority within which each parent, whether custodial or noncustodial, remains free to impart to the child his or her religious perspective.

Nothing that either Banning or the School Board has done, however, impairs Newdow's right to instruct his daughter in

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(1972) (Douglas, J., dissenting). In a fundamental respect, "[i]t is the future of the student, not the future of the parents," that is at stake. *Id.*, at 245.

his religious views. Instead, Newdow requests relief that is more ambitious than that sought in *Mentry* and *Murga*. He wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in school when he and Banning disagree. The California cases simply do not stand for the proposition that Newdow has a right to dictate to others what they may and may not say to his child respecting religion. *Mentry* and *Murga* are concerned with protecting "'the fragile, complex interpersonal bonds between child and parent,'" 142 Cal. App. 3d, at 267, 190 Cal. Rptr., at 848, and with permitting divorced parents to expose their children to the "'diversity of religious experiences [that] is itself a sound stimulant for a child,'" *id.*, at 265, 190 Cal. Rptr., at 847. The cases speak not at all to the problem of a parent seeking to reach outside the private parent-child sphere to restrain the acts of a third party. A next friend surely could exercise such a right, but the Superior Court's order has deprived Newdow of that status.

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law. There is a vast difference between Newdow's right to communicate with his child—which both California law and the First Amendment recognize—and his claimed right to shield his daughter from influences to which she is exposed in school despite the terms of the custody order. We conclude that, having been deprived under California law of the right to sue as next friend, New-

dow lacks prudential standing to bring this suit in federal court.[8]

The judgment of the Court of Appeals is reversed.

It is so ordered.

JUSTICE SCALIA took no part in the consideration or decision of this case.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE O'CONNOR joins, and with whom JUSTICE THOMAS joins as to Part I, concurring in the judgment.

The Court today erects a novel prudential standing principle in order to avoid reaching the merits of the constitutional claim. I dissent from that ruling. On the merits, I conclude that the Elk Grove Unified School District (School District) policy that requires teachers to lead willing students in reciting the Pledge of Allegiance, which includes the words "under God," does not violate the Establishment Clause of the First Amendment.

I

The Court correctly notes that "our standing jurisprudence contains two strands: Article III standing, which en-

[8] Newdow's complaint and brief cite several additional bases for standing: that Newdow "at times has himself attended—and will in the future attend—class with his daughter," App. 49, ¶ 80; that he "has considered teaching elementary school students in [the School District]," *id.*, at 65, ¶ 120; that he "has attended and will continue to attend" school board meetings at which the Pledge is "routinely recited," *id.*, at 52, ¶ 85; and that the School District uses his tax dollars to implement its Pledge policy, *id.*, at 62–65. Even if these arguments suffice to establish Article III standing, they do not respond to our prudential concerns. As for taxpayer standing, Newdow does not reside in or pay taxes to the School District; he alleges that he pays taxes to the District only "indirectly" through his child support payments to Banning. Brief for Respondent Newdow 49, n. 70. That allegation does not amount to the "direct dollars-and-cents injury" that our strict taxpayer-standing doctrine requires. *Doremus* v. *Board of Ed. of Hawthorne*, 342 U. S. 429, 434 (1952).

forces the Constitution's case-or-controversy requirement, see *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 559–562 (1992); and prudential standing, which embodies 'judicially self-imposed limits on the exercise of federal jurisdiction,' [*Allen* v. *Wright*, 468 U. S. 737, 751 (1984)]." *Ante*, at 11–12. To be clear, the Court does not dispute that respondent Newdow (hereinafter respondent) satisfies the requisites of Article III standing. But curiously the Court incorporates criticism of the Court of Appeals' Article III standing decision into its justification for its novel prudential standing principle. The Court concludes that respondent lacks prudential standing, under its new standing principle, to bring his suit in federal court.

We have, in the past, judicially self-imposed clear limits on the exercise of federal jurisdiction. See, *e. g.*, *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975); *Allen* v. *Wright*, 468 U. S. 737, 751 (1984) ("Standing doctrine embraces several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights . . ."). In contrast, here is the Court's new prudential standing principle: "[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Ante*, at 17. The Court loosely bases this novel prudential standing limitation on the domestic relations exception to diversity-of-citizenship jurisdiction pursuant to 28 U. S. C. § 1332, the abstention doctrine, and criticisms of the Court of Appeals' construction of California state law, coupled with the prudential standing prohibition on a litigant's raising another person's legal rights.

First, the Court relies heavily on *Ankenbrandt* v. *Richards*, 504 U. S. 689 (1992), in which we discussed both the domestic relations exception and the abstention doctrine. In *Ankenbrandt*, the mother of two children sued her former

spouse and his female companion on behalf of the children, alleging physical and sexual abuse of the children. The lower courts declined jurisdiction based on the domestic relations exception to diversity jurisdiction and abstention under *Younger* v. *Harris*, 401 U. S. 37 (1971). We reversed, concluding that the domestic relations exception only applies when a party seeks to have a district court issue "divorce, alimony, and child custody decrees," *Ankenbrandt*, 504 U. S., at 704. We further held that abstention was inappropriate because "the status of the domestic relationship ha[d] been determined as a matter of state law, and in any event ha[d] no bearing on the underlying torts alleged," *id.*, at 706.

The Court first cites the domestic relations exception to support its new principle. Then the Court relies on a quote from *Ankenbrandt*'s discussion of the abstention doctrine: "We have also acknowledged that it might be appropriate for the federal courts to decline to hear a case involving 'elements of the domestic relationship,' *id.*, at 705, even when divorce, alimony, or child custody is not strictly at issue." *Ante*, at 13. The Court perfunctorily states: "Thus, while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, see, *e. g.*, *Palmore* v. *Sidoti*, 466 U. S. 429, 432–434 (1984), in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts." *Ante*, at 13. That conclusion does not follow from *Ankenbrandt*'s discussion of the domestic relations exception and abstention; even if it did, it would not be applicable in this case because, on the merits, this case presents a substantial federal question that transcends the family law issue to a greater extent than *Palmore*.

The domestic relations exception is not a prudential limitation on our federal jurisdiction. It is a limiting construction of the statute defining federal diversity jurisdiction, 28 U. S. C. § 1332, which "divests the federal courts of power to issue divorce, alimony, and child custody decrees," *Anken-*

brandt, 504 U. S., at 703. This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree. Instead it involves a substantial federal question about the constitutionality of the School District's conducting the Pledge ceremony, which is the source of our jurisdiction. Therefore, the domestic relations exception to diversity jurisdiction forms no basis for denying standing to respondent.

When we discussed abstention in *Ankenbrandt*, we first noted that "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Id.*, at 705 (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U. S. 800, 817 (1976)). *Ankenbrandt*'s discussion of abstention by no means supports the proposition that only in the rare instances where "a substantial federal question . . . transcends or exists apart from the family law issue," *ante*, at 13, should federal courts decide the federal issue. As in *Ankenbrandt*, "the status of the domestic relationship has been determined as a matter of state law, and in any event has no bearing on the underlying [constitutional violation] alleged." 504 U. S., at 706. Sandra Banning and respondent now share joint custody of their daughter, respondent retains the right to expose his daughter to his religious views, and the state of their domestic affairs has nothing to do with the underlying constitutional claim. Abstention forms no basis for denying respondent standing.

The Court cites *Palmore* v. *Sidoti*, 466 U. S. 429 (1984), as an example of the exceptional case where a "substantial federal question that transcends or exists apart from the family law issue" makes the exercise of our jurisdiction appropriate. *Ante*, at 13. In *Palmore*, we granted certiorari to review a child custody decision, and reversed the state court's decision because we found that the effects of racial prejudice resulting from the mother's interracial marriage could not justify granting custody to the father. Contrary to the Court's as-

sertion, the alleged constitutional violation, while clearly involving a "substantial federal question," did not "transcen[d] or exis[t] apart from the family law issue," *ante*, at 13; it had everything to do with the domestic relationship—"[w]e granted certiorari to review a *judgment of a state court divesting a natural mother of the custody of her infant child*," 466 U. S., at 430 (emphasis added). Under the Court's discussion today, it appears that we should have stayed out of the "domestic dispute" in *Palmore* no matter how constitutionally offensive the result would have been.

Finally, it seems the Court bases its new prudential standing principle, in part, on criticisms of the Court of Appeals' construction of state law, coupled with the prudential principle prohibiting third-party standing. In the Court of Appeals' original opinion, it held unanimously that respondent satisfied the Article III standing requirements, stating respondent "has standing as a parent to challenge a practice that interferes with his right to direct the religious education of his daughter." *Newdow* v. *U. S. Congress*, 292 F. 3d 597, 602 (CA9 2002). After Banning moved for leave to intervene, the Court of Appeals reexamined respondent's standing to determine whether the parents' court-ordered custodial arrangement altered respondent's standing. *Newdow* v. *U. S. Congress*, 313 F. 3d 500 (CA9 2002). The court examined whether respondent could assert an injury in fact by asking whether, under California law, "noncustodial parents maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent."[1] *Id.*, at 504. The Court of Appeals again unanimously concluded that the respondent satisfied Article III standing, despite the custody order, because he retained sufficient parental rights under California law. *Id.*, at 504–505 (citing *In re Marriage of*

[1] I note that respondent contends that he has never been a "noncustodial" parent and points out that under the state court's most recent order he enjoys joint legal custody. Brief for Respondent Newdow 40.

Murga v. *Petersen*, 103 Cal. App. 3d 498, 163 Cal. Rptr. 79 (1980); *In re Marriage of Mentry*, 142 Cal. App. 3d 260, 190 Cal. Rptr. 843 (1983)).

The Court, contrary to the Court of Appeals' interpretation of California case law, concludes that respondent "requests relief that is more ambitious than that sought in *Mentry* and *Murga*" because he seeks to restrain the act of a third party outside the parent-child sphere. *Ante*, at 17. The Court then mischaracterizes respondent's alleged interest based on the Court's *de novo* construction of California law.

The correct characterization of respondent's interest rests on the interpretation of state law. As the Court recognizes, *ante*, at 16, we have a "settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law." *Bowen* v. *Massachusetts*, 487 U. S. 879, 908 (1988). We do so "not only to render unnecessary review of their decisions in this respect, but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 500 (1985) (internal quotation marks and citation omitted). In contrast to the Court, I would defer to the Court of Appeals' interpretation of California law because it is our settled policy to do so, and because I think that the Court of Appeals has the better reading of *Murga*, *supra*, and *Mentry*, *supra*.

The Court does not take issue with the fact that, under California law, respondent retains a right to influence his daughter's religious upbringing and to expose her to his views. But it relies on Banning's view of the merits of this case to diminish respondent's interest, stating that the respondent "wishes to forestall his daughter's exposure to religious ideas that her mother, who wields a form of veto power, endorses, and to use his parental status to challenge the influences to which his daughter may be exposed in

school when he and Banning disagree." *Ante,* at 17. As alleged by respondent and as recognized by the Court of Appeals, respondent wishes to enjoin the School District from endorsing a form of religion inconsistent with his own views because he has a right to expose his daughter to those views without the State's placing its *imprimatur* on a particular religion. Under the Court of Appeals' construction of California law, Banning's "veto power" does not override respondent's right to challenge the Pledge ceremony.

The Court concludes that the California cases "do not stand for the proposition that [respondent] has a right to dictate to others what they may or may not say to his child respecting religion." *Ibid.* Surely, under California case law and the current custody order, respondent may not tell Banning what she may say to their child respecting religion, and respondent does not seek to. Just as surely, respondent cannot name his daughter as a party to a lawsuit against Banning's wishes. But his claim is different: Respondent does not seek to tell just anyone what he or she may say to his daughter, and he does not seek to vindicate solely her rights.

Respondent asserts that the School District's Pledge ceremony infringes his right under California law to expose his daughter to his religious views. While she is intimately associated with the source of respondent's standing (the father-daughter relationship and respondent's rights thereunder), the daughter *is not the source* of respondent's standing; instead it is their relationship that provides respondent his standing, which is clear once respondent's interest is properly described.[2] The Court's criticisms of the Court of

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[2] Also as properly described, it is clear that this is not the same as a next-friend suit. The Court relies on the fact that respondent "[was] deprived under California law of the right to sue as next friend." *Ante,* at 17. The same Superior Court that determined that respondent could not sue as next friend stated:

Appeals' Article III standing decision and the prudential prohibition on third-party standing provide no basis for denying respondent standing.

Although the Court may have succeeded in confining this novel principle almost narrowly enough to be, like the proverbial excursion ticket—good for this day only—our doctrine of prudential standing should be governed by general principles, rather than ad hoc improvisations.

II

The Pledge of Allegiance reads:

> "I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all." 4 U. S. C. § 4.

As part of an overall effort to "codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America," see H. R. Rep. No. 2047, 77th Cong., 2d Sess., 1 (1942); S. Rep. No. 1477, 77th Cong., 2d Sess., 1 (1942), Congress enacted the Pledge on June 22, 1942. Pub. L. 623, ch. 435, § 7, 56 Stat. 380, former 36 U. S. C. § 1972. Congress amended the Pledge to include the phrase "under God" in 1954. Act of June 14, 1954, ch. 297, § 7, 68 Stat. 249. The amendment's sponsor, Representative Rabaut, said its purpose was to contrast this country's belief in God with the Soviet Union's embrace of atheism. 100 Cong. Rec. 1700 (1954). We do not know what

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" 'To the extent that by not naming her you have . . . an individual right as a parent to say that, "not only for all the children of the world but in—mine in particular, I believe that this child—my child is being harmed," but the child is . . . not actually part of the suit, I don't know that there's any way that this court could preclude that.' " App. to Brief for Respondent Newdow B4.

The California court did not reject Newdow's right as distinct from his daughter's, and we should not either.

other Members of Congress thought about the purpose of the amendment. Following the decision of the Court of Appeals in this case, Congress passed legislation that made extensive findings about the historic role of religion in the political development of the Nation and reaffirmed the text of the Pledge. Act of Nov. 13, 2002, Pub. L. 107–293, §§ 1–2, 116 Stat. 2057–2060. To the millions of people who regularly recite the Pledge, and who have no access to, or concern with, such legislation or legislative history, "under God" might mean several different things: that God has guided the destiny of the United States, for example, or that the United States exists under God's authority. How much consideration anyone gives to the phrase probably varies, since the Pledge itself is a patriotic observance focused primarily on the flag and the Nation, and only secondarily on the description of the Nation.

The phrase "under God" in the Pledge seems, as a historical matter, to sum up the attitude of the Nation's leaders, and to manifest itself in many of our public observances. Examples of patriotic invocations of God and official acknowledgments of religion's role in our Nation's history abound.

At George Washington's first inauguration on April 30, 1789, he

> "stepped toward the iron rail, where he was to receive the oath of office. The diminutive secretary of the Senate, Samuel Otis, squeezed between the President and Chancellor Livingston and raised up the crimson cushion with a Bible on it. Washington put his right hand on the Bible, opened to Psalm 121:1: 'I raise my eyes toward the hills. Whence shall my help come.' The Chancellor proceeded with the oath: 'Do you solemnly swear that you will faithfully execute the office of President of the United States and will to the best of your ability preserve, protect and defend the Constitution of the United States?' The President responded, 'I solemnly swear,' and repeated the oath, adding, 'So help me God.'

> He then bent forward and kissed the Bible before him." M. Riccards, A Republic, If You Can Keep It: The Foundation of the American Presidency, 1700–1800, pp. 73–74 (1987).

Later the same year, after encouragement from Congress,[3] Washington issued his first Thanksgiving proclamation, which began:

> "Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor—and whereas both Houses of Congress have by their joint Committee requested me 'to recommend to the People of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness.'" 4 Papers of George Washington 131: Presidential Series (W. Abbot & D. Twohig eds. 1993).

Almost all succeeding Presidents have issued similar Thanksgiving proclamations.

Later Presidents, at critical times in the Nation's history, have likewise invoked the name of God. Abraham Lincoln, concluding his masterful Gettysburg Address in 1863, used the very phrase "under God":

> "It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they

[3] "The day after the First Amendment was proposed, Congress urged President Washington to proclaim 'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God.'" *Lynch* v. *Donnelly*, 465 U. S. 668, 675, n. 2 (1984).

> gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth." 1 Documents of American History 429 (H. Commager ed. 8th ed. 1968).

Lincoln's equally well-known second inaugural address, delivered on March 4, 1865, makes repeated references to God, concluding with these famous words:

> "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations." *Id.*, at 443.

Woodrow Wilson appeared before Congress in April 1917, to request a declaration of war against Germany. He finished with these words:

> "But the right is more precious than peace, and we shall fight for the things which we have always carried nearest our hearts,—for democracy, for the right of those who submit to authority to have a voice in their own Governments, for the rights and liberties of small nations, for a universal dominion of right for such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free. To such a task we can dedicate our lives and our fortunes, everything that we are and everything that we have, with the pride of those who know that the day has come when America is privileged to spend her blood and her might for the principles that gave her birth and happiness and

> the peace which she has treasured. God helping her, she can do no other." 2 *id.*, at 132.

President Franklin Delano Roosevelt, taking the office of the Presidency in the depths of the Great Depression, concluded his first inaugural address with these words: "In this dedication of a nation we humbly ask the blessing of God. May He protect each and every one of us! May He guide me in the days to come!" 2 *id.*, at 242.

General Dwight D. Eisenhower, who would himself serve two terms as President, concluded his "Order of the Day" to the soldiers, sailors, and airmen of the Allied Expeditionary Force on D-Day—the day on which the Allied Forces successfully landed on the Normandy beaches in France—with these words: "Good Luck! And let us all beseech the blessing of Almighty God upon this great and noble undertaking," http://www.eisenhower.archives.gov/dl/DDay/SoldiersSailorsAirmen.pdf (all Internet materials as visited June 9, 2004, and available in Clerk of Court's case file).

The motto "In God We Trust" first appeared on the country's coins during the Civil War. Secretary of the Treasury Salmon P. Chase, acting under the authority of an Act of Congress passed in 1864, prescribed that the motto should appear on the two cent coin. The motto was placed on more and more denominations, and since 1938 all United States coins bear the motto. Paper currency followed suit at a slower pace; Federal Reserve notes were so inscribed during the decade of the 1960's. Meanwhile, in 1956, Congress declared that the motto of the United States would be "In God we Trust." Act of July 30, 1956, ch. 795, 70 Stat. 732.

Our Court Marshal's opening proclamation concludes with the words "'God save the United States and this honorable Court.'" The language goes back at least as far as 1827. O. Smith, Early Indiana Trials and Sketches: Reminiscences (1858) (quoted in 1 C. Warren, The Supreme Court in United States History 469 (rev. ed. 1926)).

All of these events strongly suggest that our national culture allows public recognition of our Nation's religious history and character. In the words of the House Report that accompanied the insertion of the phrase "under God" in the Pledge: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2 (1954). Giving additional support to this idea is our national anthem The Star-Spangled Banner, adopted as such by Congress in 1931. 36 U. S. C. § 301 and Historical and Revision Notes. The last verse ends with these words:

> "Then conquer we must, when our cause it is just,
> "And this be our motto: 'In God is our trust.'
> "And the star-spangled banner in triumph shall wave
> "O'er the land of the free and the home of the brave!"
> http://www.bcpl.net/~etowner/anthem.html.

As pointed out by the Court, California law requires public elementary schools to "conduc[t] . . . appropriate patriotic exercises" at the beginning of the schoolday, and notes that the "giving of the Pledge of Allegiance to the Flag of the United States of America shall satisfy the requirements of this section." Cal. Educ. Code Ann. § 52720 (West 1989). The School District complies with this requirement by instructing that "[e]ach elementary school class recite the [P]ledge of [A]llegiance to the [F]lag once each day." App. 149–150. Students who object on religious (or other) grounds may abstain from the recitation. *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (holding that the government may not compel school students to recite the Pledge).

Notwithstanding the voluntary nature of the School District policy, the Court of Appeals, by a divided vote, held that the policy violates the Establishment Clause of the First Amendment because it "impermissibly coerces a religious

act." *Newdow* v. *U. S. Congress*, 328 F. 3d 466, 487 (CA9 2003). To reach this result, the court relied primarily on our decision in *Lee* v. *Weisman*, 505 U. S. 577 (1992). That case arose out of a graduation ceremony for a public high school in Providence, Rhode Island. The ceremony began with an invocation and ended with a benediction, both given by a local rabbi. The Court held that even though attendance at the ceremony was voluntary, students who objected to the prayers would nonetheless feel coerced to attend and to stand during each prayer. But the Court throughout its opinion referred to the prayer as "an explicit religious exercise," *id.*, at 598, and "a formal religious exercise," *id.*, at 589.

As the Court notes in its opinion, "the Pledge of Allegiance evolved as a common public acknowledgment of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." *Ante*, at 6.

I do not believe that the phrase "under God" in the Pledge converts its recital into a "religious exercise" of the sort described in *Lee*. Instead, it is a declaration of belief in allegiance and loyalty to the United States flag and the Republic that it represents. The phrase "under God" is in no sense a prayer, nor an endorsement of any religion, but a simple recognition of the fact noted in H. R. Rep. No. 1693, at 2: "From the time of our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God." Reciting the Pledge, or listening to others recite it, is a patriotic exercise, not a religious one; participants promise fidelity to our flag and our Nation, not to any particular God, faith, or church.[4]

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[4] JUSTICE THOMAS concludes, based partly on *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), that *Lee* v. *Weisman*, 505 U. S. 577 (1992), coercion is present in the School District policy. *Post*, at 46–47 (opinion concurring in judgment). I cannot agree. *Barnette* involved a board of education policy that compelled students to recite the Pledge.

There is no doubt that respondent is sincere in his atheism and rejection of a belief in God. But the mere fact that he disagrees with this part of the Pledge does not give him a veto power over the decision of the public schools that willing participants should pledge allegiance to the flag in the manner prescribed by Congress. There may be others who disagree, not with the phrase "under God," but with the phrase "with liberty and justice for all." But surely that would not give such objectors the right to veto the holding of such a ceremony by those willing to participate. Only if it can be said that the phrase "under God" somehow tends to the establishment of a religion in violation of the First Amendment can respondent's claim succeed, where one based on objections to "with liberty and justice for all" fails. Our cases have broadly interpreted this phrase, but none have gone anywhere near as far as the decision of the Court of Appeals in this case. The recital, in a patriotic ceremony pledging allegiance to the flag and to the Nation, of the descriptive phrase "under God" cannot possibly lead to the establishment of a religion, or anything like it.

When courts extend constitutional prohibitions beyond their previously recognized limit, they may restrict democratic choices made by public bodies. Here, Congress prescribed a Pledge of Allegiance, the State of California required patriotic observances in its schools, and the School

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319 U. S., at 629. There was no opportunity to opt out, as there is in the present case. "Failure to conform [was] 'insubordination' dealt with by expulsion. Readmission [was] denied by statute until compliance. Meanwhile the expelled child [was] 'unlawfully absent' and [could] be proceeded against as a delinquent. His parents or guardians [were] liable to prosecution, and if convicted [were] subject to a fine not exceeding $50 and jail term not exceeding thirty days." *Ibid.* (footnotes omitted). I think there is a clear difference between compulsion *(Barnette)* and coercion *(Lee)*. Compulsion, after *Barnette,* is not permissible, and it is not an issue in this case. And whatever the virtues and vices of *Lee,* the Court was concerned only with "formal religious exercise[s]," 505 U. S., at 589, which the Pledge is not.

District chose to comply by requiring teacher-led recital of the Pledge of Allegiance by willing students. Thus, we have three levels of popular government—the national, the state, and the local—collaborating to produce the Elk Grove ceremony. The Constitution only requires that schoolchildren be entitled to abstain from the ceremony if they chose to do so. To give the parent of such a child a sort of "heckler's veto" over a patriotic ceremony willingly participated in by other students, simply because the Pledge of Allegiance contains the descriptive phrase "under God," is an unwarranted extension of the Establishment Clause, an extension which would have the unfortunate effect of prohibiting a commendable patriotic observance.

Justice O'Connor, concurring in the judgment.

I join the concurrence of The Chief Justice in full. Like him, I would follow our policy of deferring to the Federal Courts of Appeals in matters that involve the interpretation of state law, see *Bowen* v. *Massachusetts*, 487 U. S. 879 (1988), and thereby conclude that respondent Newdow does have standing to bring his constitutional claim before a federal court. Like The Chief Justice, I believe that we must examine those questions, and, like him, I believe that petitioner school district's policy of having its teachers lead students in voluntary recitations of the Pledge of Allegiance does not offend the Establishment Clause. But while the history presented by The Chief Justice illuminates the constitutional problems this case presents, I write separately to explain the principles that guide my own analysis of the constitutionality of that policy.

As I have said before, the Establishment Clause "cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 720 (1994) (concurring opinion). When a court confronts a challenge to

government-sponsored speech or displays, I continue to believe that the endorsement test "captures the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573, 627 (1989) (opinion concurring in part and concurring in judgment) (quoting *Wallace* v. *Jaffree*, 472 U. S. 38, 70 (1985) (O'CONNOR, J., concurring in judgment)). In that context, I repeatedly have applied the endorsement test, *Capitol Square Review and Advisory Bd.* v. *Pinette*, 515 U. S. 753, 772–773 (1995) (opinion concurring in part and concurring in judgment) (display of a cross in a plaza next to state capitol); *Allegheny*, *supra*, at 625 (display of creche in county courthouse and menorah outside city and county buildings); *Wallace*, *supra*, at 69 (statute authorizing a meditative moment of silence in classrooms); *Lynch* v. *Donnelly*, 465 U. S. 668, 688 (1984) (O'CONNOR, J., concurring) (inclusion of Nativity scene in city government's Christmas display), and I would do so again here.

Endorsement, I have explained, "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Ibid.* In order to decide whether endorsement has occurred, a reviewing court must keep in mind two crucial and related principles.

First, because the endorsement test seeks "to identify those situations in which government makes adherence to a religion relevant . . . to a person's standing in the political community," it assumes the viewpoint of a reasonable observer. *Pinette*, 515 U. S., at 772 (internal quotation marks omitted). Given the dizzying religious heterogeneity of our

Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any government action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. See *id.*, at 780 ("There is always *someone* who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion"). Second, because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape. See *id.*, at 781.

The Court has permitted government, in some instances, to refer to or commemorate religion in public life. See, *e. g.*, *Pinette*, *supra; Allegheny*, *supra; Lynch*, *supra; Marsh* v. *Chambers*, 463 U. S. 783 (1983). While the Court's explicit rationales have varied, my own has been consistent; I believe that although these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes. One such purpose is to commemorate the role of religion in our history. In my view, some references to religion in public life and government are the inevitable consequence of our Nation's origins. Just as the Court has refused to ignore changes in the religious composition of our Nation in explaining the modern scope of the Religion Clauses, see, *e. g.*, *Wallace*, *supra*, at 52–54 (even if the Religion Clauses were originally meant only to forestall intolerance between Christian sects, they now encompass all forms of religious conscience), it should not deny that our history has left its mark on our national traditions. It is unsurprising that a Nation founded by religious refugees and dedicated to religious freedom should find references to divinity in its symbols, songs, mot-

toes, and oaths.* Eradicating such references would sever ties to a history that sustains this Nation even today. See *Allegheny*, *supra*, at 623 (declining to draw lines that would "sweep away all government recognition and acknowledgment of the role of religion in the lives of our citizens").

Facially religious references can serve other valuable purposes in public life as well. Twenty years ago, I wrote that such references "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society." *Lynch*, *supra*, at 692–693 (concurring opinion). For centuries, we have marked important occasions or pronouncements with references to God and invocations of divine assistance. Such references can serve to solemnize an occasion instead of to invoke divine provenance. The reasonable observer discussed above, fully aware of our national history and the origins of such practices, would not perceive these acknowledgments as signifying a government endorsement of any specific religion, or even of religion over nonreligion.

There are no *de minimis* violations of the Constitution—no constitutional harms so slight that the courts are obliged

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*Note, for example, the following state mottoes: Arizona ("God Enriches"); Colorado ("Nothing without Providence"); Connecticut ("He Who Transplanted Still Sustains"); Florida ("In God We Trust"); Ohio ("With God All Things Are Possible"); and South Dakota ("Under God the People Rule"). Arizona, Colorado, and Florida have placed their mottoes on their state seals, and the mottoes of Connecticut and South Dakota appear on the flags of those States as well. Georgia's newly redesigned flag includes the motto "In God We Trust." The oaths of judicial office, citizenship, and military and civil service all end with the (optional) phrase "[S]o help me God." See 28 U. S. C. § 453; 5 U. S. C. § 3331; 10 U. S. C. § 502; 8 CFR § 337.1 (2004). Many of our patriotic songs contain overt or implicit references to the divine, among them: America ("Protect us by thy might, great God our King"); America the Beautiful ("God shed his grace on thee"); and God bless America.

to ignore them. Given the values that the Establishment Clause was meant to serve, however, I believe that government can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution. This category of "ceremonial deism" most clearly encompasses such things as the national motto ("In God We Trust"), religious references in traditional patriotic songs such as The Star-Spangled Banner, and the words with which the Marshal of this Court opens each of its sessions ("God save the United States and this honorable Court"). See *Allegheny*, 492 U. S., at 630 (O'CONNOR, J., concurring in part and concurring in judgment). These references are not minor trespasses upon the Establishment Clause to which I turn a blind eye. Instead, their history, character, and context prevent them from being constitutional violations at all.

This case requires us to determine whether the appearance of the phrase "under God" in the Pledge of Allegiance constitutes an instance of such ceremonial deism. Although it is a close question, I conclude that it does, based on my evaluation of the following four factors.

History and Ubiquity

The constitutional value of ceremonial deism turns on a shared understanding of its legitimate nonreligious purposes. That sort of understanding can exist only when a given practice has been in place for a significant portion of the Nation's history, and when it is observed by enough persons that it can fairly be called ubiquitous. See *Lynch*, 465 U. S., at 693. By contrast, novel or uncommon references to religion can more easily be perceived as government endorsements because the reasonable observer cannot be presumed to be fully familiar with their origins. As a result, in examining whether a given practice constitutes an instance of ceremonial deism, its "history and ubiquity" will be of great importance. As I explained in *Allegheny*, *supra*, at 630–631:

> "Under the endorsement test, the 'history and ubiquity' of a practice is relevant not because it creates an 'artificial exception' from that test. On the contrary, the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion."

Fifty years have passed since the words "under God" were added, a span of time that is not inconsiderable given the relative youth of our Nation. In that time, the Pledge has become, alongside the singing of The Star-Spangled Banner, our most routine ceremonial act of patriotism; countless schoolchildren recite it daily, and their religious heterogeneity reflects that of the Nation as a whole. As a result, the Pledge and the context in which it is employed are familiar and nearly inseparable in the public mind. No reasonable observer could have been surprised to learn the words of the Pledge, or that petitioner school district has a policy of leading its students in daily recitation of the Pledge.

It cannot be doubted that "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." *Walz* v. *Tax Comm'n of City of New York*, 397 U. S. 664, 678 (1970). And the history of a given practice is all the more relevant when the practice has been employed pervasively without engendering significant controversy. In *Lynch*, where we evaluated the constitutionality of a town Christmas display that included a creche, we found relevant to the endorsement question the fact that the display had "apparently caused no political divisiveness prior to the filing of this lawsuit" despite its use for over 40 years. See 465 U. S., at 692–693. Similarly, in the 50 years that the Pledge has been recited as it is now, by millions of children, this was, at the time of its filing, only the third reported case of which I am aware to

challenge it as an impermissible establishment of religion. See *Sherman* v. *Community Consol. School Dist. 21*, 980 F. 2d 437 (CA7 1992); *Smith* v. *Denny*, 280 F. Supp. 651 (ED Cal. 1968). The citizens of this Nation have been neither timid nor unimaginative in challenging government practices as forbidden "establishments" of religion. See, *e. g.*, *Altman* v. *Bedford Central School Dist.*, 245 F. 3d 49 (CA2 2001) (challenging, among other things, reading of a story of the Hindu deity Ganesha in a fourth-grade classroom); *Alvarado* v. *San Jose*, 94 F. 3d 1223 (CA9 1996) (challenge to use of a sculpture of the Aztec deity Quetzalcoatl to commemorate Mexican contributions to city culture); *Peloza* v. *Capistrano Unified School Dist.*, 37 F. 3d 517 (CA9 1994) (high school biology teacher's challenge to requirement that he teach the concept of evolution); *Fleischfresser* v. *Directors of School Dist. 200*, 15 F. 3d 680 (CA7 1994) (challenge to school supplemental reading program that included works of fantasy involving witches, goblins, and Halloween); *United States* v. *Allen*, 760 F. 2d 447, 449 (CA2 1985) (challenge to conviction for vandalism of B–52 bomber, based on theory that property-protection statute established a "'national religion of nuclearism . . . in which the bomb is the new source of salvation'"); *Grove* v. *Mead School Dist. No. 354*, 753 F. 2d 1528 (CA9 1985) (challenge to use of The Learning Tree, by Gordon Parks, in high school English literature class); *Crowley* v. *Smithsonian Inst.*, 636 F. 2d 738 (CADC 1980) (challenge to museum display that explained the concept of evolution). Given the vigor and creativity of such challenges, I find it telling that so little ire has been directed at the Pledge.

Absence of worship or prayer

"[O]ne of the greatest dangers to the freedom of the individual to worship in his own way [lies] in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services."

Engel v. *Vitale,* 370 U. S. 421, 429 (1962). Because of this principle, only in the most extraordinary circumstances could actual worship or prayer be defended as ceremonial deism. We have upheld only one such prayer against Establishment Clause challenge, and it was supported by an extremely long and unambiguous history. See *Marsh* v. *Chambers,* 463 U. S. 783 (1983) (upholding Nebraska Legislature's 128-year-old practice of opening its sessions with a prayer offered by a chaplain). Any statement that has as its purpose placing the speaker or listener in a penitent state of mind, or that is intended to create a spiritual communion or invoke divine aid, strays from the legitimate secular purposes of solemnizing an event and recognizing a shared religious history. *Santa Fe Independent School Dist.* v. *Doe,* 530 U. S. 290, 309 (2000) ("[T]he use of an invocation to foster . . . solemnity is impermissible when, in actuality, it constitutes [state-sponsored] prayer").

Of course, any statement *can* be imbued by a speaker or listener with the qualities of prayer. But, as I have explained, the relevant viewpoint is that of a reasonable observer, fully cognizant of the history, ubiquity, and context of the practice in question. Such an observer could not conclude that reciting the Pledge, including the phrase "under God," constitutes an instance of worship. I know of no religion that incorporates the Pledge into its canon, nor one that would count the Pledge as a meaningful expression of religious faith. Even if taken literally, the phrase is merely descriptive; it purports only to identify the United States as a Nation subject to divine authority. That cannot be seen as a serious invocation of God or as an expression of individual submission to divine authority. Cf. *Engel, supra,* at 424 (describing prayer as "a solemn avowal of divine faith and supplication for the blessings of the Almighty"). A reasonable observer would note that petitioner school district's policy of Pledge recitation appears under the heading of "Patriotic Exercises," and the California law which it implements re-

fers to "appropriate patriotic exercises." Cal. Educ. Code Ann. § 52720 (West 1989). Petitioner school district also employs teachers, not chaplains or religious instructors, to lead its students' exercise; this serves as a further indication that it does not treat the Pledge as a prayer. Cf. *Lee* v. *Weisman*, 505 U. S. 577, 594 (1992) (reasoning that a graduation benediction could not be construed as a *de minimis* religious exercise without offending the rabbi who offered it).

It is true that some of the legislators who voted to add the phrase "under God" to the Pledge may have done so in an attempt to attach to it an overtly religious message. See H. R. Rep. No. 1693, 83d Cong., 2d Sess., 2–3 (1954). But their intentions cannot, on their own, decide our inquiry. First of all, those legislators also had permissible secular objectives in mind—they meant, for example, to acknowledge the religious origins of our Nation's belief in the "individuality and the dignity of the human being." *Id.*, at 1. Second—and more critically—the *subsequent* social and cultural history of the Pledge shows that its original secular character was not transformed by its amendment. In *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), we explained that a government may initiate a practice "for the impermissible purpose of supporting religion" but nevertheless "retai[n] the la[w] for the permissible purpose of furthering overwhelmingly secular ends." *Id.*, at 263–264 (citing *McGowan* v. *Maryland*, 366 U. S. 420 (1961)). Whatever the sectarian ends its authors may have had in mind, our continued repetition of the reference to "one Nation under God" in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost. See *Lynch*, 465 U. S., at 716 (Brennan, J., dissenting) (suggesting that the reference to God in the Pledge might be permissible because it has "lost through rote repetition any significant religious content").

Absence of reference to particular religion

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson* v. *Valente*, 456 U. S. 228, 244 (1982). While general acknowledgments of religion need not be viewed by reasonable observers as denigrating the nonreligious, the same cannot be said of instances "where the endorsement is sectarian, in the sense of specifying details upon which men and women who believe in a benevolent, omnipotent Creator and Ruler of the world are known to differ." *Weisman*, *supra*, at 641 (SCALIA, J., dissenting). As a result, no religious acknowledgment could claim to be an instance of ceremonial deism if it explicitly favored one particular religious belief system over another.

The Pledge complies with this requirement. It does not refer to a nation "under Jesus" or "under Vishnu," but instead acknowledges religion in a general way: a simple reference to a generic "God." Of course, some religions—Buddhism, for instance—are not based upon a belief in a separate Supreme Being. See Brief for Buddhist Temples et al. as *Amici Curiae* 15–16. But one would be hard pressed to imagine a brief solemnizing reference to religion that would adequately encompass every religious belief expressed by any citizen of this Nation. The phrase "under God," conceived and added at a time when our national religious diversity was neither as robust nor as well recognized as it is now, represents a tolerable attempt to acknowledge religion and to invoke its solemnizing power without favoring any individual religious sect or belief system.

Minimal religious content

A final factor that makes the Pledge an instance of ceremonial deism, in my view, is its highly circumscribed reference to God. In most of the cases in which we have struck down government speech or displays under the Establishment Clause, the offending religious content has been much more

pervasive. See, *e. g.*, *Weisman*, *supra*, at 581–582 (prayers involving repeated thanks to God and requests for blessings). Of course, a ceremony cannot avoid Establishment Clause scrutiny simply by avoiding an explicit mention of God. See *Wallace* v. *Jaffree*, 472 U. S. 38 (1985) (invalidating Alabama statute providing moment of silence for meditation or voluntary prayer). But the brevity of a reference to religion or to God in a ceremonial exercise can be important for several reasons. First, it tends to confirm that the reference is being used to acknowledge religion or to solemnize an event rather than to endorse religion in any way. Second, it makes it easier for those participants who wish to "opt out" of language they find offensive to do so without having to reject the ceremony entirely. And third, it tends to limit the ability of government to express a preference for one religious sect over another.

The reference to "God" in the Pledge of Allegiance qualifies as a minimal reference to religion; Newdow's challenge focuses on only two of the Pledge's 31 words. Moreover, the presence of those words is not absolutely essential to the Pledge, as demonstrated by the fact that it existed without them for over 50 years. As a result, students who wish to avoid saying the words "under God" still can consider themselves meaningful participants in the exercise if they join in reciting the remainder of the Pledge.

I have framed my inquiry as a specific application of the endorsement test by examining whether the ceremony or representation would convey a message to a reasonable observer, familiar with its history, origins, and context, that those who do not adhere to its literal message are political outsiders. But consideration of these factors would lead me to the same result even if I were to apply the "coercion" test that has featured in several opinions of this Court. *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290 (2000); *Lee* v. *Weisman*, 505 U. S. 577 (1992).

The coercion test provides that, "at a minimum, . . . government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.*, at 587 (quoting *Lynch*, 465 U. S., at 678). Any coercion that persuades an onlooker to participate in an act of ceremonial deism is inconsequential, as an Establishment Clause matter, because such acts are simply not religious in character. As a result, symbolic references to religion that qualify as instances of ceremonial deism will pass the coercion test as well as the endorsement test. This is not to say, however, that government could *overtly* coerce a person to participate in an act of ceremonial deism. Our cardinal freedom is one of belief; leaders in this Nation cannot force us to proclaim our allegiance to *any* creed, whether it be religious, philosophic, or political. That principle found eloquent expression in a case involving the Pledge itself, even before it contained the words to which Newdow now objects. See *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624, 642 (1943) (Jackson, J.). The compulsion of which Justice Jackson was concerned, however, was of the direct sort—the Constitution does not guarantee citizens a right entirely to avoid ideas with which they disagree. It would betray its own principles if it did; no robust democracy insulates its citizens from views that they might find novel or even inflammatory.

* * *

Michael Newdow's challenge to petitioner school district's policy is a well-intentioned one, but his distaste for the reference to "one Nation under God," however sincere, cannot be the yardstick of our Establishment Clause inquiry. Certain ceremonial references to God and religion in our Nation are the inevitable consequence of the religious history that gave birth to our founding principles of liberty. It would be ironic indeed if this Court were to wield our constitutional

commitment to religious freedom so as to sever our ties to the traditions developed to honor it.

JUSTICE THOMAS, concurring in the judgment.

We granted certiorari in this case to decide whether the Elk Grove Unified School District's Pledge policy violates the Constitution. The answer to that question is: "no." But in a testament to the condition of our Establishment Clause jurisprudence, the Court of Appeals reached the opposite conclusion based on a persuasive reading of our precedent, especially *Lee* v. *Weisman*, 505 U. S. 577 (1992). In my view, *Lee* adopted an expansive definition of "coercion" that cannot be defended however one decides the "difficult question" of "[w]hether and how th[e Establishment] Clause should constrain state action under the Fourteenth Amendment." *Zelman* v. *Simmons-Harris*, 536 U. S. 639, 678 (2002) (THOMAS, J., concurring). The difficulties with our Establishment Clause cases, however, run far deeper than *Lee*.[1]

Because I agree with THE CHIEF JUSTICE that respondent Newdow has standing, I would take this opportunity to begin the process of rethinking the Establishment Clause. I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorpora-

[1] This is by no means a novel observation. See, *e. g.*, *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 861 (1995) (THOMAS, J., concurring) (noting that "our Establishment Clause jurisprudence is in hopeless disarray"); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–401 (1993) (SCALIA, J., concurring in judgment). We have selectively invoked particular tests, such as the "*Lemon* test," *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), with predictable outcomes. See, *e. g.*, *Lamb's Chapel*, *supra*, at 398–401 (SCALIA, J., concurring in judgment). Our jurisprudential confusion has led to results that can only be described as silly. In *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573 (1989), for example, the Court distinguished between a creche on the one hand and an 18-foot Chanukah menorah placed near a 45-foot Christmas tree on the other. The Court held that the first display violated the Establishment Clause but that the second did not.

tion. Moreover, as I will explain, the Pledge policy is not implicated by any sensible incorporation of the Establishment Clause, which would probably cover little more than the Free Exercise Clause.

I

In *Lee*, the Court held that invocations and benedictions could not, consistent with the Establishment Clause, be given at public secondary school graduations. The Court emphasized "heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U. S., at 592. It brushed aside both the fact that the students were not required to attend the graduation, see *id.*, at 586 (asserting that student "attendance and participation in" the graduation ceremony "are in a fair and real sense obligatory"), and the fact that they were not compelled, in any meaningful sense, to participate in the religious component of the graduation ceremony, see *id.*, at 593 ("What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it"). The Court surmised that the prayer violated the Establishment Clause because a high school student could—in light of the "peer pressure" to attend graduation and "to stand as a group or, at least, maintain respectful silence during the invocation and benediction," *ibid.*—have "a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow," *ibid.*

Adherence to *Lee* would require us to strike down the Pledge policy, which, in most respects, poses more serious difficulties than the prayer at issue in *Lee*. A prayer at graduation is a one-time event, the graduating students are almost (if not already) adults, and their parents are usually present. By contrast, very young students, removed from the protection of their parents, are exposed to the Pledge each and every day.

Moreover, this case is more troubling than *Lee* with respect to both kinds of "coercion." First, although students may feel "peer pressure" to attend their graduations, the pressure here is far less subtle: Students are actually compelled (that is, by law, and not merely "in a fair and real sense," *id.*, at 586) to attend school. See also *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203, 223 (1963).

Analysis of the second form of "coercion" identified in *Lee* is somewhat more complicated. It is true that since this Court decided *West Virginia Bd. of Ed.* v. *Barnette*, 319 U. S. 624 (1943), States cannot compel (in the traditional sense) students to pledge their allegiance. Formally, then, dissenters can refuse to pledge, and this refusal would be clear to onlookers.[2] That is, students have a theoretical means of opting out of the exercise. But as *Lee* indicated: "Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity . . . ." 505 U. S., at 593–594. On *Lee*'s reasoning, *Barnette*'s protection is illusory, for government officials can allow children to recite the Pledge and let peer pressure take its natural and predictable course. Further, even if we assume that sitting in respectful silence could be *mistaken* for assent to or participation in a graduation prayer, dissenting students graduating from high school are not "coerced" to pray. At most, they are "coerced" into possibly appearing to assent to the prayer. The "coercion" here, however, results in unwilling children actually pledging their allegiance.[3]

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[2] Of course, as *Lee* and subsequent cases make clear, "'[l]aw reaches past formalism.'" *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290, 311 (2000) (quoting *Lee* v. *Weisman*, 505 U. S. 577, 595 (1992)).

[3] Surely the "coercion" to pledge (where failure to do so is immediately obvious to one's peers) is far greater than the "coercion" resulting from a student-initiated and student-led prayer at a high school football game. See *Santa Fe Independent School Dist.*, *supra.*

THE CHIEF JUSTICE would distinguish *Lee* by asserting "that the phrase 'under God' in the Pledge [does not] conver[t] its recital into a 'religious exercise' of the sort described in *Lee*." *Ante*, at 31 (opinion concurring in judgment). In *Barnette*, the Court addressed a state law that compelled students to salute and pledge allegiance to the flag. The Court described this as "compulsion of students to declare a belief." 319 U. S., at 631. The Pledge "require[d] affirmation of a belief and an attitude of mind." *Id.*, at 633. In its current form, reciting the Pledge entails pledging allegiance to "the Flag of the United States of America, and to the Republic for which it stands, one Nation under God." 4 U. S. C. § 4. Under *Barnette*, pledging allegiance is "to declare a belief" that now includes that this is "one Nation under God." It is difficult to see how this does not entail an affirmation that God exists. Whether or not we classify affirming the existence of God as a "formal religious exercise" akin to prayer, it must present the same or similar constitutional problems.

To be sure, such an affirmation is not a prayer, and I admit that this might be a significant distinction. But the Court has squarely held that the government cannot require a person to "declare his belief in God." *Torcaso* v. *Watkins*, 367 U. S. 488, 489 (1961); *id.*, at 495 ("We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'"); see also *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872, 877 (1990) ("The government may not compel affirmation of religious belief"); *Widmar* v. *Vincent*, 454 U. S. 263, 269–270, n. 6 (1981) (rejecting attempt to distinguish worship from other forms of religious speech). And the Court has said, in my view questionably, that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief." *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U. S. 573,

594 (1989). See also *Good News Club* v. *Milford Central School*, 533 U. S. 98, 126–127 (2001) (SCALIA, J., concurring).

I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional. I believe, however, that *Lee* was wrongly decided. *Lee* depended on a notion of "coercion" that, as I discuss below, has no basis in law or reason. The kind of coercion implicated by the Religion Clauses is that accomplished "*by force of law and threat of penalty.*" 505 U. S., at 640 (SCALIA, J., dissenting); see *id.*, at 640–645. Peer pressure, unpleasant as it may be, is not coercion. But rejection of *Lee*-style "coercion" does not suffice to settle this case. Although children are not coerced to pledge their allegiance, they are legally coerced to attend school. Cf., *e. g.*, *Schempp, supra; Engel* v. *Vitale*, 370 U. S. 421 (1962). Because what is at issue is a state action, the question becomes whether the Pledge policy implicates a religious liberty right protected by the Fourteenth Amendment.

II

I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. See *Zelman*, 536 U. S., at 679, and n. 4 (THOMAS, J., concurring). But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause. In any case, I do not believe that the Pledge policy infringes any religious liberty right that would arise from incorporation of the Clause. Because the Pledge policy also does not infringe any free-exercise rights, I conclude that it is constitutional.

A

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."

Amdt. 1. As a textual matter, this Clause probably prohibits Congress from establishing a national religion. But see P. Hamburger, Separation of Church and State 106, n. 40 (2002) (citing sources). Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments, notwithstanding any argument that could be made based on Congress' power under the Necessary and Proper Clause. See A. Amar, The Bill of Rights 36–39 (1998).

Nothing in the text of the Clause suggests that it reaches any further. The Establishment Clause does not purport to protect individual rights. By contrast, the Free Exercise Clause plainly protects individuals against congressional interference with the right to exercise their religion, and the remaining Clauses within the First Amendment expressly disable Congress from "abridging [particular] *freedom[s]*." (Emphasis added.) This textual analysis is consistent with the prevailing view that the Constitution left religion to the States. See, *e. g.*, 2 J. Story, Commentaries on the Constitution of the United States § 1873 (5th ed. 1891); see also Amar, The Bill of Rights, at 32–42; *id.*, at 246–257. History also supports this understanding: At the founding, at least six States had established religions, see McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409, 1437 (1990). Nor has this federalism point escaped the notice of Members of this Court. See, *e. g.*, *Zelman*, *supra*, at 677–680 (THOMAS, J., concurring); *Lee*, *supra*, at 641 (SCALIA, J., dissenting).

Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand. The best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Fed-

eral Government, to be free from coercive federal establishments. Incorporation of this individual right, the argument goes, makes sense. I have alluded to this possibility before. See *Zelman*, *supra*, at 679 (THOMAS, J., concurring) ("States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights *or any other individual liberty interest*" (emphasis added)).

But even assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. For the reasons discussed above, it is more likely that States and only States were the direct beneficiaries. See also *Lee*, *supra*, at 641 (SCALIA, J., dissenting). Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion. See *Schempp*, 374 U. S., at 310 (Stewart, J., dissenting) (noting that "the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy"). Nevertheless, the potential right against federal establishments is the only candidate for incorporation.

I would welcome the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States. One observation suffices for now: As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to "an establishment of religion." At the very least, the burden of persuasion rests with anyone who claims that the term took on a different meaning upon incorporation. We must therefore determine whether the Pledge policy pertains to an "establishment of religion."

B

The traditional "establishments of religion" to which the Establishment Clause is addressed necessarily involve actual legal coercion:

> "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.* Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities. L. Levy, The Establishment Clause 4 (1986). Thus, for example, in the Colony of Virginia, where the Church of England had been established, ministers were required by law to conform to the doctrine and rites of the Church of England; and all persons were required to attend church and observe the Sabbath, were tithed for the public support of Anglican ministers, and were taxed for the costs of building and repairing churches. *Id.*, at 3–4." *Lee*, 505 U. S., at 640–641 (SCALIA, J., dissenting).

Even if "establishment" had a broader definition, one that included support for religion generally through taxation, the element of legal coercion (by the State) would still be present. See *id.*, at 641.

It is also conceivable that a government could "establish" a religion by imbuing it with governmental authority, see, *e. g.*, *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982), or by "delegat[ing] its civic authority to a group chosen according to a religious criterion," *Board of Ed. of Kiryas Joel Village School Dist.* v. *Grumet*, 512 U. S. 687, 698 (1994); *County of Allegheny*, 492 U. S., at 590–591. A religious organization that carries some measure of the authority of the State begins to look like a traditional "religious establishment," at least when that authority can be used coercively. See also *Zorach* v. *Clauson*, 343 U. S. 306, 319 (1952) (Black,

J., dissenting) (explaining that the Establishment Clause "insure[s] that no one powerful sect or combination of sects could use *political or governmental power* to punish dissenters whom they could not convert to their faith" (emphasis added)).

It is difficult to see how government practices that have nothing to do with creating or maintaining the sort of coercive state establishment described above implicate the possible liberty interest of being free from coercive state establishments. In addressing the constitutionality of voluntary school prayer, Justice Stewart made essentially this point, emphasizing that "we deal here not with the establishment of a state church, . . . but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so." *Engel*, 370 U. S., at 445 (dissenting opinion).[4]

To be sure, I find much to commend the view that the Establishment Clause "bar[s] governmental preferences for *particular* religious faiths." *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 856 (1995) (THOMAS, J., concurring). But the position I suggest today is consistent with this. Legal compulsion is an inherent component of "preferences" in this context. James Madison's Memorial and Remonstrance Against Religious Assessments (re-

[4] It may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause, further calling into doubt the utility of incorporating the Establishment Clause. See, *e. g.*, A. Amar, The Bill of Rights 253–254 (1998). *Lee* v. *Weisman*, 505 U. S. 577 (1992), could be thought of this way to the extent that anyone might have been "coerced" into a religious exercise. Cf. *Zorach* v. *Clauson*, 343 U. S. 306, 311 (1952) (rejecting as "obtuse reasoning" a free-exercise claim where "[n]o one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools"); *ibid.* (rejecting coercion-based Establishment Clause claim absent evidence that "teachers were using their office *to persuade or force* students to take the religious instruction" (emphasis added)).

printed in *Everson* v. *Board of Ed. of Ewing*, 330 U. S. 1, 63–72 (1947) (appendix to dissent of Rutledge, J.)), which extolled the no-preference argument, concerned coercive taxation to support an established religion, much as its title implies.[5] And, although "more extreme notions of the separation of church and state [might] be attribut[able] to Madison, many of them clearly stem from 'arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society,' [R. Cord, Separation of Church and State: Historical Fact and Current Fiction 22 (1982)], rather than the principle of nonestablishment in the Constitution." *Rosenberger*, *supra*, at 856 (THOMAS, J., concurring). See also Hamburger, Separation of Church and State, at 105 (noting that Madison's proposed language for what became the Establishment Clause did not reflect his more extreme views).

C

Through the Pledge policy, the State has not created or maintained any religious establishment, and neither has it granted government authority to an existing religion. The Pledge policy does not expose anyone to the legal coercion associated with an established religion. Further, no other free-exercise rights are at issue. It follows that religious liberty rights are not in question and that the Pledge policy fully comports with the Constitution.

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[5] Again, coercive government preferences might also implicate the Free Exercise Clause and are perhaps better analyzed in that framework.

Syllabus

NORTON, SECRETARY OF THE INTERIOR, ET AL. *v.* SOUTHERN UTAH WILDERNESS ALLIANCE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 03–101. Argued March 29, 2004—Decided June 14, 2004

The Bureau of Land Management (BLM), an Interior Department agency, manages the Utah land at issue here under the Federal Land Policy and Management Act of 1976. Pursuant to 43 U. S. C. § 1782, the Secretary of the Interior has identified certain federal lands as "wilderness study areas" (WSAs) and recommended some of these as suitable for wilderness designation. Land designated as wilderness by Act of Congress enjoys special protection; until Congress acts, the Secretary must "manage [WSAs] . . . so as not to impair the[ir] suitability . . . for preservation as wilderness." § 1782(c). In addition, each WSA or other area is managed "in accordance with" a land use plan, § 1732(a), a BLM document which generally describes, for a particular area, allowable uses, goals for the land's future condition, and next steps. 43 CFR § 1601.0–5(k). Respondents Southern Utah Wilderness Alliance and others (collectively SUWA) sought declaratory and injunctive relief for BLM's failure to act to protect Utah public lands from environmental damage caused by off-road vehicles (ORVs), asserting three claims relevant here, and contending that they could sue under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed," 5 U. S. C. § 706(1). The Tenth Circuit reversed the District Court's dismissal of the claims.

Held: BLM's alleged failures to act are not remediable under the APA. Pp. 61–73.

(a) A § 706(1) claim can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take. The discrete-action limitation precludes a broad programmatic attack such as that rejected in *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, and the required-action limitation rules out judicial direction of even discrete agency action that is not demanded by law. Pp. 61–65.

(b) SUWA first claims that BLM violated § 1782(c)'s nonimpairment mandate by permitting ORV use in certain WSAs. While § 1782(c) is mandatory as to the object to be achieved, it leaves BLM discretion to decide how to achieve that object. SUWA argues that the nonimpairment mandate will support an APA suit, but a general deficiency in compliance lacks the requisite specificity. The principal purpose of this

limitation is to protect agencies from undue judicial interference with their lawful discretion and to avoid judicial entanglement in abstract policy disagreements which courts lack the expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered to decide whether compliance was achieved. The APA does not contemplate such pervasive federal-court oversight. Pp. 65–67.

(c) SUWA also claims that BLM's failure to comply with provisions of its land use plans contravenes the requirement that the Secretary manage public lands in accordance with such plans, 43 U. S. C. § 1732(a). A land use plan, however, is a tool to project present and future use. Unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and restrains actions, but does not prescribe them. A statement about what BLM plans to do, if it has funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for a § 706(1) suit. The land use plan statements at issue here are not a legally binding commitment enforceable under § 706(1). Pp. 67–72.

(d) SUWA finally contends that BLM did not fulfill its obligation under the National Environmental Policy Act of 1969 to take a "hard look" at whether to undertake supplemental environmental analyses for areas where ORV use had increased. Because the applicable regulation requires an environmental impact statement (EIS) to be supplemented where there "are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts," 40 CFR § 1502.9(c)(1)(ii), an agency must take a "hard look" at new information to assess the need for supplementation, *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360, 385. However, supplementation is required only if "there remains major Federal actio[n] to occur," *id.*, at 374. Since the BLM's approval of a land use plan is the "action" that requires an EIS, once a plan has been approved, there is no ongoing "major Federal actio[n]" that could require supplementation. Pp. 72–73.

301 F. 3d 1217, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Kneedler argued the cause for petitioners. With him on the briefs were *Solicitor General Olson, Assistant Attorney General Sansonetti, Deputy Assistant Attorney General Clark, Barbara McDowell, An-*

drew Mergen, John A. Bryson, Susan Pacholski, and *Roderick E. Walston.*

Paul M. Smith argued the cause for respondents. With him on the brief for respondents Southern Utah Wilderness Alliance et al. were *Jerome L. Epstein, William M. Hohengarten, Elaine J. Goldenberg, Stephen H. M. Bloch, James S. Angell, Patti Goldman,* and *Todd D. True. Paul A. Turcke* and *Paul W. Mortensen* filed a brief for respondents Utah Shared Access Alliance et al.*

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we must decide whether the authority of a federal court under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed," 5 U. S. C. § 706(1), extends to the review of the United States Bureau of Land Management's stewardship of

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**Robin L. Rivett* filed a brief for the Pacific Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the State of California et al. by *Bill Lockyer,* Attorney General of California, *Manuel Medeiros,* Solicitor General, *Richard Frank,* Chief Deputy Attorney General, *William Brieger,* Acting Chief Assistant Attorney General, *Theodora Berger,* Senior Assistant Attorney General, *Ken Alex* and *Craig Thompson,* Supervising Deputy Attorneys General, and *Susan Durbin* and *James Potter,* Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Ken Salazar* of Colorado, *Richard Blumenthal* of Connecticut, *Lisa Madigan* of Illinois, *Thomas F. Reilly* of Massachusetts, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Patricia Madrid* of New Mexico, *Eliot Spitzer* of New York, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Larry Long* of South Dakota, and *Peggy A. Lautenschlager* of Wisconsin; for the Defenders of Wildlife et al. by *Katherine A. Meyer* and *Eric R. Glitzenstein;* for the Montana Wilderness Association by *Jack R. Tuholske;* for the National Organization of Veterans' Advocates by *Daniel D. Wedemeyer;* for the Natural Resources Defense Council et al. by *Charles E. Koob* and *Johanna H. Wald;* for Robert W. Adler et al. by *Robert G. Dreher;* and for Russell Train et al. by *Nicholas C. Yost* and *Gary Widman.*

public lands under certain statutory provisions and its own planning documents.

I

Almost half the State of Utah, about 23 million acres, is federal land administered by the Bureau of Land Management (BLM), an agency within the Department of Interior. For nearly 30 years, BLM's management of public lands has been governed by the Federal Land Policy and Management Act of 1976 (FLPMA), 90 Stat. 2744, 43 U. S. C. § 1701 *et seq.*, which "established a policy in favor of retaining public lands for multiple use management." *Lujan* v. *National Wildlife Federation*, 497 U. S. 871, 877 (1990). "Multiple use management" is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, "including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values." 43 U. S. C. § 1702(c). A second management goal, "sustained yield," requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future. § 1702(h). To these ends, FLPMA establishes a dual regime of inventory and planning. Sections 1711 and 1712, respectively, provide for a comprehensive, ongoing inventory of federal lands, and for a land use planning process that "project[s]" "present and future use," § 1701(a)(2), given the lands' inventoried characteristics.

Of course not all uses are compatible. Congress made the judgment that some lands should be set aside as wilderness at the expense of commercial and recreational uses. A pre-FLPMA enactment, the Wilderness Act of 1964, 78 Stat. 890, provides that designated wilderness areas, subject to certain exceptions, "shall [have] no commercial enterprise and no permanent road," no motorized vehicles, and no manmade structures. 16 U. S. C. § 1133(c). The designation of a wil-

derness area can be made only by Act of Congress, see 43 U. S. C. § 1782(b).

Pursuant to § 1782, the Secretary of the Interior (Secretary) has identified so-called "wilderness study areas" (WSAs), roadless lands of 5,000 acres or more that possess "wilderness characteristics," as determined in the Secretary's land inventory. § 1782(a); see 16 U. S. C. § 1131(c). As the name suggests, WSAs (as well as certain wild lands identified prior to the passage of FLPMA) have been subjected to further examination and public comment in order to evaluate their suitability for designation as wilderness. In 1991, out of 3.3 million acres in Utah that had been identified for study, 2 million were recommended as suitable for wilderness designation. 1 U. S. Dept. of Interior, BLM, Utah Statewide Wilderness Study Report 3 (Oct. 1991). This recommendation was forwarded to Congress, which has not yet acted upon it. Until Congress acts one way or the other, FLPMA provides that "the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness." 43 U. S. C. § 1782(c). This nonimpairment mandate applies to all WSAs identified under § 1782, including lands considered unsuitable by the Secretary. See §§ 1782(a), (b); App. 64 (BLM Interim Management Policy for Lands Under Wilderness Review).

Aside from identification of WSAs, the main tool that BLM employs to balance wilderness protection against other uses is a land use plan—what BLM regulations call a "resource management plan." 43 CFR § 1601.0–5(k) (2003). Land use plans, adopted after notice and comment, are "designed to guide and control future management actions," § 1601.0–2. See 43 U. S. C. § 1712; 43 CFR § 1610.2 (2003). Generally, a land use plan describes, for a particular area, allowable uses, goals for future condition of the land, and specific next steps. § 1601.0–5(k). Under FLPMA, "[t]he Secretary shall manage the public lands under principles of multiple use and sus-

tained yield, in accordance with the land use plans . . . when they are available." 43 U. S. C. § 1732(a).

Protection of wilderness has come into increasing conflict with another element of multiple use, recreational use of so-called off-road vehicles (ORVs), which include vehicles primarily designed for off-road use, such as lightweight, four-wheel "all-terrain vehicles," and vehicles capable of such use, such as sport utility vehicles. See 43 CFR § 8340.0–5(a) (2003). According to the United States Forest Service's most recent estimates, some 42 million Americans participate in off-road travel each year, more than double the number two decades ago. H. Cordell, Outdoor Recreation for 21st Century America 40 (2004). United States sales of all-terrain vehicles alone have roughly doubled in the past five years, reaching almost 900,000 in 2003. See Tanz, Making Tracks, Making Enemies, N. Y. Times, Jan. 2, 2004, p. F1, col. 5; Discover Today's Motorcycling, Motorcycle Industry Council, Press Release (Feb. 13, 2004), http://www.motorcycles.org (all Internet materials as visited June 4, 2004, and available in Clerk of Court's case file). The use of ORVs on federal land has negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers. See Brief for Natural Resources Defense Council et al. as *Amici Curiae* 4–7, and studies cited therein. Thus, BLM faces a classic land use dilemma of sharply inconsistent uses, in a context of scarce resources and congressional silence with respect to wilderness designation.

In 1999, respondents Southern Utah Wilderness Alliance and other organizations (collectively SUWA) filed this action in the United States District Court for Utah against petitioners BLM, its Director, and the Secretary. In its second amended complaint, SUWA sought declaratory and injunctive relief for BLM's failure to act to protect public lands in Utah from damage caused by ORV use. SUWA made three claims that are relevant here: (1) that BLM had violated its

nonimpairment obligation under § 1782(c) by allowing degradation in certain WSAs; (2) that BLM had failed to implement provisions in its land use plans relating to ORV use; and (3) that BLM had failed to take a "hard look" at whether, pursuant to the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U. S. C. § 4321 *et seq.*, it should undertake supplemental environmental analyses for areas in which ORV use had increased. SUWA contended that it could sue to remedy these three failures to act pursuant to the APA's provision of a cause of action to "compel agency action unlawfully withheld or unreasonably delayed." 5 U. S. C. § 706(1).

The District Court entered a dismissal with respect to the three claims. A divided panel of the Tenth Circuit reversed. 301 F. 3d 1217 (2002). The majority acknowledged that under § 706(1), "federal courts may order agencies to act only where the agency fails to carry out a mandatory, nondiscretionary duty." *Id.*, at 1226. It concluded, however, that BLM's nonimpairment obligation was just such a duty, and therefore BLM could be compelled to comply. Under similar reasoning, it reversed the dismissal with respect to the land use plan claim; and likewise reversed dismissal of the NEPA claim. We granted certiorari. 540 U. S. 980 (2003).

II

All three claims at issue here involve assertions that BLM failed to take action with respect to ORV use that it was required to take. Failures to act are sometimes remediable under the APA, but not always. We begin by considering what limits the APA places upon judicial review of agency inaction.

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U. S. C. § 702. Where no other statute provides a private right of action, the "agency action" complained

of must be "*final* agency action." § 704 (emphasis added). "[A]gency action" is defined in § 551(13) to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, *or failure to act.*" (Emphasis added.) The APA provides relief for a failure to act in § 706(1): "The reviewing court shall . . . compel agency action unlawfully withheld or unreasonably delayed."

Sections 702, 704, and 706(1) all insist upon an "agency action," either as the action complained of (in §§ 702 and 704) or as the action to be compelled (in § 706(1)). The definition of that term begins with a list of five categories of decisions made or outcomes implemented by an agency—"agency rule, order, license, sanction [or] relief." § 551(13). All of those categories involve circumscribed, discrete agency actions, as their definitions make clear: "an agency statement of . . . future effect designed to implement, interpret, or prescribe law or policy" (rule); "a final disposition . . . in a matter other than rule making" (order); a "permit . . . or other form of permission" (license); a "prohibition . . . or . . . taking [of] other compulsory or restrictive action" (sanction); or a "grant of money, assistance, license, authority," etc., or "recognition of a claim, right, immunity," etc., or "taking of other action on the application or petition of, and beneficial to, a person" (relief). §§ 551(4), (6), (8), (10), (11).

The terms following those five categories of agency action are not defined in the APA: "or the equivalent or denial thereof, or failure to act." § 551(13). But an "equivalent . . . thereof" must also be discrete (or it would not be equivalent), and a "denial thereof" must be the denial of a discrete listed action (and perhaps denial of a discrete equivalent).

The final term in the definition, "failure to act," is in our view properly understood as a failure to take an *agency action*—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13). Moreover, even without this equation of "act" with "agency

action" the interpretive canon of *ejusdem generis* would attribute to the last item ("failure to act") the same characteristic of discreteness shared by all the preceding items. See, *e. g.*, *Washington State Dept. of Social and Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U. S. 371, 384–385 (2003). A "failure to act" is not the same thing as a "denial." The latter is the agency's act of saying no to a request; the former is simply the omission of an action without formally rejecting a request—for example, the failure to promulgate a rule or take some decision by a statutory deadline. The important point is that a "failure to act" is properly understood to be limited, as are the other items in § 551(13), to a *discrete* action.

A second point central to the analysis of the present case is that the only agency action that can be compelled under the APA is action legally *required.* This limitation appears in § 706(1)'s authorization for courts to "compel agency action *unlawfully* withheld."[1] (Emphasis added.) In this regard the APA carried forward the traditional practice prior to its passage, when judicial review was achieved through use of the so-called prerogative writs—principally writs of mandamus under the All Writs Act, now codified at 28 U. S. C. § 1651(a). The mandamus remedy was normally limited to enforcement of "a specific, unequivocal command," *ICC* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 204 (1932), the ordering of a " 'precise, definite act . . . about which [an official] had no discretion whatever,' " *United States ex rel. Dunlap* v. *Black*, 128 U. S. 40, 46 (1888) (quoting *Kendall* v. *United States ex rel. Stokes*, 12 Pet. 524, 613 (1838)). See also *ICC* v. *United States ex rel. Humboldt S. S. Co.*, 224 U. S. 474, 484 (1912). As described in the Attorney General's Manual on the APA, a document whose reasoning we have often found persuasive, see, *e. g.*, *Darby* v. *Cisneros*, 509

[1] Of course § 706(1) also authorizes courts to "compel agency action . . . unreasonably delayed"—but a delay cannot be unreasonable with respect to action that is not required.

U. S. 137, 148, n. 10 (1993); *Chrysler Corp.* v. *Brown*, 441 U. S. 281, 302, n. 31 (1979); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U. S. 519, 546 (1978), § 706(1) empowers a court only to compel an agency "to perform a ministerial or non-discretionary act," or "to take action upon a matter, without directing *how* it shall act." Attorney General's Manual on the Administrative Procedure Act 108 (1947) (emphasis added). See also L. Jaffe, Judicial Control of Administrative Action 372 (1965); K. Davis, Administrative Law § 257, p. 925 (1951).

Thus, a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take.* These limitations rule out several kinds of challenges. The limitation to discrete agency action precludes the kind of broad programmatic attack we rejected in *Lujan* v. *National Wildlife Federation*, 497 U. S. 871 (1990). There we considered a challenge to BLM's land withdrawal review program, couched as unlawful agency "action" that the plaintiffs wished to have "set aside" under § 706(2).[2] *Id.*, at 879. We concluded that the program was not an "agency action":

> "[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made. Under the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." *Id.*, at 891 (emphasis in original).

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[2] Title 5 U. S. C. § 706(2) provides, in relevant part:

"The reviewing court shall—

. . . . . .

"(2) hold unlawful and set aside agency action . . . found to be—

"(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ."

The plaintiffs in *National Wildlife Federation* would have fared no better if they had characterized the agency's alleged "failure to revise land use plans in proper fashion" and "failure to consider multiple use," *ibid.*, in terms of "agency action unlawfully withheld" under § 706(1), rather than agency action "not in accordance with law" under § 706(2).

The limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law (which includes, of course, agency regulations that have the force of law). Thus, when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be. For example, 47 U. S. C. § 251(d)(1), which required the Federal Communications Commission "to establish regulations to implement" interconnection requirements "[w]ithin 6 months" of the date of enactment of the Telecommunications Act of 1996, would have supported a judicial decree under the APA requiring the prompt issuance of regulations, but not a judicial decree setting forth the content of those regulations.

III

A

With these principles in mind, we turn to SUWA's first claim, that by permitting ORV use in certain WSAs, BLM violated its mandate to "continue to manage [WSAs] . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U. S. C. § 1782(c). SUWA relies not only upon § 1782(c) but also upon a provision of BLM's Interim Management Policy for Lands Under Wilderness Review, which interprets the nonimpairment mandate to require BLM to manage WSAs so as to prevent them from being "degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress's

prerogative to either designate [it] as wilderness or release it for other uses." App. 65.

Section 1782(c) is mandatory as to the object to be achieved, but it leaves BLM a great deal of discretion in deciding how to achieve it. It assuredly does not mandate, with the clarity necessary to support judicial action under § 706(1), the total exclusion of ORV use.

SUWA argues that § 1782 *does* contain a categorical imperative, namely, the command to comply with the nonimpairment mandate. It contends that a federal court could simply enter a general order compelling compliance with that mandate, without suggesting any particular manner of compliance. It relies upon the language from the Attorney General's Manual quoted earlier, that a court can "take action upon a matter, without directing how [the agency] shall act," and upon language in a case cited by the Manual noting that "mandamus will lie . . . even though the act required involves the exercise of judgment and discretion," *Safeway Stores, Inc.* v. *Brown*, 138 F. 2d 278, 280 (Emerg. Ct. App. 1943). The action referred to in these excerpts, however, is *discrete* agency action, as we have discussed above. General deficiencies in compliance, unlike the failure to issue a ruling that was discussed in *Safeway Stores*, lack the specificity requisite for agency action.

The principal purpose of the APA limitations we have discussed—and of the traditional limitations upon mandamus from which they were derived—is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved—which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the

broad statutory mandate, injecting the judge into day-to-day agency management. To take just a few examples from federal resources management, a plaintiff might allege that the Secretary had failed to "manage wild free-roaming horses and burros in a manner that is designed to achieve and maintain a thriving natural ecological balance," or to "manage the [New Orleans Jazz National] [H]istorical [P]ark in such a manner as will preserve and perpetuate knowledge and understanding of the history of jazz," or to "manage the [Steens Mountain] Cooperative Management and Protection Area for the benefit of present and future generations." 16 U. S. C. §§ 1333(a), 410bbb–2(a)(1), 460nnn–12(b). The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

B

SUWA's second claim is that BLM failed to comply with certain provisions in its land use plans, thus contravening the requirement that "[t]he Secretary shall manage the public lands . . . in accordance with the land use plans . . . when they are available." 43 U. S. C. § 1732(a); see also 43 CFR § 1610.5–3(a) (2003) ("All future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan"). The relevant count in SUWA's second amended complaint alleged that BLM had violated a variety of commitments in its land use plans, but over the course of the litigation these have been reduced to two, one relating to the 1991 resource management plan for the San Rafael area, and the other to various aspects of the 1990 ORV implementation plan for the Henry Mountains area.

The actions contemplated by the first of these alleged commitments (completion of a route designation plan in the San Rafael area), and by one aspect of the second (creation of "use supervision files" for designated areas in the Henry

Mountains area) have already been completed,[3] and these claims are therefore moot. There remains the claim, with respect to the Henry Mountains plan, that "in light of damage from ORVs in the Factory Butte area," a sub-area of Henry Mountains open to ORV use, "the [plan] obligated BLM to conduct an intensive ORV monitoring program." Brief for SUWA 7–8. This claim is based upon the plan's statement that the Factory Butte area "will be monitored and closed if warranted." App. 140. SUWA does not contest BLM's assertion in the court below that informal monitoring has taken place for some years, see Brief for Appellee Secretary of Interior et al. in No. 01–4009 (CA10), p. 23, but it demands continuing implementation of a monitoring *program*. By this it apparently means to insist upon adherence to the plan's general discussion of "Use Supervision and Monitoring" in designated areas, App. 148–149, which (in addition to calling for the use supervision files that have already been created) provides that "[r]esource damage will be documented and recommendations made for corrective action," "[m]onitoring in open areas will focus on determining damage which may necessitate a change in designation," and "emphasis on use supervision will be placed on [limited and closed areas]." *Id.*, at 149. SUWA acknowledges that a monitoring program has recently been *commenced*. Brief for SUWA 12. In light, however, of the continuing action

[3] See U. S. Dept. of Interior, BLM, San Rafael Route Designation Plan (2003), http://www.ut.blm.gov/sanrafaelohv/wtheplan.htm; 3 App. to Brief for Appellants in No. 01–4009 (CA10), p. 771 (declaration of manager for relevant BLM field office, noting the establishment of monitoring files for the Henry Mountains area); Brief for Respondent SUWA et al. 12 (hereinafter Brief for SUWA) (acknowledging completion of these actions).

It is arguable that the complaint sought not merely creation but continuing maintenance of use supervision files, in which case (for the reasons set forth with respect to the ORV monitoring program later in text) that claim would not be moot. If so, what we say below with regard to the merits of the ORV monitoring claim would apply equally to the use supervision file claim.

that existence of a "program" contemplates, and in light of BLM's contention that the program cannot be compelled under § 706(1), this claim cannot be considered moot.

The statutory directive that BLM manage "in accordance with" land use plans, and the regulatory requirement that authorizations and actions "conform to" those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U. S. C. § 706(2). The claim presently under discussion, however, would have us go further, and conclude that a statement in a plan that BLM "will" take this, that, or the other action, is a binding commitment that can be compelled under § 706(1). In our view it is not—at least absent clear indication of binding commitment in the terms of the plan.

FLPMA describes land use plans as tools by which "present and future use is *projected.*" 43 U. S. C. § 1701(a)(2) (emphasis added). The implementing regulations make clear that land use plans are a preliminary step in the overall process of managing public lands—"designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 CFR § 1601.0–2 (2003). The statute and regulations confirm that a land use plan is not ordinarily the medium for affirmative decisions that implement the agency's "project[ions]."[4] Title 43 U. S. C. § 1712(e) provides that "[t]he Secretary may issue management decisions to implement land use plans"—the decisions, that is, are distinct from the plan itself. Picking up the same theme, the regula-

[4] The exceptions "are normally limited to those required by regulation, such as designating [ORV] areas, roads, and trails (see 43 CFR 8342)." U. S. Dept. of Interior, BLM, Land Use Planning Handbook II–2 (2000) (hereinafter Handbook). See, *e. g.*, U. S. Dept. of Interior, BLM, San Rafael Final Resource Management Plan 63 (1991) (hereinafter San Rafael Plan) (available at http://www.ut.blm.gov/planning/OTHERS/SRARMP-ROD%20MAY%201991.pdf).

tion defining a land use plan declares that a plan "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 CFR § 1601.0–5(k) (2003). The BLM's Land Use Planning Handbook specifies that land use plans are normally not used to make site-specific implementation decisions. See Handbook II–2.

Plans also receive a different agency review process from implementation decisions. Appeal to the Department's Board of Land Appeals is available for "a specific action being proposed to implement some portion of a resource management plan or amendment." 43 CFR § 1610.5–3(b) (2003). However, the Board, which reviews "decisions rendered by Departmental officials relating to . . . [t]he use and disposition of public lands and their resources," § 4.1(b)(3)(i), does not review the approval of a plan, since it regards a plan as a policy determination, not an implementation decision. See, *e. g.*, *Wilderness Society*, 109 I. B. L. A. 175, 178 (1989); *Wilderness Society*, 90 I. B. L. A. 221, 224 (1986); see also Handbook II–2, IV–3. Plans are protested to the BLM director, not appealed.

The San Rafael plan provides an apt illustration of the immense scope of projected activity that a land use plan can embrace. Over 100 pages in length, it presents a comprehensive management framework for 1.5 million acres of BLM-administered land. Twenty categories of resource management are separately discussed, including mineral extraction, wilderness protection, livestock grazing, preservation of cultural resources, and recreation. The plan lays out an ambitious agenda for the preparation of additional, more detailed plans and specific next steps for implementation. Its introduction notes that "[a]n [ORV] implementation plan is scheduled to be prepared within 1 year following approval of the [San Rafael plan]." San Rafael Plan 9. Similarly "scheduled for preparation" are activity plans for certain environmentally sensitive areas, "along with allotment man-

agement plans, habitat management plans, a fire management plan, recreation management plans . . . , cultural resource management plans for selected sites, watershed activity plans, and the wild and scenic river management plan." *Ibid.* The projected schedule set forth in the plan shows "[a]nticipated [i]mplementation" of some future plans within one year, others within three years, and still others, such as certain recreation and cultural resource management plans, at a pace of "one study per fiscal year." *Id.*, at 95–102.

Quite unlike a specific statutory command requiring an agency to promulgate regulations by a certain date, a land use plan is generally a statement of priorities; it guides and constrains actions, but does not (at least in the usual case) prescribe them. It would be unreasonable to think that either Congress or the agency intended otherwise, since land use plans nationwide would commit the agency to actions far in the future, for which funds have not yet been appropriated. Some plans make explicit that implementation of their programmatic content is subject to budgetary constraints. See Brief for Petitioners 42–43, and n. 18 (quoting from such plans). While the Henry Mountains plan does not contain such a specification, we think it must reasonably be implied. A statement by BLM about what it plans to do, at some point, provided it has the funds and there are not more pressing priorities, cannot be plucked out of context and made a basis for suit under § 706(1).

Of course, an action called for in a plan may be compelled when the plan merely reiterates duties the agency is already obligated to perform, or perhaps when language in the plan itself creates a commitment binding on the agency. But allowing general enforcement of plan terms would lead to pervasive interference with BLM's own ordering of priorities. For example, a judicial decree compelling immediate preparation of all of the detailed plans called for in the San Rafael plan would divert BLM's energies from other projects throughout the country that are in fact more pressing. And

while such a decree might please the environmental plaintiffs in the present case, it would ultimately operate to the detriment of sound environmental management. Its predictable consequence would be much vaguer plans from BLM in the future—making coordination with other agencies more difficult, and depriving the public of important information concerning the agency's long-range intentions.

We therefore hold that the Henry Mountains plan's statements to the effect that BLM will conduct "Use Supervision and Monitoring" in designated areas—like other "will do" projections of agency action set forth in land use plans—are not a legally binding commitment enforceable under § 706(1). That being so, we find it unnecessary to consider whether the action envisioned by the statements is sufficiently discrete to be amenable to compulsion under the APA.[5]

IV

Finally, we turn to SUWA's contention that BLM failed to fulfill certain obligations under NEPA. Before addressing whether a NEPA-required duty is actionable under the APA, we must decide whether NEPA creates an obligation in the first place. NEPA requires a federal agency to prepare an environmental impact statement (EIS) as part of any "proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(C). Often an initial EIS is sufficient, but in certain circumstances an EIS must be supplemented. See *Marsh* v. *Oregon Natural Resources Council*, 490 U. S. 360, 370–374 (1989). A regulation of the Council on Environmental Quality requires supplementation where "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 CFR § 1502.9(c)(1)(ii) (2003). In *Marsh*,

[5] We express no view as to whether a court could, under § 706(1), enforce a duty to monitor ORV use imposed by a BLM regulation, see 43 CFR § 8342.3 (2003). That question is not before us.

we interpreted § 4332 in light of this regulation to require an agency to take a "hard look" at the new information to assess whether supplementation might be necessary. 490 U. S., at 385; see *id.*, at 378–385.

SUWA argues that evidence of increased ORV use is "significant new circumstances or information" that requires a "hard look." We disagree. As we noted in *Marsh*, supplementation is necessary only if "there remains 'major Federal actio[n]' to occur," as that term is used in § 4332(2)(C). *Id.*, at 374. In *Marsh*, that condition was met: The dam construction project that gave rise to environmental review was not yet completed. Here, by contrast, although the "*[a]pproval* of a [land use plan]" is a "major Federal action" requiring an EIS, 43 CFR § 1601.0–6 (2003) (emphasis added), that action is completed when the plan is approved. The land use plan is the "proposed action" contemplated by the regulation. There is no ongoing "major Federal action" that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised, see §§ 1610.5–5, 5–6).

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Syllabus

UNITED STATES *v.* DOMINGUEZ BENITEZ

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

No. 03–167. Argued April 21, 2004—Decided June 14, 2004

After respondent Dominguez Benitez (hereinafter Dominguez) confessed to selling drugs to an informant, he was indicted on drug possession and conspiracy counts. On the conspiracy count, he faced a 10-year mandatory minimum sentence. His plea agreement with the Government provided that Dominguez would plead guilty to conspiracy and the Government would dismiss the possession charge; that he would receive a safety-valve reduction of two levels, which would allow the court to authorize a sentence below the otherwise mandatory 10-year minimum; that the agreement did not bind the sentencing court; and that he could not withdraw his plea if the court rejected the Government's stipulations or recommendations. He pleaded guilty to the conspiracy charge, but, in the plea colloquy, the court failed to mention (though the written plea agreement did say) that Dominguez could not withdraw his plea if the court did not accept the Government's recommendations. See Fed. Rule Crim. Proc. 11(c)(3)(B). The Probation Office subsequently found that Dominguez had three prior convictions, making him ineligible for the safety valve, so the District Court sentenced him to the mandatory minimum. On appeal, Dominguez argued, for the first time, that the District Court's failure to warn him, as Rule 11(c)(3)(B) instructs, that he could not withdraw his plea if the court did not accept the Government's recommendations required reversal. The Ninth Circuit agreed, citing *United States* v. *Olano*, 507 U. S. 725, in applying Federal Rule of Criminal Procedure 52's plain-error standard.

Held: To obtain relief for an unpreserved Rule 11 failing, a defendant must show a reasonable probability that, but for the error, he would not have pleaded guilty. Pp. 80–86.

(a) When a defendant is dilatory in raising Rule 11 error, reversal is unwarranted unless the error is plain. *United States* v. *Vonn*, 535 U. S. 55, 63. Except for certain structural errors undermining the criminal proceeding's fairness as a whole, relief for error is tied to prejudicial effect, and the standard phrased as "error that affects substantial rights," as used in Rule 52, means error with a prejudicial effect on a judicial proceeding's outcome. See *Kotteakos* v. *United States*, 328 U. S. 750. *Kotteakos* held that to affect "substantial rights," an error must have "substantial and injurious effect or influence in determining

the . . . verdict." *Id.*, at 776. Where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, this Court has invoked a similar standard, which requires "a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different" is required. *United States* v. *Bagley*, 473 U. S. 667, 682 (opinion of Blackmun, J.). For defendants such as Dominguez, the burden of establishing entitlement to plain-error relief should not be too easy: First, the standard should enforce the policies underpinning Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error, see *Vonn*, *supra*, at 73; and second, it should respect the particular importance of the finality of guilty pleas, which usually rest on a defendant's profession of guilt in open court, and are indispensable in the modern criminal justice system's operation, see *United States* v. *Timmreck*, 441 U. S. 780, 784. Pp. 80–83.

(b) The Ninth Circuit's test in this case fell short. Its first element (whether the error was "minor or technical") requires no examination of the omitted warning's effect on a defendant's decision, a failing repeated to a significant extent by the test's second element (whether the defendant understood the rights at issue when he pleaded guilty). That court's standard does not allow consideration of evidence tending to show that a misunderstanding was inconsequential to a defendant's decision, or evidence indicating the relative significance of other facts that may have borne on his choice regardless of any Rule 11 error. Nor does it consider the overall strength of the Government's case. When, as here, the record shows both a controlled drug sale to an informant and a confession, one can fairly ask what a defendant seeking to withdraw his plea thought he could gain by going to trial. The point is not to second-guess the defendant's actual decision, but to enquire whether the omitted warning would have made the difference required by the standard of reasonable probability; it is hard to see here how the warning could have affected Dominguez's assessment of his strategic position. Also, the plea agreement, read to Dominguez in his native Spanish, specifically warned that he could not withdraw his plea if the court refused to accept the Government's recommendations; this fact, uncontested by Dominguez, tends to show that the Rule 11 error made no difference to the outcome here. Pp. 83–86.

310 F. 3d 1221, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 86.

Dan Himmelfarb argued the cause for the United States. With him on the briefs were *Solicitor General Olson, Assistant Attorney General Wray,* and *Deputy Solicitor General Dreeben.*

Myra D. Mossman, by appointment of the Court, 540 U. S. 1175, argued the cause and filed a brief for respondent.*

JUSTICE SOUTER delivered the opinion of the Court.

Respondent claims the right to withdraw his plea of guilty as a consequence of the District Court's failure to give one of the warnings required by Federal Rule of Criminal Procedure 11. Because the claim of Rule 11 error was not preserved by timely objection, the plain-error standard of Rule 52(b) applies, with its requirement to prove effect on substantial rights. The question is what showing must thus be made to obtain relief for an unpreserved Rule 11 failing, and we hold that a defendant is obliged to show a reasonable probability that, but for the error, he would not have entered the plea.

I

In early May 1999, a confidential informant working with law enforcement arranged through respondent Carlos Dominguez Benitez (hereinafter Dominguez) to buy several pounds of methamphetamine. First, the informant got a sample from Dominguez, and a week later Dominguez went to a restaurant in Anaheim, California, to consummate the sale in the company of two confederates, one of whom brought a shopping bag with over a kilogram of the drugs. The meeting ended when the informant gave a signal and officers arrested the dealers. Dominguez confessed to selling the methamphetamine and gave information about his supplier and confederates.

**Stevan A. Buys* filed a brief for Arnaldo Rafael Vicente Infante-Cabrera as *amicus curiae* urging affirmance.

A federal grand jury indicted Dominguez on two counts: conspiracy to possess more than 500 grams of methamphetamine, and possession of 1,391 grams of a methamphetamine mixture, both with intent to distribute. On the conspiracy count, Dominguez faced a statutory, mandatory minimum sentence of 10 years, with a maximum of life. 84 Stat. 1260, 21 U. S. C. §§ 841(b)(1)(A), 846. The District Court appointed counsel, who began talking with the Government about a plea agreement.

In September 1999, the District Court received the first of several letters from Dominguez,[1] in which he asked for a new lawyer and expressed discomfort with the plea agreement his counsel was encouraging him to sign. On counsel's motion, the court held a status conference, at which Dominguez spoke to the judge. Again he said he was dissatisfied with his representation, and wanted a "better deal." The court asked whether he was "talking about a disposition . . . other than trial," and Dominguez answered, "At no time have I decided to go to any trial." App. 46–47. Counsel spoke to the same effect later in the proceeding, when he said that he had "told [the prosecutor] all along that there won't be a trial on the [date set] based on my client's representations that he doesn't want a trial." *Id.*, at 51. The court explained to Dominguez that it could not help him in plea negotiations, and found no reason to change counsel.

Shortly after that, the parties agreed that Dominguez would plead guilty to the conspiracy, and the Government would dismiss the possession charge. The Government stipulated that Dominguez would receive what is known as a safety-valve reduction of two levels. See United States Sentencing Commission, Guidelines Manual §§ 2D1.1(b)(6),

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[1] Dominguez speaks and writes Spanish, not English. A certified translator was present for the hearings in court we describe, and for the plea agreement. Some of the letters are in English, and the record does not show who translated them or assisted Dominguez in writing them.

5C1.2 (Nov. 1999) (hereinafter USSG).[2] The safety valve was important because it would allow the court to invoke 18 U. S. C. § 3553(f), authorizing a sentence below the otherwise mandatory minimum in certain cases of diminished culpability, the only chance Dominguez had for a sentence under 10 years. That chance turned on satisfying five conditions, one going to Dominguez's criminal history, which the agreement did not address. The agreement did, however, warn Dominguez that it did not bind the sentencing court, and that Dominguez could not withdraw his plea if the court did not accept the Government's stipulations or recommendations. At a hearing the next day, Dominguez changed his plea to guilty. In the plea colloquy, the court gave almost all the required Rule 11 warnings, including the warning that the plea agreement did not bind the court, but the judge failed to mention that Dominguez could not withdraw his plea if the court did not accept the Government's recommendations. See Fed. Rule Crim. Proc. 11(c)(3)(B).[3]

When the Probation Office subsequently issued its report, it found that Dominguez had three prior convictions, two of them under other names, which neither defense counsel nor the prosecutor had known at the time of the plea negotiations. The upshot was that Dominguez was ineligible for the safety valve, and so had no chance to escape the sentence of 10 years. After receiving two more letters from Dominguez complaining about the quality of counsel's representa-

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[2] The agreement also contemplated that Dominguez's total offense level under the Guidelines would be 27, after considering the safety valve and a downward adjustment for acceptance of responsibility. Assuming so, and assuming he had no (or minimal) criminal history, his sentence could have been as low as 70 months. See USSG ch. 5, pt. A (sentencing table).

[3] At the time of the plea hearing, the requirement appeared at Federal Rule of Criminal Procedure 11(e)(2). It has not changed in substance. We refer to the current Rule in the text of this opinion, and do likewise for Rules 11(h) and 52(b), each of which has also received a stylistic amendment.

tion, the District Court sentenced Dominguez to the mandatory minimum. At the sentencing hearing, all counsel told the court that they had thought Dominguez might at least have been eligible for the safety-valve mitigation, but agreed that with three convictions, he was not. Dominguez told the court that he had "never had any knowledge about the points of responsibility, the safety valve, or anything like that." App. 109. The court replied that in light of the "lengthy change of plea proceedings" it was "difficult . . . to accept what" Dominguez said. *Id.*, at 112.

On appeal, Dominguez argued that the District Court's failure to warn him, as Rule 11(c)(3)(B) instructs, that he could not withdraw his guilty plea if the court did not accept the Government's recommendations required reversal. After waiting for *United States* v. *Vonn*, 535 U. S. 55 (2002), a divided panel of the Court of Appeals for the Ninth Circuit agreed, 310 F. 3d 1221 (2002), and cited *United States* v. *Olano*, 507 U. S. 725 (1993), in applying the plain-error standard. The court held that the District Court had indeed erred; and that the error was plain, affected Dominguez's substantial rights, and required correction in the interests of justice.

To show that substantial rights were affected, the Court of Appeals required Dominguez to "prove that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea." 310 F. 3d, at 1225.[4] The court rejected the Government's arguments that the written plea agreement or the District Court's other statements in the plea colloquy sufficiently advised Dominguez of his rights, given Dominguez's inability to speak English and the assurances of both counsel that he would likely qualify under the safety-valve provision. Judge Tallman dissented, with the warning that the majori-

[4] Other Courts of Appeals employed different tests. See n. 8, *infra*.

ty's analysis followed neither *Vonn* nor Circuit precedent. 310 F. 3d, at 1227–1228.

We granted certiorari, 540 U. S. 1072 (2003), on the question "[w]hether, in order to show that a violation of Federal Rule of Criminal Procedure 11 constitutes reversible plain error, a defendant must demonstrate that he would not have pleaded guilty if the violation had not occurred." Pet. for Cert. (I). We now reverse.

II

A

Because the Government agreed to make a nonbinding sentencing recommendation, Rule 11(c)(3)(B) required the court to "advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request." Rule 11, however, instructs that not every violation of its terms calls for reversal of conviction by entitling the defendant to withdraw his guilty plea. "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." Fed. Rule Crim. Proc. 11(h).[5]

In *Vonn*, we considered the standard that applies when a defendant is dilatory in raising Rule 11 error, and held that reversal is not in order unless the error is plain. 535 U. S., at 63; see *Olano*, *supra*, at 731–737. Although we explained that in assessing the effect of Rule 11 error, a reviewing court must look to the entire record, not to the plea proceedings alone, *Vonn*, *supra*, at 74–75, we did not formulate the standard for determining whether a defendant has shown, as the plain-error standard requires, *Olano*, *supra*, at 734–735, an effect on his substantial rights.

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[5] Congress gave the courts this instruction in 1983, in partial response to this Court's decision in *McCarthy* v. *United States*, 394 U. S. 459 (1969), which it felt had caused too many reversals for reasons that were too insubstantial. See *United States* v. *Vonn*, 535 U. S. 55, 66–71 (2002) (discussing the history of Rule 11(h)).

B

It is only for certain structural errors undermining the fairness of a criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding. See *Arizona* v. *Fulminante*, 499 U. S. 279, 309–310 (1991) (giving examples). Dominguez does not argue that either Rule 11 error generally or the Rule 11 error here is structural in this sense.[6]

Otherwise, relief for error is tied in some way to prejudicial effect, and the standard phrased as "error that affects substantial rights," used in Rule 52, has previously been taken to mean error with a prejudicial effect on the outcome of a judicial proceeding. See *Kotteakos* v. *United States*, 328 U. S. 750 (1946). To affect "substantial rights," see 28 U. S. C. § 2111, an error must have "substantial and injurious effect or influence in determining the . . . verdict." *Kotteakos*, *supra*, at 776.[7] In cases where the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have invoked a standard with similarities to the *Kotteakos* formulation in requiring the showing of

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[6] The argument, if made, would not prevail. The omission of a single Rule 11 warning without more is not colorably structural. Cf. *United States* v. *Timmreck*, 441 U. S. 780, 783–784 (1979) (holding that Rule 11 error without more is not cognizable on collateral review).

[7] When the Government has the burden of addressing prejudice, as in excusing preserved error as harmless on direct review of the criminal conviction, it is not enough to negate an effect on the outcome of the case. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967) ("[T]he court must be able to declare a belief that [constitutional error] was harmless beyond a reasonable doubt"). When the Government has the burden of showing that constitutional trial error is harmless because it comes up on collateral review, the heightened interest in finality generally calls for the Government to meet the more lenient *Kotteakos* standard. *Brecht* v. *Abrahamson*, 507 U. S. 619, 638 (1993). If the burden is on a defendant to show prejudice in the first instance, of course, it would be easier to show a reasonable doubt that constitutional error affected a trial than to show a likely effect on the outcome or verdict.

"a reasonable probability that, but for [the error claimed], the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U. S. 667, 682 (1985) (opinion of Blackmun, J.) (adopting the prejudice standard of *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984), for claims under *Brady* v. *Maryland*, 373 U. S. 83 (1963) (internal quotation marks omitted)); 473 U. S., at 685 (White, J., concurring in part and concurring in judgment) (same).[8]

No reason has appeared for treating the phrase "affecting substantial rights" as untethered to a prejudice requirement when applying *Olano* to this nonstructural error, or for doubting that *Bagley* is a sensible model to follow. As *Vonn* makes clear, the burden of establishing entitlement to relief for plain error is on the defendant claiming it, and for several reasons, we think that burden should not be too easy for defendants in Dominguez's position. First, the standard should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error. See *Vonn*, 535 U. S., at 73. Second, it should respect the particular importance of the finality of guilty pleas, which usually rest, after all, on a defendant's

[8] This standard is similar to one already applied by some Courts of Appeals, though those courts have not drawn a direct connection to *Strickland* and *Bagley*, and in some cases understood themselves to be reviewing for harmless, rather than plain, error. See *United States* v. *Martinez*, 289 F. 3d 1023, 1029 (CA7 2002) (on plain-error review, asking "whether any Rule 11 violations would have likely affected [the defendant's] willingness to plead guilty"); see also *United States* v. *Johnson*, 1 F. 3d 296, 302 (CA5 1993) (en banc) (on harmless-error review, asking "whether the defendant's knowledge and comprehension of the full and correct information would have been likely to affect his willingness to plead guilty"); cf. *United States* v. *Olano*, 507 U. S. 725, 734–735 (1993) (the main difference as to substantial rights in the harmless- and plain-error analyses is that the burden of persuasion shifts from Government to defendant).

profession of guilt in open court, and are indispensable in the operation of the modern criminal justice system. See *United States* v. *Timmreck*, 441 U. S. 780, 784 (1979). And, in this case, these reasons are complemented by the fact, worth repeating, that the violation claimed was of Rule 11, not of due process.

We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is "sufficient to undermine confidence in the outcome" of the proceeding. *Strickland*, *supra*, at 694; *Bagley*, *supra*, at 682 (opinion of Blackmun, J. (internal quotation marks omitted)).[9]

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[9] One significant difference, however, between Rule 11 claims and claims under *Strickland* and *Brady* v. *Maryland*, 373 U. S. 83 (1963), is that the latter may be raised in postconviction proceedings such as a petition for habeas corpus, or a motion to vacate a sentence under 28 U. S. C. § 2255. Those proceedings permit greater development of the record. See *Massaro* v. *United States*, 538 U. S. 500 (2003) (*Strickland* claims are not procedurally defaulted when brought for the first time on § 2255, because of the advantages of that form of proceeding for hearing such cases). For Rule 11 claims, by contrast, that way is open only in the most egregious cases. *Timmreck*, *supra;* see also *Vonn*, 535 U. S., at 64 (noting that Rule 11(h) was not meant to disturb *Timmreck*). A defendant will rarely, if ever, be able to obtain relief for Rule 11 violations under § 2255; and relief on direct appeal, given the plain-error standard that will apply in many cases, will be difficult to get, as it should be. Cf. *United States* v. *Raineri*, 42 F. 3d 36, 45 (CA1 1994) (Boudin, J.) ("[J]ust as there are many fair trials but few perfect ones, so flaws are also to be expected in Rule 11 proceedings").

Our rule does not, however, foreclose relief altogether. The reasonable-probability standard is not the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for error things would have been different. See *Kyles* v. *Whitley*, 514 U. S. 419, 434 (1995).

C

What we have already said points to why the test applied by the Court of Appeals in this case fell short. Its first element was whether the error was "minor or technical," 310 F. 3d, at 1225, a phrase it took from *United States* v. *Graibe*, 946 F. 2d 1428 (CA9 1991), which in turn found it in the 1983 commentary that accompanied the amendment to Rule 11(h). 946 F. 2d, at 1433. But this element requires no examination of the effect of the omitted warning on a defendant's decision, a failing repeated to a significant extent by the second element of the Ninth Circuit's test, taken from *United States* v. *Minore*, 292 F. 3d 1109 (CA9 2002), which asks whether the defendant understood "the rights at issue when he entered his guilty plea." 310 F. 3d, at 1225. True, this enquiry gets closer than the first to a consideration of the likely effect of Rule 11 error on the defendant's decision to plead; assessing a claim that an error affected a defendant's decision to plead guilty must take into account any indication that the omission of a Rule 11 warning misled him. But the standard of the Court of Appeals does not allow consideration of any record evidence tending to show that a misunderstanding was inconsequential to a defendant's decision, or evidence indicating the relative significance of other facts that may have borne on his choice regardless of any Rule 11 error.[10]

Relevant evidence that the Court of Appeals thus passed over in this case included Dominguez's statement to the District Court that he did not intend to go to trial, and his coun-

[10] This is another point of contrast with the constitutional question whether a defendant's guilty plea was knowing and voluntary. We have held, for example, that when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed. *Boykin* v. *Alabama*, 395 U. S. 238, 243 (1969). We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.

sel's confirmation of that representation, made at the same hearing. The neglected but relevant considerations also included the implications raised by Dominguez's protests at the sentencing hearing. He claimed that when he pleaded guilty he had "never had any knowledge about the points of responsibility, the safety valve, or anything like that." App. 109. These statements, if credited, would show that Dominguez was confused about the law that applied to his sentence, about which the court clearly informed him, but they do not suggest any causal link between his confusion and the particular Rule 11 violation on which he now seeks relief.

Other matters that may be relevant but escape notice under the Ninth Circuit's test are the overall strength of the Government's case and any possible defenses that appear from the record, subjects that courts are accustomed to considering in a *Strickland* or *Brady* analysis. When the record made for a guilty plea and sentencing reveals evidence, as this one does, showing both a controlled sale of drugs to an informant and a confession, one can fairly ask a defendant seeking to withdraw his plea what he might ever have thought he could gain by going to trial. The point of the question is not to second-guess a defendant's actual decision; if it is reasonably probable he would have gone to trial absent the error, it is no matter that the choice may have been foolish. The point, rather, is to enquire whether the omitted warning would have made the difference required by the standard of reasonable probability; it is hard to see here how the warning could have had an effect on Dominguez's assessment of his strategic position. And even if there were reason to think the warning from the bench could have mattered, there was the plea agreement, read to Dominguez in his native Spanish, which specifically warned that he could not withdraw his plea if the court refused to accept the Government's recommendations. This fact, uncontested by Dominguez, tends to show that the Rule 11 error made no difference to the outcome here.

* * *

We reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring in the judgment.

I agree with much of the Court's opinion and concur in its disposition of the case. I do not, however, agree with its holding that respondent need not show prejudice by a preponderance of the evidence. *Ante*, at 83, n. 9.

By my count, this Court has adopted no fewer than four assertedly different standards of probability relating to the assessment of whether the outcome of trial *would* have been different *if* error had not occurred, or *if* omitted evidence had been included. See *Chapman* v. *California*, 386 U. S. 18, 24 (1967) (adopting "harmless beyond a reasonable doubt" standard for preserving, on direct review, conviction obtained in a trial where constitutional error occurred); *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (rejecting *Chapman* in favor of the less defendant-friendly " 'substantial and injurious effect or influence' " standard of *Kotteakos* v. *United States*, 328 U. S. 750 (1946), for overturning conviction on collateral review); *United States* v. *Agurs*, 427 U. S. 97, 111–113 (1976) (rejecting *Kotteakos* for overturning conviction on the basis of violations of *Brady* v. *Maryland*, 373 U. S. 83 (1963), in favor of an even less defendant-friendly standard later described in *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984), as a "reasonable probability"); *id.*, at 693–694 (distinguishing the "reasonable probability" standard from the *still yet* less defendant-friendly "more likely than not" standard applicable to claims of newly discovered evidence). See generally *Kyles* v. *Whitley*, 514 U. S. 419, 434–436 (1995). Such ineffable gradations of probability seem to me quite beyond the ability of the judicial mind (or any mind) to grasp, and thus harmful rather than helpful

to the consistency and rationality of judicial decisionmaking. That is especially so when they are applied to the hypothesizing of events that never in fact occurred. Such an enterprise is not factfinding, but closer to divination.

For purposes of estimating what *would* have happened, it seems to me that the only serviceable standards are the traditional "beyond a reasonable doubt" and "more likely than not." We should not pretend to a higher degree of precision. I would not, therefore, extend our "reasonable probability" standard to the plain-error context. I would hold that, where a defendant has failed to object at trial, and thus has the burden of proving that a mistake he failed to prevent had an effect on his substantial rights, he must show that effect to be probable, that is, more likely than not.

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HIBBS, DIRECTOR, ARIZONA DEPARTMENT OF REVENUE *v.* WINN ET AL.

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

No. 02–1809. Argued January 20, 2004—Decided June 14, 2004

Plaintiffs-respondents, Arizona taxpayers, filed suit in federal court against the Director of Arizona's Department of Revenue (Director) seeking to enjoin the operation of Ariz. Rev. Stat. Ann. § 43–1089 on Establishment Clause grounds. Arizona's law authorizes an income-tax credit for payments to nonprofit "school tuition organizations" (STOs) that award scholarships to students in private elementary or secondary schools. Section 43–1089 provides that STOs may not designate schools that "discriminate on the basis of race, color, handicap, familial status or national origin," § 43–1089(F), but does not preclude STOs from designating schools that provide religious instruction or give religion-based admissions preferences. The District Court granted the Director's motion to dismiss on the ground that the Tax Injunction Act (TIA), 28 U. S. C. § 1341, barred the suit. The TIA prohibits lower federal courts from restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." The Ninth Circuit reversed, holding that the TIA does not bar federal-court actions challenging state tax credits.

Held:

1. The Court rejects respondents' contention that the Director's certiorari petition was jurisdictionally untimely under 28 U. S. C. § 2101(c) and this Court's Rule 13.3. Section 2101(c) instructs that a petition must be filed "within ninety days after the entry of . . . judgment," and this Court's Rule 13.3 elaborates on that statute's instruction. More than 90 days elapsed between the date the Ninth Circuit first entered judgment and the date the Director's petition was filed. That time lapse, respondents assert, made the filing untimely under Rule 13.3's first sentence: "[T]he time to file . . . runs from the date of entry of the judgment or order sought to be reviewed." Moreover, respondents submit, because no party petitioned for rehearing, the extended filing periods prescribed by the Rule's second sentence never came into play. This case, however, did not follow the typical course. The Ninth Circuit, on its own initiative, had recalled its mandate and ordered the parties to brief the question whether the case should be reheard en banc. That order, this Court holds, suspended the judgment's finality

under § 2101(c), just as a timely filed rehearing petition would or a court's appropriate decision to consider a late-filed rehearing petition, see *Missouri* v. *Jenkins*, 495 U. S. 33, 49. The Court of Appeals' order raised the question whether that court would modify the judgment and alter the parties' rights; thus, while the court-initiated briefing order was pending, there was no "judgment" to be reviewed. See, *e. g.*, *id.*, at 46. The Director's certiorari petition was timely under the statute because it was filed within 90 days of the date the Ninth Circuit denied rehearing en banc. Were this Court to read Rule 13 as the sole guide, so that only a party's rehearing petition could reset the statute's 90-day count, the Court would lose sight of the congressional objective underpinning § 2101(c): An appellate court's final adjudication, Congress indicated, marks the time from which the filing period begins to run. The statute takes priority over the "procedural rules adopted by the Court for the orderly transaction of its business." *Schacht* v. *United States*, 398 U. S. 58, 64. Because the petition was timely under § 2101(c), the Court has jurisdiction. Pp. 96–99.

2. The TIA does not bar respondents' suit. Pp. 99–112.

(a) To determine whether the TIA bars this litigation, it is appropriate, first, to identify the relief sought. Respondents seek prospective relief only: injunctive relief prohibiting the Director from allowing taxpayers to utilize the § 43–1089 tax credit for payments to STOs that make religion-based tuition grants; a declaration that § 43–1089, on its face and as applied, violates the Establishment Clause; and an order that the Director inform such STOs that all funds in their possession as of the order's date must be paid into the state general fund. Taking account of the prospective nature of the relief requested, the Court reaches the dispositive question whether respondents' suit seeks to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law," § 1341. The answer turns on the meaning of the term "assessment" as employed in the TIA. For Internal Revenue Code (IRC) purposes, an assessment involves a "recording" of the amount the taxpayer owes the Government. 26 U. S. C. § 6203. The Court does not focus on the word "assessment" in isolation, however, but follows "the cardinal rule that statutory language must be read in context." *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 596. In the TIA and tax law generally, an assessment is closely tied to the collection of a tax, *i. e.*, the assessment is the official recording of liability that triggers levy and collection efforts. Complementing the cardinal rule just stated, the rule against superfluities instructs courts to interpret a statute to effectuate all its provisions, so that no part is rendered superfluous. If, as the Director asserts, the term "assessment," by itself, signified the entire taxing plan, the TIA would not need the words

"levy" or "collection"; the term "assessment," alone, would do all the necessary work. In briefing *United States* v. *Galletti*, 541 U. S. 114, the Government made clear that, under the IRC definition, an "assessment" serves as the trigger for levy and collection efforts. The Government did not describe "assessment" as synonymous with the entire taxation plan, nor disassociate the word from the company ("levy or collection") it keeps. Instead, and in accord with this Court's understanding, the Government related "assessment" to the term's collection-propelling function. Pp. 99–102.

(b) Congress modeled § 1341 on earlier federal statutes of similar import, which in turn paralleled state provisions proscribing state-court actions to enjoin the collection of state and local taxes. Congress drew particularly on the Anti-Injunction Act (AIA), which bars "any court" from entertaining a suit brought "for the purpose of restraining the assessment or collection of any [federal] tax." 26 U. S. C. § 7421(a). This Court has recognized, from the AIA's text, that the measure serves twin purposes: It responds to the Government's need to assess and collect taxes expeditiously with a minimum of preenforcement judicial interference; and it requires that the legal right to disputed sums be determined in a refund suit. *E. g.*, *Bob Jones Univ.* v. *Simon*, 416 U. S. 725, 736. Lower federal courts have similarly comprehended § 7421(a). Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints. In both 26 U. S. C. § 7421(a) and 28 U. S. C. § 1341, Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* were outside Congress' purview. The TIA's legislative history shows that, in enacting the statute, Congress focused on taxpayers who sought to avoid paying their state tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the history announce a sweeping congressional direction to prevent federal-court interference with all aspects of state tax administration. The foregoing understanding of the TIA's purposes and legislative history underpins this Court's previous applications of that statute. See, *e. g.*, *California* v. *Grace Brethren Church*, 457 U. S. 393, 408–409. *Id.*, at 410, distinguished. Contrary to the Director's assertion, *Arkansas* v. *Farm Credit Servs. of Central Ark.*, 520 U. S. 821; *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582; *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100; and *Rosewell* v. *LaSalle Nat. Bank*, 450 U. S. 503, do not hold that state tax administration matters must be kept entirely free from lower federal-court "interference." Like *Grace Brethren Church*, all of those cases fall within

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§ 1341's undisputed compass: All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes). Federal-court relief, therefore, would have operated to reduce the flow of state tax revenue. Those decisions are not fairly portrayed cut loose from their secure, state-revenue-protective moorings. See, *e. g.*, *Grace Brethren Church*, 457 U. S., at 410. This Court has interpreted and applied the TIA only in cases Congress wrote the statute to address, *i. e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes. The Court has read harmoniously the § 1341 instruction conditioning the jurisdictional bar on the availability of "a plain, speedy and efficient remedy" in state court. The remedy inspected in the Court's decisions was not designed for the universe of plaintiffs who sue the State, but was tailormade for taxpayers. See, *e. g.*, *id.*, at 411. Pp. 102–108.

(c) In other federal courts as well, § 1341 has been read to restrain taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to state tax benefits in a federal forum. Further, numerous federal-court decisions—including decisions of this Court reviewing lower federal-court judgments—have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA. See, *e. g.*, *Byrne* v. *Public Funds for Public Schools of New Jersey*, 442 U. S. 907; *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218. Consistent with the decades-long understanding prevailing on this issue, respondents' suit may proceed without any TIA impediment. Pp. 108–112.

307 F. 3d 1011, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which STEVENS, O'CONNOR, SOUTER, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 112. KENNEDY, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 113.

Terry Goddard, Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Mary O'Grady*, Solicitor General, *Paula S. Bickett*, and *Joseph Kanefield*, Special Assistant Attorney General.

Deputy Solicitor General Hungar argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General O'Connor*, *Kent L. Jones*, and *Kenneth L. Greene*.

Marvin S. Cohen argued the cause for respondents. With him on the brief were *Paul Bender* and *Steven R. Shapiro*.*

JUSTICE GINSBURG delivered the opinion of the Court.

Arizona law authorizes income-tax credits for payments to organizations that award educational scholarships and tuition grants to children attending private schools. See Ariz.

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*Briefs of *amici curiae* urging reversal were filed for the State of California et al. by *Bill Lockyer*, Attorney General of California, *Manuel M. Mederios*, State Solicitor General, *Andrea Lynn Hoch*, Chief Assistant Attorney General, *David S. Chaney*, Senior Assistant Attorney General, *Randall P. Borcherding*, Supervising Deputy Attorney General, *Kristian D. Whitten*, Deputy Attorney General, and *Anabelle Rodríguez*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective jurisdictions as follows: *William H. Pryor, Jr.*, of Alabama, *Gregg D. Renkes* of Alaska, *Mike Beebe* of Arkansas, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.*, of Florida, *Thurbert E. Baker* of Georgia, *Douglas B. Moylan* of Guam, *Mark J. Bennett* of Hawaii, *Lawrence G. Wasden* of Idaho, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Thomas J. Miller* of Iowa, *Richard P. Ieyoub* of Louisiana, *Steven Rowe* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Thomas F. Reilly* of Massachusetts, *Michael A. Cox* of Michigan, *Mike Moore* of Mississippi, *Jeremiah W. (Jay) Nixon* of Missouri, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Peter W. Heed* of New Hampshire, *Peter C. Harvey* of New Jersey, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Wayne Stenehjem* of North Dakota, *Jim Petro* of Ohio, *Hardy Myers* of Oregon, *D. Michael Fisher* of Pennsylvania, *Patrick C. Lynch* of Rhode Island, *Henry McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *Jerry W. Kilgore* of Virginia, *Christine O. Gregoire* of Washington, *Darrell V. McGraw, Jr.*, of West Virginia, and *Peggy A. Lautenschlager* of Wisconsin; for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley;* and for the Honorable Trent Franks et al. by *Benjamin W. Bull.*

A brief of *amici curiae* urging affirmance was filed for the NAACP Legal Defense & Educational Fund, Inc., by *Elaine R. Jones*, *Theodore M. Shaw*, and *Norman J. Chachkin.*

A brief of *amici curiae* was filed for Americans United for Separation of Church and State et al. by *Ayesha N. Khan*, *Elliot M. Mincberg*, and *Judith E. Schaeffer.*

Rev. Stat. Ann. § 43–1089 (West Supp. 2003). Plaintiffs below, respondents here, brought an action in federal court challenging § 43–1089, and seeking to enjoin its operation, on Establishment Clause grounds. The question presented is whether the Tax Injunction Act (TIA or Act), 28 U. S. C. § 1341, which prohibits a lower federal court from restraining "the assessment, levy or collection of any tax under State law," bars the suit. Plaintiffs-respondents do not contest their own tax liability. Nor do they seek to impede Arizona's receipt of tax revenues. Their suit, we hold, is not the kind § 1341 proscribes.

In decisions spanning a near half century, courts in the federal system, including this Court, have entertained challenges to tax credits authorized by state law, without conceiving of § 1341 as a jurisdictional barrier. On this first occasion squarely to confront the issue, we confirm the authority federal courts exercised in those cases.

It is hardly ancient history that States, once bent on maintaining racial segregation in public schools, and allocating resources disproportionately to benefit white students to the detriment of black students, fastened on tuition grants and tax credits as a promising means to circumvent *Brown* v. *Board of Education*, 347 U. S. 483 (1954). The federal courts, this Court among them, adjudicated the ensuing challenges, instituted under 42 U. S. C. § 1983, and upheld the Constitution's equal protection requirement. See, *e. g.*, *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218, 233 (1964) (faced with unconstitutional closure of county public schools and tuition grants and tax credits for contributions to private segregated schools, District Court could require county to levy taxes to fund nondiscriminatory public schools), rev'g 322 F. 2d 332, 343–344 (CA4 1963) (abstention required until state courts determine validity of grants, tax credits, and public-school closing), aff'g *Allen* v. *County School Bd. of Prince Edward Cty.*, 198 F. Supp. 497, 503 (ED Va. 1961) (county enjoined from paying grants or providing

tax credits to support private schools that exclude students based on race while public schools remain closed), and aff'g 207 F. Supp. 349, 355 (ED Va. 1962) (closure of public schools enjoined). See also *Moton* v. *Lambert*, 508 F. Supp. 367, 368 (ND Miss. 1981) (challenge to tax exemptions for racially discriminatory private schools may proceed in federal court).

In the instant case, petitioner Hibbs, Director of Arizona's Department of Revenue, argues, in effect, that we and other federal courts were wrong in those civil-rights cases. The TIA, petitioner maintains, trumps § 1983; the Act, according to petitioner, bars all lower federal-court interference with state tax systems, even when the challengers are not endeavoring to avoid a tax imposed on them, and no matter whether the State's revenues would be raised or lowered should the plaintiffs prevail. The alleged jurisdictional bar, which petitioner asserts has existed since the TIA's enactment in 1937, was not even imagined by the jurists in the pathmarking civil-rights cases just cited, or by the defendants in those cases, litigants with every interest in defeating federal-court adjudicatory authority. Our prior decisions command no respect, petitioner urges, because they constitute mere "sub silentio holdings." Reply Brief for Petitioner 8. We reject that assessment.

We examine in this opinion both the scope of the term "assessment" as used in the TIA, and the question whether the Act was intended to insulate state tax laws from constitutional challenge in lower federal courts even when the suit would have no negative impact on tax collection. Concluding that this suit implicates neither § 1341's conception of assessment nor any of the statute's underlying purposes, we affirm the judgment of the Court of Appeals.

I

Plaintiffs-respondents, Arizona taxpayers, filed suit in the United States District Court for the District of Arizona, challenging Ariz. Rev. Stat. Ann. § 43–1089 (West Supp. 2003) as incompatible with the Establishment Clause. Sec-

tion 43–1089 provides a credit to taxpayers who contribute money to "school tuition organizations" (STOs). An STO is a nonprofit organization that directs moneys, in the form of scholarship grants, to students enrolled in private elementary or secondary schools. STOs must disburse as scholarship grants at least 90 percent of contributions received, may allow donors to direct scholarships to individual students, may not allow donors to name their own dependents, must designate at least two schools whose students will receive funds, and must not designate schools that "discriminate on the basis of race, color, handicap, familial status or national origin." See §§ 43–1089(D)–(F). STOs are not precluded by Arizona's statute from designating schools that provide religious instruction or that give admissions preference on the basis of religion or religious affiliation. When taxpayers donate money to a qualified STO, § 43–1089 allows them, in calculating their Arizona tax liability, to credit up to $500 of their donation (or $625 for a married couple filing jointly, § 43–1089(A)(2)).

In effect, § 43–1089 gives Arizona taxpayers an election. They may direct $500 (or, for joint-return filers, $625) to an STO, or to the Arizona Department of Revenue. As long as donors do not give STOs more than their total tax liability, their $500 or $625 contributions are costless.

The Arizona Supreme Court, by a 3-to-2 vote, rejected a facial challenge to § 43–1089 before the statute went into effect. *Kotterman* v. *Killian*, 193 Ariz. 273, 972 P. 2d 606 (1999) (en banc). That case took the form of a special discretionary action invoking the court's original jurisdiction. See *id.*, at 277, 972 P. 2d, at 610. *Kotterman*, it is undisputed, has no preclusive effect on the instant as-applied challenge to § 43–1089 brought by different plaintiffs.

Respondents' federal-court complaint against the Director of Arizona's Department of Revenue (Director) alleged that § 43–1089 "authorizes the formation of agencies that have as their sole purpose the distribution of State funds to children of a particular religious denomination or to children attend-

ing schools of a particular religious denomination." Complaint ¶ 13, App. 10. Respondents sought injunctive and declaratory relief, and an order requiring STOs to pay funds still in their possession "into the state general fund." *Id.*, at 7–8, App. 15.

The Director moved to dismiss the action, relying on the TIA, which reads in its entirety:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U. S. C. § 1341.

The Director did not assert that a federal-court order enjoining § 43–1089 would interfere with the State's tax levy or collection efforts. He urged only that a federal injunction would restrain the "assessment" of taxes "under State law." Agreeing with the Director, the District Court held that the TIA required dismissal of the suit. App. to Pet. for Cert. 31.

The Court of Appeals for the Ninth Circuit reversed, holding that "a federal action challenging the granting of a state tax credit is not prohibited by the [TIA]." *Winn* v. *Killian*, 307 F. 3d 1011, 1017 (2002). Far from "adversely affect[ing] the state's ability to raise revenue," the Court of Appeals observed, "the relief requested by [respondents] . . . would result in the state's receiving more funds that could be used for the public benefit." *Id.*, at 1017, 1018. We granted certiorari, 539 U. S. 986 (2003), in view of the division of opinion on whether the TIA bars constitutional challenges to state tax credits in federal court. Compare 307 F. 3d, at 1017, with *ACLU Foundation* v. *Bridges*, 334 F. 3d 416, 421–423 (CA5 2003) (TIA bars federal action seeking to have any part of a State's tax system declared unconstitutional). We now affirm the judgment of the Ninth Circuit.

II

Before reaching the merits of this case, we must address respondents' contention that the Director's petition for cer-

tiorari was jurisdictionally untimely under 28 U. S. C. § 2101(c) and our Rules. See Brief in Opposition 8–13. Section 2101(c) instructs that a petition for certiorari must be filed "within ninety days after the entry of . . . judgment." This Court's Rule 13.3 elaborates:

> "The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment."

Respondents assert that the Director's petition missed the Rule's deadlines: More than 90 days elapsed between the date the Court of Appeals first entered judgment and the date the petition was filed, rendering the filing untimely under the first sentence of the Rule; and because no party petitioned for rehearing, the extended periods prescribed by the Rule's second sentence never came into play.

This case, however, did not follow the typical course. The Court of Appeals, on its own motion, recalled its mandate and ordered the parties to brief the question whether the case should be reheard en banc. That order, we conclude, suspended the judgment's finality under § 2101(c), just as a timely filed rehearing petition would, or a court's appropriate decision to consider a late-filed rehearing petition. Compare *Young* v. *Harper*, 520 U. S. 143, 147, n. 1 (1997) (appeals court agreed to consider a late-filed rehearing petition; timeliness of petition for certiorari measured from date court disposed of rehearing petition), with *Missouri* v. *Jenkins*, 495 U. S. 33, 49 (1990) ("The time for applying for certiorari will

not be tolled when it appears that the lower court granted rehearing or amended its order solely for the purpose of extending that time.").

A timely rehearing petition, a court's appropriate decision to entertain an untimely rehearing petition, and a court's direction, on its own initiative, that the parties address whether rehearing should be ordered share this key characteristic: All three raise the question whether the court will modify the judgment and alter the parties' rights. See *id.*, at 46 ("A timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties" (quoting *Department of Banking of Neb.* v. *Pink*, 317 U. S. 264, 266 (1942) *(per curiam);* alterations in original)). In other words, "while [a] petition for rehearing is pending," or while the court is considering, on its own initiative, whether rehearing should be ordered, "there is no 'judgment' to be reviewed." *Jenkins*, 495 U. S., at 46.

In this light, we hold that the Director's petition for a writ of certiorari was timely. When the Court of Appeals ordered briefing on the rehearing issue, 90 days had not yet passed from the issuance of the panel opinion. Because § 2101(c)'s 90-day limit had not yet expired, the clock could still be reset by an order that left unresolved whether the court would modify its judgment. The court-initiated briefing order had just that effect. Because a genuinely final judgment is critical under the statute, we must treat the date of the court's order denying rehearing en banc as the date judgment was entered. The petition was filed within 90 days of that date and was thus timely under the statute.

Were we to read Rule 13 as our sole guide, so that only a rehearing petition filed by a party could reset the statute's 90-day count, we would lose sight of the congressional objective underpinning § 2101(c): An appellate court's final adjudi-

cation, Congress indicated, marks the time from which the period allowed for a certiorari petition begins to run. The statute takes priority over the "procedural rules adopted by the Court for the orderly transaction of its business." *Schacht* v. *United States*, 398 U. S. 58, 64 (1970). When court-created rules fail to anticipate unusual circumstances that fit securely within a federal statute's compass, the statute controls our decision. See, *e. g.*, *Kontrick* v. *Ryan*, 540 U. S. 443, 453 (2004) ("'[I]t is axiomatic' that [court-prescribed procedural rules] 'do not create or withdraw federal jurisdiction.'" (quoting *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 370 (1978))). Because the petition for a writ of certiorari was timely under § 2101(c), we have jurisdiction to decide whether the TIA bars respondents' suit.

III

To determine whether this litigation falls within the TIA's prohibition, it is appropriate, first, to identify the relief sought. Respondents seek prospective relief only. Specifically, their complaint requests "injunctive relief prohibiting [the Director] from allowing taxpayers to utilize the tax credit authorized by A. R. S. § 43–1089 for payments made to STOs that make tuition grants to children attending religious schools, to children attending schools of only one religious denomination, or to children selected on the basis of their religion." Complaint 7, App. 15. Respondents further ask for a "declaration that A. R. S. § 43–1089, on its face and as applied," violates the Establishment Clause "by affirmatively authorizing STOs to use State income-tax revenues to pay tuition for students attending religious schools or schools that discriminate on the basis of religion." *Ibid.* Finally, respondents seek "[a]n order that [the Director] inform all [such] STOs that . . . all funds in their possession as of the date of this Court's order must be paid into the state general fund." Complaint 7–8, App. 15. Taking account of the prospective nature of the relief requested, does respond-

ents' suit, in 28 U. S. C. § 1341's words, seek to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law"? The answer to that question turns on the meaning of the term "assessment" as employed in the TIA.[1]

As used in the Internal Revenue Code (IRC), the term "assessment" involves a "recording" of the amount the taxpayer owes the Government. 26 U. S. C. § 6203. The "assessment" is "essentially a bookkeeping notation." *Laing* v. *United States*, 423 U. S. 161, 170, n. 13 (1976). Section 6201(a) of the IRC authorizes the Secretary of the Treasury "to make . . . assessments of all taxes . . . imposed by this title." An assessment is made "by recording the liability of the taxpayer in the office of the Secretary in accordance with rules or regulations prescribed by the Secretary." § 6203.[2] See also M. Saltzman, IRS Practice and Procedure ¶ 10.02, pp. 10–4 to 10–7 (2d ed. 1991) (when Internal Revenue Service (IRS) signs "summary list" of assessment to record amount of tax liability, "the official act of assessment has occurred for purposes of the Code").[3]

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[1] State taxation, for § 1341 purposes, includes local taxation. See 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4237, pp. 643–644 (2d ed. 1988) ("Local taxes are imposed under authority of state law and the courts have held that the Tax Injunction Act applies to them."); R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1173 (5th ed. 2003) ("For purposes of the Act, local taxes have uniformly been held to be collected 'under State law.' ").

[2] Section 301.6203–1 of the Treasury Regulations states that an assessment is accomplished by the "assessment officer signing the summary record of assessment," which, "through supporting records," provides "identification of the taxpayer, the character of the liability assessed, the taxable period, if applicable, and the amount of the assessment." 26 CFR § 301.6203–1 (2003).

[3] The term "assessment" is used in a variety of ways in tax law. In the property-tax setting, the word usually refers to the process by which the taxing authority assigns a taxable value to real or personal property. See, *e. g.*, F. Schoettle, State and Local Taxation: The Law and Policy of Multi-Jurisdictional Taxation 799 (2003) ("ASSESSMENT—The process of

We do not focus on the word "assessment" in isolation, however. Instead, we follow "the cardinal rule that statutory language must be read in context [since] a phrase gathers meaning from the words around it." *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 596 (2004) (internal quotation marks omitted). In § 1341 and tax law generally, an assessment is closely tied to the collection of a tax, *i. e.*, the assessment is the official recording of liability that triggers levy and collection efforts.

The rule against superfluities complements the principle that courts are to interpret the words of a statute in context. See 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–186 (rev. 6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." (footnotes omitted)). If, as the Director asserts, the term "assessment," by itself, signified "[t]he entire plan or scheme fixed upon for charging or taxing," Brief for Petitioner 12 (quoting Webster's New International Dictionary of the English Language 166 (2d ed. 1934)), the TIA would not need the words "levy" or "collection"; the term "assessment," alone, would do all the necessary work.

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putting a value on real or personal property for purposes of a tax to be measured as a percentage of property values. The valuation is ordinarily done by a government official, the 'assessor' or 'tax assessor,' who will sometimes hire a private professional to do the actual valuations."); Black's Law Dictionary 112 (7th ed. 1999) (defining "assessment" as, *inter alia:* "Official valuation of property for purposes of taxation <assessment of the beach house>.—Also termed *tax assessment.* Cf. APPRAISAL."). See also 5 R. Powell, Real Property § 39.02 (M. Wolf ed. 2000). To calculate the amount of property taxes owed, the tax assessor multiplies the assessed value by the appropriate tax rate. See, *e. g.*, R. Werner, Real Estate Law 534 (11th ed. 2002). Income taxes, by contrast, are typically self-assessed in the United States. As anyone who has filed a tax return is unlikely to forget, the taxpayer, not the taxing authority, is the first party to make the relevant calculation of income taxes owed. The word "self-assessment," however, is not a technical term; as IRC § 6201(a) indicates, the IRS executes the formal act of income-tax assessment.

Earlier this Term, in *United States* v. *Galletti*, 541 U. S. 114 (2004), the Government identified "two important consequences" that follow from the IRS' timely tax assessment: "[T]he IRS may employ administrative enforcement methods such as tax liens and levies to collect the outstanding tax," see 26 U. S. C. §§ 6321–6327, 6331–6344; and "the time within which the IRS may collect the tax either administratively *or* by a 'proceeding in court' is extended [from 3 years] to 10 years after the date of assessment," see §§ 6501(a), 6502(a). Brief for United States in *United States* v. *Galletti*, O. T. 2003, No. 02–1389, pp. 15–16. The Government thus made clear in briefing *Galletti* that, under the IRC definition, the tax "assessment" serves as the trigger for levy and collection efforts. The Government did not describe the term as synonymous with the entire plan of taxation. Nor did it disassociate the word "assessment" from the company ("levy or collection") that word keeps.[4] Instead, and in accord with our understanding, the Government related "assessment" to the term's collection-propelling function.

IV

Congress modeled § 1341 upon earlier federal "statutes of similar import," laws that, in turn, paralleled state provisions proscribing "actions in State courts to enjoin the collection of State and county taxes." S. Rep. No. 1035, 75th Cong., 1st Sess., 1 (1937) (hereinafter S. Rep.). In composing the TIA's text, Congress drew particularly on an 1867 measure, sometimes called the Anti-Injunction Act (AIA), which bars "any court" from entertaining a suit brought "for the purpose of restraining the assessment or collection of any [federal] tax." Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat.

[4] The dissent is of two minds in this regard. On the one hand, it twice suggests that a proper definition of the term "assessment," for § 1341 purposes, is "the entire plan or scheme fixed upon for charging or taxing." *Post*, at 117. On the other hand, the dissent would disconnect the word from the enforcement process ("levy or collection") that "assessment" sets in motion. See *post*, at 117–119.

475, now codified at 26 U. S. C. § 7421(a). See *Jefferson County* v. *Acker*, 527 U. S. 423, 434–435 (1999). While § 7421(a) "apparently has no recorded legislative history," *Bob Jones Univ.* v. *Simon*, 416 U. S. 725, 736 (1974), the Court has recognized, from the AIA's text, that the measure serves twin purposes: It responds to "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference"; and it " 'require[s] that the legal right to the disputed sums be determined in a suit for refund,' " *ibid.* (quoting *Enochs* v. *Williams Packing & Nav. Co.*, 370 U. S. 1, 7 (1962)).[5] Lower federal courts have similarly comprehended § 7421(a). See, *e. g.*, *McGlotten* v. *Connally*, 338 F. Supp. 448, 453–454 (DC 1972) (three-judge court) (§ 7421(a) does not bar action seeking to enjoin income-tax exemptions to fraternal orders that exclude nonwhites from membership, for in such an action, plaintiff "does not contest the amount of his own tax, nor does he seek to limit the amount of tax revenue collectible by the United States" (footnote omitted)); *Tax Analysts and Advocates* v. *Shultz*, 376 F. Supp. 889, 892 (DC 1974) (Section 7421(a) does not bar challenge to IRS revenue ruling allowing contributors to political candidate committees to avoid federal gift tax on contributions in excess of $3,000 ceiling; while § 7421(a) "precludes suits to restrain the assessment or collection of taxes," the proscription does not apply when "plaintiffs seek not to restrain the Commissioner from collecting taxes, but rather to *require* him to collect *additional* taxes according to the mandates of the law." (emphases in original)).[6]

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[5] That Congress had in mind challenges to assessments triggering collections, *i. e.*, attempts to prevent the collection of revenue, is borne out by the final clause of 26 U. S. C. § 7421(a), added in 1966: "whether or not such person is the person *against whom* such tax was assessed." (Emphasis added.)

[6] The dissent incorrectly ranks *South Carolina* v. *Regan*, 465 U. S. 367 (1984), with *McGlotten* and *Tax Analysts and Advocates*. *Post*, at 120–121. See also *post*, at 122. The latter decisions, as the text notes, did not seek to stop the collection of taxes. In contrast, in *South Caro-*

Just as the AIA shields federal tax collections from federal-court injunctions, so the TIA shields state tax collections from federal-court restraints. In both 26 U. S. C. § 7421(a) and 28 U. S. C. § 1341, Congress directed taxpayers to pursue refund suits instead of attempting to restrain collections. Third-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs*, as *McGlotten*, 338 F. Supp., at 453–454, and *Tax Analysts*, 376 F. Supp., at 892, explained, were outside Congress' purview. The TIA's legislative history is not silent in this regard. The Act was designed expressly to restrict "the jurisdiction of the district courts of the United States over suits relating to the collection of State taxes." S. Rep., p. 1.

Specifically, the Senate Report commented that the Act had two closely related, state-revenue-protective objectives: (1) to eliminate disparities between taxpayers who could seek injunctive relief in federal court—usually out-of-state corporations asserting diversity jurisdiction—and taxpayers with recourse only to state courts, which generally required taxpayers to pay first and litigate later; and (2) to stop taxpayers, with the aid of a federal injunction, from withholding large sums, thereby disrupting state government finances. *Id.*, at 1–2; see R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1173 (5th ed. 2003) (citing *Rosewell* v. *LaSalle Nat. Bank*, 450 U. S. 503, 522–523, and nn. 28–29, 527 (1981)). See also *Jefferson County*, 527 U. S., at 435 (observing that the TIA was "shaped by state and federal provisions barring anticipatory actions by taxpayers to stop the tax collector from initiating collection proceedings"). In short, in enacting the TIA,

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lina v. *Regan*, the State's suit aimed to reduce federal revenue receipts: South Carolina sought to enjoin as a violation of its Tenth Amendment rights not "a federal tax exemption," *post*, at 120, but federal income taxation of the interest on certain state-issued bonds. The Court held in that unique suit that § 7421(a) did not bar this Court's exercise of original jurisdiction over the case. 465 U. S., at 381.

Congress trained its attention on taxpayers who sought to avoid paying their tax bill by pursuing a challenge route other than the one specified by the taxing authority. Nowhere does the legislative history announce a sweeping congressional direction to prevent "federal-court interference with all aspects of state tax administration." Brief for Petitioner 20; *post*, at 123.[7]

The understanding of the Act's purposes and legislative history set out above underpins this Court's previous applications of the TIA. In *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982), for example, we recognized that the principal purpose of the TIA was to "limit drastically" federal-court interference with "the collection of [state] taxes." *Id.*, at 408–409 (quoting *Rosewell*, 450 U. S., at 522). True, the Court referred to the disruption of "state tax administration," but it did so specifically in relation to "the collection of revenue." 457 U. S., at 410 (quoting *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (Brennan, J., concurring in part and dissenting in part)). The complainants in *Grace Brethren Church* were several California churches and religious schools. They sought federal-court relief from an unemployment compensation tax that state law imposed on them. 457 U. S., at 398. Their federal action, which bypassed state remedies, was exactly what the TIA was designed to ward off. The Director and the dissent endeavor to reconstruct *Grace Brethren Church* as precedent for the proposition that the TIA totally immunizes from lower federal-court review "all aspects of state tax administration,

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[7] The language of the TIA differs significantly from that of the Johnson Act, which provides in part: "The district courts shall not enjoin, suspend or restrain *the operation of, or compliance with,*" public-utility rate orders made by state regulatory bodies. 28 U. S. C. § 1342 (emphasis added). The TIA does not prohibit interference with "the operation of, or compliance with," state tax laws; rather, § 1341 proscribes interference only with those aspects of state tax regimes that are needed to produce revenue—*i. e.*, assessment, levy, and collection.

and not just interference with the collection of revenue." Brief for Petitioner 20; see *post*, at 123–124. The endeavor is unavailing given the issue before the Court in *Grace Brethren Church* and the context in which the words "state tax administration" appear.

The Director invokes several other decisions alleged to keep matters of "state tax administration" entirely free from lower federal-court "interference." Brief for Petitioner 17–21; accord *post*, at 124–125. Like *Grace Brethren Church*, all of them fall within § 1341's undisputed compass: All involved plaintiffs who mounted federal litigation to avoid paying state taxes (or to gain a refund of such taxes). Federal-court relief, therefore, would have operated to reduce the flow of state tax revenue. See *Arkansas* v. *Farm Credit Servs. of Central Ark.*, 520 U. S. 821, 824 (1997) (corporations chartered under federal law claimed exemption from Arkansas sales and income taxation); *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582, 584 (1995) (action seeking to prevent Oklahoma from collecting taxes State imposed on nonresident motor carriers); *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 105–106 (1981) (taxpayers, alleging unequal taxation of real property, sought, *inter alia*, damages measured by alleged tax overassessments); *Rosewell*, 450 U. S., at 510 (state taxpayer, alleging her property was inequitably assessed, refused to pay state taxes).[8]

Our prior decisions are not fairly portrayed cut loose from their secure, state-revenue-protective moorings. See, *e. g.*,

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[8] Petitioner urges, and the dissent agrees, that the TIA safeguards another vital state interest: the authority of state courts to determine what state law means. Brief for Petitioner 21; *post*, at 125. Respondents, however, have not asked the District Court to interpret any state law—there is no disagreement as to the meaning of Ariz. Rev. Stat. Ann. § 43–1089 (West Supp. 2003), only about whether, as applied, the State's law violates the Federal Constitution. See *supra*, at 94–95. That is a question federal courts are no doubt equipped to adjudicate.

Grace Brethren Church, 457 U. S., at 410 ("If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and *taxpayers might escape the ordinary procedural requirements imposed by state law.* During the pendency of the federal suit *the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency.*" (quoting *Ledesma*, 401 U. S., at 128, n. 17 (Brennan, J., concurring in part and dissenting in part); emphases added)); *Rosewell*, 450 U. S., at 527–528 ("The compelling nature of these considerations [identified by Justice Brennan in *Perez*] is underscored by the dependency of state budgets on the receipt of local tax revenues. . . . We may readily appreciate the difficulties encountered by the county should a substantial portion of its rightful tax revenue be tied up in injunction actions.").[9]

In sum, this Court has interpreted and applied the TIA only in cases Congress wrote the Act to address, *i. e.*, cases in which state taxpayers seek federal-court orders enabling them to avoid paying state taxes. See *supra*, at 105–106. We have read harmoniously the § 1341 instruction conditioning the jurisdictional bar on the availability of "a plain, speedy and efficient remedy" in state court. The remedy inspected in our decisions was not one designed for the universe of plaintiffs who sue the State. Rather, it was a remedy tailormade for taxpayers. See, *e. g.*, *Rosewell*, 450 U. S., at 528 ("Illinois' legal remedy that provides property

[9] We note, furthermore, that this Court has relied upon "principles of comity," Brief for Petitioner 26, to preclude original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection. See *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100, 107–108 (1981) (Missouri taxpayers sought damages for increased taxes caused by alleged overassessments); *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U. S. 293, 296–299 (1943) (plaintiffs challenged Louisiana's unemployment compensation tax).

owners paying property taxes under protest a refund without interest in two years is a 'plain, speedy and efficient remedy' under the [TIA]"); *Grace Brethren Church*, 457 U. S., at 411 ("[A] state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax.'" (quoting *Rosewell*, 450 U. S., at 514)).[10]

V

In other federal courts as well, § 1341 has been read to restrain state taxpayers from instituting federal actions to contest their liability for state taxes, but not to stop third parties from pursuing constitutional challenges to tax benefits in a federal forum. Relevant to the distinction between taxpayer claims that would reduce state revenues and third-party claims that would enlarge state receipts, Seventh Circuit Judge Easterbrook wrote trenchantly:

> "Although the district court concluded that § 1341 applies to any federal litigation touching on the subject of state taxes, neither the language nor the legislative history of the statute supports this interpretation. The text of § 1341 does not suggest that federal courts should tread lightly in issuing orders that might allow local governments to raise additional taxes. The legislative history . . . shows that § 1341 is designed to ensure that federal courts do not interfere with states' collection of taxes, so long as the taxpayers have an opportunity to present to a court federal defenses to the imposition and collection of the taxes. The legislative history is filled with concern that federal judgments were emptying

[10] Far from "ignor[ing]" the "plain, speedy and efficient remedy" proviso, as the dissent charges, *post*, at 121, we agree that this "codified exception" is key to a proper understanding of the Act. The statute requires the State to provide *taxpayers* with a swift and certain remedy when they resist tax collections. An action dependent on a court's discretion, for example, would not qualify as a fitting taxpayer's remedy. Cf. *supra*, at 96.

> state coffers and that corporations with access to the diversity jurisdiction could obtain remedies unavailable to resident taxpayers. *There was no articulated concern about federal courts' flogging state and local governments to collect additional taxes.*" *Dunn* v. *Carey*, 808 F. 2d 555, 558 (1986) (emphasis added).

Second Circuit Judge Friendly earlier expressed a similar view of § 1341:

> "The [TIA's] context and the legislative history . . . lead us to conclude that, in speaking of 'collection,' Congress was referring to methods similar to assessment and levy, *e. g.*, distress or execution . . . that would produce money or other property directly, rather than indirectly through a more general use of coercive power. Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law going to the validity of the particular taxes *imposed upon them* . . . ." *Wells* v. *Malloy*, 510 F. 2d 74, 77 (1975) (emphasis added).

See also *In re Jackson County*, 834 F. 2d 150, 151–152 (CA8 1987) (observing that "§ 1341 has been held to be inapplicable to efforts to require collection of additional taxes, as opposed to efforts to inhibit the collection of taxes").[11]

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[11] In conflict with sister Circuits, and at odds with its own prior opinions, the Fifth Circuit, in *ACLU Foundation* v. *Bridges*, 334 F. 3d 416 (2003), recently construed the TIA in the way the Director does here. *Bridges* involved a challenge to tax exemptions for religious activities in several Louisiana statutes. The District Court, in line with earlier Fifth Circuit decisions, held that the TIA did not apply because the plaintiff was not seeking to restrain the "assessment, levy or collection" of state taxes, but to eliminate allegedly unconstitutional tax exemptions. Reversing, the Fifth Circuit ruled that the TIA bars any federal suit seeking to have any portion of a State's tax system declared unconstitutional. *Id.*, at 421–423.

The Director and the United States refer to four other federal-court decisions lending some support for their view that, for § 1341 purposes, no line should be drawn between challenges that would reduce revenues and

Further, numerous federal-court decisions—including decisions of this Court reviewing lower federal-court judgments—have reached the merits of third-party constitutional challenges to tax benefits without mentioning the TIA. See, *e. g.*, *Byrne* v. *Public Funds for Public Schools of New Jersey*, 442 U. S. 907 (1979), summarily aff'g 590 F. 2d 514 (CA3 1979) (state tax deduction for taxpayers with children attending nonpublic schools violates Establishment Clause), aff'g 444 F. Supp. 1228 (NJ 1978); *Franchise Tax Board of California* v. *United Americans for Public Schools*, 419

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attacks that might augment collections. See Reply Brief for Petitioner 8–9 (citing *Kraebel* v. *New York City Dept. of Housing Preservation and Development*, 959 F. 2d 395 (CA2 1992); *Colonial Pipeline Co.* v. *Collins*, 921 F. 2d 1237 (CA11 1991); *In re Gillis*, 836 F. 2d 1001 (CA6 1988); *United States Brewers Assn., Inc.* v. *Perez*, 592 F. 2d 1212 (CA1 1979)). See also Brief for United States as *Amicus Curiae* 14–15. In two of the cases, taxpayers were seeking relief aimed at lightening their own tax burdens. *Kraebel* held that § 1341 barred a taxpayer's constitutional challenge to a property-tax exemption and abatement scheme. 959 F. 2d, at 400. *Colonial Pipeline* held that a taxpayer's suit seeking a court-ordered redistribution of Georgia's ad valorem tax system, which might have reduced plaintiff's tax bill, implicated § 1341's jurisdictional bar. 921 F. 2d, at 1243. The court did observe, broadly: "[The] requested relief, if granted, . . . would clearly conflict with the principle underlying the [TIA] that the federal courts should generally avoid interfering with the sensitive and peculiarly local concerns surrounding state taxation schemes." *Id.*, at 1242.

Gillis, unlike *Kraebel* and *Colonial Pipeline*, was a third-party action. The court declined to decide "[w]hether the [TIA] actually does bar the availability of such relief," but noted that a suit seeking to enhance state revenues may nonetheless fall within § 1341's bar because "the Act is not, by its own language, limited to the *collection* of taxes." 836 F. 2d, at 1005 (emphasis in original). Finally, *Perez* concerned the Butler Act, 48 U. S. C. § 872, a TIA analog applicable to Puerto Rico. Ordering dismissal of the case for want of jurisdiction, the court rested its decision not on statutory construction, but on "underl[ying]" comity concerns, stating: "[A]n order of a federal court requiring Commonwealth officials to collect taxes which its legislature has not seen fit to impose on its citizens strikes us as a particularly inappropriate involvement in a state's management of its fiscal operations." 592 F. 2d, at 1214–1215.

U. S. 890 (1974) (summarily affirming district-court judgment striking down state statute that provided income-tax reductions for taxpayers sending children to nonpublic schools); *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973) (state tax benefits for parents of children attending nonpublic schools violates Establishment Clause), rev'g in relevant part 350 F. Supp. 655 (SDNY 1972) (three-judge court); *Grit* v. *Wolman*, 413 U. S. 901 (1973), summarily aff'g *Kosydar* v. *Wolman*, 353 F. Supp. 744, 755–756 (SD Ohio 1972) (three-judge court) (state tax credits for expenses relating to children's enrollment in nonpublic schools violate Establishment Clause); *Finlator* v. *Powers*, 902 F. 2d 1158 (CA4 1990) (state statute exempting Christian Bibles, but not holy books of other religions or other books, from state tax violates Establishment Clause); *Luthens* v. *Bair*, 788 F. Supp. 1032 (SD Iowa 1992) (state law authorizing tax benefit for tuition payments and textbook purchases does not violate Establishment Clause); *Minnesota Civil Liberties Union* v. *Roemer*, 452 F. Supp. 1316 (Minn. 1978) (three-judge court) (state law allowing parents of public or private school students to claim part of tuition and transportation expenses as tax deduction does not violate Establishment Clause).[12]

* * *

In a procession of cases not rationally distinguishable from this one, no Justice or member of the bar of this Court ever raised a § 1341 objection that, according to the petitioner in

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[12] In school desegregation cases, as a last resort, federal courts have asserted authority to direct the imposition of, or increase in, local tax levies, even in amounts exceeding the ceiling set by state law. See *Missouri* v. *Jenkins*, 495 U. S. 33, 57 (1990); *Liddell* v. *Missouri*, 731 F. 2d 1294, 1320 (CA8 1984) (en banc); cf. *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218, 233 (1964). Controversial as such a measure may be, see *Jenkins*, 495 U. S., at 65–81 (KENNEDY, J., concurring in part and concurring in judgment), it is noteworthy that § 1341 was not raised in those cases by counsel, lower courts, or this Court on its own motion.

this case, should have caused us to order dismissal of the action for want of jurisdiction. See *Mueller* v. *Allen*, 463 U. S. 388 (1983) (state tax deduction for parents who send their children to parochial schools does not violate Establishment Clause); *Byrne*, 442 U. S. 907; *United Americans for Public Schools*, 419 U. S. 890; *Committee for Public Ed. & Religious Liberty*, 413 U. S. 756; *Wolman*, 413 U. S. 901; *Griffin*, 377 U. S. 218. Consistent with the decades-long understanding prevailing on this issue, respondents' suit may proceed without any TIA impediment.[13]

For the reasons stated, the judgment of the United States Court of Appeals for the Ninth Circuit is

Affirmed.

JUSTICE STEVENS, concurring.

In Part IV of his dissent, JUSTICE KENNEDY observes that "years of unexamined habit by litigants and the courts" do not lessen this Court's obligation correctly to interpret a statute. *Post*, at 126. It merits emphasis, however, that prolonged congressional silence in response to a settled interpretation of a federal statute provides powerful support for maintaining the status quo. In statutory matters, judicial restraint strongly counsels waiting for Congress to take the initiative in modifying rules on which judges and litigants have relied. See *BedRoc Limited, LLC* v. *United States*, 541 U. S. 176, 192 (2004) (STEVENS, J., dissenting); *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88, 100–105 (1994) (STEVENS, J., dissenting); *Commissioner* v. *Fink*, 483 U. S. 89, 101–103 (1987) (STEVENS, J., dissenting); *Runyon* v. *McCrary*, 427 U. S. 160, 189–192

[13] In confirming that cases of this order may be brought in federal court, we do not suggest that "state courts are second rate constitutional arbiters." *Post*, at 113. Instead, we underscore that adjudications of great moment discerning no § 1341 barrier, see *supra*, at 93–94, cannot be written off as reflecting nothing more than "unexamined custom," *post*, at 114, or unthinking "habit," *post*, at 126.

(1976) (STEVENS, J., concurring). In a contest between the dictionary and the doctrine of *stare decisis*, the latter clearly wins. The Court's fine opinion, which I join without reservation, is consistent with these views.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

In this case, the Court shows great skepticism for the state courts' ability to vindicate constitutional wrongs. Two points make clear that the Court treats States as diminished and disfavored powers, rather than merely applies statutory text. First, the Court's analysis of the Tax Injunction Act (TIA or Act), 28 U. S. C. § 1341, contrasts with a literal reading of its terms. Second, the Court's assertion that legislative histories support the conclusion that "[t]hird-party suits not seeking to stop the collection (or contest the validity) of a tax *imposed on plaintiffs* . . . were outside Congress' purview" in enacting the TIA and the anti-injunction provision on which the TIA was modeled, *ante*, at 104, is not borne out by those sources, as previously recognized by the Court. In light of these points, today's holding should probably be attributed to the concern the Court candidly shows animates it. See *ante*, at 93 (noting it was the federal courts that "upheld the Constitution's equal protection requirement" when States circumvented *Brown* v. *Board of Education*, 347 U. S. 483 (1954), by manipulating their tax laws). The concern, it seems, is that state courts are second rate constitutional arbiters, unequal to their federal counterparts. State courts are due more respect than this. Dismissive treatment of state courts is particularly unjustified since the TIA, by express terms, provides a federal safeguard: The Act lifts its bar on federal-court intervention when state courts fail to provide "a plain, speedy, and efficient remedy." § 1341.

In view of the TIA's text, the congressional judgment that state courts are qualified constitutional arbiters, and the re-

spect state courts deserve, I disagree with the majority's superseding the balance the Act strikes between federal- and state-court adjudication. I agree with the majority that the petition for certiorari was timely under 28 U. S. C. § 2101(c), see *ante*, at 96–99, and so submit this respectful dissent on the merits of the decision.

I

Today is the first time the Court has considered whether the TIA bars federal district courts from granting injunctive relief that would prevent States from giving citizens statutorily mandated state tax credits. There are cases, some dating back almost 50 years, which proceeded as if the jurisdictional bar did not apply to tax credit challenges; but some more recent decisions have said the bar is applicable. Compare, *e. g.*, *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Committee for Public Ed. & Religious Liberty* v. *Nyquist*, 413 U. S. 756 (1973); *Griffin* v. *School Bd. of Prince Edward Cty.*, 377 U. S. 218 (1964), with, *e. g.*, *ACLU Foundation of La.* v. *Bridges*, 334 F. 3d 416 (CA5 2003); *In re Gillis*, 836 F. 2d 1001 (CA6 1988). While unexamined custom favors the first position, the statutory text favors the latter. In these circumstances a careful explanation for the conclusion is necessary; but in the end the scope and purpose of the Act should be understood from its terms alone.

The question presented—whether the TIA bars the District Court from granting injunctive relief against the tax credit—requires two inquiries. First, the term assessment, as used in § 1341, must be defined. Second, we must determine if an injunction prohibiting the Director of Arizona's Department of Revenue (Director) from allowing the credit would enjoin, suspend, or restrain an assessment.

The word assessment in the TIA is not isolated from its use in another federal statute. The TIA was modeled on the anti-injunction provision of the Internal Revenue Code (Code), 26 U. S. C. § 7421(a). See *Jefferson County* v. *Acker*, 527 U. S. 423, 434 (1999). That provision specifies, and has

specified since 1867, that federal courts may not restrain or enjoin an "assessment or collection of any [federal] tax." 26 U. S. C. § 7421(a) (first codified by Act of Mar. 2, 1867, ch. 169, § 10, 14 Stat. 475). The meaning of the term assessment in this Code provision is discernible by reference to other Code sections. 26 U. S. C. § 1 *et seq.*

Chapter 63 of Title 26 addresses the subject of assessments and sheds light on the meaning of the term in the Code. Section 6201 first instructs that "[t]he Secretary [of the Internal Revenue Service] is . . . required to make the . . . assessments of all taxes . . . imposed by this title . . . ." 26 U. S. C. § 6201(a). Further it provides, "[t]he Secretary shall assess all taxes determined by the taxpayer or by the Secretary . . . ." § 6201(a)(1). Section 6203 in turn sets forth a method for making an assessment: "The assessment shall be made by recording the liability of the taxpayer in the office of the Secretary."

Taken together, the provisions of Title 26 establish that an assessment, as that term is used in § 7421(a), must at the least encompass the recording of a taxpayer's ultimate tax liability. This is what the taxpayer owes the Government. See also *Laing* v. *United States*, 423 U. S. 161, 170, n. 13 (1976) ("The 'assessment,' essentially a bookkeeping notation, is made when the Secretary or his delegate establishes an account against the taxpayer on the tax rolls"). Whether the Secretary or his delegate (today, the Commissioner) makes the recording on the basis of a taxpayer's self-reported filing form or instead chooses to rely on his own calculation of the taxpayer's liability (*e. g.*, via an audit) is irrelevant. The recording of the liability on the Government's tax rolls is itself an assessment.

The TIA was modeled on the anti-injunction provision, see *Jefferson County*, *supra;* it incorporates the same terminology employed by the provision; and it employs that terminology for the same purpose. It is sensible, then, to interpret the TIA's terms by reference to the Code's use of the term.

Cf. *Lorillard* v. *Pons*, 434 U. S. 575, 581 (1978) ("[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute"). The Court of Appeals, which concluded that an assessment was the official estimate of the value of income or property used to calculate a tax or the imposition of a tax on someone, *Winn* v. *Killian*, 307 F. 3d 1011, 1015 (CA9 2002), placed principal reliance for its interpretation on a dictionary definition. That was not entirely misplaced; but unless the definition is considered in the context of the prior statute, the advantage of that statute's interpretive guidance is lost.

Furthermore, the court defined the term in an unusual way. It relied on a dictionary that was unavailable when the TIA was enacted; it relied not on the definition of the term under consideration, "assessment," but on the definition of the term's related verb form, "assess"; and it examined only a portion of that term's definition. In the dictionary used by the Court of Appeals, the verb is defined in two ways not noted by the court. One of the alternative definitions is quite relevant—"(2) to fix or determine the amount of (damages, a tax, a fine, etc.)." Compare *ibid.* with Random House Dictionary of the English Language 90 (1979). Further:

> "Had [the panel] looked in a different lay dictionary, [it] would have found a definition contrary to the one it preferred, such as 'the entire plan or scheme fixed upon for charging or taxing.' . . . Had the panel considered tax treatises and law dictionaries . . . it would have found much in accord with this broader definition. . . . Even the federal income tax code supports a broad reading of 'assessment.'" *Winn* v. *Killian*, 321 F. 3d 911, 912 (CA9 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc).

Guided first by the Internal Revenue Code, an assessment under § 1341, at a minimum, is the recording of taxpayers' liability on the State's tax rolls. The TIA, though a federal statute that must be interpreted as a matter of federal law, operates in a state-law context. In this respect, the Act must be interpreted so as to apply evenly to the 50 various state-law regimes and to the various recording schemes States employ. It is therefore irrelevant whether state officials record taxpayer liabilities with their own pen in a specified location, by collecting and maintaining taxpayers' self-reported filing forms, or in some other manner. The recordkeeping that equates to the determination of taxpayer liability on the State's tax rolls is the assessment, whatever the method. The Court seems to agree with this. See *ante,* at 99–102.

The dictionary definition of assessment provides further relevant information. Contemporaneous dictionaries from the time of the TIA's enactment define assessment in expansive terms. They would broaden any understanding of the term, and so the Act's bar. See, *e. g.,* Webster's New International Dictionary 139 (1927) (providing three context relevant definitions for the term assessment: It is the act of apportioning or determining an amount to be paid; a valuation of property for the purpose of taxation; or the entire plan or scheme fixed upon for charging or taxing). See also *United States* v. *Galletti,* 541 U. S. 114, 122 (2004) (noting that under the Code the term assessment refers not only to recordings of tax liability but also to "the calculation . . . of a tax liability," including self-calculation done by the taxpayer). The Court need not decide the full scope of the term assessment in the TIA, however. For present purposes, a narrow definition of the term suffices. Applying the narrowest definition, the TIA's literal text bars district courts from enjoining, suspending, or restraining a State's recording of taxpayer liability on its tax rolls, whether the recordings are made by

self-reported taxpayer filing forms or by a State's calculation of taxpayer liability.

The terms "enjoin, suspend, or restrain" require little scrutiny. No doubt, they have discrete purposes in the context of the TIA; but they also have a common meaning. They refer to actions that restrict assessments to varying degrees. It is noteworthy that the term "enjoin" has not just its meaning in the restrictive sense but also has meaning in an affirmative sense. The Black's Law Dictionary current at the TIA's enactment gives as a definition of the term, "to require; command; positively direct." Black's Law Dictionary 663 (3d ed. 1933). That definition may well be implicated here, since an order invalidating a tax credit would seem to command States to collect taxes they otherwise would not collect. The parties, however, proceed on the assumption that enjoin means to bar. It is unobjectionable for the Court to make the assumption too, leaving the broader definition for later consideration.

Respondents argue the TIA does not bar the injunction they seek because even after the credit is enjoined, the Director will be able to record and enforce taxpayers' liabilities. See Brief for Respondents 16. In fact, respondents say, with the credit out of the way the Director will be able to record and enforce a higher level of liability and so profit the State. *Ibid.* ("The amount of tax payable by some taxpayers would increase, but that can hardly be characterized as an injunction or restraint of the assessment process"). The argument, however, ignores an important part of the Act: "under State law." 28 U. S. C. § 1341 ("The district courts shall not enjoin, suspend or restrain the assessment . . . of any tax under State law"). The Act not only bars district courts from enjoining, suspending, or restraining a State's recording of taxpayer liabilities altogether; but it also bars them from enjoining, suspending, or restraining a State from recording the taxpayer liability that state law mandates.

Arizona Rev. Stat. Ann. §43–1089 (West Supp. 2003) is state law. It is an integral part of the State's tax statute; it is reflected on state tax forms; and the State Supreme Court has held that it is part of the calculus necessary to determine tax liability. See *Kotterman* v. *Killian*, 193 Ariz. 273, 279, 285, 972 P. 2d 606, 612, 618 (1999). A recording of a taxpayer's liability under state law must be made in accordance with § 43–1089. The same can be said with respect to each and every provision of the State's tax law. To order the Director not to record on the State's tax rolls taxpayer liability that reflects the operation of § 43–1089 (or any other state tax law provision for that matter) would be to bar the Director from recording the correct taxpayer liability. The TIA's language bars this relief and so bars this suit.

The Court tries to avoid this conclusion by saying that the recordings that constitute assessments under § 1341 must have a "collection-propelling function," *ante*, at 102, and that the recordings at issue here do not have such a function. See also *ante*, at 102, n. 4 ("[T]he dissent would disconnect the word [assessment] from the enforcement process"). That is wrong. A recording of taxpayer liability on the State's tax rolls of course propels collection. In most cases the taxpayer's payment will accompany his filing, and thus will accompany the assessment so that no literal collection of moneys is necessary. As anyone who has paid taxes must know, however, if owed payment were not included with the tax filing, the State's recording of one's liability on the State's rolls would certainly cause subsequent collection efforts, for the filing's recording (*i. e.*, the assessment) would propel collection by establishing the State's legal right to the taxpayer's moneys.

II

The majority offers prior judicial interpretations of the Code's similarly worded anti-injunction provision to support its contrary conclusions about the statutory text. See *ante*, at 102–103. That this Court and other federal courts have

allowed nontaxpayer suits challenging tax credits to proceed in the face of the anti-injunction provision is not at all controlling. Those cases are quite distinguishable. Had the plaintiffs in those cases been barred from suit, there would have been no available forum at all for their claims. See *McGlotten* v. *Connally*, 338 F. Supp. 448, 453–454 (DC 1972) (three-judge court) ("The preferred course of raising [such tax exemption and deduction] objections in a suit for refund is not available. In this situation we cannot read the statute to bar the present suit"). See also *Tax Analysts and Advocates* v. *Shultz*, 376 F. Supp. 889, 892 (DC 1974) ("Since plaintiffs are not seeking to restrain the collection of taxes, and since they cannot obtain relief through a refund suit, [26 U. S. C.] § 7421(a) does not bar the injunctive relief they seek"). The Court ratified those decisions only insofar as they relied on this limited rationale as the basis for an exception to the statutory bar on adjudication. See *South Carolina* v. *Regan*, 465 U. S. 367, 373 (1984) (holding the anti-injunction provision inapplicable to a State's challenge to the constitutionality of a federal tax exemption provision, § 103(a) of the Code (which exempts from a taxpayer's gross income the interest earned on the obligations of any State), as amended by § 310(b)(1) of the Tax Equity and Fiscal Responsibility Act of 1982, 96 Stat. 596, because "the [anti-injunction provision] was not intended to bar an action where . . . Congress has not provided the plaintiff with an alternative legal way to challenge the validity of a tax"). Even that strict limitation was not strict enough for four Members of the Court, one of whom noted "the broad sweep of the [a]nti-[i]njunction [provision]." 465 U. S., at 382 (Blackmun, J., concurring in judgment). The other three Justices went further still. They would have allowed an exception to the anti-injunction provision's literal bar on nontaxpayer suits challenging tax exemption provisions only if due process rights were at stake. See *id.*, at 394 (O'CONNOR, J., concurring in judgment) ("*Bob Jones University*'s

recognition that the complete inaccessibility of judicial review might implicate due process concerns provides absolutely no basis for crafting an exception" to the anti-injunction Act for a plaintiff who has "no due process right to review of its claim in a judicial forum").

In contrast to the anti-injunction provision, the TIA on its own terms ensures an adequate forum for claims it bars. The TIA specially exempts actions that could not be heard in state courts by providing an exception for instances "where a plain, speedy, and efficient remedy may [not] be had in the courts of [the] State." 28 U. S. C. § 1341. The TIA's text thus already incorporates the check that *Regan* concluded could be read into the anti-injunction provision even though "[t]he [anti-injunction provision]'s language 'could scarcely be more explicit' in prohibiting nontaxpayer suits like this one." 465 U. S., at 385 (O'CONNOR, J., concurring in judgment) (quoting *Bob Jones Univ.* v. *Simon*, 416 U. S. 725, 736 (1974)). The practical effect is that a literal reading of the TIA provides for federal district courts to stand at the ready where litigants encounter legal or practical obstacles to challenging state tax credits in state courts. And this Court, of course, stands at the ready to review decisions by state courts on these matters.

The Court does not discuss this codified exception, yet the clause is crucial. It represents a congressional judgment about the balance that should exist between the respect due to the States (for both their administration of tax schemes and their courts' interpretation of tax laws) and the need for constitutional vindication. To ignore the provision is to ignore that Congress has already balanced these interests.

Respondents admit they would be heard in state court. Indeed a quite similar action previously was heard there. See *Kotterman* v. *Killian*, 193 Ariz. 273, 972 P. 2d 606 (1999). As a result, the TIA's exception (akin to that recognized by *Regan*) does not apply. To proceed as if it does is to replace Congress' balancing of the noted interests with the Court's.

III

The Court and respondents further argue that the TIA's policy purposes and relatedly the federal anti-injunction provision's policy purposes (as discerned from legislative histories) justify today's holding. The two Acts, they say, reflect a unitary purpose: "In both . . . Congress directed taxpayers to pursue refund suits instead of attempting to restrain [tax] collections." *Ante*, at 104. See also *ante*, at 105 (concluding that the Act's underlying purpose is to bar suits by "taxpayers who sought to avoid paying their tax bill"); see also Brief for Respondents 18–20. This purpose, the Court and respondents say, shows that the Act was not intended to foreclose relief in challenges to tax credits. The proposition rests on the premise that the TIA's sole purpose is to prevent district court orders that would decrease the moneys in state fiscs. Because the legislative histories of the Acts are not carefully limited in the manner that this reading suggests, the policy argument against a literal application of the Act's terms fails.

Taking the federal anti-injunction provision first, as has been noted before, "[its] history expressly reflects the congressional desire that all injunctive suits against the tax collector be prohibited." *Regan*, 465 U. S., at 387 (O'CONNOR, J., concurring in judgment). The provision responded to "the grave dangers which accompany intrusion of the injunctive power of the courts into the administration of the revenue." *Id.*, at 388. It "generally precludes judicial resolution of all abstract tax controversies," whether brought by a taxpayer or a nontaxpayer. *Id.*, at 392; see also *id.*, at 387–392 (reviewing the legislative history of the anti-injunction provision, its various amendments, and related enactments). Thus, the provision's object is not just to bar suits that might "interrupt 'the process of collecting . . . taxes,'" but "[s]imilarly, the language and history evidence a congressional desire to prohibit courts from restraining any aspect of the tax laws' administration." *Id.*, at 399.

The majority's reading of the TIA's legislative history is also inconsistent with the interpretation of this same history in the Court's earlier cases. The Court has made clear that the TIA's purpose is not only to protect the fisc but also to protect the State's tax system administration and tax policy implementation. *California* v. *Grace Brethren Church*, 457 U. S. 393 (1982), is a prime example.

In *Grace Brethren Church* the Court held that the TIA not only bars actions by individuals to stop tax collectors from collecting moneys (*i. e.*, injunctive suits) but also bars declaratory suits. See *id.*, at 408–410. The Court explained that permitting declaratory suits to proceed would "defea[t] the principal purpose of the Tax Injunction Act: 'to limit drastically federal district court jurisdiction to interfere with so important a local concern as the collection of taxes.'" *Id.*, at 408–409 (quoting *Rosewell* v. *LaSalle Nat. Bank*, 450 U. S. 503, 522 (1981)). It continued:

> "'If federal declaratory relief were available to test state tax assessments, state tax administration might be thrown into disarray, and taxpayers might escape the ordinary procedural requirements imposed by state law. During the pendency of the federal suit the collection of revenue under the challenged law might be obstructed, with consequent damage to the State's budget, and perhaps a shift to the State of the risk of taxpayer insolvency. Moreover, federal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts.'" *Grace Brethren Church*, *supra*, at 410 (quoting with approval *Perez* v. *Ledesma*, 401 U. S. 82, 128, n. 17 (1971) (Brennan, J., concurring in part and dissenting in part)).

While this, of course, demonstrates that protecting the state fisc from damage is part of the TIA's purpose, it equally shows that actions that would throw the "state tax adminis-

tration . . . into disarray" also implicate the Act and its purpose. The Court's concern with preventing administrative disarray puts in context its explanation that the TIA's principal concern is to limit federal district court interference with the "collection of taxes." The phrase, in this context, refers to the operation of the whole tax collection system and the implementation of entire tax policy, not just a part of it. While an order interfering with a specific collection suit disrupts one of the most essential aspects of a State's tax system, it is not the only way in which federal courts can disrupt the State's tax system:

> "[T]he legislative history of the Tax Injunction Act demonstrates that Congress worried not so much about the form of relief available in the federal courts, as about divesting the federal courts of jurisdiction to interfere with state tax administration." *Grace Brethen Church*, *supra*, at 409, n. 22.

The Court's decisions in *Fair Assessment in Real Estate Assn., Inc.* v. *McNary*, 454 U. S. 100 (1981), *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U. S. 582 (1995) *(NPTC)*, and *Rosewell*, *supra*, make the same point. Though the majority says these cases support its holding because they "involved plaintiffs who mounted federal litigation to avoid paying state taxes," *ante*, at 106, the language of these cases is too clear to be ignored and is contrary to the Court's holding today. In *Fair Assessment*, the Court observed that "[t]he [TIA] 'has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations.' This last consideration was [its] principal motivating force." 454 U. S., at 110 (quoting *Rosewell*, *supra*, at 522, in turn quoting *Tully* v. *Griffin, Inc.*, 429 U. S. 68, 73 (1976) (other citation omitted)). In *NPTC*, the Court said, "Congress and this Court repeatedly have shown an aversion to federal interference with state tax administration. The passage of the [TIA] in 1937 is one manifestation of this aversion." 515

U. S., at 586 (summing up this aversion, generated also from principles of comity and federalism, as creating a "background presumption that federal law generally will not interfere with administration of state taxes," *id.*, at 588). In *Rosewell*, the Court described the Act's language as "broad" and "prophylactic." 450 U. S., at 524 (majority opinion of Brennan, J.). See also *ibid.* (the TIA was "passed to limit federal-court interference in state tax matters").

The Act is designed to respect not only the administration of state tax systems but also state-court authority to say what state law means. "[F]ederal constitutional issues are likely to turn on questions of state tax law, which, like issues of state regulatory law, are more properly heard in the state courts." *Grace Brethren Church*, *supra*, at 410 (internal quotation marks omitted). See also *Rosewell*, *supra*, at 527. This too establishes that the TIA's purpose is not solely to ensure that the State's fisc is not decreased. There would be only a diminished interest in allowing state courts to say what the State's tax statutes mean if the Act protected just the state fisc. The TIA protects the responsibility of the States and their courts to administer their own tax systems and to be accountable to the citizens of the State for their policies and decisions. The majority objects that "there is no disagreement as to the meaning of" state law in this case, *ante*, at 106, n. 8. As an initial matter, it is not clear that this is a fair conclusion. The litigation in large part turns on what state law requires and whether the product of those requirements violates the Constitution. More to the point, however, even if there were no controversy about the statutory framework the Arizona tax provision creates, the majority's ruling has implications far beyond this case and will most certainly result in federal courts in other States and in other cases being required to interpret state tax law in order to complete their review of challenges to state tax statutes.

Our heretofore consistent interpretation of the Act's legislative history to prohibit interference with state tax systems

and their administration accords with the direct, broad, and unqualified language of the statute. The Act bars all orders that enjoin, suspend, or restrain the assessment of any tax under state law. In effecting congressional intent we should give full force to simple and broad proscriptions in the statutory language.

Because the TIA's language and purpose are comprehensive, arguments based on congressional silence on the question whether the TIA applies to actions that increase moneys a state tax system collects are of no moment. Contra, *Winn*, 307 F. 3d, at 1017–1018 (relying on *Dunn* v. *Carey*, 808 F. 2d 555, 558 (CA7 1986)); see also *ante*, at 108–109 (relying on *Dunn*). Whatever weight one gives to legislative histories, silence in the legislative record is irrelevant when a plain congressional declaration exists on a matter. "[W]hen terms are unambiguous we may not speculate on probabilities of intention." *Insurance Co.* v. *Ritchie*, 5 Wall. 541, 545 (1867). Here, Congress has said district courts are barred from disrupting the State's tax operations. It is immaterial whether the State's collection is raised or lowered. A court order will thwart and replace the State's chosen tax policy if it causes either result. No authority supports the proposition that a State lacks an interest in reducing its citizens' tax burden. It is a troubling proposition for this Court to proceed on the assumption that the State's interest in limiting the tax burden on its citizens to that for which its law provides is a secondary policy, deserving of little respect from us.

IV

The final basis on which both the majority and respondents rest is that years of unexamined habit by litigants and the courts alike have resulted in federal courts' entertaining challenges to state tax credits. See *ante*, at 110–111 (citing representative cases). While we should not reverse the course of our unexamined practice lightly, our obligation is to give a correct interpretation of the statute. We are not

obliged to maintain the status quo when the status quo is unfounded. The exercise of federal jurisdiction does not and cannot establish jurisdiction. See *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33, 37–38 (1952). "[T]his Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio*." *Id.*, at 38. In this respect, the present case is no different than *Federal Election Comm'n* v. *NRA Political Victory Fund*, 513 U. S. 88 (1994). The case presented the question whether we had jurisdiction to consider a certiorari petition filed by the Federal Election Commission (FEC), and not by the Solicitor General on behalf of the FEC. The Court held that it lacked jurisdiction. See *id.*, at 99. Though that answer seemed to contradict the Court's prior practices, the Court said:

> "Nor are we impressed by the FEC's argument that it has represented itself before this Court on several occasions in the past without any question having been raised about its authority to do so . . . . The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us." *Id.*, at 97.

See also *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 63, n. 4 (1989) ("'[T]his Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974)" (alteration in original)). These cases make clear that our failure to consider a question hardly equates to a thing's being decided. Contra, *ante*, at 112–113 (STEVENS, J., concurring) (referring to prior silences of the courts with respect to the TIA as *stare decisis* and settled interpretation). As a consequence, I would follow the statutory language.

* * *

After today's decision, "[n]ontaxpaying associations of taxpayers, and most other nontaxpayers, will now be allowed to sidestep Congress' policy against [federal] judicial resolution of abstract [state] tax controversies." *Regan*, 465 U. S., at 394 (O'CONNOR, J., concurring in judgment). This unfortunate result deprives state courts of the first opportunity to hear such cases and to grant the relief the Constitution requires.

For the foregoing reasons, with respect, I dissent.

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PENNSYLVANIA STATE POLICE *v.* SUDERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03–95. Argued March 31, 2004—Decided June 14, 2004

In March 1998, the Pennsylvania State Police (PSP) hired plaintiff-respondent Suders to work as a police communications operator for the McConnellsburg barracks, where her male supervisors subjected her to a continuous barrage of sexual harassment. In June 1998, Suders told the PSP's Equal Employment Opportunity Officer, Virginia Smith-Elliott, that she might need help, but neither woman followed up on the conversation. Two months later, Suders contacted Smith-Elliott again, this time reporting that she was being harassed and was afraid. Smith-Elliott told Suders to file a complaint, but did not tell her how to obtain the necessary form. Two days later, Suders' supervisors arrested her for theft of her own computer-skills exam papers. Suders had removed the papers after concluding that the supervisors had falsely reported that she had repeatedly failed, when in fact, the exams were never forwarded for grading. Suders then resigned from the force and sued the PSP, alleging, *inter alia*, that she had been subjected to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964.

The District Court granted the PSP's motion for summary judgment. Although recognizing that Suders' testimony would permit a fact trier to conclude that her supervisors had created a hostile work environment, the court nevertheless held that the PSP was not vicariously liable for the supervisors' conduct. In support of its decision, the District Court referred to *Faragher* v. *Boca Raton*, 524 U. S. 775, 808. In that case, and in *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, decided the same day, this Court held that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Id.*, at 765. But when no such tangible action is taken, both decisions also hold, the employer may raise an affirmative defense to liability. To prevail on the basis of the defense, the employer must prove that "(a) [it] exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and that (b) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ibid.* Suders' hostile work environment claim was untenable as a matter of law, the District

Court stated, because she unreasonably failed to avail herself of the PSP's internal antiharassment procedures. The court did not address Suders' constructive discharge claim.

The Third Circuit reversed and remanded the case for trial. The appeals court disagreed with the District Court in two key respects: First, even if the PSP could assert the *Ellerth/Faragher* affirmative defense, genuine issues of material fact existed about the effectiveness of the PSP's program to address sexual harassment claims; second, Suders had stated a claim of constructive discharge due to hostile work environment. The appeals court ruled that a constructive discharge, if proved, constitutes a tangible employment action that renders an employer strictly liable and precludes recourse to the *Ellerth/Faragher* affirmative defense.

Held: To establish "constructive discharge," a plaintiff alleging sexual harassment must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may assert the *Ellerth/Faragher* affirmative defense to such a claim unless the plaintiff quit in reasonable response to an adverse action officially changing her employment status or situation, *e. g.*, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. Pp. 141–152.

(a) Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign? This doctrine was developed by the National Labor Relations Board in the 1930's, and was solidly established in the lower federal courts by 1964, when Title VII was enacted. The Court agrees that Title VII encompasses employer liability for a constructive discharge. Pp. 141–143.

(b) This case concerns employer liability for one subset of constructive discharge claims: those resulting from sexual harassment, or "hostile work environment," attributable to a supervisor. The Court's starting point is the *Ellerth/Faragher* framework. Those decisions delineate two categories of sexual harassment claims: (1) those alleging a "tangible employment action," for which employers may be held strictly liable; and (2) those asserting no tangible employment action, in which case employers may assert the affirmative defense. *Ellerth*, 524 U. S., at 765. The key issues here are: Into which *Ellerth/Faragher* category hostile-environment constructive discharge claims fall, and what proof burdens the parties bear in such cases. In *Ellerth* and *Faragher*, the

Court invoked the principle drawn from agency law that an employer is liable for the acts of its agent when the agent is "aided in accomplishing the tort by the existence of the agency relation." *Ellerth*, 524 U. S., at 758. When a supervisor engaged in harassing conduct takes a tangible employment action against a subordinate, the Court reasoned, it is beyond question that the supervisor is aided by the agency relation. A tangible employment action, the Court stated, is an "official act of the enterprise" and "fall[s] within the special province of the supervisor." *Id.*, at 762. In contrast, when supervisor harassment does not culminate in a tangible employment action, *Ellerth* and *Faragher* explained, it is less obvious that the agency relation is the driving force. The Court also recognized that a liability limitation linked to an employer's effort to install effective grievance procedures and an employee's effort to report harassing behavior would advance Title VII's conciliation and deterrence purposes. *Ellerth*, 524 U. S., at 764. Accordingly, the Court held that when no tangible employment action is taken, an employer may defeat vicarious liability for supervisor harassment by establishing the two-part affirmative defense. That defense, the Court observed, accommodates the "avoidable consequences" doctrine Title VII "borrows from tort law," *ibid.*, by requiring plaintiffs reasonably to stave off avoidable harm. *Ellerth* and *Faragher* clarify, however, that the defending employer bears the burden to prove that the plaintiff-employee unreasonably failed to avoid or reduce harm. *Faragher*, 524 U. S., at 807. Pp. 143–146.

(1) The constructive discharge at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. For an atmosphere of harassment or hostility to be actionable, the offending behavior must be sufficiently severe or pervasive to alter the victim's employment conditions and create an abusive working environment. *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67. A hostile-environment constructive discharge claim entails something more: working conditions so intolerable that a reasonable person would have felt compelled to resign. Suders' claim is of the same genre as the claims analyzed in *Ellerth* and *Faragher*. Essentially, Suders presents a "worse case" harassment scenario, harassment ratcheted up to the breaking point. Like the harassment considered in *Ellerth* and *Faragher*, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is *always* effected through an official company act, a constructive discharge may or may not involve official action. When it does not, the extent to which the agency relationship aided the supervisor's misconduct is less certain, and that uncertainty justifies affording the employer the chance to es-

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tablish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable. The Third Circuit erred in drawing the line differently. Pp. 146–150.

(2) The Third Circuit qualified its holding that a constructive discharge itself constitutes a tangible employment action under *Ellerth* and *Faragher:* The affirmative defense delineated in those cases, the court noted, might be imported into the anterior issue whether the employee's decision to resign was reasonable under the circumstances. However, the appeals court left open when and how the *Ellerth/Faragher* considerations would be brought home to the fact trier. The Court of Appeals did not address specifically the allocation of pleading and persuasion burdens, but simply relied on "the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative avenues warrants introduction at trial." 325 F. 3d 432, 463. There is no cause for leaving the district courts thus unguided. Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. Pp. 150–152.

(c) Although the Third Circuit correctly ruled that the case, in its current posture, presents genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims, that court erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases. P. 152.

325 F. 3d 432, vacated and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, SOUTER, and BREYER, JJ., joined. THOMAS, J., filed a dissenting opinion, *post*, p. 152.

John G. Knorr III, Chief Deputy Attorney General of Pennsylvania, argued the cause for petitioner. With him on the briefs were *Gerald J. Pappert*, Acting Attorney General, and *Howard G. Hopkirk* and *Sarah C. Yerger*, Deputy Attorneys General.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney Gen-*

eral Acosta, *Deputy Solicitor General Clement*, *Eric S. Dreiband*, and *Lorraine C. Davis*.

Donald A. Bailey argued the cause and filed a brief for respondent.*

JUSTICE GINSBURG delivered the opinion of the Court.

Plaintiff-respondent Nancy Drew Suders alleged sexually harassing conduct by her supervisors, officers of the Pennsylvania State Police (PSP), of such severity she was forced to resign. The question presented concerns the proof burdens parties bear when a sexual harassment/constructive discharge claim of that character is asserted under Title VII of the Civil Rights Act of 1964.

To establish hostile work environment, plaintiffs like Suders must show harassing behavior "sufficiently severe or pervasive to alter the conditions of [their] employment." *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S. 57, 67 (1986) (internal quotation marks omitted); see *Harris* v. *Forklift Systems, Inc.*, 510 U. S. 17, 22 (1993) ("[T]he very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employ-

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Peter Buscemi*, *Harry A. Rissetto*, *Stephen A. Bokat*, and *Robin S. Conrad;* for the Equal Employment Advisory Council by *Ann Elizabeth Reesman* and *Katherine Y. K. Cheung;* and for the Society for Human Resource Management by *Allan H. Weitzman*, *Sarah A. Mindes*, *Edward Cerasia II*, *Lawrence Z. Lorber*, and *Paul Salvatore*.

Briefs of *amici curiae* urging affirmance were filed for the American Federation of Labor and Congress of Industrial Organizations by *Jonathan P. Hiatt*, *James B. Coppess*, and *Laurence Gold;* and for the Lawyers' Committee for Civil Rights Under Law et al. by *Barbara R. Arnwine*, *Thomas J. Henderson*, *Michael L. Foreman*, *Sarah C. Crawford*, *Audrey Wiggins*, *Susan Grover*, *Patricia Roberts*, *Daniel B. Kohrman*, *Laurie A. McCann*, *Thomas Osborne*, *Melvin Radowitz*, *Steven R. Shapiro*, *Lenora M. Lapidus*, *Patricia A. Shiu*, *Claudia Center*, *Dennis C. Hayes*, *Vincent A. Eng*, *Judith L. Lichtman*, *Jocelyn C. Frye*, *Dina R. Lassow*, and *Jennifer K. Brown*.

ees because of their . . . gender . . . offends Title VII's broad rule of workplace equality."). Beyond that, we hold, to establish "constructive discharge," the plaintiff must make a further showing: She must show that the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions. In so ruling today, we follow the path marked by our 1998 decisions in *Burlington Industries, Inc.* v. *Ellerth,* 524 U. S. 742, and *Faragher* v. *Boca Raton,* 524 U. S. 775.

I

Because this case was decided against Suders in the District Court on the PSP's motion for summary judgment, we recite the facts, as summarized by the Court of Appeals, in the light most favorable to Suders.[1] In March 1998, the PSP hired Suders as a police communications operator for the McConnellsburg barracks. *Suders* v. *Easton,* 325 F. 3d 432, 436 (CA3 2003). Suders' supervisors were Sergeant Eric D. Easton, Station Commander at the McConnellsburg barracks, Patrol Corporal William D. Baker, and Corporal Eric B. Prendergast. *Ibid.* Those three supervisors subjected

[1] The PSP, we note, "vigorously dispute[s]" the truth of Suders' allegations, contending that some of the incidents she describes "never happened at all," while "others took place in a context quite different from that suggested by [Suders]." Brief for Petitioner 4, n. 3.

Suders to a continuous barrage of sexual harassment that ceased only when she resigned from the force. *Ibid.*

Easton "would bring up [the subject of] people having sex with animals" each time Suders entered his office. *Ibid.* (internal quotation marks omitted). He told Prendergast, in front of Suders, that young girls should be given instruction in how to gratify men with oral sex. *Ibid.* Easton also would sit down near Suders, wearing spandex shorts, and spread his legs apart. *Ibid.* Apparently imitating a move popularized by television wrestling, Baker repeatedly made an obscene gesture in Suders' presence by grabbing his genitals and shouting out a vulgar comment inviting oral sex. *Id.*, at 437. Baker made this gesture as many as five-to-ten times per night throughout Suders' employment at the barracks. *Ibid.* Suders once told Baker she "'d[id]n't think [he] should be doing this'"; Baker responded by jumping on a chair and again performing the gesture, with the accompanying vulgarity. *Ibid.* Further, Baker would "rub his rear end in front of her and remark 'I have a nice ass, don't I?'" *Ibid.* Prendergast told Suders "'the village idiot could do her job'"; wearing black gloves, he would pound on furniture to intimidate her. *Ibid.*[2]

In June 1998, Prendergast accused Suders of taking a missing accident file home with her. *Id.*, at 438. After that incident, Suders approached the PSP's Equal Employment Opportunity Officer, Virginia Smith-Elliott, and told her she "might need some help." *Ibid.* Smith-Elliott gave Suders her telephone number, but neither woman followed up on the conversation. *Ibid.* On August 18, 1998, Suders contacted Smith-Elliott again, this time stating that she was being harassed and was afraid. *Ibid.* Smith-Elliott told Suders to

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[2] In addition, the supervisors made derogatory remarks about Suders' age, *e. g.*, stating "'a 25-year-old could catch on faster'" than she could, 325 F. 3d, at 436, and calling her "'momma,'" *id.*, at 437. They further harassed her for having political influence. *Ibid.* Suders' age and political-affiliation discrimination claims are not before us.

file a complaint, but did not tell her how to obtain the necessary form. Smith-Elliott's response and the manner in which it was conveyed appeared to Suders insensitive and unhelpful. *Ibid.*

Two days later, Suders' supervisors arrested her for theft, and Suders resigned from the force. The theft arrest occurred in the following circumstances. Suders had several times taken a computer-skills exam to satisfy a PSP job requirement. *Id.*, at 438–439. Each time, Suders' supervisors told her that she had failed. *Id.*, at 439. Suders one day came upon her exams in a set of drawers in the women's locker room. She concluded that her supervisors had never forwarded the tests for grading and that their reports of her failures were false. *Ibid.* Regarding the tests as her property, Suders removed them from the locker room. *Ibid.;* App. 11, 119–120. Upon finding that the exams had been removed, Suders' supervisors devised a plan to arrest her for theft. 325 F. 3d, at 438–439. The officers dusted the drawer in which the exams had been stored with a theft-detection powder that turns hands blue when touched. *Id.*, at 439. As anticipated by Easton, Baker, and Prendergast, Suders attempted to return the tests to the drawer, whereupon her hands turned telltale blue. *Ibid.* The supervisors then apprehended and handcuffed her, photographed her blue hands, and commenced to question her. *Ibid.* Suders had previously prepared a written resignation, which she tendered soon after the supervisors detained her. *Ibid.* Nevertheless, the supervisors initially refused to release her. Instead, they brought her to an interrogation room, gave her warnings under *Miranda* v. *Arizona,* 384 U. S. 436 (1966), and continued to question her. 325 F. 3d, at 439. Suders reiterated that she wanted to resign, and Easton then let her leave. *Ibid.* The PSP never brought theft charges against her.

In September 2000, Suders sued the PSP in Federal District Court, alleging, *inter alia*, that she had been subjected

to sexual harassment and constructively discharged, in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.* App. 1, 12–13.[3] At the close of discovery, the District Court granted the PSP's motion for summary judgment. Suders' testimony, the District Court recognized, sufficed to permit a trier of fact to conclude that the supervisors had created a hostile work environment. App. to Pet. for Cert. 76a. The court nevertheless held that the PSP was not vicariously liable for the supervisors' conduct. *Id.*, at 80a.

In so concluding, the District Court referred to our 1998 decision in *Faragher* v. *Boca Raton*, 524 U. S. 775. See App. to Pet. for Cert. 77a–78a. In *Faragher*, along with *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, decided the same day, the Court distinguished between supervisor harassment unaccompanied by an adverse official act and supervisor harassment attended by "a tangible employment action." *Id.*, at 765; accord *Faragher*, 524 U. S., at 808. Both decisions hold that an employer is strictly liable for supervisor harassment that "culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Ellerth*, 524 U. S., at 765; accord *Faragher*, 524 U. S., at 808. But when no tangible employment action is taken, both decisions also hold, the employer may raise an affirmative defense to liability, subject to proof by a preponderance of the evidence: "The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably

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[3] Suders raised several other claims that are not at issue here, including claims under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, 29 U. S. C. § 621 *et seq.*, and the Pennsylvania Human Relations Act (PHRA), Pa. Stat. Ann., Tit. 43, § 951 *et seq.* (Purdon 1991). App. 7. She also asserted claims against Easton, Baker, Prendergast, and Smith-Elliott in their individual capacities under Title VII, the ADEA, and the PHRA. App. to Pet. for Cert. 70a–73a.

failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Ellerth*, 524 U. S., at 765; accord *Faragher*, 524 U. S., at 807.

Suders' hostile work environment claim was untenable as a matter of law, the District Court stated, because she "unreasonably failed to avail herself of the PSP's internal procedures for reporting any harassment." App. to Pet. for Cert. 80a. Resigning just two days after she first mentioned anything about harassment to Equal Employment Opportunity Officer Smith-Elliott, the court noted, Suders had "never given [the PSP] the opportunity to respond to [her] complaints." *Ibid.* The District Court did not address Suders' constructive discharge claim.[4]

The Court of Appeals for the Third Circuit reversed and remanded the case for disposition on the merits. 325 F. 3d, at 462. The Third Circuit agreed with the District Court that Suders had presented evidence sufficient for a trier of fact to conclude that the supervisors had engaged in a "pattern of sexual harassment that was pervasive and regular." *Id.*, at 442. But the appeals court disagreed with the District Court in two fundamental respects. First, the Court of Appeals held that, even assuming the PSP could assert the affirmative defense described in *Ellerth* and *Faragher*,

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[4] The District Court disposed of all other claims in the PSP's favor. The court granted the PSP summary judgment on Suders' Title VII retaliation claim, observing that Suders did not engage in any protected activity, *e. g.*, she did not file a discrimination claim, prior to her resignation. *Id.*, at 80a–81a. It dismissed Suders' ADEA and PHRA claims against the PSP on sovereign immunity grounds, *id.*, at 72a–73a, and her Title VII and ADEA claims against the individual defendants on the ground that those statutes do not provide for individual liability, *id.*, at 70a–72a. The court also dismissed the PHRA claims against the individual defendants because Suders had failed to respond to the defendants' assertions of immunity. *Id.*, at 73a–74a. Suders did not raise any of the above claims on appeal. See Brief for Appellant in No. 01–3512 (CA3), p. 2; Brief for Appellees in No. 01–3512, p. 4.

genuine issues of material fact existed concerning the effectiveness of the PSP's "program . . . to address sexual harassment claims." 325 F. 3d, at 443. Second, the appeals court held that the District Court erred in failing to recognize that Suders had stated a claim of constructive discharge due to the hostile work environment. *Ibid.*[5]

A plaintiff alleging constructive discharge in violation of Title VII, the Court of Appeals stated, must establish:

> "(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign . . . ; and (2) the employee's reaction to the workplace situation—that is, his or her decision to resign—was reasonable given the totality of circumstances . . . ." *Id.*, at 445.

Viewing the complaint in that context, the court determined that Suders had raised genuine issues of material fact relating to her claim of constructive discharge. *Id.*, at 446.

The Court of Appeals then made the ruling challenged here: It held that "a constructive discharge, when proved, constitutes a tangible employment action." *Id.*, at 447. Under *Ellerth* and *Faragher*, the court observed, such an action renders an employer strictly liable and precludes employer recourse to the affirmative defense announced in those decisions. 325 F. 3d, at 447. The Third Circuit recognized that the Courts of Appeals for the Second and Sixth Circuits had ruled otherwise. A constructive discharge resulting from a supervisor-created hostile work environment, both Circuits had held, does not qualify as a tangible employment action, and therefore does not stop an employer from

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[5] Although Suders' complaint did not expressly mention constructive discharge, the Third Circuit found "[t]he allegations of constructive discharge . . . apparent on the face of Suders's [pleading]." 325 F. 3d, at 443; see *ibid.* ("In the very first paragraph, Suders alleged that she was 'forced to suffer a termination of employment because she would not yield to sexual suggestions [and] innuendoes . . . .'" (quoting Introductory Statement to Suders' complaint, reprinted in this Court at App. 6)).

invoking the *Ellerth/Faragher* affirmative defense. 325 F. 3d, at 452–453 (citing *Caridad* v. *Metro-North Commuter R. Co.*, 191 F. 3d 283, 294 (CA2 1999), and *Turner* v. *Dowbrands, Inc.*, No. 99–3984, 2000 WL 924599, *1 (CA6, June 26, 2000) (unpublished)). The Third Circuit, however, reasoned that a constructive discharge "'constitutes a significant change in employment status' by ending the employer-employee relationship" and "also inflicts the same type of 'direct economic harm'" as the tangible employment actions *Ellerth* and *Faragher* offered by way of example (discharge, demotion, undesirable reassignment). 325 F. 3d, at 460 (quoting *Ellerth*, 524 U. S., at 761, 762). Satisfied that Suders had "raised genuine issues of material fact as to her claim of constructive discharge," and that the PSP was "precluded from asserting the affirmative defense to liability advanced in support of its motion for summary judgment," the Court of Appeals remanded Suders' Title VII claim for trial. 325 F. 3d, at 461.

This Court granted certiorari, 540 U. S. 1046 (2003), to resolve the disagreement among the Circuits on the question whether a constructive discharge brought about by supervisor harassment ranks as a tangible employment action and therefore precludes assertion of the affirmative defense articulated in *Ellerth* and *Faragher*. Compare 325 F. 3d, at 461 (constructive discharge qualifies as a tangible employment action); *Jaros* v. *LodgeNet Entertainment Corp.*, 294 F. 3d 960, 966 (CA8 2002) (same), with *Caridad*, 191 F. 3d, at 294 (constructive discharge does not qualify as a tangible employment action); *Turner*, 2000 WL 924599, *1 (same), and *Reed* v. *MBNA Marketing Systems, Inc.*, 333 F. 3d 27, 33 (CA1 2003) (constructive discharge qualifies as a tangible employment action only when effected through a supervisor's official act); *Robinson* v. *Sappington*, 351 F. 3d 317, 336 (CA7 2003) (same). We conclude that an employer does not have recourse to the *Ellerth/Faragher* affirmative defense when a supervisor's official act precipitates the constructive

discharge; absent such a "tangible employment action," however, the defense is available to the employer whose supervisors are charged with harassment. We therefore vacate the Third Circuit's judgment and remand the case for further proceedings.

II

A

Under the constructive discharge doctrine, an employee's reasonable decision to resign because of unendurable working conditions is assimilated to a formal discharge for remedial purposes. See 1 B. Lindemann & P. Grossman, Employment Discrimination Law 838–839 (3d ed. 1996) (hereinafter Lindemann & Grossman). The inquiry is objective: Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign? See C. Weirich et al., 2002 Cumulative Supplement to Lindemann & Grossman 651–652, and n. 1 (collecting cases) (hereinafter Weirich).

The constructive discharge concept originated in the labor-law field in the 1930's; the National Labor Relations Board (NLRB) developed the doctrine to address situations in which employers coerced employees to resign, often by creating intolerable working conditions, in retaliation for employees' engagement in collective activities. Lieb, Constructive Discharge Under Section 8(a)(3) of the National Labor Relations Act: A Study in Undue Concern Over Motives, 7 Indus. Rel. L. J. 143, 146–148 (1985); see *In re Sterling Corset Co.*, 9 N. L. R. B. 858, 865 (1938) (first case to use term "constructive discharg[e]"). Over the next two decades, Courts of Appeals sustained NLRB constructive discharge rulings. See, *e. g.*, *NLRB* v. *East Texas Motor Freight Lines*, 140 F. 2d 404, 405 (CA5 1944) (first Circuit case to hold supervisor-caused resignation an unfair labor practice); *NLRB* v. *Saxe-Glassman Shoe Corp.*, 201 F. 2d 238, 243 (CA1 1953) (first Circuit case to allow backpay award for

constructive discharge). By 1964, the year Title VII was enacted, the doctrine was solidly established in the federal courts. See Comment, That's It, I Quit: Returning to First Principles in Constructive Discharge Doctrine, 23 Berkeley J. Emp. & Lab. L. 401, 410 (2002).

The Courts of Appeals have recognized constructive discharge claims in a wide range of Title VII cases. See, *e. g.*, *Robinson*, 351 F. 3d, at 336–337 (sexual harassment); *Moore* v. *KUKA Welding Systems & Robot Corp.*, 171 F. 3d 1073, 1080 (CA6 1999) (race); *Bergstrom-Ek* v. *Best Oil Co.*, 153 F. 3d 851, 858–859 (CA8 1998) (pregnancy); *Amirmokri* v. *Baltimore Gas & Elec. Co.*, 60 F. 3d 1126, 1132–1133 (CA4 1995) (national origin); *Derr* v. *Gulf Oil Corp.*, 796 F. 2d 340, 343 (CA10 1986) (sex); *Young* v. *Southwestern Sav. & Loan Assn.*, 509 F. 2d 140, 143–144 (CA5 1975) (religion). See also *Goss* v. *Exxon Office Systems Co.*, 747 F. 2d 885, 887 (CA3 1984) ("[A]pplication of the constructive discharge doctrine to Title VII cases has received apparently universal recognition among the courts of appeals which have addressed that issue."); 3 L. Larson, Labor and Employment Law § 59.05[8] (2003) (collecting cases). And the Equal Employment Opportunity Commission (EEOC), the federal agency charged with implementing Title VII, has stated: An employer "is responsible for a constructive discharge in the same manner that it is responsible for the outright discriminatory discharge of a charging party." 2 EEOC Compliance Manual §612.9(a) (2002).

Although this Court has not had occasion earlier to hold that a claim for constructive discharge lies under Title VII, we have recognized constructive discharge in the labor-law context, see *Sure-Tan, Inc.* v. *NLRB*, 467 U. S. 883, 894 (1984) (NLRB may find employer engaged in unfair labor practice "when, for the purpose of discouraging union activity, . . . [the employer] creates working conditions so intolerable that the employee has no option but to resign—a so-called 'constructive discharge.' "). Furthermore, we have stated that

"Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment." *Ellerth*, 524 U. S., at 752. See also *Meritor Savings Bank, FSB* v. *Vinson*, 477 U. S., at 64 ("The phrase 'terms, conditions, or privileges of employment' [in Title VII] evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment." (some internal quotation marks omitted)). We agree with the lower courts and the EEOC that Title VII encompasses employer liability for a constructive discharge.

B

This case concerns an employer's liability for one subset of Title VII constructive discharge claims: constructive discharge resulting from sexual harassment, or "hostile work environment," attributable to a supervisor. Our starting point is the framework *Ellerth* and *Faragher* established to govern employer liability for sexual harassment by supervisors.[6] As earlier noted, see *supra*, at 137–138, those decisions delineate two categories of hostile work environment claims: (1) harassment that "culminates in a tangible employment action," for which employers are strictly liable, *Ellerth*, 524 U. S., at 765; accord *Faragher*, 524 U. S., at 808, and (2) harassment that takes place in the absence of a tangible employment action, to which employers may assert an affirmative defense, *Ellerth*, 524 U. S., at 765; accord *Faragher*, 524 U. S., at 807. With the background set out above in mind, we turn to the key issues here at stake: Into which *Ellerth/Faragher* category do hostile-environment constructive discharge claims fall—and what proof burdens do the parties bear in such cases.

In *Ellerth* and *Faragher*, the plaintiffs-employees sought to hold their employers vicariously liable for sexual harassment by their supervisors, even though the plaintiffs "suf-

[6] *Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we.

fer[ed] no adverse, tangible job consequences." *Ellerth*, 524 U. S., at 747. Setting out a framework for employer liability in those decisions, this Court noted that Title VII's definition of "employer" includes the employer's "agent[s]," 42 U. S. C. § 2000e(b). See *Ellerth*, 524 U. S., at 754. We viewed that definition as a direction to "interpret Title VII based on agency principles." *Ibid.* The Restatement (Second) of Agency (1957) (hereinafter Restatement), the Court noted, states (in its black-letter formulation) that an employer is liable for the acts of its agent when the agent "'was aided in accomplishing the tort by the existence of the agency relation.'" *Ellerth*, 524 U. S., at 758 (quoting Restatement § 219(2)(d)); accord *Faragher*, 524 U. S., at 801.

We then identified "a class of cases where, beyond question, more than the mere existence of the employment relation aids in commission of the harassment: when a supervisor takes a tangible employment action against the subordinate." *Ellerth*, 524 U. S., at 760. A tangible employment action, the Court explained, "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.*, at 761. Unlike injuries that could equally be inflicted by a co-worker, we stated, tangible employment actions "fall within the special province of the supervisor," who "has been empowered by the company as . . . [an] agent to make economic decisions affecting other employees under his or her control." *Id.*, at 762. The tangible employment action, the Court elaborated, is, in essential character, "an official act of the enterprise, a company act." *Ibid.* It is "the means by which the supervisor brings the official power of the enterprise to bear on subordinates." *Ibid.* Often, the supervisor will "use [the company's] internal processes" and thereby "obtain the imprimatur of the enterprise." *Ibid.* Ordinarily, the tangible employment decision "is documented in official company records, and may be subject to review by

higher level supervisors." *Ibid.* In sum, we stated, "when a supervisor takes a tangible employment action against a subordinate[,] . . . it would be implausible to interpret agency principles to allow an employer to escape liability." *Id.*, at 762–763.

When a supervisor's harassment of a subordinate does not culminate in a tangible employment action, the Court next explained, it is "less obvious" that the agency relation is the driving force. *Id.*, at 763. We acknowledged that a supervisor's "power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation." *Ibid.* But we also recognized that "there are acts of harassment a supervisor might commit which might be the same acts a coemployee would commit, and there may be some circumstances where the supervisor's status [would] mak[e] little difference." *Ibid.*

An "aided-by-the-agency-relation" standard, the Court suggested, was insufficiently developed to press into service as the standard governing cases in which no tangible employment action is in the picture. Looking elsewhere for guidance, we focused on Title VII's design "to encourage the creation of antiharassment policies and effective grievance mechanisms." *Id.*, at 764. The Court reasoned that tying the liability standard to an employer's effort to install effective grievance procedures would advance Congress' purpose "to promote conciliation rather than litigation" of Title VII controversies. *Ibid.* At the same time, such linkage of liability limitation to effective preventive and corrective measures could serve Title VII's deterrent purpose by "encourag[ing] employees to report harassing conduct before it becomes severe or pervasive." *Ibid.* Accordingly, we held that when no tangible employment action is taken, the employer may defeat vicarious liability for supervisor harassment by establishing, as an affirmative defense, both that "the employer exercised reasonable care to prevent and cor-

rect promptly any sexually harassing behavior," and that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*, at 765; accord *Faragher*, 524 U. S., at 807.

Ellerth and *Faragher* also clarified the parties' respective proof burdens in hostile environment cases. Title VII, the Court noted, "borrows from tort law the avoidable consequences doctrine," *Ellerth*, 524 U. S., at 764, under which victims have "a duty 'to use such means as are reasonable under the circumstances to avoid or minimize the damages' that result from violations of the statute," *Faragher*, 524 U. S., at 806 (quoting *Ford Motor Co.* v. *EEOC*, 458 U. S. 219, 231, n. 15 (1982)). The *Ellerth*/*Faragher* affirmative defense accommodates that doctrine by requiring plaintiffs reasonably to stave off avoidable harm. But both decisions place the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm. *Ellerth*, 524 U. S., at 765; accord *Faragher*, 524 U. S., at 807; cf. C. McCormick, Law of Damages 130 (1935) (defendant has burden of persuading factfinder "plaintiff could reasonably have reduced his loss or avoided injurious consequences").[7]

1

The constructive discharge here at issue stems from, and can be regarded as an aggravated case of, sexual harassment or hostile work environment. For an atmosphere of sexual harassment or hostility to be actionable, we reiterate, see *supra*, at 133–134, the offending behavior "must be sufficiently severe or pervasive to alter the conditions of the vic-

[7] The employer is in the best position to know what remedial procedures it offers to employees and how those procedures operate. See 9 J. Wigmore, Evidence § 2486, p. 290 (J. Chadbourn rev. ed. 1981) ("[T]he burden of proving a fact is said to be put on the party who presumably has peculiar means of knowledge enabling him to prove its falsity if it is false." (emphasis deleted)).

tim's employment and create an abusive working environment." *Meritor*, 477 U. S., at 67 (internal quotation marks and brackets omitted). A hostile-environment constructive discharge claim entails something more: A plaintiff who advances such a compound claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign. See, *e. g.*, *Breeding* v. *Arthur J. Gallagher & Co.*, 164 F. 3d 1151, 1160 (CA8 1999) ("[A]lthough there may be evidence from which a jury could find sexual harassment, . . . the facts alleged [for constructive discharge must be] . . . so intolerable that a reasonable person would be forced to quit."); *Perry* v. *Harris Chernin, Inc.*, 126 F. 3d 1010, 1015 (CA7 1997) ("[U]nless conditions are beyond 'ordinary' discrimination, a complaining employee is expected to remain on the job while seeking redress.").[8]

Suders' claim is of the same genre as the hostile work environment claims the Court analyzed in *Ellerth* and *Faragher*.[9] Essentially, Suders presents a "worse case" harassment sce-

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[8] As earlier noted, see *supra*, at 141, a prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge. The plaintiff may recover postresignation damages, including both backpay and, in fitting circumstances, frontpay, see 1 Lindemann & Grossman 838; Weirich 651, as well as the compensatory and punitive damages now provided for Title VII claims generally, see 42 U. S. C. § 1981a(a)(1); *Pollard* v. *E. I. du Pont de Nemours & Co.*, 532 U. S. 843, 848 (2001) (noting expanded remedies under Civil Rights Act of 1991).

[9] Both the *Ellerth* and *Faragher* plaintiffs resigned from their posts; plaintiff Ellerth expressly alleged constructive discharge. See *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 748–749 (1998); *Faragher* v. *Boca Raton*, 524 U. S. 775, 783 (1998). Although Ellerth's constructive discharge claim was not before this Court, the decision's omission of constructive discharge from its examples of tangible employment actions is conspicuous. See 524 U. S., at 761; Brief for Chamber of Commerce of the United States as *Amicus Curiae* 10 ("[T]his Court's omission of constructive discharge in its discussion of tangible employment actions was widely regarded as a purposeful one."). Tellingly, we stated that Ellerth "ha[d] not alleged she suffered a tangible employment action," despite the fact that her complaint alleged constructive discharge. 524 U. S., at 766.

nario, harassment ratcheted up to the breaking point. Like the harassment considered in our pathmarking decisions, harassment so intolerable as to cause a resignation may be effected through co-worker conduct, unofficial supervisory conduct, or official company acts. Unlike an actual termination, which is *always* effected through an official act of the company, a constructive discharge need not be. A constructive discharge involves both an employee's decision to leave and precipitating conduct: The former involves no official action; the latter, like a harassment claim without any constructive discharge assertion, may or may not involve official action. See Brief for United States as *Amicus Curiae* 24.

To be sure, a constructive discharge is functionally the same as an actual termination in damages-enhancing respects. See *supra*, at 147, n. 8. As the Third Circuit observed, both "en[d] the employer-employee relationship," and both "inflic[t] . . . direct economic harm." 325 F. 3d, at 460 (internal quotation marks omitted). But when an official act does not underlie the constructive discharge, the *Ellerth* and *Faragher* analysis, we here hold, calls for extension of the affirmative defense to the employer. As those leading decisions indicate, official directions and declarations are the acts most likely to be brought home to the employer, the measures over which the employer can exercise greatest control. See *Ellerth*, 524 U. S., at 762. Absent "an official act of the enterprise," *ibid.*, as the last straw, the employer ordinarily would have no particular reason to suspect that a resignation is not the typical kind daily occurring in the work force. And as *Ellerth* and *Faragher* further point out, an official act reflected in company records—a demotion or a reduction in compensation, for example—shows "beyond question" that the supervisor has used his managerial or controlling position to the employee's disadvantage. See *Ellerth*, 524 U. S., at 760. Absent such an official act, the extent to which the supervisor's misconduct has been aided by the agency relation, as we earlier recounted, see *supra*, at

145, is less certain. That uncertainty, our precedent establishes, see *supra*, at 145–146, justifies affording the employer the chance to establish, through the *Ellerth/Faragher* affirmative defense, that it should not be held vicariously liable.

The Third Circuit drew the line differently. Under its formulation, the affirmative defense would be eliminated in all hostile-environment constructive discharge cases, but retained, as *Ellerth* and *Faragher* require, in "ordinary" hostile work environment cases, *i. e.*, cases involving no tangible employment action. That placement of the line, anomalously, would make the *graver* claim of hostile-environment constructive discharge *easier* to prove than its lesser included component, hostile work environment. Moreover, the Third Circuit's formulation, that court itself recognized, would make matters complex, indeed, more than a little confusing to jurors. Creation of a hostile work environment is a necessary predicate to a hostile-environment constructive discharge case. Juries would be so informed. Under the Third Circuit's decision, a jury, presumably, would be cautioned to consider the affirmative-defense evidence only in reaching a decision on the hostile work environment claim, and to ignore or at least downplay that same evidence in deciding the closely associated constructive discharge claim. It makes scant sense thus to alter the decisive instructions from one claim to the next when the only variation between the two claims is the severity of the hostile working conditions. Cf. *Faragher*, 524 U. S., at 801 (affirming "the virtue of categorical clarity").

We note, finally, two recent Court of Appeals decisions that indicate how the "official act" (or "tangible employment action") criterion should play out when constructive discharge is alleged. Both decisions advance the untangled approach we approve in this opinion. In *Reed* v. *MBNA Marketing Systems, Inc.*, 333 F. 3d 27 (CA1 2003), the plaintiff claimed a constructive discharge based on her supervisor's

repeated sexual comments and an incident in which he sexually assaulted her. The First Circuit held that the alleged wrongdoing did not preclude the employer from asserting the *Ellerth/Faragher* affirmative defense. As the court explained in *Reed*, the supervisor's behavior involved no official actions. Unlike, "*e. g.*, an extremely dangerous job assignment to retaliate for spurned advances," 333 F. 3d, at 33, the supervisor's conduct in *Reed* "was exceedingly unofficial and involved no direct exercise of company authority"; indeed, it was "exactly the kind of wholly unauthorized conduct for which the affirmative defense was designed," *ibid.* In contrast, in *Robinson* v. *Sappington*, 351 F. 3d 317 (CA7 2003), after the plaintiff complained that she was sexually harassed by the judge for whom she worked, the presiding judge decided to transfer her to another judge, but told her that "her first six months [in the new post] probably would be 'hell,'" and that it was in her "'best interest to resign.'" *Id.*, at 324. The Seventh Circuit held that the employer was precluded from asserting the affirmative defense to the plaintiff's constructive discharge claim. The *Robinson* plaintiff's decision to resign, the court explained, "resulted, at least in part, from [the presiding judge's] official actio[n] in transferring" her to a judge who resisted placing her on his staff. *Id.*, at 337. The courts in *Reed* and *Robinson* properly recognized that *Ellerth* and *Faragher*, which divided the universe of supervisor-harassment claims according to the presence or absence of an official act, mark the path constructive discharge claims based on harassing conduct must follow.

2

In its summation, the Third Circuit qualified its holding that a constructive discharge itself "constitutes a tangible employment action within the meaning of *Ellerth* and *Faragher*." 325 F. 3d, at 462. The affirmative defense *Ellerth* and *Faragher* delineated, the court said, might be imported into the anterior issue whether "the employee's deci-

sion to resign was reasonable under the circumstances." 325 F. 3d, at 462.[10] As the Third Circuit expressed its thinking:

> "[I]t may be relevant to a claim of constructive discharge whether an employer had an effective remedial scheme in place, whether an employer attempted to investigate, or otherwise to address, plaintiff's complaints, and whether plaintiff took advantage of alternatives offered by antiharassment programs." *Ibid.*

These considerations, the Third Circuit recognized, "are, of course, the same considerations relevant to the affirmative defense in *Ellerth* and *Faragher*." *Ibid.*

The Third Circuit left open when and how the *Ellerth*/*Faragher* considerations would be brought home to the fact trier. It did not address specifically the allocation of pleading and persuasion burdens. It simply relied on "the wisdom and expertise of trial judges to exercise their gatekeeping authority when assessing whether all, some, or none of the evidence relating to employers' antiharassment programs and to employees' exploration of alternative avenues warrants introduction at trial." 325 F. 3d, at 463.

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[10] For similar expressions, see, *e. g., Jaros* v. *LodgeNet Entertainment Corp.*, 294 F. 3d 960, 965 (CA8 2002) (though not entitled to the *Ellerth*/*Faragher* affirmative defense, employer facing constructive discharge complaint may assert that plaintiff "did not give it a chance to respond to her [grievance]" in rebutting plaintiff's contention that conditions were so intolerable as to force her resignation); *Marrero* v. *Goya of Puerto Rico, Inc.*, 304 F. 3d 7, 28 (CA1 2002) ("the jury reasonably can take into account how the employer responded to the plaintiff's complaints, if any," in deciding whether conditions were intolerable); *Hartman* v. *Sterling, Inc.*, No. Civ. A. 01–CV–2630, 2003 WL 22358548, *13 (ED Pa., Sept. 10, 2003) (noting "it is relevant," but not dispositive, whether plaintiff complained); Brief for Lawyers' Committee for Civil Rights Under Law et al. as *Amici Curiae* 19 (affirmative defense unnecessary because of "the overlap between elements of constructive discharge and of the *Faragher/Ellerth* [affirmative] defense").

We see no cause for leaving the district courts thus unguided. Following *Ellerth* and *Faragher*, the plaintiff who alleges no tangible employment action has the duty to mitigate harm, but the defendant bears the burden to allege and prove that the plaintiff failed in that regard. See *supra*, at 146. The plaintiff might elect to allege facts relevant to mitigation in her pleading or to present those facts in her case in chief, but she would do so in anticipation of the employer's affirmative defense, not as a legal requirement.

* * *

We agree with the Third Circuit that the case, in its current posture, presents genuine issues of material fact concerning Suders' hostile work environment and constructive discharge claims.[11] We hold, however, that the Court of Appeals erred in declaring the affirmative defense described in *Ellerth* and *Faragher* never available in constructive discharge cases. Accordingly, we vacate the Third Circuit's judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE THOMAS, dissenting.

As the Court explains, the National Labor Relations Board (NLRB) developed the concept of constructive discharge to address situations in which employers coerced employees into resigning because of the employees' involvement in union activities. See *ante*, at 141–142. In light of this specific focus, the NLRB requires employees to establish two elements to prove a constructive discharge. First, the employer must impose burdens upon the employee that "cause, and [are] intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign.

[11] Although most of the discriminatory behavior Suders alleged involved unofficial conduct, the events surrounding her computer-skills exams, see *supra*, at 136, were less obviously unofficial.

Second, it must be shown that those burdens were imposed because of the employee's union activities." *Crystal Princeton Refining Co.*, 222 N. L. R. B. 1068, 1069 (1976).

When the constructive discharge concept was first imported into Title VII of the Civil Rights Act of 1964, some courts imposed similar requirements. See, *e. g.*, *Muller* v. *United States Steel Corp.*, 509 F. 2d 923, 929 (CA10 1975) (requiring a showing that "an employer deliberately render[ed] the employee's working conditions intolerable and thus force[d] him to quit his job"). Moreover, because the Court had not yet recognized the hostile work environment cause of action, the first successful Title VII constructive discharge claims typically involved adverse employment actions. See, *Muller*, *supra* (denial of job promotion); *Derr* v. *Gulf Oil Corp.*, 796 F. 2d 340, 344 (CA10 1986) (demotion). If, in order to establish a constructive discharge, an employee must prove that his employer subjected him to an adverse employment action with the specific intent of forcing the employee to quit, it makes sense to attach the same legal consequences to a constructive discharge as to an actual discharge.

The Court has now adopted a definition of constructive discharge, however, that does not in the least resemble actual discharge. The Court holds that to establish "'constructive discharge,'" a plaintiff must "show that the abusive working environment became so intolerable that [the employee's] resignation qualified as a fitting response." *Ante*, at 134. Under this rule, it is possible to allege a constructive discharge absent any adverse employment action. Moreover, a majority of Courts of Appeals have declined to impose a specific intent or reasonable foreseeability requirement. See, *e. g.*, *Brooks* v. *San Mateo*, 229 F. 3d 917, 930 (CA9 2000) ("[C]onstructive discharge occurs when the working conditions deteriorate, as a result of discrimination, to the point that they become sufficiently extraordinary and egregious to overcome the normal motivation of a competent,

diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer" (internal quotation marks omitted)).

Thus, as it is currently conceived, a "constructive" discharge does not require a "company ac[t] that can be performed only by the exercise of specific authority granted by the employer," *Burlington Industries, Inc.* v. *Ellerth*, 524 U. S. 742, 768 (1998) (THOMAS, J., dissenting) (*i. e.*, an adverse employment action), nor does it require that the act be undertaken with the same purpose as an actual discharge. Under these circumstances, it no longer makes sense to view a constructive discharge as equivalent to an actual discharge. Instead, as the Court points out, a constructive discharge is more akin to "an aggravated case of . . . sexual harassment or hostile work environment." *Ante*, at 146. And under this "hostile work environment plus" framework, the proper standard for determining employer liability is the same standard for hostile work environment claims that I articulated in *Burlington Industries, Inc.*, *supra*. "An employer should be liable if, and only if, the plaintiff proves that the employer was negligent in permitting the supervisor's conduct to occur." *Id.*, at 767. If a supervisor takes an adverse employment action because of sex that directly results in the constructive discharge, the employer is vicariously liable. *Id.*, at 768. But, where the alleged constructive discharge results only from a hostile work environment, an employer is liable if negligent. *Ibid.* Because respondent has not adduced sufficient evidence of an adverse employment action taken because of her sex, nor has she proffered any evidence that petitioner knew or should have known of the alleged harassment, I would reverse the judgment of the Court of Appeals.

Syllabus

F. HOFFMANN-La ROCHE LTD et al. *v.* EMPAGRAN S. A. et al.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03–724. Argued April 26, 2004—Decided June 14, 2004

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA or Act) provides that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations," 15 U. S. C. § 6a, but creates exceptions for conduct that significantly harms imports, domestic commerce, or American exporters. In this case, vitamin purchasers filed a class action alleging that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, raising vitamin prices in the United States and foreign countries, in violation of the Sherman Act. As relevant here, defendants (petitioners) moved to dismiss the suit as to the *foreign* purchasers (respondents), foreign companies located abroad, who had purchased vitamins only outside United States commerce. In dismissing respondents' claims, the District Court applied the FTAIA and found none of its exceptions applicable. The Court of Appeals reversed, concluding that the FTAIA's exclusionary rule applied, but so did its exception for conduct that has a "direct, substantial and reasonably foreseeable effect" on domestic commerce that "gives rise to a [Sherman Act] claim," §§ 6a(1)(A), (2). Assuming that the foreign effect, *i. e.*, higher foreign prices, was independent of the domestic effect, *i. e.*, higher domestic prices, the court nonetheless concluded that the Act's text, legislative history, and policy goal of deterring harmful price-fixing activity made the lack of connection between the two effects inconsequential.

Held: Where the price-fixing conduct significantly and adversely affects both customers outside and within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the FTAIA exception does not apply, and thus, neither does the Sherman Act, to a claim based solely on the foreign effect. Pp. 161–175.

(a) Respondents' threshold argument that the transactions fall outside the FTAIA because its general exclusionary rule applies only to conduct involving exports is rejected. The House Judiciary Committee changed the bill's original language from "export trade or export commerce," H. R. 5235, to "trade or commerce (other than import trade or import commerce)" deliberately to include commerce that did not involve American exports but was wholly foreign. Pp. 162–163.

(b) The FTAIA exception does not apply here for two reasons. *First*, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority. This rule of construction reflects customary international law principles and cautions courts to assume that legislators take account of other nations' legitimate sovereign interests when writing American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony. While applying America's antitrust laws to foreign conduct can interfere with a foreign nation's ability to regulate its own commercial affairs, courts have long held such application nonetheless reasonable, and hence consistent with prescriptive comity principles, insofar as the laws reflect a legislative effort to redress domestic antitrust injury caused by foreign anticompetitive conduct. However, it is not reasonable to apply American laws to foreign conduct insofar as that conduct causes independent foreign harm that alone gives rise to a plaintiff's claim. The risk of interference is the same, but the justification for the interference seems insubstantial. While some of the anticompetitive conduct alleged here took place in America, the higher foreign prices are not the consequence of any domestic anticompetitive conduct sought to be forbidden by Congress, which rather wanted to release domestic (and foreign) anticompetitive conduct from Sherman Act constraint when that conduct causes foreign harm. Contrary to respondents' claim, the comity concerns remain real as other nations have not in all areas adopted antitrust laws similar to this country's and, in any event, disagree dramatically about appropriate remedies. Respondents' alternative argument that case-by-case comity analysis is preferable to an across the board exclusion of foreign injury cases is too complex to prove workable. *Second*, the FTAIA's language and history suggest that Congress designed the Act to clarify, perhaps to limit, but not to expand, the Sherman Act's scope as applied to foreign commerce. There is no significant indication that at the time Congress wrote the FTAIA courts would have thought the Sherman Act applicable in these circumstances, nor do the six cases on which respondents rely warrant a different conclusion. Pp. 163–173.

(c) Respondents' additional linguistic arguments might show a natural reading of the statute, but the comity and history considerations previously discussed make clear that respondents' reading is not consistent with the FTAIA's basic intent. Their deterrence-based policy argument is also unavailing in light of the contrary arguments by the antitrust enforcement agencies. Pp. 173–175.

(d) On remand, the Court of Appeals may consider whether respondents properly preserved their alternative argument that the foreign

Syllabus

injury here was not in fact independent of the domestic effects; and, if so, it may consider and decide the related claim. P. 175.

315 F. 3d 338, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined, *post*, p. 176. O'CONNOR, J., took no part in the consideration or decision of the case.

Stephen M. Shapiro argued the cause for petitioners. With him on the briefs were *Arthur F. Golden*, *Tyrone C. Fahner*, *Andrew S. Marovitz*, *Jeffrey W. Sarles*, *Lawrence Portnoy*, *Charles S. Duggan*, *John M. Majoras*, *Daniel H. Bromberg*, *Kenneth Prince*, *Lawrence Byrne*, *Bruce L. Montgomery*, *D. Stuart Meiklejohn*, *Michael L. Denger*, *Miguel A. Estrada*, *Laurence T. Sorkin*, *Roy L. Regozin*, *Donald I. Baker*, *Donald C. Klawiter*, *Peter E. Halle*, *James R. Weiss*, *Jim J. Shoemake*, *Thomas M. Mueller*, *Michael O. Ware*, *Aileen Meyer*, *Sutton Keany*, *Kenneth W. Starr*, *Moses Silverman*, *Aidan Synnott*, *Mark Riera*, *Kevin R. Sullivan*, *Peter M. Todaro*, *William J. Kolasky*, and *Edward DuMont*.

Assistant Attorney General Pate argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Kneedler*, *Deputy Assistant Attorney General Delrahim*, *Lisa S. Blatt*, *Robert B. Nicholson*, *Steven J. Mintz*, *William H. Taft IV*, and *John D. Graubert*.

Thomas C. Goldstein argued the cause for respondents. With him on the brief were *Amy Howe*, *Michael H. Gottesman*, *Michael D. Hausfeld*, *Paul T. Gallagher*, and *Brian A. Ratner*.*

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*Briefs of *amici curiae* urging reversal were filed for the Government of Canada by *Homer E. Moyer, Jr.*, *Michael T. Brady*, and *Alan I. Horowitz;* for the Government of the Federal Republic of Germany et al. by *David C. Frederick;* for the Government of the United Kingdom of Great Britain and Northern Ireland et al. by *Ernest Gellhorn* and *Ann*

JUSTICE BREYER delivered the opinion of the Court.

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." 96 Stat. 1246, 15 U. S. C. § 6a. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury. We ask two questions about the price-fixing conduct and the foreign injury that it causes. First, does that conduct fall within the FTAIA's general rule excluding the Sherman Act's application? That is to say, does the price-fixing activity constitute "conduct involving trade or commerce . . . with foreign nations"? We conclude that it does.

Weymouth; for the Government of Japan by *Douglas E. Rosenthal;* for the Business Roundtable by *Janet L. McDavid*, *Jonathan S. Franklin*, and *William H. Johnson;* for the Chamber of Commerce of the United States et al. by *Roy T. Englert, Jr.*, *Donald J. Russell*, *Max Huffman*, and *Robin S. Conrad;* for Bank Austria AG et al. by *Carter G. Phillips*, *Virginia A. Seitz*, *John H. Shenefield*, *Jonathan M. Rich*, *Robert A. Horowitz*, *Richard A. Martin*, *Richard S. Goldstein*, *Jeffrey Barist*, *Charles Westland*, and *Richard L. Mattiaccio;* and for the International Chamber of Commerce by *A. Paul Victor* and *Steven Alan Reiss.*

Briefs of *amici curiae* urging affirmance were filed for the Committee to Support the Antitrust Laws et al. by *Charles J. Cooper* and *David H. Thompson;* for Public Citizen by *Amanda Frost* and *Brian Wolfman;* for Harry First et al. by *Jonathan S. Massey*, *Lynn Lincoln Sarko*, *Mark A. Griffin*, *Edgar D. Gankendorff*, and *Henry S. Provosty;* for Ralf Michaels et al. by *Arthur R. Miller;* and for Joseph E. Stiglitz et al. by *Erik S. Jaffe* and *Mary Boies.*

Briefs of *amici curiae* were filed for Certain Professors of Economics by *James vanR. Springer* and *James R. Martin;* and for Darren Bush et al. by *Peter J. Rubin.*

Second, we ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [Sherman Act] claim." §§ 6a(1)(A), (2). We conclude that the exception does not apply where the plaintiff's claim rests solely on the independent foreign harm.

To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. We conclude that, in this scenario, a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

I

The plaintiffs in this case originally filed a class-action suit on behalf of foreign and domestic purchasers of vitamins under, *inter alia*, § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, and §§ 4 and 16 of the Clayton Act, 38 Stat. 731, 737, as amended, 15 U. S. C. §§ 15, 26. Their complaint alleged that petitioners, foreign and domestic vitamin manufacturers and distributors, had engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries.

As relevant here, petitioners moved to dismiss the suit as to the *foreign* purchasers (the respondents here), five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins from peti-

tioners for delivery outside the United States. No. Civ. 001686TFH, 2001 WL 761360, *4 (D. D. C., June 7, 2001) (describing the relevant transactions as "wholly foreign"). Respondents have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the question presented assumes that the relevant "transactions occurr[ed] entirely outside U. S. commerce," Pet. for Cert. (i). The District Court dismissed their claims. 2001 WL 761360, at *4. It applied the FTAIA and found none of the exceptions applicable. *Id.*, at *3–*4. Thereafter, the *domestic* purchasers transferred their claims to another pending suit and did not take part in the subsequent appeal. 315 F. 3d 338, 343 (CADC 2003).

A divided panel of the Court of Appeals reversed. 315 F. 3d 338. The panel concluded that the FTAIA's general exclusionary rule applied to the case, but that its domestic-injury exception also applied. It basically read the plaintiffs' complaint to allege that the vitamin manufacturers' price-fixing conspiracy (1) had "a direct, substantial, and reasonably foreseeable effect" on ordinary domestic trade or commerce, *i. e.*, the conspiracy brought about higher domestic vitamin prices, and (2) "such effect" gave "rise to a [Sherman Act] claim," *i. e.*, an injured *domestic* customer could have brought a Sherman Act suit, 15 U. S. C. §§ 6a(1), (2). Those allegations, the court held, are sufficient to meet the exception's requirements. 315 F. 3d, at 341.

The court assumed that the foreign effect, *i. e.*, higher prices in Ukraine, Panama, Australia, and Ecuador, was independent of the domestic effect, *i. e.*, higher domestic prices. *Ibid.* But it concluded that, in light of the FTAIA's text, legislative history, and the policy goal of deterring harmful price-fixing activity, this lack of connection does not matter. *Ibid.* The District of Columbia Circuit denied rehearing en banc by a 4-to-3 vote. App. to Pet. for Cert. 44a.

We granted certiorari to resolve a split among the Courts of Appeals about the exception's application. Compare *Den*

Norske Stats Oljeselskap As v. *HeereMac Vof*, 241 F. 3d 420, 427 (CA5 2001) (exception does not apply where foreign injury independent of domestic harm), with *Kruman* v. *Christie's Int'l PLC*, 284 F. 3d 384, 400 (CA2 2002) (exception does apply even where foreign injury independent); 315 F. 3d, at 341 (similar).

II

The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. See H. R. Rep. No. 97–686, pp. 1–3, 9–10 (1982) (hereinafter House Report). It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

The FTAIA says:

> "Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> "(1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> "(A) on trade or commerce which is not trade or commerce with foreign nations [*i. e.*, domestic trade or commerce], or on import trade or import commerce with foreign nations; or
>
> "(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [*i. e.*, on an American export competitor]; and

> "(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> "If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States." 15 U. S. C. § 6a.

This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i. e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i. e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim." §§ 6a(1), (2).

We ask here how this language applies to price-fixing activity that is in significant part foreign, that has the requisite domestic effect, and that also has independent foreign effects giving rise to the plaintiff's claim.

III

Respondents make a threshold argument. They say that the transactions here at issue fall outside the FTAIA because the FTAIA's general exclusionary rule applies only to conduct involving exports. The rule says that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) *with* foreign nations." § 6a (emphasis added). The word "with" means *between* the United States and foreign nations. And, they contend, commerce between the United States and foreign nations that is not import commerce must consist of export commerce—a kind of commerce irrelevant to the case at hand.

The difficulty with respondents' argument is that the FTAIA originated in a bill that initially referred only to "export trade or export commerce." H. R. 5235, 97th Cong., 1st Sess., § 1 (1981). But the House Judiciary Committee subsequently changed that language to "trade or commerce (other than import trade or import commerce)." 15 U. S. C. § 6a. And it did so deliberately to include commerce that did not involve American exports but which was wholly foreign. The House Report says in relevant part:

> "The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i. e.*, transactions within, between, or among other nations. . . . *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions*—that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to 'export' trade, and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment*, but that import transactions are not." House Report, at 9–10 (emphases added).

For those who find legislative history useful, the House Report's account should end the matter. Others, by considering carefully the amendment itself and the lack of any other plausible purpose, may reach the same conclusion, namely, that the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign.

IV

We turn now to the basic question presented, that of the exception's application. Because the underlying antitrust

action is complex, potentially raising questions not directly at issue here, we reemphasize that we base our decision upon the following: The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the Sherman Act does not apply) for two main reasons.

First, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, *e. g.*, *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U. S. 10, 20–22 (1963) (application of National Labor Relations Act to foreign-flag vessels); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 382–383 (1959) (application of Jones Act in maritime case); *Lauritzen* v. *Larsen*, 345 U. S. 571, 578 (1953) (same). This rule of construction reflects principles of customary international law—law that (we must assume) Congress ordinarily seeks to follow. See Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2) (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804) ("[A]n act of congress ought never to be construed to violate the law of nations if any other possible construction remains"); *Hartford Fire Ins. Co.* v. *California*, 509 U. S. 764, 817 (1993) (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "'prescriptive comity'").

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony—a harmony partic-

ularly needed in today's highly interdependent commercial world.

No one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443–444 (CA2 1945) (L. Hand, J.); 1 P. Areeda & D. Turner, Antitrust Law ¶ 236 (1978).

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See Restatement § 403(2) (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of *American* companies, see Restatement § 402; and some of the anticompetitive price-fixing conduct alleged here took place in *America*. But the higher foreign prices of which the foreign plaintiffs here complain are not the con-

sequence of any domestic anticompetitive conduct *that Congress sought to forbid*, for Congress did not seek to forbid any such conduct insofar as it is here relevant, *i. e.*, insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct also causes domestic harm. See House Report, at 13 (concerns about American firms' participation in international cartels addressed through "domestic injury" exception). But any independent domestic harm the foreign conduct causes here has, by definition, little or nothing to do with the matter.

We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.

The Areeda and Hovenkamp treatise notes that under the Court of Appeals' interpretation of the statute

> "a Malaysian customer could . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U. S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have

> intended that result." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 273, pp. 51–52 (Supp. 2003).

We agree with the comment. We can find no convincing justification for the extension of the Sherman Act's scope that it describes.

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. See, *e. g.*, *Hartford Fire*, 509 U. S., at 797–799 (noting that the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy); see also, *e. g.*, 2 W. Fugate, Foreign Commerce and the Antitrust Laws § 16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints).

Regardless, even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. See, *e. g.*, 2 ABA Section of Antitrust Law, Antitrust Law Developments 1208–1209 (5th ed. 2002). And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody. *E. g.*, Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 2 (setting forth German interest "in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs—whose injuries were sustained in transactions entirely outside United States commerce—seeking treble damages in private lawsuits against German companies"); Brief for Gov-

ernment of Canada as *Amicus Curiae* 14 ("treble damages remedy would supersede" Canada's "national policy decision"); Brief for Government of Japan as *Amicus Curiae* 10 (finding "particularly troublesome" the potential "interfere[nce] with Japanese governmental regulation of the Japanese market").

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 28–30; Brief for Government of Canada as *Amicus Curiae* 11–14. See also Brief for United States as *Amicus Curiae* 19–21 (arguing the same in respect to American antitrust enforcement).

Respondents alternatively argue that comity does not demand an interpretation of the FTAIA that would exclude independent foreign injury cases *across the board.* Rather, courts can take (and sometimes have taken) account of comity considerations case by case, abstaining where comity considerations so dictate. Cf., *e. g.*, *Hartford Fire*, *supra*, at 797, n. 24; *United States* v. *Nippon Paper Industries Co.*, 109 F. 3d 1, 8 (CA1 1997); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F. 2d 1287, 1294–1295 (CA3 1979).

In our view, however, this approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings—to the point where procedural costs and delays could

themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damages liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely, that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty programs). Compare, *e. g.*, Brief for Certain Professors of Economics as *Amici Curiae* 2–4 with Brief for United States as *Amicus Curiae* 19–21. How could a court seriously interested in resolving so empirical a matter—a matter potentially related to impact on foreign interests—do so simply and expeditiously?

We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Second, the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce. See House Report, at 2–3. And we have found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances.

The Solicitor General and petitioners tell us that they have found no case in which any court applied the Sherman Act to redress foreign injury in such circumstances. Tr. of Oral Arg. 21; Brief for United States as *Amicus Curiae* 13; Brief

for Petitioners 13; see also *Den Norske,* 241 F. 3d, at 429 ("[W]e have found no case in which jurisdiction was found in a case like this—where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market"). And respondents themselves apparently conceded as much at a May 23, 2001, hearing before the District Court below. 2001 WL 761360, at *4.

Nevertheless, respondents now have called to our attention six cases, three decided by this Court and three decided by lower courts. In the first three cases the defendants included both American companies and foreign companies jointly engaged in anticompetitive behavior having both foreign and domestic effects. See *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 595 (1951) (agreements among American, British, and French corporations to eliminate competition in the manufacture and sale of antifriction bearings in world, including United States, markets); *United States* v. *National Lead Co.*, 332 U. S. 319, 325–328 (1947) (international cartels with American and foreign members, restraining international commerce, including United States commerce, in titanium pigments); *United States* v. *American Tobacco Co.*, 221 U. S. 106, 171–172 (1911) (American tobacco corporations agreed in England with British company to divide world markets). In all three cases the plaintiff sought relief, including relief that might have helped to protect those injured abroad.

In all three cases, however, the plaintiff was the Government of the United States. A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. 15 U. S. C. § 25; see also, *e. g.*, *United States* v. *E. I. du Pont de Nemours & Co.*, 366 U. S. 316, 334 (1961) ("[I]t is well settled that once the Government has

successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor"). Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief. See *California* v. *American Stores Co.*, 495 U. S. 271, 295 (1990) ("Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief"); 2 P. Areeda, H. Hovenkamp, & R. Blair, Antitrust Law ¶¶ 303d–303e, pp. 40–45 (2d ed. 2000) (distinguishing between private and government suits in terms of availability, public interest motives, and remedial scope); Griffin, Extraterritoriality in U. S. and EU Antitrust Enforcement, 67 Antitrust L. J. 159, 194 (1999) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U. S. Government"). This difference means that the Government's ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Neither did the Court focus explicitly in its opinions on a claim that the remedies sought to cure only independently caused foreign harm. Thus the three cases tell us even less about whether this Court then thought that foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury.

Respondents also refer to three lower court cases brought by private plaintiffs. In the first, *Industria Siciliana Asfalti, Bitumi, S. p. A.* v. *Exxon Research & Engineering Co.*, No. 75 Civ. 5828-CSH, 1977 WL 1353 (SDNY, Jan. 18, 1977), a District Court permitted an Italian firm to proceed against an American firm with a Sherman Act claim based upon a purely foreign injury, *i. e.*, an injury suffered in Italy. The court made clear, however, that the foreign injury was "*inex-*

tricably bound up with . . . domestic restraints of trade," and that the plaintiff "*was injured . . . by reason of an alleged restraint of our domestic trade,*" *id.*, at *11, *12 (emphasis added), *i. e.*, the foreign injury was dependent upon, *not independent of,* domestic harm. See Part VI, *infra.*

In the second case, *Dominicus Americana Bohio* v. *Gulf & Western Industries, Inc.*, 473 F. Supp. 680 (SDNY 1979), a District Court permitted Dominican and American firms to proceed against a competing American firm and the Dominican Tourist Information Center with a Sherman Act claim based upon injury apparently suffered in the Dominican Republic. The court, in finding the Sherman Act applicable, weighed several different factors, including the participation of American firms in the unlawful conduct, the partly domestic nature of both conduct and harm (to American tourists, a kind of "export"), and the fact that the domestic harm depended in part upon the foreign injury. *Id.*, at 688. The court did not separately analyze the legal problem before it in terms of independently caused foreign injury. Its opinion simply does not discuss the matter. It consequently cannot be taken as significant support for application of the Sherman Act here.

The third case, *Hunt* v. *Mobil Oil Corp.*, 550 F. 2d 68, 72 (CA2 1977), involved a claim by Hunt, an independent oil producer with reserves in Libya, that other major oil producers in Libya and the Persian Gulf (the "seven majors") had conspired in New York and elsewhere to make it more difficult for Hunt to reach agreement with the Libyan Government on production terms and thereby eliminate him as a competitor. The case can be seen as involving a primarily foreign conspiracy designed to bring about foreign injury in Libya. But, as in *Dominicus*, the court nowhere considered the problem of independently caused foreign harm. Rather, the case was about the "act of state" doctrine, and the sole discussion of Sherman Act applicability—one brief paragraph—refers to other matters. 550 F. 2d, at 72, and n. 2.

We do not see how Congress could have taken this case as significant support for the proposition that the Sherman Act applies in present circumstances.

The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume. Indeed, a leading contemporaneous lower court case contains language suggesting the contrary. See *Timberlane Lumber Co.* v. *Bank of America, N. T. & S. A.*, 549 F. 2d 597, 613 (CA9 1976) (insisting that the foreign conduct's domestic effect be "sufficiently large to present a cognizable injury *to the plaintiffs*" (emphasis added)).

Taken together, these two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.

V

Respondents point to several considerations that point the other way. For one thing, the FTAIA's language speaks in terms of the Sherman Act's *applicability* to certain kinds of *conduct.* The FTAIA says that the Sherman Act applies to foreign "conduct" with a certain kind of harmful domestic effect. Why isn't that the end of the matter? How can the Sherman Act both *apply to the conduct* when one person sues but *not apply to the same conduct* when another person sues? The question of who can or cannot sue is a matter for other statutes (namely, the Clayton Act) to determine.

Moreover, the exception says that it applies if the conduct's domestic effect gives rise to "*a* claim," not to "*the plaintiff's* claim" or "*the* claim *at issue.*" 15 U. S. C. § 6a(2) (emphases added). The alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to "a" claim. Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguis-

tically speaking, they say, that is beside the point. Nor did Congress place the relevant words "gives rise to a claim" in the FTAIA to suggest any geographical limitation; rather it did so for a here neutral reason, namely, in order to make clear that the domestic effect must be an *adverse* (as opposed to a beneficial) effect. See House Report, at 11 (citing *National Bank of Canada* v. *Interbank Card Assn.*, 666 F. 2d 6, 8 (CA2 1981)).

Despite their linguistic logic, these arguments are not convincing. Linguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic sense to read the words "a claim" as if they refer to the "plaintiff's claim" or "the claim at issue."

At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language. But those arguments do not show that we *must* accept that reading. And that is the critical point. The considerations previously mentioned—those of comity and history—make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it. And, for the reasons stated, we believe that the statute's language permits the reading that we give it.

Finally, respondents point to policy considerations, namely, that application of the Sherman Act in present circumstances will (through increased deterrence) help protect Americans against foreign-caused anticompetitive injury. Petitioners and supporting enforcement-agency *amici*, however, have made important experience-backed arguments (based upon amnesty-seeking incentives) to the contrary. We cannot say whether, on balance, respondents' side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither

clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion.

For these reasons, we conclude that petitioners' reading of the statute's language is correct. That reading furthers the statute's basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.

VI

We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm. Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i. e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.

The Court of Appeals, however, did not address this argument, 315 F. 3d, at 341, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

Justice Scalia, with whom Justice Thomas joins, concurring in the judgment.

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

Syllabus

HIIBEL *v.* SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, ET AL.

CERTIORARI TO THE SUPREME COURT OF NEVADA

No. 03–5554. Argued March 22, 2004—Decided June 21, 2004

Petitioner Hiibel was arrested and convicted in a Nevada court for refusing to identify himself to a police officer during an investigative stop involving a reported assault. Nevada's "stop and identify" statute requires a person detained by an officer under suspicious circumstances to identify himself. The state intermediate appellate court affirmed, rejecting Hiibel's argument that the state law's application to his case violated the Fourth and Fifth Amendments. The Nevada Supreme Court affirmed.

Held: Petitioner's conviction does not violate his Fourth Amendment rights or the Fifth Amendment's prohibition on self-incrimination. Pp. 182–191.

(a) State stop and identify statutes often combine elements of traditional vagrancy laws with provisions intended to regulate police behavior in the course of investigatory stops. They vary from State to State, but all permit an officer to ask or require a suspect to disclose his identity. In *Papachristou* v. *Jacksonville*, 405 U. S. 156, 167–171, this Court invalidated a traditional vagrancy law for vagueness because of its broad scope and imprecise terms. The Court recognized similar constitutional limitations in *Brown* v. *Texas*, 443 U. S. 47, 52, where it invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds, and in *Kolender* v. *Lawson*, 461 U. S. 352, where it invalidated on vagueness grounds California's modified stop and identify statute that required a suspect to give an officer "credible and reliable" identification when asked to identify himself, *id.*, at 360. This case begins where those cases left off. Here, the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in *Brown*. Further, Hiibel has not alleged that the Nevada statute is unconstitutionally vague, as in *Kolender*. This statute is narrower and more precise. In contrast to the "credible and reliable" identification requirement in *Kolender*, the Nevada Supreme Court has interpreted the instant statute to require only that a suspect disclose his name. It apparently does not require him to produce a driver's license or any other document. If he chooses either to state his name or communicate it to the officer by other means, the statute is satisfied and no violation occurs. Pp. 182–185.

(b) The officer's conduct did not violate Hiibel's Fourth Amendment rights. Ordinarily, an investigating officer is free to ask a person for identification without implicating the Amendment. *INS* v. *Delgado*, 466 U. S. 210, 216. Beginning with *Terry* v. *Ohio*, 392 U. S. 1, the Court has recognized that an officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. Although it is well established that an officer may ask a suspect to identify himself during a *Terry* stop, see, *e. g.*, *United States* v. *Hensley*, 469 U. S. 221, 229, it has been an open question whether the suspect can be arrested and prosecuted for refusal to answer, see *Brown*, *supra*, at 53, n. 3. The Court is now of the view that *Terry* principles permit a State to require a suspect to disclose his name in the course of a *Terry* stop. *Terry*, *supra*, at 34. The Nevada statute is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures because it properly balances the intrusion on the individual's interests against the promotion of legitimate government interests. See *Delaware* v. *Prouse*, 440 U. S. 648, 654. An identity request has an immediate relation to the *Terry* stop's purpose, rationale, and practical demands, and the threat of criminal sanction helps ensure that the request does not become a legal nullity. On the other hand, the statute does not alter the nature of the stop itself, changing neither its duration nor its location. Hiibel argues unpersuasively that the statute circumvents the probable-cause requirement by allowing an officer to arrest a person for being suspicious, thereby creating an impermissible risk of arbitrary police conduct. These familiar concerns underlay *Kolender*, *Brown*, and *Papachristou*. They are met by the requirement that a *Terry* stop be justified at its inception and be "reasonably related in scope to the circumstances which justified" the initial stop. *Terry*, *supra*, at 20. Under those principles, an officer may not arrest a suspect for failure to identify himself if the identification request is not reasonably related to the circumstances justifying the stop. Cf. *Hayes* v. *Florida*, 470 U. S. 811, 817. The request in this case was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the Fourth Amendment. Pp. 185–189.

(c) Hiibel's contention that his conviction violates the Fifth Amendment's prohibition on self-incrimination fails because disclosure of his name and identity presented no reasonable danger of incrimination. The Fifth Amendment prohibits only compelled testimony that is incriminating, see *Brown* v. *Walker*, 161 U. S. 591, 598, and protects only

against disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used, *Kastigar* v. *United States*, 406 U. S. 441, 445. Hiibel's refusal to disclose was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it would furnish evidence needed to prosecute him. *Hoffman* v. *United States*, 341 U. S. 479, 486. It appears he refused to identify himself only because he thought his name was none of the officer's business. While the Court recognizes his strong belief that he should not have to disclose his identity, the Fifth Amendment does not override the Nevada Legislature's judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him. Answering a request to disclose a name is likely to be so insignificant as to be incriminating only in unusual circumstances. See, *e. g.*, *Baltimore City Dept. of Social Servs.* v. *Bouknight*, 493 U. S. 549, 555. If a case arises where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense, the court can then consider whether the Fifth Amendment privilege applies, whether it has been violated, and what remedy must follow. Those questions need not be resolved here. Pp. 189–191.

118 Nev. 868, 59 P. 3d 1201, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. STEVENS, J., filed a dissenting opinion, *post*, p. 191. BREYER, J., filed a dissenting opinion, in which SOUTER and GINSBURG, JJ., joined, *post*, p. 197.

Robert E. Dolan argued the cause for petitioner. With him on the briefs were *James P. Logan, Jr.*, and *Harriet E. Cummings*.

Conrad Hafen, Senior Deputy Attorney General of Nevada, argued the cause for respondents. With him on the brief were *Brian Sandoval*, Attorney General, and *David Allison*.

Sri Srinivasan argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General*

Wray, *Deputy Solicitor General Dreeben*, and *Joel M. Gershowitz.**

JUSTICE KENNEDY delivered the opinion of the Court.

The petitioner was arrested and convicted for refusing to identify himself during a stop allowed by *Terry* v. *Ohio*, 392 U. S. 1 (1968). He challenges his conviction under the Fourth and Fifth Amendments to the United States Constitution, applicable to the States through the Fourteenth Amendment.

I

The sheriff's department in Humboldt County, Nevada, received an afternoon telephone call reporting an assault. The caller reported seeing a man assault a woman in a red and silver GMC truck on Grass Valley Road. Deputy Sheriff Lee Dove was dispatched to investigate. When the officer arrived at the scene, he found the truck parked on the side of the road. A man was standing by the truck, and a young woman was sitting inside it. The officer observed skid marks in the gravel behind the vehicle, leading him to believe it had come to a sudden stop.

The officer approached the man and explained that he was investigating a report of a fight. The man appeared to be

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union by *Steven R. Shapiro*, *Lawrence S. Lustberg*, and *Mark A. Berman;* for the Cato Institute by *Timothy Lynch* and *M. Christine Klein;* for the National Law Center on Homelessness & Poverty et al. by *Carter G. Phillips*, *Edward R. McNicholas*, and *Rebecca K. Troth;* and for John Gilmore by *James P. Harrison.*

Briefs of *amici curiae* urging affirmance were filed for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson;* and for the National Association of Police Organizations by *Joel D. Bertocchi* and *Philip Allen Lacovara.*

Briefs of *amici curiae* were filed for the Electronic Frontier Foundation by *Robert Weisberg;* for the Electronic Privacy Information Center et al. by *Marc Rotenberg* and *David L. Sobel;* and for PrivacyActivism et al. by *William M. Simpich.*

intoxicated. The officer asked him if he had "any identification on [him]," which we understand as a request to produce a driver's license or some other form of written identification. The man refused and asked why the officer wanted to see identification. The officer responded that he was conducting an investigation and needed to see some identification. The unidentified man became agitated and insisted he had done nothing wrong. The officer explained that he wanted to find out who the man was and what he was doing there. After continued refusals to comply with the officer's request for identification, the man began to taunt the officer by placing his hands behind his back and telling the officer to arrest him and take him to jail. This routine kept up for several minutes: The officer asked for identification 11 times and was refused each time. After warning the man that he would be arrested if he continued to refuse to comply, the officer placed him under arrest.

We now know that the man arrested on Grass Valley Road is Larry Dudley Hiibel. Hiibel was charged with "willfully resist[ing], delay[ing] or obstruct[ing] a public officer in discharging or attempting to discharge any legal duty of his office" in violation of Nev. Rev. Stat. (NRS) § 199.280 (2003). The government reasoned that Hiibel had obstructed the officer in carrying out his duties under § 171.123, a Nevada statute that defines the legal rights and duties of a police officer in the context of an investigative stop. Section 171.123 provides in relevant part:

> "1. Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime.
>
> . . . . . .
>
> "3. The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not

be compelled to answer any other inquiry of any peace officer."

Hiibel was tried in the Justice Court of Union Township. The court agreed that Hiibel's refusal to identify himself as required by § 171.123 "obstructed and delayed Dove as a public officer in attempting to discharge his duty" in violation of § 199.280. App. 5. Hiibel was convicted and fined $250. The Sixth Judicial District Court affirmed, rejecting Hiibel's argument that the application of § 171.123 to his case violated the Fourth and Fifth Amendments. On review the Supreme Court of Nevada rejected the Fourth Amendment challenge in a divided opinion. 118 Nev. 868, 59 P. 3d 1201 (2002). Hiibel petitioned for rehearing, seeking explicit resolution of his Fifth Amendment challenge. The petition was denied without opinion. We granted certiorari. 540 U. S. 965 (2003).

II

NRS § 171.123(3) is an enactment sometimes referred to as a "stop and identify" statute. See Ala. Code § 15–5–30 (West 2003); Ark. Code Ann. § 5–71–213(a)(1) (2004); Colo. Rev. Stat. § 16–3–103(1) (2003); Del. Code Ann., Tit. 11, §§ 1902(a), 1321(6) (2003); Fla. Stat. § 856.021(2) (2003); Ga. Code Ann. § 16–11–36(b) (2003); Ill. Comp. Stat., ch. 725, § 5/107–14 (2004); Kan. Stat. Ann. § 22–2402(1) (2003); La. Code Crim. Proc. Ann., Art. 215.1(A) (West 2004); Mo. Rev. Stat. § 84.710(2) (2003); Mont. Code Ann. § 46–5–401(2)(a) (2003); Neb. Rev. Stat. § 29–829 (2003); N. H. Rev. Stat. Ann. §§ 594:2, 644:6 (Lexis 2003); N. M. Stat. Ann. § 30–22–3 (2004); N. Y. Crim. Proc. Law § 140.50(1) (West 2004); N. D. Cent. Code § 29–29–21 (2003); R. I. Gen. Laws § 12–7–1 (2003); Utah Code Ann. § 77–7–15 (2003); Vt. Stat. Ann., Tit. 24, § 1983 (Supp. 2003); Wis. Stat. § 968.24 (2003). See also Note, Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem, 12 Rutgers L. J. 585 (1981); Note, Stop-and-Identify Statutes After *Kolender v. Lawson:* Ex-

ploring the Fourth and Fifth Amendment Issues, 69 Iowa L. Rev. 1057 (1984).

Stop and identify statutes often combine elements of traditional vagrancy laws with provisions intended to regulate police behavior in the course of investigatory stops. The statutes vary from State to State, but all permit an officer to ask or require a suspect to disclose his identity. A few States model their statutes on the Uniform Arrest Act, a model code that permits an officer to stop a person reasonably suspected of committing a crime and "demand of him his name, address, business abroad and whither he is going." Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 344 (1942). Other statutes are based on the text proposed by the American Law Institute as part of the Institute's Model Penal Code. See ALI, Model Penal Code § 250.6, Comment 4, pp. 392–393 (1980). The provision, originally designated § 250.12, provides that a person who is loitering "under circumstances which justify suspicion that he may be engaged or about to engage in crime commits a violation if he refuses the request of a peace officer that he identify himself and give a reasonably credible account of the lawfulness of his conduct and purposes." § 250.12 (Tent. Draft No. 13) (1961). In some States, a suspect's refusal to identify himself is a misdemeanor offense or civil violation; in others, it is a factor to be considered in whether the suspect has violated loitering laws. In other States, a suspect may decline to identify himself without penalty.

Stop and identify statutes have their roots in early English vagrancy laws that required suspected vagrants to face arrest unless they gave "a good Account of themselves," 15 Geo. 2, ch. 5, § 2 (1744), a power that itself reflected common-law rights of private persons to "arrest any suspicious night-walker, and detain him till he give a good account of himself . . . ." 2 W. Hawkins, Pleas of the Crown, ch. 13, § 6, p. 130 (6th ed. 1787). In recent decades, the Court has found constitutional infirmity in traditional vagrancy laws.

In *Papachristou* v. *Jacksonville*, 405 U. S. 156 (1972), the Court held that a traditional vagrancy law was void for vagueness. Its broad scope and imprecise terms denied proper notice to potential offenders and permitted police officers to exercise unfettered discretion in the enforcement of the law. See *id.*, at 167–171.

The Court has recognized similar constitutional limitations on the scope and operation of stop and identify statutes. In *Brown* v. *Texas*, 443 U. S. 47, 52 (1979), the Court invalidated a conviction for violating a Texas stop and identify statute on Fourth Amendment grounds. The Court ruled that the initial stop was not based on specific, objective facts establishing reasonable suspicion to believe the suspect was involved in criminal activity. See *id.*, at 51–52. Absent that factual basis for detaining the defendant, the Court held, the risk of "arbitrary and abusive police practices" was too great and the stop was impermissible. *Id.*, at 52. Four Terms later, the Court invalidated a modified stop and identify statute on vagueness grounds. See *Kolender* v. *Lawson*, 461 U. S. 352 (1983). The California law in *Kolender* required a suspect to give an officer "'credible and reliable'" identification when asked to identify himself. *Id.*, at 360. The Court held that the statute was void because it provided no standard for determining what a suspect must do to comply with it, resulting in "'virtually unrestrained power to arrest and charge persons with a violation.'" *Ibid.* (quoting *Lewis* v. *New Orleans*, 415 U. S. 130, 135 (1974) (Powell, J., concurring in result)).

The present case begins where our prior cases left off. Here there is no question that the initial stop was based on reasonable suspicion, satisfying the Fourth Amendment requirements noted in *Brown*. Further, the petitioner has not alleged that the statute is unconstitutionally vague, as in *Kolender*. Here the Nevada statute is narrower and more precise. The statute in *Kolender* had been interpreted to require a suspect to give the officer "credible and reliable"

identification. In contrast, the Nevada Supreme Court has interpreted NRS § 171.123(3) to require only that a suspect disclose his name. See 118 Nev., at 875, 59 P. 3d, at 1206 (opinion of Young, C. J.) ("The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists"). As we understand it, the statute does not require a suspect to give the officer a driver's license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means—a choice, we assume, that the suspect may make—the statute is satisfied and no violation occurs. See *id.*, at 876–877, 59 P. 3d, at 1206–1207.

III

Hiibel argues that his conviction cannot stand because the officer's conduct violated his Fourth Amendment rights. We disagree.

Asking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment. "[I]nterrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure." *INS* v. *Delgado*, 466 U. S. 210, 216 (1984). Beginning with *Terry* v. *Ohio*, 392 U. S. 1 (1968), the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further. *Delgado*, *supra*, at 216; *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 881 (1975). To ensure that the resulting seizure is constitutionally reasonable, a *Terry* stop must be limited. The officer's action must be "'justified at its inception, and . . . reasonably related in scope to the circumstances which justified the interference in the first place.'" *United States* v. *Sharpe*, 470 U. S. 675, 682 (1985) (quoting *Terry*, *supra*, at 20). For example, the seizure can-

not continue for an excessive period of time, see *United States* v. *Place*, 462 U. S. 696, 709 (1983), or resemble a traditional arrest, see *Dunaway* v. *New York*, 442 U. S. 200, 212 (1979).

Our decisions make clear that questions concerning a suspect's identity are a routine and accepted part of many *Terry* stops. See *United States* v. *Hensley*, 469 U. S. 221, 229 (1985) ("[T]he ability to briefly stop [a suspect], ask questions, or check identification in the absence of probable cause promotes the strong government interest in solving crimes and bringing offenders to justice"); *Hayes* v. *Florida*, 470 U. S. 811, 816 (1985) ("[I]f there are articulable facts supporting a reasonable suspicion that a person has committed a criminal offense, that person may be stopped in order to identify him, to question him briefly, or to detain him briefly while attempting to obtain additional information"); *Adams* v. *Williams*, 407 U. S. 143, 146 (1972) ("A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time").

Obtaining a suspect's name in the course of a *Terry* stop serves important government interests. Knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder. On the other hand, knowing identity may help clear a suspect and allow the police to concentrate their efforts elsewhere. Identity may prove particularly important in cases such as this, where the police are investigating what appears to be a domestic assault. Officers called to investigate domestic disputes need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.

Although it is well established that an officer may ask a suspect to identify himself in the course of a *Terry* stop, it has been an open question whether the suspect can be ar-

rested and prosecuted for refusal to answer. See *Brown*, 443 U. S., at 53, n. 3. Petitioner draws our attention to statements in prior opinions that, according to him, answer the question in his favor. In *Terry*, Justice White stated in a concurring opinion that a person detained in an investigative stop can be questioned but is "not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest." 392 U. S., at 34. The Court cited this opinion in dicta in *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984), a decision holding that a routine traffic stop is not a custodial stop requiring the protections of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In the course of explaining why *Terry* stops have not been subject to *Miranda*, the Court suggested reasons why *Terry* stops have a "nonthreatening character," among them the fact that a suspect detained during a *Terry* stop "is not obliged to respond" to questions. See *Berkemer*, *supra*, at 439, 440. According to petitioner, these statements establish a right to refuse to answer questions during a *Terry* stop.

We do not read these statements as controlling. The passages recognize that the Fourth Amendment does not impose obligations on the citizen but instead provides rights against the government. As a result, the Fourth Amendment itself cannot require a suspect to answer questions. This case concerns a different issue, however. Here, the source of the legal obligation arises from Nevada state law, not the Fourth Amendment. Further, the statutory obligation does not go beyond answering an officer's request to disclose a name. See NRS § 171.123(3) ("Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer"). As a result, we cannot view the dicta in *Berkemer* or Justice White's concurrence in *Terry* as answering the question whether a State can compel a suspect to disclose his name during a *Terry* stop.

The principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop. The rea-

sonableness of a seizure under the Fourth Amendment is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979). The Nevada statute satisfies that standard. The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop. The threat of criminal sanction helps ensure that the request for identity does not become a legal nullity. On the other hand, the Nevada statute does not alter the nature of the stop itself: it does not change its duration, *Place*, *supra*, at 709, or its location, *Dunaway*, *supra*, at 212. A state law requiring a suspect to disclose his name in the course of a valid *Terry* stop is consistent with Fourth Amendment prohibitions against unreasonable searches and seizures.

Petitioner argues that the Nevada statute circumvents the probable-cause requirement, in effect allowing an officer to arrest a person for being suspicious. According to petitioner, this creates a risk of arbitrary police conduct that the Fourth Amendment does not permit. Brief for Petitioner 28–33. These are familiar concerns; they were central to the opinion in *Papachristou*, and also to the decisions limiting the operation of stop and identify statutes in *Kolender* and *Brown*. Petitioner's concerns are met by the requirement that a *Terry* stop must be justified at its inception and "reasonably related in scope to the circumstances which justified" the initial stop. 392 U. S., at 20. Under these principles, an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop. The Court noted a similar limitation in *Hayes*, where it suggested that *Terry* may permit an officer to determine a suspect's identity by compelling the suspect to submit to fingerprinting only if there is "a reasonable basis for believing that fingerprinting will establish or negate the suspect's connection with that crime." 470 U. S., at 817. It is clear in this case that the

request for identification was "reasonably related in scope to the circumstances which justified" the stop. *Terry*, *supra*, at 20. The officer's request was a commonsense inquiry, not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence. The stop, the request, and the State's requirement of a response did not contravene the guarantees of the Fourth Amendment.

IV

Petitioner further contends that his conviction violates the Fifth Amendment's prohibition on compelled self-incrimination. The Fifth Amendment states that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." To qualify for the Fifth Amendment privilege, a communication must be testimonial, incriminating, and compelled. See *United States* v. *Hubbell*, 530 U. S. 27, 34–38 (2000).

Respondents urge us to hold that the statements NRS § 171.123(3) requires are nontestimonial, and so outside the Clause's scope. We decline to resolve the case on that basis. "[T]o be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information." *Doe* v. *United States*, 487 U. S. 201, 210 (1988). See also *Hubbell*, 530 U. S., at 35. Stating one's name may qualify as an assertion of fact relating to identity. Production of identity documents might meet the definition as well. As we noted in *Hubbell*, acts of production may yield testimony establishing "the existence, authenticity, and custody of items [the police seek]." *Id.*, at 41. Even if these required actions are testimonial, however, petitioner's challenge must fail because in this case disclosure of his name presented no reasonable danger of incrimination.

The Fifth Amendment prohibits only compelled testimony that is incriminating. See *Brown* v. *Walker*, 161 U. S. 591, 598 (1896) (noting that where "the answer of the witness will not directly show his infamy, but only *tend* to disgrace him,

he is bound to answer"). A claim of Fifth Amendment privilege must establish

> "'reasonable ground to apprehend danger to the witness from his being compelled to answer . . . . [T]he danger to be apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things,—not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct.'" *Id.*, at 599–600 (quoting *Queen* v. *Boyes*, 1 B. & S. 311, 330, 121 Eng. Rep. 730, 738 (Q. B. 1861) (Cockburn, C. J.)).

As we stated in *Kastigar* v. *United States*, 406 U. S. 441, 445 (1972), the Fifth Amendment privilege against compulsory self-incrimination "protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Suspects who have been granted immunity from prosecution may, therefore, be compelled to answer; with the threat of prosecution removed, there can be no reasonable belief that the evidence will be used against them. See *id.*, at 453.

In this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it "would furnish a link in the chain of evidence needed to prosecute" him. *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). As best we can tell, petitioner refused to identify himself only because he thought his name was none of the officer's business. Even today, petitioner does not explain how the disclosure of his name could have been used against him in a criminal case. While we recognize petitioner's strong belief that he should not have to disclose his identity, the Fifth

Amendment does not override the Nevada Legislature's judgment to the contrary absent a reasonable belief that the disclosure would tend to incriminate him.

The narrow scope of the disclosure requirement is also important. One's identity is, by definition, unique; yet it is, in another sense, a universal characteristic. Answering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances. See *Baltimore City Dept. of Social Servs.* v. *Bouknight*, 493 U. S. 549, 555 (1990) (suggesting that "fact[s] the State could readily establish" may render "any testimony regarding existence or authenticity [of them] insufficiently incriminating"); cf. *California* v. *Byers*, 402 U. S. 424, 432 (1971) (opinion of Burger, C. J.). In every criminal case, it is known and must be known who has been arrested and who is being tried. Cf. *Pennsylvania* v. *Muniz*, 496 U. S. 582, 601–602 (1990) (principal opinion of Brennan, J.). Even witnesses who plan to invoke the Fifth Amendment privilege answer when their names are called to take the stand. Still, a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence needed to convict the individual of a separate offense. In that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow. We need not resolve those questions here.

The judgment of the Nevada Supreme Court is

Affirmed.

JUSTICE STEVENS, dissenting.

The Nevada law at issue in this case imposes a narrow duty to speak upon a specific class of individuals. The class includes only those persons detained by a police officer "under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a

crime"[1]—persons who are, in other words, targets of a criminal investigation. The statute therefore is directed not "at the public at large," but rather "at a highly selective group inherently suspect of criminal activities." *Albertson* v. *Subversive Activities Control Bd.*, 382 U. S. 70, 79 (1965).

Under the Nevada law, a member of the targeted class "may not be compelled to answer" any inquiry except a command that he "identify himself."[2] Refusal to identify oneself upon request is punishable as a crime.[3] Presumably the statute does not require the detainee to answer any other question because the Nevada Legislature realized that the Fifth Amendment prohibits compelling the target of a criminal investigation to make any other statement. In my judgment, the broad constitutional right to remain silent, which derives from the Fifth Amendment's guarantee that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself,"[4] is not as circumscribed as the Court suggests, and does not admit even of the narrow exception defined by the Nevada statute.

"[T]here can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda* v. *Arizona*, 384 U. S. 436, 467 (1966). It is a "settled principle" that "the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes," but

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[1] Nev. Rev. Stat. § 171.123(1) (2003).

[2] § 171.123(3).

[3] In this case, petitioner was charged with violating § 199.280, which makes it a crime to "willfully resis[t], dela[y] or obstruc[t] a public officer in discharging or attempting to discharge any legal duty of his office." A violation of that provision is a misdemeanor unless a dangerous weapon is involved.

[4] The Fifth Amendment's protection against compelled self-incrimination applies to the States through the Fourteenth Amendment's Due Process Clause. See *Malloy* v. *Hogan*, 378 U. S. 1, 6 (1964).

"they have no right to compel them to answer." *Davis* v. *Mississippi*, 394 U. S. 721, 727, n. 6 (1969). The protections of the Fifth Amendment are directed squarely toward those who are the focus of the government's investigative and prosecutorial powers. In a criminal trial, the indicted defendant has an unqualified right to refuse to testify and may not be punished for invoking that right. See *Carter* v. *Kentucky*, 450 U. S. 288, 299–300 (1981). The unindicted target of a grand jury investigation enjoys the same constitutional protection even if he has been served with a subpoena. See *Chavez* v. *Martinez*, 538 U. S. 760, 767–768 (2003). So does an arrested suspect during custodial interrogation in a police station. *Miranda*, 384 U. S., at 467.

There is no reason why the subject of police interrogation based on mere suspicion, rather than probable cause, should have any lesser protection. Indeed, we have said that the Fifth Amendment's protections apply with equal force in the context of *Terry* stops, see *Terry* v. *Ohio*, 392 U. S. 1 (1968), where an officer's inquiry "must be 'reasonably related in scope to the justification for [the stop's] initiation,'" *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984) (some internal quotation marks omitted). "Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond." *Ibid.* See also *Terry*, 392 U. S., at 34 (White, J., concurring) ("Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation"). Given our statements to the effect that citizens are not required to respond to police officers' questions during a *Terry* stop, it is no surprise that petitioner assumed, as have we, that he had a right not to disclose his identity.

The Court correctly observes that a communication does not enjoy the Fifth Amendment privilege unless it is testi-

monial. Although the Court declines to resolve this question, *ante*, at 189, I think it clear that this case concerns a testimonial communication. Recognizing that whether a communication is testimonial is sometimes a "difficult question," *Doe* v. *United States*, 487 U. S. 201, 214–215 (1988), we have stated generally that "[i]t is the 'extortion of information from the accused,' the attempt to force him 'to disclose the contents of his own mind,' that implicates the Self-Incrimination Clause," *id.*, at 211 (citations omitted). While "[t]he vast majority of verbal statements thus will be testimonial and, to that extent at least, will fall within the privilege," *id.*, at 213–214, certain acts and physical evidence fall outside the privilege.[5] In all instances, we have afforded Fifth Amendment protection if the disclosure in question was being admitted because of its content rather than some other aspect of the communication.[6]

Considered in light of these precedents, the compelled statement at issue in this case is clearly testimonial. It is significant that the communication must be made in response

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[5] A suspect may be made, for example, to provide a blood sample, *Schmerber* v. *California*, 384 U. S. 757, 765 (1966), a voice exemplar, *United States* v. *Dionisio*, 410 U. S. 1, 7 (1973), or a handwriting sample, *Gilbert* v. *California*, 388 U. S. 263, 266–267 (1967).

[6] See *Pennsylvania* v. *Muniz*, 496 U. S. 582, 598–599 (1990) (respondent's answer to the "birthday question" was protected because the "content of his truthful answer supported an inference that his mental faculties were impaired"); *Doe* v. *United States*, 487 U. S. 201, 211, n. 10 (1988) ("The content itself must have testimonial significance"); *Fisher* v. *United States*, 425 U. S. 391, 410–411 (1976) ("[H]owever incriminating the contents of the accountant's workpapers might be, the act of producing them—the only thing which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination"); *Gilbert*, 388 U. S., at 266–267 ("A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside its protection"); *United States* v. *Wade*, 388 U. S. 218, 223 (1967) ("[I]t deserves emphasis that this case presents no question of the admissibility in evidence of anything Wade said or did at the lineup which implicates his privilege").

to a question posed by a police officer. As we recently explained, albeit in the different context of the Sixth Amendment's Confrontation Clause, "[w]hatever else the term ['testimonial'] covers, it applies at a minimum . . . to police interrogations." *Crawford* v. *Washington*, 541 U. S. 36, 68 (2004). Surely police questioning during a *Terry* stop qualifies as an interrogation, and it follows that responses to such questions are testimonial in nature.

Rather than determining whether the communication at issue is testimonial, the Court instead concludes that the State can compel the disclosure of one's identity because it is not "incriminating." *Ante*, at 189. But our cases have afforded Fifth Amendment protection to statements that are "incriminating" in a much broader sense than the Court suggests. It has "long been settled that [the Fifth Amendment's] protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence." *United States* v. *Hubbell*, 530 U. S. 27, 37 (2000). By "incriminating" we have meant disclosures that "could be used in a criminal prosecution or could lead to other evidence that might be so used," *Kastigar* v. *United States*, 406 U. S. 441, 445 (1972)—communications, in other words, that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime," *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). Thus, "[c]ompelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." *Hubbell*, 530 U. S., at 38 (quoting *Doe*, 487 U. S., at 208, n. 6).

Given a proper understanding of the category of "incriminating" communications that fall within the Fifth Amendment privilege, it is clear that the disclosure of petitioner's identity is protected. The Court reasons that we should not assume that the disclosure of petitioner's "name would be used to incriminate him, or that it would furnish a link in [a]

chain of evidence needed to prosecute him." *Ante,* at 190 (internal quotation marks omitted). But why else would an officer ask for it? And why else would the Nevada Legislature require its disclosure only when circumstances "reasonably indicate that the person has committed, is committing or is about to commit a crime"?[7] If the Court is correct, then petitioner's refusal to cooperate did not impede the police investigation. Indeed, if we accept the predicate for the Court's holding, the statute requires nothing more than a useless invasion of privacy. I think that, on the contrary, the Nevada Legislature intended to provide its police officers with a useful law enforcement tool, and that the very existence of the statute demonstrates the value of the information it demands.

A person's identity obviously bears informational and incriminating worth, "even if the [name] itself is not inculpatory." *Hubbell,* 530 U. S., at 38. A name can provide the key to a broad array of information about the person, particularly in the hands of a police officer with access to a range of law enforcement databases. And that information, in turn, can be tremendously useful in a criminal prosecution. It is therefore quite wrong to suggest that a person's identity provides a link in the chain to incriminating evidence "only in unusual circumstances." *Ante,* at 191.

The officer in this case told petitioner, in the Court's words, that "he was conducting an investigation and needed to see some identification." *Ante,* at 181. As the target of that investigation, petitioner, in my view, acted well within his rights when he opted to stand mute. Accordingly, I respectfully dissent.

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[7] Nev. Rev. Stat. § 171.123(1) (2003). The Court suggests that furnishing identification also allows the investigating officer to assess the threat to himself and others. See *ante,* at 186. But to the extent that officer or public safety is immediately at issue, that concern is sufficiently alleviated by the officer's ability to perform a limited patdown search for weapons. See *Terry* v. *Ohio,* 392 U. S. 1, 25–26 (1968).

JUSTICE BREYER, with whom JUSTICE SOUTER and JUSTICE GINSBURG join, dissenting.

Notwithstanding the vagrancy statutes to which the majority refers, see *ante,* at 183–184, this Court's Fourth Amendment precedents make clear that police may conduct a *Terry* stop only within circumscribed limits. And one of those limits invalidates laws that compel responses to police questioning.

In *Terry* v. *Ohio,* 392 U. S. 1 (1968), the Court considered whether police, in the absence of probable cause, can stop, question, or frisk an individual at all. The Court recognized that the Fourth Amendment protects the "'right of every individual to the possession and control of his own person.'" *Id.,* at 9 (quoting *Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 251 (1891)). At the same time, it recognized that in certain circumstances, public safety might require a limited "seizure," or stop, of an individual against his will. The Court consequently set forth conditions circumscribing when and how the police might conduct a *Terry* stop. They include what has become known as the "reasonable suspicion" standard. 392 U. S., at 20–22. Justice White, in a separate concurring opinion, set forth further conditions. Justice White wrote: "Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.,* at 34.

About 10 years later, the Court, in *Brown* v. *Texas,* 443 U. S. 47 (1979), held that police lacked "any reasonable suspicion" to detain the particular petitioner and require him to identify himself. *Id.,* at 53. The Court noted that the trial judge had asked the following: "'I'm sure [officers conducting a *Terry* stop] should ask everything they possibly could find out. *What I'm asking is what's the State's interest in putting a man in jail because he doesn't want to answer . . . .*'" *Id.,* at 54 (Appendix to opinion of the Court) (emphasis in

original). The Court referred to Justice White's *Terry* concurrence. 443 U. S., at 53, n. 3. And it said that it "need not decide" the matter. *Ibid.*

Then, five years later, the Court wrote that an "officer may ask the *[Terry]* detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. *But the detainee is not obliged to respond.*" *Berkemer* v. *McCarty*, 468 U. S. 420, 439 (1984) (emphasis added). See also *Kolender* v. *Lawson*, 461 U. S. 352, 365 (1983) (Brennan, J., concurring) (*Terry* suspect "must be free to . . . decline to answer the questions put to him"); *Illinois* v. *Wardlow*, 528 U. S. 119, 125 (2000) (stating that allowing officers to stop and question a fleeing person "is quite consistent with the individual's right to go about his business or to stay put and remain silent in the face of police questioning").

This lengthy history—of concurring opinions, of references, and of clear explicit statements—means that the Court's statement in *Berkemer*, while technically dicta, is the kind of strong dicta that the legal community typically takes as a statement of the law. And that law has remained undisturbed for more than 20 years.

There is no good reason now to reject this generation-old statement of the law. There are sound reasons rooted in Fifth Amendment considerations for adhering to this Fourth Amendment legal condition circumscribing police authority to stop an individual against his will. See *ante*, at 192–196 (STEVENS, J., dissenting). Administrative considerations also militate against change. Can a State, in addition to requiring a stopped individual to answer "What's your name?" also require an answer to "What's your license number?" or "Where do you live?" Can a police officer, who must know how to make a *Terry* stop, keep track of the constitutional answers? After all, answers to any of these questions may, or may not, incriminate, depending upon the circumstances.

Indeed, as the Court points out, a name itself—even if it is not "Killer Bill" or "Rough 'em up Harry"—will sometimes provide the police with "a link in the chain of evidence needed to convict the individual of a separate offense." *Ante*, at 191. The majority reserves judgment about whether compulsion is permissible in such instances. *Ibid.* How then is a police officer in the midst of a *Terry* stop to distinguish between the majority's ordinary case and this special case where the majority reserves judgment?

The majority presents no evidence that the rule enunciated by Justice White and then by the *Berkemer* Court, which for nearly a generation has set forth a settled *Terry*-stop condition, has significantly interfered with law enforcement. Nor has the majority presented any other convincing justification for change. I would not begin to erode a clear rule with special exceptions.

I consequently dissent.

Syllabus

AETNA HEALTH INC., FKA AETNA U. S. HEALTHCARE INC., ET AL. *v.* DAVILA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02–1845. Argued March 23, 2004—Decided June 21, 2004*

Respondents brought separate Texas state-court suits, alleging that petitioners, their health maintenance organizations (HMOs), had refused to cover certain medical services in violation of an HMO's duty "to exercise ordinary care" under the Texas Health Care Liability Act (THCLA), and that those refusals "proximately caused" respondents' injuries. Petitioners removed the cases to federal courts, claiming that the actions fit within the scope of, and were thus completely pre-empted by, § 502 of the Employee Retirement Income Security Act of 1974 (ERISA). The District Courts agreed, declined to remand the cases to state court, and dismissed the complaints with prejudice after respondents refused to amend them to bring explicit ERISA claims. Consolidating these and other cases, the Fifth Circuit reversed. It found that respondents' claims did not fall under ERISA § 502(a)(2), which allows suit against a plan fiduciary for breaches of fiduciary duty to the plan, because petitioners were being sued for mixed eligibility and treatment decisions that were not fiduciary in nature, see *Pegram* v. *Herdrich*, 530 U. S. 211; and did not fall within the scope of § 502(a)(1)(B), which provides a cause of action for the recovery of wrongfully denied benefits, because THCLA did not duplicate that cause of action, see *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355.

Held: Respondents' state causes of action fall within ERISA § 502(a)(1)(B), and are therefore completely pre-empted by ERISA § 502 and removable to federal court. Pp. 207–221.

(a) When a federal statute completely pre-empts a state-law cause of action, the state claim can be removed. See *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 8. ERISA is such a statute. Because its purpose is to provide a uniform regulatory regime, ERISA includes expansive pre-emption provisions, such as ERISA § 502(a)'s integrated enforcement mechanism, which are intended to ensure that employee benefit plan regulation is "exclusively a federal concern," *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 523. Any state-law cause of

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*Together with No. 03–83, *CIGNA HealthCare of Texas, Inc., dba CIGNA Corp.* v. *Calad et al.*, also on certiorari to the same court.

action that duplicates, supplements, or supplants ERISA's civil enforcement remedy conflicts with clear congressional intent to make that remedy exclusive, and is therefore pre-empted. ERISA § 502(a)'s pre-emptive force is still stronger. Since ERISA § 502(a)(1)(B)'s pre-emptive force mirrors that of § 301 of the Labor Management Relations Act, 1947, *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58, 65–66, and since § 301 converts state causes of actions into federal ones for purposes of determining the propriety of removal, so too does ERISA § 502(a)(1)(B). Pp. 207–209.

(b) If an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where no other independent legal duty is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B). Respondents brought suit only to rectify wrongful benefits denials, and their only relationship with petitioners is petitioners' partial administration of their ERISA-regulated benefit plans; respondents therefore could have brought § 502(a)(1)(B) claims to recover the allegedly wrongfully denied benefits. Both respondents allege violations of the THCLA's duty of ordinary care, which they claim is entirely independent of any ERISA duty or the employee benefits plans at issue. However, respondents' claims do not arise independently of ERISA or the plan terms. If a managed care entity correctly concluded that, under the relevant plan's terms, a particular treatment was not covered, the plan's failure to cover the requested treatment would be the proximate cause of any injury arising from the denial. More significantly, the THCLA provides that a managed care entity is not subject to THCLA liability if it denies coverage for a treatment not covered by the plan it administers. Pp. 210–214.

(c) The Fifth Circuit's reasons for reaching its contrary conclusion are all erroneous. First, it found significant that respondents asserted tort, rather than contract, claims and that they were not seeking reimbursement for benefits denied. However, distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would allow parties to evade ERISA's pre-emptive scope simply by relabeling contract claims as claims for tortious breach of contracts. And the fact that a state cause of action attempts to authorize remedies beyond those that ERISA § 502(a) authorizes does not put it outside the scope of ERISA's civil enforcement mechanism. See, *e. g.*, *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 43. Second, the court believed the plans' wording immaterial because the claims invoked an external ordinary care duty, but the wording is material to the state causes of action and the THCLA creates a duty that is not external to respondents' rights under their respective plans. Finally, nowhere in *Rush Pruden-*

Syllabus

tial did this Court suggest that ERISA § 502(a)'s pre-emptive force is limited to state causes of action that precisely duplicate an ERISA § 502(a) cause. Nor would it be consistent with this Court's precedent to do so. Pp. 214–216.

(d) Also unavailing is respondents' argument that the THCLA is a law regulating insurance that is saved from pre-emption by ERISA § 514(b)(2)(A). This Court's understanding of § 514(b)(2)(A) is informed by the overpowering federal policy embodied in ERISA § 502(a), which is intended to create an exclusive federal remedy, *Pilot Life*, 481 U. S., at 52. Allowing respondents to proceed with their state-law suits would "pose an obstacle" to that objective. *Ibid.* Pp. 216–218.

(e) *Pegram*'s holding that an HMO is not intended to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians is not implicated here because petitioners' coverage decisions are pure eligibility decisions. A benefit determination under ERISA is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan. That it is infused with medical judgments does not alter this result. *Pegram* itself recognized this principle, see 530 U. S., at 231–232. And ERISA and its implementing regulations confirm this interpretation. Here, petitioners are neither respondents' treating physicians nor those physicians' employees. Pp. 218–221.

307 F. 3d 298, reversed and remanded.

THOMAS, J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which BREYER, J., joined, *post*, p. 222.

Miguel A. Estrada argued the cause for petitioners in both cases. With him on the briefs in No. 02–1845 were *Mark A. Perry*, *J. Edward Neugebauer*, *John B. Shely*, *Kendall M. Gray*, and *Roy T. Englert, Jr.* On the briefs in No. 03–83 were *Robert N. Eccles* and *Jonathan D. Hacker.*

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Acting Solicitor General Clement*, *Deputy Solicitor General Kneedler*, *Howard M. Radzely*, *Allen H. Feldman*, *Nathaniel I. Spiller*, and *Edward D. Sieger.*

David Mattax, Assistant Attorney General of Texas, argued the cause for the State of Texas et al. as *amici curiae* urging affirmance. With him on the brief were *Greg Abbott*,

Attorney General, *Barry R. McBee*, First Assistant Attorney General, *Edward D. Burbach*, Deputy Attorney General, *R. Ted Cruz*, Solicitor General, *Rance L. Craft* and *Kristofer S. Monson*, Assistant Solicitors General, and *Anabelle Rodríguez*, Secretary of Justice of Puerto Rico, and by the Attorneys General for their respective States as follows: *Bill Lockyer* of California, *Richard Blumenthal* of Connecticut, *M. Jane Brady* of Delaware, *Lisa Madigan* of Illinois, *Phill Kline* of Kansas, *Charles C. Foti, Jr.*, of Louisiana, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Jeremiah W. "Jay" Nixon* of Missouri, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Patricia A. Madrid* of New Mexico, *Eliot Spitzer* of New York, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Hardy Myers* of Oregon, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, and *Christine O. Gregoire* of Washington.

George Parker Young argued the cause for respondents in both cases. With him on the brief was *Eric Schnapper*.†

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†Briefs of *amici curiae* urging reversal were filed for AAHP–HIAA et al. by *Seth P. Waxman*, *Edward C. DuMont*, *Kenneth A. Bamberger*, and *Stephanie W. Kanwit;* for the Association of Federal Health Organizations by *Anthony F. Shelley* and *James R. Barnett;* and for the Chamber of Commerce of the United States by *Glen D. Nager*, *Traci L. Lovitt*, *Stephen A. Bokat*, and *Robin S. Conrad*.

Briefs of *amici curiae* urging affirmance were filed for AARP et al. by *Sarah Lenz Lock*, *Michael Schuster*, and *Judith L. Lichtman;* for the American College of Legal Medicine by *Miles J. Zaremski;* for the American Medical Association et al. by *Gary W. Howell*, *Thomas Campbell*, *Jon N. Ekdahl*, *Leonard A. Nelson*, and *Donald P. Wilcox;* for the Association of Trial Lawyers of America by *Daniel M. Soloway*, *Jeffrey Robert White*, and *David S. Casey, Jr.;* for the California Consumer Health Care Council et al. by *Eugene R. Anderson*, *Rhonda D. Orin*, *Daniel J. Healy*, and *David Trueman;* for Community Rights Counsel et al. by *Timothy J. Dowling;* for the Council of State Governments et al. by *Richard Ruda* and *James I. Crowley;* for Families USA et al. by *Jeffrey Lewis;* for the Health Administration Responsibility Project by *Sharon J. Arkin* and *Harvey S. Frey;* for the National Alliance for Model State Drug Laws by *Gerald*

JUSTICE THOMAS delivered the opinion of the Court.

In these consolidated cases, two individuals sued their respective health maintenance organizations (HMOs) for alleged failures to exercise ordinary care in the handling of coverage decisions, in violation of a duty imposed by the Texas Health Care Liability Act (THCLA), Tex. Civ. Prac. & Rem. Code Ann. §§ 88.001–88.003 (West 2004 Supp. Pamphlet). We granted certiorari to decide whether the individuals' causes of action are completely pre-empted by the "interlocking, interrelated, and interdependent remedial scheme," *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134, 146 (1985), found at § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 88 Stat. 891, as amended, 29 U. S. C. § 1132(a) *et seq.* 540 U. S. 981 (2003). We hold that the causes of action are completely pre-empted and hence removable from state to federal court. The Court of Appeals, having reached a contrary conclusion, is reversed.

I

A

Respondent Juan Davila is a participant, and respondent Ruby Calad is a beneficiary, in ERISA-regulated employee benefit plans. Their respective plan sponsors had entered into agreements with petitioners, Aetna Health Inc. and CIGNA HealthCare of Texas, Inc., to administer the plans. Under Davila's plan, for instance, Aetna reviews requests for coverage and pays providers, such as doctors, hospitals, and nursing homes, which perform covered services for members; under Calad's plan sponsor's agreement, CIGNA is responsible for plan benefits and coverage decisions.

Respondents both suffered injuries allegedly arising from Aetna's and CIGNA's decisions not to provide coverage for

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A. McHugh, Jr., and *Gregory B. Heller;* for United Policyholders by *Arnold R. Levinson;* and for Senator Edward M. Kennedy et al. by *Mr. Zaremski.*

certain treatment and services recommended by respondents' treating physicians. Davila's treating physician prescribed Vioxx to remedy Davila's arthritis pain, but Aetna refused to pay for it. Davila did not appeal or contest this decision, nor did he purchase Vioxx with his own resources and seek reimbursement. Instead, Davila began taking Naprosyn, from which he allegedly suffered a severe reaction that required extensive treatment and hospitalization. Calad underwent surgery, and although her treating physician recommended an extended hospital stay, a CIGNA discharge nurse determined that Calad did not meet the plan's criteria for a continued hospital stay. CIGNA consequently denied coverage for the extended hospital stay. Calad experienced postsurgery complications forcing her to return to the hospital. She alleges that these complications would not have occurred had CIGNA approved coverage for a longer hospital stay.

Respondents brought separate suits in Texas state court against petitioners. Invoking THCLA § 88.002(a), respondents argued that petitioners' refusal to cover the requested services violated their "duty to exercise ordinary care when making health care treatment decisions," and that these refusals "proximately caused" their injuries. *Ibid.* Petitioners removed the cases to Federal District Courts, arguing that respondents' causes of action fit within the scope of, and were therefore completely pre-empted by, ERISA § 502(a). The respective District Courts agreed, and declined to remand the cases to state court. Because respondents refused to amend their complaints to bring explicit ERISA claims, the District Courts dismissed the complaints with prejudice.

B

Both Davila and Calad appealed the refusals to remand to state court. The United States Court of Appeals for the Fifth Circuit consolidated their cases with several others raising similar issues. The Court of Appeals recognized

that state causes of action that "duplicat[e] or fal[l] within the scope of an ERISA § 502(a) remedy" are completely pre-empted and hence removable to federal court. *Roark* v. *Humana, Inc.*, 307 F. 3d 298, 305 (2002) (internal quotation marks omitted). After examining the causes of action available under § 502(a), the Court of Appeals determined that respondents' claims could possibly fall under only two: § 502(a)(1)(B), which provides a cause of action for the recovery of wrongfully denied benefits, and § 502(a)(2), which allows suit against a plan fiduciary for breaches of fiduciary duty to the plan.

Analyzing § 502(a)(2) first, the Court of Appeals concluded that, under *Pegram* v. *Herdrich*, 530 U. S. 211 (2000), the decisions for which petitioners were being sued were "mixed eligibility and treatment decisions" and hence were not fiduciary in nature. 307 F. 3d, at 307–308.[1] The Court of Appeals next determined that respondents' claims did not fall within § 502(a)(1)(B)'s scope. It found significant that respondents "assert tort claims," while § 502(a)(1)(B) "creates a cause of action for breach of contract," *id.*, at 309, and also that respondents "are not seeking reimbursement for benefits denied them," but rather request "tort damages" arising from "an external, statutorily imposed duty of 'ordinary care,'" *ibid.* From *Rush Prudential HMO, Inc.* v. *Moran*, 536 U. S. 355 (2002), the Court of Appeals derived the principle that complete pre-emption is limited to situations in which "States . . . duplicate the causes of action listed in ERISA § 502(a)," and concluded that "[b]ecause the THCLA does not provide an action for collecting benefits," it fell outside the scope of § 502(a)(1)(B). 307 F. 3d, at 310–311.

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[1] In this Court, petitioners do not claim or argue that respondents' causes of action fall under ERISA § 502(a)(2). Because petitioners do not argue this point, and since we can resolve these cases entirely by reference to ERISA § 502(a)(1)(B), we do not address ERISA § 502(a)(2).

II

A

Under the removal statute, "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant" to federal court. 28 U. S. C. § 1441(a). One category of cases of which district courts have original jurisdiction is "[f]ederal question" cases: cases "arising under the Constitution, laws, or treaties of the United States." § 1331. We face in these cases the issue whether respondents' causes of action arise under federal law.

Ordinarily, determining whether a particular case arises under federal law turns on the "'well-pleaded complaint'" rule. *Franchise Tax Bd. of Cal.* v. *Construction Laborers Vacation Trust for Southern Cal.*, 463 U. S. 1, 9–10 (1983). The Court has explained that

> "whether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute[,] . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Taylor* v. *Anderson*, 234 U. S. 74, 75–76 (1914).

In particular, the existence of a federal defense normally does not create statutory "arising under" jurisdiction, *Louisville & Nashville R. Co.* v. *Mottley*, 211 U. S. 149 (1908), and "a defendant may not [generally] remove a case to federal court unless the *plaintiff's* complaint establishes that the case 'arises under' federal law," *Franchise Tax Bd.*, *supra*, at 10. There is an exception, however, to the well-pleaded complaint rule. "[W]hen a federal statute wholly displaces the state-law cause of action through complete pre-emption," the state claim can be removed. *Beneficial Nat. Bank* v. *Anderson*, 539 U. S. 1, 8 (2003). This is so because "[w]hen

the federal statute completely pre-empts the state-law cause of action, a claim which comes within the scope of that cause of action, even if pleaded in terms of state law, is in reality based on federal law." *Ibid.* ERISA is one of these statutes.

B

Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans and their beneficiaries" by setting out substantive regulatory requirements for employee benefit plans and to "provid[e] for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U. S. C. § 1001(b). The purpose of ERISA is to provide a uniform regulatory regime over employee benefit plans. To this end, ERISA includes expansive pre-emption provisions, see ERISA § 514, 29 U. S. C. § 1144, which are intended to ensure that employee benefit plan regulation would be "exclusively a federal concern." *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U. S. 504, 523 (1981).

ERISA's "comprehensive legislative scheme" includes "an integrated system of procedures for enforcement." *Russell*, 473 U. S., at 147 (internal quotation marks omitted). This integrated enforcement mechanism, ERISA § 502(a), 29 U. S. C. § 1132(a), is a distinctive feature of ERISA, and essential to accomplish Congress' purpose of creating a comprehensive statute for the regulation of employee benefit plans. As the Court said in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41 (1987):

> "[T]he detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan

> participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA. 'The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.*, at 54 (quoting *Russell*, *supra*, at 146).

Therefore, any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted. See 481 U. S., at 54–56; see also *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 143–145 (1990).

The pre-emptive force of ERISA § 502(a) is still stronger. In *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58, 65–66 (1987), the Court determined that the similarity of the language used in the Labor Management Relations Act, 1947 (LMRA), and ERISA, combined with the "clear intention" of Congress "to make § 502(a)(1)(B) suits brought by participants or beneficiaries federal questions for the purposes of federal court jurisdiction in like manner as § 301 of the LMRA," established that ERISA § 502(a)(1)(B)'s pre-emptive force mirrored the pre-emptive force of LMRA § 301. Since LMRA § 301 converts state causes of action into federal ones for purposes of determining the propriety of removal, see *Avco Corp.* v. *Machinists*, 390 U. S. 557 (1968), so too does ERISA § 502(a)(1)(B). Thus, the ERISA civil enforcement mechanism is one of those provisions with such "extraordinary pre-emptive power" that it "converts an ordinary state common law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule." *Metropolitan Life*, 481 U. S., at 65–66. Hence, "causes of action within the scope of the civil enforcement provisions of § 502(a) [are] removable to federal court." *Id.*, at 66.

III

A

ERISA § 502(a)(1)(B) provides:

> "A civil action may be brought—(1) by a participant or beneficiary—. . . (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." 29 U. S. C. § 1132(a)(1)(B).

This provision is relatively straightforward. If a participant or beneficiary believes that benefits promised to him under the terms of the plan are not provided, he can bring suit seeking provision of those benefits. A participant or beneficiary can also bring suit generically to "enforce his rights" under the plan, or to clarify any of his rights to future benefits. Any dispute over the precise terms of the plan is resolved by a court under a *de novo* review standard, unless the terms of the plan "giv[e] the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U. S. 101, 115 (1989).

It follows that if an individual brings suit complaining of a denial of coverage for medical care, where the individual is entitled to such coverage only because of the terms of an ERISA-regulated employee benefit plan, and where no legal duty (state or federal) independent of ERISA or the plan terms is violated, then the suit falls "within the scope of" ERISA § 502(a)(1)(B). *Metropolitan Life*, *supra*, at 66. In other words, if an individual, at some point in time, could have brought his claim under ERISA § 502(a)(1)(B), and where there is no other independent legal duty that is implicated by a defendant's actions, then the individual's cause of action is completely pre-empted by ERISA § 502(a)(1)(B).

To determine whether respondents' causes of action fall "within the scope" of ERISA § 502(a)(1)(B), we must examine respondents' complaints, the statute on which their claims are based (the THCLA), and the various plan documents. Davila alleges that Aetna provides health coverage under his employer's health benefits plan. App. H to Pet. for Cert. in No. 02–1845, p. 67a, ¶ 11. Davila also alleges that after his primary care physician prescribed Vioxx, Aetna refused to pay for it. *Id.*, at 67a, ¶ 12. The only action complained of was Aetna's refusal to approve payment for Davila's Vioxx prescription. Further, the only relationship Aetna had with Davila was its partial administration of Davila's employer's benefit plan. See App. JA–25, JA–31, JA–39 to JA–40, JA–45 to JA–48, JA–108.

Similarly, Calad alleges that she receives, as her husband's beneficiary under an ERISA-regulated benefit plan, health coverage from CIGNA. *Id.*, at JA–184, ¶ 17. She alleges that she was informed by CIGNA, upon admittance into a hospital for major surgery, that she would be authorized to stay for only one day. *Id.*, at JA–184, ¶ 18. She also alleges that CIGNA, acting through a discharge nurse, refused to authorize more than a single day despite the advice and recommendation of her treating physician. *Id.*, at JA–185, ¶¶ 20, 21. Calad contests only CIGNA's decision to refuse coverage for her hospital stay. *Id.*, at JA–185, ¶ 20. And, as in Davila's case, the only connection between Calad and CIGNA is CIGNA's administration of portions of Calad's ERISA-regulated benefit plan. *Id.*, at JA–219 to JA–221.

It is clear, then, that respondents complain only about denials of coverage promised under the terms of ERISA-regulated employee benefit plans. Upon the denial of benefits, respondents could have paid for the treatment themselves and then sought reimbursement through a § 502(a)(1)(B) action, or sought a preliminary injunction, see *Pryzbowski* v. *U. S. Healthcare, Inc.*, 245 F. 3d 266, 274 (CA3

2001) (giving examples where federal courts have issued such preliminary injunctions).[2]

Respondents contend, however, that the complained-of actions violate legal duties that arise independently of ERISA or the terms of the employee benefit plans at issue in these cases. Both respondents brought suit specifically under the THCLA, alleging that petitioners "controlled, influenced, participated in and made decisions which affected the quality of the diagnosis, care, and treatment provided" in a manner that violated "the duty of ordinary care set forth in §§ 88.001 and 88.002." App. H to Pet. for Cert. in No. 02–1845, at 69a, ¶ 18; see also App. JA–187, ¶ 28. Respondents contend that this duty of ordinary care is an independent legal duty. They analogize to this Court's decisions interpreting LMRA § 301, 29 U. S. C. § 185, with particular focus on *Caterpillar Inc.* v. *Williams*, 482 U. S. 386 (1987) (suit for breach of individual employment contract, even if defendant's action also constituted a breach of an entirely separate collective-bargaining agreement, not pre-empted by LMRA § 301). Because this duty of ordinary care arises independently of any duty imposed by ERISA or the plan terms, the argument goes, any civil action to enforce this duty is not within the scope of the ERISA civil enforcement mechanism.

The duties imposed by the THCLA in the context of these cases, however, do not arise independently of ERISA or the plan terms. The THCLA does impose a duty on managed care entities to "exercise ordinary care when making health care treatment decisions," and makes them liable for damages proximately caused by failures to abide by that duty.

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[2] Respondents also argue that the benefit due under their ERISA-regulated employee benefit plans is simply the membership in the respective HMOs, not coverage for the particular medical treatments that are delineated in the plan documents. See Brief for Respondents 28–30. Respondents did not identify this possible argument in their brief in opposition to the petitions for certiorari, and we deem it waived. See this Court's Rule 15.2.

§ 88.002(a). However, if a managed care entity correctly concluded that, under the terms of the relevant plan, a particular treatment was not covered, the managed care entity's denial of coverage would not be a proximate cause of any injuries arising from the denial. Rather, the failure of the plan itself to cover the requested treatment would be the proximate cause.[3] More significantly, the THCLA clearly states that "[t]he standards in Subsections (a) and (b) create no obligation on the part of the health insurance carrier, health maintenance organization, or other managed care entity to provide to an insured or enrollee treatment which is not covered by the health care plan of the entity." § 88.002(d). Hence, a managed care entity could not be subject to liability under the THCLA if it denied coverage for any treatment not covered by the health care plan that it was administering.

Thus, interpretation of the terms of respondents' benefit plans forms an essential part of their THCLA claim, and THCLA liability would exist here only because of petitioners' administration of ERISA-regulated benefit plans. Petitioners' potential liability under the THCLA in these cases, then, derives entirely from the particular rights and obligations established by the benefit plans. So, unlike the state-law claims in *Caterpillar*, *supra*, respondents' THCLA causes of action are not entirely independent of the federally regulated contract itself. Cf. *Allis-Chalmers Corp.* v. *Lueck*, 471 U. S. 202, 217 (1985) (state-law tort of bad-faith handling of insurance claim pre-empted by LMRA § 301, since the "duties imposed and rights established through the state tort . . . derive[d] from the rights and obligations established by the contract"); *Steelworkers* v. *Rawson*, 495 U. S.

[3] To take a clear example, if the terms of the health care plan specifically exclude from coverage the cost of an appendectomy, then any injuries caused by the refusal to cover the appendectomy are properly attributed to the terms of the plan itself, not the managed care entity that applied those terms.

362, 371 (1990) (state-law tort action brought due to alleged negligence in the inspection of a mine was pre-empted, as the duty to inspect the mine arose solely out of the collective-bargaining agreement).

Hence, respondents bring suit only to rectify a wrongful denial of benefits promised under ERISA-regulated plans, and do not attempt to remedy any violation of a legal duty independent of ERISA. We hold that respondents' state causes of action fall "within the scope of" ERISA § 502(a)(1)(B), *Metropolitan Life*, 481 U. S., at 66, and are therefore completely pre-empted by ERISA § 502 and removable to federal district court.[4]

B

The Court of Appeals came to a contrary conclusion for several reasons, all of them erroneous. First, the Court of Appeals found significant that respondents "assert a tort claim for tort damages" rather than "a contract claim for contract damages," and that respondents "are not seeking reimbursement for benefits denied them." 307 F. 3d, at 309. But, distinguishing between pre-empted and non-pre-empted claims based on the particular label affixed to them would "elevate form over substance and allow parties to evade" the pre-emptive scope of ERISA simply "by relabeling their contract claims as claims for tortious breach of contract." *Allis-Chalmers*, *supra*, at 211. Nor can the mere fact that the state cause of action attempts to authorize remedies beyond those authorized by ERISA § 502(a) put the cause

[4] Respondents also argue that ERISA § 502(a) completely pre-empts a state cause of action only if the cause of action would be pre-empted under ERISA § 514(a); respondents then argue that their causes of action do not fall under the terms of § 514(a). But a state cause of action that provides an alternative remedy to those provided by the ERISA civil enforcement mechanism conflicts with Congress' clear intent to make the ERISA mechanism exclusive. See *Ingersoll-Rand Co.* v. *McClendon*, 498 U. S. 133, 142 (1990) (holding that "[e]ven if there were no express pre-emption [under ERISA § 514(a)]" of the cause of action in that case, it "would be pre-empted because it conflict[ed] directly with an ERISA cause of action").

of action outside the scope of the ERISA civil enforcement mechanism. In *Pilot Life*, *Metropolitan Life*, and *Ingersoll-Rand*, the plaintiffs all brought state claims that were labeled either tort or tort-like. See *Pilot Life*, 481 U. S., at 43 (suit for, *inter alia*, " 'Tortious Breach of Contract' "); *Metropolitan Life*, *supra*, at 61–62 (suit requesting damages for "mental anguish caused by breach of [the] contract"); *Ingersoll-Rand*, 498 U. S., at 136 (suit brought under various tort and contract theories). And, the plaintiffs in these three cases all sought remedies beyond those authorized under ERISA. See *Pilot Life*, *supra*, at 43 (compensatory and punitive damages); *Metropolitan Life*, *supra*, at 61 (mental anguish); *Ingersoll-Rand*, *supra*, at 136 (punitive damages, mental anguish). And, in all these cases, the plaintiffs' claims were pre-empted. The limited remedies available under ERISA are an inherent part of the "careful balancing" between ensuring fair and prompt enforcement of rights under a plan and the encouragement of the creation of such plans. *Pilot Life*, *supra*, at 55.

Second, the Court of Appeals believed that "the wording of [respondents'] plans is immaterial" to their claims, as "they invoke an external, statutorily imposed duty of 'ordinary care.' " 307 F. 3d, at 309. But as we have already discussed, the wording of the plans is certainly material to their state causes of action, and the duty of "ordinary care" that the THCLA creates is not external to their rights under their respective plans.

Ultimately, the Court of Appeals rested its decision on one line from *Rush Prudential*. There, we described our holding in *Ingersoll-Rand* as follows: "[W]hile state law duplicated the elements of a claim available under ERISA, it converted the remedy from an equitable one under § 1132(a)(3) (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal)." 536 U. S., at 379. The point of this sentence was to describe why the state cause of action in *Ingersoll-Rand* was pre-empted by ERISA § 502(a): It was pre-empted because it attempted

to convert an equitable remedy into a legal remedy. Nowhere in *Rush Prudential* did we suggest that the preemptive force of ERISA § 502(a) is limited to the situation in which a state cause of action precisely duplicates a cause of action under ERISA § 502(a).

Nor would it be consistent with our precedent to conclude that only strictly duplicative state causes of action are preempted. Frequently, in order to receive exemplary damages on a state claim, a plaintiff must prove facts beyond the bare minimum necessary to establish entitlement to an award. Cf. *Allis-Chalmers*, 471 U. S., at 217 (bad-faith refusal to honor a claim needed to be proved in order to recover exemplary damages). In order to recover for mental anguish, for instance, the plaintiffs in *Ingersoll-Rand* and *Metropolitan Life* would presumably have had to prove the existence of mental anguish; there is no such element in an ordinary suit brought under ERISA § 502(a)(1)(B). See *Ingersoll-Rand*, *supra*, at 136; *Metropolitan Life*, *supra*, at 61. This did not save these state causes of action from pre-emption. Congress' intent to make the ERISA civil enforcement mechanism exclusive would be undermined if state causes of action that supplement the ERISA § 502(a) remedies were permitted, even if the elements of the state cause of action did not precisely duplicate the elements of an ERISA claim.

C

Respondents also argue—for the first time in their brief to this Court—that the THCLA is a law that regulates insurance, and hence that ERISA § 514(b)(2)(A) saves their causes of action from pre-emption (and thereby from complete preemption).[5] This argument is unavailing. The existence of

[5] ERISA § 514(b)(2)(A), 29 U. S. C. § 1144(b)(2)(A), reads, as relevant: "[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."

a comprehensive remedial scheme can demonstrate an "overpowering federal policy" that determines the interpretation of a statutory provision designed to save state law from being pre-empted. *Rush Prudential*, 536 U. S., at 375. ERISA's civil enforcement provision is one such example. See *ibid.*

As this Court stated in *Pilot Life*, "our understanding of [§ 514(b)(2)(A)] must be informed by the legislative intent concerning the civil enforcement provisions provided by ERISA § 502(a), 29 U. S. C. § 1132(a)." 481 U. S., at 52. The Court concluded that "[t]he policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA." *Id.*, at 54. The Court then held, based on

> "the common-sense understanding of the saving clause, the McCarran-Ferguson Act factors defining the business of insurance, and, *most importantly*, the clear expression of congressional intent that ERISA's civil enforcement scheme be exclusive, . . . that [the plaintiff's] state law suit asserting improper processing of a claim for benefits under an ERISA-regulated plan is not saved by § 514(b)(2)(A)." *Id.*, at 57 (emphasis added).

Pilot Life's reasoning applies here with full force. Allowing respondents to proceed with their state-law suits would "pose an obstacle to the purposes and objectives of Congress." *Id.*, at 52. As this Court has recognized in both *Rush Prudential* and *Pilot Life*, ERISA § 514(b)(2)(A) must be interpreted in light of the congressional intent to create an exclusive federal remedy in ERISA § 502(a). Under ordinary principles of conflict pre-emption, then, even a state law that can arguably be characterized as "regulating insurance" will be pre-empted if it provides a separate vehicle to assert

a claim for benefits outside of, or in addition to, ERISA's remedial scheme.

IV

Respondents, their *amici*, and some Courts of Appeals have relied heavily upon *Pegram* v. *Herdrich*, 530 U. S. 211 (2000), in arguing that ERISA does not pre-empt or completely pre-empt state suits such as respondents'. They contend that *Pegram* makes it clear that causes of action such as respondents' do not "relate to [an] employee benefit plan," ERISA § 514(a), 29 U. S. C. § 1144(a), and hence are not pre-empted. See Brief for Respondents 35–38; *Cicio* v. *Does*, 321 F. 3d 83, 100–104 (CA2 2003), cert. pending *sub nom. Vytra Healthcare* v. *Cicio*, No. 03–69 [REPORTER'S NOTE: See *post*, p. 933]; see also *Land* v. *CIGNA Healthcare of Fla.*, 339 F. 3d 1286, 1292–1294 (CA11 2003).

Pegram cannot be read so broadly. In *Pegram*, the plaintiff sued her physician-owned-and-operated HMO (which provided medical coverage through plaintiff's employer pursuant to an ERISA-regulated benefit plan) and her treating physician, both for medical malpractice and for a breach of an ERISA fiduciary duty. See 530 U. S., at 215–216. The plaintiff's treating physician was also the person charged with administering plaintiff's benefits; it was she who decided whether certain treatments were covered. See *id.*, at 228. We reasoned that the physician's "eligibility decision and the treatment decision were inextricably mixed." *Id.*, at 229. We concluded that "Congress did not intend [the defendant HMO] or any other HMO to be treated as a fiduciary to the extent that it makes mixed eligibility decisions acting through its physicians." *Id.*, at 231.

A benefit determination under ERISA, though, is generally a fiduciary act. See *Bruch*, 489 U. S., at 111–113. "At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries." *Pegram*, *supra*, at 231; cf. 2A A. Scott & W. Fratcher, Law of Trusts §§ 182, 183 (4th ed. 1987);

G. Bogert & G. Bogert, Law of Trusts & Trustees § 541 (rev. 2d ed. 1993). Hence, a benefit determination is part and parcel of the ordinary fiduciary responsibilities connected to the administration of a plan. See *Varity Corp.* v. *Howe*, 516 U. S. 489, 512 (1996) (relevant plan fiduciaries owe a "fiduciary duty with respect to the interpretation of plan documents and the payment of claims"). The fact that a benefits determination is infused with medical judgments does not alter this result.

Pegram itself recognized this principle. *Pegram*, in highlighting its conclusion that "mixed eligibility decisions" were not fiduciary in nature, contrasted the operation of "[t]raditional trustees administer[ing] a medical trust" and "physicians through whom HMOs act." 530 U. S., at 231–232. A traditional medical trust is administered by "paying out money to buy medical care, whereas physicians making mixed eligibility decisions consume the money as well." *Ibid.* And, significantly, the Court stated that "[p]rivate trustees do not make treatment judgments." *Id.*, at 232. But a trustee managing a medical trust undoubtedly must make administrative decisions that require the exercise of medical judgment. Petitioners are not the employers of respondents' treating physicians and are therefore in a somewhat analogous position to that of a trustee for a traditional medical trust.[6]

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[6] Both *Pilot Life* and *Metropolitan Life* support this understanding. The plaintiffs in *Pilot Life* and *Metropolitan Life* challenged disability determinations made by the insurers of their ERISA-regulated employee benefit plans. See *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 43 (1987); *Metropolitan Life Ins. Co.* v. *Taylor*, 481 U. S. 58, 61 (1987). A disability determination often involves medical judgments. See, *e. g.*, *ibid.* (plaintiff determined not to be disabled only after a medical examination undertaken by one of his employer's physicians). Yet, in both *Pilot Life* and *Metropolitan Life*, the Court held that the causes of action were preempted. Cf. *Black & Decker Disability Plan* v. *Nord*, 538 U. S. 822 (2003) (discussing "treating physician" rule in the context of disability determinations made by ERISA-regulated disability plans).

ERISA itself and its implementing regulations confirm this interpretation. ERISA defines a fiduciary as any person "to the extent . . . he has any discretionary authority or discretionary responsibility in the administration of [an employee benefit] plan." § 3(21)(A)(iii), 29 U. S. C. § 1002(21)(A)(iii). When administering employee benefit plans, HMOs must make discretionary decisions regarding eligibility for plan benefits, and, in this regard, must be treated as plan fiduciaries. See *Varity Corp.*, *supra*, at 511 (plan administrator "engages in a fiduciary act when making a discretionary determination about whether a claimant is entitled to benefits under the terms of the plan documents"). Also, ERISA § 503, which specifies minimum requirements for a plan's claim procedure, requires plans to "afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim." 29 U. S. C. § 1133(2). This strongly suggests that the ultimate decisionmaker in a plan regarding an award of benefits must be a fiduciary and must be acting as a fiduciary when determining a participant's or beneficiary's claim. The relevant regulations also establish extensive requirements to ensure full and fair review of benefit denials. See 29 CFR § 2560.503–1 (2003). These regulations, on their face, apply equally to health benefit plans and other plans, and do not draw distinctions between medical and nonmedical benefits determinations. Indeed, the regulations strongly imply that benefits determinations involving medical judgments are, just as much as any other benefits determinations, actions by plan fiduciaries. See, *e. g.*, § 2560.503–1(h)(3)(iii). Classifying any entity with discretionary authority over benefits determinations as anything but a plan fiduciary would thus conflict with ERISA's statutory and regulatory scheme.

Since administrators making benefits determinations, even determinations based extensively on medical judgments, are ordinarily acting as plan fiduciaries, it was essential to *Pe-*

gram's conclusion that the decisions challenged there were truly "mixed eligibility and treatment decisions," 530 U. S., at 229, *i. e.*, medical necessity decisions made by the plaintiff's treating physician *qua* treating physician and *qua* benefits administrator. Put another way, the reasoning of *Pegram* "only make[s] sense where the underlying negligence also plausibly constitutes medical maltreatment by a party who can be deemed to be a treating physician or such a physician's employer." *Cicio*, 321 F. 3d, at 109 (Calabresi, J., dissenting in part). Here, however, petitioners are neither respondents' treating physicians nor the employers of respondents' treating physicians. Petitioners' coverage decisions, then, are pure eligibility decisions, and *Pegram* is not implicated.

V

We hold that respondents' causes of action, brought to remedy only the denial of benefits under ERISA-regulated benefit plans, fall within the scope of, and are completely pre-empted by, ERISA § 502(a)(1)(B), and thus removable to federal district court. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.[7]

It is so ordered.

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[7] The United States, as *amicus*, suggests that some individuals in respondents' positions could possibly receive some form of "make-whole" relief under ERISA § 502(a)(3). Brief for United States as *Amicus Curiae* 27, n. 13. However, after their respective District Courts denied their motions for remand, respondents had the opportunity to amend their complaints to bring expressly a claim under ERISA § 502(a). Respondents declined to do so; the District Courts therefore dismissed their complaints with prejudice. See App. JA–147 to JA–148; *id.*, at JA–298; App. B to Pet. for Cert. in No. 02–1845, pp. 34a–35a; App. B to Pet. for Cert. in No. 03–83, p. 40a. Respondents have thus chosen not to pursue any ERISA claim, including any claim arising under ERISA § 502(a)(3). The scope of this provision, then, is not before us, and we do not address it.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring.

The Court today holds that the claims respondents asserted under Texas law are totally preempted by § 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA or Act), 29 U. S. C. § 1132(a). That decision is consistent with our governing case law on ERISA's preemptive scope. I therefore join the Court's opinion. But, with greater enthusiasm, as indicated by my dissenting opinion in *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U. S. 204 (2002), I also join "the rising judicial chorus urging that Congress and [this] Court revisit what is an unjust and increasingly tangled ERISA regime." *DiFelice* v. *AETNA U. S. Healthcare*, 346 F. 3d 442, 453 (CA3 2003) (Becker, J., concurring).

Because the Court has coupled an encompassing interpretation of ERISA's preemptive force with a cramped construction of the "equitable relief" allowable under § 502(a)(3), a "regulatory vacuum" exists: "[V]irtually all state law remedies are preempted but very few federal substitutes are provided." *Id.*, at 456, 457 (internal quotation marks omitted).

A series of the Court's decisions has yielded a host of situations in which persons adversely affected by ERISA-proscribed wrongdoing cannot gain make-whole relief. First, in *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U. S. 134 (1985), the Court stated, in dicta: "[T]here is a stark absence—in [ERISA] itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages" for consequential injuries. *Id.*, at 148. Then, in *Mertens* v. *Hewitt Associates*, 508 U. S. 248 (1993), the Court held that § 502(a)(3)'s term " 'equitable relief' . . . refer[s] to those categories of relief that were *typically* available in equity (such as injunction, mandamus, and restitution, but not compensatory damages)." *Id.*, at 256 (emphasis in original). Most recently, in *Great-West*, the

Court ruled that, as "§ 502(a)(3), by its terms, only allows for *equitable* relief," the provision excludes "the imposition of personal liability . . . for a contractual obligation to pay money." 534 U. S., at 221 (emphasis in original).

As the array of lower court cases and opinions documents, see, *e. g., DiFelice; Cicio* v. *Does*, 321 F. 3d 83 (CA2 2003), cert. pending *sub nom. Vytra Healthcare* v. *Cicio*, No. 03–69 [REPORTER'S NOTE: See *post*, p. 933], fresh consideration of the availability of consequential damages under § 502(a)(3) is plainly in order. See 321 F. 3d, at 106, 107 (Calabresi, J., dissenting in part) ("gaping wound" caused by the breadth of preemption and limited remedies under ERISA, as interpreted by this Court, will not be healed until the Court "start[s] over" or Congress "wipe[s] the slate clean"); *DiFelice*, 346 F. 3d, at 467 ("The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable."); Langbein, What ERISA Means by "Equitable": The Supreme Court's Trail of Error in *Russell*, *Mertens*, and *Great-West*, 103 Colum. L. Rev. 1317, 1365 (2003) (hereinafter Langbein) ("The Supreme Court needs to . . . realign ERISA remedy law with the trust remedial tradition that Congress intended [when it provided in § 502(a)(3) for] 'appropriate equitable relief.' ").

The Government notes a potential amelioration. Recognizing that "this Court has construed Section 502(a)(3) not to authorize an award of money damages against a *non-fiduciary*," the Government suggests that the Act, as currently written and interpreted, may "allo[w] at least some forms of 'make-whole' relief against a breaching *fiduciary* in light of the general availability of such relief in equity at the time of the divided bench." Brief for United States as *Amicus Curiae* 27–28, n. 13 (emphases added); cf. *ante*, at 220 ("entity with discretionary authority over benefits determinations" is a "plan fiduciary"); Tr. of Oral Arg. 13 ("Aetna is [a fiduciary]—and CIGNA is for purposes of claims processing."). As the Court points out, respondents here de-

clined the opportunity to amend their complaints to state claims for relief under § 502(a); the District Court, therefore, properly dismissed their suits with prejudice. See *ante*, at 221, n. 7. But the Government's suggestion may indicate an effective remedy others similarly circumstanced might fruitfully pursue.

"Congress . . . intended ERISA to replicate the core principles of trust remedy law, including the make-whole standard of relief." Langbein 1319. I anticipate that Congress, or this Court, will one day so confirm.

Syllabus

PLILER, WARDEN *v.* FORD

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

No. 03–221. Argued April 26, 2004—Decided June 21, 2004

Five days before the 1-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) would have run, respondent filed two *pro se* "mixed" federal habeas petitions—those containing both unexhausted and exhausted claims—and motions to stay the petitions while he returned to state court to exhaust the unexhausted claims. The Magistrate Judge gave him three options: (1) The petitions could be dismissed without prejudice and respondent could refile after exhausting the unexhausted claims; (2) the unexhausted claims could be dismissed and he could proceed with only the exhausted claims; or (3) he could contest the Magistrate Judge's finding that some claims were unexhausted. He chose the first option with respect to one petition and failed to respond with respect to the other. The Federal District Court dismissed his petitions without prejudice. He then filed habeas petitions in the California Supreme Court, which were both denied. The federal court dismissed his subsequently refiled *pro se* habeas petitions with prejudice as untimely under AEDPA, see 28 U. S. C. § 2244(d), and denied him a certificate of appealability (COA). The Ninth Circuit granted a COA, concluding that his initial petitions were timely under § 2244(d) and that his later petitions related back to the initial ones. The Ninth Circuit determined that although the District Court correctly concluded that it did not have discretion to stay respondent's mixed petitions, it could have acted on his stay motions had he chosen the Magistrate Judge's second option and then renewed the prematurely filed stay motions. It also held that the District Court had to give respondent two specific warnings: first, that it could not consider his motions to stay the mixed petitions unless he chose to amend them and dismiss the then-unexhausted claims; and second, if applicable, that his federal claims would be time barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions without prejudice and return to state court to exhaust all his claims.

Held: The District Court was not required to provide the warnings directed by the Ninth Circuit. Pp. 230–234.

(a) Federal district courts must dismiss "mixed" habeas petitions. *Rose* v. *Lundy*, 455 U. S. 509, 522. The combined effect of *Rose* and

Syllabus

AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all his claims—including those already exhausted—because the limitations period could expire during the time he returns to state court to exhaust his unexhausted claims. To address this, the Ninth Circuit allows a district court to employ a stay-and-abeyance procedure, which involves (1) dismissal of any unexhausted claims from the original mixed habeas petition; (2) a stay of the remaining claims, pending exhaustion of the dismissed unexhausted claims in state court; and (3) amendment of the original petition to add the newly exhausted claims that then relate back to the original petition. Here, the Ninth Circuit held that if a *pro se* prisoner files a mixed petition, the district court must give two specific warnings regarding the stay-and-abeyance procedure. But federal district judges have no obligation to act as counsel or paralegal to *pro se* litigants. See, *e. g.*, *McKaskle* v. *Wiggins*, 465 U. S. 168, 183–184. Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel. Requiring district courts to advise *pro se* litigants in such a manner would undermine district judges' role as impartial decisionmakers. And the warnings run the risk of being misleading. The first could encourage the use of stay-and-abeyance when it is not in the petitioner's best interest. The second would force upon judges the potentially burdensome task of making a case-specific calculation of whether the AEDPA limitations period has already run or will have run by the time the petitioner returns to federal court. Because such calculations depend upon information contained in documents that do not necessarily accompany the petition, a district judge's calculation could be in error and thereby misinform a *pro se* petitioner. Respondent's argument that *Rose* requires that a prisoner be given "the choice of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court," 455 U. S., at 510, is unavailing. *Rose* requires only that a district court dismiss mixed petitions, which, as a practical matter, means that the prisoner must follow one of these two paths if he wants to proceed with his federal petition. Nothing in *Rose* requires that both options be equally attractive, or that district judges give specific advisements as to the availability and wisdom of these options. Respondent's reliance on *Castro* v. *United States*, 540 U. S. 375, is misplaced, because *Castro* dealt with a District Court's *sua sponte* recharacterization of a prisoner's pleading and did not address whether a district court is required to explain a *pro se* litigant's options before a *voluntary* dismissal. Pp. 230–234.

(b) The case is remanded for further proceedings given the concern that respondent had been affirmatively misled. P. 234.

330 F. 3d 1086, vacated and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. O'CONNOR, J., filed a concurring opinion, *post*, p. 234. STEVENS, J., filed an opinion concurring in the judgment, in which SOUTER, J., joined, *post*, p. 235. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 235. BREYER, J., filed a dissenting opinion, *post*, p. 237.

Paul M. Roadarmel, Jr., Deputy Attorney General of California, argued the cause for petitioner. With him on the briefs were *Bill Lockyer*, Attorney General, *Manuel M. Medeiros*, State Solicitor General, *Robert R. Anderson*, Chief Assistant Attorney General, *Pamela C. Hamanaka*, Senior Assistant Attorney General, *Donald E. De Nicola*, Deputy Attorney General, and *Kenneth C. Byrne*, Supervising Deputy Attorney General.

Lisa M. Bassis, by appointment of the Court, 540 U. S. 1216, argued the cause and filed a brief for respondent.*

JUSTICE THOMAS delivered the opinion of the Court.

Under *Rose* v. *Lundy*, 455 U. S. 509 (1982), federal district courts must dismiss "mixed" habeas corpus petitions—those containing both unexhausted and exhausted claims. In this case, we decide whether the District Court erred by dismissing, pursuant to *Rose*, a *pro se* habeas petitioner's two habeas petitions without giving him two particular advisements. Because we hold that the District Court's failure to provide these warnings did not make the dismissals improper, we need not address the second question presented, whether respondent's subsequent untimely petitions relate back to his "improperly dismissed" initial petitions.

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*Briefs of *amici curiae* urging affirmance were filed for Federal Defenders in the Ninth Circuit by *Maria E. Stratton, Mark R. Drozdowski, Frederic F. Kay, Quin A. Denvir, Barry J. Portman, Peter C. Wolff, Jr., Anthony R. Gallagher, Roger Peven,* and *Thomas W. Hillier II;* and for the National Association of Criminal Defense Lawyers by *Walter Dellinger, Pamela Harris,* and *David M. Porter.*

I

On April 19, 1997, five days before his 1-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 110 Stat. 1214, would have run, respondent signed and delivered to prison authorities two *pro se* federal habeas corpus petitions. The first petition related to respondent's conviction for, among other things, conspiring to murder John Loguercio and attempting to murder Loguercio's wife; the second related to his conviction for the first-degree murder and conspiracy to commit the murder of Thomas Weed. Because the petitions contained unexhausted claims, respondent also filed motions to stay the petitions so that he could return to state court to exhaust the unexhausted claims. The Magistrate Judge gave respondent three options: (1) The petitions could be dismissed without prejudice and respondent could refile after exhausting the unexhausted claims; (2) the unexhausted claims could be dismissed and respondent could proceed with only the exhausted claims; or (3) respondent could contest the Magistrate Judge's finding that some of the claims had not been exhausted. App. 51–52; 81–82.

With respect to his petition in the Loguercio case, respondent chose the first option. With respect to the Weed case, respondent failed to respond to the Magistrate Judge. The District Court dismissed respondent's petitions without prejudice. In both cases, respondent proceeded by filing habeas corpus petitions in the California Supreme Court, which were both summarily denied. Respondent subsequently refiled his *pro se* habeas petitions in Federal District Court. The District Court, in both cases, dismissed the petitions with prejudice as untimely under AEDPA's 1-year statute of limitations, 28 U. S. C. § 2244(d), and denied respondent's motions for a certificate of appealability (COA). The Ninth Circuit consolidated respondent's motions for a COA, and then granted a COA on the question whether his federal habeas petitions were timely under § 2244(d). A divided panel

concluded that both of respondent's initial federal habeas petitions were timely filed and held that his later petitions related back to the initial petitions. *Ford* v. *Hubbard*, 330 F. 3d 1086, 1097 (2003).

Although the District Court correctly concluded that it did not have discretion to stay respondent's mixed petitions, see *Rose*, *supra*, at 522, the Ninth Circuit determined that the District Court could have acted on the stay motions if respondent had chosen the Magistrate Judge's second option—dismissal of the unexhausted claims—and then renewed the prematurely filed stay motions. Under the Ninth Circuit's view, the District Court was obligated to advise respondent that it could consider his stay motions only if he chose this route. 330 F. 3d, at 1099. The District Court's failure to inform respondent was, according to the Court of Appeals, prejudicial error because it deprived respondent of a "fair and informed opportunity to have his stay motions heard, to exhaust his unexhausted claims, and ultimately to have his claims considered on the merits." *Id.*, at 1100.

The District Court also committed prejudicial error, according to the Ninth Circuit, for failing to inform respondent that AEDPA's 1-year statute of limitations had run on both of his petitions and that, consequently, he would be barred from refiling his petitions in federal court if he failed to amend them or if he chose to dismiss the petitions without prejudice in order to exhaust the unexhausted claims. Under the Court of Appeals' view, the District Court "definitively, although not intentionally," misled respondent by telling him that if he chose the first option, the dismissal would be without prejudice. *Ibid.* The Court of Appeals concluded that respondent should have been told that, because AEDPA's statute of limitations had run with respect to his claims, a dismissal without prejudice would effectively result in a dismissal with prejudice unless equitable tolling applied. *Id.*, at 1101. According to the Court of Appeals, the District Court's error in this regard deprived respondent

of the opportunity to make a "meaningful" choice between the two options. *Id.*, at 1102.[1] We granted certiorari, 540 U. S. 1099 (2004).

II

Under *Rose*, federal district courts must dismiss mixed habeas petitions. 455 U. S., at 510, 522. Subsequent to the Court's decision in *Rose*, Congress enacted AEDPA, which imposed a 1-year statute of limitations for filing a federal habeas corpus petition. See 28 U. S. C. § 2244(d)(1). The combined effect of *Rose* and AEDPA's limitations period is that if a petitioner comes to federal court with a mixed petition toward the end of the limitations period, a dismissal of his mixed petition could result in the loss of all of his claims—including those already exhausted—because the limitations period could expire during the time a petitioner returns to state court to exhaust his unexhausted claims. To address this, the Ninth Circuit has held that a district court may employ a stay-and-abeyance procedure. See *Calderon* v. *United States Dist. Court for Northern Dist. of Cal. ex rel. Taylor*, 134 F. 3d 981, 988 (1998). The stay-and-abeyance procedure involves three steps: first, dismissal of any unexhausted claims from the original mixed habeas petition; second, a stay of the remaining claims, pending exhaustion of the dismissed unexhausted claims in state court; and third, amendment of the original petition to add the newly ex-

[1] Finding it impossible to put respondent in the position he had occupied prior to the District Court's "erroneous dismissal" of his initial petitions, the Ninth Circuit concluded that Federal Rule of Civil Procedure 15(c)'s amendment procedures apply to "ensure that [respondent's] rights are not unduly prejudiced as a result of the district court's errors." 330 F. 3d, at 1102. Accordingly, it held that "a *pro se* habeas petitioner who files a mixed petition that is improperly dismissed by the district court, and who then . . . returns to state court to exhaust his unexhausted claims and subsequently re-files a second petition without unreasonable delay," may have his second petition relate back to the initial timely petition. *Ibid.* As explained above, we need not address whether the Ninth Circuit's decision on this ground was correct.

hausted claims that then relate back to the original petition. *Id.*, at 986.

In this case, the Ninth Circuit held that if a *pro se* prisoner files a mixed petition, the district court must give two specific warnings regarding the stay-and-abeyance procedure: first, that "it would not have the power to consider [a prisoner's] motions to stay the [mixed] petitions unless he opted to amend them and dismiss the then-unexhausted claims," 330 F. 3d, at 1092–1093, and, second, if applicable, "that [a prisoner's] federal claims would be time-barred, absent cause for equitable tolling, upon his return to federal court if he opted to dismiss the petitions 'without prejudice' and return to state court to exhaust all of his claims," *id.*, at 1093.

Without addressing the propriety of this stay-and-abeyance procedure, we hold that federal district judges are not required to give *pro se* litigants these two warnings. District judges have no obligation to act as counsel or paralegal to *pro se* litigants. In *McKaskle* v. *Wiggins*, 465 U. S. 168, 183–184 (1984), the Court stated that "[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure" and that "the Constitution [does not] require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course." See also *Martinez* v. *Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U. S. 152, 162 (2000) ("[T]he trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out"). Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a *pro se* litigant in such a manner would undermine district judges' role as impartial decisionmakers. And, to the extent that respondent is concerned with a district court's potential to mislead *pro se* habeas petitioners, the

warnings respondent advocates run the risk of being misleading themselves.

Specifically, the first warning could encourage the use of stay-and-abeyance when it is not in the petitioner's best interest to pursue such a course. This could be the case, for example, where the petitioner's unexhausted claims are particularly weak and petitioner would therefore be better off proceeding only with his exhausted claims. And it is certainly the case that not every litigant seeks to maximize judicial process.

The second advisement would force upon district judges the potentially burdensome, time-consuming, and fact-intensive task of making a case-specific investigation and calculation of whether the AEDPA limitations period has already run or will have run by the time the petitioner returns to federal court. As the dissent below recognized, district judges often will not be able to make these calculations based solely on the face of habeas petitions. 330 F. 3d, at 1108. Such calculations depend upon information contained in documents that do not necessarily accompany the petitions. This is so because petitioners are not required by 28 U. S. C. § 2254 or the Rules Governing § 2254 Cases to attach to their petitions, or to file separately, state-court records.[2] See 1 R. Hertz & J. Liebman, Federal Habeas Corpus Practice and Procedure § 15.2c, p. 711 (4th ed. 2001) ("Most petitioners do not have the ability to submit the record with the petition, and the statute and rules relieve them of any obligation to do so and require the state to furnish the record with the answer"). District judges, thus, might err in their

[2] There is one circumstance where nonindigent petitioners must furnish the court with portions of the record. See 28 U. S. C. § 2254(f) ("If the applicant challenges the sufficiency of the evidence . . . to support the State court's determination of a factual issue . . . , the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence"; "[i]f the applicant, because of indigency or other reason is unable to produce such part of the record," a court must direct the State to produce it).

calculation of the statute of limitations and affirmatively misinform *pro se* petitioners of their options.

Respondent nevertheless argues that the advisements are necessary to ensure that *pro se* petitioners make informed decisions and do not unknowingly forfeit rights. Brief for Respondent 27–32. Respondent reads *Rose* as mandating that "a prisoner be given '*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court.'" Brief for Respondent 25–26, 27 (quoting *Rose*, 455 U. S., at 510) (emphasis in brief). But *Rose* requires only that "a district court must dismiss . . . 'mixed petitions,' leaving the prisoner with the choice" described above. *Ibid.* In other words, *Rose* requires dismissal of mixed petitions, which, as a practical matter, means that the prisoner must follow one of the two paths outlined in *Rose* if he wants to proceed with his federal habeas petition. But nothing in *Rose* requires that both of these options be equally attractive, much less suggests that district judges give specific advisements as to the availability and wisdom of these options. As such, any advisement of this additional option would not "simply implement what this Court *already* requires." Brief for Respondent 27 (emphasis in original).

Respondent also relies heavily upon *Castro* v. *United States*, 540 U. S. 375 (2003). In *Castro*, we held that a federal district court cannot *sua sponte* recharacterize a *pro se* litigant's motion as a first § 2255 motion unless it informs the litigant of the consequences of the recharacterization, thereby giving the litigant the opportunity to contest the recharacterization, or to withdraw or amend the motion. *Id.*, at 377. *Castro* dealt with a District Court, of its own volition, taking away a petitioner's desired route—namely, a Federal Rule of Criminal Procedure 33 motion—and transforming it, against his will, into a § 2255 motion. Cf. *id.*, at 386 (SCALIA, J., concurring in part and concurring in judgment) ("Recharacterization . . . requires a court deliberately to override the *pro se* litigant's choice of procedural vehicle

for his claim"). We recognized that although this practice is often used to help *pro se* petitioners, it could also harm them. *Id.*, at 381–382. Because of these competing considerations, we reasoned that the warning would "help the *pro se* litigant understand . . . whether he should withdraw or amend his motion [and] whether he should *contest* the recharacterization." *Id.*, at 384 (emphasis in original). *Castro*, then, did not address the question whether a district court is required to explain to a *pro se* litigant his options before a *voluntary* dismissal and its reasoning sheds no light on the question we confront.

Therefore, we hold that district courts are not required to give the particular advisements required by the Ninth Circuit before dismissing a *pro se* petitioner's mixed habeas petition under *Rose*. We remand the case for further proceedings given the Court of Appeals' concern that respondent had been affirmatively misled quite apart from the District Court's failure to give the two warnings.

For the foregoing reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, concurring.

I join the Court's opinion because it is limited to the narrow question whether the notifications crafted by the Ninth Circuit must be given.

The propriety of the stay-and-abeyance procedure generally is not addressed. The District Court did not employ that procedure, nor did the Ninth Circuit hold that it must be applied in every case. There is, therefore, no need for us to pass on it in this case, and the Court properly avoids doing so. I note, however, that the procedure is not an idiosyncratic one; as JUSTICE BREYER describes, *post*, at 239 (dissenting opinion), seven of the eight Circuits to consider it have approved stay-and-abeyance as an appropriate exercise of a district court's equitable powers.

For the reasons given by the majority, *ante*, at 232–233, it is not incumbent upon a district court to establish whether the statute of limitations has already run before explaining the options available to a habeas petitioner who has filed a mixed petition. Nevertheless, if the petitioner is affirmatively misled, either by the court or by the State, equitable tolling might well be appropriate. This is a question for the Ninth Circuit to consider on remand. See *ante*, at 234.

JUSTICE STEVENS, with whom JUSTICE SOUTER joins, concurring in the judgment.

While I fully agree with the views expressed by JUSTICE GINSBURG, *post* this page, and JUSTICE BREYER, *post*, p. 237 (dissenting opinions), I am persuaded that the judgment entered by the Court—remanding to the Ninth Circuit to determine the propriety of equitable tolling—is both consistent with those views and correct. I therefore concur in that judgment.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, dissenting.

The three options the Magistrate Judge gave respondent, see *ante*, at 228, did not include the three-step stay and abeyance procedure described *ante*, at 230–231. Under that procedure: (1) unexhausted claims are dismissed from the federal petition; (2) exhausted claims are retained in federal court, but are stayed pending exhaustion in state court of the dismissed unexhausted claims; and (3) postexhaustion in state court, the original federal petition is amended to reinstate the now exhausted claims, which are then deemed to relate back to the initial filing.[1] The Court today does not "addres[s] the propriety of this stay-and-abeyance proce-

[1] The Ninth Circuit here allowed relation back of amendments although no pleading remained before the federal court. See *ante*, at 230, n. 1. In contrast, under the stay and abeyance procedure, the original habeas petition, although shorn of unexhausted claims, remains pending in federal court, albeit stayed.

dure." *Ante*, at 231. But that unaddressed issue seems to me pivotal. If the stay and abeyance procedure was a choice respondent could have made, then the Magistrate Judge erred in failing to inform respondent of that option. While I do not suggest that clear statement of the options available to respondent must be augmented by "advisements," *ante*, at 234, I would not defer, as the Court does, the question at the core of this case.[2]

Furthermore, as this Court recognizes, *ante*, at 228, respondent filed his habeas petitions "five days before [the termination of AEDPA's] 1-year statute of limitations." Thus, any new petition by respondent would have been time barred even before the Magistrate Judge dismissed respondent's original petitions. Given that undisputed fact, the Magistrate Judge's characterization of the dismissal orders as "without prejudice" seems to me highly misleading.

Because the Court disposes of this case without confronting the above-described ripe issues, I dissent. Although my reasons differ from those stated in the Ninth Circuit's opinion, I would affirm the Ninth Circuit's judgment to the ex-

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[2] A related question also postponed by the Court's opinion is whether the solution in *Rose* v. *Lundy*, 455 U. S. 509 (1982), to a mixed petition—dismissal without prejudice—bears reexamination in light of the one-year statute of limitations imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), on the time to file federal habeas petitions. See *Duncan* v. *Walker*, 533 U. S. 167, 182–183 (2001) (STEVENS, J., concurring in part and concurring in judgment) ("[A]lthough the Court's pre-AEDPA decision in *Rose* v. *Lundy* prescribed the dismissal of federal habeas corpus petitions containing unexhausted claims, in our post-AEDPA world there is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies." (citation omitted)); *Crews* v. *Horn*, 360 F. 3d 146, 154, and n. 5 (CA3 2004) (holding that both exhausted and unexhausted claims "should be stayed," and noting that a stay, "as effectively as a dismissal, . . . is a traditional way to defer to another court until that court has had an opportunity to exercise its jurisdiction over a habeas petition's unexhausted claims" (internal quotation marks omitted)).

tent that it vacated the District Court's dismissal of Ford's second petitions.

JUSTICE BREYER, dissenting.

I join JUSTICE GINSBURG's dissent. But I write separately to "addres[s] the propriety of" the Ninth Circuit's "stay-and-abeyance procedure." *Ante*, at 231 (majority opinion). That procedure would have permitted Richard Ford, the respondent, to ask the federal court to stay proceedings and hold his federal habeas petition (in abeyance) on its docket while he returned to state court to exhaust his unexhausted federal claims. Thus Ford would not have had to bring his federal petition again, after expiration of the 1-year limitations period. California's courts thereby could have considered his unexhausted claims without forcing him to forfeit his right to ask a federal court for habeas relief.

What could be unlawful about this procedure? In *Rose* v. *Lundy*, 455 U. S. 509 (1982), the Court, pointing to considerations of comity, held that federal habeas courts must give state courts a first crack at deciding an issue. *Id.*, at 518–519. It prohibited the federal courts from considering unexhausted claims. The Court added that, where a habeas petition is "mixed" (containing both exhausted and unexhausted claims), the federal habeas court should dismiss the petition. *Id.*, at 520. *Rose* reassured those prisoners (typically acting *pro se*), however, that the dismissal would not "unreasonably impair the prisoner's right to relief." *Id.*, at 522. That reassurance made sense at that time because the law did not then put a time limit on refiling. It thereby permitted a prisoner to return to federal court after he had exhausted his state remedies. *Id.*, at 520. Of course, the law prohibits a prisoner from "abusing the writ," but ordinarily a petitioner's dismissal of his mixed petition, his presenting unexhausted claims to the state courts, and his subsequent return to federal court would not have constituted an abuse.

Fourteen years after *Rose*, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA imposed a 1-year statute of limitations for filing a habeas petition. 28 U. S. C. § 2244(d)(1). One might have thought at first blush that the 1-year limitations period would not make much practical difference where an exhaustion-based dismissal of a mixed petition was at issue, for AEDPA tolls the limitations period while "a properly filed application for State post-conviction or other collateral review . . . is pending." § 2244(d)(2). In *Duncan* v. *Walker*, 533 U. S. 167, 181–182 (2001), however, this Court held that the words "other collateral review" do not cover a federal habeas proceeding. And that fact means that a *pro se* habeas petitioner who mistakenly files a mixed petition in federal court may well find that he has no time to get to state court and back before his year expires. Hence, after *Duncan*, the dismissal of such a petition will not simply give state courts a chance to consider the unexhausted issues he raises; it often also means the permanent end of *any* federal habeas review. *Ante*, at 230; see also *Duncan*, *supra*, at 186, 191 (BREYER, J., dissenting) (citing statistics that 93% of habeas petitioners are *pro se;* 63% of all habeas petitions are dismissed; 57% of those are dismissed for failure to exhaust; and district courts took an average of nearly nine months to dismiss petitions on procedural grounds). Indeed, in this very case—a not atypical scenario—the limitations period expired while the petition was pending before the District Court.

I dissented in *Duncan*, arguing that Congress could not have intended to cause prisoners to lose their habeas rights under these circumstances. 533 U. S., at 190. Although the majority reached a different conclusion, it did so primarily upon the basis of the statute's language. See *id.*, at 172–178.

Accepting the majority's view of that language, I nonetheless believe that the other considerations that I raised in *Duncan* support the lawfulness of the Ninth Circuit's stay-

and-abeyance procedure. That procedure recognizes the comity interests that *Rose* identified, and it reconciles those interests with the longstanding constitutional interest in making habeas corpus available to state prisoners. There is no tension between the two. It is thus not surprising that nearly every circuit has adopted a similar procedure. *E. g.*, *Crews* v. *Horn*, 360 F. 3d 146, 152 (CA3 2004) ("[V]irtually every other Circuit that has considered this issue has held that, following AEDPA, while it usually is within a district court's discretion to determine whether to stay or dismiss a mixed petition, staying the petition is the only appropriate course of action where an outright dismissal could jeopardize the timeliness of a collateral attack" (internal quotation marks omitted)); *Nowaczyk* v. *Warden*, 299 F. 3d 69, 79 (CA1 2002); *Palmer* v. *Carlton*, 276 F. 3d 777, 781 (CA6 2002); *Zarvela* v. *Artuz*, 254 F. 3d 374, 381 (CA2 2001); *Freeman* v. *Page*, 208 F. 3d 572, 577 (CA7 2000); *Brewer* v. *Johnson*, 139 F. 3d 491, 493 (CA5 1998); cf. *Mackall* v. *Angelone*, 131 F. 3d 442, 445 (CA4 1997); but cf. *Akins* v. *Kenney*, 341 F. 3d 681, 685–686 (CA8 2003) (refusing to stay *mixed* petitions). See also *Duncan*, 533 U. S., at 182–183 (STEVENS, J., concurring in part and concurring in judgment) ("[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies"); *id.*, at 192 (BREYER, J., dissenting) (noting "JUSTICE STEVENS' sound suggestions that district courts hold mixed petitions in abeyance").

I recognize that the *Duncan* majority also noted the importance of respecting AEDPA's goals of "comity, finality, and federalism." *Id.*, at 178 (internal quotation marks omitted). But I do not see how the Ninth Circuit's procedure could significantly undermine those goals. It is unlikely to mean that prisoners will increasingly file mixed petitions. A petitioner who believes that he is wrongly incarcerated would not deliberately file a petition with unexhausted claims in the wrong (*i. e.*, federal) court, for that error would

simply prolong proceedings. Those under a sentence of death might welcome delays, but in such cases deliberate misfiling would risk a finding that the filer has abused the writ and a consequent judicial refusal to hold the petition in abeyance. Moreover, a habeas court may fashion a stay to prevent abusive delays; for example, by providing a time limit within which a prisoner must exhaust state-court remedies. See, *e. g.*, *Zarvela*, *supra*, at 381.

Nor does the Ninth Circuit procedure seriously undermine AEDPA's 1-year limitations period. That provision requires a prisoner to file a federal habeas petition with at least one exhausted claim within the 1-year period, and it prohibits the habeas petitioner from subsequently including any new claim. These requirements remain.

Given the importance of maintaining a prisoner's access to a federal habeas court and the comparatively minor interference that the Ninth Circuit's procedure creates with comity or other AEDPA concerns, I would find use of the stay-and-abeyance procedure legally permissible. I also believe that the Magistrate Judge should have informed Ford of this important rights-preserving option. See *ante*, at 236 (GINSBURG, J., dissenting). For these reasons, I respectfully dissent.

Syllabus

INTEL CORP. *v.* ADVANCED MICRO DEVICES, INC.

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

No. 02–572. Argued April 20, 2004—Decided June 21, 2004

In 1964, pursuant to a recommendation by the Commission on International Rules of Judicial Procedure (Rules Commission), and as part of an endeavor to improve judicial assistance between the United States and foreign countries, Congress completely revised 28 U. S. C. § 1782(a). In its current form, § 1782(a) provides that a federal district court "may order" a person residing or found in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person." The 1964 overhaul of § 1782(a) deleted the prior law's words, "in any judicial proceeding *pending* in any court in a foreign country." (Emphasis added.)

Respondent Advanced Micro Devices, Inc. (AMD), filed an antitrust complaint against petitioner Intel Corporation (Intel) with the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities (Commission), alleging that Intel had violated European competition law. After the DG-Competition declined AMD's recommendation to seek documents Intel had produced in a private antitrust suit in an Alabama federal court, AMD petitioned the District Court for the Northern District of California under § 1782(a) for an order directing Intel to produce those documents. The District Court concluded that § 1782(a) did not authorize such discovery. The Ninth Circuit reversed and remanded with instructions to rule on the application's merits. The appeals court observed that § 1782(a) includes matters before bodies of a quasi-judicial or administrative nature, and, since 1964, has contained no limitation to foreign proceedings that are "pending." A proceeding judicial in character, the Ninth Circuit noted, was a likely sequel to the Commission investigation. The Court of Appeals rejected Intel's argument that § 1782(a) called for a threshold showing that the documents AMD sought, if located in the European Union, would have been discoverable in the Commission investigation. Nothing in § 1782(a)'s language or legislative history, the Ninth Circuit said, required a "foreign-discoverability" rule of that order.

Held: Section 1782(a) authorizes, but does not require, the District Court to provide discovery aid to AMD. Pp. 254–266.

1. To provide context, the Court summarizes how the Commission, acting through the DG-Competition, enforces European competition

laws. Upon receiving a complaint, or *sua sponte*, the DG-Competition conducts a preliminary investigation into alleged violations of those laws. The DG-Competition may consider information provided by a complainant, and it may seek information from a complaint's target. The DG-Competition's investigation results in a formal written decision whether to pursue the complaint. If the DG-Competition decides not to proceed, its decision may be reviewed by the Court of First Instance and, ultimately, the Court of Justice for the European Communities (European Court of Justice). When the DG-Competition pursues a complaint, it typically serves the investigation's target with a formal "statement of objections" and advises the target of its intention to recommend a decision finding an antitrust violation. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. Once the DG-Competition makes its recommendation, the Commission may dismiss the complaint or issue a decision holding the target liable and imposing penalties. The Commission's final action is subject to review in the Court of First Instance and the European Court of Justice. Lacking formal "litigant" status in Commission proceedings, a complainant nonetheless has significant procedural rights. Important here, a complainant may submit relevant information to the DG-Competition and seek judicial review of the Commission's disposition. Pp. 254–255.

2. Section 1782(a)'s language, confirmed by its context, warrants the conclusion that the provision authorizes, but does not require, a federal district court to provide assistance to a complainant in a Commission proceeding that leads to a dispositive ruling. The Court therefore rejects the categorical limitations Intel would place on the statute's reach. Pp. 255–263.

(a) A complainant before the Commission, such as AMD, qualifies as an "interested person" within § 1782(a)'s compass. The Court rejects Intel's contention that "interested person[s]" does not include complainants, but encompasses only litigants, foreign sovereigns, and a sovereign's designated agents. To support its reading, Intel highlights § 1782's caption, "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." (Emphasis added.) A statute's caption, however, cannot undo or limit its text's plain meaning. *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 529. Section 1782(a) plainly reaches beyond the universe of persons designated "litigant." With significant participation rights in Commission proceedings, the complainant qualifies as an "interested person" within any fair construction of that term. Pp. 256–257.

(b) The assistance AMD seeks meets § 1782(a)'s specification "for use in a foreign or international tribunal." The Commission qualifies

as a "tribunal" when it acts as a first-instance decisionmaker. Both the Court of First Instance and the European Court of Justice are tribunals, but not proof-takers. Their review is limited to the record before the Commission. Hence, AMD could "use" evidence in those reviewing courts only by submitting it to the Commission in the current, investigative stage. In adopting the Rules Commission's recommended replacement of the term "any judicial proceeding" with the words "a proceeding in a foreign or international tribunal," Congress opened the way for judicial assistance in foreign administrative and quasi-judicial proceedings. This Court has no warrant to exclude the Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit. Pp. 257–258.

(c) The "proceeding" for which discovery is sought under § 1782(a) must be within reasonable contemplation, but need not be "pending" or "imminent." The Court rejects Intel's argument that the Commission *investigation* launched by AMD's complaint does not qualify for § 1782(a) assistance. Since the 1964 revision, which deleted the prior law's reference to "pending," Congress has not limited judicial assistance under § 1782(a) to "pending" adjudicative proceedings. This Court presumes that Congress intends its statutory amendments to have real and substantial effect. *Stone* v. *INS*, 514 U. S. 386, 397. The 1964 revision's legislative history corroborates Congress' recognition that judicial assistance would be available for both foreign proceedings and *investigations.* A 1996 amendment clarifies that § 1782(a) covers "criminal investigations conducted before formal accusation." Nothing in that amendment, however, suggests that Congress meant to rein in, rather than to confirm, by way of example, the range of discovery § 1782(a) authorizes. Pp. 258–259.

(d) Section 1782(a) does not impose a foreign-discoverability requirement. Although § 1782(a) expressly shields from discovery matters protected by legally applicable privileges, nothing in § 1782(a)'s text limits a district court's production-order authority to materials discoverable in the foreign jurisdiction if located there. Nor does the legislative history suggest that Congress intended to impose a blanket foreign-discoverability rule on § 1782(a) assistance. The Court rejects two policy concerns raised by Intel in support of a foreign-discoverability limitation on § 1782(a) aid—avoiding offense to foreign governments, and maintaining parity between litigants. While comity and parity concerns may be legitimate touchstones for a district court's exercise of discretion in particular cases, they do not warrant construction of § 1782(a)'s text to include a generally applicable foreign-discoverability rule. Moreover, the Court questions whether foreign governments would be offended by a domestic prescription permitting, but not requir-

ing, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions; such reasons do not necessarily signal objection to aid from United States federal courts. A foreign tribunal's reluctance to order production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a). When the foreign tribunal would readily accept relevant information discovered in the United States, application of a categorical foreign-discoverability rule would be senseless. Concerns about parity among adversaries in litigation likewise provide no sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an "interested person," a district court can condition relief upon reciprocal information exchange. Moreover, the foreign tribunal can place conditions on its acceptance of information, thereby maintaining whatever measure of parity it deems appropriate. The Court also rejects Intel's suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger. For example, the United States has no close analogue to the Commission regime, under which AMD lacks party status and can participate only as a complainant. Pp. 259–263.

3. Whether § 1782(a) assistance is appropriate in this case is yet unresolved. To guide the District Court on remand, the Court notes factors relevant to that question. First, when the person from whom discovery is sought is a participant in the foreign proceeding, as Intel is here, the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. In contrast, nonparticipants in foreign proceedings may be outside the foreign tribunal's jurisdictional reach; thus, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid. Second, a court presented with a § 1782(a) request may consider the nature of the foreign tribunal, the character of proceedings underway abroad, and the receptivity of the foreign government, court, or agency to federal-court judicial assistance. Further, the grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. Specifically, a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering limits or other policies of a for-

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eign country or the United States. Also, unduly intrusive or burdensome requests may be rejected or trimmed. The Court declines, at this juncture, Intel's suggestion that it exercise its supervisory authority to adopt rules barring § 1782(a) discovery here. Any such endeavor should await further experience with § 1782(a) applications in the lower courts. Several facets of this case remain largely unexplored. While Intel and its *amici* are concerned that granting AMD's application in any part may yield disclosure of confidential information, encourage "fishing expeditions," and undermine the Commission's program offering prosecutorial leniency for admissions of wrongdoing, no one has suggested that AMD's complaint to the Commission is pretextual. Nor has it been shown that § 1782(a)'s preservation of legally applicable privileges and the controls on discovery available under Federal Rule of Civil Procedure 26(b)(2) and (c) would be ineffective to prevent discovery of Intel's confidential information. The Court leaves it to the courts below, applying closer scrutiny, to ensure an airing adequate to determine what, if any, assistance is appropriate. Pp. 264–266.

292 F. 3d 664, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, and THOMAS, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, *post*, p. 267. BREYER, J., filed a dissenting opinion, *post*, p. 267. O'CONNOR, J., took no part in the consideration or decision of the case.

Seth P. Waxman argued the cause for petitioner. With him on the briefs were *Jonathan E. Nuechterlein*, *Joseph Kattan*, and *James A. Murray*. *Carter G. Phillips* argued the cause and filed a brief as *amicus curiae* for the Commission of the European Communities in support of petitioner under this Court's Rule 12.6. With him on the brief were *Virginia A. Seitz*, *Richard Weiner*, *Gene C. Schaerr*, and *Marinn F. Carlson*.

Patrick Lynch argued the cause for respondent. With him on the brief was *Jonathan D. Hacker*.

Jeffrey P. Minear argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Acting Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Dreeben*, *Deputy*

Assistant Attorney General Katsas, *Michael Jay Singer*, and *Sushma Soni*.*

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns the authority of federal district courts to assist in the production of evidence for use in a foreign or international tribunal. In the matter before us, respondent Advanced Micro Devices, Inc. (AMD), filed an antitrust complaint against petitioner Intel Corporation (Intel) with the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities (European Commission or Commission). In pursuit of that complaint, AMD applied to the United States District Court for the Northern District of California, invoking 28 U. S. C. § 1782(a), for an order requiring Intel to produce potentially relevant documents. Section 1782(a) provides that a federal district court "may order" a person "resid[ing]" or "found" in the district to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal . . . upon the application of any interested person."

Concluding that § 1782(a) did not authorize the requested discovery, the District Court denied AMD's application. The Court of Appeals for the Ninth Circuit reversed that determination and remanded the case, instructing the District Court to rule on the merits of AMD's application. In accord with the Court of Appeals, we hold that the District Court had authority under § 1782(a) to entertain AMD's discovery request. The statute, we rule, does not categorically bar the assistance AMD seeks: (1) A complainant before the European Commission, such as AMD, qualifies as an "interested person" within § 1782(a)'s compass; (2) the Commission is a § 1782(a) "tribunal" when it acts as a first-instance

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*Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *Roy T. Englert, Jr.*, *Max Huffman*, and *Robin S. Conrad;* and for the Product Liability Advisory Council, Inc., by *Kenneth S. Geller* and *Miriam R. Nemetz*.

decisionmaker; (3) the "proceeding" for which discovery is sought under § 1782(a) must be in reasonable contemplation, but need not be "pending" or "imminent"; and (4) § 1782(a) contains no threshold requirement that evidence sought from a federal district court would be discoverable under the law governing the foreign proceeding. We caution, however, that § 1782(a) authorizes, but does not require, a federal district court to provide judicial assistance to foreign or international tribunals or to "interested person[s]" in proceedings abroad. Whether such assistance is appropriate in this case is a question yet unresolved. To guide the District Court on remand, we suggest considerations relevant to the disposition of that question.

I

A

Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide federal-court assistance in gathering evidence for use in foreign tribunals. Congress first provided for federal-court aid to foreign tribunals in 1855; requests for aid took the form of letters rogatory forwarded through diplomatic channels. See Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630 (circuit court may appoint "a United States commissioner designated . . . to make the examination of witnesses" on receipt of a letter rogatory from a foreign court); Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769 (authorizing district courts to respond to letters rogatory by compelling witnesses here to provide testimony for use abroad in "suit[s] for the recovery of money or property").[1] In 1948, Congress substantially broadened the scope of as-

[1] "[A] *letter rogatory* is the request by a domestic court to a foreign court to take evidence from a certain witness." Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515, 519 (1953). See Smit, International Litigation under the United States Code, 65 Colum. L. Rev. 1015, 1027 (1965) (hereinafter Smit, International Litigation) (noting foreign courts' use of letters rogatory to request evidence-gathering aid from United States courts).

sistance federal courts could provide for foreign proceedings. That legislation, codified as § 1782, eliminated the prior requirement that the government of a foreign country be a party or have an interest in the proceeding. The measure allowed district courts to designate persons to preside at depositions "to be used in *any civil action* pending in any court in a foreign country with which the United States is at peace." Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 (emphasis added). The next year, Congress deleted "civil action" from § 1782's text and inserted "judicial proceeding." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103. See generally Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515 (1953).

In 1958, prompted by the growth of international commerce, Congress created a Commission on International Rules of Judicial Procedure (Rules Commission) to "investigate and study existing practices of judicial assistance and cooperation between the United States and foreign countries with a view to achieving improvements." Act of Sept. 2, Pub. L. 85–906, § 2, 72 Stat. 1743; S. Rep. No. 2392, 85th Cong., 2d Sess., 3 (1958); Smit, International Litigation 1015–1016. Six years later, in 1964, Congress unanimously adopted legislation recommended by the Rules Commission;[2] the legislation included a complete revision of § 1782. See Act of Oct. 3, Pub. L. 88–619, § 9, 78 Stat. 997; Smit, International Litigation 1026–1035.

As recast in 1964, § 1782 provided for assistance in obtaining documentary and other tangible evidence as well as testimony. Notably, Congress deleted the words "in any judicial proceeding *pending* in any court in a foreign country," and replaced them with the phrase "in a proceeding in a foreign

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[2] The Rules Commission also drafted amendments to the Federal Rules of Civil and Criminal Procedure and a Uniform Interstate and International Procedure Act, recommended for adoption by individual States. See Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H. R. Doc. No. 88, 88th Cong., 1st Sess., 2 (1963).

or international tribunal." Brief for United States as *Amicus Curiae* 6, 4a–5a (emphasis added). While the accompanying Senate Report does not account discretely for the deletion of the word "pending,"[3] it explains that Congress introduced the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but extends also to "administrative and quasi-judicial proceedings." S. Rep. No. 1580, 88th Cong., 2d Sess., 7 (1964); see H. R. Rep. No. 1052, 88th Cong., 1st Sess., 9 (1963) (same). Congress further amended § 1782(a) in 1996 to add, after the reference to "foreign or international tribunal," the words "including criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104–106, § 1342(b), 110 Stat. 486. Section 1782(a)'s current text reads:

> "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person . . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing . . . [or may be] the Federal Rules of Civil Procedure.
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> "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege."

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[3] See Smit, International Litigation 1026–1027, n. 72 (commenting that Congress eliminated the word "pending" in order "to facilitate the gathering of evidence prior to the institution of litigation abroad").

B

AMD and Intel are "worldwide competitors in the microprocessor industry." 292 F. 3d 664, 665 (CA9 2002). In October 2000, AMD filed an antitrust complaint with the DG-Competition of the European Commission. *Ibid.;* App. 41. "The European Commission is the executive and administrative organ of the European Communities." Brief for Commission of European Communities as *Amicus Curiae* 1 (hereinafter European Commission *Amicus Curiae*). The Commission exercises responsibility over the wide range of subject areas covered by the European Union treaty; those areas include the treaty provisions, and regulations thereunder, governing competition. See *ibid.;* Consolidated Versions of Treaty on European Union and Treaty Establishing European Community, Arts. 81 and 82, 2002 O. J. (C 325) 33, 64–65, 67 (hereinafter EC Treaty). The DG-Competition, operating under the Commission's aegis, is the European Union's primary antitrust law enforcer. European Commission *Amicus Curiae* 2. Within the DG-Competition's domain are anticompetitive agreements (Art. 81) and abuse of dominant market position (Art. 82). *Ibid.;* EC Treaty 64–65.

AMD's complaint alleged that Intel, in violation of European competition law, had abused its dominant position in the European market through loyalty rebates, exclusive purchasing agreements with manufacturers and retailers, price discrimination, and standard-setting cartels. App. 40–43; Brief for Petitioner 13. AMD recommended that the DG-Competition seek discovery of documents Intel had produced in a private antitrust suit, titled *Intergraph Corp.* v. *Intel Corp.*, brought in a Federal District Court in Alabama. 3 F. Supp. 2d 1255 (ND Ala. 1998), vacated, 195 F. 3d 1346 (CA Fed. 1999), remanded, 88 F. Supp. 2d 1288 (ND Ala. 2000), aff'd, 253 F. 3d 695 (CA Fed. 2001); App. 111; App. to Pet. for

Cert. 13a–14a.[4] After the DG-Competition declined to seek judicial assistance in the United States, AMD, pursuant to § 1782(a), petitioned the District Court for the Northern District of California[5] for an order directing Intel to produce documents discovered in the *Intergraph* litigation and on file in the federal court in Alabama. App. to Pet. for Cert. 13a–14a. AMD asserted that it sought the materials in connection with the complaint it had filed with the European Commission. *Ibid.*[6]

The District Court denied the application as "[un]supported by applicable authority." *Id.*, at 15a. Reversing that determination, the Court of Appeals for the Ninth Circuit remanded the case for disposition on the merits. 292 F. 3d, at 669. The Court of Appeals noted two points significant to its decision: § 1782(a) includes matters before "'bodies of a quasi-judicial or administrative nature,'" *id.*, at 667 (quoting *In re Letters Rogatory from Tokyo Dist.*, 539 F. 2d 1216, 1218–1219 (CA9 1976)); and, since 1964, the statute's text has contained "[no] requirement that the proceeding be 'pending,'" 292 F. 3d, at 667 (quoting *United States* v. *Sealed 1, Letter of Request for Legal Assistance from the*

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[4] The Alabama federal court granted summary judgment in Intel's favor in the *Intergraph* litigation, and the Court of Appeals for the Federal Circuit affirmed. See 253 F. 3d, at 699. A protective order, imposed by the Alabama federal court, governs the confidentiality of all discovery in that case. App. 72–73.

[5] Both Intel and AMD are headquartered in the Northern District of California. *Id.*, at 113.

[6] AMD's complaint to the Commission alleges, *inter alia*, "that Intel has monopolized the worldwide market for Windows-capable *i. e.* x86, microprocessors." *Id.*, at 55–56. The documents from the *Intergraph* litigation relate to: "(a) the market within which Intel x86 microprocessors compete; (b) the power that Intel enjoys within that market; (c) actions taken by Intel to preserve and enhance its position in the market; and (d) the impact of the actions taken by Intel to preserve and enhance its market position." App. 55.

Deputy Prosecutor Gen. of Russian Federation, 235 F. 3d 1200, 1204 (CA9 2000)); see *supra*, at 248–249. A proceeding judicial in character, the Ninth Circuit further observed, was a likely sequel to the European Commission's investigation: "[The European Commission is] a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties. [The Commission's] decisions are appealable to the Court of First Instance and then to the [European] Court of Justice. Thus, the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings." 292 F. 3d, at 667; see *infra*, at 254–255 (presenting synopsis of Commission proceedings and judicial review of Commission decisions).

The Court of Appeals rejected Intel's argument that § 1782(a) called for a threshold showing that the documents AMD sought in the California federal court would have been discoverable by AMD in the European Commission investigation had those documents been located within the Union. 292 F. 3d, at 668. Acknowledging that other Courts of Appeals had construed § 1782(a) to include a "foreign-discoverability" rule, the Ninth Circuit found "nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing [by] the party seeking discovery that what is sought be discoverable in the foreign proceeding," *id.*, at 669. A foreign-discoverability threshold, the Court of Appeals added, would disserve § 1782(a)'s twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.*

On remand, a Magistrate Judge found AMD's application "overbroad," and recommended an order directing AMD to submit a more specific discovery request confined to documents directly relevant to the European Commission investigation. App. to Brief in Opposition 1a–6a; Brief for Petitioner 15, n. 9. The District Court has stayed further

proceedings pending disposition of the questions presented by Intel's petition for certiorari. *Ibid.;* see Order Vacating Hearing Date, No. C 01–7033 MISC JW (ND Cal., Dec. 1, 2003) (stating "Intel may renotice its motion for de novo review of the Magistrate Judge's decision after the Supreme Court issues its ruling").

We granted certiorari, 540 U. S. 1003 (2003), in view of the division among the Circuits on the question whether § 1782(a) contains a foreign-discoverability requirement.[7] We now hold that § 1782(a) does not impose such a requirement. We also granted review on two other questions. First, does § 1782(a) make discovery available to complainants, such as AMD, who do not have the status of private "litigants" and are not sovereign agents? See Pet. for Cert. (i). Second, must a "proceeding" before a foreign "tribunal" be "pending" or at least "imminent" for an applicant to invoke § 1782(a) successfully? Compare *In re Letter of Request from Crown Prosecution Serv. of United Kingdom*, 870 F. 2d 686, 691 (CADC 1989) (proceeding must be "within reasonable contemplation"), with *In re Ishihari Chemical Co.*, 251 F. 3d 120, 125 (CA2 2001) (proceeding must be "imminent—very likely to occur and very soon to occur"); *In re International Judicial Assistance (Letter Rogatory) for Federative Republic of Brazil*, 936 F. 2d 702, 706 (CA2 1991)

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[7] The First and Eleventh Circuits have construed § 1782(a) to contain a foreign-discoverability requirement. See *In re Application of Asta Medica, S. A.*, 981 F. 2d 1, 7 (CA1 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1156 (CA11 1988). The Fourth and Fifth Circuits have held that no such requirement exists if the § 1782(a) applicant is a foreign sovereign. See *In re Letter of Request from Amtsgericht Ingolstadt, F. R. G.*, 82 F. 3d 590, 592 (CA4 1996); *In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F. 3d 308, 310–311 (CA5 1995). In alignment with the Ninth Circuit, the Second and Third Circuits have rejected a foreign-discoverability requirement. See *In re Application of Gianoli Aldunate*, 3 F. 3d 54, 59–60 (CA2 1993); *In re Bayer AG*, 146 F. 3d 188, 193–194 (CA3 1998).

(same). Answering "yes" to the first question and "no" to the second, we affirm the Ninth Circuit's judgment.

II

To place this case in context, we sketch briefly how the European Commission, acting through the DG-Competition, enforces European competition laws and regulations. The DG-Competition's "overriding responsibility" is to conduct investigations into alleged violations of the European Union's competition prescriptions. See European Commission *Amicus Curiae* 6. On receipt of a complaint or *sua sponte*, the DG-Competition conducts a preliminary investigation. *Ibid.* In that investigation, the DG-Competition "may take into account information provided by a complainant, and it may seek information directly from the target of the complaint." *Ibid.* "Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint. If [the DG-Competition] declines to proceed, that decision is subject to judicial review" by the Court of First Instance and, ultimately, by the court of last resort for European Union matters, the Court of Justice for the European Communities (European Court of Justice). *Id.*, at 7; App. 50; see, *e. g.*, Case T–241/97, *Stork Amsterdam BV* v. *Commission*, 2000 E. C. R. II–309, [2000] 5 C. M. L. R. 31 (Ct. 1st Instance 2000) (annulling Commission's rejection of a complaint).[8]

If the DG-Competition decides to pursue the complaint, it typically serves the target of the investigation with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated European competition law. European Commission

[8] The Court of First Instance, which is "attached to the [European] Court of Justice," was established "to improve the judicial protection of individual interests, particularly in cases requiring the examination of complex facts, whilst at the same time reducing the workload of the [European] Court of Justice." C. Kerse, E. C. Antitrust Procedure 37 (3d ed. 1994).

Amicus Curiae 7. The target is entitled to a hearing before an independent officer, who provides a report to the DG-Competition. *Ibid.;* App. 18–27. Once the DG-Competition has made its recommendation, the European Commission may "dismis[s] the complaint, or issu[e] a decision finding infringement and imposing penalties." European Commission *Amicus Curiae* 7. The Commission's final action dismissing the complaint or holding the target liable is subject to review in the Court of First Instance and the European Court of Justice. *Ibid.;* App. 52–53, 89–90.

Although lacking formal "party" or "litigant" status in Commission proceedings, the complainant has significant procedural rights. Most prominently, the complainant may submit to the DG-Competition information in support of its allegations, and may seek judicial review of the Commission's disposition of a complaint. See European Commission *Amicus Curiae* 7–8, and n. 5; *Stork Amsterdam*, 2000 E. C. R. II, at 328–329, ¶¶ 51–53.

III

As "in all statutory construction cases, we begin [our examination of § 1782] with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U. S. 438, 450 (2002). The language of § 1782(a), confirmed by its context, our examination satisfies us, warrants this conclusion: The statute authorizes, but does not require, a federal district court to provide assistance to a complainant in a European Commission proceeding that leads to a dispositive ruling, *i. e.*, a final administrative action both responsive to the complaint and reviewable in court.[9] Accordingly, we reject the categorical limitations Intel would place on the statute's reach.

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[9] The dissent suggests that the Commission "more closely resembles a prosecuting authority, say, the Department of Justice's Antitrust Division, than an administrative agency that adjudicates cases, say, the Federal Trade Commission." *Post,* at 270. That is a questionable suggestion in view of the European Commission's authority to determine liability and impose penalties, dispositions that will remain final unless overturned by the European courts. See *supra* this page.

A

We turn first to Intel's contention that the catalog of "interested person[s]" authorized to apply for judicial assistance under § 1782(a) includes only "litigants, foreign sovereigns, and the designated agents of those sovereigns," and excludes AMD, a mere complainant before the Commission, accorded only "limited rights." Brief for Petitioner 10–11, 24, 26–27. Highlighting § 1782's caption, "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals," Intel urges that the statutory phrase "any interested person" should be read, correspondingly, to reach only "litigants." *Id.*, at 24 (internal quotation marks omitted, emphasis in original).

The caption of a statute, this Court has cautioned, "cannot undo or limit that which the [statute's] text makes plain." *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U. S. 519, 529 (1947). The text of § 1782(a), "upon the application of any interested person," plainly reaches beyond the universe of persons designated "litigant." No doubt litigants are included among, and may be the most common example of, the "interested person[s]" who may invoke § 1782; we read § 1782's caption to convey no more. See, *e. g.*, *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 482–483 (2001) (rejecting narrow reading of 42 U. S. C. § 7511(a) based on caption in light of "specifically" broader coverage of provision's text).

The complainant who triggers a European Commission investigation has a significant role in the process. As earlier observed, see *supra*, at 255, in addition to prompting an investigation, the complainant has the right to submit information for the DG-Competition's consideration, and may proceed to court if the Commission discontinues the investigation or dismisses the complaint. App. 52–53. Given these participation rights, a complainant "possess[es] a reasonable interest in obtaining [judicial] assistance," and therefore qualifies as an "interested person" within any fair construction of that term. See Smit, International Litiga-

tion 1027 ("any interested person" is "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance").[10]

B

We next consider whether the assistance in obtaining documents here sought by an "interested person" meets the specification "for use in a foreign or international tribunal." Beyond question the reviewing authorities, both the Court of First Instance and the European Court of Justice, qualify as tribunals. But those courts are not proof-taking instances. Their review is limited to the record before the Commission. See Tr. of Oral Arg. 17. Hence, AMD could "use" evidence in the reviewing courts only by submitting it to the Commission in the current, investigative stage.

Moreover, when Congress established the Commission on International Rules of Judicial Procedure in 1958, see *supra*, at 248, it instructed the Rules Commission to recommend

[10] The term "interested person," Intel notes, also appears in 28 U. S. C. § 1696(a), a provision enacted concurrently with the 1964 revision of § 1782. Brief for Petitioner 27. Section 1696(a) authorizes federal district courts to "order service . . . of any document issued in connection with a [foreign] proceeding" pursuant to a request made by the foreign tribunal "or upon application of any interested person." Intel reasons that "[t]he class of private parties qualifying as 'interested persons' for [service] purposes *must* of course be limited to litigants, because private parties . . . cannot serve 'process' unless they have filed suit." Brief for Petitioner 27 (emphasis in original). Section 1696(a), however, is not limited to service of *process;* it allows service of "any document" issued in connection with a foreign proceeding. As the Government points out by way of example: "[I]f the European Commission's procedures were revised to require a complainant to serve its complaint on a target company, but the complainant's role in the Commission's proceedings otherwise remained unchanged, [§]1696 would authorize the district court to provide that 'interested [person]' with assistance in serving that document." Brief for United States as *Amicus Curiae* 20, n. 11.

procedural revisions "for the rendering of assistance to foreign courts *and quasi-judicial agencies.*" § 2, 72 Stat. 1743 (emphasis added). Section 1782 had previously referred to "any judicial proceeding." The Rules Commission's draft, which Congress adopted, replaced that term with "a proceeding in a foreign or international tribunal." See *supra*, at 248–249. Congress understood that change to "provid[e] the possibility of U. S. judicial assistance in connection with [administrative and quasi-judicial proceedings abroad]." S. Rep. No. 1580, at 7–8; see Smit, International Litigation 1026–1027, and nn. 71, 73 ("[t]he term 'tribunal' . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts"; in addition to affording assistance in cases before the European Court of Justice, § 1782, as revised in 1964, "permits the rendition of proper aid in proceedings before the [European] Commission in which the Commission exercises quasi-judicial powers"). See also European Commission *Amicus Curiae* 9 ("[W]hen the Commission acts on DG Competition's final recommendation . . . the investigative function blur[s] into decisionmaking."). We have no warrant to exclude the European Commission, to the extent that it acts as a first-instance decisionmaker, from § 1782(a)'s ambit. See 292 F. 3d, at 667; *supra*, at 255, n. 9.

C

Intel also urges that AMD's complaint has not progressed beyond the investigative stage; therefore, no adjudicative action is currently or even imminently on the Commission's agenda. Brief for Petitioner 27–29.

Section 1782(a) does not limit the provision of judicial assistance to "pending" adjudicative proceedings. In 1964, when Congress eliminated the requirement that a proceeding be "judicial," Congress also deleted the requirement that a proceeding be "pending." See *supra*, at 248–249. "When

Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone* v. *INS*, 514 U. S. 386, 397 (1995). The legislative history of the 1964 revision is in sync; it reflects Congress' recognition that judicial assistance would be available "whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." S. Rep. No. 1580, at 9 (emphasis added).

In 1996, Congress amended § 1782(a) to clarify that the statute covers "criminal investigations conducted before formal accusation." See § 1342(b), 110 Stat. 486; *supra*, at 249. Nothing suggests that this amendment was an endeavor to rein in, rather than to confirm, by way of example, the broad range of discovery authorized in 1964. See S. Rep. No. 1580, at 7 ("[T]he [district] court[s] have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.").

In short, we reject the view, expressed in *In re Ishihara Chemical Co.*, that § 1782 comes into play only when adjudicative proceedings are "pending" or "imminent." See 251 F. 3d, at 125 (proceeding must be "imminent—very likely to occur and very soon to occur" (internal quotation marks omitted)). Instead, we hold that § 1782(a) requires only that a dispositive ruling by the Commission, reviewable by the European courts, be within reasonable contemplation. See *Crown Prosecution Serv. of United Kingdom*, 870 F. 2d, at 691; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F. 2d 1151, 1155, and n. 9 (CA11 1988); Smit, International Litigation 1026 ("It is not necessary . . . for the [adjudicative] proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.").

D

We take up next the foreign-discoverability rule on which lower courts have divided: Does § 1782(a) categorically bar a

district court from ordering production of documents when the foreign tribunal or the "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction? See *supra*, at 253–254, and n. 7.

We note at the outset, and count it significant, that § 1782(a) expressly shields privileged material: "A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege." See S. Rep. No. 1580, at 9 ("[N]o person shall be required under the provisions of [§ 1782] to produce any evidence in violation of an applicable privilege."). Beyond shielding material safeguarded by an applicable privilege, however, nothing in the text of § 1782 limits a district court's production-order authority to materials that could be discovered in the foreign jurisdiction if the materials were located there. "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect." *In re Application of Gianoli Aldunate*, 3 F. 3d 54, 59 (CA2 1993); accord *Four Pillars Enterprises Co.* v. *Avery Dennison Corp.*, 308 F. 3d 1075, 1080 (CA9 2002); 292 F. 3d, at 669 (case below); *In re Bayer AG*, 146 F. 3d 188, 193–194 (CA3 1998).[11]

Nor does § 1782(a)'s legislative history suggest that Congress intended to impose a blanket foreign-discoverability rule on the provision of assistance under § 1782(a). The Senate Report observes in this regard that § 1782(a) "leaves the issuance of an appropriate order to the discretion of the court

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[11] Section 1782(a) instructs that a district court's discovery order "may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing . . . [or may be] the Federal Rules of Civil Procedure." This mode-of-proof-taking instruction imposes no substantive limitation on the discovery to be had.

which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable." S. Rep. No. 1580, at 7.

Intel raises two policy concerns in support of a foreign-discoverability limitation on § 1782(a) aid—avoiding offense to foreign governments, and maintaining parity between litigants. Brief for Petitioner 23–24; Reply Brief 5, 13–14; see *In re Application of Asta Medica, S. A.*, 981 F. 2d 1, 6 (CA1 1992) ("Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited to their concepts of litigation."). While comity and parity concerns may be important as touchstones for a district court's exercise of discretion in particular cases, they do not permit our insertion of a generally applicable foreign-discoverability rule into the text of § 1782(a).

We question whether foreign governments would in fact be offended by a domestic prescription permitting, but not requiring, judicial assistance. A foreign nation may limit discovery within its domain for reasons peculiar to its own legal practices, culture, or traditions—reasons that do not necessarily signal objection to aid from United States federal courts. See *Bayer*, 146 F. 3d, at 194 ("[T]here is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use."); Smit, Recent Developments in International Litigation, 35 S. Tex. L. Rev. 215, 235–236 (1994) (hereinafter Smit, Recent Developments) (same).[12] A foreign tribunal's reluctance to order

[12] Most civil-law systems lack procedures analogous to the pretrial discovery regime operative under the Federal Rules of Civil Procedure. See ALI, ALI/Unidroit Principles and Rules of Transnational Civil Procedure, Proposed Final Draft, Rule 22, Comment R–22E, p. 118 (2004) ("Disclosure and exchange of evidence under the civil-law systems are generally more restricted, or nonexistent."); Hazard, Discovery and the Role of the Judge in Civil Law Jurisdictions, 73 Notre Dame L. Rev. 1017, 1018–1019 (1998) (same). See also Smit, Recent Developments 235, n. 93 ("The drafters [of § 1782] were quite aware of the circumstance that civil law systems

production of materials present in the United States similarly may signal no resistance to the receipt of evidence gathered pursuant to § 1782(a). See *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N. V.*, [1987] 1 App. Cas. 24 (House of Lords ruled that nondiscoverability under English law did not stand in the way of a litigant in English proceedings seeking assistance in the United States under § 1782).[13] When the foreign tribunal would readily accept relevant information discovered in the United States, application of a foreign-discoverability rule would be senseless. The rule in that situation would serve only to thwart § 1782(a)'s objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons having no bearing on international comity, they cannot obtain under their own laws.

Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a cross-the-board foreign-discoverability rule. When information is sought by an "interested person," a district court could condition relief upon that person's reciprocal exchange of information. See *Euromepa, S. A.* v. *R. Esmerian, Inc.*, 51 F. 3d 1095, 1102 (CA2 1995); Smit, Recent Developments 237. Moreover, the foreign tribunal can place conditions on its acceptance of the information to maintain whatever measure of parity it concludes is appropriate. See *Euromepa*, 51 F. 3d, at 1101.[14]

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generally do not have American type pretrial discovery, and do not compel the production of documentary evidence.").

[13] See Smit, American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U. S. C. Revisited, 25 Syracuse J. Int'l L. & Comm. 1, 13, and n. 63 (1998) (hereinafter Smit, American Assistance) (noting that "[a] similar decision was rendered by the President of the Amsterdam District Court").

[14] A civil-law court, furthermore, might attend to litigant-parity concerns in its merits determination: "In civil law countries, documentary evidence is generally submitted as an attachment to the pleadings or as part of a report by an expert. . . . A civil law court generally rules upon the question of whether particular documentary evidence may be relied

We also reject Intel's suggestion that a § 1782(a) applicant must show that United States law would allow discovery in domestic litigation analogous to the foreign proceeding. Brief for Petitioner 19–20 ("[I]f AMD were pursuing this matter in the United States, U. S. law would preclude it from obtaining discovery of Intel's documents."). Section 1782 is a provision for assistance to tribunals abroad. It does not direct United States courts to engage in comparative analysis to determine whether analogous proceedings exist here. Comparisons of that order can be fraught with danger.[15] For example, we have in the United States no close analogue to the European Commission regime under which AMD is not free to mount its own case in the Court of First Instance or the European Court of Justice, but can participate only as complainant, an "interested person," in Commission-steered proceedings. See L. Ritter, W. Braun, & F. Rawlinson, European Competition Law: A Practitioner's Guide 824–826 (2d ed. 2000) (describing a complaint as a potentially "more certain (and cheaper) alternative to private enforcement through the [European Union's member states'] courts").[16]

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upon only in its decision on the merits." Smit, Recent Developments 235–236, n. 94.

[15] Among its proposed rules, the dissent would exclude from § 1782(a)'s reach discovery not available "under foreign law" *and* "under domestic law in analogous circumstances." *Post*, at 270. Because comparison of systems is slippery business, the dissent's rule is infinitely easier to state than to apply. As the dissent's examples tellingly reveal, see *post*, at 267–268, a foreign proceeding may have no direct analogue in our legal system. In light of the variety of foreign proceedings resistant to ready classification in domestic terms, Congress left unbounded by categorical rules the determination whether a matter is proceeding "in a foreign or international tribunal." While we reject the rules the dissent would inject into the statute, see *post*, at 269–273, we do suggest guides for the exercise of district-court discretion, see *infra*, at 264–266.

[16] At oral argument, counsel for AMD observed: "In the United States, we could have brought a private action in the district court for these very same violations. In Europe, our only Europe-wide remedy was to go to the [European Commission]." Tr. of Oral Arg. 33.

IV

As earlier emphasized, see *supra,* at 260–261, a district court is not required to grant a § 1782(a) discovery application simply because it has the authority to do so. See *United Kingdom* v. *United States,* 238 F. 3d 1312, 1319 (CA11 2001) ("a district court's compliance with a § 1782 request is not mandatory"). We note below factors that bear consideration in ruling on a § 1782(a) request.

First, when the person from whom discovery is sought is a participant in the foreign proceeding (as Intel is here), the need for § 1782(a) aid generally is not as apparent as it ordinarily is when evidence is sought from a nonparticipant in the matter arising abroad. A foreign tribunal has jurisdiction over those appearing before it, and can itself order them to produce evidence. App. to Reply Brief 4a ("When th[e] person [who is to produce the evidence] is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence." (quoting declaration of H. Smit in *In re: Application of Ishihara Chemical Co., Ltd., For order to take discovery of Shipley Company, L. L. C., Pursuant to 28 U. S. C. § 1782,* Misc. 99–232 (FB) (EDNY, May 18, 2000))). In contrast, nonparticipants in the foreign proceeding may be outside the foreign tribunal's jurisdictional reach; hence, their evidence, available in the United States, may be unobtainable absent § 1782(a) aid. See App. to Reply Brief 4a.

Second, as the 1964 Senate Report suggests, a court presented with a § 1782(a) request may take into account the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the foreign government or the court or agency abroad to U. S. federal-court judicial assistance. See S. Rep. No. 1580, at 7. Further, the grounds Intel urged for categorical limitations on § 1782(a)'s scope may be relevant in determining whether a discovery order should be granted in a particular case. See Brief for United States as *Amicus Curiae* 23. Specifically,

a district court could consider whether the § 1782(a) request conceals an attempt to circumvent foreign proof-gathering restrictions or other policies of a foreign country or the United States. See *id.*, at 27. Also, unduly intrusive or burdensome requests may be rejected or trimmed. See *Bayer*, 146 F. 3d, at 196 (remanding for district-court consideration of "appropriate measures, if needed, to protect the confidentiality of materials"); *In re Application of Esses*, 101 F. 3d 873, 876 (CA2 1996) (affirming limited discovery that is neither "burdensome [n]or duplicative").

Intel maintains that, if we do not accept the categorical limitations it proposes, then, at least, we should exercise our supervisory authority to adopt rules barring § 1782(a) discovery here. Brief for Petitioner 34–36; cf. *Thomas* v. *Arn*, 474 U. S. 140, 146–147 (1985) (this Court can establish rules of "sound judicial practice" (internal quotation marks omitted)). We decline, at this juncture, to adopt supervisory rules. Any such endeavor at least should await further experience with § 1782(a) applications in the lower courts.[17] The European Commission has stated in *amicus curiae* briefs to this Court that it does not need or want the District Court's assistance. See European Commission *Amicus Curiae* 11–16; Brief for European Commission as *Amicus Curiae* in Sup-

[17] The dissent sees a need for "categorical limits" to ward off "expensive, time-consuming battles about discovery." *Post*, at 268. That concern seems more imaginary than real. There is no evidence whatsoever, in the 40 years since § 1782(a)'s adoption, see *supra*, at 248, of the costs, delays, and forced settlements the dissent hypothesizes. See Smit, American Assistance 1, 19–20 ("The revised section 1782 . . . has been applied in scores of cases. . . . All in all, Section 1782 has largely served the purposes for which it was enacted. . . . [T]here appears to be no reason for seriously considering, at this time, any statutory amendments.").

The Commission, we note, is not obliged to respond to a discovery request of the kind AMD has made. The party targeted in the complaint and in the § 1782(a) application would no doubt wield the laboring oar in opposing discovery, as Intel did here. Not only was there no "need for the Commission to respond," *post*, at 271, the Commission in fact made no submission at all in the instant matter before it reached this Court.

port of Pet. for Cert. 4–8. It is not altogether clear, however, whether the Commission, which may itself invoke § 1782(a) aid, means to say "never" or "hardly ever" to judicial assistance from United States courts. Nor do we know whether the European Commission's views on § 1782(a)'s utility are widely shared in the international community by entities with similarly blended adjudicative and prosecutorial functions.

Several facets of this case remain largely unexplored. Intel and its *amici* have expressed concerns that AMD's application, if granted in any part, may yield disclosure of confidential information, encourage "fishing expeditions," and undermine the European Commission's Leniency Program. See Brief for Petitioner 37; European Commission *Amicus Curiae* 11–16.[18] Yet no one has suggested that AMD's complaint to the Commission is pretextual. Nor has it been shown that § 1782(a)'s preservation of legally applicable privileges, see *supra*, at 260, and the controls on discovery available to the District Court, see, *e. g.*, Fed. Rule Civ. Proc. 26(b)(2) and (c), would be ineffective to prevent discovery of Intel's business secrets and other confidential information.

On the merits, this case bears closer scrutiny than it has received to date. Having held that § 1782(a) authorizes, but does not require, discovery assistance, we leave it to the courts below to ensure an airing adequate to determine what, if any, assistance is appropriate.[19]

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[18] The European Commission's "Leniency Program" allows "cartel participants [to] confess their own wrongdoing" in return for prosecutorial leniency. European Commission *Amicus Curiae* 14–15; Brief for European Commission as *Amicus Curiae* in Support of Pet. for Cert. 6.

[19] The District Court might also consider the significance of the protective order entered by the District Court for the Northern District of Alabama. See App. 73; *supra*, at 251, n. 4; cf. *Four Pillars Enterprises Co.* v. *Avery Dennison Corp.*, 308 F. 3d 1075, 1080 (CA9 2002) (affirming district-court denial of discovery that "would frustrate the protective order of [another] federal [district] court").

* * *

For the reasons stated, the judgment of the Court of Appeals for the Ninth Circuit is

Affirmed.

JUSTICE O'CONNOR took no part in the consideration or decision of this case.

JUSTICE SCALIA, concurring in the judgment.

As today's opinion shows, the Court's disposition is required by the text of the statute. None of the limitations urged by petitioner finds support in the categorical language of 28 U. S. C. § 1782(a). That being so, it is not only (as I think) improper but also quite unnecessary to seek repeated support in the words of a Senate Committee Report—which, as far as we know, not even the full committee, much less the full Senate, much much less the House, and much much much less the President who signed the bill, agreed with. Since, moreover, I have not read the entire so-called legislative history, and have no need or desire to do so, so far as I know the statements of the Senate Report may be contradicted elsewhere.

Accordingly, because the statute—the only sure expression of the will of Congress—says what the Court says it says, I join in the judgment.

JUSTICE BREYER, dissenting.

The Court reads the scope of 28 U. S. C. § 1782 to extend beyond what I believe Congress might reasonably have intended. Some countries allow a private citizen to ask a court to review a criminal prosecutor's decision not to prosecute. On the majority's reading, that foreign private citizen could ask an American court to help the citizen obtain information, even if the foreign prosecutor were indifferent or unreceptive. See, *e. g.*, Mann, Criminal Procedure, in Introduction to the Law of Israel 267, 278 (A. Shapira & K.

DeWitt-Arar eds. 1995). Many countries allow court review of decisions made by any of a wide variety of nonprosecutorial, nonadjudicative bodies. On the majority's reading, a British developer, hoping to persuade the British Housing Corporation to grant it funding to build a low-income housing development, could ask an American court to demand that an American firm produce information designed to help the developer obtain the British grant. Cf., *e. g.*, Mayer, The Housing Corporation: Multiple Lines of Accountability, in Quangos, Accountability and Reform: The Politics of Quasi-Government 111, 114 (M. Flinders & M. Smith eds. 1999). This case itself suggests that an American firm, hoping to obtain information from a competitor, might file an antitrust complaint with the European antitrust authorities, thereby opening up the possibility of broad American discovery—contrary to the antitrust authorities' desires.

One might ask why it is wrong to read the statute as permitting the use of America's court processes to obtain information in such circumstances. One might also ask why American courts should not deal *case by case* with any problems of the sort mentioned. The answer to both of these questions is that discovery and discovery-related judicial proceedings take time, they are expensive, and cost and delay, or threats of cost and delay, can themselves force parties to settle underlying disputes. See The Brookings Institution, Justice For All: Reducing Costs and Delay in Civil Litigation, Report of a Task Force 6–7 (1989) (lawyers surveyed estimated that 60% of litigation costs in a typical federal case are attributable to discovery and agreed that high litigation costs are often attributable to abuse of the discovery process); Federal Judicial Center, T. Willging, J. Shapard, D. Stienstra, & D. Miletich, Discovery and Disclosure Practice, Problems, and Proposals for Change 1–2, 4, 8, 14–16 (Tables 3–5) (1997) (study outlining costs of discovery). To the extent that expensive, time-consuming battles about discovery proliferate, they deflect the attention of foreign authori-

ties from other matters those authorities consider more important; they can lead to results contrary to those that foreign authorities desire; and they can promote disharmony among national and international authorities, rather than the harmony that § 1782 seeks to achieve. They also use up domestic judicial resources and crowd our dockets.

That is why I believe the statute, while granting district courts broad authority to order discovery, nonetheless must be read as subject to some categorical limits, at least at the outer bounds—a matter that today's decision makes even more important. Those limits should rule out instances in which it is virtually certain that discovery (if considered case by case) would prove unjustified.

This case does not require us to find a comprehensive set of limits. But it does suggest two categorical limitations, which I would adopt. First, when a foreign entity possesses few tribunal-like characteristics, so that the applicability of the statute's word "tribunal" is in serious doubt, then a court should pay close attention to the foreign entity's own view of its "tribunal"-like or non-"tribunal"-like status. By paying particular attention to the views of the very foreign nations that Congress sought to help, courts would better achieve Congress' basic cooperative objectives in enacting the statute. See Act of Sept. 2, 1958, Pub. L. 85–906, § 2, 72 Stat. 1743 (creating Commission on International Rules of Judicial Procedure to investigate and improve judicial "cooperation" between the United States and other countries).

The concept of paying special attention to administrative views is well established in American law. Cf. *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984); *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944). Like American administrators, foreign administrators are likely to understand better than American courts their own job and, for example, how discovery rights might affect their ability to carry out their responsibilities. I can think of no reason why Congress would have intended a

court to pay *less* attention to the foreign entity's view of the matter than courts ordinarily pay to a domestic agency's understanding of the workings of its own statute.

Second, a court should not permit discovery where both of the following are true: (1) A private person seeking discovery would not be entitled to that discovery under foreign law, *and* (2) the discovery would not be available under domestic law in analogous circumstances. The Federal Rules of Civil Procedure, for example, make only limited provisions for nonlitigants to obtain certain discovery. See Fed. Rule Civ. Proc. 27. The limitations contained in the Rules help to avoid discovery battles launched by firms simply seeking information from competitors. Where there is benefit in permitting such discovery, and the benefit outweighs the cost of allowing it, one would expect either domestic law or foreign law to authorize it. If, notwithstanding the fact that it would not be allowed under either domestic or foreign law, there is some special need for the discovery in a particular instance, one would expect to find foreign governmental or intergovernmental authorities making the case for that need. Where *none* of these circumstances is present, what benefit could offset the obvious costs to the competitor and to our courts? I cannot think of any.

Application of either of these limiting principles would require dismissal of this discovery proceeding. First, the Commission of the European Communities' (Commission) antitrust authority's status as a "tribunal" is questionable. In many respects, the Commission more closely resembles a prosecuting authority, say, the Department of Justice's Antitrust Division, than an administrative agency that adjudicates cases, say, the Federal Trade Commission. To my knowledge, those who decide whether to bring an antitrust prosecution on the Commission's behalf are not judges. See App. 96; Wils, The Combination of the Investigative and Prosecutorial Function and the Adjudicative Function in EC Antitrust Enforcement: A Legal and Economic Analysis, 27

World Competition Law and Economics Review 201, 207 (June 2004) (explaining, in an article written by a member of the Commission's Legal Service, that "in European Commission proceedings there is no independent initial adjudicator . . . and the Commissioners do not sit as judges hearing directly both sides of the case"). They do not adjudicate adversary proceedings on the basis of proofs and argument. *Ibid.* Nor, as the majority appears to recognize, does the later availability of a reviewing court matter where "review is limited to the record before the Commission," and "AMD could 'use' evidence in the reviewing courts only by submitting it to the Commission in the current, investigative stage." *Ante*, at 257. At a minimum, then, the question whether the Commission is a "tribunal" is unclear. See Wils, *supra*, at 207–209 (noting the scholarly and legal debate as to whether the Commission's antitrust investigation and enforcement activities qualify it as an " 'independent and impartial tribunal' " for purposes of the European Convention on Human Rights).

At the same time, the Commission has told this Court that it is not a "tribunal" under the Act. It has added that, should it be considered, against its will, a "tribunal," its "ability to carry out its governmental responsibilities" will be seriously threatened. Brief for Commission of the European Communities as *Amicus Curiae* 2. Given the potential need for the Commission to respond when a private firm (including an American company) files a complaint with the Commission and seeks discovery in an American court (say, from a competitor), its concerns are understandable.

The Commission's characterization of its own functions is, in my view, entitled to deference. The majority disregards the Commission's opinion and states categorically that "the Commission is a § 1782(a) 'tribunal' when it acts as a first-instance decisionmaker." *Ante*, at 246–247. In so ignoring the Commission, the majority undermines the comity interests § 1782 was designed to serve and disregards the maxim

that we construe statutes so as to "hel[p] the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world." *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, *ante*, at 164–165.

The second limiting factor is also present. Neither Advanced Micro Devices, Inc. (AMD), nor any comparable private party would be able to obtain the kind of discovery AMD seeks, either in Europe or in the United States. In respect to Europe, the Commission has told us that any person in the world is free to file a complaint with the Commission, but it is the Commission that then investigates. The private complainant lacks any authority to obtain discovery of business secrets and commercial information. See Brief for Commission of the European Communities as *Amicus Curiae* 13, and n. 15. In respect to the United States, AMD is a nonlitigant, apart from this discovery proceeding. Conditions under which a nonlitigant may obtain discovery are limited. AMD does not suggest that it meets those conditions, or that it is comparable in any other way to one who might obtain discovery under roughly analogous circumstances. In addition, the material it seeks is under a protective order. See *ante*, at 251, n. 4.

What is the legal source of these limiting principles? In my view, they, and perhaps others, are implicit in the statute itself, given its purpose and use of the terms "tribunal" and "interested person." § 1782(a). But even if they are not, this Court's "supervisory powers . . . permit, at the least, the promulgation of procedural rules governing the management of litigation," not to mention "'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, 474 U. S. 140, 146–147 (1985) (quoting *Cupp* v. *Naughten*, 414 U. S. 141, 146 (1973)). See also *Dickerson* v. *United States*, 530 U. S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may

use that authority to prescribe rules of evidence and procedure that are binding in those tribunals"). Intel Corp. has asked us to exercise those powers in this case. Brief for Petitioner 34–38. We should do so along the lines that I suggest; consequently, we should reverse the judgment below and order the complaint in this case dismissed.

I respectfully dissent from the Court's contrary determination.

Syllabus

TENNARD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02–10038. Argued March 22, 2004—Decided June 24, 2004

During his capital murder trial's penalty phase, petitioner Tennard presented evidence that he had an IQ of 67. The jury was instructed to determine the appropriate punishment by considering two "special issues," which inquired into whether the crime was committed deliberately and whether the defendant posed a risk of future dangerousness. These were materially identical to two special issues found insufficient in *Penry* v. *Lynaugh*, 492 U. S. 302, for the jury to give effect to Penry's mitigating mental retardation and childhood abuse evidence. Tennard's jury answered both special issues affirmatively, and Tennard was sentenced to death. The Federal District Court denied Tennard's federal habeas petition in which he claimed that his death sentence violated the Eighth Amendment as interpreted in *Penry*, and denied a certificate of appealability (COA). The Fifth Circuit agreed that Tennard was not entitled to a COA. It applied a threshold test to Tennard's mitigating evidence, asking whether it met the Fifth Circuit's standard of "constitutional relevance" in *Penry* cases—that is, whether it was evidence of a "uniquely severe permanent handicap" that bore a "nexus" to the crime. The court concluded that (1) low IQ evidence alone does not constitute a uniquely severe condition, and no evidence tied Tennard's IQ to retardation, and (2) even if his low IQ amounted to mental retardation evidence, Tennard did not show that his crime was attributable to it. After this Court vacated the judgment and remanded for further consideration in light of *Atkins* v. *Virginia*, 536 U. S. 304, the Fifth Circuit reinstated its prior opinion.

Held: Because "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack* v. *McDaniel*, 529 U. S. 473, 484, a COA should have issued. Pp. 282–289.

(a) A COA should issue if an applicant has "made a substantial showing of the denial of a constitutional right," 28 U. S. C. § 2253(c)(2), by demonstrating "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," 529 U. S., at 484. Relief may not be granted unless the state court adjudication "was contrary to, or involved an unreasonable application of, clearly

Syllabus

established Federal law, as determined by" this Court. § 2254(d)(1). Pp. 282–283.

(b) The Fifth Circuit assessed Tennard's *Penry* claim under an improper standard. Its threshold "constitutional relevance" screening test has no foundation in this Court's decisions. Relevance was not at issue in *Penry.* And this Court spoke in the most expansive terms when addressing the relevance standard directly in *McKoy* v. *North Carolina*, 494 U. S. 433, 440–441, finding applicable the general evidentiary standard that "'"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,"'" *id.*, at 440. Once this low relevance threshold is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. *Boyde* v. *California*, 494 U. S. 370, 377–378. The Fifth Circuit's test is inconsistent with these principles. Thus, neither the "uniquely severe" nor the "nexus" element of the Fifth Circuit's test was a proper reason not to reach the substance of Tennard's *Penry* claims. Pp. 283–288.

(c) Turning to the analysis that the Fifth Circuit should have conducted, reasonable jurists could conclude that Tennard's low IQ evidence was relevant mitigating evidence, and that the Texas Court of Criminal Appeals' application of *Penry* was unreasonable, since the relationship between the special issues and Tennard's low IQ evidence has the same essential features as that between those issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the ability to act deliberately. A reasonable jurist could conclude that the jury might have given the low IQ evidence aggravating effect in considering Tennard's future dangerousness. Indeed, the prosecutor pressed exactly the most problematic interpretation of the special issues, suggesting that Tennard's low IQ was irrelevant in mitigation, but relevant to future dangerousness. Pp. 288–289.

317 F. 3d 476, reversed and remanded.

O'Connor, J., delivered the opinion of the Court, in which Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., *post*, p. 289, Scalia, J., *post*, p. 293, and Thomas, J., *post*, p. 294, filed dissenting opinions.

Robert C. Owen argued the cause for petitioner. With him on the briefs were *Jordan M. Steiker* and *Richard H. Burr.*

Edward L. Marshall, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Greg Abbott*, Attorney General, *Barry R. McBee*, First Assistant Attorney General, *Don Clemmer*, Acting Deputy Attorney General, and *Gena Bunn* and *Tommy L. Skaggs*, Assistant Attorneys General.*

JUSTICE O'CONNOR delivered the opinion of the Court.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*, we held that the Texas capital sentencing scheme provided a constitutionally inadequate vehicle for jurors to consider and give effect to the mitigating evidence of mental retardation and childhood abuse the petitioner had presented. The petitioner in this case argues that the same scheme was inadequate for jurors to give effect to his evidence of low intelligence. The Texas courts rejected his claim, and a Federal District Court denied his petition for a writ of habeas corpus. We conclude that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000), and therefore hold that a certificate of appealability should have issued.

I

Petitioner Robert Tennard was convicted by a jury of capital murder in October 1986. The evidence presented at trial indicated that Tennard and two accomplices killed two of his neighbors and robbed their house. Tennard himself stabbed one of the victims to death, and one of the accomplices killed the other victim with a hatchet.

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*Briefs of *amici curiae* urging reversal were filed for the American Association on Mental Retardation et al. by *James W. Ellis*, *Michael B. Browde*, *Christian G. Fritz*, *April Land*, and *Robert L. Schwartz;* for the National Mental Health Association by *J. Brett Busby*, *Claudia Wilson Frost*, and *Charles S. Kelley;* and for the Texas Defender Service et al. by *Peter Buscemi*, *Anthony C. Roth*, and *Jeffrey J. Pokorak*.

During the penalty phase of the trial, defense counsel called only one witness—Tennard's parole officer—who testified that Tennard's Department of Corrections record from a prior incarceration indicated that he had an IQ of 67. App. 28–29. He testified that the IQ test would have been administered as a matter of course. *Ibid.* The report, which indicated that Tennard was 17 years old at the time it was prepared, was admitted into evidence. On cross-examination, the parole officer testified that he did not know who had administered the test. *Id.*, at 30. The government introduced evidence in the penalty phase regarding a prior conviction for rape, committed when Tennard was 16. The rape victim testified that she had escaped through a window after Tennard permitted her to go to the bathroom to take a bath, promising him she would not run away. *Id.*, at 16–17.

The jury was instructed to consider the appropriate punishment by answering the two "special issues" used at the time in Texas to establish whether a sentence of life imprisonment or death would be imposed:

> "Was the conduct of the defendant, Robert James Tennard, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?" *Id.*, at 69 (the "deliberateness special issue").
>
> "Is there a probability that the defendant, Robert James Tennard, would commit criminal acts of violence that would constitute a continuing threat to society?" *Id.*, at 70 (the "future dangerousness special issue").

In his penalty phase closing argument, defense counsel relied on both the IQ score and the rape victim's testimony to suggest that Tennard's limited mental faculties and gullible nature mitigated his culpability:

> "Tennard has got a 67 IQ. The same guy that told this poor unfortunate woman [the rape victim] that was trying to work that day, 'Well, if I let you in there, will you

> leave?' And he believed her. This guy with the 67 IQ, and she goes in and, sure enough, she escapes, just like she should have. That is uncontroverted testimony before you, that we have got a man before us that has got an intelligence quotient . . . that is that low." *Id.*, at 51.

In rebuttal, the prosecution suggested that the low IQ evidence was simply irrelevant to the question of mitigation:

> "But whether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question [the future dangerousness special issue], the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question." *Id.*, at 60.

The jury answered both special issues in the affirmative, and Tennard was accordingly sentenced to death.

Unsuccessful on direct appeal, Tennard sought state post-conviction relief. He argued that, in light of the instructions given to the jury, his death sentence had been obtained in violation of the Eighth Amendment as interpreted by this Court in *Penry I*. In that case, we had held that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Penry I*, *supra*, at 319; see also *Penry* v. *Johnson*, 532 U. S. 782, 797 (2001) *(Penry II)* (describing "'*give effect to*'" language of *Penry I* as "the key" to that decision). We concluded that the same two special issues that were presented to Tennard's jury (plus a third immaterial to the questions now before us) were insufficient for the jury in Penry's case to consider and give effect to Penry's evidence of mental retardation and childhood abuse, and therefore ran afoul of the Eighth Amendment. *Penry I*, 492 U. S., at 319–328. His mental retardation evidence, we held, "'had relevance to [his] moral culpability beyond the scope of the [deliberate-

ness] special verdict questio[n]' " because "[p]ersonal culpability is not solely a function of a defendant's capacity to act 'deliberately.' " *Id.*, at 322 (some brackets in original). Moreover, because the "evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes," his retardation was relevant to the future dangerousness special issue "only as an *aggravating* factor." *Id.*, at 323. As to the evidence of childhood abuse, we held that the two special issues simply failed to "provide a vehicle for the jury to give [it] mitigating effect." *Id.*, at 322–324.

The Texas Court of Criminal Appeals rejected Tennard's *Penry* claim. *Ex parte Tennard*, 960 S. W. 2d 57 (1997) (en banc). Writing for a plurality of four, Presiding Judge McCormick observed that the definition of mental retardation adopted in Texas involves three components ("(1) subaverage general intellectual functioning, (2) concurrent deficits in adaptive behavior, *and* (3) onset during the early development period," *id.*, at 60), and concluded: "[Tennard's] evidence of a low IQ score, standing alone, does not meet this definition. Qualitatively and quantitatively [Tennard's] low IQ evidence does not approach the level of Johnny Paul Penry's evidence of mental retardation. . . . [W]e find no evidence in this record that applicant is mentally retarded." *Id.*, at 61.

The plurality went on to consider whether Tennard would be entitled to relief under *Penry* even if his low IQ fell "within *Penry*'s definition of mental retardation." 960 S. W. 2d, at 61. It held that he would not. The court explained that, unlike the evidence presented in Penry's case, "there is no evidence [that Tennard's] low IQ rendered him unable to appreciate the wrongfulness of his conduct when he committed the offense, or that his low IQ rendered him unable to learn from his mistakes or . . . control his impulses . . . ." *Id.*, at 62. It found there was "no danger" that the jury would have given the evidence "*only* aggravating effect in

answering" the future dangerousness special issue, and that the low IQ and gullibility evidence was not beyond the jury's effective reach because the jury "could have used this evidence for a 'no' answer" to the deliberateness special issue. *Ibid.*

Two judges concurred separately, and wrote that "this Court has sustained a *Penry* claim *only* when there is evidence of mental retardation. But even in those cases, the evidence of mental retardation was always something more than what was presented in this case." 960 S. W. 2d, at 64 (opinion of Meyers, J.) (citations omitted). Taking a more permissive view of evidence of impaired intellectual functioning than did the plurality ("[F]or *Penry* purposes, courts should not distinguish between mental retardation and dementia," even though the onset of the latter "may occur after age eighteen," *id.*, at 65), the concurring judges nevertheless concluded that "the record does not contain sufficient evidence to support" Tennard's *Penry* claim. 960 S. W. 2d, at 63. The concurring judges also rejected Tennard's contention that "evidence of an IQ of below 70 alone requires a '*Penry* instruction' " because published opinions of the Texas courts had uniformly required more. *Id.*, at 67.

Judge Baird dissented, maintaining that the Court of Criminal Appeals had "consistent[ly]" held, in the wake of *Penry I*, that "evidence of mental retardation cannot be adequately considered within the statutory" special issues. 960 S. W. 2d, at 67. The court had strayed from its precedent, Judge Baird wrote, and instead of asking simply whether the jury had a vehicle for considering the mitigating evidence, had "weigh[ed] the sufficiency of [Tennard's] mitigating evidence." *Id.*, at 70. Judges Overstreet and Womack dissented without opinion. *Id.*, at 63.

Tennard sought federal habeas corpus relief. The District Court denied his petition. *Tennard* v. *Johnson*, Civ. Action No. H–98–4238 (SD Tex., July 25, 2000), App. 121. The court began by observing that "[e]vidence of a single low

score on an unidentified intelligence test is not evidence that Tennard was mentally retarded." *Id.*, at 128. It then considered whether the 67 IQ score was "within 'the effective reach' of the jury." *Ibid.* Noting that "Tennard's low IQ score was not concealed from the jury; it was in evidence, and both sides argued its significance for punishment," the court concluded that the jury had adequate means, in the two special issues, by which to give effect to that mitigating evidence. *Id.*, at 129. The court subsequently denied Tennard a certificate of appealability (COA). Civ. Action No. H–98–4238 (SD Tex., Oct. 17, 2000), see App. 2.

The Court of Appeals for the Fifth Circuit, after full briefing and oral argument, issued an opinion holding that Tennard was not entitled to a COA because his *Penry* claim was not debatable among jurists of reason. *Tennard* v. *Cockrell*, 284 F. 3d 591 (2002). The court began by stating the test applied in the Fifth Circuit to *Penry* claims, which involves a threshold inquiry into whether the petitioner presented "constitutionally relevant" mitigating evidence, that is, evidence of a "'uniquely severe permanent handicap with which the defendant was burdened through no fault of his own,'" and evidence that "'the criminal act was attributable to this severe permanent condition.'" 284 F. 3d, at 595.

The court then held that Tennard was not entitled to a COA, for two reasons: First, it held that evidence of low IQ alone does not constitute a uniquely severe condition, and rejected Tennard's claim that his evidence was of mental retardation, not just low IQ, because no evidence had been introduced tying his IQ score to retardation. *Id.*, at 596. Second, it held that even if Tennard's evidence was mental retardation evidence, his claim must fail because he did not show that the crime he committed was attributable to his low IQ. *Id.*, at 596–597. Judge Dennis dissented, concluding that the Texas court's application of *Penry* was unreasonable and that Tennard was entitled to habeas relief. 284 F. 3d, at 597–604.

Tennard filed a petition for certiorari, and this Court granted the writ, vacated the judgment, and remanded for further consideration in light of *Atkins* v. *Virginia*, 536 U. S. 304 (2002). *Tennard* v. *Cockrell*, 537 U. S. 802 (2002). The Fifth Circuit took the remand to be for consideration of a substantive *Atkins* claim. It observed that "Tennard has never argued that the Eighth Amendment prohibits his execution" and reinstated its prior panel opinion. *Tennard* v. *Cockrell*, 317 F. 3d 476, 477 (2003). We again granted certiorari. 540 U. S. 945 (2003).

II

A

A COA should issue if the applicant has "made a substantial showing of the denial of a constitutional right," 28 U. S. C. § 2253(c)(2), which we have interpreted to require that the "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U. S., at 484; see also *Miller-El* v. *Cockrell*, 537 U. S. 322, 336 (2003) ("Under the controlling standard, a petitioner must 'sho[w] that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were "adequate to deserve encouragement to proceed further"'"). The petitioner's arguments ultimately must be assessed under the deferential standard required by 28 U. S. C. § 2254(d)(1): Relief may not be granted unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

The State has never disputed that Tennard's *Penry* claim was properly preserved for federal habeas review. Not only did the state court consider the question on the merits, we note that the issue was also raised by defense counsel prior

to trial in a motion to set aside the indictment on the ground, among others, that the "Texas capital murder statutes do not explicitly allow the consideration of any specific mitigating circumstances at the punishment phase of the prosecution and, consequently, are violative of the accused's right to be free from cruel and unusual punishment and are also void for vagueness." Defendant's Motion to Set Aside the Indictment in Cause No. 431127 (248th Jud. Dist. Ct. Harris County, Tex., May 28, 1986), p. 4.

B

Despite paying lipservice to the principles guiding issuance of a COA, *Tennard* v. *Cockrell*, 284 F. 3d, at 594, the Fifth Circuit's analysis proceeded along a distinctly different track. Rather than examining the District Court's analysis of the Texas court decision, it invoked its own restrictive gloss on *Penry I:*

> "In reviewing a *Penry* claim, we must determine whether the mitigating evidence introduced at trial was constitutionally relevant and beyond the effective reach of the jury. . . . To be constitutionally relevant, 'the evidence must show (1) a uniquely severe permanent handicap with which the defendant was burdened through no fault of his own, . . . and (2) that the criminal act was attributable to this severe permanent condition.'" *Id.*, at 595 (quoting *Davis* v. *Scott,* 51 F. 3d 457, 460–461 (CA5 1995)).

This test for "constitutional relevance," characterized by the State at oral argument as a threshold "screening test," Tr. of Oral Arg. 10, 28, appears to be applied uniformly in the Fifth Circuit to *Penry* claims. See, *e. g.*, *Bigby* v. *Cockrell*, 340 F. 3d 259, 273 (2003); *Robertson* v. *Cockrell*, 325 F. 3d 243, 251 (2003) (en banc); *Smith* v. *Cockrell*, 311 F. 3d 661, 680 (2002); *Blue* v. *Cockrell*, 298 F. 3d 318, 320–321 (2002); *Davis*, *supra*, at 460–461. Only after the court finds that

certain mitigating evidence is "constitutionally relevant" will it consider whether that evidence was within "'the "effective reach" of the jur[y].'" *E. g.*, *Smith*, *supra*, at 680 (court asks whether evidence was constitutionally relevant and, "'if so,'" will consider whether it was within jury's effective reach). In *Tennard* v. *Cockrell*, the Fifth Circuit concluded that Tennard was "precluded from establishing a *Penry* claim" because his low IQ evidence bore no nexus to the crime, and so did not move on to the "effective reach" question. 284 F. 3d, at 597.

The Fifth Circuit's test has no foundation in the decisions of this Court. Neither *Penry I* nor its progeny screened mitigating evidence for "constitutional relevance" before considering whether the jury instructions comported with the Eighth Amendment. Indeed, the mitigating evidence presented in *Penry I* was *concededly* relevant, see Tr. of Oral Arg., O. T. 1988, No. 87–6177, pp. 34–36, so even if limiting principles regarding relevance were suggested in our opinion—and we do not think they were—they could not have been material to the holding.

When we addressed directly the relevance standard applicable to mitigating evidence in capital cases in *McKoy* v. *North Carolina*, 494 U. S. 433, 440–441 (1990), we spoke in the most expansive terms. We established that the "meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding" than in any other context, and thus the general evidentiary standard—"'"any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"'"—applies. *Id.*, at 440 (quoting *New Jersey* v. *T. L. O.*, 469 U. S. 325, 345 (1985)). We quoted approvingly from a dissenting opinion in the state court: "'Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" 494 U. S., at

440 (quoting *State* v. *McKoy*, 323 N. C. 1, 55–56, 372 S. E. 2d 12, 45 (1988) (opinion of Exum, C. J.)). Thus, a State cannot bar "the consideration of . . . evidence if the sentencer could reasonably find that it warrants a sentence less than death." 494 U. S., at 441.

Once this low threshold for relevance is met, the "Eighth Amendment requires that the jury be able to consider and give effect to" a capital defendant's mitigating evidence. *Boyde* v. *California*, 494 U. S. 370, 377–378 (1990) (citing *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Penry I*, 492 U. S. 302 (1989)); see also *Payne* v. *Tennessee*, 501 U. S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances" (quoting *Eddings*, *supra*, at 114)).

The Fifth Circuit's test is inconsistent with these principles. Most obviously, the test will screen out any positive aspect of a defendant's character, because good character traits are neither "handicap[s]" nor typically traits to which criminal activity is "attributable." In *Skipper* v. *South Carolina*, 476 U. S. 1, 5 (1986), however, we made clear that good character evidence can be evidence that, "[u]nder *Eddings*, . . . may not be excluded from the sentencer's consideration." We observed that even though the petitioner's evidence of good conduct in jail did "not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such [evidence] would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.' *Lockett*, *supra*, at 604." *Id.*, at 4–5 (citation omitted). Such evidence, we said, of "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is . . . by its nature relevant to the sentencing determination." *Id.*, at 7. Of course, the Texas courts might

reasonably conclude that evidence of good conduct in jail was within the jury's effective reach via the future dangerousness special issue. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 177–178 (1988) (plurality opinion); *id.*, at 185–186 (O'CONNOR, J., concurring in judgment). But under the Fifth Circuit's test, the evidence would have been screened out before the time came to consider that question.

In Tennard's case, the Fifth Circuit invoked both the "uniquely severe" and the "nexus" elements of its test to deny him relief under *Penry I*. *Tennard* v. *Cockrell*, 284 F. 3d, at 596 (contrasting Tennard's low IQ evidence, which did "not constitute a uniquely severe condition," with mental retardation, a "severe permanent condition"); *id.*, at 596–597 (concluding that *Penry* claims "must fail because [Tennard] made no showing at trial that the criminal act was attributable" to his condition).* Neither ground provided an adequate reason to fail to reach the heart of Tennard's *Penry* claims.

We have never denied that gravity has a place in the relevance analysis, insofar as evidence of a trivial feature of the defendant's character or the circumstances of the crime is unlikely to have any tendency to mitigate the defendant's culpability. See *Skipper*, *supra*, at 7, n. 2 ("We do not hold that all facets of the defendant's ability to adjust to prison life must be treated as relevant and potentially mitigating. For example, we have no quarrel with the statement . . . that 'how often [the defendant] will take a shower' is irrelevant to the sentencing determination" (quoting *State* v. *Plath*, 281

*The Fifth Circuit stated that "a majority of the Court of Criminal Appeals found 'no evidence in this record that [Tennard] is mentally retarded.'" 284 F. 3d, at 596–597. As described above, however, that was the conclusion of a four-judge plurality; the narrowest and thus controlling opinion on this point, correctly described by the Fifth Circuit as "concluding that there was *not enough* evidence of mental retardation in the record to support Tennard's claim," *id.*, at 596, n. 5 (emphasis added), is Judge Meyers' concurring opinion.

S. C. 1, 15, 313 S. E. 2d 619, 627 (1984))). However, to say that only those features and circumstances that a panel of federal appellate judges deems to be "severe" (let alone "uniquely severe") could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death,' " *Skipper*, *supra*, at 5.

The Fifth Circuit was likewise wrong to have refused to consider the debatability of the *Penry* question on the ground that Tennard had not adduced evidence that his crime was attributable to his low IQ. In *Atkins* v. *Virginia*, 536 U. S., at 316, we explained that impaired intellectual functioning is inherently mitigating: "[T]oday our society views mentally retarded offenders as categorically less culpable than the average criminal." Nothing in our opinion suggested that a mentally retarded individual must establish a nexus between her mental capacity and her crime before the Eighth Amendment prohibition on executing her is triggered. Equally, we cannot countenance the suggestion that low IQ evidence is not relevant mitigating evidence—and thus that the *Penry* question need not even be asked—unless the defendant also establishes a nexus to the crime.

The State claims that "the Fifth Circuit's *Penry I* jurisprudence is not at issue" in this case. Brief for Respondent 35, n. 21; Tr. of Oral Arg. 33. To the contrary, that jurisprudence is directly at issue because the Fifth Circuit denied Tennard relief on the ground that he did not satisfy the requirements imposed by its "constitutional relevance" test. As we have explained, the Fifth Circuit's screening test has no basis in our precedents and, indeed, is inconsistent with the standard we have adopted for relevance in the capital sentencing context. We therefore hold that the Fifth Circuit assessed Tennard's *Penry* claim under an improper legal standard. Cf. *Miller-El* v. *Cockrell*, 537 U. S., at 341 (holding, on certiorari review of the denial of a COA, that the

Fifth Circuit had applied an incorrect standard by improperly merging the requirements of two statutory sections).

C

We turn to the analysis the Fifth Circuit should have conducted: Has Tennard "demonstrate[d] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong"? *Slack* v. *McDaniel*, 529 U. S., at 484. We conclude that he has.

Reasonable jurists could conclude that the low IQ evidence Tennard presented was relevant mitigating evidence. Evidence of significantly impaired intellectual functioning is obviously evidence that "might serve 'as a basis for a sentence less than death,' " *Skipper*, 476 U. S., at 5; see also, *e. g.*, *Wiggins* v. *Smith*, 539 U. S. 510, 535 (2003) (observing, with respect to individual with IQ of 79, that "Wiggins[']. . . diminished mental capacitie[s] further augment his mitigation case"); *Burger* v. *Kemp*, 483 U. S. 776, 779, 789, n. 7 (1987) (noting that petitioner "had an IQ of 82 and functioned at the level of a 12-year-old child," and later that "[i]n light of petitioner's youth at the time of the offense, . . . testimony that his 'mental and emotional development were at a level several years below his chronological age' could not have been excluded by the state court" (quoting *Eddings*, 455 U. S., at 116)).

Reasonable jurists also could conclude that the Texas Court of Criminal Appeals' application of *Penry* to the facts of Tennard's case was unreasonable. The relationship between the special issues and Tennard's low IQ evidence has the same essential features as the relationship between the special issues and Penry's mental retardation evidence. Impaired intellectual functioning has mitigating dimension beyond the impact it has on the individual's ability to act deliberately. See *Penry I*, 492 U. S., at 322. A reasonable jurist could conclude that the jury might well have given Tennard's low IQ evidence aggravating effect in considering his future

dangerousness, not only as a matter of probable inference from the evidence but also because the prosecutor told them to do so: "[W]hether he has a low IQ or not is not really the issue. Because the legislature, in asking you to address that question, the reasons why he became a danger are not really relevant. The fact that he is a danger, that the evidence shows he's a danger, is the criteria to use in answering that question." App. 60. Indeed, the prosecutor's comments pressed exactly the most problematic interpretation of the special issues, suggesting that Tennard's low IQ was irrelevant in mitigation, but relevant to the question whether he posed a future danger.

* * *

We hold that the Fifth Circuit's "uniquely severe permanent handicap" and "nexus" tests are incorrect, and we reject them. We hold that reasonable jurists would find debatable or wrong the District Court's disposition of Tennard's low-IQ-based *Penry* claim, and that Tennard is therefore entitled to a COA. The judgment of the United States Court of Appeals for the Fifth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

CHIEF JUSTICE REHNQUIST, dissenting.

A certificate of appealability may only issue if the applicant has "made a substantial showing of the denial of a constitutional right," 28 U. S. C. § 2253(c)(2). "Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack* v. *McDaniel*, 529 U. S. 473, 484 (2000). Because I believe that reasonable ju-

rists would not find the District Court's assessment of the constitutional claims debatable or wrong, I dissent.

The District Court conducted the proper inquiry by examining whether Tennard's evidence of low intelligence was "within 'the effective reach' " of the jury. App. 128 (quoting *Johnson* v. *Texas*, 509 U. S. 350, 368 (1993)). And the District Court came to the correct result; that is, the special issues allowed the jury to give some mitigating effect to Tennard's evidence of low intelligence. *Id.*, at 369; *Graham* v. *Collins*, 506 U. S. 461, 475 (1993).

In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court held that the Texas special issues system, as a general matter, is constitutional. The special issues system guides the jury's consideration of mitigating evidence at sentencing. We have stated:

> "Although *Lockett* [v. *Ohio*, 438 U. S. 586 (1978),] and *Eddings* [v. *Oklahoma*, 455 U. S. 104 (1982),] prevent a State from placing relevant mitigating evidence 'beyond the effective reach of the sentencer,' *Graham*, *supra*, at 475, those cases and others in that decisional line do not bar a State from guiding the sentencer's consideration of mitigating evidence. Indeed, we have held that 'there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." ' *Boyde* v. *California*, 494 U. S. 370, 377 (1990) (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion))." *Johnson*, *supra*, at 362.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*, the Court concluded that the Texas special issues were too limited to give effect to Penry's mitigating evidence of his mental retardation and severe childhood abuse. But we have noted that *Penry I* did not "effec[t] a sea change in this

Court's view of the constitutionality of the former Texas death penalty statute," *Graham*, *supra*, at 474. Tennard's evidence of low intelligence simply does not present the same difficulty that Penry's evidence did.

There is no dispute that Tennard's low intelligence is a relevant mitigating circumstance, and that the sentencing jury must be allowed to consider that mitigating evidence. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982) (" '[T]he sentencer . . . [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense' " (emphasis deleted) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978))). But the Constitution does not require that "a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence [may] be relevant." *Johnson*, *supra*, at 372. The only question in this case is whether reasonable jurists would find the District Court's assessment that Tennard's evidence of low intelligence was within the effective reach of the jury via the Texas special issues debatable or wrong.

The Court concludes that "[t]he relationship between the special issues and Tennard's low IQ evidence has the same essential features as the relationship between the special issues and Penry's mental retardation evidence." *Ante*, at 288. I disagree. The first special issue asked whether Tennard had caused the death of the victim " 'deliberately and with the reasonable expectation that the death of the deceased or another would result.' " *Ante*, at 277. As the Court of Criminal Appeals of Texas noted and the District Court agreed, the mitigating evidence of Tennard's low intelligence could be given effect by the jury through this deliberateness special issue. It does not follow from the Court's conclusion in *Penry I* that mental retardation had relevance to Penry's moral culpability beyond the scope of the deliberateness special issue that evidence of low intelligence has the same relevance. And, after *Johnson* and *Graham*, it is clear

that the question is simply whether the jury could give *some effect* to the mitigating evidence through the special issues. *Johnson*, *supra*, at 369 (rejecting the petitioner's claim that a special instruction was necessary because his evidence of youth had relevance outside the special issue framework); *Graham*, *supra*, at 476–477 ("[R]eading *Penry [I]* as petitioner urges—and thereby holding that a defendant is entitled to special instructions whenever he can offer mitigating evidence that has *some* arguable relevance beyond the special issues—would be to require in all cases that a fourth 'special issue' be put to the jury: '"Does any mitigating evidence before you, whether or not relevant to the [other special issues], lead you to believe that the death penalty should not be imposed?"' The *Franklin* [v. *Lynaugh*, 487 U. S. 164 (1988),] plurality rejected precisely this contention, finding it irreconcilable with the Court's holding in *Jurek*, see *Franklin*, *supra*, at 180, n. 10, and we affirm that conclusion today").

The second special issue asked "'[i]s there a probability that the defendant . . . would commit criminal acts of violence that would constitute a continuing threat to society?'" *Ante*, at 277. Here, too, this case is very different from *Penry I*, where there was expert medical testimony that Penry's condition prevented him from learning from experience. 492 U. S., at 308–309. Here, no such evidence was presented. Given the evidence, the jury could have concluded that low intelligence meant that Tennard is a slow learner, but with the proper instruction, he could conform his behavior to social norms. It also could have concluded, as the Court of Criminal Appeals of Texas noted, that Tennard was a "'follower'" rather than a "'leader,'" App. 91, and that he again could conform his behavior in the proper environment. In either case—contrary to *Penry I*—the evidence could be given mitigating effect in the second special issue. In short, low intelligence is not the same as mental

retardation and does not necessarily create the *Penry I* "two-edged sword." 492 U. S., at 324. The two should not be summarily bracketed together.

Because I do not think that reasonable jurists would disagree with the District Court's conclusion that the jury in this case had the ability to give mitigating effect to Tennard's evidence of low intelligence through the first and second special issues, I dissent.

JUSTICE SCALIA, dissenting.

Petitioner argues that Texas's statutory special issues framework unconstitutionally constrained the jury's discretion to give effect to his mitigating evidence of a low IQ score, violating the requirement that "'"a sentencer must be allowed to give *full* consideration and *full* effect to mitigating circumstances."'" Reply Brief for Petitioner 4 (quoting *Penry* v. *Johnson*, 532 U. S. 782, 797 (2001) *(Penry II)*, in turn quoting *Johnson* v. *Texas*, 509 U. S. 350, 381 (1993) (O'CONNOR, J., dissenting)). This claim relies on *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) *(Penry I)*, a case that applied principles earlier limned in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978).

I have previously expressed my view that this "right" to unchanneled sentencer discretion has no basis in the Constitution. See *Penry I*, *supra*, at 356–360 (opinion concurring in part and dissenting in part). I have also said that the Court's decisions establishing this right do not deserve *stare decisis* effect, because requiring unchanneled discretion to say *no* to death cannot rationally be reconciled with our prior decisions requiring canalized discretion to say *yes*. "[T]he practice which in *Furman* [v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*,] had been described as the discretion to sentence to death and pronounced constitutionally prohibited, was in *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion),] and *Lockett* renamed the discretion not to

sentence to death and pronounced constitutionally required." *Walton* v. *Arizona*, 497 U. S. 639, 662 (1990) (SCALIA, J., concurring in part and concurring in judgment).

The Court returned greater rationality to our *Penry* jurisprudence by cutting it back in *Graham* v. *Collins*, 506 U. S. 461 (1993), and *Johnson* v. *Texas*, *supra*. I joined the Court in this pruning effort, noting that "the essence of today's holding (to the effect that discretion *may* constitutionally be channeled) was set forth in my dissent in *Penry*." *Id.*, at 374 (concurring opinion). As THE CHIEF JUSTICE notes, the lower courts' disposition of petitioner's *Penry* claim in the present case was entirely appropriate under these cases. *Ante*, at 290–293 (dissenting opinion). Yet the opinion for the Court does not even acknowledge their existence. It finds failings in the Fifth Circuit's framework for analyzing *Penry* claims as if this Court's own jurisprudence were not the root of the problem. "The simultaneous pursuit of contradictory objectives necessarily produces confusion." *Walton*, *supra*, at 667.

Although the present case involves only a certificate of appealability (COA) ruling, rather than a ruling directly on the merits of petitioner's claim, I cannot require the issuance of a COA when the insubstantial right at issue derives from case law in which this Court has long left the Constitution behind and embraced contradiction. I respectfully dissent.

JUSTICE THOMAS, dissenting.

Petitioner must rely on *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), to argue that Texas' special issues framework unconstitutionally limited the discretion of his sentencing jury. I have long maintained, however, that *Penry* did "so much violence to so many of this Court's settled precedents in an area of fundamental constitutional law, [that] it cannot command the force of *stare decisis*." *Graham* v. *Collins*, 506 U. S. 461, 497 (1993) (concurring opinion). I therefore agree with JUSTICE SCALIA that a certificate of appealability can-

not be issued based upon an "insubstantial right . . . derive[d] from case law in which this Court has long left the Constitution behind and embraced contradiction." *Ante*, at 294 (dissenting opinion). I respectfully dissent.

Syllabus

BLAKELY *v.* WASHINGTON

CERTIORARI TO THE COURT OF APPEALS OF WASHINGTON

No. 02–1632. Argued March 23, 2004—Decided June 24, 2004

Petitioner pleaded guilty to kidnaping his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months, but the judge imposed a 90-month sentence after finding that petitioner had acted with deliberate cruelty, a statutorily enumerated ground for departing from the standard range. The Washington Court of Appeals affirmed, rejecting petitioner's argument that the sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence.

Held: Because the facts supporting petitioner's exceptional sentence were neither admitted by petitioner nor found by a jury, the sentence violated his Sixth Amendment right to trial by jury. Pp. 301–314.

(a) This case requires the Court to apply the rule of *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant statutory maximum for *Apprendi* purposes is the maximum a judge may impose based solely on the facts reflected in the jury verdict or admitted by the defendant. Here, the judge could not have imposed the 90-month sentence based solely on the facts admitted in the guilty plea, because Washington law requires an exceptional sentence to be based on factors other than those used in computing the standard-range sentence. Petitioner's sentence is not analogous to those upheld in *McMillan* v. *Pennsylvania*, 477 U. S. 79, and *Williams* v. *New York*, 337 U. S. 241, which were not greater than what state law authorized based on the verdict alone. Regardless of whether the judge's authority to impose the enhanced sentence depends on a judge's finding a specified fact, one of several specified facts, or *any* aggravating fact, it remains the case that the jury's verdict alone does not authorize the sentence. Pp. 301–305.

(b) This Court's commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the fundamental constitutional right of jury trial. Pp. 305–308.

(c) This case is not about the constitutionality of determinate sentencing, but only about how it can be implemented in a way that respects

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the Sixth Amendment. The Framers' paradigm for criminal justice is the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. That can be preserved without abandoning determinate sentencing and at no sacrifice of fairness to the defendant. Pp. 308–313.

111 Wash. App. 851, 47 P. 3d 149, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BREYER, J., joined, and in which REHNQUIST, C. J., and KENNEDY, J., joined except as to Part IV–B, *post*, p. 314. KENNEDY, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 326. BREYER, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 328.

Jeffrey L. Fisher argued the cause and filed briefs for petitioner.

John D. Knodell III argued the cause and filed a brief for respondent.

Deputy Solicitor General Dreeben argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Wray*, *Matthew D. Roberts*, and *Nina Goodman*.*

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*Briefs of *amici curiae* urging reversal were filed for the American Civil Liberties Union et al. by *James E. Lobsenz*, *Aaron H. Caplan*, and *Steven R. Shapiro;* for the Kansas Appellate Defender Office by *Randall L. Hodgkinson;* and for the National Association of Criminal Defense Lawyers et al. by *David M. Porter* and *Sheryl Gordon McCloud*.

Briefs of *amici curiae* urging affirmance were filed for the State of Alabama et al. by *William H. Pryor, Jr.*, Attorney General of Alabama, *Kevin C. Newsom*, Solicitor General, *Michael B. Billingsley*, Deputy Solicitor General, and *Nathan A. Forrester*, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.*, of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Jon Bruning* of Nebraska, *Hardy Myers* of Oregon, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger*.

JUSTICE SCALIA delivered the opinion of the Court.

Petitioner Ralph Howard Blakely, Jr., pleaded guilty to the kidnaping of his estranged wife. The facts admitted in his plea, standing alone, supported a maximum sentence of 53 months. Pursuant to state law, the court imposed an "exceptional" sentence of 90 months after making a judicial determination that he had acted with "deliberate cruelty." App. 40, 49. We consider whether this violated petitioner's Sixth Amendment right to trial by jury.

I

Petitioner married his wife Yolanda in 1973. He was evidently a difficult man to live with, having been diagnosed at various times with psychological and personality disorders including paranoid schizophrenia. His wife ultimately filed for divorce. In 1998, he abducted her from their orchard home in Grant County, Washington, binding her with duct tape and forcing her at knifepoint into a wooden box in the bed of his pickup truck. In the process, he implored her to dismiss the divorce suit and related trust proceedings.

When the couple's 13-year-old son Ralphy returned home from school, petitioner ordered him to follow in another car, threatening to harm Yolanda with a shotgun if he did not do so. Ralphy escaped and sought help when they stopped at a gas station, but petitioner continued on with Yolanda to a friend's house in Montana. He was finally arrested after the friend called the police.

The State charged petitioner with first-degree kidnaping, Wash. Rev. Code Ann. § 9A.40.020(1) (2000).[1] Upon reaching a plea agreement, however, it reduced the charge to second-degree kidnaping involving domestic violence and use

[1] Parts of Washington's criminal code have been recodified and amended. We cite throughout the provisions in effect at the time of sentencing.

of a firearm, see §§ 9A.40.030(1), 10.99.020(3)(p), 9.94A.125.[2] Petitioner entered a guilty plea admitting the elements of second-degree kidnaping and the domestic-violence and firearm allegations, but no other relevant facts.

The case then proceeded to sentencing. In Washington, second-degree kidnaping is a class B felony. § 9A.40.030(3). State law provides that "[n]o person convicted of a [class B] felony shall be punished by confinement . . . exceeding . . . a term of ten years." § 9A.20.021(1)(b). Other provisions of state law, however, further limit the range of sentences a judge may impose. Washington's Sentencing Reform Act specifies, for petitioner's offense of second-degree kidnaping with a firearm, a "standard range" of 49 to 53 months. See § 9.94A.320 (seriousness level V for second-degree kidnaping); App. 27 (offender score 2 based on § 9.94A.360); § 9.94A.310(1), box 2–V (standard range of 13–17 months); § 9.94A.310(3)(b) (36-month firearm enhancement).[3] A judge may impose a sentence above the standard range if he finds "substantial and compelling reasons justifying an exceptional sentence." § 9.94A.120(2). The Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. § 9.94A.390. Nevertheless, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense." *State* v. *Gore*, 143 Wash. 2d 288, 315–316, 21 P. 3d 262, 277 (2001). When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. § 9.94A.120(3). A review-

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[2] Petitioner further agreed to an additional charge of second-degree assault involving domestic violence, Wash. Rev. Code Ann. §§ 9A.36.021(1)(c), 10.99.020(3)(b) (2000). The 14-month sentence on that count ran concurrently and is not relevant here.

[3] The domestic-violence stipulation subjected petitioner to such measures as a "no-contact" order, see § 10.99.040, but did not increase the standard range of his sentence.

ing court will reverse the sentence if it finds that "under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence." *Id.*, at 315, 21 P. 3d, at 277 (citing § 9.94A.210(4)).

Pursuant to the plea agreement, the State recommended a sentence within the standard range of 49 to 53 months. After hearing Yolanda's description of the kidnaping, however, the judge rejected the State's recommendation and imposed an exceptional sentence of 90 months—37 months beyond the standard maximum. He justified the sentence on the ground that petitioner had acted with "deliberate cruelty," a statutorily enumerated ground for departure in domestic-violence cases. § 9.94A.390(2)(h)(iii).[4]

Faced with an unexpected increase of more than three years in his sentence, petitioner objected. The judge accordingly conducted a 3-day bench hearing featuring testimony from petitioner, Yolanda, Ralphy, a police officer, and medical experts. After the hearing, he issued 32 findings of fact, concluding:

> "The defendant's motivation to commit kidnapping was complex, contributed to by his mental condition and personality disorders, the pressures of the divorce litigation, the impending trust litigation trial and anger over his troubled interpersonal relationships with his spouse and children. While he misguidedly intended to forcefully reunite his family, his attempt to do so was subservient to his desire to terminate lawsuits and modify title ownerships to his benefit.

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[4] The judge found other aggravating factors, but the Court of Appeals questioned their validity under state law and their independent sufficiency to support the extent of the departure. See 111 Wash. App. 851, 868–870, and n. 3, 47 P. 3d 149, 158–159, and n. 3 (2002). It affirmed the sentence solely on the finding of domestic violence with deliberate cruelty. *Ibid.* We therefore focus only on that factor.

> "The defendant's methods were more homogeneous than his motive. He used stealth and surprise, and took advantage of the victim's isolation. He immediately employed physical violence, restrained the victim with tape, and threatened her with injury and death to herself and others. He immediately coerced the victim into providing information by the threatening application of a knife. He violated a subsisting restraining order." App. 48–49.

The judge adhered to his initial determination of deliberate cruelty.

Petitioner appealed, arguing that this sentencing procedure deprived him of his federal constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. The State Court of Appeals affirmed, 111 Wash. App. 851, 870–871, 47 P. 3d 149, 159 (2002), relying on the Washington Supreme Court's rejection of a similar challenge in *Gore, supra,* at 311–315, 21 P. 3d, at 275–277. The Washington Supreme Court denied discretionary review. 148 Wash. 2d 1010, 62 P. 3d 889 (2003). We granted certiorari. 540 U. S. 965 (2003).

II

This case requires us to apply the rule we expressed in *Apprendi* v. *New Jersey*, 530 U. S. 466, 490 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements

of the common law, and it is no accusation in reason," 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872).[5] These principles have been acknowledged by courts and treatises since the earliest days of graduated sentencing; we compiled the relevant authorities in *Apprendi*, see 530 U. S., at 476–483, 489–490, n. 15; *id.*, at 501–518 (THOMAS, J., concurring), and need not repeat them here.[6]

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[5] JUSTICE BREYER cites JUSTICE O'CONNOR's *Apprendi* dissent for the point that this Bishop quotation means only that indictments must charge facts that trigger statutory aggravation of a common-law offense. *Post*, at 340–341 (dissenting opinion). Of course, as he notes, JUSTICE O'CONNOR was referring to an entirely different quotation, from *Archbold*'s treatise. See 530 U. S., at 526 (citing J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)). JUSTICE BREYER claims the two are "similar," *post*, at 341, but they are as similar as chalk and cheese. Bishop was not "addressing" the "problem" of statutes that aggravate common-law offenses. *Ibid.* Rather, the entire chapter of his treatise is devoted to the point that "every fact which is legally essential to the punishment," 1 Criminal Procedure § 81, at 51, must be charged in the indictment and proved to a jury, *id.*, ch. 6, at 50–56. As one "example" of this principle (appearing several pages before the language we quote in text above), he notes a statute aggravating common-law assault. *Id.*, § 82, at 51–52. But nowhere is there the slightest indication that his general principle was *limited* to that example. Even JUSTICE BREYER's academic supporters do not make *that* claim. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1131–1132 (2001) (conceding that Bishop's treatise supports *Apprendi*, while criticizing its "natural-law theorizing").

[6] As to JUSTICE O'CONNOR's criticism of the quantity of historical support for the *Apprendi* rule, *post*, at 323 (dissenting opinion): It bears repeating that the issue between us is not *whether* the Constitution limits States' authority to reclassify elements as sentencing factors (we all agree that it does); it is only which line, ours or hers, the Constitution draws. Criticism of the quantity of evidence favoring our alternative would have some force if it were accompanied by *any* evidence favoring hers. JUSTICE O'CONNOR does not even provide a coherent alternative meaning for the jury-trial guarantee, unless one considers "whatever the legislature chooses to leave to the jury, so long as it does not go too far" coherent. See *infra*, at 305–308.

Apprendi involved a New Jersey hate-crime statute that authorized a 20-year sentence, despite the usual 10-year maximum, if the judge found the crime to have been committed "'with a purpose to intimidate . . . because of race, color, gender, handicap, religion, sexual orientation or ethnicity.'" *Id.*, at 468–469 (quoting N. J. Stat. Ann. § 2C:44–3(e) (West Supp. 1999–2000)). In *Ring* v. *Arizona*, 536 U. S. 584, 592–593, and n. 1 (2002), we applied *Apprendi* to an Arizona law that authorized the death penalty if the judge found 1 of 10 aggravating factors. In each case, we concluded that the defendant's constitutional rights had been violated because the judge had imposed a sentence greater than the maximum he could have imposed under state law without the challenged factual finding. *Apprendi*, *supra*, at 491–497; *Ring*, *supra*, at 603–609.

In this case, petitioner was sentenced to more than three years above the 53-month statutory maximum of the standard range because he had acted with "deliberate cruelty." The facts supporting that finding were neither admitted by petitioner nor found by a jury. The State nevertheless contends that there was no *Apprendi* violation because the relevant "statutory maximum" is not 53 months, but the 10-year maximum for class B felonies in § 9A.20.021(1)(b). It observes that no exceptional sentence may exceed that limit. See § 9.94A.420. Our precedents make clear, however, that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.* See *Ring*, *supra*, at 602 ("'the maximum he would receive if punished according to the facts reflected in the jury verdict alone'" (quoting *Apprendi*, *supra*, at 483)); *Harris* v. *United States*, 536 U. S. 545, 563 (2002) (plurality opinion) (same); cf. *Apprendi*, *supra*, at 488 (facts admitted by the defendant). In other words, the relevant "statutory maximum" is not the maximum sentence a judge may impose

after finding additional facts, but the maximum he may impose *without* any additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.

The judge in this case could not have imposed the exceptional 90-month sentence solely on the basis of the facts admitted in the guilty plea. Those facts alone were insufficient because, as the Washington Supreme Court has explained, "[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense," *Gore*, 143 Wash. 2d, at 315–316, 21 P. 3d, at 277, which in this case included the elements of second-degree kidnaping and the use of a firearm, see §§ 9.94A.320, 9.94A.310(3)(b).[7] Had the judge imposed the 90-month sentence solely on the basis of the plea, he would have been reversed. See § 9.94A.210(4). The "maximum sentence" is no more 10 years here than it was 20 years in *Apprendi* (because that is what the judge could have imposed upon finding a hate crime) or death in *Ring* (because that is what the judge could have imposed upon finding an aggravator).

The State defends the sentence by drawing an analogy to those we upheld in *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986), and *Williams* v. *New York*, 337 U. S. 241 (1949). Neither case is on point. *McMillan* involved a sentencing scheme that imposed a statutory *minimum* if a judge found a particular fact. 477 U. S., at 81. We specifically noted that the statute "does not authorize a sentence in excess of that otherwise allowed for [the underlying] offense." *Id.*,

[7] The State does not contend that the domestic-violence stipulation alone supports the departure. That the statute lists domestic violence as grounds for departure only when combined with some other aggravating factor suggests it could not. See §§ 9.94A.390(2)(h)(i)–(iii).

at 82; cf. *Harris*, *supra*, at 567. *Williams* involved an indeterminate-sentencing regime that allowed a judge (but did not compel him) to rely on facts outside the trial record in determining whether to sentence a defendant to death. 337 U. S., at 242–243, and n. 2. The judge could have "sentenced [the defendant] to death giving no reason at all." *Id.*, at 252. Thus, neither case involved a sentence greater than what state law authorized on the basis of the verdict alone.

Finally, the State tries to distinguish *Apprendi* and *Ring* by pointing out that the enumerated grounds for departure in its regime are illustrative rather than exhaustive. This distinction is immaterial. Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.[8]

Because the State's sentencing procedure did not comply with the Sixth Amendment, petitioner's sentence is invalid.[9]

III

Our commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is

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[8] Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

[9] The United States, as *amicus curiae*, urges us to affirm. It notes differences between Washington's sentencing regime and the Federal Sentencing Guidelines but questions whether those differences are constitutionally significant. See Brief for United States as *Amicus Curiae* 25–30. The Federal Guidelines are not before us, and we express no opinion on them.

no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary. See Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed. 1981) (describing the jury as "secur-[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry (Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed. 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson 282, 283 (J. Boyd ed. 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative"); *Jones* v. *United States*, 526 U. S. 227, 244–248 (1999). *Apprendi* carries out this design by ensuring that the judge's authority to sentence derives wholly from the jury's verdict. Without that restriction, the jury would not exercise the control that the Framers intended.

Those who would reject *Apprendi* are resigned to one of two alternatives. The first is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge. This would mean, for example, that a judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. Cf. 530 U. S., at 552–553 (O'Connor, J., dissenting). The jury could not function as circuitbreaker in the State's machinery of justice if it were

relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.[10]

The second alternative is that legislatures may establish legally essential sentencing factors *within limits*—limits crossed when, perhaps, the sentencing factor is a "tail which wags the dog of the substantive offense." *McMillan*, 477 U. S., at 88. What this means in operation is that the law must not go *too far*—it must not exceed the judicial estimation of the proper role of the judge.

The subjectivity of this standard is obvious. Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See 111 Wash. App., at 869, 47 P. 3d, at 158.[11] Petitioner's 90-month sentence exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State* v. *Oxborrow*, 106 Wash. 2d 525, 528, 533, 723 P. 2d 1123, 1125, 1128 (1986) (en banc) (15-year exceptional sentence; 1-year standard maximum sen-

[10] JUSTICE O'CONNOR believes that a "built-in political check" will prevent lawmakers from manipulating offense elements in this fashion. *Post*, at 322. But the many immediate practical advantages of judicial factfinding, see *post*, at 318–320, suggest that political forces would, if anything, pull in the opposite direction. In any case, the Framers' decision to entrench the jury-trial right in the Constitution shows that they did not trust government to make political decisions in this area.

[11] Another example of conversion from separate crime to sentence enhancement that JUSTICE O'CONNOR evidently does not consider going "too far" is the obstruction-of-justice enhancement, see *post*, at 319. Why perjury during trial should be grounds for a judicial sentence enhancement on the underlying offense, rather than an entirely separate offense to be found by a jury beyond a reasonable doubt (as it has been for centuries, see 4 W. Blackstone, Commentaries on the Laws of England 136–138 (1769)), is unclear.

tence); *State* v. *Branch,* 129 Wash. 2d 635, 650, 919 P. 2d 1228, 1235 (1996) (en banc) (4-year exceptional sentence; 3-month standard maximum sentence). Did the court go *too far* in any of these cases? There is no answer that legal analysis can provide. With *too far* as the yardstick, it is always possible to disagree with such judgments and never to refute them.

Whether the Sixth Amendment incorporates this manipulable standard rather than *Apprendi*'s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges' intuitive sense of how far is *too far.* We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury.

IV

By reversing the judgment below, we are not, as the State would have it, "find[ing] determinate sentencing schemes unconstitutional." Brief for Respondent 34. This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment. Several policies prompted Washington's adoption of determinate sentencing, including proportionality to the gravity of the offense and parity among defendants. See Wash. Rev. Code Ann. § 9.94A.010 (2000). Nothing we have said impugns those salutary objectives.

JUSTICE O'CONNOR argues that, because determinate-sentencing schemes involving judicial factfinding entail less judicial discretion than indeterminate schemes, the constitutionality of the latter implies the constitutionality of the former. *Post,* at 314–323. This argument is flawed on a number of levels. First, the Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.

Indeterminate sentencing does not do so. It increases judicial discretion, to be sure, but not at the expense of the jury's traditional function of finding the facts essential to lawful imposition of the penalty. Of course indeterminate schemes involve judicial factfinding, in that a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion. But the facts do not pertain to whether the defendant has a legal *right* to a lesser sentence—and that makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned. In a system that says the judge may punish burglary with 10 to 40 years, every burglar knows he is risking 40 years in jail. In a system that punishes burglary with a 10-year sentence, with another 30 added for use of a gun, the burglar who enters a home unarmed is *entitled* to no more than a 10-year sentence—and by reason of the Sixth Amendment the facts bearing upon that entitlement must be found by a jury.

But even assuming that restraint of judicial power unrelated to the jury's role is a Sixth Amendment objective, it is far from clear that *Apprendi* disserves that goal. Determinate judicial-factfinding schemes entail less judicial power than indeterminate schemes, but more judicial power than determinate *jury*-factfinding schemes. Whether *Apprendi* increases judicial power overall depends on what States with determinate judicial-factfinding schemes would do, given the choice between the two alternatives. JUSTICE O'CONNOR simply assumes that the net effect will favor judges, but she has no empirical basis for that prediction. Indeed, what evidence we have points exactly the other way: When the Kansas Supreme Court found *Apprendi* infirmities in that State's determinate-sentencing regime in *State* v. *Gould*, 271 Kan. 394, 404–414, 23 P. 3d 801, 809–814 (2001), the legislature responded not by reestablishing indeterminate sentencing but by applying *Apprendi*'s requirements to its current regime. See Act of May 29, 2002, ch. 170, 2002 Kan. Sess.

Laws pp. 1018–1023 (codified at Kan. Stat. Ann. §21–4718 (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3–7. The result was less, not more, judicial power.

JUSTICE BREYER argues that *Apprendi* works to the detriment of criminal defendants who plead guilty by depriving them of the opportunity to argue sentencing factors to a judge. *Post*, at 331. But nothing prevents a defendant from waiving his *Apprendi* rights. When a defendant pleads guilty, the State is free to seek judicial sentence enhancements so long as the defendant either stipulates to the relevant facts or consents to judicial factfinding. See *Apprendi*, 530 U. S., at 488; *Duncan* v. *Louisiana*, 391 U. S. 145, 158 (1968). If appropriate waivers are procured, States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty. Even a defendant who stands trial may consent to judicial factfinding as to sentence enhancements, which may well be in his interest if relevant evidence would prejudice him at trial. We do not understand how *Apprendi* can possibly work to the detriment of those who are free, if they think its costs outweigh its benefits, to render it inapplicable.[12]

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[12] JUSTICE BREYER responds that States are not *required* to give defendants the option of waiving jury trial on some elements but not others. *Post*, at 335–336. True enough. But why would the States that he asserts we are coercing into hardheartedness—that is, States that *want* judge-pronounced determinate sentencing to be the norm but we won't let them—want to prevent a defendant from *choosing* that regime? JUSTICE BREYER claims this alternative may prove "too expensive and unwieldy for States to provide," *post*, at 336, but there is no obvious reason why forcing defendants to choose between contesting all elements of his hypothetical 17-element robbery crime and contesting none of them is less expensive than also giving them the third option of pleading guilty to some elements and submitting the rest to judicial factfinding. JUSTICE BREYER's argument rests entirely on a speculative prediction about the number of defendants likely to choose the first (rather than the second) option if denied the third.

Nor do we see any merit to JUSTICE BREYER's contention that *Apprendi* is unfair to criminal defendants because, if States respond by enacting "17-element robbery crime[s]," prosecutors will have more elements with which to bargain. *Post*, at 331, 335–336 (citing Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097 (2001)). Bargaining already exists with regard to sentencing factors because defendants can either stipulate or contest the facts that make them applicable. If there is any difference between bargaining over sentencing factors and bargaining over elements, the latter probably favors the defendant. Every new element that a prosecutor can threaten to charge is also an element that a defendant can threaten to contest at trial and make the prosecutor prove beyond a reasonable doubt. Moreover, given the sprawling scope of most criminal codes, and the power to affect sentences by making (even nonbinding) sentencing recommendations, there is already no shortage of *in terrorem* tools at prosecutors' disposal. See King & Klein, *Apprendi* and Plea Bargaining, 54 Stan. L. Rev. 295, 296 (2001) ("Every prosecutorial bargaining chip mentioned by Professor Bibas existed pre-*Apprendi* exactly as it does post-*Apprendi*").

Any evaluation of *Apprendi*'s "fairness" to criminal defendants must compare it with the regime it replaced, in which a defendant, with no warning in either his indictment or plea, would routinely see his maximum potential sentence balloon from as little as five years to as much as life imprisonment, see 21 U. S. C. §§ 841(b)(1)(A), (D),[13] based not on

[13] To be sure, JUSTICE BREYER and the other dissenters would forbid those increases of sentence that violate the constitutional principle that tail shall not wag dog. The source of this principle is entirely unclear. Its precise effect, if precise effect it has, is presumably to require that the ratio of sentencing-factor add-on to basic criminal sentence be no greater than the ratio of caudal vertebrae to body in the breed of canine with the longest tail. Or perhaps no greater than the average such ratio for all breeds. Or perhaps the median. Regrettably, *Apprendi* has prevented full development of this line of jurisprudence.

facts proved to his peers beyond a reasonable doubt, but on facts extracted after trial from a report compiled by a probation officer who the judge thinks more likely got it right than got it wrong. We can conceive of no measure of fairness that would find more fault in the utterly speculative bargaining effects JUSTICE BREYER identifies than in the regime he champions. Suffice it to say that, if such a measure exists, it is not the one the Framers left us with.

The implausibility of JUSTICE BREYER's contention that *Apprendi* is unfair to criminal defendants is exposed by the lineup of *amici* in this case. It is hard to believe that the National Association of Criminal Defense Lawyers was somehow duped into arguing for the wrong side. JUSTICE BREYER's only authority asking that defendants be protected from *Apprendi* is an article written not by a criminal defense lawyer but by a law professor and former prosecutor. See *post*, at 331 (citing Bibas, *supra*); Association of American Law Schools Directory of Law Teachers 2003–2004, p. 319.

JUSTICE BREYER also claims that *Apprendi* will attenuate the connection between "real criminal conduct and real punishment" by encouraging plea bargaining and by restricting alternatives to adversarial factfinding. *Post*, at 334, 338–339. The short answer to the former point (even assuming the questionable premise that *Apprendi* does encourage plea bargaining, but see *supra*, at 310, n. 12) is that the Sixth Amendment was not written for the benefit of those who choose to forgo its protection. It guarantees the *right* to jury trial. It does not guarantee that a particular number of jury trials will actually take place. That more defendants elect to waive that right (because, for example, government at the moment is not particularly oppressive) does not prove that a constitutional provision guaranteeing *availability* of that option is disserved.

JUSTICE BREYER's more general argument—that *Apprendi* undermines alternatives to adversarial factfinding—

is not so much a criticism of *Apprendi* as an assault on jury trial generally. His esteem for "nonadversarial" truth-seeking processes, *post*, at 339, supports just as well an argument against either. Our Constitution and the common-law traditions it entrenches, however, do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury. See 3 Blackstone, Commentaries, at 373–374, 379–381. JUSTICE BREYER may be convinced of the equity of the regime he favors, but his views are not the ones we are bound to uphold.

Ultimately, our decision cannot turn on whether or to what degree trial by jury impairs the efficiency or fairness of criminal justice. One can certainly argue that both these values would be better served by leaving justice entirely in the hands of professionals; many nations of the world, particularly those following civil-law traditions, take just that course. There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment. Under the dissenters' alternative, he has no such right. That should be the end of the matter.

* * *

Petitioner was sentenced to prison for more than three years beyond what the law allowed for the crime to which he confessed, on the basis of a disputed finding that he had acted with "deliberate cruelty." The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neigh-

bours," 4 Blackstone, *supra*, at 343, rather than a lone employee of the State.

The judgment of the Washington Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BREYER joins, and with whom THE CHIEF JUSTICE and JUSTICE KENNEDY join as to all but Part IV–B, dissenting.

The legacy of today's opinion, whether intended or not, will be the consolidation of sentencing power in the State and Federal Judiciaries. The Court says to Congress and state legislatures: If you want to constrain the sentencing discretion of judges and bring some uniformity to sentencing, it will cost you—dearly. Congress and States, faced with the burdens imposed by the extension of *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), to the present context, will either trim or eliminate altogether their sentencing guidelines schemes and, with them, 20 years of sentencing reform. It is thus of little moment that the majority does not expressly declare guidelines schemes unconstitutional, *ante*, at 308; for, as residents of "*Apprendi*-land" are fond of saying, "the relevant inquiry is one not of form, but of effect." *Apprendi*, *supra*, at 494; *Ring* v. *Arizona*, 536 U. S. 584, 613 (2002) (SCALIA, J., concurring). The "effect" of today's decision will be greater judicial discretion and less uniformity in sentencing. Because I find it implausible that the Framers would have considered such a result to be required by the Due Process Clause or the Sixth Amendment, and because the practical consequences of today's decision may be disastrous, I respectfully dissent.

I

One need look no further than the history leading up to and following the enactment of Washington's guidelines

scheme to appreciate the damage that today's decision will cause. Prior to 1981, Washington, like most other States and the Federal Government, employed an indeterminate sentencing scheme. Washington's criminal code separated all felonies into three broad categories: "class A," carrying a sentence of 20 years to life; "class B," carrying a sentence of 0 to 10 years; and "class C," carrying a sentence of 0 to 5 years. Wash. Rev. Code Ann. § 9A.20.020 (2000); see also Sentencing Reform Act of 1981, 1981 Wash. Laws ch. 137, p. 534. Sentencing judges, in conjunction with parole boards, had virtually unfettered discretion to sentence defendants to prison terms falling anywhere within the statutory range, including probation—*i. e.*, no jail sentence at all. Wash. Rev. Code Ann. §§ 9.95.010–9.95.011; Boerner & Lieb, Sentencing Reform in the Other Washington, 28 Crime and Justice 71, 73 (M. Tonry ed. 2001) (hereinafter Boerner & Lieb) ("Judges were authorized to choose between prison and probation with few exceptions, subject only to review for abuse of discretion"). See also D. Boerner, Sentencing in Washington § 2.4, pp. 2–27 to 2–28 (1985).

This system of unguided discretion inevitably resulted in severe disparities in sentences received and served by defendants committing the same offense and having similar criminal histories. Boerner & Lieb 126–127; cf. S. Rep. No. 98–225, p. 38 (1983) (Senate Report on precursor to federal Sentencing Reform Act of 1984) ("[E]very day Federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, committed under similar circumstances. . . . These disparities, whether they occur at the time of the initial sentencing or at the parole stage, can be traced directly to the unfettered discretion the law confers on those judges and parole authorities responsible for imposing and implementing the sentence"). Indeed, rather than reflect legally relevant criteria, these disparities too often were correlated with constitutionally suspect variables such as race. Boerner & Lieb

126–128. See also Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 Hofstra L. Rev. 1, 5 (1988) (elimination of racial disparity one reason behind Congress' creation of the Federal Sentencing Commission).

To counteract these trends, the state legislature passed the Sentencing Reform Act of 1981. The Act had the laudable purposes of "mak[ing] the criminal justice system accountable to the public," and "[e]nsur[ing] that the punishment for a criminal offense is proportionate to the seriousness of the offense . . . [and] commensurate with the punishment imposed on others committing similar offenses." Wash. Rev. Code Ann. § 9.94A.010 (2000). The Act neither increased any of the statutory sentencing ranges for the three types of felonies (though it did eliminate the statutory mandatory minimum for class A felonies), nor reclassified any substantive offenses. 1981 Wash. Laws ch. 137, p. 534. It merely placed meaningful constraints on discretion to sentence offenders within the statutory ranges, and eliminated parole. There is thus no evidence that the legislature was attempting to manipulate the statutory elements of criminal offenses or to circumvent the procedural protections of the Bill of Rights. Rather, lawmakers were trying to bring some much-needed uniformity, transparency, and accountability to an otherwise "'labyrinthine' sentencing and corrections system that 'lack[ed] any principle except unguided discretion.'" Boerner & Lieb 73 (quoting F. Zimring, Making the Punishment Fit the Crime: A Consumers' Guide to Sentencing Reform, Occasional Paper No. 12, p. 6 (1977)).

II

Far from disregarding principles of due process and the jury trial right, as the majority today suggests, Washington's reform has served them. Before passage of the Act, a defendant charged with second degree kidnaping, like petitioner, had no idea whether he would receive a 10-year sen-

tence or probation. The ultimate sentencing determination could turn as much on the idiosyncracies of a particular judge as on the specifics of the defendant's crime or background. A defendant did not know what facts, if any, about his offense or his history would be considered relevant by the sentencing judge or by the parole board. After passage of the Act, a defendant charged with second degree kidnaping knows what his presumptive sentence will be; he has a good idea of the types of factors that a sentencing judge can and will consider when deciding whether to sentence him outside that range; he is guaranteed meaningful appellate review to protect against an arbitrary sentence. Boerner & Lieb 93 ("By consulting one sheet, practitioners could identify the applicable scoring rules for criminal history, the sentencing range, and the available sentencing options for each case"). Criminal defendants still face the same statutory maximum sentences, but they now at least know, much more than before, the real consequences of their actions.

Washington's move to a system of guided discretion has served equal protection principles as well. Over the past 20 years, there has been a substantial reduction in racial disparity in sentencing across the State. *Id.*, at 126 (Racial disparities that do exist "are accounted for by differences in legally relevant variables—the offense of conviction and prior criminal record"); *id.*, at 127 ("[J]udicial authority to impose exceptional sentences under the court's departure authority shows little evidence of disparity correlated with race"). The reduction is directly traceable to the constraining effects of the guidelines—namely, their "presumptive range[s]" and limits on the imposition of "exceptional sentences" outside of those ranges. *Id.*, at 128. For instance, sentencing judges still retain unreviewable discretion in first-time offender cases and in certain sex offender cases to impose alternative sentences that are far more lenient than those contemplated by the guidelines. To the extent that unjustifiable racial disparities have persisted in Washington, it

has been in the imposition of such alternative sentences: "The lesson is powerful: racial disparity is correlated with unstructured and unreviewed discretion." *Ibid.;* see also Washington State Minority and Justice Commission, R. Crutchfield, J. Weis, R. Engen, & R. Gainey, Racial/Ethnic Disparities and Exceptional Sentences in Washington State, Final Report 51–53 (Sept. 1993) ("[E]xceptional sentences are not a major source of racial disparities in sentencing").

The majority does not, because it cannot, disagree that determinate sentencing schemes, like Washington's, serve important constitutional values. *Ante,* at 308. Thus, the majority says: "This case is not about whether determinate sentencing is constitutional, only about how it can be implemented in a way that respects the Sixth Amendment." *Ibid.* But extension of *Apprendi* to the present context will impose significant costs on a legislature's determination that a particular fact, not historically an element, warrants a higher sentence. While not a constitutional prohibition on guidelines schemes, the majority's decision today exacts a substantial constitutional tax.

The costs are substantial and real. Under the majority's approach, any fact that increases the upper bound on a judge's sentencing discretion is an element of the offense. Thus, facts that historically have been taken into account by sentencing judges to assess a sentence within a broad range—such as drug quantity, role in the offense, risk of bodily harm—all must now be charged in an indictment and submitted to a jury, *In re Winship,* 397 U. S. 358 (1970), simply because it is the legislature, rather than the judge, that constrains the extent to which such facts may be used to impose a sentence within a pre-existing statutory range.

While that alone is enough to threaten the continued use of sentencing guidelines schemes, there are additional costs. For example, a legislature might rightly think that some factors bearing on sentencing, such as prior bad acts or criminal history, should not be considered in a jury's determination of

a defendant's guilt—such "character evidence" has traditionally been off limits during the guilt phase of criminal proceedings because of its tendency to inflame the passions of the jury. See, *e. g.*, Fed. Rule Evid. 404; 1 E. Imwinkelried, P. Giannelli, F. Gilligan, & F. Lederer, Courtroom Criminal Evidence 285 (3d ed. 1998). If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury's initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during the penalty phase proceeding.

Some facts that bear on sentencing either will not be discovered, or are not discoverable, prior to trial. For instance, a legislature might desire that defendants who act in an obstructive manner during trial or post-trial proceedings receive a greater sentence than defendants who do not. See, *e. g.*, United States Sentencing Commission, Guidelines Manual §3C1.1 (Nov. 2003) (hereinafter USSG) (2-point increase in offense level for obstruction of justice). In such cases, the violation arises too late for the State to provide notice to the defendant or to argue the facts to the jury. A State wanting to make such facts relevant at sentencing must now either vest sufficient discretion in the judge to account for them *or* bring a separate criminal prosecution for obstruction of justice or perjury. And, the latter option is available only to the extent that a defendant's obstructive behavior is so severe as to constitute an already-existing separate offense, unless the legislature is willing to undertake the unlikely expense of criminalizing relatively minor obstructive behavior.

Likewise, not all facts that historically have been relevant to sentencing always will be known prior to trial. For instance, trial or sentencing proceedings of a drug distribution defendant might reveal that he sold primarily to children. Under the majority's approach, a State wishing such a revelation to result in a higher sentence within a pre-existing statutory range either must vest judges with sufficient dis-

cretion to account for it (and trust that they exercise that discretion) *or* bring a separate criminal prosecution. Indeed, the latter choice might not be available—a separate prosecution, if it is for an aggravated offense, likely would be barred altogether by the Double Jeopardy Clause. *Blockburger* v. *United States*, 284 U. S. 299 (1932) (government cannot prosecute for separate offenses unless each offense has at least one element that the other does not).

The majority may be correct that States and the Federal Government will be willing to bear some of these costs. *Ante*, at 309–310. But simple economics dictate that they will not, and cannot, bear them all. To the extent that they do not, there will be an inevitable increase in judicial discretion with all of its attendant failings.[1]

III

Washington's Sentencing Reform Act did not alter the statutory maximum sentence to which petitioner was exposed. See Wash. Rev. Code Ann. § 9A.40.030 (2003) (second

[1] The paucity of empirical evidence regarding the impact of extending *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), to guidelines schemes should come as no surprise to the majority. *Ante*, at 309. Prior to today, only one court had ever applied *Apprendi* to invalidate application of a guidelines scheme. Compare *State* v. *Gould*, 271 Kan. 394, 23 P. 3d 801 (2001), with, *e. g.*, *United States* v. *Goodine*, 326 F. 3d 26 (CA1 2003); *United States* v. *Luciano*, 311 F. 3d 146 (CA2 2002); *United States* v. *DeSumma*, 272 F. 3d 176 (CA3 2001); *United States* v. *Kinter*, 235 F. 3d 192 (CA4 2000); *United States* v. *Randle*, 304 F. 3d 373 (CA5 2002); *United States* v. *Helton*, 349 F. 3d 295 (CA6 2003); *United States* v. *Johnson*, 335 F. 3d 589 (CA7 2003) *(per curiam); United States* v. *Piggie*, 316 F. 3d 789 (CA8 2003); *United States* v. *Toliver*, 351 F. 3d 423 (CA9 2003); *United States* v. *Mendez-Zamora*, 296 F. 3d 1013 (CA10 2002); *United States* v. *Sanchez*, 269 F. 3d 1250 (CA11 2001); *United States* v. *Fields*, 251 F. 3d 1041 (CADC 2001); *State* v. *Dilts*, 336 Ore. 158, 82 P. 3d 593 (2003); *State* v. *Gore*, 143 Wash. 2d 288, 21 P. 3d 262 (2001); *State* v. *Lucas*, 353 N. C. 568, 548 S. E. 2d 712 (2001); *State* v. *Dean*, No. C4–02–1225, 2003 WL 21321425 (Ct. App. Minn., June 10, 2003) (unpublished opinion). Thus, there is no map of the uncharted territory blazed by today's unprecedented holding.

degree kidnaping class B felony since 1975); see also *State* v. *Pawling*, 23 Wash. App. 226, 228–229, 597 P. 2d 1367, 1369 (1979) (citing second degree kidnaping provision as existed in 1977). Petitioner was informed in the charging document, his plea agreement, and during his plea hearing that he faced a potential statutory maximum of 10 years in prison. App. 63, 66, 76. As discussed above, the guidelines served due process by providing notice to petitioner of the consequences of his acts; they vindicated his jury trial right by informing him of the stakes of risking trial; they served equal protection by ensuring petitioner that invidious characteristics such as race would not impact his sentence.

Given these observations, it is difficult for me to discern what principle besides doctrinaire formalism actually motivates today's decision. The majority chides the *Apprendi* dissenters for preferring a nuanced interpretation of the Due Process Clause and Sixth Amendment jury trial guarantee that would generally defer to legislative labels while acknowledging the existence of constitutional constraints—what the majority calls "the law must not go too far" approach. *Ante*, at 307 (emphasis deleted). If indeed the choice is between adopting a balanced case-by-case approach that takes into consideration the values underlying the Bill of Rights, as well as the history of a particular sentencing reform law, and adopting a rigid rule that destroys everything in its path, I will choose the former. See *Apprendi*, 530 U. S., at 552–554 (O'CONNOR, J., dissenting) ("Because I do not believe that the Court's 'increase in the maximum penalty' rule is required by the Constitution, I would evaluate New Jersey's sentence-enhancement statute by analyzing the factors we have examined in past cases" (citation omitted)).

But even were one to accept formalism as a principle worth vindicating for its own sake, it would not explain *Apprendi*'s, or today's, result. A rule of deferring to legislative labels has no less formal pedigree. It would be more

consistent with our decisions leading up to *Apprendi*, see *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998) (fact of prior conviction not an element of aggravated recidivist offense); *United States* v. *Watts*, 519 U. S. 148 (1997) *(per curiam)* (acquittal of offense no bar to consideration of underlying conduct for purposes of guidelines enhancement); *Witte* v. *United States*, 515 U. S. 389 (1995) (no double jeopardy bar against consideration of uncharged conduct in imposition of guidelines enhancement); *Walton* v. *Arizona*, 497 U. S. 639 (1990) (aggravating factors need not be found by a jury in capital case); *Mistretta* v. *United States*, 488 U. S. 361 (1989) (Federal Sentencing Guidelines do not violate separation of powers); *McMillan* v. *Pennsylvania*, 477 U. S. 79 (1986) (facts increasing mandatory minimum sentence are not necessarily elements); and it would vest primary authority for defining crimes in the political branches, where it belongs. *Apprendi*, *supra*, at 523–554 (O'CONNOR, J., dissenting). It also would be easier to administer than the majority's rule, inasmuch as courts would not be forced to look behind statutes and regulations to determine whether a particular fact does or does not increase the penalty to which a defendant was exposed.

The majority is correct that rigid adherence to such an approach *could conceivably* produce absurd results, *ante*, at 306; but, as today's decision demonstrates, rigid adherence to the majority's approach *does and will continue* to produce results that disserve the very principles the majority purports to vindicate. The pre-*Apprendi* rule of deference to the legislature retains a built-in political check to prevent lawmakers from shifting the prosecution for crimes to the penalty phase proceedings of lesser included and easier-to-prove offenses—*e. g.*, the majority's hypothesized prosecution of murder in the guise of a traffic offense sentencing proceeding. *Ante*, at 306. There is no similar check, however, on application of the majority's "any fact that increases the upper bound of judicial discretion" by courts.

The majority claims the mantle of history and original intent. But as I have explained elsewhere, a handful of state decisions in the mid-19th century and a criminal procedure treatise have little if any persuasive value as evidence of what the Framers of the Federal Constitution intended in the late 18th century. See *Apprendi*, 530 U. S., at 525–528 (O'CONNOR, J., dissenting). Because broad judicial sentencing discretion was foreign to the Framers, *id.*, at 478–479 (citing J. Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862)), they were never faced with the constitutional choice between submitting every fact that increases a sentence to the jury or vesting the sentencing judge with broad discretionary authority to account for differences in offenses and offenders.

IV

A

The consequences of today's decision will be as far reaching as they are disturbing. Washington's sentencing system is by no means unique. Numerous other States have enacted guidelines systems, as has the Federal Government. See, *e. g.*, Alaska Stat. § 12.55.155 (2002); Ark. Code Ann. § 16–90–804 (2003 Supp.); Fla. Stat. § 921.0016 (2003); Kan. Stat. Ann. § 21–4701 *et seq.* (2003); Mich. Comp. Laws Ann. § 769.34 (West Supp. 2004); Minn. Stat. § 244.10 (2002); N. C. Gen. Stat. § 15A–1340.16 (Lexis 2003); Ore. Admin. Rule § 213–008–0001 (2003); 204 Pa. Code § 303 *et seq.* (2004), reproduced following 42 Pa. Cons. Stat. Ann. § 9721 (Purdon Supp. 2004); 18 U. S. C. § 3553; 28 U. S. C. § 991 *et seq.* Today's decision casts constitutional doubt over them all and, in so doing, threatens an untold number of criminal judgments. Every sentence imposed under such guidelines in cases currently pending on direct appeal is in jeopardy. And, despite the fact that we hold in *Schriro* v. *Summerlin*, *post*, p. 348, that *Ring* (and *a fortiori Apprendi*) does not apply retroactively on habeas review, all criminal sentences imposed

under the federal and state guidelines since *Apprendi* was decided in 2000 arguably remain open to collateral attack. See *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality opinion) ("[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final").[2]

The practical consequences for trial courts, starting today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? The Court ignores the havoc it is about to wreak on trial courts across the country.

B

It is no answer to say that today's opinion impacts only Washington's scheme and not others, such as, for example, the Federal Sentencing Guidelines. See *ante*, at 305, n. 9 ("The Federal Guidelines are not before us, and we express no opinion on them"); cf. *Apprendi*, *supra*, at 496–497 (claiming not to overrule *Walton*, *supra*, soon thereafter overruled in *Ring*); *Apprendi*, *supra*, at 497, n. 21 (reserving question of Federal Sentencing Guidelines). The fact that the Federal Sentencing Guidelines are promulgated by an administrative agency nominally located in the Judicial Branch is irrelevant to the majority's reasoning. The Guidelines have the force of law, see *Stinson* v. *United States*, 508 U. S. 36 (1993); and Congress has unfettered control to reject or

[2] The numbers available from the federal system alone are staggering. On March 31, 2004, there were 8,320 federal criminal appeals pending in which the defendant's sentence was at issue. Memorandum from Steven Schlesinger, Administrative Office of the United States Courts, to Supreme Court Library (June 1, 2004) (available in Clerk of Court's case file). Between June 27, 2000, when *Apprendi* was decided, and March 31, 2004, there have been 272,191 defendants sentenced in federal court. Memorandum, *supra*. Given that nearly all federal sentences are governed by the Federal Sentencing Guidelines, the vast majority of these cases are Guidelines cases.

accept any particular guideline, *Mistretta*, 488 U. S., at 393–394.

The structure of the Federal Guidelines likewise does not, as the Government halfheartedly suggests, provide any grounds for distinction. Brief for United States as *Amicus Curiae* 27–29. Washington's scheme is almost identical to the upward departure regime established by 18 U. S. C. § 3553(b) and implemented in USSG § 5K2.0. If anything, the structural differences that do exist make the Federal Guidelines more vulnerable to attack. The provision struck down here provides for an increase in the upper bound of the presumptive sentencing range if the sentencing court finds, "considering the purpose of [the Act], that there are substantial and compelling reasons justifying an exceptional sentence." Wash. Rev. Code Ann. § 9.94A.120 (2000). The Act elsewhere provides a nonexhaustive list of aggravating factors that satisfy the definition. § 9.94A.390. The Court flatly rejects respondent's argument that such soft constraints, which still allow Washington judges to exercise a substantial amount of discretion, survive *Apprendi*. *Ante*, at 305. This suggests that the hard constraints found throughout chapters 2 and 3 of the Federal Sentencing Guidelines, which require an increase in the sentencing range upon specified factual findings, will meet the same fate. See, *e. g.*, USSG § 2K2.1 (increases in offense level for firearms offenses based on number of firearms involved, whether possession was in connection with another offense, whether the firearm was stolen); § 2B1.1 (increase in offense level for financial crimes based on amount of money involved, number of victims, possession of weapon); § 3C1.1 (general increase in offense level for obstruction of justice).

Indeed, the "extraordinary sentence" provision struck down today is as inoffensive to the holding of *Apprendi* as a regime of guided discretion could possibly be. The list of facts that justify an increase in the range is nonexhaustive. The State's "real facts" doctrine precludes reliance by sen-

tencing courts upon facts that would constitute the elements of a different or aggravated offense. See Wash. Rev. Code Ann. § 9.94A.370(2) (2000) (codifying "real facts" doctrine). If the Washington scheme does not comport with the Constitution, it is hard to imagine a guidelines scheme that would.

* * *

What I have feared most has now come to pass: Over 20 years of sentencing reform are all but lost, and tens of thousands of criminal judgments are in jeopardy. *Apprendi*, 530 U. S., at 549–559 (O'CONNOR, J., dissenting); *Ring*, 536 U. S., at 619–621 (O'CONNOR, J., dissenting). I respectfully dissent.

JUSTICE KENNEDY, with whom JUSTICE BREYER joins, dissenting.

The majority opinion does considerable damage to our laws and to the administration of the criminal justice system for all the reasons well stated in JUSTICE O'CONNOR's dissent, plus one more: The Court, in my respectful submission, disregards the fundamental principle under our constitutional system that different branches of government "converse with each other on matters of vital common interest." *Mistretta* v. *United States*, 488 U. S. 361, 408 (1989). As the Court in *Mistretta* explained, the Constitution establishes a system of government that presupposes, not just "'autonomy'" and "'separateness,'" but also "'interdependence'" and "'reciprocity.'" *Id.*, at 381 (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)). Constant, constructive discourse between our courts and our legislatures is an integral and admirable part of the constitutional design. Case-by-case judicial determinations often yield intelligible patterns that can be refined by legislatures and codified into statutes or rules as general standards. As these legislative enactments are followed by incremental judicial interpretation, the legis-

latures may respond again, and the cycle repeats. This recurring dialogue, an essential source for the elaboration and the evolution of the law, is basic constitutional theory in action.

Sentencing guidelines are a prime example of this collaborative process. Dissatisfied with the wide disparity in sentencing, participants in the criminal justice system, including judges, pressed for legislative reforms. In response, legislators drew from these participants' shared experiences and enacted measures to correct the problems, which, as JUSTICE O'CONNOR explains, could sometimes rise to the level of a constitutional injury. As *Mistretta* recognized, this interchange among different actors in the constitutional scheme is consistent with the Constitution's structural protections.

To be sure, this case concerns the work of a state legislature, and not of Congress. If anything, however, this distinction counsels even greater judicial caution. Unlike *Mistretta*, the case here implicates not just the collective wisdom of legislators on the other side of the continuing dialogue over fair sentencing, but also the interest of the States to serve as laboratories for innovation and experiment. See *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting). With no apparent sense of irony that the effect of today's decision is the destruction of a sentencing scheme devised by democratically elected legislators, the majority shuts down alternative, nonjudicial, sources of ideas and experience. It does so under a faintly disguised distrust of judges and their purported usurpation of the jury's function in criminal trials. It tells not only trial judges who have spent years studying the problem but also legislators who have devoted valuable time and resources "calling upon the accumulated wisdom and experience of the Judicial Branch . . . on a matter uniquely within the ken of judges," *Mistretta*, *supra*, at 412, that their efforts and judgments were all for naught. Numerous States that have enacted sentencing guidelines similar to the one in Washing-

ton State are now commanded to scrap everything and start over.

If the Constitution required this result, the majority's decision, while unfortunate, would at least be understandable and defensible. As JUSTICE O'CONNOR's dissent demonstrates, however, this is simply not the case. For that reason, and because the Constitution does not prohibit the dynamic and fruitful dialogue between the judicial and legislative branches of government that has marked sentencing reform on both the state and the federal levels for more than 20 years, I dissent.

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, dissenting.

The Court makes clear that it means what it said in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). In its view, the Sixth Amendment says that "'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury.'" *Ante*, at 301 (quoting *Apprendi*, *supra*, at 490). "'[P]rescribed statutory maximum'" means the penalty that the relevant statute authorizes "solely on the basis of the facts reflected in the jury verdict." *Ante*, at 301, 303 (emphasis deleted). Thus, a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime.

It is not difficult to understand the impulse that produced this holding. Imagine a classic example—a statute (or mandatory sentencing guideline) that provides a 10-year sentence for ordinary bank robbery, but a 15-year sentence for bank robbery committed with a gun. One might ask why it should matter for jury trial purposes whether the statute (or guideline) labels the gun's presence (a) a *sentencing fact* about the way in which the offender carried out the *lesser* crime of ordinary bank robbery, or (b) a factual *element* of

the *greater* crime of bank robbery with a gun? If the Sixth Amendment requires a jury finding about the gun in the latter circumstance, why should it not also require a jury to find the same fact in the former circumstance? The two sets of circumstances are functionally identical. In both instances, identical punishment follows from identical factual findings (related to, *e. g.*, a bank, a taking, a thing-of-value, force or threat of force, and a gun). The only difference between the two circumstances concerns a legislative (or Sentencing Commission) decision about which *label* ("sentencing fact" or "element of a greater crime") to affix to one of the facts, namely, the presence of the gun, that will lead to the greater sentence. Given the identity of circumstances apart from the label, the jury's traditional factfinding role, and the law's insistence upon treating like cases alike, why should the legislature's labeling choice make an important Sixth Amendment difference?

The Court in *Apprendi*, and now here, concludes that it should not make a difference. The Sixth Amendment's jury trial guarantee applies similarly to both. I agree with the majority's analysis, but not with its conclusion. That is to say, I agree that, classically speaking, the difference between a traditional sentencing factor and an element of a greater offense often comes down to a legislative choice about which label to affix. But I cannot jump from there to the conclusion that the Sixth Amendment always requires identical treatment of the two scenarios. That jump is fraught with consequences that threaten the fairness of our traditional criminal justice system; it distorts historical sentencing or criminal trial practices; and it upsets settled law on which legislatures have relied in designing punishment systems.

The Justices who have dissented from *Apprendi* have written about many of these matters in other opinions. See 530 U. S., at 523–554 (O'CONNOR, J., dissenting); *id.*, at 555–566 (BREYER, J., dissenting); *Harris* v. *United States*, 536 U. S. 545, 549–550, 556–569 (2002) (KENNEDY, J.); *id.*, at 569–572

(BREYER, J., concurring in part and concurring in judgment); *Jones* v. *United States*, 526 U. S. 227, 254, 264–272 (1999) (KENNEDY, J., dissenting); *Monge* v. *California*, 524 U. S. 721, 728–729 (1998) (O'CONNOR, J.); *McMillan* v. *Pennsylvania*, 477 U. S. 79, 86–91 (1986) (REHNQUIST, C. J.). At the risk of some repetition, I shall set forth several of the most important considerations here. They lead me to conclude that I must again dissent.

I

The majority ignores the adverse consequences inherent in its conclusion. As a result of the majority's rule, sentencing must now take one of three forms, each of which risks either impracticality, unfairness, or harm to the jury trial right the majority purports to strengthen. This circumstance shows that the majority's Sixth Amendment interpretation cannot be right.

A

A first option for legislators is to create a simple, pure or nearly pure "charge offense" or "determinate" sentencing system. See Breyer, The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest, 17 Hofstra L. Rev. 1, 8–9 (1988). In such a system, an indictment would charge a few facts which, taken together, constitute a crime, such as robbery. Robbery would carry a single sentence, say, five years' imprisonment. And every person convicted of robbery would receive that sentence—just as, centuries ago, everyone convicted of almost any serious crime was sentenced to death. See, *e. g.*, Lillquist, The Puzzling Return of Jury Sentencing: Misgivings About *Apprendi*, 82 N. C. L. Rev. 621, 630 (2004).

Such a system assures uniformity, but at intolerable costs. First, simple determinate sentencing systems impose identical punishments on people who committed their crimes in very different ways. When dramatically different conduct

ends up being punished the same way, an injustice has taken place. Simple determinate sentencing has the virtue of treating like cases alike, but it simultaneously fails to treat different cases differently. Some commentators have leveled this charge at sentencing guidelines systems themselves. See, *e. g.*, Schulhofer, Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity, 29 Am. Crim. L. Rev. 833, 847 (1992) (arguing that the "most important problem under the Guidelines system is not too much disparity, but rather excessive uniformity" and arguing for adjustments, including elimination of mandatory minimums, to make the Guidelines system more responsive to relevant differences). The charge is doubly applicable to simple "pure charge" systems that permit no departures from the prescribed sentences, even in extraordinary cases.

Second, in a world of statutorily fixed mandatory sentences for many crimes, determinate sentencing gives tremendous power to prosecutors to manipulate sentences through their choice of charges. Prosecutors can simply charge, or threaten to charge, defendants with crimes bearing higher mandatory sentences. Defendants, knowing that they will not have a chance to argue for a lower sentence in front of a judge, may plead to charges that they might otherwise contest. Considering that most criminal cases do not go to trial and resolution by plea bargaining is the norm, the rule of *Apprendi*, to the extent it results in a return to determinate sentencing, threatens serious unfairness. See Bibas, Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas, 110 Yale L. J. 1097, 1100–1101 (2001) (explaining that the rule of *Apprendi* hurts defendants by depriving them of sentencing hearings, "the only hearings they were likely to have"; forcing defendants to surrender sentencing issues like drug quantity when they agree to the plea; and transferring power to prosecutors).

B

A second option for legislators is to return to a system of indeterminate sentencing, such as California had before the recent sentencing reform movement. See *Payne* v. *Tennessee*, 501 U. S. 808, 820 (1991) ("With the increasing importance of probation, as opposed to imprisonment, as a part of the penological process, some States such as California developed the 'indeterminate sentence,' where the time of incarceration was left almost entirely to the penological authorities rather than to the courts"); Thompson, Navigating the Hidden Obstacles to Ex-Offender Reentry, 45 Boston College L. Rev. 255, 267 (2004) ("In the late 1970s, California switched from an indeterminate criminal sentencing scheme to determinate sentencing"). Under indeterminate systems, the length of the sentence is entirely or almost entirely within the discretion of the judge or of the parole board, which typically has broad power to decide when to release a prisoner.

When such systems were in vogue, they were criticized, and rightly so, for producing unfair disparities, including race-based disparities, in the punishment of similarly situated defendants. See, *e. g.*, *ante*, at 315–316 (O'CONNOR, J., dissenting) (citing sources). The length of time a person spent in prison appeared to depend on "what the judge ate for breakfast" on the day of sentencing, on which judge you got, or on other factors that should not have made a difference to the length of the sentence. See Breyer, *supra*, at 4–5 (citing congressional and expert studies indicating that, before the United States Sentencing Commission Guidelines were promulgated, punishments for identical crimes in the Second Circuit ranged from 3 to 20 years' imprisonment and that sentences varied depending upon region, gender of the defendant, and race of the defendant). And under such a system, the judge could vary the sentence greatly based upon his findings about how the defendant had committed the crime—findings that might not have been

made by a "preponderance of the evidence," much less "beyond a reasonable doubt." See *McMillan*, 477 U. S., at 91 ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all" (citing *Williams* v. *New York*, 337 U. S. 241 (1949))).

Returning to such a system would diminish the "'reason'" the majority claims it is trying to uphold. *Ante*, at 302 (quoting 1 J. Bishop, Criminal Procedure § 87, p. 55 (2d ed. 1872)). It also would do little to "ensur[e] [the] control" of what the majority calls "the peopl[e,]" *i. e.*, the jury, "in the judiciary," *ante*, at 306, since "the peopl[e]" would only decide the defendant's guilt, a finding with no effect on the duration of the sentence. While "the judge's authority to sentence" would formally derive from the jury's verdict, the jury would exercise little or no control over the sentence itself. *Ibid.* It is difficult to see how such an outcome protects the structural safeguards the majority claims to be defending.

C

A third option is that which the Court seems to believe legislators will in fact take. That is the option of retaining structured schemes that attempt to punish similar conduct similarly and different conduct differently, but modifying them to conform to *Apprendi*'s dictates. Judges would be able to depart *downward* from presumptive sentences upon finding that mitigating factors were present, but would not be able to depart *upward* unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt. The majority argues, based on the single example of Kansas, that most legislatures will enact amendments along these lines in the face of the oncoming *Apprendi* train. See *ante*, at 309–310 (citing *State* v. *Gould*, 271 Kan. 394, 404–414, 23 P. 3d 801, 809–814 (2001); Act of May 29, 2002, ch. 170, 2002 Kan. Sess. Laws pp. 1018–1023 (codified at Kan. Stat. Ann. § 21–4718 (2003 Cum. Supp.)); Brief for Kansas Appellate Defender Office as *Amicus Curiae* 3–7). It is therefore

worth exploring how this option could work in practice, as well as the assumptions on which it depends.

1

This option can be implemented in one of two ways. The first way would be for legislatures to subdivide each crime into a list of complex crimes, each of which would be defined to include commonly found sentencing factors such as drug quantity, type of victim, presence of violence, degree of injury, use of gun, and so on. A legislature, for example, might enact a robbery statute, modeled on robbery sentencing guidelines, that increases punishment depending upon (1) the nature of the institution robbed, (2) the (a) presence of, (b) brandishing of, (c) other use of, a firearm, (3) making of a death threat, (4) presence of (a) ordinary, (b) serious, (c) permanent or life threatening, bodily injury, (5) abduction, (6) physical restraint, (7) taking of a firearm, (8) taking of drugs, (9) value of property loss, etc. Cf. United States Sentencing Commission, Guidelines Manual §2B3.1 (Nov. 2003) (hereinafter USSG).

This possibility is, of course, merely a highly calibrated form of the "pure charge" system discussed in Part I–A, *supra*. And it suffers from some of the same defects. The prosecutor, through control of the precise charge, controls the punishment, thereby marching the sentencing system directly away from, not toward, one important guideline goal: rough uniformity of punishment for those who engage in roughly the same *real* criminal conduct. The artificial (and consequently unfair) nature of the resulting sentence is aggravated by the fact that prosecutors must charge all relevant facts about the way the crime was committed before a presentence investigation examines the criminal conduct, perhaps before the trial itself, *i. e.*, before many of the facts relevant to punishment are known.

This "complex charge offense" system also prejudices defendants who seek trial, for it can put them in the untenable

position of contesting material aggravating facts in the guilt phases of their trials. Consider a defendant who is charged, not with mere possession of cocaine, but with the specific offense of possession of more than 500 grams of cocaine. Or consider a defendant charged, not with murder, but with the new crime of murder using a machete. Or consider a defendant who the prosecution wants to claim was a "supervisor," rather than an ordinary gang member. How can a Constitution that guarantees due process put these defendants, as a matter of course, in the position of arguing, "I did not sell drugs, and if I did, I did not sell more than 500 grams," or "I did not kill him, and if I did, I did not use a machete," or "I did not engage in gang activity, and certainly not as a supervisor" to a single jury? See *Apprendi*, 530 U. S., at 557–558 (BREYER, J., dissenting); *Monge*, 524 U. S., at 729. The system can tolerate this kind of problem up to a point (consider the defendant who wants to argue innocence, and, in the alternative, second-degree, not first-degree, murder). But a rereading of the many distinctions made in a typical robbery guideline, see *supra*, at 334, suggests that an effort to incorporate any real set of guidelines in a complex statute would reach well beyond that point.

The majority announces that there really is no problem here because "States may continue to offer judicial factfinding as a matter of course to all defendants who plead guilty" and defendants may "stipulat[e] to the relevant facts or consen[t] to judicial factfinding." *Ante*, at 310. The problem, of course, concerns defendants who do not want to plead guilty to those elements that, until recently, were commonly thought of as sentencing factors. As to those defendants, the fairness problem arises because States may very well decide that they will *not* permit defendants to carve subsets of facts out of the new, *Apprendi*-required 17-element robbery crime, seeking a judicial determination as to some of those facts and a jury determination as to others. Instead, States may simply require defendants to plead guilty to all

17 elements or proceed with a (likely prejudicial) trial on all 17 elements.

The majority does not deny that States may make this choice; it simply fails to understand *why* any State would want to exercise it. *Ante,* at 310, n. 12. The answer is, as I shall explain in a moment, that the alternative may prove too expensive and unwieldy for States to provide. States that offer defendants the option of judicial factfinding as to some facts (*i. e.,* sentencing facts), say, because of fairness concerns, will also have to offer the defendant a second sentencing jury—just as Kansas has done. I therefore turn to that alternative.

2

The second way to make sentencing guidelines *Apprendi*-compliant would be to require at least two juries for each defendant whenever aggravating facts are present: one jury to determine guilt of the crime charged, and an additional jury to try the disputed facts that, if found, would aggravate the sentence. Our experience with bifurcated trials in the capital punishment context suggests that requiring them for run-of-the-mill sentences would be costly, both in money and in judicial time and resources. Cf. Kozinski & Gallagher, Death: The Ultimate Run-On Sentence, 46 Case W. Res. L. Rev. 1, 13–15, and n. 64 (1995) (estimating the costs of each capital case at around $1 million more than each noncapital case); Tabak, How Empirical Studies Can Affect Positively the Politics of the Death Penalty, 83 Cornell L. Rev. 1431, 1439–1440 (1998) (attributing the greater cost of death penalty cases in part to bifurcated proceedings). In the context of noncapital crimes, the potential need for a second indictment alleging aggravating facts, the likely need for formal evidentiary rules to prevent prejudice, and the increased difficulty of obtaining relevant sentencing information, all will mean greater complexity, added cost, and further delay. See Part V, *infra.* Indeed, cost and delay could lead legislatures

to revert to the complex charge offense system described in Part I–C–1, *supra*.

The majority refers to an *amicus curiae* brief filed by the Kansas Appellate Defender Office, which suggests that a two-jury system has proved workable in Kansas. *Ante*, at 309–310. And that may be so. But in all likelihood, any such workability reflects an uncomfortable fact, a fact at which the majority hints, *ante*, at 310, but whose constitutional implications it does not seem to grasp. The uncomfortable fact that could make the system seem workable—even desirable in the minds of some, including defense attorneys—is called "plea bargaining." See Bibas, 110 Yale L. J., at 1150, and n. 330 (reporting that in 1996, fewer than 4% of adjudicated state felony defendants have jury trials, 5% have bench trials, and 91% plead guilty). See also *ante*, at 310 (making clear that plea bargaining applies). The Court can announce that the Constitution requires at least two jury trials for each criminal defendant—one for guilt, another for sentencing—but only because it knows full well that more than 90% of defendants will not go to trial even once, much less insist on two or more trials.

What will be the consequences of the Court's holding for the 90% of defendants who do not go to trial? The truthful answer is that we do not know. Some defendants may receive bargaining advantages if the increased cost of the "double jury trial" guarantee makes prosecutors more willing to cede certain sentencing issues to the defense. Other defendants may be hurt if a "single-jury-decides-all" approach makes them more reluctant to risk a trial—perhaps because they want to argue that they did not know what was in the cocaine bag, that it was a small amount regardless, that they were unaware a confederate had a gun, etc. See Bibas, 110 Yale L. J., at 1100 ("Because for many defendants going to trial is not a desirable option, they are left without any real hearings at all"); *id.*, at 1151 ("The trial right does little good when most defendants do not go to trial").

At the least, the greater expense attached to trials and their greater complexity, taken together in the context of an overworked criminal justice system, will likely mean, other things being equal, fewer trials and a greater reliance upon plea bargaining—a system in which punishment is set not by judges or juries but by advocates acting under bargaining constraints. At the same time, the greater power of the prosecutor to control the punishment through the charge would likely weaken the relation between real conduct and real punishment as well. See, *e. g.*, Schulhofer, 29 Am. Crim. L. Rev., at 845 (estimating that evasion of the proper sentence under the Federal Guidelines may now occur in 20%–35% of all guilty plea cases). Even if the Court's holding does not further embed plea-bargaining practices (as I fear it will), its success depends upon the existence of present practice. I do not understand how the Sixth Amendment could *require* a sentencing system that will work in practice only if no more than a handful of defendants exercise their right to a jury trial.

The majority's only response is to state that "bargaining over elements . . . probably favors the defendant," *ante*, at 311, adding that many criminal defense lawyers favor its position, *ante*, at 312. But the basic problem is not one of "fairness" to defendants or, for that matter, "fairness" to prosecutors. Rather, it concerns the greater fairness of a sentencing system that a more uniform correspondence between real criminal conduct and real punishment helps to create. At a minimum, a two-jury system, by preventing a judge from taking account of an aggravating fact without the prosecutor's acquiescence, would undercut, if not nullify, legislative efforts to ensure through guidelines that punishments reflect a convicted offender's real criminal conduct, rather than that portion of the offender's conduct that a prosecutor decides to charge and prove.

Efforts to tie real punishment to real conduct are not new. They are embodied in well-established preguidelines sen-

tencing practices—practices under which a judge, looking at a presentence report, would seek to tailor the sentence in significant part to fit the criminal conduct in which the offender actually engaged. For more than a century, questions of *punishment* (not those of guilt or innocence) have reflected determinations made, not only by juries, but also by judges, probation officers, and executive parole boards. Such truthseeking determinations have rested upon both adversarial and nonadversarial processes. The Court's holding undermines efforts to reform these processes, for it means that legislatures cannot *both* permit judges to base sentencing upon real conduct *and* seek, through guidelines, to make the results more uniform.

In these and other ways, the two-jury system would work a radical change in pre-existing criminal law. It is not surprising that this Court has never previously suggested that the Constitution—outside the unique context of the death penalty—might require bifurcated jury-based sentencing. And it is the impediment the Court's holding poses to legislative efforts to achieve that greater systematic fairness that casts doubt on its constitutional validity.

D

Is there a fourth option? Perhaps. Congress and state legislatures might, for example, rewrite their criminal codes, attaching astronomically high sentences to each crime, followed by long lists of mitigating facts, which, for the most part, would consist of the absence of aggravating facts. *Apprendi*, 530 U. S., at 541–542 (O'CONNOR, J., dissenting) (explaining how legislatures can evade the majority's rule by making yet another labeling choice). But political impediments to legislative action make such rewrites difficult to achieve; and it is difficult to see why the Sixth Amendment would require legislatures to undertake them.

It may also prove possible to find combinations of, or variations upon, my first three options. But I am unaware of any

variation that does not involve (a) the shift of power to the prosecutor (weakening the connection between real conduct and real punishment) inherent in any charge offense system, (b) the lack of uniformity inherent in any system of pure judicial discretion, or (c) the complexity, expense, and increased reliance on plea bargains involved in a "two-jury" system. The simple fact is that the design of any fair sentencing system must involve efforts to make practical compromises among competing goals. The majority's reading of the Sixth Amendment makes the effort to find those compromises—already difficult—virtually impossible.

II

The majority rests its conclusion in significant part upon a claimed historical (and therefore constitutional) imperative. According to the majority, the rule it applies in this case is rooted in "longstanding tenets of common-law criminal jurisprudence," *ante*, at 301: that every accusation against a defendant must be proved to a jury and that "'an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason,'" *ante*, at 301–302 (quoting Bishop, Criminal Procedure § 87, at 55). The historical sources upon which the majority relies, however, do not compel the result it reaches. See *ante*, at 323 (O'CONNOR, J., dissenting); *Apprendi*, 530 U. S., at 525–528 (O'CONNOR, J., dissenting). The quotation from Bishop, to which the majority attributes great weight, stands for nothing more than the "unremarkable proposition" that where a legislature passes a statute setting forth heavier penalties than were available for committing a common-law offense and specifying those facts that triggered the statutory penalty, "a defendant could receive the greater statutory punishment only if the indictment expressly charged and the prosecutor proved the facts that made up the statutory offense, as opposed to simply those facts that made up

the common-law offense." *Id.*, at 526 (O'CONNOR, J., dissenting) (characterizing a similar statement of the law in J. Archbold, Pleading and Evidence in Criminal Cases 51, 188 (15th ed. 1862)).

This is obvious when one considers the problem that Bishop was addressing. He provides as an example "statutes whereby, when [a common-law crime] is committed with a particular intent, or with a particular weapon, or the like, it is subjected to a particular corresponding punishment, heavier than that for" the simple common-law offense (though, of course, his concerns were not "*limited* to that example," *ante*, at 302, n. 5). Bishop, *supra*, § 82, at 51–52 (discussing the example of common assault and enhanced-assault statutes, *e. g.*, "assaults committed with the intent to rob"). That indictments historically had to charge all of the statutorily labeled elements of the offense is a proposition on which all can agree. See *Apprendi*, *supra*, at 526–527 (O'CONNOR, J., dissenting). See also J. Archbold, Pleading and Evidence in Criminal Cases 44 (11th ed. 1849) ("[E]very fact or circumstance which is a necessary ingredient in the offence must be set forth in the indictment" so that "there may be no doubt as to the judgment which should be given, if the defendant be convicted"); 1 T. Starkie, Criminal Pleading 68 (2d ed. 1822) (the indictment must state "the criminal nature and degree of the offence, which are conclusions of law from the facts; and also the particular facts and circumstances which render the defendant guilty of that offence").

Neither Bishop nor any other historical treatise writer, however, disputes the proposition that judges historically had discretion to vary the sentence, within the range provided by the statute, based on facts not proved at the trial. See Bishop, *supra*, § 85, at 54 ("[W]ithin the limits of any discretion as to the punishment which the law may have allowed, the judge, when he pronounces sentence, may suffer his discretion to be influenced by matter shown in aggravation or mitigation, not covered by the allegations of the in-

dictment"); K. Stith & J. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 9 (1998). The modern history of preguidelines sentencing likewise indicates that judges had broad discretion to set sentences within a statutory range based on uncharged conduct. Usually, the judge based his or her sentencing decision on facts gleaned from a presentence report, which the defendant could dispute at a sentencing hearing. In the federal system, for example, Federal Rule of Criminal Procedure 32 provided that probation officers, who are employees of the Judicial Branch, prepared a presentence report for the judge, a copy of which was generally given to the prosecution and defense before the sentencing hearing. See Stith & Cabranes, *supra*, at 79–80, 221, n. 5. See also *ante*, at 315 (O'CONNOR, J., dissenting) (describing the State of Washington's former indeterminate sentencing law).

In this case, the statute provides that kidnaping may be punished by up to 10 years' imprisonment. Wash. Rev. Code Ann. §§ 9A.40.030(3), 9A.20.021(1)(b) (2000). Modern structured sentencing schemes like Washington's do not change the statutorily fixed maximum penalty, nor do they purport to establish new elements for the crime. Instead, they undertake to structure the previously unfettered discretion of the sentencing judge, channeling and limiting his or her discretion even *within* the statutory range. (Thus, contrary to the majority's arguments, *ante*, at 308–309, kidnapers in the State of Washington know that they risk up to 10 years' imprisonment, but they also have the benefit of additional information about how long—within the 10-year maximum—their sentences are likely to be, based on how the kidnaping was committed.)

Historical treatises do not speak to such a practice because it was not done in the 19th century. Cf. *Jones*, 526 U. S., at 244 ("[T]he scholarship of which we are aware does not show that a question exactly like this one was ever raised and resolved in the period before the framing"). This makes

sense when one considers that, prior to the 19th century, the prescribed penalty for felonies was often death, which the judge had limited, and sometimes no, power to vary. See Lillquist, 82 N. C. L. Rev., at 628–630. The 19th century saw a movement to a rehabilitative mode of punishment in which prison terms became a norm, shifting power to the judge to impose a longer or shorter term within the statutory maximum. See *ibid.* The ability of legislatures to guide the judge's discretion by designating presumptive ranges, while allowing the judge to impose a more or less severe penalty in unusual cases, was therefore never considered. To argue otherwise, the majority must ignore the significant differences between modern structured sentencing schemes and the history on which it relies to strike them down. And while the majority insists that the historical sources, particularly Bishop, should not be "*limited*" to the context in which they were written, *ante,* at 302, n. 5, it has never explained why the Court *must* transplant those discussions to the very different context of sentencing schemes designed to structure judges' discretion within a statutory sentencing range.

Given history's silence on the question of laws that structure a judge's discretion within the range provided by the legislatively labeled maximum term, it is not surprising that our modern, pre-*Apprendi* cases made clear that legislatures could, within broad limits, distinguish between "sentencing facts" and "elements of crimes." See *McMillan,* 477 U. S., at 85–88. By their choice of label, legislatures could indicate whether a judge or a jury must make the relevant factual determination. History does not preclude legislatures from making this decision. And, as I argued in Part I, *supra,* allowing legislatures to structure sentencing in this way has the dual effect of enhancing and giving meaning to the Sixth Amendment's jury trial right as to core crimes, while affording additional due process to defendants in the form of sen-

tencing hearings before judges—hearings the majority's rule will eliminate for many.

Is there a risk of unfairness involved in permitting Congress to make this labeling decision? Of course. As we have recognized, the "tail" of the sentencing fact might "wa[g] the dog of the substantive offense." *McMillan*, *supra*, at 88. Congress might permit a judge to sentence an individual for murder though convicted only of making an illegal lane change. See *ante*, at 306 (majority opinion). But that is the kind of problem that the Due Process Clause is well suited to cure. *McMillan* foresaw the possibility that judges would have to use their own judgment in dealing with such a problem; but that is what judges are there for. And, as Part I, *supra*, makes clear, the alternatives are worse—not only practically, but, although the majority refuses to admit it, constitutionally as well.

Historic practice, then, does not compel the result the majority reaches. And constitutional concerns counsel the opposite.

III

The majority also overlooks important institutional considerations. Congress and the States relied upon what they believed was their constitutional power to decide, within broad limits, whether to make a particular fact (a) a sentencing factor or (b) an element in a greater crime. They relied upon *McMillan* as guaranteeing the constitutional validity of that proposition. They created sentencing reform, an effort to change the criminal justice system so that it reflects systematically not simply upon guilt or innocence but also upon what should be done about this now-guilty offender. Those efforts have spanned a generation. They have led to state sentencing guidelines and the Federal Sentencing Guidelines system. *E. g.*, *ante*, at 314–318 (O'CONNOR, J., dissenting) (describing sentencing reform in the State of Washington). These systems are imperfect and they yield far from perfect results, but I cannot believe the Constitu-

tion forbids the state legislatures and Congress to adopt such systems and to try to improve them over time. Nor can I believe that the Constitution hamstrings legislatures in the way that JUSTICE O'CONNOR and I have discussed.

IV

Now, let us return to the question I posed at the outset. Why does the Sixth Amendment permit a jury trial right (in respect to a particular fact) to depend upon a legislative labeling decision, namely, the legislative decision to label the fact a *sentencing fact*, instead of an *element of the crime?* The answer is that the fairness and effectiveness of a sentencing system, and the related fairness and effectiveness of the criminal justice system itself, depend upon the legislature's possessing the constitutional authority (within due process limits) to make that labeling decision. To restrict radically the legislature's power in this respect, as the majority interprets the Sixth Amendment to do, prevents the legislature from seeking sentencing systems that are consistent with, and indeed may help to advance, the Constitution's greater fairness goals.

To say this is not simply to express concerns about fairness to defendants. It is also to express concerns about the serious practical (or impractical) changes that the Court's decision seems likely to impose upon the criminal process; about the tendency of the Court's decision to embed further plea bargaining processes that lack transparency and too often mean nonuniform, sometimes arbitrary, sentencing practices; about the obstacles the Court's decision poses to legislative efforts to bring about greater uniformity between real criminal conduct and real punishment; and ultimately about the limitations that the Court imposes upon legislatures' ability to make democratic legislative decisions. Whatever the faults of guidelines systems—and there are many—they are more likely to find their cure in legislation emerging from the experience of, and discussion among, all elements of the

criminal justice community, than in a virtually unchangeable constitutional decision of this Court.

V

Taken together these three sets of considerations, concerning consequences, concerning history, concerning institutional reliance, leave me where I was in *Apprendi*, *i. e.*, convinced that the Court is wrong. Until now, I would have thought the Court might have limited *Apprendi* so that its underlying principle would not undo sentencing reform efforts. Today's case dispels that illusion. At a minimum, the case sets aside numerous state efforts in that direction. Perhaps the Court will distinguish the Federal Sentencing Guidelines, but I am uncertain how. As a result of today's decision, federal prosecutors, like state prosecutors, must decide what to do next, how to handle tomorrow's case.

Consider some of the matters that federal prosecutors must know about, or guess about, when they prosecute their next case: (1) Does today's decision apply in full force to the Federal Sentencing Guidelines? (2) If so, must the initial indictment contain all sentencing factors, charged as "elements" of the crime? (3) What, then, are the evidentiary rules? Can the prosecution continue to use, say, presentence reports, with their conclusions reflecting layers of hearsay? Cf. *Crawford* v. *Washington*, 541 U. S. 36, 63, 68 (2004) (clarifying the Sixth Amendment's requirement of confrontation with respect to testimonial hearsay). Are the numerous cases of this Court holding that a sentencing judge may consider virtually any reliable information still good law when juries, not judges, are required to determine the matter? See, *e. g.*, *United States* v. *Watts*, 519 U. S. 148, 153–157 (1997) *(per curiam)* (evidence of conduct of which the defendant has been acquitted may be considered at sentencing). Cf. *Witte* v. *United States*, 515 U. S. 389, 399–401 (1995) (evidence of uncharged criminal conduct used in determining sentence). (4) How are juries to deal with highly complex

or open-ended Sentencing Guidelines obviously written for application by an experienced trial judge? See, *e. g.*, USSG §3B1.1 (requiring a greater sentence when the defendant was a leader of a criminal activity that involved four or more participants or was "*otherwise extensive*" (emphasis added)); §§3D1.1–3D1.2 (highly complex "multiple count" rules); §1B1.3 (relevant conduct rules).

Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions, including federal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised. But that is not the Court's view.

For the reasons given, I dissent.

Syllabus

SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* SUMMERLIN

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

No. 03–526. Argued April 19, 2004—Decided June 24, 2004

Respondent was convicted of first-degree murder and sentenced to death under Arizona's capital sentencing scheme then in effect, which authorized the trial judge, rather than the jury, to determine the presence of aggravating circumstances that make the defendant eligible for the death sentence. The State Supreme Court affirmed on direct review. While respondent's subsequent federal habeas case was pending in the Ninth Circuit, this Court decided that *Apprendi* v. *New Jersey*, 530 U. S. 466, 490, required the existence of an aggravating factor to be proved to a jury rather than a judge under Arizona's scheme. *Ring* v. *Arizona*, 536 U. S. 584, 603–609. The Ninth Circuit invalidated respondent's death sentence, rejecting the argument that *Ring* did not apply because respondent's conviction and sentence had become final on direct review before *Ring* was decided.

Held: Ring does not apply retroactively to cases already final on direct review. Pp. 351–358.

(a) A "new rule" resulting from a decision of this Court applies to convictions that are already final only in limited circumstances. New substantive rules generally apply retroactively, but new procedural rules generally do not—only "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding" are given retroactive effect. *Saffle* v. *Parks*, 494 U. S. 484, 495. Such a rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Teague* v. *Lane*, 489 U. S. 288, 313. Pp. 351–353.

(b) *Ring*'s holding is properly classified as procedural. It did not alter the range of conduct or the class of persons subject to the death penalty in Arizona, but only the method of determining whether the defendant engaged in that conduct. Pp. 353–355.

(c) *Ring* did not announce a watershed rule of criminal procedure. This Court cannot confidently say that judicial factfinding seriously diminishes accuracy. Pp. 355–358.

341 F. 3d 1082, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined. BREYER, J.,

filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 358.

John Pressley Todd, Assistant Attorney General of Arizona, argued the cause for petitioner. With him on the briefs were *Terry Goddard*, Attorney General, *Mary R. O'Grady*, Solicitor General, *Kent E. Cattani*, Chief Counsel, and *Robert L. Ellman*, Assistant Attorney General.

James A. Feldman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Assistant Attorney General Wray*, and *Deputy Solicitor General Dreeben.*

Ken Murray argued the cause for respondent. With him on the brief were *Fredric F. Kay*, *Michael L. Burke*, *Leticia Marquez*, *John A. Stookey*, and *Daniel L. Kaplan.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case, we decide whether *Ring* v. *Arizona*, 536 U. S. 584 (2002), applies retroactively to cases already final on direct review.

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*Briefs of *amici curiae* urging reversal were filed for the State of Nebraska et al. by *Jon Bruning*, Attorney General of Nebraska, and *J. Kirk Brown*, Solicitor General, and by the Attorneys General for their respective States as follows: *William H. Pryor, Jr.*, of Alabama, *Ken Salazar* of Colorado, *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.*, of Florida, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Mike McGrath* of Montana, *Brian Sandoval* of Nevada, *Jim Petro* of Ohio, *W. A. Drew Edmondson* of Oklahoma, *Henry Dargan McMaster* of South Carolina, *Lawrence E. Long* of South Dakota, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, and *Jerry W. Kilgore* of Virginia; for the Arizona Voice for Victims, Inc., et al. by *Steve Twist* and *Douglas E. Beloof;* and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Beth S. Brinkmann*, *Seth M. Galanter*, *David M. Porter*, and *Peter Goldberger;* and for Welsh S. White et al. by *Jeffrey T. Green*, *Mr. White*, *pro se*, and *Rudy Gerber*, *pro se.*

Kate Lowenstein and *Michael Avery* filed a brief of *amici curiae* for Murder Victims' Families for Reconciliation et al.

I

In April 1981, Finance America employee Brenna Bailey disappeared while on a house call to discuss an outstanding debt with respondent Warren Summerlin's wife. That evening, an anonymous woman (later identified as respondent's mother-in-law) called the police and accused respondent of murdering Bailey. Bailey's partially nude body, her skull crushed, was found the next morning in the trunk of her car, wrapped in a bedspread from respondent's home. Police arrested respondent and later overheard him make incriminating remarks to his wife.

Respondent was convicted of first-degree murder and sexual assault. Arizona's capital sentencing provisions in effect at the time authorized the death penalty if one of several enumerated aggravating factors was present. See Ariz. Rev. Stat. Ann. §§ 13–703(E), (F) (West 1978), as amended by Act of May 1, 1979 Ariz. Sess. Laws ch. 144. Whether those aggravating factors existed, however, was determined by the trial judge rather than by a jury. § 13–703(B). In this case the judge, after a hearing, found two aggravating factors: a prior felony conviction involving use or threatened use of violence, § 13–703(F)(2), and commission of the offense in an especially heinous, cruel, or depraved manner, § 13–703(F)(6). Finding no mitigating factors, the judge imposed the death sentence. The Arizona Supreme Court affirmed on direct review. *State* v. *Summerlin*, 138 Ariz. 426, 675 P. 2d 686 (1983).

Protracted state and federal habeas proceedings followed. While respondent's case was pending in the Ninth Circuit, we decided *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000), and *Ring* v. *Arizona*, *supra*. In *Apprendi*, we interpreted the constitutional due-process and jury-trial guarantees to require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U. S., at 490. In

Ring, we applied this principle to a death sentence imposed under the Arizona sentencing scheme at issue here. We concluded that, because Arizona law authorized the death penalty only if an aggravating factor was present, *Apprendi* required the existence of such a factor to be proved to a jury rather than to a judge. 536 U. S., at 603–609.[1] We specifically overruled our earlier decision in *Walton* v. *Arizona*, 497 U. S. 639 (1990), which had upheld an Arizona death sentence against a similar challenge. 536 U. S., at 609.

The Ninth Circuit, relying on *Ring*, invalidated respondent's death sentence. *Summerlin* v. *Stewart*, 341 F. 3d 1082, 1121 (2003) (en banc).[2] It rejected the argument that *Ring* did not apply because respondent's conviction and sentence had become final on direct review before *Ring* was decided. We granted certiorari. 540 U. S. 1045 (2003).[3]

II

When a decision of this Court results in a "new rule," that rule applies to all criminal cases still pending on direct review. *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). As to convictions that are already final, however, the rule applies only in limited circumstances. New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms,

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[1] Because Arizona law already required aggravating factors to be proved beyond a reasonable doubt, see *State* v. *Jordan*, 126 Ariz. 283, 286, 614 P. 2d 825, 828, cert. denied, 449 U. S. 986 (1980), that aspect of *Apprendi* was not at issue.

[2] Because respondent filed his habeas petition before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214, the provisions of that Act do not apply. See *Lindh* v. *Murphy*, 521 U. S. 320, 336–337 (1997).

[3] The State also sought certiorari on the ground that there was no *Apprendi* violation because the prior-conviction aggravator, exempt from *Apprendi* under *Almendarez-Torres* v. *United States*, 523 U. S. 224 (1998), was sufficient standing alone to authorize the death penalty. We denied certiorari on that issue, 540 U. S. 1045 (2003), and express no opinion on it.

see *Bousley* v. *United States*, 523 U. S. 614, 620–621 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, see *Saffle* v. *Parks*, 494 U. S. 484, 494–495 (1990); *Teague* v. *Lane*, 489 U. S. 288, 311 (1989) (plurality opinion).[4] Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal'" or faces a punishment that the law cannot impose upon him. *Bousley*, *supra*, at 620 (quoting *Davis* v. *United States*, 417 U. S. 333, 346 (1974)).

New rules of procedure, on the other hand, generally do not apply retroactively. They do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise. Because of this more speculative connection to innocence, we give retroactive effect to only a small set of "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, *supra*, at 495 (quoting *Teague*, 489 U. S., at 311 (plurality opinion)). That a new procedural rule is "fundamental" in some abstract sense is not enough; the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." *Id.*, at 313 (emphasis added). This class of rules is extremely narrow, and "it is unlikely that any . . . 'ha[s] yet to emerge.'" *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001) (quoting *Sawyer* v. *Smith*, 497 U. S. 227, 243 (1990)).

The Ninth Circuit agreed with the State that *Ring* announced a new rule. 341 F. 3d, at 1108–1109. It neverthe-

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[4] We have sometimes referred to rules of this latter type as falling under an exception to *Teague*'s bar on retroactive application of procedural rules, see, *e. g.*, *Horn* v. *Banks*, 536 U. S. 266, 271, and n. 5 (2002) *(per curiam)*; they are more accurately characterized as substantive rules not subject to the bar.

less applied the rule retroactively to respondent's case, relying on two alternative theories: first, that it was substantive rather than procedural; and second, that it was a "watershed" procedural rule entitled to retroactive effect. We consider each theory in turn.

A

A rule is substantive rather than procedural if it alters the range of conduct or the class of persons that the law punishes. See *Bousley*, *supra*, at 620–621 (rule "hold[s] that a . . . statute does not reach certain conduct" or "make[s] conduct criminal"); *Saffle*, *supra*, at 495 (rule "decriminalize[s] a class of conduct [or] prohibit[s] the imposition of . . . punishment on a particular class of persons"). In contrast, rules that regulate only the *manner of determining* the defendant's culpability are procedural. See *Bousley*, *supra*, at 620.

Judged by this standard, *Ring*'s holding is properly classified as procedural. *Ring* held that "a sentencing judge, sitting without a jury, [may not] find an aggravating circumstance necessary for imposition of the death penalty." 536 U. S., at 609. Rather, "the Sixth Amendment requires that [those circumstances] be found by a jury." *Ibid.* This holding did not alter the range of conduct Arizona law subjected to the death penalty. It could not have; it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize. Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather than a judge find the essential facts bearing on punishment. Rules that allocate decisionmaking authority in this fashion are prototypical procedural rules, a conclusion we have reached in numerous other contexts. See *Gasperini* v. *Center for Humanities, Inc.*, 518 U. S. 415, 426 (1996) (*Erie* doctrine); *Landgraf* v. *USI Film Products*, 511 U. S. 244, 280–281

(1994) (antiretroactivity presumption); *Dobbert* v. *Florida*, 432 U. S. 282, 293–294 (1977) (*Ex Post Facto* Clause).

Respondent nevertheless argues that *Ring* is substantive because it modified the elements of the offense for which he was convicted. He relies on our statement in *Ring* that, "[b]ecause Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." 536 U. S., at 609 (citation omitted); see also *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 111 (2003) (plurality opinion). The Ninth Circuit agreed, concluding that *Ring* "reposition[ed] Arizona's aggravating factors as elements of the separate offense of capital murder and reshap[ed] the structure of Arizona murder law." 341 F. 3d, at 1105.

A decision that modifies the elements of an offense is normally substantive rather than procedural. New elements alter the range of conduct the statute punishes, rendering some formerly unlawful conduct lawful or vice versa. See *Bousley*, 523 U. S., at 620–621. But that is not what *Ring* did; the range of conduct punished by death in Arizona was the same before *Ring* as after. *Ring* held that, because Arizona's statutory aggravators restricted (as a matter of state law) the class of death-eligible defendants, those aggravators *effectively were* elements for federal constitutional purposes, and so were subject to the procedural requirements the Constitution attaches to trial of elements. 536 U. S., at 609. This Court's holding that, *because Arizona* has made a certain fact essential to the death penalty, that fact must be found by a jury, is not the same as *this Court's* making a certain fact essential to the death penalty. The former was a procedural holding; the latter would be substantive. The Ninth Circuit's conclusion that *Ring* nonetheless "reshap[ed] the structure of Arizona murder law," 341 F. 3d, at 1105, is particularly remarkable in the face of the Arizona Supreme Court's previous conclusion to the contrary. See *State* v.

Towery, 204 Ariz. 386, 390–391, 64 P. 3d 828, 832–833, cert. dism'd, 539 U. S. 986 (2003).[5]

B

Respondent argues in the alternative that *Ring* falls under the retroactivity exception for " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U. S., at 495 (quoting *Teague*, 489 U. S., at 311). He offers several reasons why juries are more accurate factfinders, including the tendency of group deliberation to suppress individual eccentricities; the jury's protection from exposure to inadmissible evidence; and its better representation of the common sense of the community. The Ninth Circuit majority added others, including the claim that a judge might be too acclimated to capital sentencing and that he might be swayed by political pressure. 341 F. 3d, at 1109–1116. Respondent further notes that common-law authorities praised the jury's factfinding ability. See, *e. g.*, 3 W. Blackstone, Commentaries on the Laws of England 380 (1768); *Georgia* v. *Brailsford*, 3 Dall. 1, 4 (1794) (jury charge of Jay, C. J.).

The question here is not, however, whether the Framers believed that juries are more accurate factfinders than judges (perhaps so—they certainly thought juries were more independent, see *Blakely* v. *Washington*, *ante*, at 305–308). Nor is the question whether juries actually *are* more accurate factfinders than judges (again, perhaps so). Rather, the question is whether judicial factfinding so "*seriously* dimin-

[5] Respondent also argues that *Ring* was substantive because our understanding of Arizona law changed. Compare *Ring* v. *Arizona*, 536 U. S. 584, 602–603 (2002), with *Apprendi* v. *New Jersey*, 530 U. S. 466, 496–497 (2000). Even if our understanding of state law changed, however, the actual content of state law did not. See *State* v. *Ring*, 200 Ariz. 267, 279, 25 P. 3d 1139, 1151 (2001), rev'd on other grounds, 536 U. S. 584 (2002); *State* v. *Gretzler*, 135 Ariz. 42, 54, 659 P. 2d 1, 13, cert. denied, 461 U. S. 971 (1983); *Johnson* v. *Fankell*, 520 U. S. 911, 916 (1997).

ishe[s]" accuracy that there is an "'impermissibly large risk'" of punishing conduct the law does not reach. *Teague*, *supra*, at 312–313 (quoting *Desist* v. *United States*, 394 U. S. 244, 262 (1969) (Harlan, J., dissenting)) (emphasis added). The evidence is simply too equivocal to support that conclusion.

First, for every argument why juries are more accurate factfinders, there is another why they are less accurate. The Ninth Circuit dissent noted several, including juries' tendency to become confused over legal standards and to be influenced by emotion or philosophical predisposition. 341 F. 3d, at 1129–1131 (opinion of Rawlinson, J.) (citing, *inter alia*, Eisenberg & Wells, Deadly Confusion: Juror Instructions in Capital Cases, 79 Cornell L. Rev. 1 (1993); Garvey, The Emotional Economy of Capital Sentencing, 75 N. Y. U. L. Rev. 26 (2000); and Bowers, Sandys, & Steiner, Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions, Guilt-Trial Experience, and Premature Decision Making, 83 Cornell L. Rev. 1476 (1998)). Members of this Court have opined that judicial sentencing may yield more consistent results because of judges' greater experience. See *Proffitt* v. *Florida*, 428 U. S. 242, 252 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). Finally, the mixed reception that the right to jury trial has been given in other countries, see Vidmar, The Jury Elsewhere in the World, in World Jury Systems 421–447 (N. Vidmar ed. 2000), though irrelevant to the meaning and continued existence of that right under our Constitution, surely makes it implausible that judicial factfinding so "*seriously* diminishe[s]" accuracy as to produce an "'impermissibly large risk'" of injustice. When so many presumably reasonable minds continue to disagree over whether juries are better factfinders *at all*, we cannot confidently say that judicial factfinding *seriously* diminishes accuracy.

Our decision in *DeStefano* v. *Woods*, 392 U. S. 631 (1968) *(per curiam)*, is on point. There we refused to give retroac-

tive effect to *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the States. While *DeStefano* was decided under our pre-*Teague* retroactivity framework, its reasoning is germane. We noted that, although "the right to jury trial generally tends to prevent arbitrariness and repression[,] . . . '[w]e would not assert . . . that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge as he would be by a jury.'" 392 U. S., at 633–634 (quoting *Duncan*, *supra*, at 158). We concluded that "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." 392 U. S., at 634. If under *DeStefano* a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be.

The dissent contends that juries are more accurate because they better reflect community standards in deciding whether, for example, a murder was heinous, cruel, or depraved. *Post*, at 361–362 (opinion of BREYER, J.). But the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved *as determined by community standards*. See Ariz. Rev. Stat. Ann. § 13–703(F)(6) (West 1978). It is easy to find enhanced accuracy in jury determination when one redefines the statute's substantive scope in such manner as to ensure that result. The dissent also advances several variations on the theme that death is different (or rather, "dramatically different," *post*, at 363). Much of this analysis is not an application of *Teague*, but a rejection of it, in favor of a broader endeavor to "balance competing considerations," *post*, at 362. Even were we inclined to revisit *Teague* in this fashion, we would not agree with the dissent's conclusions. Finally, the dissent notes that, in *DeStefano*, we considered factors other than

enhanced accuracy that are no longer relevant after *Teague*. See *post*, at 365. But we held in that case that "*[a]ll three* factors favor only prospective application of the rule." 392 U. S., at 633 (emphasis added). Thus, the result would have been the same even if enhanced accuracy were the sole criterion for retroactivity.[6]

* * *

The right to jury trial is fundamental to our system of criminal procedure, and States are bound to enforce the Sixth Amendment's guarantees as we interpret them. But it does not follow that, when a criminal defendant has had a full trial and one round of appeals in which the State faithfully applied the Constitution as we understood it at the time, he may nevertheless continue to litigate his claims indefinitely in hopes that we will one day have a change of heart. *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review. The contrary judgment of the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

In *Ring* v. *Arizona*, 536 U. S. 584 (2002), this Court held that a jury, not a judge, must make the findings necessary to

[6] The dissent distinguishes *DeStefano* on the ground that "this case involves only a small subclass of defendants deprived of jury trial rights, the relevant harm within that subclass is more widespread, the administration of justice problem is far less serious, and the reliance interest less weighty." *Post*, at 366. But the first, third, and fourth of these points are irrelevant under *Teague*, and the second, insofar as it relates to accuracy, is an unsubstantiated assertion. If jury trial significantly enhances accuracy, we would not have been able to hold as we did in *DeStefano* that the first factor—"prevent[ing] arbitrariness and repression," 392 U. S., at 633—did not favor retroactivity.

qualify a person for punishment by death. In my view, that holding amounts to a "watershed" procedural ruling that a federal habeas court must apply when considering a constitutional challenge to a "final" death sentence—*i. e.*, a sentence that was already final on direct review when *Ring* was decided.

Teague v. *Lane*, 489 U. S. 288 (1989) (plurality opinion), sets forth the relevant retroactivity criteria. A new procedural rule applies retroactively in habeas proceedings if the new procedure is (1) "implicit in the concept of ordered liberty," implicating "fundamental fairness," and (2) "central to an accurate determination of innocence or guilt," such that its absence "creates an impermissibly large risk that the innocent will be convicted." *Id.*, at 311–313 (plurality opinion) (internal quotation marks omitted). In the context of a death sentence, where the matter is not one of "innocence or guilt," the second criterion asks whether the new procedure is "*central to an accurate determination*" *that death is a legally appropriate punishment. Id.*, at 313 (emphasis added). See *Sawyer* v. *Smith*, 497 U. S. 227, 244 (1990); *O'Dell* v. *Netherland*, 521 U. S. 151, 171, n. 3 (1997) (STEVENS, J., dissenting).

The majority does not deny that *Ring* meets the first criterion, that its holding is "implicit in the concept of ordered liberty." Cf. *Apprendi* v. *New Jersey*, 530 U. S. 466, 499 (2000) (SCALIA, J., concurring) (absent *Apprendi*'s rule jury trial right "has no intelligible content"); *Ring*, *supra*, at 610 (SCALIA, J., concurring) (*Apprendi* involves the fundamental meaning of the jury trial guarantee); *Blakely* v. *Washington*, *ante*, at 301–302 (tracing *Apprendi*'s conception of the jury trial right back to Blackstone); *Duncan* v. *Louisiana*, 391 U. S. 145, 157–158 (1968) (Sixth Amendment jury trial guarantee is a "fundamental right"). Rather, the majority focuses on whether *Ring* meets the second criterion: Is its rule "central to an accurate determination" that death is a legally appropriate punishment? *Teague*, *supra*, at 313.

As I explained in my separate concurrence in *Ring,* I believe the Eighth Amendment demands the use of a jury in capital sentencing because a death sentence must reflect a community-based judgment that the sentence constitutes proper retribution. See 536 U. S., at 614 (opinion concurring in judgment); see also *Harris* v. *Alabama,* 513 U. S. 504, 515–526 (1995) (STEVENS, J., dissenting); *Spaziano* v. *Florida,* 468 U. S. 447, 467–490 (1984) (STEVENS, J., concurring in part and dissenting in part). And a jury is significantly more likely than a judge to "express the conscience of the community on the ultimate question of life or death." *Witherspoon* v. *Illinois,* 391 U. S. 510, 519 (1968). As JUSTICE STEVENS has pointed out:

> "Juries—comprised as they are of a fair cross section of the community—are more representative institutions than is the judiciary; they reflect more accurately the composition and experiences of the community as a whole, and inevitably make decisions based on community values more reliably, than can that segment of the community that is selected for service on the bench." *Spaziano*, *supra,* at 486–487 (footnote omitted).

On this view of the matter, the right to have jury sentencing in the capital context is both a fundamental aspect of constitutional liberty and also significantly more likely to produce an accurate assessment of whether death is the appropriate punishment.

But my view is not the *Ring* majority's view. The majority held only that the jury must decide whether the special aggravating factors that make the offender *eligible* for death are present. 536 U. S., at 603–609. And it rested its decision that a jury, not a judge, must make that determination upon the Court's Sixth Amendment holding in *Apprendi* that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt," 530 U. S., at 490.

In this case, the majority says that *Ring*'s *Apprendi*-related rule cannot satisfy *Teague*'s accuracy-enhancing requirement, for two reasons. First, it points out that for "every argument why juries are more accurate factfinders, there is another why they are less accurate." *Ante*, at 356. Hence, one cannot say "confidently" that "judicial factfinding *seriously* diminishes accuracy." *Ibid.* (emphasis in original). Second, it relies on *DeStefano* v. *Woods*, 392 U. S. 631 (1968) *(per curiam)*, the case in which this Court considered whether *Duncan* v. *Louisiana*, *supra*, which extended the Sixth Amendment jury trial guarantee to the States, should apply retroactively. The Court decided that *Duncan* should *not* have retroactive effect. "If," the majority concludes, "a trial held entirely without a jury was not impermissibly inaccurate, it is hard to see how a trial in which a judge finds only aggravating factors could be." *Ante*, at 357.

The majority, however, overlooks three additional considerations that lead me to the opposite conclusion.

First, the factfinder's role in determining the applicability of aggravating factors in a death case is a special role that can involve, not simply the finding of brute facts, but also the making of death-related, community-based value judgments. The leading single aggravator charged in Arizona, for example, requires the factfinder to decide whether the crime was committed in an "especially heinous, cruel, or depraved manner." Ariz. Rev. Stat. Ann. § 13–703(F)(6) (West Supp. 2003); see Office of Attorney General, State of Arizona, Capital Case Commission Final Report (2002). Three of the other four *Ring*-affected States use a similar aggravator. See Colo. Rev. Stat. § 18–1.3–1201(5)(j) (Lexis 2003); Idaho Code § 19–2515(9)(e) (Lexis Supp. 2003); Neb. Rev. Stat. § 29–2523(1)(d) (1995). Words like "especially heinous," "cruel," or "depraved"—particularly when asked in the context of a death sentence proceeding—require reference to community-based standards, standards that incorporate values. (Indeed, Nebraska's standard explicitly asks the fact-

finder to assess the defendant's conduct in light of "ordinary standards of morality and intelligence." *Ibid.*) A jury is better equipped than a judge to identify and to apply those standards accurately. See *supra*, at 360.

Second, *Teague*'s basic purpose strongly favors retroactive application of *Ring*'s rule. *Teague*'s retroactivity principles reflect the Court's effort to balance competing considerations. See 489 U. S., at 309–313; *Mackey* v. *United States*, 401 U. S. 667, 675 (1971) (Harlan, J., concurring in two judgments and dissenting in one); *Desist* v. *United States*, 394 U. S. 244, 256 (1969) (Harlan, J., dissenting). On the one hand, interests related to certain of the Great Writ's basic objectives—protecting the innocent against erroneous conviction or punishment and assuring fundamentally fair procedures—favor applying a new procedural rule retroactively. *Teague*, *supra*, at 312–313; *Mackey*, 401 U. S., at 693–694. So too does the legal system's commitment to "equal justice"—*i. e.*, to "assur[ing] a uniformity of ultimate treatment among prisoners." *Id.*, at 689.

Where death-sentence-related factfinding is at issue, these considerations have unusually strong force. This Court has made clear that in a capital case "the Eighth Amendment requires a greater degree of accuracy . . . than would be true in a noncapital case." *Gilmore* v. *Taylor*, 508 U. S. 333, 342 (1993). Hence, the risk of error that the law can tolerate is correspondingly diminished. At the same time, the "qualitative difference of death from all other punishments"—namely, its severity and irrevocability—"requires a correspondingly greater degree of scrutiny of the capital sentencing determination" than of other criminal judgments. *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983); see also *Spaziano*, 468 U. S., at 468 (STEVENS, J., concurring in part and dissenting in part) (the Eighth Amendment mandates special safeguards to ensure that death is "a justified response to a given offense"); *Ake* v. *Oklahoma*, 470 U. S. 68,

87 (1985) (Burger, C. J., concurring in judgment) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases").

Consider, too, the law's commitment to uniformity. *Mackey*, *supra*, at 689. Is treatment "uniform" when two offenders each have been sentenced to death through the use of procedures that we now know violate the Constitution—but one is allowed to go to his death while the other receives a new, constitutionally proper sentencing proceeding? Outside the capital sentencing context, one might understand the nature of the difference that the word "finality" implies: One prisoner is already serving a final sentence, the other's has not yet begun. But a death sentence is different in that it seems to be, and it is, an entirely future event—an event not yet undergone by either prisoner. And in respect to that event, both prisoners are, in every important respect, in the same position. I understand there is a "finality-based" difference. But given the dramatically different nature of death, that difference diminishes in importance.

Certainly the ordinary citizen will not understand the difference. That citizen will simply witness two individuals, both sentenced through the use of unconstitutional procedures, one individual going to his death, the other saved, all through an accident of timing. How can the Court square this spectacle with what it has called the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason"? *Beck* v. *Alabama*, 447 U. S. 625, 637–638 (1980) (internal quotation marks omitted).

JUSTICE SCALIA's observation, in his concurring opinion in *Ring*, underscores the point. He wrote there that "the repeated spectacle of a man's going to his death because *a judge* found that an aggravating factor existed" would undermine "our people's traditional . . . veneration for the protection of the jury in criminal cases." 536 U. S., at 612 (emphasis in original). If that is so, it is equally so whether

the *judge* found that aggravating factor before or after *Ring*.

On the other hand, *Teague* recognizes that important interests argue against, and indeed generally forbid, retroactive application of new procedural rules. These interests include the "interest in insuring that there will at some point be the certainty that comes with an end to litigation"; the desirability of assuring that "attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community"; and the fact that society does not have endless resources to spend upon retrials, which (where witnesses have become unavailable and other evidence stale) may well produce unreliable results. *Mackey*, *supra*, at 690–691 (internal quotation marks omitted); see also *Teague*, 489 U. S., at 308–310. Comity interests and respect for state autonomy point in the same direction. See *id.*, at 308; *Engle* v. *Isaac*, 456 U. S. 107, 128, n. 33 (1982).

Certain of these interests are unusually weak where capital sentencing proceedings are at issue. Retroactivity here, for example, would not require inordinate expenditure of state resources. A decision making *Ring* retroactive would affect approximately 110 individuals on death row. Court Hears Arguments in Latest Death Case, N. Y. L. J., Apr. 20, 2004, p. 5. This number, however large in absolute terms, is small compared with the approximately 1.2 million individuals presently confined in state prisons. U. S. Dept. of Justice, Bureau of Justice Statistics Bulletin, Prisoner and Jail Inmates at Midyear 2003, p. 2 (May 2004). Consequently, the impact on resources is likely to be much less than if a rule affecting the ordinary criminal process were made retroactive.

Further, where the issue is "life or death," the concern that "attention . . . ultimately" should be focused "on whether the prisoner can be restored to a useful place in the community" is barely relevant. *Mackey*, 401 U. S., at 690 (internal

quotation marks omitted). Finally, I believe we should discount ordinary finality interests in a death case, for those interests are comparative in nature and death-related collateral proceedings, in any event, may stretch on for many years regardless. Cf. *Teague*, *supra*, at 321, n. 3 (STEVENS, J., concurring in part and concurring in judgment) ("A major reason that Justice Harlan espoused limited retroactivity in collateral proceedings was the interest in making convictions final, an interest that is wholly inapplicable to the capital sentencing context").

Third, *DeStefano* v. *Woods*, 392 U. S. 631 (1968) *(per curiam)*, fails to give the majority the support for which it hopes. *DeStefano* did decide that *Duncan*'s holding—that the Sixth Amendment jury trial right applies to the States—should *not* have retroactive effect. But the Court decided *DeStefano* before *Teague*. And it explicitly took into account "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 392 U. S., at 633 (internal quotation marks omitted).

The latter two factors, "reliance" and "effect on the administration of justice," argued strongly against retroactivity. Retroactivity there, unlike here, would have thrown the prison doors open wide—at least in Louisiana and possibly in other States as well. *Id.*, at 634. The Court believed that the first factor—"the purpose to be served by the new standards"—also favored prospective application only. But the Court described that purpose broadly, as "prevent-[ing] arbitrariness and repression"; it recognized that some judge-only trials might have been fair; and it concluded that the values served by the jury trial guarantee "would not measurably be served by requiring retrial of *all* persons convicted in the past" without a jury. *Id.*, at 633–634 (emphasis added).

By contrast, this case involves only a small subclass of defendants deprived of jury trial rights, the relevant harm within that subclass is more widespread, the administration of justice problem is far less serious, and the reliance interest less weighty. For these reasons, I believe the *DeStefano* Court would have come out differently had it been considering *Ring*'s rule. Insofar as *DeStefano* has any relevance here, it highlights the importance, when making retroactivity decisions, of taking account of the considerations that underlie *Teague*'s categorical rules. And, as shown above, those considerations argue in favor of retroactivity in this case. See *supra*, at 362–365.

As I have pointed out, the majority does not deny that *Ring*'s rule makes *some* contribution to greater accuracy. It simply is unable to say "confidently" that the absence of *Ring*'s rule creates an "'"impermissibly large risk"'" that the death penalty was improperly imposed. *Ante*, at 356. For the reasons stated, I believe that the risk is one that the law need not and should not tolerate. Judged in light of *Teague*'s basic purpose, *Ring*'s requirement that a jury, and not a judge, must apply the death sentence aggravators announces a watershed rule of criminal procedure that should be applied retroactively in habeas proceedings.

I respectfully dissent.

Syllabus

CHENEY, VICE PRESIDENT OF THE UNITED STATES, ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03–475. Argued April 27, 2004—Decided June 24, 2004

The President established the National Energy Policy Development Group (Group) to give him advice and make recommendations on energy policy, assigning a number of federal agency heads and assistants to serve as Group members and authorizing the Vice President, as Group chairman, to include other federal officers as appropriate. After the Group issued a final report and, according to the Government, terminated all operations, respondents filed these separate actions, later consolidated in the District Court, alleging that the Group had not complied with the Federal Advisory Committee Act (FACA), which, *inter alia*, imposes a variety of open-meeting and disclosure requirements on entities meeting the definition of "advisory committee." As relevant here, such a committee is an entity or "subgroup . . . , which is . . . established or utilized by the President, . . . exclud[ing] . . . any committee . . . composed wholly of full-time, or permanent part-time, [federal] officers or employees." 5 U. S. C. App. § 2(B)(i). The complaint alleged that, because nonfederal employees and private lobbyists regularly attended and fully participated in the Group's nonpublic meetings as *de facto* Group members, the Group could not benefit from the § 2(B) exemption and was therefore subject to FACA's requirements. The suit sought declaratory relief and an injunction requiring the defendants—including the Vice President and the Government officials serving on the Group—to produce all materials allegedly subject to FACA's requirements.

Among its rulings, the District Court granted the defendants' motion to dismiss as to some of them, but denied it as to others. The Court held that FACA's substantive requirements could be enforced against the Vice President and the other Government participants under the Mandamus Act, 28 U. S. C. § 1361, and against the agency defendants under the Administrative Procedure Act, 5 U. S. C. § 706. It deferred ruling on whether the FACA disclosure duty was sufficiently clear and nondiscretionary for mandamus to issue. It also deferred ruling on the Government's contention that to disregard the § 2(B) exemption and apply FACA to the Group would violate separation-of-powers principles

and interfere with the President's and Vice President's constitutional prerogatives. Instead, the court allowed respondents to conduct a "tightly-reined" discovery to ascertain the Group's structure and membership, and thus to determine whether the *de facto* membership doctrine applied. While acknowledging that discovery itself might raise serious constitutional questions, the court explained that the Government could assert executive privilege to protect sensitive materials from disclosure. The court noted that if, after discovery, respondents had no evidentiary support for their allegations about *de facto* members in the Group, the Government could prevail on statutory grounds. Even were it appropriate to address constitutional issues, the court explained, its discovery orders would provide the factual development necessary to determine the extent of the alleged intrusion into the Executive's constitutional authority. The court then ordered respondents to submit a discovery plan, approved that plan in due course, entered orders allowing discovery to proceed, and denied the Government's motion for certification under 28 U. S. C. § 1292(b) with respect to the discovery orders.

Petitioners sought a writ of mandamus in the Court of Appeals to vacate the discovery orders and for other relief, but the court dismissed the mandamus petition on the ground that alternative avenues of relief remained available. Citing *United States* v. *Nixon*, 418 U. S. 683, the court held that petitioners, in order to guard against intrusion into the President's prerogatives, must first assert executive privilege with particularity in the District Court. If the lower court sustained the privilege, the appeals court observed, petitioners would be able to obtain all the relief they sought; but if the District Court rejected the claim, mandamus might well be appropriate. So long as the separation-of-powers conflict remained hypothetical, the court held, it had no authority to exercise the extraordinary remedy of mandamus. Although acknowledging that the scope of respondents' discovery requests was overly broad, the appeals court nonetheless agreed with the District Court that petitioners should bear the burden of invoking executive privilege and of objecting to the discovery orders with detailed precision.

Held:

1. Respondents' preliminary argument that the mandamus petition was jurisdictionally out of time is rejected. Respondents assert that, because the Government's basic argument was one of discovery immunity—*i. e.*, it need not invoke executive privilege or make particular objections to the discovery requests—the mandamus petition should have been filed within 60 days after the District Court denied the motion to

dismiss under Federal Rule of Appellate Procedure 4(a)(1)(B). On this theory, the last day for any filing in the appeals court was September 9, 2002, whereas the mandamus petition and notice of appeal were not filed until November 7. However, Rule 4(a), by its plain terms, applies only to the filing of a notice of appeal. It is inapplicable to the mandamus petition under the All Writs Act, 28 U. S. C. § 1651. Respondents' alternative argument that the mandamus petition was barred by the equitable doctrine of laches also fails. Laches might be a bar where the petitioner slept on his rights and especially if the delay was prejudicial. *Chapman* v. *County of Douglas*, 107 U. S. 348, 355. Here, however, the flurry of motions the Government filed after the District Court denied the dismissal motion overcomes respondents' argument. Nor does the Court accept their argument that laches should apply because those Government motions amounted to little more than dilatory tactics. Given the drastic nature of mandamus and this Court's holdings that the writ may not issue while alternative avenues of relief remain available, the Government cannot be faulted for attempting to resolve the dispute through less drastic means. Pp. 378–380.

2. The Court of Appeals erred in concluding it lacked authority to issue mandamus because the Government could protect its rights by asserting executive privilege in the District Court. Pp. 380–392.

(a) Mandamus is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259–260. While the conditions for obtaining it may be demanding, they are not insuperable. This Court has issued mandamus to, *inter alia*, restrain a lower court whose actions would threaten the separation of powers by embarrassing the Executive Branch. *Ex parte Peru*, 318 U. S. 578, 588. Were the Vice President not a party, the argument that the Court of Appeals should have entertained a mandamus action might present different considerations. Here, however, the Vice President and his Group comembers are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten substantial intrusions on the process by which those closest to the President advise him. These facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise. A President's communications and activities encompass a vastly wider range of sensitive material than would be true of any ordinary individual. *Nixon*, 418 U. S., at 715. While the President is not above the law, the Judiciary must afford Presidential confidentiality the greatest possible protection, *ibid.*, recognizing the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties. These separation-of-powers consid-

erations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President. Accepted mandamus standards are broad enough to allow a court to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities. See *Ex parte Peru*, *supra*, at 587. Pp. 380–382.

(b) The Court of Appeals labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections. In its view, the requirement that the Vice President and his Group colleagues bear the burden of invoking executive privilege with narrow specificity and objecting to the discovery requests with detailed precision was mandated by *Nixon*'s rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances," 418 U. S., at 706. The appeals court's analysis overlooks fundamental differences between this case and *Nixon*, which cannot bear the weight the court put on it. Unlike this case, which concerns requests for information for use in a civil suit, *Nixon* involved the proper balance between the Executive's interest in the confidentiality of its communications and the "constitutional need for production of relevant evidence in a criminal proceeding." *Id.*, at 713. The distinction between criminal and civil proceedings is not just a matter of formalism in this context. The right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions" as it does in the criminal context. *Id.*, at 711. Withholding necessary materials in an ongoing criminal case constitutes an impermissible impairment of another branch's "essential functions." *Ibid.* Withholding the information in this case does not hamper such "essential functions" in quite the same way. The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA's disclosure requirements apply to the Group at all. This situation cannot, in fairness, be compared to *Nixon*, where a court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinged on the availability of certain indispensable information. Another important factor here is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the Group to give advice and make recommendations to the President. Special considerations control when the Executive's interests in maintaining its autonomy and safeguarding its communications' confidentiality are implicated. See, *e. g.*, *Clinton* v. *Jones*, 520 U. S. 681, 707. Even when compared against *Nixon*'s criminal subpoenas involving the President, the civil discovery here militates against respondents' position.

Syllabus

There are no checks in civil discovery analogous to the constraints imposed in the criminal justice system to filter out insubstantial legal claims. Federal Rule of Civil Procedure 11 sanctions and private attorneys' obligation of candor to the judicial tribunal have proved insufficient to discourage the filing of meritless claims against the Executive Branch. Finally, the narrowly tailored subpoena orders in *Nixon*, which "precisely identified" and "specific[ally] . . . enumerated" the relevant materials, 418 U. S., at 688, and n. 5, stand in marked contrast to the overly broad discovery requests approved by the District Court. Given that disparity, this Court's precedents provide no support for the appeals court's requirement that the Executive Branch bear the burden of invoking executive privilege with sufficient specificity and of making particularized objections. Indeed, those precedents suggest just the opposite. See, *e. g.*, *Clinton*, *supra*, at 705. Contrary to their conclusions, *Nixon* did not leave the lower courts the sole option of inviting the Executive Branch to invoke executive privilege. Rather, they could have narrowed the scope of the discovery orders on their own. In deciding whether to issue mandamus, the Court of Appeals must not only determine whether there are exceptional circumstances amounting to a judicial usurpation of power, *Will* v. *United States*, 389 U. S. 90, 95, or a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 383, but must also ask whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties. Pp. 383–391.

(c) Absent overriding concerns such as the need to avoid piecemeal litigation, see *Schlagenhauf* v. *Holder*, 379 U. S. 104, 111, the Court declines to direct the Court of Appeals to issue mandamus against the District Court. This is not a case where, having considered the issues, the appeals court abused its discretion by failing to issue the writ. Instead, it relied on its mistaken reading of *Nixon* and prematurely terminated its inquiry without even reaching the weighty separation-of-powers objections raised in the case or exercising its discretion to determine whether mandamus is appropriate under the circumstances. Because issuance of the writ is vested in the discretion of the court to which the petition is made, this Court leaves it to the Court of Appeals to address the parties' arguments and other matters bearing on whether mandamus should issue, bearing in mind the burdens imposed on the Executive Branch in any future proceedings. Special considerations applicable to the President and the Vice President suggest that the lower courts should be sensitive to Government requests for interlocutory appeals to reexamine, *e. g.*, whether the statute embodies the *de facto* membership doctrine. Pp. 391–392.

334 F. 3d 1096, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, and BREYER, JJ., joined, and in which SCALIA and THOMAS, JJ., joined as to Parts I, II, III, and IV. STEVENS, J., filed a concurring opinion, *post,* p. 392. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which SCALIA, J., joined, *post,* p. 393. GINSBURG, J., filed a dissenting opinion, in which SOUTER, J., joined, *post,* p. 396.

Solicitor General Olson argued the cause for petitioners. With him on the briefs were *Assistant Attorney General Keisler*, *Deputy Solicitor General Clement*, *Deputy Assistant Attorneys General Katsas* and *Coffin*, and *Mark B. Stern*, *Michael S. Raab*, and *Douglas Hallward-Driemeier.*

Alan B. Morrison argued the cause for respondent Sierra Club. With him on the brief were *Scott Nelson*, *David Bookbinder*, *Patrick Gallagher*, *Alex Levinson*, and *Sanjay Narayan.* *Paul J. Orfanedes* argued the cause for respondent Judicial Watch, Inc. With him on the brief was *James F. Peterson.**

JUSTICE KENNEDY delivered the opinion of the Court.

The United States District Court for the District of Columbia entered discovery orders directing the Vice President and other senior officials in the Executive Branch to produce information about a task force established to give advice and make policy recommendations to the President. This case requires us to consider the circumstances under which a court of appeals may exercise its power to issue a writ of mandamus to modify or dissolve the orders when, by virtue of their overbreadth, enforcement might interfere with the

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*Briefs of *amici curiae* urging affirmance were filed for the American Association of Law Libraries et al. by *David Overlock Stewart*, *Thomas M. Susman*, *Miriam M. Nisbet*, *Mark David Agrast*, *Meredith Fuchs*, and *Elliot M. Mincberg;* for Natural Resources Defense Council by *Eric R. Glitzenstein*, *Howard M. Crystal*, and *Sharon Buccino;* and for The Reporters Committee for Freedom of the Press et al. by *Lucy A. Dalglish*, *Richard M. Schmidt, Jr.*, and *Bruce W. Sanford.*

officials in the discharge of their duties and impinge upon the President's constitutional prerogatives.

I

A few days after assuming office, President George W. Bush issued a memorandum establishing the National Energy Policy Development Group (NEPDG or Group). The Group was directed to "develo[p] . . . a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." App. 156–157. The President assigned a number of agency heads and assistants—all employees of the Federal Government—to serve as members of the committee. He authorized the Vice President, as chairman of the Group, to invite "other officers of the Federal Government" to participate "as appropriate." *Id.*, at 157. Five months later, the NEPDG issued a final report and, according to the Government, terminated all operations.

Following publication of the report, respondents Judicial Watch, Inc., and the Sierra Club filed these separate actions, which were later consolidated in the District Court. Respondents alleged the NEPDG had failed to comply with the procedural and disclosure requirements of the Federal Advisory Committee Act (FACA or Act), 5 U. S. C. App. §2, p. 1.

FACA was enacted to monitor the "numerous committees, boards, commissions, councils, and similar groups [that] have been established to advise officers and agencies in the executive branch of the Federal Government," §2(a), and to prevent the "wasteful expenditure of public funds" that may result from their proliferation, *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 453 (1989). Subject to specific exemptions, FACA imposes a variety of open-meeting and disclosure requirements on groups that meet the definition of an "advisory committee." As relevant here, an "advisory committee" means

> "any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . , which is—
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> . . . . . .
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> "(B) established or utilized by the President, . . . except that [the definition] excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government . . . ." 5 U. S. C. App. § 3(2), p. 2.

Respondents do not dispute the President appointed only Federal Government officials to the NEPDG. They agree that the NEPDG, as established by the President in his memorandum, was "composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government." *Ibid.* The complaint alleges, however, that "non-federal employees," including "private lobbyists," "regularly attended and fully participated in non-public meetings." App. 21 (Judicial Watch Complaint ¶ 25). Relying on *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F. 2d 898 (CADC 1993) *(AAPS)*, respondents contend that the regular participation of the non-Government individuals made them *de facto* members of the committee. According to the complaint, their "involvement and role are functionally indistinguishable from those of the other [formal] members." *Id.*, at 915. As a result, respondents argue, the NEPDG cannot benefit from the Act's exemption under subsection B and is subject to FACA's requirements.

Vice President Cheney, the NEPDG, the Government officials who served on the committee, and the alleged *de facto* members were named as defendants. The suit seeks declaratory relief and an injunction requiring them to produce all materials allegedly subject to FACA's requirements.

All defendants moved to dismiss. The District Court granted the motion in part and denied it in part. The court acknowledged FACA does not create a private cause of action. On this basis, it dismissed respondents' claims against

the non-Government defendants. Because the NEPDG had been dissolved, it could not be sued as a defendant; and the claims against it were dismissed as well. The District Court held, however, that FACA's substantive requirements could be enforced against the Vice President and other Government participants on the NEPDG under the Mandamus Act, 28 U. S. C. § 1361, and against the agency defendants under the Administrative Procedure Act (APA), 5 U. S. C. § 706. The District Court recognized the disclosure duty must be clear and nondiscretionary for mandamus to issue, and there must be, among other things, "final agency actions" for the APA to apply. According to the District Court, it was premature to decide these questions. It held only that respondents had alleged sufficient facts to keep the Vice President and the other defendants in the case.

The District Court deferred ruling on the Government's contention that to disregard the exemption and apply FACA to the NEPDG would violate principles of separation of powers and interfere with the constitutional prerogatives of the President and the Vice President. Instead, the court allowed respondents to conduct a "tightly-reined" discovery to ascertain the NEPDG's structure and membership, and thus to determine whether the *de facto* membership doctrine applies. *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 54 (DC 2002). While acknowledging that discovery itself might raise serious constitutional questions, the District Court explained that the Government could assert executive privilege to protect sensitive materials from disclosure. In the District Court's view, these "issues of executive privilege will be much more limited in scope than the broad constitutional challenge raised by the government." *Id.*, at 55. The District Court adopted this approach in an attempt to avoid constitutional questions, noting that if, after discovery, respondents have no evidentiary support for the allegations about the regular participation by lobbyists and industry executives on the NEPDG, the

Government can prevail on statutory grounds. Furthermore, the District Court explained, even were it appropriate to address constitutional issues, some factual development is necessary to determine the extent of the alleged intrusion into the Executive's constitutional authority. The court denied in part the motion to dismiss and ordered respondents to submit a discovery plan.

In due course the District Court approved respondents' discovery plan, entered a series of orders allowing discovery to proceed, see CADC App. 238, 263, 364 (reproducing orders entered on Sept. 9, Oct. 17, and Nov. 1, 2002), and denied the Government's motion for certification under 28 U. S. C. § 1292(b) with respect to the discovery orders. Petitioners sought a writ of mandamus in the Court of Appeals to vacate the discovery orders, to direct the District Court to rule on the basis of the administrative record, and to dismiss the Vice President from the suit. The Vice President also filed a notice of appeal from the same orders. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541 (1949); *United States* v. *Nixon*, 418 U. S. 683 (1974).

A divided panel of the Court of Appeals dismissed the petition for a writ of mandamus and the Vice President's attempted interlocutory appeal. *In re Cheney*, 334 F. 3d 1096 (CADC 2003). With respect to mandamus, the majority declined to issue the writ on the ground that alternative avenues of relief remained available. Citing *United States* v. *Nixon*, *supra*, the majority held that petitioners, to guard against intrusion into the President's prerogatives, must first assert privilege. Under its reading of *Nixon*, moreover, privilege claims must be made "'with particularity.'" 334 F. 3d, at 1104. In the majority's view, if the District Court sustains the privilege, petitioners will be able to obtain all the relief they seek. If the District Court rejects the claim of executive privilege and creates "an imminent risk of disclosure of allegedly protected presidential communications," "mandamus might well be appropriate to avoid letting 'the

cat . . . out of the bag.'" *Id.*, at 1104–1105. "But so long as the separation of powers conflict that petitioners anticipate remains hypothetical," the panel held, "we have no authority to exercise the extraordinary remedy of mandamus." *Id.*, at 1105. The majority acknowledged the scope of respondents' requests is overly broad, because it seeks far more than the "limited items" to which respondents would be entitled if "the district court ultimately determines that the NEPDG is subject to FACA." *Id.*, at 1105–1106; *id.*, at 1106 ("The requests to produce also go well beyond FACA's requirements"); *ibid.* ("[Respondents'] discovery also goes well beyond what they need to prove"). It nonetheless agreed with the District Court that petitioners "'shall bear the burden'" of invoking executive privilege and filing objections to the discovery orders with "'detailed precision.'" *Id.*, at 1105 (quoting Aug. 2, 2002, Order).

For similar reasons, the majority rejected the Vice President's interlocutory appeal. In *United States* v. *Nixon*, the Court held that the President could appeal an interlocutory subpoena order without having "to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review." 418 U. S., at 691. The majority, however, found the case inapplicable because Vice President Cheney, unlike then-President Nixon, had not yet asserted privilege. In the majority's view, the Vice President was not forced to choose between disclosure and suffering contempt for failure to obey a court order. The majority held that to require the Vice President to assert privilege does not create the unnecessary confrontation between two branches of Government described in *Nixon*.

Judge Randolph filed a dissenting opinion. In his view *AAPS' de facto* membership doctrine is mistaken, and the Constitution bars its application to the NEPDG. Allowing discovery to determine the applicability of the *de facto* membership doctrine, he concluded, is inappropriate. He would

have issued the writ of mandamus directing dismissal of the complaints. 334 F. 3d, at 1119.

We granted certiorari. 540 U. S. 1088 (2003). We now vacate the judgment of the Court of Appeals and remand the case for further proceedings to reconsider the Government's mandamus petition.

II

As a preliminary matter, we address respondents' argument that the Government's petition for a writ of mandamus was jurisdictionally out of time or, alternatively, barred by the equitable doctrine of laches. According to respondents, because the Government's basic argument was one of discovery immunity—that is, it need not invoke executive privilege or make particular objections to the discovery requests—the mandamus petition should have been filed with the Court of Appeals within 60 days after the District Court denied the Government's motion to dismiss. See Fed. Rule App. Proc. 4(a)(1)(B) ("When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered"). On this theory, the last day for making any filing to the Court of Appeals was September 9, 2002. The Government, however, did not file the mandamus petition and the notice of appeal until November 7, four months after the District Court issued the order that, under respondents' view, commenced the time for appeal.

As even respondents acknowledge, however, Rule 4(a), by its plain terms, applies only to the filing of a notice of appeal. Brief for Respondent Sierra Club 23. Rule 4(a) is inapplicable to the Government's mandamus petition under the All Writs Act, 28 U. S. C. § 1651. Because we vacate the Court of Appeals' judgment and remand the case for further proceedings for the court to consider whether a writ of mandamus should have issued, we need not decide whether the Vice President also could have appealed the District Court's or-

ders under *Nixon* and the collateral order doctrine. We express no opinion on whether the Vice President's notice of appeal was timely filed.

Respondents' argument that the mandamus petition was barred by laches does not withstand scrutiny. Laches might bar a petition for a writ of mandamus if the petitioner "slept upon his rights . . . , and especially if the delay has been prejudicial to the [other party], or to the rights of other persons." *Chapman* v. *County of Douglas*, 107 U. S. 348, 355 (1883). Here, the flurry of activity following the District Court's denial of the motion to dismiss overcomes respondents' argument that the Government neglected to assert its rights. The Government filed, among other papers, a motion for a protective order on September 3; a motion to stay pending appeal on October 21; and a motion for leave to appeal pursuant to 28 U. S. C. § 1292(b) on October 23. Even were we to agree that the baseline for measuring the timeliness of the Government's mandamus petition was the District Court's order denying the motion to dismiss, the Government's active litigation posture was far from the neglect or delay that would make the application of laches appropriate.

We do not accept, furthermore, respondents' argument that laches should apply because the motions filed by the Government following the District Court's denial of its motion to dismiss amounted to little more than dilatory tactics to "delay and obstruct the proceedings." Brief for Respondent Sierra Club 23. In light of the drastic nature of mandamus and our precedents holding that mandamus may not issue so long as alternative avenues of relief remain available, the Government cannot be faulted for attempting to resolve the dispute through less drastic means. The law does not put litigants in the impossible position of having to exhaust alternative remedies before petitioning for mandamus, on the one hand, and having to file the mandamus petition at the earliest possible moment to avoid laches, on the

other. The petition was properly before the Court of Appeals for its consideration.

III

We now come to the central issue in the case—whether the Court of Appeals was correct to conclude it "ha[d] no authority to exercise the extraordinary remedy of mandamus," 334 F. 3d, at 1105, on the ground that the Government could protect its rights by asserting executive privilege in the District Court.

The common-law writ of mandamus against a lower court is codified at 28 U. S. C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947). "The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction." *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" *Will* v. *United States*, 389 U. S. 90, 95 (1967), "only exceptional circumstances amounting to a judicial 'usurpation of power,'" *ibid.*, or a "clear abuse of discretion," *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 383 (1953), "will justify the invocation of this extraordinary remedy," *Will*, 389 U. S., at 95.

As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, three conditions must be satisfied before it may issue. *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394, 403 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid.*—a condition designed to ensure that the writ will not be used as a

substitute for the regular appeals process, *Fahey*, *supra*, at 260. Second, the petitioner must satisfy "'the burden of showing that [his] right to issuance of the writ is "clear and indisputable."'" *Kerr*, *supra*, at 403 (quoting *Bankers Life & Casualty Co.*, *supra*, at 384). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr*, *supra*, at 403 (citing *Schlagenhauf* v. *Holder*, 379 U. S. 104, 112, n. 8 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru*, 318 U. S. 578, 588 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will*, *supra*, at 95 (citing *Maryland* v. *Soper (No. 1)*, 270 U. S. 9 (1926)).

Were the Vice President not a party in the case, the argument that the Court of Appeals should have entertained an action in mandamus, notwithstanding the District Court's denial of the motion for certification, might present different considerations. Here, however, the Vice President and his comembers on the NEPDG are the subjects of the discovery orders. The mandamus petition alleges that the orders threaten "substantial intrusions on the process by which those in closest operational proximity to the President advise the President." App. 343. These facts and allegations remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise. It is well established that "a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any 'ordinary individual.'" *United States* v. *Nixon*, 418 U. S., at 715. Chief Justice Marshall, sitting as a trial judge, recognized the unique position of the Executive Branch when he stated that "[i]n no case . . . would a court be required to

proceed against the president as against an ordinary individual." *United States* v. *Burr*, 25 F. Cas. 187, 192 (No. 14,694) (CC Va. 1807). See also *Clinton* v. *Jones*, 520 U. S. 681, 698–699 (1997) ("We have, in short, long recognized the 'unique position in the constitutional scheme' that [the Office of the President] occupies" (quoting *Nixon* v. *Fitzgerald*, 457 U. S. 731, 749 (1982))); 520 U. S., at 710–724 (BREYER, J., concurring in judgment). As *United States* v. *Nixon* explained, these principles do not mean that the "President is above the law." 418 U. S., at 715. Rather, they simply acknowledge that the public interest requires that a coequal branch of Government "afford Presidential confidentiality the greatest protection consistent with the fair administration of justice," *ibid.*, and give recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties.

These separation-of-powers considerations should inform a court of appeals' evaluation of a mandamus petition involving the President or the Vice President. Accepted mandamus standards are broad enough to allow a court of appeals to prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities. See *Ex parte Peru*, *supra*, at 587 (recognizing jurisdiction to issue the writ because "the action of the political arm of the Government taken within its appropriate sphere [must] be promptly recognized, and . . . delay and inconvenience of a prolonged litigation [must] be avoided by prompt termination of the proceedings in the district court"); see also *Clinton* v. *Jones*, *supra*, at 701 ("We have recognized that '[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties'" (quoting *Loving* v. *United States*, 517 U. S. 748, 757 (1996))).

IV

The Court of Appeals dismissed these separation-of-powers concerns. Relying on *United States* v. *Nixon*, it held that even though respondents' discovery requests are overbroad and "go well beyond FACA's requirements," the Vice President and his former colleagues on the NEPDG "'shall bear the burden'" of invoking privilege with narrow specificity and objecting to the discovery requests with "'detailed precision.'" 334 F. 3d, at 1105–1106. In its view, this result was required by *Nixon*'s rejection of an "absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances." 418 U. S., at 706. If *Nixon* refused to recognize broad claims of confidentiality where the President had asserted executive privilege, the majority reasoned, *Nixon* must have rejected, *a fortiori*, petitioners' claim of discovery immunity where the privilege has not even been invoked. According to the majority, because the Executive Branch can invoke executive privilege to maintain the separation of powers, mandamus relief is premature.

This analysis, however, overlooks fundamental differences in the two cases. *Nixon* cannot bear the weight the Court of Appeals puts upon it. First, unlike this case, which concerns respondents' requests for information for use in a civil suit, *Nixon* involves the proper balance between the Executive's interest in the confidentiality of its communications and the "constitutional need for production of relevant evidence in a criminal proceeding." *Id.*, at 713. The Court's decision was explicit that it was "not . . . concerned with the balance between the President's generalized interest in confidentiality and the need for relevant evidence in civil litigation . . . . We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials." *Id.*, at 712, n. 19.

The distinction *Nixon* drew between criminal and civil proceedings is not just a matter of formalism. As the Court explained, the need for information in the criminal context is much weightier because "our historic[al] commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.'" *Id.*, at 708–709 (quoting *Berger* v. *United States*, 295 U. S. 78, 88 (1935)). In light of the "fundamental" and "comprehensive" need for "every man's evidence" in the criminal justice system, 418 U. S., at 709, 710, not only must the Executive Branch first assert privilege to resist disclosure, but privilege claims that shield information from a grand jury proceeding or a criminal trial are not to be "expansively construed, for they are in derogation of the search for truth," *id.*, at 710. The need for information for use in civil cases, while far from negligible, does not share the urgency or significance of the criminal subpoena requests in *Nixon*. As *Nixon* recognized, the right to production of relevant evidence in civil proceedings does not have the same "constitutional dimensions." *Id.*, at 711.

The Court also observed in *Nixon* that a "primary constitutional duty of the Judicial Branch [is] to do justice in criminal prosecutions." *Id.*, at 707. Withholding materials from a tribunal in an ongoing criminal case when the information is necessary to the court in carrying out its tasks "conflict[s] with the function of the courts under Art. III." *Ibid.* Such an impairment of the "essential functions of [another] branch," *ibid.*, is impermissible. Withholding the information in this case, however, does not hamper another branch's ability to perform its "essential functions" in quite the same way. *Ibid.* The District Court ordered discovery here, not to remedy known statutory violations, but to ascertain whether FACA's disclosure requirements even apply to the NEPDG in the first place. Even if FACA embodies important congressional objectives, the only consequence from re-

spondents' inability to obtain the discovery they seek is that it would be more difficult for private complainants to vindicate Congress' policy objectives under FACA. And even if, for argument's sake, the reasoning in Judge Randolph's dissenting opinion in the end is rejected and FACA's statutory objectives would be to some extent frustrated, it does not follow that a court's Article III authority or Congress' central Article I powers would be impaired. The situation here cannot, in fairness, be compared to *Nixon*, where a court's ability to fulfill its constitutional responsibility to resolve cases and controversies within its jurisdiction hinges on the availability of certain indispensable information.

A party's need for information is only one facet of the problem. An important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute. The discovery requests are directed to the Vice President and other senior Government officials who served on the NEPDG to give advice and make recommendations to the President. The Executive Branch, at its highest level, is seeking the aid of the courts to protect its constitutional prerogatives. As we have already noted, special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated. This Court has held, on more than one occasion, that "[t]he high respect that is owed to the office of the Chief Executive . . . is a matter that should inform the conduct of the entire proceeding, including the timing and scope of discovery," *Clinton*, 520 U. S., at 707, and that the Executive's "constitutional responsibilities and status [are] factors counseling judicial deference and restraint" in the conduct of litigation against it, *Nixon* v. *Fitzgerald*, 457 U. S., at 753. Respondents' reliance on cases that do not involve senior members of the Executive Branch, see, *e. g.*, *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394 (1976), is altogether misplaced.

Even when compared against *United States* v. *Nixon*'s criminal subpoenas, which did involve the President, the civil discovery here militates against respondents' position. The observation in *Nixon* that production of confidential information would not disrupt the functioning of the Executive Branch cannot be applied in a mechanistic fashion to civil litigation. In the criminal justice system, there are various constraints, albeit imperfect, to filter out insubstantial legal claims. The decision to prosecute a criminal case, for example, is made by a publicly accountable prosecutor subject to budgetary considerations and under an ethical obligation, not only to win and zealously to advocate for his client but also to serve the cause of justice. The rigors of the penal system are also mitigated by the responsible exercise of prosecutorial discretion. In contrast, there are no analogous checks in the civil discovery process here. Although under Federal Rule of Civil Procedure 11, sanctions are available, and private attorneys also owe an obligation of candor to the judicial tribunal, these safeguards have proved insufficient to discourage the filing of meritless claims against the Executive Branch. "In view of the visibility of" the Offices of the President and the Vice President and "the effect of [their] actions on countless people," they are "easily identifiable target[s] for suits for civil damages." *Nixon* v. *Fitzgerald*, *supra*, at 753.

Finally, the narrow subpoena orders in *United States* v. *Nixon* stand on an altogether different footing from the overly broad discovery requests approved by the District Court in this case. The criminal subpoenas in *Nixon* were required to satisfy exacting standards of "(1) relevancy; (2) admissibility; (3) specificity." 418 U. S., at 700 (interpreting Fed. Rule Crim. Proc. 17(c)). They were "not intended to provide a means of discovery." 418 U. S., at 698. The burden of showing these standards were met, moreover, fell on the party requesting the information. *Id.*, at 699 ("[I]n order to require production prior to trial, the moving party

must show [that the applicable standards are met]"). In *Nixon*, the Court addressed the issue of executive privilege only after having satisfied itself that the special prosecutor had surmounted these demanding requirements. *Id.*, at 698 ("If we sustained this [Rule 17(c)] challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material"). The very specificity of the subpoena requests serves as an important safeguard against unnecessary intrusion into the operation of the Office of the President.

In contrast to *Nixon*'s subpoena orders that "precisely identified" and "specific[ally] . . . enumerated" the relevant materials, *id.*, at 688, and n. 5, the discovery requests here, as the panel majority acknowledged, ask for everything under the sky:

> "1. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of the Task Force.
>
> "2. All documents establishing or referring to any Sub-Group.
>
> "3. All documents identifying or referring to any staff, personnel, contractors, consultants or employees of any Sub-Group.
>
> "4. All documents identifying or referring to any other persons participating in the preparation of the Report or in the activities of the Task Force or any Sub-Group.
>
> "5. All documents concerning any communication relating to the activities of the Task Force, the activities of any Sub-Groups, or the preparation of the Report . . . .
>
> "6. All documents concerning any communication relating to the activities of the Task Force, the activities of Sub-Groups, or the preparation of the Report between any person . . . and [a list of agencies]." App. 220–221.

The preceding excerpt from respondents' "*First* Request for Production of Documents," *id.*, at 215 (emphasis added),

is only the beginning. Respondents' "First Set of Interrogatories" are similarly unbounded in scope. *Id.*, at 224. Given the breadth of the discovery requests in this case compared to the narrow subpoena orders in *United States* v. *Nixon*, our precedent provides no support for the proposition that the Executive Branch "shall bear the burden" of invoking executive privilege with sufficient specificity and of making particularized objections. 334 F. 3d, at 1105. To be sure, *Nixon* held that the President cannot, through the assertion of a "broad [and] undifferentiated" need for confidentiality and the invocation of an "absolute, unqualified" executive privilege, withhold information in the face of subpoena orders. 418 U. S., at 706, 707. It did so, however, only after the party requesting the information—the special prosecutor—had satisfied his burden of showing the propriety of the requests. Here, as the Court of Appeals acknowledged, the discovery requests are anything but appropriate. They provide respondents all the disclosure to which they would be entitled in the event they prevail on the merits, and much more besides. In these circumstances, *Nixon* does not require the Executive Branch to bear the onus of critiquing the unacceptable discovery requests line by line. Our precedents suggest just the opposite. See, *e. g.*, *Clinton* v. *Jones*, 520 U. S. 681 (1997); *id.*, at 705 (holding that the Judiciary may direct "appropriate process" to the Executive); *Nixon* v. *Fitzgerald*, 457 U. S., at 753.

The Government, however, did in fact object to the scope of discovery and asked the District Court to narrow it in some way. Its arguments were ignored. See App. 167, 181–183 (arguing "this case can be resolved far short of the wide-ranging inquiries plaintiffs have proposed" and suggesting alternatives to "limi[t]" discovery); *id.*, at 232 ("Defendants object to the scope of plaintiffs' discovery requests and to the undue burden imposed by them. The scope of plaintiffs' requests is broader than that reasonably calculated to lead to admissible evidence"); *id.*, at 232, n. 10 ("We state

our general objections here for purposes of clarity for the record and to preclude any later argument that, by not including them here, those general objections have been waived"). In addition, the Government objected to the burden that would arise from the District Court's insistence that the Vice President winnow the discovery orders by asserting specific claims of privilege and making more particular objections. *Id.*, at 201 (Tr. of Status Hearing (Aug. 2, 2002)) (noting "concerns with disrupting the effective functioning of the presidency and the vice-presidency"); *id.*, at 274 ("[C]ompliance with the order of the court imposes a burden on the Office of the Vice President. That is a real burden. If we had completed and done everything that Your Honor has asked us to do today that burden would be gone, but it would have been realized"). These arguments, too, were rejected. See *id.*, at 327, 329 (Nov. 1, 2002, Order) (noting that the court had, "on numerous occasions," rejected the Government's assertion "that court orders requiring [it] to respond in any fashion to [the] discovery requests creates an 'unconstitutional burden' on the Executive Branch").

Contrary to the District Court's and the Court of Appeals' conclusions, *Nixon* does not leave them the sole option of inviting the Executive Branch to invoke executive privilege while remaining otherwise powerless to modify a party's overly broad discovery requests. Executive privilege is an extraordinary assertion of power "not to be lightly invoked." *United States* v. *Reynolds*, 345 U. S. 1, 7 (1953). Once executive privilege is asserted, coequal branches of the Government are set on a collision course. The Judiciary is forced into the difficult task of balancing the need for information in a judicial proceeding and the Executive's Article II prerogatives. This inquiry places courts in the awkward position of evaluating the Executive's claims of confidentiality and autonomy, and pushes to the fore difficult questions of separation of powers and checks and balances. These "occasion[s] for constitutional confrontation between the two

branches" should be avoided whenever possible. *United States* v. *Nixon, supra,* at 692.

In recognition of these concerns, there is sound precedent in the District of Columbia itself for district courts to explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas. In *United States* v. *Poindexter,* 727 F. Supp. 1501 (1989), defendant Poindexter, on trial for criminal charges, sought to have the District Court enforce subpoena orders against President Reagan to obtain allegedly exculpatory materials. The Executive considered the subpoenas "unreasonable and oppressive." *Id.*, at 1503. Rejecting defendant's argument that the Executive must first assert executive privilege to narrow the subpoenas, the District Court agreed with the President that "it is undesirable as a matter of constitutional and public policy to compel a President to make his decision on privilege with respect to a large array of documents." *Ibid.* The court decided to narrow, on its own, the scope of the subpoenas to allow the Executive "to consider whether to invoke executive privilege with respect to . . . a possibly smaller number of documents following the narrowing of the subpoenas." *Id.*, at 1504. This is but one example of the choices available to the District Court and the Court of Appeals in this case.

As we discussed at the outset, under principles of mandamus jurisdiction, the Court of Appeals may exercise its power to issue the writ only upon a finding of "exceptional circumstances amounting to a judicial 'usurpation of power,'" *Will,* 389 U. S., at 95, or a "clear abuse of discretion," *Bankers Life,* 346 U. S., at 383. As this case implicates the separation of powers, the Court of Appeals must also ask, as part of this inquiry, whether the District Court's actions constituted an unwarranted impairment of another branch in the performance of its constitutional duties. This is especially so here because the District Court's analysis of whether mandamus relief is appropriate should itself be constrained

by principles similar to those we have outlined, *supra*, at 380–382, that limit the Court of Appeals' use of the remedy. The panel majority, however, failed to ask this question. Instead, it labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections.

V

In the absence of overriding concerns of the sort discussed in *Schlagenhauf*, 379 U. S., at 111 (discussing, among other things, the need to avoid "piecemeal litigation" and to settle important issues of first impression in areas where this Court bears special responsibility), we decline petitioners' invitation to direct the Court of Appeals to issue the writ against the District Court. Moreover, this is not a case where, after having considered the issues, the Court of Appeals abused its discretion by failing to issue the writ. Instead, the Court of Appeals, relying on its mistaken reading of *United States* v. *Nixon*, prematurely terminated its inquiry after the Government refused to assert privilege and did so without even reaching the weighty separation-of-powers objections raised in the case, much less exercised its discretion to determine whether "the writ is appropriate under the circumstances." *Supra*, at 381. Because the issuance of the writ is a matter vested in the discretion of the court to which the petition is made, and because this Court is not presented with an original writ of mandamus, see, *e. g.*, *Ex parte Peru*, 318 U. S., at 586, we leave to the Court of Appeals to address the parties' arguments with respect to the challenge to *AAPS* and the discovery orders. Other matters bearing on whether the writ of mandamus should issue should also be addressed, in the first instance, by the Court of Appeals after considering any additional briefs and arguments as it deems appropriate. We note only that all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings. Special consider-

ations applicable to the President and the Vice President suggest that the courts should be sensitive to requests by the Government for interlocutory appeals to reexamine, for example, whether the statute embodies the *de facto* membership doctrine.

The judgment of the Court of Appeals for the District of Columbia is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Broad discovery should be encouraged when it serves the salutary purpose of facilitating the prompt and fair resolution of concrete disputes. In the normal case, it is entirely appropriate to require the responding party to make particularized objections to discovery requests. In some circumstances, however, the requesting party should be required to assume a heavy burden of persuasion before any discovery is allowed. Two interrelated considerations support taking that approach in this case: the nature of the remedy respondents requested from the District Court, and the nature of the statute they sought to enforce.

As relevant here, respondents, Judicial Watch, Inc., and Sierra Club, sought a writ of mandamus under 28 U. S. C. § 1361. Mandamus is an extraordinary remedy, available to "a plaintiff only if . . . the defendant owes him a clear nondiscretionary duty." *Heckler* v. *Ringer*, 466 U. S. 602, 616 (1984). Thus, to persuade the District Court that they were entitled to mandamus relief, respondents had to establish that petitioners had a nondiscretionary duty to comply with the Federal Advisory Committee Act (FACA), 5 U. S. C. App. § 1 *et seq.*, p. 1, and in particular with FACA's requirement that "records related to the advisory committee's work be made public"—the only requirement still enforceable if, as respondent Sierra Club concedes, the National Energy Policy Development Group (NEPDG) no longer exists. See *Ju-*

dicial Watch, Inc. v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 42 (DC 2002). Relying on the Court of Appeals' novel *de facto* member doctrine, *ante*, at 374, respondents sought to make that showing by obtaining the very records to which they will be entitled if they win their lawsuit. In other words, respondents sought to obtain, through discovery, information about the NEPDG's work in order to establish their entitlement *to the same information.*

Thus, granting broad discovery in this case effectively prejudged the merits of respondents' claim for mandamus relief—an outcome entirely inconsistent with the extraordinary nature of the writ. Under these circumstances, instead of requiring petitioners to object to particular discovery requests, the District Court should have required respondents to demonstrate that particular requests would tend to establish their theory of the case.* I therefore think it would have been appropriate for the Court of Appeals to vacate the District Court's discovery order. I nevertheless join the Court's opinion and judgment because, as the architect of the *de facto* member doctrine, the Court of Appeals is the appropriate forum to direct future proceedings in the case.

JUSTICE THOMAS, with whom JUSTICE SCALIA joins, concurring in part and dissenting in part.

I agree that "[t]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394, 402 (1976). In framing our review of the Court of Appeals' judgment, the Court recognizes this hurdle, observing that "the petitioner must satisfy 'the burden of showing

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*A few interrogatories or depositions might have determined, for example, whether any non-Government employees voted on NEPDG recommendations or drafted portions of the committee's report. In my view, only substantive participation of this nature would even arguably be sufficient to warrant classifying a non-Government employee as a *de facto* committee member.

that [his] right to issuance of the writ is clear and indisputable.'" *Ante*, at 381 (quoting *Kerr*, *supra*, at 403 (internal quotation marks omitted)). But in reaching its disposition, the Court barely mentions the fact that respondents, Judicial Watch, Inc., and Sierra Club, face precisely the same burden to obtain relief from the District Court. The proper question presented to the Court of Appeals was not only whether it is clear and indisputable that petitioners have a right to an order "'vacat[ing] the discovery orders issued by the district court, direct[ing] the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct[ing] that the Vice President be dismissed as a defendant.'" 334 F. 3d 1096, 1101 (CADC 2003) (quoting Emergency Pet. for Writ of Mandamus in *In re Cheney*, in No. 02–5354 (CADC)). The question with which the Court of Appeals was faced also necessarily had to account for the fact that respondents sought mandamus relief in the District Court. Because they proceeded by mandamus, respondents had to demonstrate in the District Court a clear and indisputable right to the Federal Advisory Committee Act (FACA) materials. If respondents' right to the materials was not clear and indisputable, then petitioners' right to relief in the Court of Appeals was clear.

One need look no further than the District Court's opinion to conclude respondents' right to relief in the District Court was unclear and hence that mandamus would be unavailable. Indeed, the District Court acknowledged this Court's recognition "that applying FACA to meetings among Presidential advisors 'present[s] formidable constitutional difficulties.'" *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 47 (DC 2002) (quoting *Public Citizen* v. *Department of Justice*, 491 U. S. 440, 466 (1989)).

Putting aside the serious constitutional questions raised by respondents' challenge, the District Court could not even

determine whether FACA applies to the National Energy Policy Development Group (NEPDG) as a statutory matter. 219 F. Supp. 2d, at 54–55 (noting the possibility that, after discovery, petitioners might prevail on summary judgment on statutory grounds). I acknowledge that under the Court of Appeals' *de facto* member doctrine, see *Association of American Physicians & Surgeons, Inc.* v. *Clinton*, 997 F. 2d 898, 915 (CADC 1993), a district court is authorized to undertake broad discovery to determine whether FACA's Government employees exception, 5 U. S. C. App. § 3(2)(C)(i), p. 2, applies. But, application of the *de facto* member doctrine to authorize broad discovery into the inner workings of the NEPDG has the same potential to offend the Constitution's separation of powers as the actual application of FACA to the NEPDG itself. 334 F. 3d, at 1114–1115 (Randolph, J., dissenting). Thus, the existence of this doctrine cannot support the District Court's actions here. If respondents must conduct wide-ranging discovery in order to prove that they have *any* right to relief—much less that they have a clear and indisputable right to relief—mandamus is unwarranted, and the writ should not issue.

Although the District Court might later conclude that FACA applies to the NEPDG as a statutory matter and that such application is constitutional, the mere fact that the District Court *might* rule in respondents' favor cannot establish the clear right to relief necessary for mandamus. Otherwise, the writ of mandamus could turn into a freestanding cause of action for plaintiffs seeking to enforce virtually any statute, even those that provide no such private remedy.

Because the District Court clearly exceeded its authority in this case, I would reverse the judgment of the Court of Appeals and remand the case with instruction to issue the writ.*

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*I join Parts I, II, III, and IV of the Court's opinion.

JUSTICE GINSBURG, with whom JUSTICE SOUTER joins, dissenting.

The Government, in seeking a writ of mandamus from the Court of Appeals for the District of Columbia, and on brief to this Court, urged that this case should be resolved without *any* discovery. See App. 183–184, 339; Brief for Petitioners 45; Reply Brief 18. In vacating the judgment of the Court of Appeals, however, this Court remands for consideration whether mandamus is appropriate due to the *overbreadth* of the District Court's discovery orders. See *ante*, at 372–373, 387–390. But, as the Court of Appeals observed, it appeared that the Government "never asked the district court to *narrow* discovery." *In re Cheney*, 334 F. 3d 1096, 1106 (CADC 2003) (emphasis in original). Given the Government's decision to resist all discovery, mandamus relief based on the exorbitance of the discovery orders is at least "premature," *id.*, at 1104. I would therefore affirm the judgment of the Court of Appeals denying the writ,[1] and allow the District Court, in the first instance, to pursue its expressed intention "tightly [to] rei[n] [in] discovery," 219 F. Supp. 2d 20, 54 (DC 2002), should the Government so request.

I

A

The discovery at issue here was sought in a civil action filed by respondents Judicial Watch, Inc., and Sierra Club.

[1] The Court of Appeals also concluded, altogether correctly in my view, that it lacked ordinary appellate jurisdiction over the Vice President's appeal. See 334 F. 3d, at 1109; cf. *ante*, at 378–379 (leaving appellate-jurisdiction question undecided). In its order addressing the petitioners' motions to dismiss, the District Court stated "it would be premature and inappropriate to determine whether" any relief could be obtained from the Vice President. *Judicial Watch, Inc.* v. *National Energy Policy Dev. Group*, 219 F. Supp. 2d 20, 44 (DC 2002). Immediate review of an interlocutory ruling, allowed in rare cases under the collateral-order doctrine, is inappropriate when an order is, as in this case, "inherently tentative" and not "the final word on the subject." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 277 (1988) (internal quotation marks omitted).

To gain information concerning the membership and operations of an energy-policy task force, the National Energy Policy Development Group (NEPDG), respondents filed suit under the Federal Advisory Committee Act (FACA), 5 U. S. C. App. § 1 *et seq.*, p. 1; respondents named among the defendants the Vice President and senior Executive Branch officials. See App. 16–40, 139–154; *ante*, at 373–374. After granting in part and denying in part the Government's motions to dismiss, see 219 F. Supp. 2d 20, the District Court approved respondents' extensive discovery plan, which included detailed and far-ranging interrogatories and sweeping requests for production of documents, see App. to Pet. for Cert. 51a; App. 215–230. In a later order, the District Court directed the Government to "produce non-privileged documents and a privilege log." App. to Pet. for Cert. 47a.

The discovery plan drawn by Judicial Watch and Sierra Club was indeed "unbounded in scope." *Ante*, at 388; accord 334 F. 3d, at 1106. Initial approval of that plan by the District Court, however, was not given in stunning disregard of separation-of-powers concerns. Cf. *ante*, at 387–391. In the order itself, the District Court invited "detailed and precise object[ions]" to any of the discovery requests, and instructed the Government to "identify and explain . . . invocations of privilege with particularity." App. to Pet. for Cert. 51a. To avoid duplication, the District Court provided that the Government could identify "documents or information [responsive to the discovery requests] that [it] ha[d] already released to [Judicial Watch or the Sierra Club] in different fora." *Ibid.*[2] Anticipating further proceedings concerning discovery, the District Court suggested that the Government could "submit [any privileged documents] under seal for the court's consideration," or that "the court [could] appoint the equivalent of a Special Master, maybe a retired judge," to review allegedly privileged documents. App. 247.

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[2] Government agencies had produced some relevant documents in related Freedom of Information Act litigation. See 219 F. Supp. 2d, at 27.

The Government did not file specific objections; nor did it supply particulars to support assertions of privilege. Instead, the Government urged the District Court to rule that Judicial Watch and the Sierra Club could have no discovery at all. See *id.*, at 192 ("the governmen[t] position is that . . . no discovery is appropriate"); *id.*, at 205 (same); 334 F. 3d, at 1106 ("As far as we can tell, petitioners never asked the district court to *narrow* discovery to those matters [respondents] need to support their allegation that FACA applies to the NEPDG." (emphasis in original)). In the Government's view, "the resolution of the case ha[d] to flow from the administrative record" *sans* discovery. App. 192. Without taking up the District Court's suggestion of that court's readiness to rein in discovery, see 219 F. Supp. 2d, at 54, the Government, on behalf of the Vice President, moved, unsuccessfully, for a protective order and for certification of an interlocutory appeal pursuant to 28 U. S. C. § 1292(b). See 334 F. 3d, at 1100; see App. to Pet. for Cert. 47a (District Court denial of protective order); 233 F. Supp. 2d 16 (DC 2002) (District Court denial of § 1292(b) certification).[3] At the District Court's hearing on the Government's motion for a stay pending interlocutory appeal, the Government argued that "the injury is submitting to discovery in the absence of a compelling showing of need by the [respondents]." App. 316; see 230 F. Supp. 2d 12 (DC 2002) (District Court order denying stay).

Despite the absence from this "flurry of activity," *ante*, at 379, of any Government motion contesting the terms of the discovery plan or proposing a scaled-down substitute plan, see 334 F. 3d, at 1106, this Court states that the Government

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[3] Section 1292(b) of Title 28 allows a court of appeals, "in its discretion," to entertain an appeal from an interlocutory order "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

"did in fact object to the scope of discovery and asked the District Court to narrow it in some way," *ante,* at 388. In support of this statement, the Court points to the Government's objections to the proposed discovery plan, its response to the interrogatories and production requests, and its contention that discovery would be unduly burdensome. See *ante,* at 388–389; App. 166–184, 201, 231–234, 274.

True, the Government disputed the definition of the term "meeting" in respondents' interrogatories, and stated, in passing, that "discovery should be [both] limited to written interrogatories" and "limited in scope to the issue of membership." *Id.*, at 179, 181, 233.[4] But as the Court of Appeals noted, the Government mentioned "excessive discovery" in support of its plea to be shielded from any discovery. 334 F. 3d, at 1106. The Government argument that "the burden of doing a document production is an unconstitutional burden," App. 274, was similarly anchored. The Government so urged at a District Court hearing in which its underlying "position [was] that it's not going to produce anything," *id.*, at 249.[5]

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[4] On limiting discovery to the issue of membership, the Court of Appeals indicated its agreement. See 334 F. 3d, at 1106 ("[Respondents] have no need for the names of all persons who participated in [NEPDG]'s activities, nor a description of each person's role in the activities of [NEPDG]. They must discover only whether non-federal officials participated, and if so, to what extent." (internal quotation marks, ellipsis, and brackets omitted)).

[5] According to the Government, "24 boxes of materials [are] potentially responsive to [respondents'] discovery requests. . . . The documents identified as likely to be responsive from those boxes . . . are contained in approximately twelve boxes." App. 282–283. Each box "requires one to two attorney days to review and prepare a rough privilege log. Following that review, privilege logs must be finalized. Further, once the responsive emails are identified, printed, and numbered, [petitioners] expect that the privilege review and logging process [will] be equally, if not more, time-consuming, due to the expected quantity of individual emails." *Id.*, at 284.

The Government's bottom line was firmly and consistently that "review, limited to the administrative record, should frame the resolution of this case." *Id.*, at 181; accord *id.*, at 179, 233. That administrative record would "consist of the Presidential Memorandum establishing NEPDG, NEPDG's public report, and the Office of the Vice President's response to . . . Judicial Watch's request for permission to attend NEPDG meetings"; it would not include anything respondents could gain through discovery. *Id.*, at 183. Indeed, the Government acknowledged before the District Court that its litigation strategy involved opposition to the discovery plan as a whole in lieu of focused objections. See *id.*, at 205 (Government stated: "We did not choose to offer written objections to [the discovery plan] . . . .").

Further sounding the Government's leitmotif, in a hearing on the proposed discovery plan, the District Court stated that the Government "didn't file objections" to rein in discovery "because [in the Government's view] no discovery is appropriate." *Id.*, at 192; *id.*, at 205 (same). Without endeavoring to correct any misunderstanding on the District Court's part, the Government underscored its resistance to any and all discovery. *Id.*, at 192–194; *id.*, at 201 (asserting that respondents are "not entitled to discovery to supplement [the administrative record]"). And in its motion for a protective order, the Government similarly declared its unqualified opposition to discovery. See Memorandum in Support of Defendants' Motion for a Protective Order and for Reconsideration, C. A. Nos. 01–1530 (EGS), 02–631 (EGS), p. 21 (D. D. C., Sept. 3, 2002) ("[Petitioners] respectfully request that the Court enter a protective order relieving them of *any obligation* to respond to [respondents'] discovery [requests]." (emphasis added)); see 334 F. 3d, at 1106 (same).[6]

[6] The agency petitioners, in responses to interrogatories, gave rote and hardly illuminating responses refusing "on the basis of executive and deliberative process privileges" to be more forthcoming. See, *e. g.*, Defendant Department of Energy's Response to Plaintiffs' First Set of Interroga-

The District Court, in short, "ignored" no concrete pleas to "narrow" discovery. But see *ante*, at 388–390. That court did, however, voice its concern about the Government's failure to heed the court's instructions:

> "I told the government, if you have precise constitutional objections, let me know what they are so I can determine whether or not this [discovery] plan is appropriate, and . . . you said, well, it's unconstitutional, without elaborating. You said, because Plaintiffs' proposed discovery plan has not been approved by the court, the Defendants are not submitting specific objections to Plaintiffs' proposed request. . . . My rule was, if you have objections, let me know what the objections are, and you chose not to do so." App. 205.

B

Denied § 1292(b) certification by the District Court, the Government sought a writ of mandamus from the Court of Appeals. See *id.*, at 339–365. In its mandamus petition, the Government asked the appellate court to "vacate the discovery orders issued by the district court, direct the court to decide the case on the basis of the administrative record and such supplemental affidavits as it may require, and direct that the Vice President be dismissed as a defendant." *Id.*, at 364–365. In support of those requests, the Government again argued that the case should be adjudicated without discovery: "The Constitution and principles of comity preclude discovery of the President or Vice President, especially without a demonstration of compelling and focused countervailing interest." *Id.*, at 360.

The Court of Appeals acknowledged that the discovery plan presented by respondents and approved by the District

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tories, C. A. Nos. 01–1530 (EGS), 02–631 (EGS) (D. D. C., Sept. 3, 2002); Defendant United States Office of Management and Budget's Response to Plaintiffs' First Set of Interrogatories, C. A. Nos. 01–1530 (EGS), 02–631 (EGS) (D. D. C., Sept. 3, 2002).

Court "goes well beyond what [respondents] need." 334 F. 3d, at 1106. The appellate court nevertheless denied the mandamus petition, concluding that the Government's separation-of-powers concern "remain[ed] hypothetical." *Id.*, at 1105. Far from ordering immediate "disclosure of communications between senior executive branch officials and those with information relevant to advice that was being formulated for the President," the Court of Appeals observed, the District Court had directed the Government initially to produce only "non-privileged documents and a privilege log." *Id.*, at 1104 (citation and internal quotation marks omitted); see App. to Pet. for Cert. 47a.[7]

The Court of Appeals stressed that the District Court could accommodate separation-of-powers concerns short of denying all discovery or compelling the invocation of executive privilege. See 334 F. 3d, at 1105–1106. Principally, the Court of Appeals stated, discovery could be narrowed, should the Government so move, to encompass only "whether non-federal officials participated [in NEPDG], and if so, to what extent." *Id.*, at 1106. The Government could identify relevant materials produced in other litigation, thus avoiding undue reproduction. *Id.*, at 1105; see App. to Pet. for Cert. 51a; *supra*, at 397. If, after appropriate narrowing, the discovery allowed still impels "the Vice President . . . to claim privilege," the District Court could "entertain [those] privilege claims" and "review allegedly privileged documents in camera." 334 F. 3d, at 1107. Mindful of "the judiciary's responsibility to police the separation of powers in litigation involving the executive," the Court of Appeals

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[7] The Court suggests that the appeals court "labored under the mistaken assumption that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections." *Ante*, at 391. The Court of Appeals, however, described the constitutional concern as "hypothetical," not merely because no executive privilege had been asserted, but also in light of measures the District Court could take to "narrow" and "carefully focu[s]" discovery. See 334 F. 3d, at 1105, 1107.

expressed confidence that the District Court would "respond to petitioners' concern and narrow discovery to ensure that [respondents] obtain no more than they need to prove their case." *Id.*, at 1106.

II

"This Court repeatedly has observed that the writ of mandamus is an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U. S. 271, 289 (1988) (citing *Kerr* v. *United States Dist. Court for Northern Dist. of Cal.*, 426 U. S. 394, 402 (1976)); see *ante*, at 380–381 (same). As the Court reiterates, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires." *Kerr*, 426 U. S., at 403 (citing *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26 (1943)); *ante*, at 380–381.

Throughout this litigation, the Government has declined to move for reduction of the District Court's discovery order to accommodate separation-of-powers concerns. See *supra*, at 398–402. The Court now remands this case so the Court of Appeals can consider whether a mandamus writ should issue ordering the District Court to "explore other avenues, short of forcing the Executive to invoke privilege," and, in particular, to "narrow, on its own, the scope of [discovery]." *Ante*, at 390. Nothing in the District Court's orders or the Court of Appeals' opinion, however, suggests that either of those courts would refuse reasonably to accommodate separation-of-powers concerns. See *supra*, at 397, 398, 401–402, and this page. When parties seeking a mandamus writ decline to avail themselves of opportunities to obtain relief from the District Court, a writ of mandamus ordering the same relief—*i. e.*, here, reined-in discovery—is surely a doubtful proposition.

The District Court, moreover, did not err in failing to narrow discovery on its own initiative. Although the Court cites *United States* v. *Poindexter*, 727 F. Supp. 1501 (DC 1989), as "sound precedent" for district-court narrowing of

discovery, see *ante*, at 390, the target of the subpoena in that case, former President Reagan, unlike petitioners in this case, affirmatively requested such narrowing, 727 F. Supp., at 1503. A district court is not subject to criticism if it awaits a party's motion before tightening the scope of discovery; certainly, that court makes no "clear and indisputable" error in adhering to the principle of party initiation, *Kerr*, 426 U. S., at 403 (internal quotation marks omitted).[8]

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[8] The Court also questions the District Court's invocation of the federal mandamus statute, 28 U. S. C. § 1361, which provides that "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." See *ante*, at 390–391; 219 F. Supp. 2d, at 41–44. See also *Chandler* v. *Judicial Council of Tenth Circuit*, 398 U. S. 74, 87–89, and n. 8 (1970) (holding mandamus under the All Writs Act, 28 U. S. C. § 1651, improper, but expressing no opinion on relief under the federal mandamus statute, § 1361). On the question whether § 1361 allows enforcement of the FACA against the Vice President, the District Court concluded it "would be premature and inappropriate to determine whether the relief of mandamus will or will not issue." 219 F. Supp. 2d, at 44. The Government, moreover, contested the propriety of § 1361 relief only in passing in its petition to the appeals court for § 1651 mandamus relief. See App. 363–364 (Government asserted in its mandamus petition: "The more general writ of mandamus cannot be used to circumvent . . . limits on the provision directly providing for review of administrative action."). A question not decided by the District Court, and barely raised in a petition for mandamus, hardly qualifies as grounds for "drastic and extraordinary" mandamus relief, *Ex parte Fahey*, 332 U. S. 258, 259–260 (1947).

JUSTICE THOMAS urges that respondents cannot obtain § 1361 relief if "wide-ranging discovery [is needed] to prove that they have *any* right to relief." *Ante*, at 395 (opinion concurring in part and dissenting in part) (emphasis in original). First, as the Court of Appeals recognized, see *supra*, at 402–403; *infra*, at 405, should the Government so move, the District Court could contain discovery so that it would not be "wide-ranging." Second, all agree that an applicant seeking a § 1361 mandamus writ must show that "the [federal] defendant owes him a clear *nondiscretionary* duty." *Heckler* v. *Ringer*, 466 U. S. 602, 616 (1984) (emphasis added). No § 1361 writ may issue, in other words, when federal law grants discretion to the federal officer, rather than imposing a duty on him. When federal law imposes an obligation, however, suit under § 1361

* * *

Review by mandamus at this stage of the proceedings would be at least comprehensible as a means to test the Government's position that *no* discovery is appropriate in this litigation. See Brief for Petitioners 45 ("[P]etitioners' separation-of-powers arguments are . . . in the nature of a claim of immunity from discovery."). But in remanding for consideration of discovery-tailoring measures, the Court apparently rejects that no-discovery position. Otherwise, a remand based on the overbreadth of the discovery requests would make no sense. Nothing in the record, however, intimates lower court refusal to reduce discovery. Indeed, the appeals court has already suggested tailored discovery that would avoid "effectively prejudg[ing] the merits of respondents' claim," *ante*, at 393 (STEVENS, J., concurring). See 334 F. 3d, at 1106 (respondents "need only documents referring to the involvement of non-federal officials"). See also *ante*, at 393, n. (STEVENS, J., concurring) ("A few interrogatories or depositions might have determined . . . whether any non-Government employees voted on NEPDG recommendations or drafted portions of the committee's report"). In accord with the Court of Appeals, I am "confident that [were it moved to do so] the district court here [would] protect petitioners' legitimate interests and keep discovery within appropriate limits." 334 F. 3d, at 1107.[9] I would therefore affirm the judgment of the Court of Appeals.

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is not precluded simply because facts must be developed to ascertain whether a federal command has been dishonored. Congress enacted § 1361 to "mak[e] it more convenient for aggrieved persons to file actions in the nature of mandamus," *Stafford* v. *Briggs*, 444 U. S. 527, 535 (1980), not to address the rare instance in which a federal defendant, upon whom the law unequivocally places an obligation, concedes his failure to measure up to that obligation.

[9] While I agree with the Court that an interlocutory appeal may become appropriate at some later juncture in this litigation, see *ante*, at 391, I note that the decision whether to allow such an appeal lies in the first instance in the District Court's sound discretion, see 28 U. S. C. § 1292(b); *supra*, at 398, n. 3.

Syllabus

BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* BANKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 02–1603. Argued February 24, 2004—Decided June 24, 2004

After respondent's murder conviction and death sentence were upheld by the Pennsylvania Supreme Court, this Court decided *Mills* v. *Maryland*, 486 U. S. 367, and *McKoy* v. *North Carolina*, 494 U. S. 433, in which it held invalid capital sentencing schemes requiring juries to disregard mitigating factors not found unanimously. After respondent's state postconviction *Mills* claim was rejected by the State Supreme Court on the merits, he turned to the federal courts. Ultimately, the Third Circuit applied the analytical framework set forth in *Teague* v. *Lane*, 489 U. S. 288, under which federal habeas petitioners may not avail themselves of new rules of constitutional criminal procedure outside two narrow exceptions; concluded that *Mills* did not announce a new rule and therefore could be applied retroactively; and granted respondent relief.

Held: Because *Mills* announced a new rule of constitutional criminal procedure that does not fall within either *Teague* exception, its rule cannot be applied retroactively. Pp. 411–420.

(a) *Teague* analysis involves a three-step process requiring a court to determine when a defendant's conviction became final; whether, given the legal landscape at the time the conviction became final, the rule sought to be applied is actually new; and, if so, whether it falls within either of two exceptions to nonretroactivity. P. 411.

(b) Respondent's conviction became final before *Mills* was decided. The normal rule for determining a state conviction's finality for retroactivity review—when the availability of direct appeal to the state courts has been exhausted and the time for filing a certiorari petition has elapsed or a timely petition has been finally denied—applies here. That the Pennsylvania Supreme Court considered the merits of respondent's *Mills* claim on collateral review does not change his conviction's finality to a date subsequent to *Mills*. Pp. 411–413.

(c) *Mills* announced a new rule. In reaching its conclusion in *Mills* and *McKoy*, this Court relied on a line of cases beginning with *Lockett* v. *Ohio*, 438 U. S. 586. *Lockett*'s general rule that the sentencer must be allowed to consider any mitigating evidence could be thought to support the conclusion in *Mills* and *McKoy* that capital sentencing schemes cannot require juries to disregard mitigating factors not found unanimously, but it did not mandate the *Mills* rule. Each of the cases relied

on by *Mills* (and *McKoy*) considered only obstructions to the sentencer's ability to consider mitigating evidence. *Mills'* innovation rests with its shift in focus to individual jurors. Moreover, there is no need to guess whether reasonable jurists could have differed as to whether the *Lockett* line of cases compelled *Mills*. Four dissenting Justices in *Mills* reasoned that because nothing prevented the jury from hearing the mitigating evidence, *Lockett* did not control; and three dissenting Justices in *McKoy* concluded that *Lockett* did not remotely support the new focus on individual jurors. Because the *Mills* rule broke new ground, it applies to respondent on collateral review only if it falls under a *Teague* exception. Pp. 413–416.

(d) The *Mills* rule does not fall within either exception. There is no argument that the first exception applies here. And this Court has repeatedly emphasized the limited scope of the second exception—for "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding,'" *O'Dell* v. *Netherland*, 521 U. S. 151, 157—which "'is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty,'" *ibid.* This Court has yet to find a new rule that falls under this exception. In providing guidance as to what might do so, the Court has repeatedly, and only, referred to the right-to-counsel rule of *Gideon* v. *Wainwright*, 372 U. S. 335, which "alter[ed] [the Court's] understanding of the *bedrock procedural elements* essential to the fairness of a proceeding," *Sawyer* v. *Smith*, 497 U. S. 227, 242. The Court has not hesitated to hold less sweeping and fundamental rules outside the exception. See, *e. g.*, *O'Dell* v. *Netherland*, *supra*. While *Mills* and *McKoy* were decided to avoid potentially arbitrary impositions of the death sentence, the *Mills* rule has "none of the primacy and centrality of the rule adopted in *Gideon*," *Saffle* v. *Parks*, 494 U. S. 484, 495. It applies narrowly and works no fundamental shift in the Court's "'understanding of the *bedrock procedural elements*'" essential to fundamental fairness, *O'Dell*, *supra*, at 167. Pp. 416–420.

316 F. 3d 228, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 420. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 423.

Ronald Eisenberg argued the cause for petitioners. With him on the briefs were *Scott C. Gartley*, *Thomas W. Dolgenos*, and *Lynne Abraham*.

Albert J. Flora, Jr., argued the cause for respondent. With him on the brief were *Basil G. Russin, Joseph Cosgrove, Matthew C. Lawry,* and *Maureen Kearney Rowley.**

JUSTICE THOMAS delivered the opinion of the Court.

In *Mills* v. *Maryland*, 486 U. S. 367 (1988), and *McKoy* v. *North Carolina*, 494 U. S. 433 (1990), this Court held invalid capital sentencing schemes that require juries to disregard mitigating factors not found unanimously. In this case, we must determine whether the rule announced in *Mills* and *McKoy* can be applied on federal habeas corpus review to a defendant whose conviction became final in 1987. Under our retroactivity analysis as set forth in *Teague* v. *Lane*, 489 U. S. 288 (1989), federal habeas corpus petitioners may not avail themselves of new rules of criminal procedure outside two narrow exceptions. We conclude that *Mills* announced a new rule that does not fall within either of *Teague*'s exceptions.

I

More than 20 years ago, a jury convicted respondent, George Banks, of 12 counts of first-degree murder, and the trial court sentenced him to death. The facts of this case are set forth in detail in the Pennsylvania Supreme Court's decision affirming respondent's conviction and sentence on direct review. See *Commonwealth* v. *Banks*, 513 Pa. 318, 521 A. 2d 1 (1987). Direct review ended when this Court denied certiorari on October 5, 1987. *Banks* v. *Pennsylvania*, 484 U. S. 873. Approximately eight months later, this Court handed down its decision in *Mills*, *supra*, which announced that the Constitution forbids States from imposing

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**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Larry Yackle, Joshua Dratel, Steven R. Shapiro,* and *Stefan Presser;* and for the Pennsylvania Association of Criminal Defense Lawyers by *Louis M. Natali, Jr.*, and *Peter Goldberger.*

a requirement that the jury find a potential mitigating factor unanimously before that factor may be considered in the sentencing decision.

Respondent pursued state postconviction relief on the theory that the instructions and verdict form given to the jury in his case violated the *Mills* principle, but the Pennsylvania Supreme Court rejected this claim on the merits. See *Commonwealth* v. *Banks*, 540 Pa. 143, 656 A. 2d 467 (1995). Respondent then turned to the federal courts. Although the District Court denied relief, *Banks* v. *Horn*, 63 F. Supp. 2d 525 (MD Pa. 1999), the Court of Appeals for the Third Circuit reversed respondent's death sentence, *Banks* v. *Horn*, 271 F. 3d 527 (2001). In reaching its decision, the Court of Appeals declined to apply the retroactivity analysis set forth in *Teague* v. *Lane*, *supra*, to the question whether *Mills* applied retroactively to respondent. This was not necessary, in the Court of Appeals' view, because the Pennsylvania Supreme Court had itself applied *Mills*. 271 F. 3d, at 543. We summarily reversed, holding that "in addition to performing any analysis required by AEDPA [the Antiterrorism and Effective Death Penalty Act of 1996], a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn* v. *Banks*, 536 U. S. 266, 272 (2002) *(per curiam) (Banks I)*.

On remand, the Court of Appeals considered the retroactive application of *Mills*. *Banks* v. *Horn*, 316 F. 3d 228 (CA3 2003). The court recognized that its primary task was to determine whether *Mills* announced a new rule, and that this, in turn, required it to ascertain whether the precedent existing at the time respondent's conviction became final dictated or compelled the rule in *Mills*. 316 F. 3d, at 233–235. From this Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and their direct progeny, the Court of Appeals distilled the rule that the "Eighth Amendment prohibits any barrier to the sentencer's consideration of mitigating evidence." 316 F. 3d, at

239. The Court of Appeals characterized this Court's decision in *Mills* as "merely recogniz[ing] that the perceived need for unanimity could constitute one such unconstitutional barrier," and concluded that the existing legal landscape compelled the decision in *Mills*. 316 F. 3d, at 240. Accordingly, the court held that *Mills* applied retroactively to respondent and reinstated the remainder of its previous opinion, again granting respondent relief from his death sentence.[1]

We granted the Commonwealth's second petition for certiorari in this case to decide whether *Mills* applies retroactively to respondent and, if so, whether the Pennsylvania Supreme Court unreasonably applied federal law in holding that there was no *Mills* error in respondent's case. 539 U. S. 987 (2003). Although the *Lockett*/*Eddings* line of cases supports the Court's decision in *Mills*, it does not compel that decision. *Mills* therefore announced a new rule. We are also unable to conclude that the *Mills* rule falls under either *Teague* exception. In particular, *Mills* did not announce a "watershed rul[e] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (internal quotation marks omitted). Accordingly, we again reverse the judgment of the Court of Appeals.[2]

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[1] Judge Sloviter wrote separately to express her view that *Mills* v. *Maryland*, 486 U. S. 367 (1988), established a new rule that qualified for neither *Teague* v. *Lane*, 489 U. S. 288 (1989), exception. 316 F. 3d 228, 253–254 (CA3 2003) (opinion concurring in judgment). Judge Sloviter nevertheless posited that *Mills* could be applied to respondent because of Pennsylvania's "unique relaxed waiver doctrine in capital cases." 316 F. 3d, at 256.

[2] Given our determination that the Court of Appeals erred in holding that *Mills* applied retroactively to respondent, we do not reach the question whether the Court of Appeals also erred in concluding that the Pennsylvania Supreme Court unreasonably applied *Mills*.

II

Under *Teague*, the determination whether a constitutional rule of criminal procedure applies to a case on collateral review involves a three-step process. See, *e. g.*, *Lambrix* v. *Singletary*, 520 U. S. 518, 527 (1997). First, the court must determine when the defendant's conviction became final. Second, it must ascertain the "legal landscape as it then existed," *Graham* v. *Collins*, 506 U. S. 461, 468 (1993), and ask whether the Constitution, as interpreted by the precedent then existing, compels the rule, *Saffle*, *supra*, at 488. That is, the court must decide whether the rule is actually "new." Finally, if the rule is new, the court must consider whether it falls within either of the two exceptions to nonretroactivity. *Lambrix*, *supra*, at 527.[3]

A

Ordinarily, ascertaining the date on which a defendant's conviction becomes final poses no difficulties: State convictions are final "for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari* v. *Bohlen*, 510 U. S. 383, 390 (1994). See also *Clay* v. *United States*, 537 U. S. 522, 527 (2003). Respondent, however, urges a different rule. He argues that, in view of the Pennsylvania Supreme Court's unique "relaxed waiver rule"—pursuant to which that court considered his *Mills* claim on the merits—his conviction became final for *Teague* purposes in 1995 when the State Supreme Court decided the *Mills* claim against him. Brief for Respondent 25–31. Because of the Pennsylvania Supreme Court's practice

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[3] Rules that fall within what we have referred to as *Teague*'s first exception "are more accurately characterized as substantive rules not subject to [*Teague*'s] bar." *Schriro* v. *Summerlin*, *ante*, at 352, n. 4. See also *infra*, at 416, and n. 7.

of considering forfeited claims in capital cases, respondent insists, "conventional notions of 'finality'" do not apply. *Id.*, at 27.

In the past, the Pennsylvania Supreme Court did, in fact, apply a "relaxed waiver rule" in death penalty cases. See, *e. g.*, *Commonwealth* v. *DeHart*, 539 Pa. 5, 25, 650 A. 2d 38, 48 (1994); *Commonwealth* v. *Billa*, 521 Pa. 168, 181, 555 A. 2d 835, 842 (1989). But this practice, which the court has abandoned, see *Commonwealth* v. *Albrecht*, 554 Pa. 31, 44–46, 720 A. 2d 693, 700 (1998), "was not absolute, but discretionary," *Commonwealth* v. *Freeman*, 573 Pa. 532, 557, n. 9, 827 A. 2d 385, 400, n. 9 (2003) (describing past practice). Notably, the Pennsylvania Supreme Court has expressly stated, in a capital case, that it would decline to apply *Mills* retroactively. *Commonwealth* v. *Peterkin*, 538 Pa. 455, 465, n. 4, 649 A. 2d 121, 126, n. 4 (1994).

A state court's past discretionary "'practice' [of] declin-[ing] to apply ordinary waiver principles in capital cases," *Albrecht*, *supra*, at 44, 720 A. 2d, at 700, does not render convictions and sentences that are no longer subject to direct review nonfinal for *Teague* purposes. Such a judgment is "final" despite the possibility that a state court might, in its discretion, decline to enforce an available procedural bar and choose to apply a new rule of law. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 81–91 (1977).

Respondent's argument reflects a fundamental misunderstanding of *Teague*. *Teague*'s nonretroactivity principle acts as a limitation on the power of federal courts to grant "habeas corpus relief to . . . state prisoner[s]." *Caspari*, 510 U. S., at 389. That is why federal habeas corpus courts "*must* apply *Teague* before considering the merits of [a] claim," *ibid.*, whenever *the State* raises the question, a point we explained in *Banks I*, see 536 U. S., at 271. See also *id.*, at 271–272 (explaining that the Court of Appeals had erred by focusing only on the Pennsylvania Supreme Court's treatment of respondent's *Mills* claim).

This should make clear that the *Teague* principle protects not only the reasonable judgments of state courts but also the States' interest in finality quite apart from their courts. As *Teague* explained:

> "In many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of criminal prosecutions, cf. *Younger* v. *Harris*, 401 U. S. 37, 43–54 (1971), for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards." 489 U. S., at 310.

In short, our rule for determining when a state conviction becomes final applies to this case without modification, and we agree with the Court of Appeals that respondent's conviction became final in 1987. See 316 F. 3d, at 235.

B

We must therefore assay the legal landscape as of 1987 and ask "whether the rule later announced in *[Mills]* was *dictated* by then-existing precedent—whether, that is, the unlawfulness of [respondent's] conviction was apparent to all reasonable jurists." *Lambrix*, *supra*, at 527–528. In *Mills*, the Court held that the Constitution prohibits States from requiring jurors to find mitigating factors unanimously. *McKoy*, 494 U. S., at 444; *Mills*, 486 U. S., at 374–375; *id.*, at 384 (vacating death sentence because the jury instructions gave rise to a "substantial probability that reasonable jurors . . . may have thought they were precluded from considering any mitigating evidence" not found unanimously).[4]

In reaching its conclusion, the Court in *Mills* and *McKoy* relied on a line of cases beginning with *Lockett* v. *Ohio*, 438

[4] Although nothing in this case turns on it, we note that it is arguable that the "*Mills* rule" did not fully emerge until the Court issued *McKoy* v. *North Carolina*, 494 U. S. 433 (1990). See *id.*, at 459–463 (SCALIA, J., dissenting).

U. S. 586 (1978) (plurality opinion), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). In *Lockett*, a plurality of the Court struck down Ohio's death penalty statute because it prevented the sentencer from "considering, *as a mitigating factor*," certain "aspect[s] of a defendant's character or record and [certain] circumstances of the offense that the defendant proffer[ed] as a basis for a sentence less than death." 438 U. S., at 604. A majority of the Court first embraced this principle in *Eddings*. There, the Court confronted a situation in which the sentencer had found, "*as a matter of law* [that it] was unable even to consider [potentially mitigating] evidence." 455 U. S., at 113. The Court held that this limitation violated the *Lockett* rule. 455 U. S., at 113–115. See also *Skipper* v. *South Carolina*, 476 U. S. 1, 4, 8–9 (1986) (holding that States cannot, through evidentiary rules, exclude relevant mitigating evidence from the sentencer's consideration).

In *Mills*, the Court noted that its previous cases did not depend on the source of the potential barrier to the sentencer's ability to consider mitigating evidence. 486 U. S., at 375. The Court then asserted that "[t]he same [rule must apply] with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance." *Ibid.* See also *McKoy*, *supra*, at 441–443 (quoting *Mills* and performing the same analysis).

The generalized *Lockett* rule (that the sentencer must be allowed to consider any mitigating evidence) could be thought to support the Court's conclusion in *Mills* and *McKoy*. But what is essential here is that it does not mandate the *Mills* rule. Each of the cases relied on by *Mills* (and *McKoy*) specifically considered only obstructions to the *sentencer's* ability to consider mitigating evidence. *Mills*' innovation rests with its shift in focus to individual jurors. We think it clear that reasonable jurists could have differed as to whether the *Lockett* principle compelled *Mills*. See *Lambrix*, 520 U. S., at 527–528.

But there is no need to guess. In *Mills*, four Justices dissented, reasoning that because nothing prevented the jurors from hearing any mitigating evidence that the defendant proffered, the *Lockett* principle did not control. 486 U. S., at 394 (opinion of REHNQUIST, C. J.). In *McKoy*, three Justices dissented, explaining that "'the principle established in *Lockett*' does not remotely support" the new focus on individual jurors. 494 U. S., at 464 (opinion of SCALIA, J.); see *id.*, at 466 ("In short, *Lockett* and *Eddings* are quite simply irrelevant to the question before us . . ."); see also *id.*, at 452–453 (KENNEDY, J., concurring in judgment) (noting that the Court "stretche[d]" the *Lockett* cases "beyond their proper bounds"). The dissent in *McKoy* stressed the Court's move from jury to juror. See 494 U. S., at 465–466 (opinion of SCALIA, J.). Indeed, prior to *Mills*, *none* of the Court's relevant cases addressed individual jurors, see, *e. g.*, *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), a trend that continued even after *Mills*, see, *e. g.*, *Saffle* v. *Parks*, 494 U. S. 484 (1990); *Penry* v. *Lynaugh*, 492 U. S. 302 (1989); *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988).

The *McKoy* dissent also explained that the *Mills* rule governs how the sentencer considers evidence, not what evidence it considers. In the dissent's view, the *Lockett* line governed the latter but not the former. See 494 U. S., at 465–466 (opinion of SCALIA, J.). For this distinction, the dissent relied on *Saffle* v. *Parks*, *supra*, decided the same day. There, the Court held that the *Lockett* line of cases did not compel (assuming it informed) the sought-for rule that States may not "instruct the sentencer to render its decision on the evidence without sympathy." 494 U. S., at 490. The Court observed:

> "Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern

> what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision." *Ibid.*

Thus, although the Lockett principle—conceived of at a high level of generality—could be thought to support the *Mills* rule, reasonable jurists differed even as to this point. It follows *a fortiori* that reasonable jurists could have concluded that the *Lockett* line of cases did not compel *Mills*.[5] Given the brand new attention *Mills* paid to individual jurors and the relevance of the what/how distinction drawn in *Saffle* (which again distinguishes *Mills* from the *Lockett* line), we must conclude that the *Mills* rule "br[o]k[e] new ground," *Teague*, 489 U. S., at 301.[6] Accordingly, *Mills* announced a new rule, which does not apply to respondent on collateral review, unless, of course, it falls under one of *Teague*'s exceptions.

C

Teague's bar on retroactive application of new rules of constitutional criminal procedure has two exceptions. First, the bar does not apply to rules forbidding punishment "of certain primary conduct [or to] rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, *supra*, at 330; see also

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[5] Because the focus of the inquiry is whether *reasonable* jurists could differ as to whether precedent compels the sought-for rule, we do not suggest that the mere existence of a dissent suffices to show that the rule is new.

[6] The Court of Appeals erred by drawing from *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), the general rule that "the Constitution prohibited any barrier to the *jury's* consideration of mitigating evidence," 316 F. 3d, at 241–243 (emphasis added), without also acknowledging that the rule, for purposes of the *Teague* analysis, did not automatically extend to arguably analogous contexts. It is with respect to this last point that reasonable jurists did in fact differ.

O'Dell v. *Netherland*, 521 U. S. 151, 157 (1997).[7] There is no argument that this exception applies here. The second exception is for "'watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.'" *Ibid.* (quoting *Graham*, 506 U. S., at 478).

We have repeatedly emphasized the limited scope of the second *Teague* exception, explaining that "'it is clearly meant to apply only to a small core of rules requiring observance of those procedures that . . . are implicit in the concept of ordered liberty.'" *O'Dell*, *supra*, at 157 (quoting *Graham*, *supra*, at 478). And, because any qualifying rule "'would be so central to an accurate determination of innocence or guilt [that it is] unlikely that many such components of basic due process have yet to emerge,'" *Graham*, *supra*, at 478 (quoting *Teague*, *supra*, at 313), it should come as no surprise that we have yet to find a new rule that falls under the second *Teague* exception. Perhaps for this reason, respondent does not even attempt to argue that *Mills* qualifies or to rebut petitioners' argument that it does not, Brief for Petitioners 23–26.

In providing guidance as to what might fall within this exception, we have repeatedly referred to the rule of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) (right to counsel), and only to this rule. See, *e. g.*, *Saffle*, *supra*, at 495; cf. *Gilmore* v. *Taylor*, 508 U. S. 333, 364 (1993) (Blackmun, J., dissenting). *Gideon* overruled *Betts* v. *Brady*, 316 U. S. 455 (1942), noting that *Betts* itself had "made an abrupt break with [the Court's] well-considered precedents." 372 U. S., at 344. The Court continued:

> "Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can

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[7] As noted above, these rules are more properly viewed as substantive and therefore not subject to *Teague*'s bar. See n. 3, *supra*.

> get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. *The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.*" *Ibid.* (emphasis added).

See also *id.*, at 344–345 (quoting *Powell* v. *Alabama*, 287 U. S. 45, 68–69 (1932)). *Gideon*, it is fair to say, "alter[ed] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer* v. *Smith*, 497 U. S. 227, 242 (1990) (internal quotation marks omitted).

By contrast, we have not hesitated to hold that less sweeping and fundamental rules do not fall within *Teague*'s second exception. In *O'Dell* v. *Netherland*, *supra*, for example, we considered the retroactivity of the rule announced in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). *Simmons* held that a capital defendant must be allowed to inform the sentencer that he would be ineligible for parole if the prosecution argues future dangerousness. We rejected the petitioner's argument that the *Simmons* rule was "'on par' with *Gideon* v. *Wainwright*, 372 U. S. 335 (1963)," emphasizing "the sweeping [nature] of *Gideon*, which established an affirmative right to counsel in all felony cases." *O'Dell*, *supra*, at 167.

And, in *Sawyer* v. *Smith*, *supra*, we considered whether a habeas petitioner could make use of the rule announced in *Caldwell* v. *Mississippi*, 472 U. S. 320, 323 (1985) (holding

that the Eighth Amendment bars imposition of the death penalty by a jury that had been led to believe that responsibility for the ultimate decision rested elsewhere). There too we declined to give retroactive effect to a rule that effectively withheld relevant information from the sentencer. See *Sawyer*, *supra*, at 242–245. We acknowledged that the *Caldwell* rule was intended to enhance "the accuracy of capital sentencing." 497 U. S., at 244. But because it effected an incremental change, we could not conclude that "this systemic rule enhancing reliability is an 'absolute prerequisite to fundamental fairness.'" *Ibid.* (quoting *Teague*, 489 U. S., at 314). See also *Graham*, *supra*, at 478 (concluding that the rule announced in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), does not fall within the second *Teague* exception).

We recognize that avoidance of potentially arbitrary impositions of the death sentence motivated the Court in *Mills* and *McKoy*. *Mills* described two troubling situations that could theoretically occur absent the *Mills* rule. Eleven of twelve jurors, could, for example, agree that six mitigating circumstances existed, but one holdout juror could nevertheless force the death sentence. Similarly, all 12 jurors could agree that some mitigating circumstances existed and that these outweighed any aggravators, but because they did not agree on which mitigating circumstances were present, they would again have to return a death sentence. See *Mills*, 486 U. S., at 373–374; see also *McKoy*, 494 U. S., at 439–440 (describing these examples). Imposition of the death penalty in these circumstances, the Court reasoned, "would be the 'height of arbitrariness.'" *Id.*, at 440 (quoting *Mills*, *supra*, at 374). See also *McKoy*, *supra*, at 454 (KENNEDY, J., concurring in judgment).

Quite obviously, the Court decided *Mills* and *McKoy* as it did to avoid this possibility. But because "[a]ll of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense," the fact that a new rule removes some re-

mote possibility of arbitrary infliction of the death sentence does not suffice to bring it within *Teague*'s second exception. *Sawyer*, *supra*, at 243.

However laudable the *Mills* rule might be, "it has none of the primacy and centrality of the rule adopted in *Gideon*." *Saffle*, 494 U. S., at 495. The *Mills* rule applies fairly narrowly and works no fundamental shift in "our understanding of the *bedrock procedural elements*" essential to fundamental fairness. *O'Dell*, 521 U. S., at 167 (internal quotation marks omitted). We therefore conclude that the *Mills* rule does not fall within the second *Teague* exception.

III

We hold that *Mills* announced a new rule of constitutional criminal procedure that falls within neither *Teague* exception. Accordingly, that rule cannot be applied retroactively to respondent. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

A capital sentencing procedure that required the jury to return a death sentence if even a single juror supported that outcome would be the "'"height of arbitrariness."'" *Ante*, at 419. The use of such a procedure is unquestionably unconstitutional today, and I believe it was equally so in 1987 when respondent's death sentence became final. The Court reaches a different conclusion because it reads *Mills* v. *Maryland*, 486 U. S. 367 (1988), to announce a "new rule" of criminal procedure that may not be applied on federal habeas review to defendants whose convictions became final before *Mills* was decided. *Ante*, at 408. In my opinion, however, *Mills* simply represented a straightforward application of our longstanding view that "the Eighth and Fourteenth

Amendments cannot tolerate the infliction of a sentence of death under [a] legal syste[m] that permit[s] this unique penalty to be . . . wantonly and . . . freakishly imposed." *Furman* v. *Georgia*, 408 U. S. 238, 310 (1972) (Stewart, J., concurring).

The dispute in *Mills* concerned jury instructions and a verdict form that the majority read to create a "substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." 486 U. S., at 384. The resulting unanimity requirement, the majority concluded, violated the Constitution in that it "allow[ed] a 'holdout' juror to prevent the other jurors from considering mitigating evidence." *McKoy* v. *North Carolina*, 494 U. S. 433, 438 (1990) (quoting *Mills*, 486 U. S., at 375). When *Mills* was decided, there was nothing novel about acknowledging that permitting one death-prone juror to control the entire jury's sentencing decision would be arbitrary. That acknowledgment was a natural outgrowth of our cases condemning mandatory imposition of the death penalty, *Roberts* v. *Louisiana*, 431 U. S. 633 (1977) *(per curiam); Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), recognizing that arbitrary imposition of that penalty violates the Eighth Amendment,[1] *e. g.*, *Zant* v. *Stephens*, 462 U. S. 862, 874 (1983); *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976); *Furman*, *supra*, and mandating procedures that guarantee full consideration of miti-

[1] JUSTICE KENNEDY made precisely this point in his concurrence in *McKoy* v. *North Carolina*, 494 U. S. 433, 454 (1990):

"Application of the death penalty on the basis of a single juror's vote is 'intuitively disturbing.' . . . More important, it represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in *Mills* described such a result as the 'height of arbitrariness.' . . . Given this description, it is apparent that the result in *Mills* fits within our line of cases forbidding the imposition of capital punishment on the basis of 'caprice,' in 'an arbitrary and unpredictable fashion,' or through 'arbitrary' or 'freakish' means."

gating evidence, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality opinion). Indeed, in my judgment, the kind of arbitrariness that would enable 1 vote in favor of death to outweigh 11 in favor of forbearance would violate the bedrock fairness principles that have governed our trial proceedings for centuries. Rejecting such a manifestly unfair procedural innovation does not announce a "new rule" covered by *Teague* v. *Lane*, 489 U. S. 288, 301–302 (1989), but simply affirms that our fairness principles do not permit blatant exceptions.[2]

This leaves only the question whether reasonable jurors could have read Pennsylvania's jury instructions and verdict

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[2] Supporting this reading, even the dissenting Justices in *Mills* v. *Maryland*, 486 U. S. 367 (1988), did not challenge the majority's assumption that instructions unambiguously requiring unanimity on the existence of any mitigating factor would be unconstitutional; they argued only that reasonable jurors would have understood that in order "to mark '*no*' to each mitigating factor on the sentencing form, all 12 jurors [had to] agree." *Id.*, at 394 (REHNQUIST, C. J., dissenting) (emphasis added). I recognize that some Justices believe the *Mills* Court had no occasion to consider the constitutionality of a unanimity requirement because the State had conceded the point. See *McKoy*, 494 U. S., at 459 (SCALIA, J., dissenting) ("Although there is language in *Mills* . . . suggesting that a unanimity requirement would contravene this Court's decisions . . . , that issue plainly was not presented in *Mills*, and can therefore not have been decided"). *Mills*' author, Justice Blackmun, disagreed with this view, however: "[T]he Maryland instructions [at issue in *Mills*] were held to be invalid because they were susceptible of two plausible interpretations, *and under one of those interpretations the instructions were unconstitutional.*" *McKoy*, 494 U. S., at 445 (concurring opinion) (emphasis in original).

I think Justice Blackmun had the better of this argument, but even if one assumes the *Mills* dissenters failed to defend the constitutionality of unanimity requirements because they did not think the issue properly before the Court rather than because they, too, condemned such requirements, my overall point remains the same: executing a defendant when only 1 of his 12 jurors believes that to be the appropriate penalty would be "so wanto[n] and so freakis[h]" as to violate the Eighth and Fourteenth Amendments, *Furman* v. *Georgia*, 408 U. S. 238, 310 (1972) (Stewart, J., concurring), and that violation would have been as clear in 1987 as today.

form to impose a unanimity requirement with respect to mitigating circumstances. For the reasons identified by the Third Circuit, *Banks* v. *Horn*, 271 F. 3d 527, 543–551 (2001); see also *Banks* v. *Horn*, 316 F. 3d 228, 247 (2003) (leaving in place the relevant portions of the court's earlier opinion), particularly with respect to the verdict form, 271 F. 3d, at 549–550, I answer this question in the affirmative.

I would affirm the judgment of the Court of Appeals.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, dissenting.

I join JUSTICE STEVENS's dissenting opinion in this case. I add this word about the way I see its relation to JUSTICE BREYER's dissenting opinion in *Schriro* v. *Summerlin*, *ante*, p. 358, and to other cases in the line that began with *Teague* v. *Lane*, 489 U. S. 288 (1989).

In determining whether *Mills* v. *Maryland*, 486 U. S. 367 (1988), states a new rule of constitutional law for purpose of *Teague*'s general bar to applying such rules on collateral review, the Court invokes the perspective of "'all reasonable jurists,'" *ante*, at 413 (quoting *Lambrix* v. *Singletary*, 520 U. S. 518, 528 (1997)); see also *ante*, at 414–416. It acknowledges, however, that this standard is objective, so that the presence of actual disagreement among jurists and even among Members of this Court does not conclusively establish a rule's novelty. *Ante*, at 416, n. 5; cf. *Wright* v. *West*, 505 U. S. 277, 304 (1992) (O'CONNOR, J., concurring in judgment). This objectively reasonable jurist is a cousin to the common law's reasonable person, whose job is to impose a judicially determined standard of conduct on litigants who come before the court. Similarly, the function of *Teague*'s reasonable-jurist standard is to distinguish those developments in this Court's jurisprudence that state judges should have anticipated from those they could not have been expected to foresee.

In applying *Teague*, this Court engages in an ongoing process of defining the characteristics of a reasonable jurist,

by identifying arguments that reasonable jurists would or would not accept. The particular characteristic at stake here is the degree to which a reasonable jurist would avoid the risk of a certain kind of erroneous outcome in a capital case. *Mills*'s rule protects against essentially the same kind of error that JUSTICE BREYER discusses in *Summerlin:* a death sentence that is arbitrary because it is inaccurate as a putative expression of "'the conscience of the community on the ultimate question of life or death,'" *ante*, at 360 (dissenting opinion) (quoting *Witherspoon* v. *Illinois*, 391 U. S. 510, 519 (1968)). JUSTICE BREYER has explained in his *Summerlin* opinion why some new rules demanding that kind of accuracy should be applied through a *Teague* exception, and our longstanding espousal of accurate expression of community conscience should also inform our judgment, in any debatable case, about the newness of a rule.

As JUSTICE STEVENS says, a death sentence based upon a verdict by 11 jurors who would have relied on a given mitigating circumstance to spare a defendant's life, and a single holdout who blocked them from doing so, would surely be an egregious failure to express the public conscience accurately. *Ante*, at 420–421 (dissenting opinion). The question presented by this case is ultimately whether the Court should deem reasonable, and thus immunize from collateral attack, at least at the first *Teague* stage, a reading of its pre-*Mills* precedents that accepts the risk of such errors that Maryland's or Pennsylvania's jury instructions and verdict form would have produced.

The Court concludes that, as compared with *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), *Mills* "shift[ed] . . . focus" from "obstructions to the *sentencer's* ability to consider mitigating evidence" to the abilities of "individual jurors" to do so, and that a reasonable jurist could have drawn a distinction on this basis. *Ante*, at 414. This approach gives considerable weight to a reasonable jurist's analytical capacity to pick out arguably material differences between sets of

facts, and relatively less to the jurist's understanding of the substance of the principles underlying our Eighth Amendment cases that follow *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*. Although the Court's view of the reasonable jurist is not inconsistent with some of *Teague*'s progeny,* for the reasons given in JUSTICE BREYER's dissent in *Summerlin*, *ante*, at 362–365, 365–366, I am now convinced that this reading of *Teague* gives too much importance to the finality of capital sentences and not enough to their accuracy. I would affirm the judgment of the Court of Appeals, and respectfully dissent.

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*See, *e. g.*, *O'Dell* v. *Netherland*, 521 U. S. 151, 157–166 (1997) (holding new the rule of *Simmons* v. *South Carolina*, 512 U. S. 154 (1994), that a jury may not be misled about defendant's parole eligibility when prosecutor argues future dangerousness); *Lambrix* v. *Singletary*, 520 U. S. 518, 527–539 (1997) (holding new the rule of *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) *(per curiam)*, that a Florida jury's consideration of a vague aggravating factor taints a judge's later death sentence); see also *Stringer* v. *Black*, 503 U. S. 222, 243–247 (1992) (SOUTER, J., dissenting) (arguing that the rule of *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), that sentencer's weighing among others of a vague aggravating factor taints a death sentence, was new).

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RUMSFELD, SECRETARY OF DEFENSE *v.* PADILLA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 03–1027. Argued April 28, 2004—Decided June 28, 2004

Respondent Padilla, a United States citizen, was brought to New York for detention in federal criminal custody after federal agents apprehended him while executing a material witness warrant issued by the District Court for the Southern District of New York (Southern District) in connection with its grand jury investigation into the September 11, 2001, al Qaeda terrorist attacks. While his motion to vacate the warrant was pending, the President issued an order to Secretary of Defense Rumsfeld designating Padilla an "enemy combatant" and directing that he be detained in military custody. Padilla was later moved to a Navy brig in Charleston, S. C., where he has been held ever since. His counsel then filed in the Southern District a habeas petition under 28 U. S. C. § 2241, which, as amended, alleged that Padilla's military detention violates the Constitution, and named as respondents the President, the Secretary, and Melanie Marr, the brig's commander. The Government moved to dismiss, arguing, *inter alia*, that Commander Marr, as Padilla's immediate custodian, was the only proper respondent, and that the District Court lacked jurisdiction over her because she is located outside the Southern District. That court held that the Secretary's personal involvement in Padilla's military custody rendered him a proper respondent, and that it could assert jurisdiction over the Secretary under New York's long-arm statute, notwithstanding his absence from the District. On the merits, the court accepted the Government's contention that the President has authority as Commander in Chief to detain as enemy combatants citizens captured on American soil during a time of war. The Second Circuit agreed that the Secretary was a proper respondent and that the Southern District had jurisdiction over the Secretary under New York's long-arm statute. The appeals court reversed on the merits, however, holding that the President lacks authority to detain Padilla militarily.

Held:

1. Because this Court answers the jurisdictional question in the negative, it does not reach the question whether the President has authority to detain Padilla militarily. P. 430.

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2. The Southern District lacks jurisdiction over Padilla's habeas petition. Pp. 434–451.

(a) Commander Marr is the only proper respondent to Padilla's petition because she, not Secretary Rumsfeld, is Padilla's custodian. The federal habeas statute straightforwardly provides that the proper respondent is "the person" having custody over the petitioner. §§ 2242, 2243. Its consistent use of the definite article indicates that there is generally only one proper respondent, and the custodian is "the person" with the ability to produce the prisoner's body before the habeas court, see *Wales* v. *Whitney*, 114 U. S. 564, 574. In accord with the statutory language and *Wales*' immediate custodian rule, longstanding federal-court practice confirms that, in "core" habeas challenges to present physical confinement, the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official. No exceptions to this rule, either recognized or proposed, apply here. Padilla does not deny the immediate custodian rule's general applicability, but argues that the rule is flexible and should not apply on the unique facts of this case. The Court disagrees. That the Court's understanding of custody has broadened over the years to include restraints short of physical confinement does nothing to undermine the rationale or statutory foundation of the *Wales* rule where, in core proceedings such as the present, physical custody *is* at issue. Indeed, that rule has consistently been applied in this core context. The Second Circuit erred in taking the view that this Court has relaxed the immediate custodian rule with respect to prisoners detained for other than federal criminal violations, and in holding that the proper respondent is the person exercising the "legal reality of control" over the petitioner. The statute itself makes no such distinction, nor does the Court's case law support a deviation from the immediate custodian rule here. Rather, the cases Padilla cites stand for the simple proposition that the immediate physical custodian rule, by its terms, does not apply when a habeas petitioner challenges something other than his present physical confinement. See, *e. g.*, *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484; *Strait* v. *Laird*, 406 U. S. 341. That is not the case here: Marr exercises day-to-day control over Padilla's physical custody. The petitioner cannot name someone else just because Padilla's physical confinement stems from a military order by the President. Identification of the party exercising legal control over the detainee only comes into play when there is no immediate physical custodian. *Ex parte Endo*, 323 U. S. 283, 304–305, distinguished. Although Padilla's detention is unique in many respects, it is at bottom a simple challenge to physical custody imposed by the Executive. His detention is thus not unique in any way that

would provide arguable basis for a departure from the immediate custodian rule. Pp. 434–442.

(b) The Southern District does not have jurisdiction over Commander Marr. Section 2241(a)'s language limiting district courts to granting habeas relief "within their respective jurisdictions" requires "that the court issuing the writ have jurisdiction over the custodian," *Braden*, *supra*, at 495. Because Congress added the "respective jurisdictions" clause to prevent judges anywhere from issuing the Great Writ on behalf of applicants far distantly removed, *Carbo* v. *United States*, 364 U. S. 611, 617, the traditional rule has always been that habeas relief is issuable only in the district of confinement, *id.*, at 618. This commonsense reading is supported by other portions of the habeas statute, *e. g.*, § 2242, and by Federal Rule of Appellate Procedure 22(a). Congress has also legislated against the background of the "district of confinement" rule by fashioning explicit exceptions: *E. g.*, when a petitioner is serving a state criminal sentence in a State containing more than one federal district, "the district . . . wherein [he] is in custody" and "the district . . . within which the State court was held which convicted and sentenced him" have "concurrent jurisdiction," § 2241(d). Such exceptions would have been unnecessary if, as the Second Circuit believed, § 2241 permits a prisoner to file outside the district of confinement. Despite this ample statutory and historical pedigree, Padilla urges that, under *Braden* and *Strait*, jurisdiction lies in any district in which the respondent is amenable to service of process. The Court disagrees, distinguishing those two cases. Padilla seeks to challenge his present physical custody in South Carolina. Because the immediate custodian rule applies, the proper respondent is Commander Marr, who is present in South Carolina. There is thus no occasion to designate a "nominal" custodian and determine whether he or she is "present" in the same district as petitioner. The habeas statute's "respective jurisdictions" proviso forms an important corollary to the immediate custodian rule in challenges to present physical custody under § 2241. Together they compose a simple rule that has been consistently applied in the lower courts, including in the context of military detentions: Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement. This rule serves the important purpose of preventing forum shopping by habeas petitioners. The District of South Carolina, not the Southern District of New York, was where Padilla should have brought his habeas petition. Pp. 442–447.

(c) The Court rejects additional arguments made by the dissent in support of the mistaken view that exceptions exist to the immediate

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custodian and district of confinement rules whenever exceptional, special, or unusual cases arise. Pp. 447–451.

352 F. 3d 695, reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, *post*, p. 451. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined, *post*, p. 455.

Deputy Solicitor General Clement argued the cause for petitioner. With him on the briefs were *Solicitor General Olson*, *Sri Srinivasan*, and *Jonathan L. Marcus*.

Jennifer S. Martinez argued the cause for respondents. With her on the brief were *Donna R. Newman*, *Andrew G. Patel*, *Jonathan M. Freiman*, *David W. DeBruin*, *William M. Hohengarten*, and *Matthew Hersh*.*

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*Briefs of *amici curiae* urging reversal were filed for the Commonwealth of Virginia by *Jerry W. Kilgore*, Attorney General of Virginia, *William H. Hurd*, State Solicitor, *Maureen Riley Matsen* and *William E. Thro*, Deputy State Solicitors, *Alison P. Landry*, Senior Assistant Attorney General, and *Courtney M. Malveaux* and *Russell E. McGuire*, Assistant Attorneys General; for the American Center for Law & Justice by *Jay Alan Sekulow*, *Thomas P. Monaghan*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson, Sr.*, *Joel H. Thornton*, and *Robert W. Ash;* for the Cato Institute by *Timothy Lynch;* for the Criminal Justice Legal Foundation by *Kent S. Scheidegger;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Sharon M. McGowan*, *Lucas Guttentag*, *Robin L. Goldfaden*, *Arthur N. Eisenberg*, *Arthur H. Bryant*, and *Rebecca E. Epstein;* for the Association of the Bar of the City of New York et al. by *Joseph Gerard Davis;* for the Beverly Hills Bar Association et al. by *Bridget Arimond*, *Stephen F. Rohde*, and *Marc J. Poster;* for the Center for National Security Studies et al. by *John Payton*, *Seth P. Waxman*, *Paul R. Q. Wolfson*, *Kate Martin*, and *Joseph Onek;* for Global Rights by *James F. Fitzpatrick*, *Kathleen A. Behan*, and *Gay J. McDougall;* for Others Are Us et al. by *Jonathan D. Wallace;* for the Rutherford Institute et al. by *Carter G. Phillips*, *Mark E. Haddad*, *Joseph R. Guerra*, and *Elliot M. Mincberg;* for the Spartacist League et al. by *Rachel H. Wolkenstein;* for Bruce A. Ackerman et al. by *Jules Lobel*, *Bar-*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Respondent Jose Padilla is a United States citizen detained by the Department of Defense pursuant to the President's determination that he is an "enemy combatant" who conspired with al Qaeda to carry out terrorist attacks in the United States. We confront two questions: First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the President possess authority to detain Padilla militarily. We answer the threshold question in the negative and thus do not reach the second question presented.

Because we do not decide the merits, we only briefly recount the relevant facts. On May 8, 2002, Padilla flew from Pakistan to Chicago's O'Hare International Airport. As he stepped off the plane, Padilla was apprehended by federal agents executing a material witness warrant issued by the United States District Court for the Southern District of

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bara Olshansky, *Nancy Chang*, and *Shayana Kadidal;* for Susan Akram et al. by *Daniel Kanstroom;* for Philip Alston et al. by *David N. Rosen*, *Homer E. Moyer, Jr.*, and *Michael T. Brady;* for the Honorable John Conyers, Jr., et al. by *Brian S. Koukoutchos;* for Samuel R. Gross et al. by *Jonathan L. Hafetz*, *Lawrence S. Lustberg*, and *Michael J. Wishnie;* for Louis Henkin et al. by *Donald Francis Donovan*, *Carl Micarelli*, and *J. Paul Oetken;* for Fred Korematsu et al. by *Arturo J. González* and *Jon B. Streeter;* and for Janet Reno et al. by *Robert S. Litt* and *Theodore D. Frank*.

Briefs of *amici curiae* were filed for the National Association of Criminal Defense Lawyers et al. by *Donald G. Rehkopf, Jr.*, and *Lisa B. Kemler;* for the Public Defender Service for the District of Columbia by *Catharine F. Easterly*, *Giovanna Shay*, and *Timothy P. O'Toole;* for William J. Aceves et al. by *Linda A. Malone* and *Jordan J. Paust;* for Payam Akhavan et al. by *Allison Marston Danner;* for the Honorable Shirley M. Hufstedler et al. by *Robert P. LoBue;* and for David J. Scheffer et al. by *Mr. Scheffer*, *pro se*.

A brief of *amici curiae* urging affirmance in No. 03–6696, *Hamdi et al.* v. *Rumsfeld, Secretary of Defense, et al.*, *post*, p. 507, and reversal in No. 03–1027 was filed for Senator John Cornyn et al. by *Senator Cornyn*, *pro se*.

New York (Southern District) in connection with its grand jury investigation into the September 11th terrorist attacks. Padilla was then transported to New York, where he was held in federal criminal custody. On May 22, acting through appointed counsel, Padilla moved to vacate the material witness warrant.

Padilla's motion was still pending when, on June 9, the President issued an order to Secretary of Defense Donald H. Rumsfeld designating Padilla an "enemy combatant" and directing the Secretary to detain him in military custody. App. D to Brief for Petitioner 5a (June 9 Order). In support of this action, the President invoked his authority as "Commander in Chief of the U. S. armed forces" and the Authorization for Use of Military Force Joint Resolution, Pub. L. 107–40, 115 Stat. 224 (AUMF),[1] enacted by Congress on September 18, 2001. June 9 Order 5a. The President also made several factual findings explaining his decision to designate Padilla an enemy combatant.[2] Based on these findings, the President concluded that it is "consistent with U. S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.*, at 6a.

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[1] The AUMF provides in relevant part: "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." 115 Stat. 224.

[2] In short, the President "[d]etermine[d]" that Padilla (1) "is closely associated with al Qaeda, an international terrorist organization with which the United States is at war;" (2) that he "engaged in . . . hostile and war-like acts, including . . . preparation for acts of international terrorism" against the United States; (3) that he "possesses intelligence" about al Qaeda that "would aid U. S. efforts to prevent attacks by al Qaeda on the United States"; and finally, (4) that he "represents a continuing, present and grave danger to the national security of the United States," such that his military detention "is necessary to prevent him from aiding al Qaeda in its efforts to attack the United States." June 9 Order 5a–6a.

That same day, Padilla was taken into custody by Department of Defense officials and transported to the Consolidated Naval Brig in Charleston, South Carolina.[3] He has been held there ever since.

On June 11, Padilla's counsel, claiming to act as his next friend, filed in the Southern District a habeas corpus petition under 28 U. S. C. § 2241. The petition, as amended, alleged that Padilla's military detention violates the Fourth, Fifth, and Sixth Amendments and the Suspension Clause, Art. I, § 9, cl. 2, of the United States Constitution. The amended petition named as respondents President Bush, Secretary Rumsfeld, and Melanie A. Marr, Commander of the Consolidated Naval Brig.

The Government moved to dismiss, arguing that Commander Marr, as Padilla's immediate custodian, is the only proper respondent to his habeas petition, and that the District Court lacks jurisdiction over Commander Marr because she is located outside the Southern District. On the merits, the Government contended that the President has authority to detain Padilla militarily pursuant to the Commander in Chief Clause of the Constitution, Art. II, § 2, cl. 1, the congressional AUMF, and this Court's decision in *Ex parte Quirin*, 317 U. S. 1 (1942).

The District Court issued its decision in December 2002. *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564. The court held that the Secretary's "personal involvement" in Padilla's military custody renders him a proper respondent to Padilla's habeas petition, and that it can assert jurisdiction over the Secretary under New York's long-arm statute, not-

[3] Also on June 9, the Government notified the District Court *ex parte* of the President's order; informed the court that it was transferring Padilla into military custody in South Carolina and that it was consequently withdrawing its grand jury subpoena of Padilla; and asked the court to vacate the material witness warrant. *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 571 (SDNY 2002). The court vacated the warrant. *Ibid.*

withstanding his absence from the Southern District.[4] *Id.*, at 581–587. On the merits, however, the court accepted the Government's contention that the President has authority to detain as enemy combatants citizens captured on American soil during a time of war. *Id.*, at 587–599.[5]

The Court of Appeals for the Second Circuit reversed. 352 F. 3d 695 (2003). The court agreed with the District Court that Secretary Rumsfeld is a proper respondent, reasoning that in cases where the habeas petitioner is detained for "other than federal criminal violations, the Supreme Court has recognized exceptions to the general practice of naming the immediate physical custodian as respondent." *Id.*, at 704–708. The Court of Appeals concluded that on these "unique" facts Secretary Rumsfeld is Padilla's custodian because he exercises "the legal reality of control" over Padilla and because he was personally involved in Padilla's military detention. *Id.*, at 707–708. The Court of Appeals also affirmed the District Court's holding that it has jurisdiction over the Secretary under New York's long-arm statute. *Id.*, at 708–710.

Reaching the merits, the Court of Appeals held that the President lacks authority to detain Padilla militarily. *Id.*, at 710–724. The court concluded that neither the President's

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[4] The court dismissed Commander Marr, Padilla's immediate custodian, reasoning that she would be obliged to obey any order the court directed to the Secretary. *Id.*, at 583. The court also dismissed President Bush as a respondent, a ruling Padilla does not challenge. *Id.*, at 582–583.

[5] Although the District Court upheld the President's authority to detain domestically captured enemy combatants, it rejected the Government's contentions that Padilla has no right to challenge the factual basis for his detention and that he should be denied access to counsel. Instead, the court held that the habeas statute affords Padilla the right to controvert alleged facts, and granted him monitored access to counsel to effectuate that right. *Id.*, at 599–605. Finally, the court announced that after it received Padilla's factual proffer, it would apply a deferential "some evidence" standard to determine whether the record supports the President's designation of Padilla as an enemy combatant. *Id.*, at 605–608.

Commander in Chief power nor the AUMF authorizes military detentions of American citizens captured on American soil. *Id.*, at 712–718, 722–723. To the contrary, the Court of Appeals found in both our case law and in the Non-Detention Act, 18 U. S. C. § 4001(a),[6] a strong presumption against domestic military detention of citizens absent explicit congressional authorization. 352 F. 3d, at 710–722. Accordingly, the court granted the writ of habeas corpus and directed the Secretary to release Padilla from military custody within 30 days. *Id.*, at 724.

We granted the Government's petition for certiorari to review the Court of Appeals' rulings with respect to the jurisdictional and the merits issues, both of which raise important questions of federal law. 540 U. S. 1173 (2004).[7]

The question whether the Southern District has jurisdiction over Padilla's habeas petition breaks down into two related subquestions. First, who is the proper respondent to that petition? And second, does the Southern District have jurisdiction over him or her? We address these questions in turn.

I

The federal habeas statute straightforwardly provides that the proper respondent to a habeas petition is "the person who has custody over [the petitioner]." 28 U. S. C. § 2242; see also § 2243 ("The writ, or order to show cause shall be directed to the person having custody of the person detained"). The consistent use of the definite article in reference to the custodian indicates that there is generally only one proper respondent to a given prisoner's habeas petition.

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[6] Section 4001(a) provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."

[7] The word "jurisdiction," of course, is capable of different interpretations. We use it in the sense that it is used in the habeas statute, 28 U. S. C. § 2241(a), and not in the sense of subject-matter jurisdiction of the District Court.

This custodian, moreover, is "the person" with the ability to produce the prisoner's body before the habeas court. *Ibid.* We summed up the plain language of the habeas statute over 100 years ago in this way: "[T]hese provisions contemplate a proceeding against some person who has the *immediate custody* of the party detained, with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Wales* v. *Whitney*, 114 U. S. 564, 574 (1885) (emphasis added); see also *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 494–495 (1973) ("The writ of habeas corpus" acts upon "the person who holds [the detainee] in what is alleged to be unlawful custody," citing *Wales*, *supra*, at 574); *Braden*, *supra*, at 495 (" '[T]his writ . . . is directed to . . . [the] jailer,' " quoting *In re Jackson*, 15 Mich. 417, 439–440 (1867)).

In accord with the statutory language and *Wales*' immediate custodian rule, longstanding practice confirms that in habeas challenges to present physical confinement—"core challenges"—the default rule is that the proper respondent is the warden of the facility where the prisoner is being held, not the Attorney General or some other remote supervisory official. See, *e. g.*, *Hogan* v. *Hanks*, 97 F. 3d 189, 190 (CA7 1996); *Brittingham* v. *United States*, 982 F. 2d 378, 379 (CA9 1992); *Blango* v. *Thornburgh*, 942 F. 2d 1487, 1491–1492 (CA10 1991) *(per curiam)*; *Brennan* v. *Cunningham*, 813 F. 2d 1, 12 (CA1 1987); *Guerra* v. *Meese*, 786 F. 2d 414, 416 (CADC 1986) *(per curiam)*; *Billiteri* v. *United States Bd. of Parole*, 541 F. 2d 938, 948 (CA2 1976); *Sanders* v. *Bennett*, 148 F. 2d 19, 20 (CADC 1945); *Jones* v. *Biddle*, 131 F. 2d 853, 854 (CA8 1942).[8] No exceptions to this rule, either recog-

[8] In *Ahrens* v. *Clark*, 335 U. S. 188 (1948), we left open the question whether the Attorney General is a proper respondent to a habeas petition filed by an alien detained pending deportation. *Id.*, at 189, 193. The lower courts have divided on this question, with the majority applying the immediate custodian rule and holding that the Attorney General is not a proper respondent. Compare *Robledo-Gonzales* v. *Ashcroft*, 342 F. 3d 667

nized[9] or proposed, see *post*, at 454 (KENNEDY, J., concurring), apply here.

If the *Wales* immediate custodian rule applies in this case, Commander Marr—the equivalent of the warden at the military brig—is the proper respondent, not Secretary Rumsfeld. See *Al-Marri* v. *Rumsfeld*, 360 F. 3d 707, 708–709 (CA7 2004) (holding in the case of an alleged enemy combatant detained at the Consolidated Naval Brig, the proper respondent is Commander Marr, not Secretary Rumsfeld); *Monk* v. *Secretary of the Navy*, 793 F. 2d 364, 369 (CADC 1986) (holding that the proper respondent in a habeas action brought by a military prisoner is the commandant of the military detention facility, not the Secretary of the Navy); cf. 10 U. S. C. § 951(c) (providing that the commanding officer of a military correctional facility "shall have custody and control" of the prisoners confined therein). Neither Padilla, nor the courts below, nor JUSTICE STEVENS' dissent deny the general applicability of the immediate custodian rule to habeas petitions challenging physical custody. *Post*, at 458. They argue instead that the rule is flexible and should not apply on the "unique facts" of this case. Brief for Respondents 44. We disagree.

(CA7 2003) (Attorney General is not proper respondent); *Roman* v. *Ashcroft*, 340 F. 3d 314 (CA6 2003) (same); *Vasquez* v. *Reno*, 233 F. 3d 688 (CA1 2000) (same); *Yi* v. *Maugans*, 24 F. 3d 500 (CA3 1994) (same), with *Armentero* v. *INS*, 340 F. 3d 1058 (CA9 2003) (Attorney General is proper respondent). The Second Circuit discussed the question at some length, but ultimately reserved judgment in *Henderson* v. *INS*, 157 F. 3d 106 (1998). Because the issue is not before us today, we again decline to resolve it.

[9] We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American citizen is detained outside the territorial jurisdiction of any district court. *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 498 (1973) (discussing the exception); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955) (court-martial convict detained in Korea named Secretary of the Air Force as respondent); *Burns* v. *Wilson*, 346 U. S. 137 (1953) (courts-martial convicts detained in Guam named Secretary of Defense as respondent).

First, Padilla notes that the substantive holding of *Wales*—that a person released on his own recognizance is not "in custody" for habeas purposes—was disapproved in *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty.*, 411 U. S. 345, 350, n. 8 (1973), as part of this Court's expanding definition of "custody" under the habeas statute.[10] Padilla seems to contend, and the dissent agrees, *post,* at 461–462, that because we no longer require physical detention as a prerequisite to habeas relief, the immediate custodian rule, too, must no longer bind us, even in challenges to physical custody. That argument, as the Seventh Circuit aptly concluded, is a "non sequitur." *Al-Marri, supra,* at 711. That our understanding of custody has broadened to include restraints short of physical confinement does nothing to undermine the rationale or statutory foundation of *Wales'* immediate custodian rule where physical custody *is* at issue. Indeed, as the cases cited above attest, it has consistently been applied in this core habeas context within the United States.[11]

The Court of Appeals' view that we have relaxed the immediate custodian rule in cases involving prisoners detained for "other than federal criminal violations," and that in such cases the proper respondent is the person exercising the "legal reality of control" over the petitioner, suffers from the same logical flaw. 352 F. 3d, at 705, 707. Certainly the statute itself makes no such distinction based on the source of the physical detention. Nor does our case law support a deviation from the immediate custodian rule here. Rather,

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[10] For other landmark cases addressing the meaning of "in custody" under the habeas statute, see *Garlotte* v. *Fordice,* 515 U. S. 39 (1995); *Carafas* v. *LaVallee,* 391 U. S. 234 (1968); *Peyton* v. *Rowe,* 391 U. S. 54 (1968); *Jones* v. *Cunningham,* 371 U. S. 236 (1963).

[11] Furthermore, Congress has not substantively amended in more than 130 years the relevant portions of the habeas statute on which *Wales* based its immediate custodian rule, despite uniform case law embracing the *Wales* rule in challenges to physical custody.

the cases cited by Padilla stand for the simple proposition that the immediate physical custodian rule, by its terms, does not apply when a habeas petitioner challenges something other than his present physical confinement.

In *Braden*, for example, an Alabama prisoner filed a habeas petition in the Western District of Kentucky. He did not contest the validity of the Alabama conviction for which he was confined, but instead challenged a detainer lodged against him in Kentucky state court. Noting that petitioner sought to challenge a "confinement that would be imposed in the future," we held that petitioner was "in custody" in Kentucky by virtue of the detainer. 410 U. S., at 488–489. In these circumstances, the Court held that the proper respondent was not the prisoner's immediate physical custodian (the Alabama warden), but was instead the Kentucky court in which the detainer was lodged. This made sense because the Alabama warden was not "the person who [held] him in what [was] alleged to be unlawful custody." *Id.*, at 494–495 (citing *Wales*, 114 U. S., at 574); *Hensley*, *supra*, at 351, n. 9 (observing that the petitioner in *Braden* "was in the custody of Kentucky officials for purposes of his habeas corpus action"). Under *Braden*, then, a habeas petitioner who challenges a form of "custody" other than present physical confinement may name as respondent the entity or person who exercises legal control with respect to the challenged "custody." But nothing in *Braden* supports departing from the immediate custodian rule in the traditional context of challenges to present physical confinement. See *Al-Marri*, *supra*, at 711–712; *Monk*, *supra*, at 369. To the contrary, *Braden* cited *Wales* favorably and reiterated the traditional rule that a prisoner seeking release from confinement must sue his "jailer." 410 U. S., at 495 (internal quotation marks omitted).

For the same reason, *Strait* v. *Laird*, 406 U. S. 341 (1972), does not aid Padilla. *Strait* involved an inactive reservist domiciled in California who filed a § 2241 petition seeking

relief from his military obligations. We noted that the reservist's "nominal" custodian was a commanding officer in Indiana who had charge of petitioner's Army records. *Id.*, at 344. As in *Braden*, the immediate custodian rule had no application because petitioner was not challenging any present physical confinement.

In *Braden* and *Strait*, the immediate custodian rule did not apply because *there was no* immediate physical custodian with respect to the "custody" being challenged. That is not the case here: Commander Marr exercises day-to-day control over Padilla's physical custody. We have never intimated that a habeas petitioner could name someone other than his immediate physical custodian as respondent simply because the challenged physical custody does not arise out of a criminal conviction. Nor can we do so here just because Padilla's physical confinement stems from a military order by the President.

It follows that neither *Braden* nor *Strait* supports the Court of Appeals' conclusion that Secretary Rumsfeld is the proper respondent because he exercises the "legal reality of control" over Padilla.[12] As we have explained, identification of the party exercising legal control only comes into play when there is no immediate physical custodian with respect to the challenged "custody." In challenges to present physical confinement, we reaffirm that the immediate custodian, not a supervisory official who exercises legal control, is the proper respondent. If the "legal control" test applied to physical-custody challenges, a convicted prisoner would be able to name the State or the Attorney General as a respondent to a § 2241 petition. As the statutory language,

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[12] The Court of Appeals reasoned that "only [the Secretary]—not Commander Marr—could inform the President that further restraint of Padilla as an enemy combatant is no longer necessary." 352 F. 3d 695, 707 (CA2 2003). JUSTICE STEVENS' dissent echoes this argument. *Post*, at 461–462.

established practice, and our precedent demonstrate, that is not the case.[13]

At first blush *Ex parte Endo*, 323 U. S. 283 (1944), might seem to lend support to Padilla's "legal control" argument. There, a Japanese-American citizen interned in California by the War Relocation Authority (WRA) sought relief by filing a § 2241 petition in the Northern District of California, naming as a respondent her immediate custodian. After she filed the petition, however, the Government moved her to Utah. Thus, the prisoner's immediate physical custodian was no longer within the jurisdiction of the District Court. We held, nonetheless, that the Northern District "acquired jurisdiction in this case and that [Endo's] removal . . . did not cause it to lose jurisdiction where a person in whose custody she is remains within the district." *Id.*, at 306. We held that, under these circumstances, the assistant director of the WRA, who resided in the Northern District, would be an "appropriate respondent" to whom the District Court could direct the writ. *Id.*, at 304–305.

While *Endo* did involve a petitioner challenging her present physical confinement, it did not, as Padilla and JUSTICE STEVENS contend, hold that such a petitioner may properly name as respondent someone other than the immediate physical custodian. *Post*, at 461–462 (citing *Endo* as supporting a "more functional approach" that allows habeas petitioners

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[13] Even less persuasive is the Court of Appeals' and the dissent's belief that Secretary Rumsfeld's "unique" and "pervasive" personal involvement in authorizing Padilla's detention justifies naming him as the respondent. 352 F. 3d, at 707–708 (noting that the Secretary "was charged by the President in the June 9 Order with detaining Padilla" and that the Secretary "determined that Padilla would be sent to the brig in South Carolina"); *post*, at 462. If personal involvement were the standard, "then the prosecutor, the trial judge, or the governor would be named as respondents" in criminal habeas cases. *Al-Marri* v. *Rumsfeld*, 360 F. 3d 707, 711 (CA7 2004). As the Seventh Circuit correctly held, the proper respondent is the person responsible for maintaining—not authorizing—the custody of the prisoner. *Ibid.*

to name as respondent an individual with "control" over the petitioner). Rather, the Court's holding that the writ could be directed to a supervisory official came not in our holding that the District Court initially acquired jurisdiction—it did so because Endo properly named her immediate custodian and filed in the district of confinement—but in our holding that the District Court could effectively grant habeas relief despite the Government-procured absence of petitioner from the Northern District.[14] Thus, *Endo* stands for the important but limited proposition that when the Government moves a habeas petitioner after she properly files a petition naming her immediate custodian, the District Court retains jurisdiction and may direct the writ to any respondent within its jurisdiction who has legal authority to effectuate the prisoner's release.

Endo's holding does not help respondents here. Padilla was moved from New York to South Carolina before his lawyer filed a habeas petition on his behalf. Unlike the District Court in *Endo*, therefore, the Southern District never acquired jurisdiction over Padilla's petition.

Padilla's argument reduces to a request for a new exception to the immediate custodian rule based upon the "unique facts" of this case. While Padilla's detention is undeniably unique in many respects, it is at bottom a simple challenge to physical custody imposed by the Executive—the traditional core of the Great Writ. There is no indication that there was any attempt to manipulate behind Padilla's transfer—he was taken to the same facility where other al Qaeda members were already being held, and the Government did not attempt to hide from Padilla's lawyer where it had taken him. *Infra*, at 449–450, and n. 17; *post*, at 454 (KENNEDY,

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[14] As we explained: "Th[e] objective [of habeas relief] may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the [petitioner] is within reach of the court's process." 323 U. S., at 307.

J., concurring). His detention is thus not unique in any way that would provide arguable basis for a departure from the immediate custodian rule. Accordingly, we hold that Commander Marr, not Secretary Rumsfeld, is Padilla's custodian and the proper respondent to his habeas petition.

II

We turn now to the second subquestion. District courts are limited to granting habeas relief "within their respective jurisdictions." 28 U. S. C. § 2241(a). We have interpreted this language to require "nothing more than that the court issuing the writ have jurisdiction over the custodian." *Braden*, 410 U. S., at 495. Thus, jurisdiction over Padilla's habeas petition lies in the Southern District only if it has jurisdiction over Commander Marr. We conclude it does not.

Congress added the limiting clause—"within their respective jurisdictions"—to the habeas statute in 1867 to avert the "inconvenient [and] potentially embarrassing" possibility that "every judge anywhere [could] issue the Great Writ on behalf of applicants far distantly removed from the courts whereon they sat." *Carbo* v. *United States*, 364 U. S. 611, 617 (1961). Accordingly, with respect to habeas petitions "designed to relieve an individual from oppressive confinement," the traditional rule has always been that the Great Writ is "issuable only in the district of confinement." *Id.*, at 618.

Other portions of the habeas statute support this commonsense reading of § 2241(a). For example, if a petitioner seeks habeas relief in the court of appeals, or from this Court or a Justice thereof, the petition must "state the reasons for not making application to *the* district court of the district *in which the applicant is held.*" 28 U. S. C. § 2242 (emphases added). Moreover, the court of appeals, this Court, or a Justice thereof "may decline to entertain an application for a writ of habeas corpus and may transfer the application . . . to *the* district court having jurisdiction to entertain it."

§ 2241(b) (emphasis added). The Federal Rules similarly provide that an "application for a writ of habeas corpus must be made to *the* appropriate district court." Fed. Rule App. Proc. 22(a) (emphasis added).

Congress has also legislated against the background of the "district of confinement" rule by fashioning explicit exceptions to the rule in certain circumstances. For instance, § 2241(d) provides that when a petitioner is serving a state criminal sentence in a State that contains more than one federal district, he may file a habeas petition not only "in the district court for the district wherein [he] is in custody," but also "in the district court for the district within which the State court was held which convicted and sentenced him"; and "each of such district courts shall have concurrent jurisdiction to entertain the application." Similarly, until Congress directed federal criminal prisoners to file certain post-conviction petitions in the sentencing courts by adding § 2255 to the habeas statute, federal prisoners could litigate such collateral attacks only in the district of confinement. See *United States* v. *Hayman*, 342 U. S. 205, 212–219 (1952). Both of these provisions would have been unnecessary if, as the Court of Appeals believed, § 2241's general habeas provisions permit a prisoner to file outside the district of confinement.

The plain language of the habeas statute thus confirms the general rule that for core habeas petitions challenging present physical confinement, jurisdiction lies in only one district: the district of confinement. Despite this ample statutory and historical pedigree, Padilla contends, and the Court of Appeals held, that the district of confinement rule no longer applies to core habeas challenges. Rather, Padilla, as well as today's dissenters, *post*, at 462–464, urge that our decisions in *Braden* and *Strait* stand for the proposition that jurisdiction will lie in any district in which the respondent is amenable to service of process. We disagree.

Prior to *Braden*, we had held that habeas jurisdiction depended on the presence of both the petitioner and his custodian within the territorial confines of the district court. See *Ahrens* v. *Clark*, 335 U. S. 188, 190–192 (1948). By allowing an Alabama prisoner to challenge a Kentucky detainer in the Western District of Kentucky, *Braden* changed course and held that habeas jurisdiction requires only "that the court issuing the writ have jurisdiction over the custodian." 410 U. S., at 495.

But we fail to see how *Braden*'s requirement of jurisdiction over the respondent alters the district of confinement rule for challenges to present physical custody. *Braden* itself did not involve such a challenge; rather, Braden challenged his future confinement in Kentucky by suing his Kentucky custodian. We reasoned that "[u]nder these circumstances it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama." *Id.*, at 499. In habeas challenges to *present* physical confinement, by contrast, the district of confinement is *synonymous* with the district court that has territorial jurisdiction over the proper respondent. This is because, as we have held, the immediate custodian rule applies to core habeas challenges to present physical custody. By definition, the immediate custodian and the prisoner reside in the same district.

Rather than focusing on the holding and historical context of *Braden*, JUSTICE STEVENS, *post*, at 462, like the Court of Appeals, seizes on dicta in which we referred to "service of process" to contend that the Southern District could assert jurisdiction over Secretary Rumsfeld under New York's long-arm statute. See *Braden*, 410 U. S., at 495 ("So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' . . . even if the prisoner himself is confined outside the court's territorial jurisdiction"). But that dicta did not indicate that a custodian may be served with process *outside* of the district court's territorial jurisdiction. To the contrary, the facts and hold-

ing of *Braden* dictate the opposite inference. Braden served his Kentucky custodian in Kentucky. Accordingly, we concluded that the Western District of Kentucky had jurisdiction over the petition "since the respondent was properly served *in that district.*" *Id.*, at 500 (emphasis added); see also *Endo*, 323 U. S., at 304–305 (noting that the court could issue the writ to a WRA official "whose office is at San Francisco, which is in the jurisdiction of the [Northern District of California]"). Thus, *Braden* in no way authorizes district courts to employ long-arm statutes to gain jurisdiction over custodians who are outside of their territorial jurisdiction. See *Al-Marri*, 360 F. 3d, at 711; *Guerra*, 786 F. 2d, at 417. Indeed, in stating its holding, *Braden* favorably cites *Schlanger* v. *Seamans*, 401 U. S. 487 (1971), a case squarely holding that the custodian's absence from the territorial jurisdiction of the district court is fatal to habeas jurisdiction. 410 U. S., at 500. Thus, Braden does not derogate from the traditional district of confinement rule for core habeas petitions challenging present physical custody.

The Court of Appeals also thought *Strait* supported its long-arm approach to habeas jurisdiction. But *Strait* offers even less help than *Braden.* In *Strait*, we held that the Northern District of California had jurisdiction over Strait's "nominal" custodian—the commanding officer of the Army records center—even though he was physically located in Indiana. We reasoned that the custodian was "present" in California "through the officers in the hierarchy of the command who processed [Strait's] application for discharge." 406 U. S., at 345. The *Strait* Court contrasted its broad view of "presence" in the case of a nominal custodian with a "'commanding officer who is responsible for the day to day control of his subordinates,'" who would be subject to habeas jurisdiction only in the district where he physically resides. *Ibid.* (quoting *Arlen* v. *Laird*, 451 F. 2d 684, 687 (CA2 1971)).

The Court of Appeals, much like JUSTICE STEVENS' dissent, reasoned that Secretary Rumsfeld, in the same way as

Strait's commanding officer, was "present" in the Southern District through his subordinates who took Padilla into military custody. 352 F. 3d, at 709–710; *post*, at 462. We think not.

Strait simply has no application to the present case. *Strait* predated *Braden*, so the then-applicable *Ahrens* rule required that both the petitioner and his custodian be present in California. Thus, the only question was whether Strait's commanding officer was present in California notwithstanding his physical absence from the district. Distinguishing *Schlanger*, *supra*, we held that it would "exalt fiction over reality" to require Strait to sue his "nominal custodian" in Indiana when Strait had always resided in California and had his only meaningful contacts with the Army there. 406 U. S., at 344–346. Only under these limited circumstances did we invoke concepts of personal jurisdiction to hold that the custodian was "present" in California through the actions of his agents. *Id.*, at 345.

Here, by contrast, Padilla seeks to challenge his present physical custody in South Carolina. Because the immediate custodian rule applies to such habeas challenges, the proper respondent is Commander Marr, who is also present in South Carolina. There is thus no occasion to designate a "nominal" custodian and determine whether he or she is "present" in the same district as petitioner.[15] Under *Braden* and the district of confinement rule, as we have explained, Padilla must file his habeas action in South Carolina. Were we to extend *Strait*'s limited exception to the territorial nature of habeas jurisdiction to the context of physical-custody challenges, we would undermine, if not negate, the purpose of Congress in amending the habeas statute in 1867.

The proviso that district courts may issue the writ only "within their respective jurisdictions" forms an important

[15] In other words, Commander Marr is the equivalent of the "commanding officer [with] day to day control" that we distinguished in *Strait*. 406 U. S., at 345 (internal quotation marks omitted).

corollary to the immediate custodian rule in challenges to present physical custody under § 2241. Together they compose a simple rule that has been consistently applied in the lower courts, including in the context of military detentions: Whenever a § 2241 habeas petitioner seeks to challenge his present physical custody within the United States, he should name his warden as respondent and file the petition in the district of confinement. See *Al-Marri*, *supra*, at 710, 712 (alleged enemy combatant detained at Consolidated Naval Brig must file petition in the District of South Carolina; collecting cases dismissing § 2241 petitions filed outside the district of confinement); *Monk*, 793 F. 2d, at 369 (court-martial convict must file in district of confinement).[16]

This rule, derived from the terms of the habeas statute, serves the important purpose of preventing forum shopping by habeas petitioners. Without it, a prisoner could name a high-level supervisory official as respondent and then sue that person wherever he is amenable to long-arm jurisdiction. The result would be rampant forum shopping, district courts with overlapping jurisdiction, and the very inconvenience, expense, and embarrassment Congress sought to avoid when it added the jurisdictional limitation 137 years ago.

III

JUSTICE STEVENS' dissent, not unlike the Court of Appeals' decision, rests on the mistaken belief that we have

[16] As a corollary to the previously referenced exception to the immediate custodian rule, n. 8, *supra*, we have similarly relaxed the district of confinement rule when "American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus." *Braden*, 410 U. S., at 498 (citing cases). In such cases, we have allowed the petitioner to name as respondent a supervisory official and file the petition in the district where the respondent resides. *Burns* v. *Wilson*, 346 U. S. 137 (1953) (courts-martial convicts held in Guam sued Secretary of Defense in the District of Columbia); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955) (court-martial convict held in Korea sued Secretary of the Air Force in the District of Columbia).

made various exceptions to the immediate custodian and district of confinement rules whenever "exceptional," "'special,'" or "unusual" cases have arisen. *Post*, at 455, 458, 462, n. 5. We have addressed most of his contentions in the foregoing discussion, but we briefly touch on a few additional points.

Apparently drawing a loose analogy to *Endo*, JUSTICE STEVENS asks us to pretend that Padilla and his immediate custodian were present in the Southern District at the time counsel filed the instant habeas petition, thus rendering jurisdiction proper. *Post*, at 458–459. The dissent asserts that the Government "depart[ed] from the time-honored practice of giving one's adversary fair notice of an intent to present an important motion to the court," when on June 9 it moved *ex parte* to vacate the material witness warrant and allegedly failed to immediately inform counsel of its intent to transfer Padilla to military custody in South Carolina. *Post*, at 459; cf. n. 3, *supra*. Constructing a hypothetical "scenario," the dissent contends that if counsel had been immediately informed, she "would have filed the habeas application then and there," while Padilla remained in the Southern District, "rather than waiting two days." *Post*, at 458. Therefore, JUSTICE STEVENS concludes, the Government's alleged misconduct "justifies treating the habeas application as the functional equivalent of one filed two days earlier." *Post*, at 459 ("[W]e should not permit the Government to obtain a tactical advantage as a consequence of an *ex parte* proceeding").

The dissent cites no authority whatsoever for its extraordinary proposition that a district court can exercise statutory jurisdiction based on a series of events that did not occur, or that jurisdiction might be premised on "punishing" alleged Government misconduct. The lower courts—unlike the dissent—did not perceive any hint of Government misconduct or bad faith that would warrant extending *Endo* to a case where both the petitioner and his immediate custodian were

outside of the district at the time of filing. Not surprisingly, then, neither Padilla nor the lower courts relied on the dissent's counterfactual theory to argue that habeas jurisdiction was proper. Finding it contrary to our well-established precedent, we are not persuaded either.[17]

The dissent contends that even if we do not indulge its hypothetical scenario, the Court has made "numerous exceptions" to the immediate custodian and district of confinement rules, rendering our bright-line rule "far from bright." *Post*, at 460. Yet the dissent cannot cite *a single case* in which we have deviated from the longstanding rule we reaffirm today—that is, a case in which we allowed a habeas petitioner challenging his present physical custody within the United States to name as respondent someone other than

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[17] On a related note, the dissent argues that the facts as they actually existed at the time of filing should not matter, because "what matters for present purposes are the facts available to [counsel] at the time of filing." *Post*, at 459, n. 3. According to the dissent, because the Government "shrouded . . . in secrecy" the location of Padilla's military custody, counsel was entitled to file in the district where Padilla's presence was "last officially confirmed." *Ibid.* As with the argument addressed above, neither Padilla nor the District Court—which was much closer to the facts of the case than we are—or the Court of Appeals ever suggested that the Government concealed Padilla's whereabouts from counsel, much less contended that such concealment was the basis for habeas jurisdiction in the Southern District. And even if this were a valid legal argument, the record simply does not support the dissent's inference of Government secrecy. The dissent relies solely on a letter written by Padilla's counsel. In that same letter, however, counsel states that she "was informed [on June 10]" that her client had been taken into custody by the Department of Defense and "detain[ed] at a naval military prison." App. 66. When counsel filed Padilla's habeas petition on June 11, she averred that "Padilla is being held in segregation at the high-security Consolidated Naval Brig in Charleston, South Carolina." Pet. for Writ of Habeas Corpus in No. 02 Civ. 4445 (SDNY), p. 2, Record, Doc. 1. The only reasonable inference, particularly in light of Padilla's failure to argue to the contrary, is that counsel was well aware of Padilla's presence in South Carolina when she filed the habeas petition, not that the Government "shrouded" Padilla's whereabouts in secrecy.

the immediate custodian and to file somewhere other than the district of confinement.[18] If JUSTICE STEVENS' view were accepted, district courts would be consigned to making ad hoc determinations as to whether the circumstances of a given case are "exceptional," "special," or "unusual" enough to require departure from the jurisdictional rules this Court has consistently applied. We do not think Congress intended such a result.

Finally, the dissent urges us to bend the jurisdictional rules because the merits of this case are indisputably of "profound importance," *post,* at 455, 460–461. But it is surely

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[18] Instead, JUSTICE STEVENS, like the Court of Appeals, relies heavily on *Braden*, *Strait*, and other cases involving challenges to something other than present physical custody. *Post,* at 461–464, and n. 4; *post,* at 461, n. 4 (citing *Garlotte* v. *Fordice,* 515 U. S. 39 (1995) (habeas petitioner challenging expired sentence named Governor as respondent; immediate custodian issue not addressed); *Middendorf* v. *Henry,* 425 U. S. 25 (1976) (putative habeas class action challenging court-martial procedures throughout the military; immediate custodian issue not addressed)); *post,* at 463 (citing *Eisel* v. *Secretary of the Army,* 477 F. 2d 1251 (CADC 1973) (allowing an inactive reservist challenging his military status to name the Secretary of the Army as respondent)). *Demjanjuk* v. *Meese,* 784 F. 2d 1114 (CADC 1986), on which the dissent relies, *post,* at 458, is similarly unhelpful: When, as in that case, a prisoner is held in an undisclosed location by an unknown custodian, it is impossible to apply the immediate custodian and district of confinement rules. That is not the case here, where the identity of the immediate custodian and the location of the appropriate district court are clear.

The dissent also cites two cases in which a state prisoner proceeding under 28 U. S. C. § 2254 named as respondent the State's officer in charge of penal institutions. *Post,* at 461, n. 4 (citing *California Dept. of Corrections* v. *Morales,* 514 U. S. 499 (1995); *Wainwright* v. *Greenfield,* 474 U. S. 284 (1986)). But such cases do not support Padilla's cause. First of all, the respondents did not challenge their designation as inconsistent with the immediate custodian rule. More to the point, Congress has authorized § 2254 petitioners challenging present physical custody to name either the warden *or* the chief state penal officer as a respondent. Rule 2(a) of the Rules Governing Section 2254 Cases in the United States District Courts; Advisory Committee's Note on Rule 2(a), 28 U. S. C., pp. 469–470 (adopted in 1976). Congress has made no such provision for § 2241 petitioners like Padilla.

just as necessary in important cases as in unimportant ones that courts take care not to exceed their "respective jurisdictions" established by Congress.

The District of South Carolina, not the Southern District of New York, was the district court in which Padilla should have brought his habeas petition. We therefore reverse the judgment of the Court of Appeals and remand the case for entry of an order of dismissal without prejudice.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring.

Though I join the opinion of the Court, this separate opinion is added to state my understanding of how the statute should be interpreted in light of the Court's holding. The Court's analysis relies on two rules. First, the habeas action must be brought against the immediate custodian. Second, when an action is brought in the district court, it must be filed in the district court whose territorial jurisdiction includes the place where the custodian is located.

These rules, however, are not jurisdictional in the sense of a limitation on subject-matter jurisdiction. *Ante*, at 434, n. 7. That much is clear from the many cases in which petitions have been heard on the merits despite their noncompliance with either one or both of the rules. See, *e. g.*, *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 495 (1973); *Strait* v. *Laird*, 406 U. S. 341, 345 (1972); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955); *Burns* v. *Wilson*, 346 U. S. 137 (1953); *Ex parte Endo*, 323 U. S. 283 (1944).

In my view, the question of the proper location for a habeas petition is best understood as a question of personal jurisdiction or venue. This view is more in keeping with the opinion in *Braden*, and its discussion explaining the rules for the proper forum for habeas petitions. 410 U. S., at 493, 500 (indicating that the analysis is guided by "traditional

venue considerations" and "traditional principles of venue"); see also *Moore* v. *Olson*, 368 F. 3d 757, 759–760 (CA7 2004) (suggesting that the territorial-jurisdiction rule is a venue rule, and the immediate-custodian rule is a personal-jurisdiction rule). This approach is consistent with the reference in the statute to the "respective jurisdictions" of the district court. 28 U. S. C. § 2241. As we have noted twice this Term, the word "jurisdiction" is susceptible of different meanings, not all of which refer to the power of a federal court to hear a certain class of cases. *Kontrick* v. *Ryan*, 540 U. S. 443 (2004); *Scarborough* v. *Principi*, 541 U. S. 401 (2004). The phrase "respective jurisdictions" does establish a territorial restriction on the proper forum for habeas petitions, but does not of necessity establish that the limitation goes to the power of the court to hear the case.

Because the immediate-custodian and territorial-jurisdiction rules are like personal-jurisdiction or venue rules, objections to the filing of petitions based on those grounds can be waived by the Government. *Moore*, *supra*, at 759; cf. *Endo*, *supra*, at 305 ("The fact that no respondent was ever served with process or appeared in the proceedings is not important. The United States resists the issuance of a writ. A cause exists in that state of the proceedings and an appeal lies from denial of a writ without the appearance of a respondent"). For the same reason, the immediate-custodian and territorial rules are subject to exceptions, as acknowledged in the Court's opinion. *Ante*, at 436, n. 9, 438–442, 444–446. This does not mean that habeas petitions are governed by venue rules and venue considerations that apply to other sorts of civil lawsuits. Although habeas actions are civil cases, they are not automatically subject to all of the Federal Rules of Civil Procedure. See Fed. Rule Civ. Proc. 81(a)(2) ("These rules are applicable to proceedings for . . . habeas corpus . . . to the extent that the practice in such proceedings is not set forth in statutes of the United States, the Rules Governing Section 2254 Cases, or the

Rules Governing Section 2255 Proceedings"). Instead, these forum-location rules for habeas petitions are based on the habeas statutes and the cases interpreting them. Furthermore, the fact that these habeas rules are subject to exceptions does not mean that, in the exceptional case, a petition may be properly filed in any one of the federal district courts. When an exception applies, see, *e. g.*, *Rasul* v. *Bush*, *post*, p. 466, courts must still take into account the considerations that in the ordinary case are served by the immediate-custodian rule, and, in a similar fashion, limit the available forum to the one with the most immediate connection to the named custodian.

I would not decide today whether these habeas rules function more like rules of personal jurisdiction or rules of venue. It is difficult to describe the precise nature of these restrictions on the filing of habeas petitions, as an examination of the Court's own opinions in this area makes clear. Compare, *e. g.*, *Ahrens* v. *Clark*, 335 U. S. 188 (1948), with *Schlanger* v. *Seamans*, 401 U. S. 487, 491 (1971), and *Braden*, *supra*, at 495. The precise question of how best to characterize the statutory direction respecting where the action must be filed need not be resolved with finality in this case. Here there has been no waiver by the Government; there is no established exception to the immediate-custodian rule or to the rule that the action must be brought in the district court with authority over the territory in question; and there is no need to consider some further exception to protect the integrity of the writ or the rights of the person detained.

For the purposes of this case, it is enough to note that, even under the most permissive interpretation of the habeas statute as a venue provision, the Southern District of New York was not the proper place for this petition. As the Court concludes, in the ordinary case of a single physical custody within the borders of the United States, where the objection has not been waived by the Government, the immediate-custodian and territorial-jurisdiction rules must

apply. *Ante,* at 451. I also agree with the arguments from statutory text and case law that the Court marshals in support of these two rules. *Ante,* at 434–435, 442–443. Only in an exceptional case may a court deviate from those basic rules to hear a habeas petition filed against some person other than the immediate custodian of the prisoner, or in some court other than the one in whose territory the custodian may be found.

The Court has made exceptions in the cases of nonphysical custody, see, *e. g., Strait,* 406 U. S., at 345, of dual custody, see, *e. g., Braden,* 410 U. S., at 500, and of removal of the prisoner from the territory of a district after a petition has been filed, see, *e. g., Endo,* 323 U. S., at 306; see also *ante,* at 440–441, 444. In addition, I would acknowledge an exception if there is an indication that the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or where the Government was not forthcoming with respect to the identity of the custodian and the place of detention. In cases of that sort, habeas jurisdiction would be in the district court from whose territory the petitioner had been removed. In this case, if the Government had removed Padilla from the Southern District of New York but refused to tell his lawyer where he had been taken, the District Court would have had jurisdiction over the petition. Or, if the Government did inform the lawyer where a prisoner was being taken but kept moving him so a filing could not catch up to the prisoner, again, in my view, habeas jurisdiction would lie in the district or districts from which he had been removed.

None of the exceptions apply here. There is no indication that the Government refused to tell Padilla's lawyer where he had been taken. The original petition demonstrates that the lawyer knew where Padilla was being held at that time. *Ante,* at 449, n. 17. In these circumstances, the basic rules apply, and the District of South Carolina was the proper

forum. The present case demonstrates the wisdom of those rules.

Both Padilla's change in location and his change of custodian reflected a change in the Government's rationale for detaining him. He ceased to be held under the authority of the criminal justice system, see 18 U. S. C. § 3144, and began to be held under that of the military detention system. Rather than being designed to play games with forums, the Government's removal of Padilla reflected the change in the theory on which it was holding him. Whether that theory is a permissible one, of course, is a question the Court does not reach today.

The change in custody, and the underlying change in rationale, should be challenged in the place the Government has brought them to bear and against the person who is the immediate representative of the military authority that is detaining him. That place is the District of South Carolina, and that person is Commander Marr. The Second Circuit erred in holding that the Southern District of New York was a proper forum for Padilla's petition. With these further observations, I join the opinion and judgment of the Court.

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

The petition for a writ of habeas corpus filed in this case raises questions of profound importance to the Nation. The arguments set forth by the Court do not justify avoidance of our duty to answer those questions. It is quite wrong to characterize the proceeding as a "simple challenge to physical custody," *ante*, at 441, that should be resolved by slavish application of a "bright-line rule," *ante*, at 449, designed to prevent "rampant forum shopping" by litigious prison inmates, *ante*, at 447. As the Court's opinion itself demonstrates, that rule is riddled with exceptions fashioned to protect the high office of the Great Writ. This is an exceptional case that we clearly have jurisdiction to decide.

I

In May 2002, a grand jury convened in the Southern District of New York was conducting an investigation into the September 11, 2001, terrorist attacks. In response to an application by the Department of Justice, the Chief Judge of the District issued a material witness warrant authorizing Padilla's arrest when his plane landed in Chicago on May 8.[1] Pursuant to that warrant, agents of the Department of Justice took Padilla (hereinafter respondent) into custody and transported him to New York City, where he was detained at the Metropolitan Correctional Center. On May 15, the court appointed Donna R. Newman, a member of the New York bar, to represent him. She conferred with respondent in person and filed motions on his behalf, seeking his release on the ground that his incarceration was unauthorized and unconstitutional. The District Court scheduled a hearing on those motions for Tuesday, June 11, 2002.

On Sunday, June 9, 2002, before that hearing could occur, the President issued a written command to the Secretary of Defense concerning respondent. "Based on the information available to [him] from all sources," the President determined that respondent is an "enemy combatant," that he is "closely associated with al Qaeda, an international terrorist organization with which the United States is at war," and that he possesses intelligence that, "if communicated to the U. S., would aid U. S. efforts to prevent attacks by al Qaeda"

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[1] As its authority for detaining respondent as a material witness, the Government relied on a federal statute that provides: "If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 . . . . Release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure." 18 U. S. C. § 3144.

on U. S. targets. App. A to Pet. for Cert. 57a. The command stated that "it is in the interest of the United States" and "consistent with U. S. law and the laws of war for the Secretary of Defense to detain Mr. Padilla as an enemy combatant." *Id.*, at 58a. The President's order concluded: "Accordingly, you are directed to receive Mr. Padilla from the Department of Justice and to detain him as an enemy combatant." *Ibid.*

On the same Sunday that the President issued his order, the Government notified the District Court in an *ex parte* proceeding that it was withdrawing its grand jury subpoena, and it asked the court to enter an order vacating the material witness warrant. *Padilla ex rel. Newman* v. *Bush*, 233 F. Supp. 2d 564, 571 (SDNY 2002). In that proceeding, in which respondent was not represented, the Government informed the court that the President had designated respondent an enemy combatant and had directed the Secretary of Defense, petitioner Donald Rumsfeld, to detain respondent. *Ibid.* The Government also disclosed that the Department of Defense would take custody of respondent and immediately transfer him to South Carolina. The District Court complied with the Government's request and vacated the warrant.[2]

On Monday, June 10, 2002, the Attorney General publicly announced respondent's detention and transfer "to the custody of the Defense Department," which he called "a significant step forward in the War on Terrorism." Amended Pet.

[2] The order vacating the material witness warrant that the District Court entered in the *ex parte* proceeding on June 9 terminated the Government's lawful custody of respondent. After that order was entered, Secretary Rumsfeld's agents took custody of respondent. The authority for that action was based entirely on the President's command to the Secretary—a document that, needless to say, would not even arguably qualify as a valid warrant. Thus, whereas respondent's custody during the period between May 8 and June 9, 2002, was pursuant to a judicially authorized seizure, he has been held ever since—for two years—pursuant to a warrantless arrest.

for Writ of Habeas Corpus in No. 02 Civ. 4445 (SDNY), Exh. A, p. 1, Record, Doc. 4. On June 11, 2002, presumably in response to that announcement, Newman commenced this proceeding by filing a petition for a writ of habeas corpus in the Southern District of New York. 233 F. Supp. 2d, at 571. At a conference on that date, which had been originally scheduled to address Newman's motion to vacate the material witness warrant, the Government conceded that Defense Department personnel had taken custody of respondent in the Southern District of New York. *Id.*, at 571–572.

II

All Members of this Court agree that the immediate custodian rule should control in the ordinary case and that habeas petitioners should not be permitted to engage in forum shopping. But we also all agree with Judge Bork that "special circumstances" can justify exceptions from the general rule. *Demjanjuk* v. *Meese*, 784 F. 2d 1114, 1116 (CADC 1986). See *ante*, at 450, n. 18. Cf. *ante*, at 452 (KENNEDY, J., concurring). More narrowly, we agree that if jurisdiction was proper when the petition was filed, it cannot be defeated by a later transfer of the prisoner to another district. *Ex parte Endo*, 323 U. S. 283, 306 (1944). See *ante*, at 441.

It is reasonable to assume that if the Government had given Newman, who was then representing respondent in an adversary proceeding, notice of its intent to ask the District Court to vacate the outstanding material witness warrant and transfer custody to the Department of Defense, Newman would have filed the habeas petition then and there, rather than waiting two days.[3] Under that scenario, respondent's

[3] The record indicates that the Government had not *officially* informed Newman of her client's whereabouts at the time she filed the habeas petition on June 11. Pet. for Writ of Habeas Corpus in No. 02 Civ. 4445 (SDNY), p. 2, ¶ 4, Record, Doc. 1 ("On information and belief, Padilla is being held in segregation at the high-security Consolidated Naval Brig in Charleston, South Carolina"); Letter from Donna R. Newman to General

immediate custodian would then have been physically present in the Southern District of New York carrying out orders of the Secretary of Defense. Surely at that time Secretary Rumsfeld, rather than the lesser official who placed the handcuffs on petitioner, would have been the proper person to name as a respondent to that petition.

The difference between that scenario and the secret transfer that actually occurred should not affect our decision, for we should not permit the Government to obtain a tactical advantage as a consequence of an *ex parte* proceeding. The departure from the time-honored practice of giving one's adversary fair notice of an intent to present an important motion to the court justifies treating the habeas application as the functional equivalent of one filed two days earlier. See *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864) ("Common justice

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Counsel of the Department of Defense, June 17, 2002 ("I understand *from the media* that my client is being held in Charleston, South Carolina in the military brig" (emphasis added)), Amended Pet. for Writ of Habeas Corpus in No. 02 Civ. 4445 (SDNY), Exh. A, p. 4, Record, Doc. 4. Thus, while it is true, as the Court observes, that "Padilla was moved from New York to South Carolina before his lawyer filed a habeas petition on his behalf," *ante*, at 441, what matters for present purposes are the facts available to Newman at the time of filing. When the Government shrouded those facts in secrecy, Newman had no option but to file immediately in the district where respondent's presence was last officially confirmed.

Moreover, Newman was appointed to represent respondent by the District Court for the Southern District of New York. Once the Government removed her client, it did not permit her to counsel him until February 11, 2004. Consultation thereafter has been allowed as a matter of the Government's grace, not as a matter of right stemming from the Southern District of New York appointment. Further, it is not apparent why the District of South Carolina, rather than the Southern District of New York, should be regarded as the proper forum to determine the validity of the "change in the Government's rationale for detaining" respondent. *Ante*, at 455. If the Government's theory is not "a permissible one," *ibid.*, then the New York federal court would remain the proper forum in this case. Why should the New York court not have the authority to determine the legitimacy of the Government's removal of respondent beyond that court's borders?

requires that no man shall be condemned in his person or property without notice and an opportunity to make his defence"). "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris* v. *Nelson,* 394 U. S. 286, 291 (1969). But even if we treat respondent's habeas petition as having been filed in the Southern District after the Government removed him to South Carolina, there is ample precedent for affording special treatment to this exceptional case, both by recognizing Secretary Rumsfeld as the proper respondent and by treating the Southern District as the most appropriate venue.

Although the Court purports to be enforcing a "bright-line rule" governing district courts' jurisdiction, *ante,* at 449, an examination of its opinion reveals that the line is far from bright. Faced with a series of precedents emphasizing the writ's "scope and flexibility," *Harris,* 394 U. S., at 291, the Court is forced to acknowledge the numerous exceptions we have made to the immediate custodian rule. The rule does not apply, the Court admits, when physical custody is not at issue, *ante,* at 437–438, or when American citizens are confined overseas, *ante,* at 447, n. 16, or when the petitioner has been transferred after filing, *ante,* at 441, or when the custodian is "'present'" in the district through his agents' conduct, *ante,* at 445. In recognizing exception upon exception and corollaries to corollaries, the Court itself persuasively demonstrates that the rule is not ironclad. It is, instead, a workable general rule that frequently gives way outside the context of "'core challenges'" to executive confinement. *Ante,* at 435.

In the Court's view, respondent's detention falls within the category of "'core challenges'" because it is "not unique in any way that would provide arguable basis for a departure from the immediate custodian rule." *Ante,* at 442. It is, however, disingenuous at best to classify respondent's petition with run-of-the-mill collateral attacks on federal crimi-

nal convictions. On the contrary, this case is singular not only because it calls into question decisions made by the Secretary himself, but also because those decisions have created a unique and unprecedented threat to the freedom of every American citizen.

"[W]e have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court, San Jose-Milpitas Judicial Dist., Santa Clara Cty.*, 411 U. S. 345, 350 (1973). With respect to the custody requirement, we have declined to adopt a strict reading of *Wales* v. *Whitney*, 114 U. S. 564 (1885), see *Hensley*, 411 U. S., at 350, n. 8, and instead have favored a more functional approach that focuses on the person with the power to produce the body, see *Endo*, 323 U. S., at 306–307.[4] In this case, the President entrusted the Secretary of De-

[4] For other cases in which the immediate custodian rule has not been strictly applied, see *Garlotte* v. *Fordice*, 515 U. S. 39 (1995) (prisoner named Governor of Mississippi, not warden, as respondent); *California Dept. of Corrections* v. *Morales*, 514 U. S. 499 (1995) (prisoner named Department of Corrections, not warden, as respondent); *Wainwright* v. *Greenfield*, 474 U. S. 284 (1986) (prisoner named Secretary of Florida Department of Corrections, not warden, as respondent); *Middendorf* v. *Henry*, 425 U. S. 25 (1976) (persons convicted or ordered to stand trial at summary courts-martial named Secretary of the Navy as respondent); *Strait* v. *Laird*, 406 U. S. 341, 345–346 (1972) ("The concepts of 'custody' and 'custodian' are sufficiently broad to allow us to say that the commanding officer in Indiana, operating through officers in California in processing petitioner's claim, is in California for the limited purposes of habeas corpus jurisdiction"); *Burns* v. *Wilson*, 346 U. S. 137 (1953) (service members convicted and held in military custody in Guam named Secretary of Defense as respondent); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955) (next friend of ex-service member in military custody in Korea named Secretary of the Air Force as respondent); *Endo*, 323 U. S., at 304 (California District Court retained jurisdiction over Japanese-American's habeas challenge to her internment, despite her transfer to Utah, noting absence of any "suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent").

fense with control over respondent. To that end, the Secretary deployed Defense Department personnel to the Southern District with instructions to transfer respondent to South Carolina. Under the President's order, only the Secretary—not a judge, not a prosecutor, not a warden—has had a say in determining respondent's location. As the District Court observed, Secretary Rumsfeld has publicly shown "both his familiarity with the circumstances of Padilla's detention, and his personal involvement in the handling of Padilla's case." 233 F. Supp. 2d, at 574. Having "emphasized and jealously guarded" the Great Writ's "ability to cut through barriers of form and procedural mazes," *Harris*, 394 U. S., at 291, surely we should acknowledge that the writ reaches the Secretary as the relevant custodian in this case.

Since the Secretary is a proper custodian, the question whether the petition was appropriately filed in the Southern District is easily answered. "So long as the custodian can be reached by service of process, the court can issue a writ 'within its jurisdiction' requiring that the prisoner be brought before the court for a hearing on his claim . . . even if the prisoner himself is confined outside the court's territorial jurisdiction." *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 495 (1973).[5] See also *Endo*, 323 U. S., at 306 ("[T]he court may act if there is a respondent within reach of its process who has custody of the petitioner"). In this case, Secretary Rumsfeld no doubt has sufficient contacts with the Southern District properly to be served with process there. The Secretary, after all, ordered military personnel to that forum to seize and remove respondent.

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[5] Although, as the Court points out, *ante*, at 445, the custodian in *Braden* was served within the territorial jurisdiction of the District Court, the salient point is that *Endo* and *Braden* decoupled the District Court's jurisdiction from the detainee's place of confinement and adopted for unusual cases a functional analysis that does not depend on the physical location of any single party.

It bears emphasis that the question of the proper forum to determine the legality of Padilla's incarceration is not one of federal subject-matter jurisdiction. See *ante*, at 434, n. 7; *ante*, at 451 (KENNEDY, J., concurring). Federal courts undoubtedly have the authority to issue writs of habeas corpus to custodians who can be reached by service of process "within their respective jurisdictions." 28 U. S. C. § 2241(a). Rather, the question is one of venue, *i. e.*, in which federal court the habeas inquiry may proceed.[6] The Government purports to exercise complete control, free from judicial surveillance, over that placement. Venue principles, however, center on the most convenient and efficient forum for resolution of a case, see *Braden*, 410 U. S., at 493–494, 499–500 (considering those factors in allowing Alabama prisoner to sue in Kentucky), and on the placement most likely to minimize forum shopping by either party, see *Eisel* v. *Secretary of the Army*, 477 F. 2d 1251, 1254 (CADC 1973) (preferring such functional considerations to "blind incantation of words with implied magical properties, such as 'immediate custodian' ").[7] Cf. *Ex parte Bollman*, 4 Cranch 75, 136 (1807) ("It would . . . be extremely dangerous to say, that because the

[6] Although the Court makes no reference to venue principles, it is clear that those principles, not rigid jurisdictional rules, govern the forum determination. In overruling *Ahrens* v. *Clark*, 335 U. S. 188 (1948), the Court in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973), clarified that the place of detention pertains only to the question of venue. See *id.*, at 493–495 (applying "traditional venue considerations" and rejecting a stricter jurisdictional approach); *id.*, at 502 (REHNQUIST, J., dissenting) ("Today the Court overrules *Ahrens*"); *Moore* v. *Olson*, 368 F. 3d 757, 758 (CA7 2004) ("[A]fter *Braden* . . . , which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue"); *Armentero* v. *INS*, 340 F. 3d 1058, 1070 (CA9 2003) ("District courts may use traditional venue considerations to control where detainees bring habeas petitions" (citing *Braden*, 410 U. S., at 493–494)).

[7] If, upon consideration of traditional venue principles, the district court in which a habeas petition is filed determines that venue is inconvenient or improper, it of course has the authority to transfer the petition. See 28 U. S. C. §§ 1404(a), 1406(a).

prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried").

When this case is analyzed under those traditional venue principles, it is evident that the Southern District of New York, not South Carolina, is the more appropriate place to litigate respondent's petition. The Government sought a material witness warrant for respondent's detention in the Southern District, indicating that it would be convenient for its attorneys to litigate in that forum. As a result of the Government's initial forum selection, the District Judge and counsel in the Southern District were familiar with the legal and factual issues surrounding respondent's detention both before and after he was transferred to the Defense Department's custody. Accordingly, fairness and efficiency counsel in favor of preserving venue in the Southern District. In sum, respondent properly filed his petition against Secretary Rumsfeld in the Southern District of New York.

III

Whether respondent is entitled to immediate release is a question that reasonable jurists may answer in different ways.[8] There is, however, only one possible answer to the question whether he is entitled to a hearing on the justification for his detention.[9]

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[8] Consistent with the judgment of the Court of Appeals, I believe that the Non-Detention Act, 18 U. S. C. § 4001(a), prohibits—and the Authorization for Use of Military Force Joint Resolution, 115 Stat. 224, adopted on September 18, 2001, does not authorize—the protracted, incommunicado detention of American citizens arrested in the United States.

[9] Respondent's custodian has been remarkably candid about the Government's motive in detaining respondent: " '[O]ur interest really in his case is not law enforcement, it is not punishment because he was a terrorist or working with the terrorists. Our interest at the moment is to try and find out everything he knows so that hopefully we can stop other terrorist

At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber.[10] Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process.

Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction. It may not, however, be justified by the naked interest in using unlawful procedures to extract information. Incommunicado detention for months on end is such a procedure. Whether the information so procured is more or less reliable than that acquired by more extreme forms of torture is of no consequence. For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny.

I respectfully dissent.

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acts.'" 233 F. Supp. 2d 564, 573–574 (SDNY 2002) (quoting News Briefing, Dept. of Defense (June 12, 2002), 2002 WL 22026773).

[10] See *Watts* v. *Indiana*, 338 U. S. 49, 54 (1949) (opinion of Frankfurter, J.). "There is torture of mind as well as body; the will is as much affected by fear as by force. And there comes a point where this Court should not be ignorant as judges of what we know as men." *Id.*, at 52.

Syllabus

RASUL ET AL. *v.* BUSH, PRESIDENT OF THE UNITED STATES, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 03–334. Argued April 20, 2004—Decided June 28, 2004*

Pursuant to Congress' joint resolution authorizing the use of necessary and appropriate force against nations, organizations, or persons that planned, authorized, committed, or aided in the September 11, 2001, al Qaeda terrorist attacks, the President sent Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it. Petitioners, 2 Australians and 12 Kuwaitis captured abroad during the hostilities, are being held in military custody at the Guantanamo Bay, Cuba, Naval Base, which the United States occupies under a lease and treaty recognizing Cuba's ultimate sovereignty, but giving this country complete jurisdiction and control for so long as it does not abandon the leased areas. Petitioners filed suits under federal law challenging the legality of their detention, alleging that they had never been combatants against the United States or engaged in terrorist acts, and that they have never been charged with wrongdoing, permitted to consult counsel, or provided access to courts or other tribunals. The District Court construed the suits as habeas petitions and dismissed them for want of jurisdiction, holding that, under *Johnson* v. *Eisentrager*, 339 U. S. 763, aliens detained outside United States sovereign territory may not invoke habeas relief. The Court of Appeals affirmed.

Held: United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay. Pp. 473–485.

(a) The District Court has jurisdiction to hear petitioners' habeas challenges under 28 U. S. C. §2241, which authorizes district courts, "within their respective jurisdictions," to entertain habeas applications by persons claiming to be held "in custody in violation of the . . . laws . . . of the United States," §§2241(a), (c)(3). Such jurisdiction extends to aliens held in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty." Pp. 473–484.

(1) The Court rejects respondents' primary submission that these cases are controlled by *Eisentrager*'s holding that a District Court

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*Together with No. 03–343, *Al Odah et al.* v. *United States et al.*, also on certiorari to the same court.

lacked authority to grant habeas relief to German citizens captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in occupied Germany. Reversing a Court of Appeals judgment finding jurisdiction, the *Eisentrager* Court found six critical facts: The German prisoners were (a) enemy aliens who (b) had never been or resided in the United States, (c) were captured outside U. S. territory and there held in military custody, (d) were there tried and convicted by the military (e) for offenses committed there, and (f) were imprisoned there at all times. 339 U. S., at 777. Petitioners here differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control. The *Eisentrager* Court also made clear that all six of the noted critical facts were relevant only to the question of the prisoners' *constitutional* entitlement to habeas review. *Ibid.* The Court's only statement on their *statutory* entitlement was a passing reference to its absence. *Id.*, at 768. This cursory treatment is explained by the Court's then-recent decision in *Ahrens* v. *Clark*, 335 U. S. 188, in which it held that the District Court for the District of Columbia lacked jurisdiction to entertain the habeas claims of aliens detained at Ellis Island because the habeas statute's phrase "within their respective jurisdictions" required the petitioners' presence within the court's territorial jurisdiction, *id.*, at 192. However, the Court later held, in *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 494–495, that such presence is not "an invariable prerequisite" to the exercise of § 2241 jurisdiction because habeas acts upon the person holding the prisoner, not the prisoner himself, so that the court acts "within [its] respective jurisdiction" if the custodian can be reached by service of process. Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* does not preclude the exercise of § 2241 jurisdiction over petitioners' claims. Pp. 475–479.

(2) Also rejected is respondents' contention that § 2241 is limited by the principle that legislation is presumed not to have extraterritorial application unless Congress clearly manifests such an intent, *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248. That presumption has no application to the operation of the habeas statute with respect to persons detained within "the [United States'] territorial jurisdiction." *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285. By the express terms of its agreements with Cuba, the United States exercises complete jurisdiction and control over the Guantanamo Base, and may continue to

Syllabus

do so permanently if it chooses. Respondents concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Considering that § 2241 draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the statute's geographical coverage to vary depending on the detainee's citizenship. Aliens held at the base, like American citizens, are entitled to invoke the federal courts' § 2241 authority. Pp. 480–482.

(3) Petitioners contend that they are being held in federal custody in violation of United States laws, and the District Court's jurisdiction over petitioners' custodians is unquestioned, cf. *Braden*, 410 U. S., at 495. Section 2241 requires nothing more and therefore confers jurisdiction on the District Court. Pp. 483–484.

(b) The District Court also has jurisdiction to hear the *Al Odah* petitioners' complaint invoking 28 U. S. C. § 1331, the federal-question statute, and § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed these claims for want of jurisdiction because the petitioners lacked the privilege of litigation in U. S. courts. Nothing in *Eisentrager* or any other of the Court's cases categorically excludes aliens detained in military custody outside the United States from that privilege. United States courts have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570, 578. And indeed, § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners are being held in military custody is immaterial. Pp. 484–485.

(c) Whether and what further proceedings may become necessary after respondents respond to the merits of petitioners' claims are not here addressed. P. 485.

321 F. 3d 1134, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, SOUTER, GINSBURG, and BREYER, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 485. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 488.

John J. Gibbons argued the cause for petitioners in both cases. With him on the briefs for petitioner Rasul et al. in No. 03–334 were *Joseph Margulies*, *Barbara J. Olshansky*, and *Michael Ratner*. *Thomas B. Wilner*, *Neil H. Koslowe*, and *Kristine A. Huskey* filed briefs for petitioner Al Odah et al. in both cases.

Counsel

Solicitor General Olson argued the cause for respondents in both cases. With him on the brief were *Assistant Attorney General Keisler*, *Deputy Solicitor General Clement*, *Deputy Assistant Attorney General Katsas*, *Gregory G. Garre*, *Douglas N. Letter*, *Robert M. Loeb*, *Sharon Swingle*, and *William H. Taft IV*.†

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†Briefs of *amici curiae* urging reversal in both cases were filed for Hungarian Jews et al. by *Steve W. Berman*, *R. Brent Walton*, *Jonathan W. Cuneo*, *David W. Stanley*, *Michael Waldman*, and *Samuel J. Dubbin;* for the International Commission of Jurists et al. by *William J. Butler* and *A. Hays Butler;* for the National Institute of Military Justice by *Ronald W. Meister;* for Abdullah Al-Joaid by *Mary Patricia Michel;* for Diego C. Asencio et al. by *William M. Hannay;* for David M. Brahms et al. by *James C. Schroeder;* for the Honorable John H. Dalton et al. by *Harold Hongju Koh*, *Gerald L. Neuman*, *Phillip H. Rudolph*, and *Daniel Feldman;* for Leslie H. Jackson et al. by *Thomas F. Cullen, Jr.*, and *Christian G. Vergonis;* for the Honorable Nathaniel R. Jones et al. by *David J. Bradford;* for Omar Ahmed Khadr by *John A. E. Pottow;* and for Fred Korematsu by *Stephen J. Schulhofer*, *Evan R. Chesler*, *Dale Minami*, and *Eric K. Yamamoto*.

Briefs of *amici curiae* urging affirmance in both cases were filed for the State of Alabama et al. by *John J. Park, Jr.*, Assistant Attorney General of Alabama, *Richard F. Allen*, Acting Attorney General of Alabama, and *Kevin Newsom*, Solicitor General, and by the Attorneys General for their respective States as follows: *Jim Petro* of Ohio, *Greg Abbott* of Texas, and *Jerry W. Kilgore* of Virginia; for the Honorable Bill Owens, Governor of Colorado, et al. by *Richard A. Westfall* and *Allan L. Hale;* for the American Center for Law & Justice et al. by *Jay Alan Sekulow*, *Thomas P. Monaghan*, *Stuart J. Roth*, *Colby M. May*, *James M. Henderson, Sr.*, *Joel H. Thornton*, and *Robert W. Ash;* for Citizens for the Common Defence by *Carter G. Phillips;* for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Richard A. Samp;* for Professor Kenneth Anderson et al. by *David B. Rivkin, Jr.*, *Lee A. Casey*, *Darin R. Bartram*, *Ruth Wedgwood*, *Charles Fried*, and *Max Kampelman;* and for the Honorable William P. Barr et al. by *Andrew G. McBride*.

Briefs of *amici curiae* were filed in both cases for the Bipartisan Coalition of National and International Non-Governmental Organizations by *Jonathan M. Freiman;* for the Center for Justice and Accountability et al. by *Nicholas W. Van Aelstyn*, *Warrington S. Parker III*, *Thomas P. Brown*, *Christian E. Mammen*, and *Elizabeth A. Brown;* for the Commonwealth Lawyers Association by *Stephen J. Pollak* and *John Townsend Rich;* for the Human Rights Institute of the International Bar Association

JUSTICE STEVENS delivered the opinion of the Court.

These two cases present the narrow but important question whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba.

I

On September 11, 2001, agents of the al Qaeda terrorist network hijacked four commercial airliners and used them as missiles to attack American targets. While one of the four attacks was foiled by the heroism of the plane's passengers, the other three killed approximately 3,000 innocent civilians, destroyed hundreds of millions of dollars of property, and severely damaged the U. S. economy. In response to the attacks, Congress passed a joint resolution authorizing the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . or harbored such organizations or persons." Authorization for Use of Military Force, Pub. L. 107–40, §§ 1–2, 115 Stat. 224. Acting pursuant to that authorization, the President sent U. S. Armed Forces into Afghanistan to wage a military campaign against al Qaeda and the Taliban regime that had supported it.

Petitioners in these cases are 2 Australian citizens and 12 Kuwaiti citizens who were captured abroad during hostilities

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by *Pamela Rogers Chepiga;* for International Law Expert by *James R. Klimaski;* for Sir J. H. Baker et al. by *James Oldham* and *Michael J. Wishnie;* for Professor John H. Barton et al. by *Mr. Barton, pro se,* and *Barry E. Carter;* and for 175 Members of Both Houses of the Parliament of the United Kingdom of Great Britain and Northern Ireland by *Edwin S. Matthews, Jr.,* and *Edward H. Tillinghast III.*

A brief of *amicus curiae* was filed in No. 03–343 for Military Attorneys Assigned to the Defense in the Office of Military Commissions by *Neal Katyal, Sharon A. Shaffer, Philip Sundel, Mark A. Bridges,* and *Michael D. Mori.*

between the United States and the Taliban.[1] Since early 2002, the U. S. military has held them—along with, according to the Government's estimate, approximately 640 other non-Americans captured abroad—at the naval base at Guantanamo Bay. Brief for Respondents 6. The United States occupies the base, which comprises 45 square miles of land and water along the southeast coast of Cuba, pursuant to a 1903 Lease Agreement executed with the newly independent Republic of Cuba in the aftermath of the Spanish-American War. Under the agreement, "the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," while "the Republic of Cuba consents that during the period of the occupation by the United States . . . the United States shall exercise complete jurisdiction and control over and within said areas."[2] In 1934, the parties entered into a treaty providing that, absent an agreement to modify or abrogate the lease, the lease would remain in effect "[s]o long as the United States of America shall not abandon the . . . naval station of Guantanamo."[3]

In 2002, petitioners, through relatives acting as their next friends, filed various actions in the U. S. District Court for the District of Columbia challenging the legality of their detention at the base. All alleged that none of the petitioners has ever been a combatant against the United States or has

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[1] When we granted certiorari, the petitioners also included two British citizens, Shafiq Rasul and Asif Iqbal. These petitioners have since been released from custody.

[2] Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418 (hereinafter 1903 Lease Agreement). A supplemental lease agreement, executed in July 1903, obligates the United States to pay an annual rent in the amount of "two thousand dollars, in gold coin of the United States," and to maintain "permanent fences" around the base. Lease of Certain Areas for Naval or Coaling Stations, July 2, 1903, U. S.-Cuba, Arts. I–II, T. S. No. 426.

[3] Treaty Defining Relations with Cuba, May 29, 1934, U. S.-Cuba, Art. III, 48 Stat. 1683, T. S. No. 866 (hereinafter 1934 Treaty).

ever engaged in any terrorist acts.[4] They also alleged that none has been charged with any wrongdoing, permitted to consult with counsel, or provided access to the courts or any other tribunal. App. 29, 77, 108.[5]

The two Australians, Mamdouh Habib and David Hicks, each filed a petition for writ of habeas corpus, seeking release from custody, access to counsel, freedom from interrogations, and other relief. *Id.*, at 98–99, 124–126. Fawzi Khalid Abdullah Fahad Al Odah and the 11 other Kuwaiti detainees filed a complaint seeking to be informed of the charges against them, to be allowed to meet with their families and with counsel, and to have access to the courts or some other impartial tribunal. *Id.*, at 34. They claimed that denial of these rights violates the Constitution, international law, and treaties of the United States. Invoking the court's jurisdiction under 28 U. S. C. §§ 1331 and 1350, among other statutory bases, they asserted causes of action under the Administrative Procedure Act, 5 U. S. C. §§ 555, 702, 706; the Alien Tort Statute, 28 U. S. C. § 1350; and the general federal habeas corpus statute, §§ 2241–2243. App. 19.

Construing all three actions as petitions for writs of habeas corpus, the District Court dismissed them for want of jurisdiction. The court held, in reliance on our opinion in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), that "aliens detained outside the sovereign territory of the United States

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[4] Relatives of the Kuwaiti detainees allege that the detainees were taken captive "by local villagers seeking promised bounties or other financial rewards" while they were providing humanitarian aid in Afghanistan and Pakistan, and were subsequently turned over to U. S. custody. App. 24–25. The Australian David Hicks was allegedly captured in Afghanistan by the Northern Alliance, a coalition of Afghan groups opposed to the Taliban, before he was turned over to the United States. *Id.*, at 84. The Australian Mamdouh Habib was allegedly arrested in Pakistan by Pakistani authorities and turned over to Egyptian authorities, who in turn transferred him to U. S. custody. *Id.*, at 110–111.

[5] David Hicks has since been permitted to meet with counsel. Brief for Respondents 9.

[may not] invok[e] a petition for a writ of habeas corpus." 215 F. Supp. 2d 55, 68 (DC 2002). The Court of Appeals affirmed. Reading *Eisentrager* to hold that "'the privilege of litigation' does not extend to aliens in military custody who have no presence in 'any territory over which the United States is sovereign,'" 321 F. 3d 1134, 1144 (CADC 2003) (quoting *Eisentrager*, 339 U. S., at 777–778), it held that the District Court lacked jurisdiction over petitioners' habeas actions, as well as their remaining federal statutory claims that do not sound in habeas. We granted certiorari, 540 U. S. 1003 (2003), and now reverse.

II

Congress has granted federal district courts, "within their respective jurisdictions," the authority to hear applications for habeas corpus by any person who claims to be held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §§ 2241(a), (c)(3). The statute traces its ancestry to the first grant of federal-court jurisdiction: Section 14 of the Judiciary Act of 1789 authorized federal courts to issue the writ of habeas corpus to prisoners who are "in custody, under or by colour of the authority of the United States, or are committed for trial before some court of the same." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. In 1867, Congress extended the protections of the writ to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, 14 Stat. 385. See *Felker* v. *Turpin*, 518 U. S. 651, 659–660 (1996).

Habeas corpus is, however, "a writ antecedent to statute, . . . throwing its root deep into the genius of our common law." *Williams* v. *Kaiser*, 323 U. S. 471, 484, n. 2 (1945) (internal quotation marks omitted). The writ appeared in English law several centuries ago, became "an integral part of our common-law heritage" by the time the

Colonies achieved independence, *Preiser* v. *Rodriguez*, 411 U. S. 475, 485 (1973), and received explicit recognition in the Constitution, which forbids suspension of "[t]he Privilege of the Writ of Habeas Corpus . . . unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2.

As it has evolved over the past two centuries, the habeas statute clearly has expanded habeas corpus "beyond the limits that obtained during the 17th and 18th centuries." *Swain* v. *Pressley*, 430 U. S. 372, 380, n. 13 (1977). But "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). See also *Brown* v. *Allen*, 344 U. S. 443, 533 (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial"). As Justice Jackson wrote in an opinion respecting the availability of habeas corpus to aliens held in U. S. custody:

> "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U. S. 206, 218–219 (1953) (dissenting opinion).

Consistent with the historic purpose of the writ, this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace. The Court has, for example, entertained the habeas petitions of an American citizen who plotted an attack on military installations during the Civil War, *Ex parte*

Milligan, 4 Wall. 2 (1866), and of admitted enemy aliens convicted of war crimes during a declared war and held in the United States, *Ex parte Quirin*, 317 U. S. 1 (1942), and its insular possessions, *In re Yamashita*, 327 U. S. 1 (1946).

The question now before us is whether the habeas statute confers a right to judicial review of the legality of executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not "ultimate sovereignty."[6]

III

Respondents' primary submission is that the answer to the jurisdictional question is controlled by our decision in *Eisentrager*. In that case, we held that a Federal District Court lacked authority to issue a writ of habeas corpus to 21 German citizens who had been captured by U. S. forces in China, tried and convicted of war crimes by an American military commission headquartered in Nanking, and incarcerated in the Landsberg Prison in occupied Germany. The Court of Appeals in *Eisentrager* had found jurisdiction, reasoning that "any person who is deprived of his liberty by officials of the United States, acting under purported authority of that Government, and who can show that his confinement is in violation of a prohibition of the Constitution, has a right to the writ." *Eisentrager* v. *Forrestal*, 174 F. 2d 961, 963 (CADC 1949). In reversing that determination, this Court summarized the six critical facts in the case:

> "We are here confronted with a decision whose basic premise is that these prisoners are entitled, as a constitutional right, to sue in some court of the United States for a writ of *habeas corpus*. To support that assumption we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our ter-

[6] 1903 Lease Agreement, Art. III.

> ritory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against laws of war committed outside the United States; (f) and is at all times imprisoned outside the United States." 339 U. S., at 777.

On this set of facts, the Court concluded, "no right to the writ of *habeas corpus* appears." *Id.,* at 781.

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the prisoners' *constitutional* entitlement to habeas corpus. *Id.,* at 777. The Court had far less to say on the question of the petitioners' *statutory* entitlement to habeas review. Its only statement on the subject was a passing reference to the absence of statutory authorization: "Nothing in the text of the Constitution extends such a right, nor does anything in our statutes." *Id.,* at 768.

Reference to the historical context in which *Eisentrager* was decided explains why the opinion devoted so little attention to the question of statutory jurisdiction. In 1948, just two months after the *Eisentrager* petitioners filed their petition for habeas corpus in the U. S. District Court for the District of Columbia, this Court issued its decision in *Ahrens* v. *Clark,* 335 U. S. 188, a case concerning the application of the habeas statute to the petitions of 120 Germans who were

then being detained at Ellis Island, New York, for deportation to Germany. The *Ahrens* detainees had also filed their petitions in the U. S. District Court for the District of Columbia, naming the Attorney General as the respondent. Reading the phrase "within their respective jurisdictions" as used in the habeas statute to require the petitioners' presence within the district court's territorial jurisdiction, the Court held that the District of Columbia court lacked jurisdiction to entertain the detainees' claims. *Id.*, at 192. *Ahrens* expressly reserved the question "of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, at 192, n. 4. But as the dissent noted, if the presence of the petitioner in the territorial jurisdiction of a federal district court were truly a jurisdictional requirement, there could be only one response to that question. *Id.*, at 209 (opinion of Rutledge, J.).[7]

When the District Court for the District of Columbia reviewed the German prisoners' habeas application in *Eisentrager*, it thus dismissed their action on the authority of *Ahrens*. See *Eisentrager*, 339 U. S., at 767, 790. Although the Court of Appeals reversed the District Court, it implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*. The Court of Appeals instead held that petitioners had a constitutional right to habeas corpus secured by the Suspension Clause, U. S. Const., Art. I, § 9, cl. 2, reasoning that "if a person has a right to a writ of habeas corpus, he cannot be deprived of the privilege by an omission in a fed-

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[7] Justice Rutledge wrote:

"[I]f absence of the body detained from the territorial jurisdiction of the court having jurisdiction of the jailer creates a total and irremediable void in the court's capacity to act, . . . then it is hard to see how that gap can be filled by such extraneous considerations as whether there is no other court in the place of detention from which remedy might be had . . . ." 335 U. S., at 209.

eral jurisdictional statute." *Eisentrager* v. *Forrestal*, 174 F. 2d, at 965. In essence, the Court of Appeals concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to "fundamentals." 174 F. 2d, at 963. In its review of that decision, this Court, like the Court of Appeals, proceeded from the premise that "nothing in our statutes" conferred federal-court jurisdiction, and accordingly evaluated the Court of Appeals' resort to "fundamentals" on its own terms. 339 U. S., at 768.[8]

Because subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to "fundamentals," persons detained outside the territorial jurisdiction of any federal district court no longer need rely on the Constitution as the source of their right to federal habeas review. In *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484, 495 (1973), this Court held, contrary to *Ahrens*, that the prisoner's presence within the territorial jurisdiction of the district court is not "an invariable prerequisite" to the exercise of district court jurisdiction under the federal habeas statute. Rather, because "the writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody," a district court acts "within [its] respective jurisdiction" within the meaning of § 2241 as long as "the custodian

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[8] Although JUSTICE SCALIA disputes the basis for the Court of Appeals' holding, *post*, at 491 (dissenting opinion), what is most pertinent for present purposes is that this Court clearly understood the Court of Appeals' decision to rest on constitutional and not statutory grounds. *Eisentrager*, 339 U. S., at 767 ("[The Court of Appeals] concluded that any person, including an enemy alien, deprived of his liberty anywhere under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal; [and] that, *although no statutory jurisdiction of such cases is given*, courts must be held to possess it as part of the judicial power of the United States . . ." (emphasis added)).

can be reached by service of process." 410 U. S., at 494–495. *Braden* reasoned that its departure from the rule of *Ahrens* was warranted in light of developments that "had a profound impact on the continuing vitality of that decision." 410 U. S., at 497. These developments included, notably, decisions of this Court in cases involving habeas petitioners "confined overseas (and thus outside the territory of any district court)," in which the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.*, at 498 (citing *Burns* v. *Wilson*, 346 U. S. 137 (1953), rehearing denied, 346 U. S. 844, 851–852 (opinion of Frankfurter, J.); *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11 (1955); *Hirota* v. *MacArthur*, 338 U. S. 197, 199 (1948) (Douglas, J., concurring (1949))). *Braden* thus established that *Ahrens* can no longer be viewed as establishing "an inflexible jurisdictional rule," and is strictly relevant only to the question of the appropriate forum, not to whether the claim can be heard at all. 410 U. S., at 499–500.

Because *Braden* overruled the statutory predicate to *Eisentrager*'s holding, *Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims.[9]

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[9] The dissent argues that *Braden* did not overrule *Ahrens*' jurisdictional holding, but simply distinguished it. *Post*, at 494–495. Of course, *Braden* itself indicated otherwise, 410 U. S., at 495–500, and a long line of judicial and scholarly interpretations, beginning with then-JUSTICE REHNQUIST's dissenting opinion, have so understood the decision. See, *e. g.*, *id.*, at 502 ("Today the Court overrules *Ahrens*"); *Moore* v. *Olson*, 368 F. 3d 757, 758 (CA7 2004) ("[A]fter *Braden* . . . , which overruled *Ahrens*, the location of a collateral attack is best understood as a matter of venue"); *Armentero* v. *INS*, 340 F. 3d 1058, 1063 (CA9 2003) ("[T]he Court in *[Braden]* declared that *Ahrens* was overruled"); *Henderson* v. *INS*, 157 F. 3d 106, 126, n. 20 (CA2 1998) ("On the issue of territorial jurisdiction, *Ahrens* was subsequently overruled by *Braden*"); *Chatman-Bey* v. *Thornburgh*, 864 F. 2d 804, 811 (CADC 1988) (en banc) ("[I]n *Braden*, the Court cut back substantially on *Ahrens* (and indeed overruled its territorially-based jurisdictional

IV

Putting *Eisentrager* and *Ahrens* to one side, respondents contend that we can discern a limit on § 2241 through application of the "longstanding principle of American law" that congressional legislation is presumed not to have extraterritorial application unless such intent is clearly manifested. *EEOC* v. *Arabian American Oil Co.*, 499 U. S. 244, 248 (1991). Whatever traction the presumption against extraterritoriality might have in other contexts, it certainly has no application to the operation of the habeas statute with respect to persons detained within "the territorial jurisdiction" of the United States. *Foley Bros., Inc.* v. *Filardo*, 336 U. S. 281, 285 (1949). By the express terms of its agreements with Cuba, the United States exercises "complete jurisdiction and control" over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses. 1903 Lease Agreement, Art. III; 1934

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holding)"). See also, *e. g.*, *Patterson* v. *McLean Credit Union*, 485 U. S. 617, 618 (1988) *(per curiam);* Eskridge, Overruling Statutory Precedents, 76 Geo. L. J. 1361, App. A (1988).

The dissent also disingenuously contends that the continuing vitality of *Ahrens'* jurisdictional holding is irrelevant to the question presented in these cases, "inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager.*" *Post*, at 494. But what JUSTICE SCALIA describes as *Eisentrager*'s statutory holding—"that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States," *post*, at 493—is little more than the rule of *Ahrens* cloaked in the garb of *Eisentrager*'s facts. To contend plausibly that this holding survived *Braden*, JUSTICE SCALIA at a minimum must find a textual basis for the rule other than the phrase "within their respective jurisdictions"—a phrase which, after *Braden*, can no longer be read to require the habeas petitioner's physical presence within the territorial jurisdiction of a federal district court. Two references to the district of confinement in provisions relating to recordkeeping and pleading requirements in proceedings before circuit judges hardly suffice in that regard. See *post*, at 489–490 (citing 28 U. S. C. §§ 2241(a), 2242).

Treaty, Art. III. Respondents themselves concede that the habeas statute would create federal-court jurisdiction over the claims of an American citizen held at the base. Tr. of Oral Arg. 27. Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship.[10] Aliens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241.

Application of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus. At common law, courts exercised habeas jurisdiction over the claims of aliens detained within sovereign territory of the realm,[11] as well as the claims of persons

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[10] JUSTICE SCALIA appears to agree that neither the plain text of the statute nor his interpretation of that text provides a basis for treating American citizens differently from aliens. *Post*, at 497. But resisting the practical consequences of his position, he suggests that he might nevertheless recognize an "atextual exception" to his statutory rule for citizens held beyond the territorial jurisdiction of the federal district courts. *Ibid.*

[11] See, *e. g.*, *King* v. *Schiever*, 2 Burr. 765, 97 Eng. Rep. 551 (K. B. 1759) (reviewing the habeas petition of a neutral alien deemed a prisoner of war because he was captured aboard an enemy French privateer during a war between England and France); *Sommersett* v. *Stewart*, 20 How. St. Tr. 1, 79–82 (K. B. 1772) (releasing on habeas an African slave purchased in Virginia and detained on a ship docked in England and bound for Jamaica); *Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810) (reviewing the habeas petition of a "native of *South Africa*" allegedly held in private custody).

American courts followed a similar practice in the early years of the Republic. See, *e. g.*, *United States* v. *Villato*, 2 Dall. 370 (CC Pa. 1797) (granting habeas relief to Spanish-born prisoner charged with treason on the ground that he had never become a citizen of the United States); *Ex parte D'Olivera*, 7 F. Cas. 853 (No. 3,967) (CC Mass. 1813) (Story, J., on circuit) (ordering the release of Portuguese sailors arrested for deserting their ship); *Wilson* v. *Izard*, 30 F. Cas. 131 (No. 17,810) (CC NY 1815)

detained in the so-called "exempt jurisdictions," where ordinary writs did not run,[12] and all other dominions under the sovereign's control.[13] As Lord Mansfield wrote in 1759, even if a territory was "no part of the realm," there was "no doubt" as to the court's power to issue writs of habeas corpus if the territory was "under the subjection of the Crown." *King* v. *Cowle*, 2 Burr. 834, 854–855, 97 Eng. Rep. 587, 598–599 (K. B.). Later cases confirmed that the reach of the writ depended not on formal notions of territorial sovereignty, but rather on the practical question of "the exact extent and nature of the jurisdiction or dominion exercised in fact by the Crown." *Ex parte Mwenya*, [1960] 1 Q. B. 241, 303 (C. A.) (Lord Evershed, M. R.).[14]

(Livingston, J., on circuit) (reviewing the habeas petition of enlistees who claimed that they were entitled to discharge because of their status as enemy aliens).

[12] See, *e. g.*, *Bourn's Case*, Cro. Jac. 543, 79 Eng. Rep. 465 (K. B. 1619) (writ issued to the Cinque-Ports town of Dover); *Alder* v. *Puisy*, 1 Freem. 12, 89 Eng. Rep. 10 (K. B. 1671) (same); *Jobson's Case*, Latch 160, 82 Eng. Rep. 325 (K. B. 1626) (entertaining the habeas petition of a prisoner held in the County Palatine of Durham). See also 3 W. Blackstone, Commentaries on the Laws of England 79 (1769) (hereinafter Blackstone) ("[A]ll prerogative writs (as those of *habeas corpus*, prohibition, *certiorari*, and *mandamus*) may issue . . . to all these exempt jurisdictions; because the privilege, that the king's writ runs not, must be intended between party and party, for there can be no such privilege against the king" (footnotes omitted)); R. Sharpe, Law of Habeas Corpus 188–189 (2d ed. 1989) (describing the "extraordinary territorial ambit" of the writ at common law).

[13] See, *e. g.*, *King* v. *Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K. B. 1668) (writ issued to Isle of Jersey); *King* v. *Salmon*, 2 Keb. 450, 84 Eng. Rep. 282 (K. B. 1669) (same). See also 3 Blackstone 131 (habeas corpus "run[s] into all parts of the king's dominions: for the king is at all times [e]ntitled to have an account, why the liberty of any of his subjects is restrained, wherever that restraint may be inflicted" (footnote omitted)); M. Hale, History of the Common Law 120–121 (C. Gray ed. 1971) (writ of habeas corpus runs to the Channel Islands, even though "they are not Parcel of the Realm of England").

[14] *Ex parte Mwenya* held that the writ ran to a territory described as a "foreign country within which [the Crown] ha[d] power and jurisdiction by treaty, grant, usage, sufferance, and other lawful means." 1 Q. B., at 265

In the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States.[15] No party questions the District Court's jurisdiction over petitioners' custodians. Cf. *Braden*, 410 U. S., at 495. Section

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(Parker, C. J.) (internal quotation marks omitted). See also *King* v. *The Earl of Crewe ex parte Sekgome*, [1910] 2 K. B. 576, 606 (C. A.) (Williams, L. J.) (concluding that the writ would run to such a territory); *id.*, at 618 (Farwell, L. J.) (same). As Lord Justice Sellers explained:

"Lord Mansfield gave the writ the greatest breadth of application which in the then circumstances could well be conceived. . . . 'Subjection' is fully appropriate to the powers exercised or exercisable by this country irrespective of territorial sovereignty or dominion, and it embraces in outlook the power of the Crown in the place concerned." 1 Q. B., at 310.

JUSTICE SCALIA cites *In re Ning Yi-Ching*, 56 T. L. R. 3 (K. B. Vac. Ct. 1939), for the broad proposition that habeas corpus has been categorically unavailable to aliens held outside sovereign territory. *Post*, at 504. *Ex parte Mwenya*, however, casts considerable doubt on this narrow view of the territorial reach of the writ. 1 Q. B., at 295 (Lord Evershed, M. R.) (noting that *In re Ning Yi-Ching* relied on Lord Justice Kennedy's opinion in *Ex parte Sekgome* concerning the territorial reach of the writ, despite the opinions of two members of the court who "took a different view upon this matter"). And *In re Ning Yi-Ching* itself made quite clear that "the remedy of *habeas corpus* was not confined to British subjects," but would extend to "any person . . . detained" within reach of the writ. 56 T. L. R., at 5 (citing *Ex parte Sekgome*, 2 K. B., at 620 (Kennedy, L. J.)). Moreover, the result in that case can be explained by the peculiar nature of British control over the area where the petitioners, four Chinese nationals accused of various criminal offenses, were being held pending transfer to the local district court. Although the treaties governing the British Concession at Tientsin did confer on Britain "certain rights of administration and control," "the right to administer justice" to Chinese nationals was not among them. 56 T. L. R., at 4–6.

[15] Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. §2241(c)(3). Cf. *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring), and cases cited therein.

2241, by its terms, requires nothing more. We therefore hold that § 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenges to the legality of their detention at the Guantanamo Bay Naval Base.

V

In addition to invoking the District Court's jurisdiction under § 2241, the Al Odah petitioners' complaint invoked the court's jurisdiction under 28 U. S. C. § 1331, the federal-question statute, as well as § 1350, the Alien Tort Statute. The Court of Appeals, again relying on *Eisentrager*, held that the District Court correctly dismissed the claims founded on § 1331 and § 1350 for lack of jurisdiction, even to the extent that these claims "deal only with conditions of confinement and do not sound in habeas," because petitioners lack the "privilege of litigation" in U. S. courts. 321 F. 3d, at 1144 (internal quotation marks omitted). Specifically, the court held that because petitioners' § 1331 and § 1350 claims "necessarily rest on alleged violations of the same category of laws listed in the habeas corpus statute," they, like claims founded on the habeas statute itself, must be "beyond the jurisdiction of the federal courts." *Id.*, at 1144–1145.

As explained above, *Eisentrager* itself erects no bar to the exercise of federal-court jurisdiction over the petitioners' habeas corpus claims. It therefore certainly does not bar the exercise of federal-court jurisdiction over claims that merely implicate the "same category of laws listed in the habeas corpus statute." But in any event, nothing in *Eisentrager* or in any of our other cases categorically excludes aliens detained in military custody outside the United States from the " 'privilege of litigation' " in U. S. courts. 321 F. 3d, at 1139. The courts of the United States have traditionally been open to nonresident aliens. Cf. *Disconto Gesellschaft* v. *Umbreit*, 208 U. S. 570, 578 (1908) ("Alien citizens, by the policy and practice of the courts of this country, are ordinarily permitted to resort to the courts for the redress of wrongs and the

protection of their rights"). And indeed, 28 U. S. C. § 1350 explicitly confers the privilege of suing for an actionable "tort . . . committed in violation of the law of nations or a treaty of the United States" on aliens alone. The fact that petitioners in these cases are being held in military custody is immaterial to the question of the District Court's jurisdiction over their nonhabeas statutory claims.

VI

Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now. What is presently at stake is only whether the federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing. Answering that question in the affirmative, we reverse the judgment of the Court of Appeals and remand these cases for the District Court to consider in the first instance the merits of petitioners' claims.

It is so ordered.

JUSTICE KENNEDY, concurring in the judgment.

The Court is correct, in my view, to conclude that federal courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals held at the Guantanamo Bay Naval Base in Cuba. While I reach the same conclusion, my analysis follows a different course. JUSTICE SCALIA exposes the weakness in the Court's conclusion that *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973), "overruled the statutory predicate to *Eisentrager*'s holding," *ante*, at 479. As he explains, the Court's approach is not a plausible reading of *Braden* or *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950). In my view, the correct course is to follow the framework of *Eisentrager*.

Eisentrager considered the scope of the right to petition for a writ of habeas corpus against the backdrop of the con-

stitutional command of the separation of powers. The issue before the Court was whether the Judiciary could exercise jurisdiction over the claims of German prisoners held in the Landsberg prison in Germany following the cessation of hostilities in Europe. The Court concluded the petition could not be entertained. The petition was not within the proper realm of the judicial power. It concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.

The Court began by noting the "ascending scale of rights" that courts have recognized for individuals depending on their connection to the United States. *Id.*, at 770. Citizenship provides a longstanding basis for jurisdiction, the Court noted, and among aliens physical presence within the United States also "gave the Judiciary power to act." *Id.*, at 769, 771. This contrasted with the "essential pattern for seasonable Executive constraint of enemy aliens." *Id.*, at 773. The place of the detention was also important to the jurisdictional question, the Court noted. Physical presence in the United States "implied protection," *id.*, at 777–778, whereas in *Eisentrager* "th[e] prisoners at no relevant time were within any territory over which the United States is sovereign," *id.*, at 778. The Court next noted that the prisoners in *Eisentrager* "were actual enemies" of the United States, proven to be so at trial, and thus could not justify "a limited opening of our courts" to distinguish the "many [aliens] of friendly personal disposition to whom the status of enemy" was unproven. *Ibid.* Finally, the Court considered the extent to which jurisdiction would "hamper the war effort and bring aid and comfort to the enemy." *Id.*, at 779. Because the prisoners in *Eisentrager* were proven enemy aliens found and detained outside the United States, and because the existence of jurisdiction would have had a clear harmful effect on the Nation's military affairs, the matter was appropriately left to the Executive Branch and there was no jurisdiction for the courts to hear the prisoner's claims.

The decision in *Eisentrager* indicates that there is a realm of political authority over military affairs where the judicial power may not enter. The existence of this realm acknowledges the power of the President as Commander in Chief, and the joint role of the President and the Congress, in the conduct of military affairs. A faithful application of *Eisentrager*, then, requires an initial inquiry into the general circumstances of the detention to determine whether the Court has the authority to entertain the petition and to grant relief after considering all of the facts presented. A necessary corollary of *Eisentrager* is that there are circumstances in which the courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated. See also *Ex parte Milligan*, 4 Wall. 2 (1866).

The facts here are distinguishable from those in *Eisentrager* in two critical ways, leading to the conclusion that a federal court may entertain the petitions. First, Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities. The opinion of the Court well explains the history of its possession by the United States. In a formal sense, the United States leases the Bay; the 1903 lease agreement states that Cuba retains "ultimate sovereignty" over it. Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418. At the same time, this lease is no ordinary lease. Its term is indefinite and at the discretion of the United States. What matters is the unchallenged and indefinite control that the United States has long exercised over Guantanamo Bay. From a practical perspective, the indefinite lease of Guantanamo Bay has produced a place that belongs to the United States, extending the "implied protection" of the United States to it. *Eisentrager*, *supra*, at 777–778.

The second critical set of facts is that the detainees at Guantanamo Bay are being held indefinitely, and without

benefit of any legal proceeding to determine their status. In *Eisentrager,* the prisoners were tried and convicted by a military commission of violating the laws of war and were sentenced to prison terms. Having already been subject to procedures establishing their status, they could not justify "a limited opening of our courts" to show that they were "of friendly personal disposition" and not enemy aliens. 339 U. S., at 778. Indefinite detention without trial or other proceeding presents altogether different considerations. It allows friends and foes alike to remain in detention. It suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus. Perhaps, where detainees are taken from a zone of hostilities, detention without proceedings or trial would be justified by military necessity for a matter of weeks; but as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker.

In light of the status of Guantanamo Bay and the indefinite pretrial detention of the detainees, I would hold that federal-court jurisdiction is permitted in these cases. This approach would avoid creating automatic statutory authority to adjudicate the claims of persons located outside the United States, and remains true to the reasoning of *Eisentrager.* For these reasons, I concur in the judgment of the Court.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, dissenting.

The Court today holds that the habeas statute, 28 U. S. C. § 2241, extends to aliens detained by the United States military overseas, outside the sovereign borders of the United States and beyond the territorial jurisdictions of all its courts. This is not only a novel holding; it contradicts a half-century-old precedent on which the military undoubtedly relied, *Johnson* v. *Eisentrager,* 339 U. S. 763 (1950). The Court's contention that *Eisentrager* was somehow ne-

gated by *Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U. S. 484 (1973)—a decision that dealt with a different issue and did not so much as mention *Eisentrager*—is implausible in the extreme. This is an irresponsible overturning of settled law in a matter of extreme importance to our forces currently in the field. I would leave it to Congress to change § 2241, and dissent from the Court's unprecedented holding.

I

As we have repeatedly said: "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction . . . ." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U. S. 375, 377 (1994) (citations omitted). The petitioners do not argue that the Constitution independently requires jurisdiction here.[1] Accordingly, these cases turn on the words of § 2241, a text the Court today largely ignores. Even a cursory reading of the habeas statute shows that it presupposes a federal district court with territorial jurisdiction over the detainee. Section 2241(a) states:

> "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" (Emphasis added.)

It further requires that "[t]he order of a circuit judge shall be entered in the records of *the* district court of *the district wherein the restraint complained of is had.*" (Emphases added.) And § 2242 provides that a petition "addressed to the Supreme Court, a justice thereof or a circuit judge . . .

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[1] See Tr. of Oral Arg. 5 ("Question: And you don't raise the issue of any potential jurisdiction on the basis of the Constitution alone. We are here debating the jurisdiction under the Habeas Statute, is that right? [Answer]: That's correct . . .").

shall state the reasons for not making application to *the* district court of *the district in which the applicant is held.*" (Emphases added.) No matter to whom the writ is directed, custodian or detainee, the statute could not be clearer that a necessary requirement for issuing the writ is that *some* federal district court have territorial jurisdiction over the detainee. Here, as the Court allows, see *ante*, at 478, the Guantanamo Bay detainees are not located within the territorial jurisdiction of any federal district court. One would think that is the end of these cases.

The Court asserts, however, that the decisions of this Court have placed a gloss on the phrase "within their respective jurisdictions" in § 2241 which allows jurisdiction in these cases. That is not so. In fact, the only case in point holds just the opposite (and just what the statute plainly says). That case is *Eisentrager*, but to fully understand its implications for the present dispute, I must also discuss our decisions in the earlier case of *Ahrens* v. *Clark*, 335 U. S. 188 (1948), and the later case of *Braden*.

In *Ahrens*, the Court considered "whether the presence within the territorial jurisdiction of the District Court of the person detained is prerequisite to filing a petition for a writ of *habeas corpus*." 335 U. S., at 189 (construing 28 U. S. C. § 452, the statutory precursor to § 2241). The *Ahrens* detainees were held at Ellis Island, New York, but brought their petitions in the District Court for the District of Columbia. Interpreting "within their respective jurisdictions," the Court held that a district court has jurisdiction to issue the writ only on behalf of petitioners detained within its territorial jurisdiction. It was "not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." 335 U. S., at 190.

Ahrens explicitly reserved "the question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." *Id.*, at 192, n. 4. That question, the same question

presented to this Court today, was shortly thereafter resolved in *Eisentrager* insofar as noncitizens are concerned. *Eisentrager* involved petitions for writs of habeas corpus filed in the District Court for the District of Columbia by German nationals imprisoned in Landsberg Prison, Germany. The District Court, relying on *Ahrens*, dismissed the petitions because the petitioners were not located within its territorial jurisdiction. The Court of Appeals reversed. According to the Court today, the Court of Appeals "implicitly conceded that the District Court lacked jurisdiction under the habeas statute as it had been interpreted in *Ahrens*," and "[i]n essence . . . concluded that the habeas statute, as construed in *Ahrens*, had created an unconstitutional gap that had to be filled by reference to 'fundamentals.'" *Ante*, at 477, 478. That is not so. The Court of Appeals concluded that there *was* statutory jurisdiction. It arrived at that conclusion by applying the canon of constitutional avoidance: "[I]f the existing jurisdictional act be construed to deny the writ to a person entitled to it as a substantive right, the act would be unconstitutional. It should be construed, if possible, to avoid that result." *Eisentrager* v. *Forrestal*, 174 F. 2d 961, 966 (CADC 1949). In cases where there was no territorial jurisdiction over the detainee, the Court of Appeals held, the writ would lie at the place of a respondent with directive power over the detainee. "It is not too violent an interpretation of 'custody' to construe it as including those who have directive custody, as well as those who have immediate custody, where such interpretation is necessary to comply with constitutional requirements. . . . *The statute must be so construed*, lest it be invalid as constituting a suspension of the writ in violation of the constitutional provision." *Id.*, at 967 (emphasis added).[2]

[2] The parties' submissions to the Court in *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), construed the Court of Appeals' decision as I do. See Pet. for Cert., O. T. 1949, No. 306, pp. 8–9 ("[T]he court felt constrained to construe the habeas corpus jurisdictional statute—despite its reference to

This Court's judgment in *Eisentrager* reversed the Court of Appeals. The opinion was largely devoted to rejecting the lower court's constitutional analysis, since the doctrine of constitutional avoidance underlay its statutory conclusion. But the opinion *had* to pass judgment on whether the statute granted jurisdiction, since that was the basis for the judgments of both lower courts. A conclusion of no constitutionally conferred right would obviously not support reversal of a judgment that rested upon a statutorily conferred right.[3]

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the 'respective jurisdictions' of the various courts and the gloss put on that terminology in the *Ahrens* and previous decisions—to permit a petition to be filed in the district court with territorial jurisdiction over the officials who have directive authority over the immediate jailer in Germany"); Brief for Respondent, O. T. 1949, No. 306, p. 9 ("Respondent contends that the U. S. Court of Appeals . . . was correct in its holding that the statute, 28 U. S. C. 2241, provides that the U. S. District Court for the District of Columbia has jurisdiction to entertain the petition for a writ of habeas corpus in the case at bar"). Indeed, the briefing in *Eisentrager* was mainly devoted to the question whether there was statutory jurisdiction. See, *e. g.*, Brief for Petitioner, O. T. 1949, No. 306, pp. 15–59; Brief for Respondent, O. T. 1949, No. 306, at 9–27, 38–49.

[3] The Court does not seriously dispute my analysis of the Court of Appeals' holding in *Eisentrager*. Instead, it argues that this Court in *Eisentrager* "understood the Court of Appeals' decision to rest on constitutional and not statutory grounds." *Ante*, at 478, n. 8. That is inherently implausible, given that the Court of Appeals' opinion clearly reached a statutory holding, and that both parties argued the case to this Court on that basis, see n. 2, *supra*. The only evidence of misunderstanding the Court adduces today is the *Eisentrager* Court's description of the Court of Appeals' reasoning as "that, although no statutory jurisdiction of such cases is given, courts must be held to possess it as part of the judicial power of the United States . . . ." 339 U. S., at 767. That is no misunderstanding, but an entirely accurate description of the Court of Appeals' reasoning—the penultimate step of that reasoning rather than its conclusion. The Court of Appeals went on to hold that, in light of the constitutional imperative, the statute should be interpreted as supplying jurisdiction. See *Eisentrager* v. *Forrestal*, 174 F. 2d 961, 965–967 (CADC 1949). This Court in *Eisentrager* undoubtedly understood that, which is why it immediately followed the foregoing description with a description of the Court of Appeals' *conclusion* tied to the language of the habeas statute:

And absence of a right to the writ under the clear wording of the habeas statute is what the *Eisentrager* opinion held: "Nothing in the text of the Constitution extends such a right, *nor does anything in our statutes.*" 339 U. S., at 768 (emphasis added). "[T]hese prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment *were all beyond the territorial jurisdiction of any court of the United States.*" *Id.*, at 777–778. See also *id.*, at 781 (concluding that "no right to the writ of *habeas corpus* appears"); *id.*, at 790 (finding "no basis for invoking federal judicial power in any district"). The brevity of the Court's statutory analysis signifies nothing more than that the Court considered it obvious (as indeed it is) that, unaided by the canon of constitutional avoidance, the statute did not confer jurisdiction over an alien detained outside the territorial jurisdiction of the courts of the United States.

Eisentrager's directly-on-point statutory holding makes it exceedingly difficult for the Court to reach the result it desires today. To do so neatly and cleanly, it must either argue that our decision in *Braden* overruled *Eisentrager*, or admit that *it* is overruling *Eisentrager*. The former course would not pass the laugh test, inasmuch as *Braden* dealt with a detainee held within the territorial jurisdiction of a district court, and never *mentioned Eisentrager*. And the latter course would require the Court to explain why our almost categorical rule of *stare decisis* in statutory cases should be set aside in order to complicate the present war, *and*, having set it aside, to explain why the habeas statute does not mean what it plainly says. So instead the Court tries an oblique course: "*Braden*," it claims, "overruled *the statutory predi-*

"[W]here deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer." 339 U. S., at 767.

cate to *Eisentrager*'s holding," *ante*, at 479 (emphasis added), by which it means the statutory analysis of *Ahrens*. Even assuming, for the moment, that *Braden* overruled some aspect of *Ahrens*, inasmuch as *Ahrens* did not pass upon any of the statutory issues decided by *Eisentrager*, it is hard to see how any of that case's "statutory predicate" could have been impaired.

But in fact *Braden* did not overrule *Ahrens;* it distinguished *Ahrens*. *Braden* dealt with a habeas petitioner incarcerated in Alabama. The petitioner filed an application for a writ of habeas corpus in Kentucky, challenging an indictment that had been filed against him in that Commonwealth and naming as respondent the Kentucky court in which the proceedings were pending. This Court held that Braden was in custody because a detainer had been issued against him by Kentucky, and was being executed by Alabama, serving as an agent for Kentucky. We found that jurisdiction existed in Kentucky for Braden's petition challenging the Kentucky detainer, notwithstanding his physical confinement in Alabama. *Braden* was careful to *distinguish* that situation from the general rule established in *Ahrens*.

> "A further, *critical* development since our decision in *Ahrens* is the emergence of *new classes of prisoners* who are able to petition for habeas corpus because of the adoption of a more expansive definition of the 'custody' requirement of the habeas statute. The overruling of *McNally* v. *Hill*, 293 U. S. 131 (1934), made it possible for prisoners in custody under one sentence to attack a sentence which they had not yet begun to serve. And it also enabled a petitioner held in one State to attack a detainer lodged against him by another State. In such a case, the State holding the prisoner in immediate confinement acts as agent for the demanding State, and the custodian State is presumably indifferent to the resolution of the prisoner's attack on the detainer. Here, for example, the petitioner is confined in Alabama, but his

> dispute is with the Commonwealth of Kentucky, not the State of Alabama. *Under these circumstances*, it would serve no useful purpose to apply the *Ahrens* rule and require that the action be brought in Alabama." 410 U. S., at 498–499 (citations and footnotes omitted; emphases added).

This cannot conceivably be construed as an overturning of the *Ahrens* rule *in other circumstances*. See also *Braden*, *supra*, at 499–500 (noting that *Ahrens* does not establish "an inflexible jurisdictional rule dictating the choice of an inconvenient forum *even in a class of cases which could not have been foreseen at the time of that decision*" (emphasis added)). Thus, *Braden* stands for the proposition, and only the proposition, that where a petitioner is in custody in multiple jurisdictions within the United States, he may seek a writ of habeas corpus in a jurisdiction in which he suffers legal confinement, though not physical confinement, if his challenge is to that legal confinement. Outside that class of cases, *Braden* did not question the general rule of *Ahrens* (much less that of *Eisentrager*). Where, as here, present physical custody is at issue, *Braden* is inapposite, and *Eisentrager* unquestionably controls.[4]

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[4] The Court points to Court of Appeals cases that have described *Braden* as "overruling" *Ahrens*. See *ante*, at 479–480, n. 9. Even if that description (rather than what I think the correct one, "distinguishing") is accepted, it would not support the Court's view that *Ahrens* was overruled *with regard to the point on which Eisentrager relied*. The *ratio decidendi* of *Braden* does not call into question the principle of *Ahrens* applied in *Eisentrager:* that habeas challenge to present physical confinement must be made in the district where the physical confinement exists. The Court is unable to produce a single authority that agrees with its conclusion that *Braden* overruled *Eisentrager*.

JUSTICE KENNEDY recognizes that *Eisentrager* controls, *ante*, at 485 (opinion concurring in judgment), but misconstrues that opinion. He thinks it makes jurisdiction under the habeas statute turn on the circumstances of the detainees' confinement—including, apparently, the availability of legal proceedings and the length of detention, see *ante*, at 487–

The considerations of forum convenience that drove the analysis in *Braden* do not call into question *Eisentrager*'s holding. The *Braden* opinion is littered with venue reasoning of the following sort: "The expense and risk of transporting the petitioner to the Western District of Kentucky, should his presence at a hearing prove necessary, would in all likelihood be outweighed by the difficulties of transporting records and witnesses from Kentucky to the district where petitioner is confined." 410 U. S., at 494. Of course nothing could be *more* inconvenient than what the Court (on the alleged authority of *Braden*) prescribes today: a domestic hearing for persons held abroad, dealing with events that transpired abroad.

Attempting to paint *Braden* as a refutation of *Ahrens* (and thereby, it is suggested, *Eisentrager*), today's Court imprecisely describes *Braden* as citing with approval post-*Ahrens* cases in which "habeas petitioners" located overseas were allowed to proceed (without consideration of the jurisdictional issue) in the District Court for the District of Columbia. *Ante*, at 479. In fact, what *Braden* said is that "[w]here *American citizens* confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus, we have held, if only implicitly, that the

488. The *Eisentrager* Court mentioned those circumstances, however, only in the course of its *constitutional* analysis, and not in its application of the statute. It is quite impossible to read § 2241 as conditioning its geographic scope upon them. Among the consequences of making jurisdiction turn upon circumstances of confinement are (1) that courts would *always* have authority to inquire into circumstances of confinement, and (2) that the Executive would be unable to know with certainty that any given prisoner-of-war camp is immune from writs of habeas corpus. And among the questions this approach raises: When does definite detention become indefinite? How much process will suffice to stave off jurisdiction? If there is a terrorist attack at Guantanamo Bay, will the area suddenly fall outside the habeas statute because it is no longer "far removed from any hostilities," *ante,* at 487? JUSTICE KENNEDY's approach provides enticing law-school-exam imponderables in an area where certainty is called for.

petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." 410 U. S., at 498 (emphasis added). Of course "the existence of unaddressed jurisdictional defects has no precedential effect," *Lewis* v. *Casey*, 518 U. S. 343, 352, n. 2 (1996) (citing cases), but we need not "overrule" those implicit holdings to decide these cases. Since *Eisentrager itself* made an exception for such cases, they in no way impugn its holding. "With the citizen," *Eisentrager* said, "we are now little concerned, except to set his case apart *as untouched by this decision* and to take measure of the difference between his status and that of all categories of aliens." 339 U. S., at 769. The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas. Neither party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts; but the possibility of one atextual exception thought to be required by the Constitution is no justification for abandoning the clear application of the text to a situation in which it raises no constitutional doubt.

The reality is this: Today's opinion, and today's opinion alone, overrules *Eisentrager;* today's opinion, and today's opinion alone, extends the habeas statute, for the first time, to aliens held beyond the sovereign territory of the United States and beyond the territorial jurisdiction of its courts. No reasons are given for this result; no acknowledgment of its consequences made. By spurious reliance on *Braden* the Court evades explaining why *stare decisis* can be disregarded, *and why Eisentrager was wrong.* Normally, we consider the interests of those who have relied on our decisions. Today, the Court springs a trap on the Executive, subjecting Guantanamo Bay to the oversight of the federal

courts even though it has never before been thought to be within their jurisdiction—and thus making it a foolish place to have housed alien wartime detainees.

II

In abandoning the venerable statutory line drawn in *Eisentrager*, the Court boldly extends the scope of the habeas statute to the four corners of the earth. Part III of its opinion asserts that *Braden* stands for the proposition that "a district court acts 'within [its] respective jurisdiction' within the meaning of § 2241 as long as 'the custodian can be reached by service of process.'" *Ante*, at 478–479. Endorsement of that proposition is repeated in Part IV. *Ante*, at 483–484 ("Section 2241, by its terms, requires nothing more [than the District Court's jurisdiction over petitioners' custodians]").

The consequence of this holding, as applied to aliens outside the country, is breathtaking. It permits an alien captured in a foreign theater of active combat to bring a § 2241 petition against the Secretary of Defense. Over the course of the last century, the United States has held millions of alien prisoners abroad. See, *e. g.*, Department of Army, G. Lewis & J. Mewha, History of Prisoner of War Utilization by the United States Army 1776–1945, Pamphlet No. 20–213, p. 244 (1955) (noting that, "[b]y the end of hostilities [in World War II], U. S. forces had in custody approximately two million enemy soldiers"). A great many of these prisoners would no doubt have complained about the circumstances of their capture and the terms of their confinement. The military is currently detaining over 600 prisoners at Guantanamo Bay alone; each detainee undoubtedly has complaints—real or contrived—about those terms and circumstances. The Court's unheralded expansion of federal-court jurisdiction is not even mitigated by a comforting assurance that the legion of ensuing claims will be easily resolved on the merits. To the contrary, the Court says that the "[p]etitioners' allegations . . . unquestionably describe 'custody in violation

of the Constitution or laws or treaties of the United States.'" *Ante*, at 483, n. 15 (citing *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 277–278 (1990) (KENNEDY, J., concurring)). From this point forward, federal courts will entertain petitions from these prisoners, and others like them around the world, challenging actions and events far away, and forcing the courts to oversee one aspect of the Executive's conduct of a foreign war.

Today's carefree Court disregards, without a word of acknowledgment, the dire warning of a more circumspect Court in *Eisentrager:*

> "To grant the writ to these prisoners might mean that our army must transport them across the seas for hearing. This would require allocation for shipping space, guarding personnel, billeting and rations. It might also require transportation for whatever witnesses the prisoners desired to call as well as transportation for those necessary to defend legality of the sentence. The writ, since it is held to be a matter of right, would be equally available to enemies during active hostilities as in the present twilight between war and peace. Such trials would hamper the war effort and bring aid and comfort to the enemy. They would diminish the prestige of our commanders, not only with enemies but with wavering neutrals. It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States." 339 U. S., at 778–779.

These results should not be brought about lightly, and certainly not without a textual basis in the statute and on the

strength of nothing more than a decision dealing with an Alabama prisoner's ability to seek habeas in Kentucky.

III

Part IV of the Court's opinion, dealing with the status of Guantanamo Bay, is a puzzlement. The Court might have made an effort (a vain one, as I shall discuss) to distinguish *Eisentrager* on the basis of a difference between the status of Landsberg Prison in Germany and Guantanamo Bay Naval Base. But Part III flatly rejected such an approach, holding that the place of detention of an alien has no bearing on the statutory availability of habeas relief, but "is strictly relevant only to the question of the appropriate forum." *Ante*, at 479. That rejection is repeated at the end of Part IV: "In the end, the answer to the question presented is clear. . . . No party questions the District Court's jurisdiction over petitioners' custodians. . . . Section 2241, by its terms, requires nothing more." *Ante*, at 483–484. Once that has been said, the status of Guantanamo Bay is entirely irrelevant to the issue here. The habeas statute is (according to the Court) being applied *domestically*, to "petitioners' custodians," and the doctrine that statutes are presumed to have no extraterritorial effect simply has no application.

Nevertheless, the Court spends most of Part IV rejecting respondents' invocation of that doctrine on the peculiar ground that it has no application to Guantanamo Bay. Of course if the Court is right about that, not only § 2241 but presumably *all* United States law applies there—including, for example, the federal cause of action recognized in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), which would allow prisoners to sue their captors for damages. Fortunately, however, the Court's irrelevant discussion also happens to be wrong.

The Court gives only two reasons why the presumption against extraterritorial effect does not apply to Guantanamo Bay. First, the Court says (without any further elaboration)

that "the United States exercises 'complete jurisdiction and control' over the Guantanamo Bay Naval Base [under the terms of a 1903 lease agreement], and may continue to exercise such control permanently if it so chooses [under the terms of a 1934 Treaty]." *Ante*, at 480; see *ante*, at 471. But that lease agreement explicitly recognized "the continuance of the ultimate sovereignty of the Republic of Cuba over the [leased areas]," Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U. S.-Cuba, Art. III, T. S. No. 418, and the Executive Branch—whose head is "exclusively responsible" for the "conduct of diplomatic and foreign affairs," *Eisentrager*, *supra*, at 789—affirms that the lease and treaty do not render Guantanamo Bay the sovereign territory of the United States, see Brief for Respondents 21.

The Court does not explain how "complete jurisdiction and control" without sovereignty causes an enclave to be part of the United States for purposes of its domestic laws. Since "jurisdiction and control" obtained through a lease is no different in effect from "jurisdiction and control" acquired by lawful force of arms, parts of Afghanistan and Iraq should logically be regarded as subject to our domestic laws. Indeed, if "jurisdiction and control" rather than sovereignty were the test, so should the Landsberg Prison in Germany, where the United States held the *Eisentrager* detainees.

The second and last reason the Court gives for the proposition that domestic law applies to Guantanamo Bay is the Solicitor General's concession that there would be habeas jurisdiction over a United States citizen in Guantanamo Bay. "Considering that the statute draws no distinction between Americans and aliens held in federal custody, there is little reason to think that Congress intended the geographical coverage of the statute to vary depending on the detainee's citizenship." *Ante*, at 481. But the reason the Solicitor General conceded there would be jurisdiction over a detainee who was a United States citizen had *nothing to do* with the special status of Guantanamo Bay: "Our answer to that ques-

tion, Justice Souter, is that citizens of the United States, because of their constitutional circumstances, may have greater rights with respect to the scope and reach of the Habeas Statute as the Court has or would interpret it." Tr. of Oral Arg. 40. See also *id.*, at 27–28. And *that* position—the position that United States citizens throughout the world may be entitled to habeas corpus rights—is precisely the position that this Court adopted in *Eisentrager*, see 339 U. S., at 769–770, even while holding that aliens abroad *did not have* habeas corpus rights. Quite obviously, the Court's second reason has no force whatever.

The last part of the Court's Part IV analysis digresses from the point that the presumption against extraterritorial application does not apply to Guantanamo Bay. Rather, it is directed to the contention that the Court's approach to habeas jurisdiction—applying it to aliens abroad—is "consistent with the historical reach of the writ." *Ante*, at 481. None of the authorities it cites comes close to supporting that claim. Its first set of authorities involves claims by aliens detained in what is indisputably domestic territory. *Ante*, at 481–482, n. 11. Those cases are irrelevant because they do not purport to address the territorial reach of the writ. The remaining cases involve issuance of the writ to " 'exempt jurisdictions' " and "other dominions under the sovereign's control." *Ante*, at 482, and nn. 12–13. These cases are inapposite for two reasons: Guantanamo Bay is not a sovereign dominion, and even if it were, jurisdiction would be limited to subjects.

"Exempt jurisdictions"—the Cinque Ports and Counties Palatine (located in modern-day England)—were local franchises granted by the Crown. See 1 W. Holdsworth, History of English Law 108, 532 (7th ed. rev. 1956); 3 W. Blackstone, Commentaries on the Laws of England 78–79 (1768) (hereinafter Blackstone). These jurisdictions were "exempt" in the sense that the Crown had ceded management of municipal affairs to local authorities, whose courts had exclusive juris-

diction over private disputes among residents (although review was still available in the royal courts by writ of error). See *id.*, at 79. Habeas jurisdiction nevertheless extended to those regions on the theory that the delegation of the King's authority did not include his own prerogative writs. *Ibid.;* R. Sharpe, Law of Habeas Corpus 188–189 (2d ed. 1989) (hereinafter Sharpe). Guantanamo Bay involves no comparable local delegation of pre-existing sovereign authority.

The cases involving "other dominions under the sovereign's control" fare no better. These cases stand only for the proposition that the writ extended to dominions of the Crown outside England proper. The authorities relating to Jersey and the other Channel Islands, for example, see *ante*, at 482, n. 13, involve territories that are "dominions of the crown of Great Britain" even though not "part of the kingdom of England," 1 Blackstone 102–105 (1765), much as were the colonies in America, *id.*, at 104–105, and Scotland, Ireland, and Wales, *id.*, at 93. See also *King* v. *Cowle*, 2 Burr. 834, 853–854, 97 Eng. Rep. 587, 598 (K. B. 1759) (even if Berwick was "no part of the realm of England," it was still a "dominion of the Crown"). All of the dominions in the cases the Court cites—and all of the territories Blackstone lists as dominions, see 1 Blackstone 93–106—are the sovereign territory of the Crown: colonies, acquisitions and conquests, and so on. It is an enormous extension of the term to apply it to installations merely leased for a particular use from another nation that still retains ultimate sovereignty.

The Court's historical analysis fails for yet another reason: To the extent the writ's "extraordinary territorial ambit" did extend to exempt jurisdictions, outlying dominions, and the like, that extension applied only to British *subjects.* The very sources the majority relies on say so: Sharpe explains the "broader ambit" of the writ on the ground that it is "said to depend not on the ordinary jurisdiction of the court for its effectiveness, but upon the authority of the sovereign over

all her *subjects.*" Sharpe 188 (emphasis added). Likewise, Blackstone explained that the writ "run[s] into all parts of the king's dominions" because "the king is at all times entitled to have an account why the liberty of any of his *subjects* is restrained." 3 Blackstone 131 (emphasis added). *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), which can hardly be viewed as evidence of the *historic* scope of the writ, only confirms the ongoing relevance of the sovereign-subject relationship to the scope of the writ. There, the question was whether "the Court of Queen's Bench [can] be debarred from making an order in favour of a British citizen unlawfully or arbitrarily detained" in Northern Rhodesia, which was at the time a protectorate of the Crown. *Id.*, at 300 (Lord Evershed, M. R.). Each judge made clear that the detainee's status as a subject was material to the resolution of the case. See *id.*, at 300, 302 (Lord Evershed, M. R.); *id.*, at 305 (Romer, L. J.) ("[I]t is difficult to see why the sovereign should be deprived of her right to be informed through her High Court as to the validity of the detention of her subjects in that territory"); *id.*, at 311 (Sellers, L. J.) ("I am not prepared to say, as we are solely asked to say on this appeal, that the English courts have no jurisdiction in any circumstances to entertain an application for a writ of habeas corpus ad subjiciendum in respect of an unlawful detention of a British subject in a British protectorate"). None of the exempt-jurisdiction or dominion cases the Court cites involves someone not a subject of the Crown.

The rule against issuing the writ to aliens in foreign lands was still the law when, in *In re Ning Yi-Ching*, 56 T. L. R. 3 (K. B. Vac. Ct. 1939), an English court considered the habeas claims of four Chinese subjects detained on criminal charges in Tientsin, China, an area over which Britain had by treaty acquired a lease and "therewith exercised certain rights of administration and control." *Id.*, at 4. The court held that Tientsin was a foreign territory, and that the writ would not

issue to a foreigner detained there. The Solicitor-General had argued that "[t]here was no case on record in which a writ of *habeas corpus* had been obtained on behalf of a foreign subject on foreign territory," *id.*, at 5, and the court "listened in vain for a case in which the writ of *habeas corpus* had issued in respect of a foreigner detained in a part of the world which was not a part of the King's dominions or realm," *id.*, at 6.[5]

In sum, the Court's treatment of Guantanamo Bay, like its treatment of § 2241, is a wrenching departure from precedent.[6]

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[5] The Court argues at some length that *Ex parte Mwenya*, [1960] 1 Q. B. 241 (C. A.), calls into question my reliance on *In re Ning Yi-Ching*. See *ante*, at 15, n. 14. But as I have explained, see *supra*, at 504, *Mwenya* dealt with a British subject and the court went out of its way to explain that its expansive description of the scope of the writ was premised on that fact. The Court cites not a single case holding that aliens held outside the territory of the sovereign were within reach of the writ.

[6] The Court grasps at two other bases for jurisdiction: the Alien Tort Statute (ATS), 28 U. S. C. § 1350, and the federal-question statute, § 1331. The former is not presented to us. The ATS, while invoked below, was repudiated as a basis for jurisdiction by all petitioners, either in their petition for certiorari, in their briefing before this Court, or at oral argument. See Pet. for Cert. in No. 03–334, p. 2, n. 1 ("Petitioners withdraw any reliance on the Alien Tort Claims Act . . ."); Brief for Petitioners in No. 03–343, p. 13; Tr. of Oral Arg. 6.

With respect to § 1331, petitioners assert a variety of claims arising under the Constitution, treaties, and laws of the United States. In *Eisentrager*, though the Court's holding focused on § 2241, its analysis spoke more broadly: "We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States." 339 U. S., at 777–778. That reasoning dooms petitioners' claims under § 1331, at least where Congress has erected a jurisdictional bar to their raising such claims in habeas.

* * *

Departure from our rule of *stare decisis* in statutory cases is always extraordinary; it ought to be unthinkable when the departure has a potentially harmful effect upon the Nation's conduct of a war. The Commander in Chief and his subordinates had every reason to expect that the internment of combatants at Guantanamo Bay would not have the consequence of bringing the cumbersome machinery of our domestic courts into military affairs. Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so. And it could have done so by intelligent revision of the statute,[7] instead of by today's clumsy, countertextual reinterpretation that confers upon wartime prisoners greater habeas rights than domestic detainees. The latter must challenge their present physical confinement in the district of their confinement, see *Rumsfeld* v. *Padilla*, *ante*, p. 426, whereas under today's strange holding Guantanamo Bay detainees can petition in any of the 94 federal judicial districts. The fact that extraterritorially located detainees lack the district of detention that the statute requires has been converted from a factor that precludes their ability to bring a petition at all into a factor that frees them to petition wherever they wish—and, as a result, to forum-shop. For this Court to create such a monstrous scheme in time of war, and in frustration of our military commanders' reliance upon clearly stated prior law, is judicial adventurism of the worst sort. I dissent.

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[7] It could, for example, provide for jurisdiction by placing Guantanamo Bay within the territory of an existing district court; or by creating a district court for Guantanamo Bay, as it did for the Panama Canal Zone, see 22 U. S. C. § 3841(a) (repealed 1979).

Syllabus

HAMDI ET AL. *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03–6696. Argued April 28, 2004—Decided June 28, 2004

After Congress passed a resolution—the Authorization for Use of Military Force (AUMF)—empowering the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001, al Qaeda terrorist attacks, the President ordered the Armed Forces to Afghanistan to subdue al Qaeda and quell the supporting Taliban regime. Petitioner Yaser Hamdi, an American citizen whom the Government has classified as an "enemy combatant" for allegedly taking up arms with the Taliban during the conflict, was captured in Afghanistan and presently is detained at a naval brig in Charleston, S. C. Hamdi's father filed this habeas petition on his behalf under 28 U. S. C. § 2241, alleging, among other things, that the Government holds his son in violation of the Fifth and Fourteenth Amendments. Although the petition did not elaborate on the factual circumstances of Hamdi's capture and detention, his father has asserted in other documents in the record that Hamdi went to Afghanistan to do "relief work" less than two months before September 11 and could not have received military training. The Government attached to its response to the petition a declaration from Michael Mobbs (Mobbs Declaration), a Defense Department official. The Mobbs Declaration alleges various details regarding Hamdi's trip to Afghanistan, his affiliation there with a Taliban unit during a time when the Taliban was battling U. S. allies, and his subsequent surrender of an assault rifle. The District Court found that the Mobbs Declaration, standing alone, did not support Hamdi's detention and ordered the Government to turn over numerous materials for *in camera* review. The Fourth Circuit reversed, stressing that, because it was undisputed that Hamdi was captured in an active combat zone, no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper. Concluding that the factual averments in the Mobbs Declaration, if accurate, provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi, the court ordered the habeas petition dismissed. The appeals court held that, assuming that express congressional authorization of the detention was required by 18 U. S. C.

Syllabus

§ 4001(a)—which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress"—the AUMF's "necessary and appropriate force" language provided the authorization for Hamdi's detention. It also concluded that Hamdi is entitled only to a limited judicial inquiry into his detention's legality under the war powers of the political branches, and not to a searching review of the factual determinations underlying his seizure.

Held: The judgment is vacated, and the case is remanded.

316 F. 3d 450, vacated and remanded.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER, concluded that although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. P. 509.

JUSTICE SOUTER, joined by JUSTICE GINSBURG, concluded that Hamdi's detention is unauthorized, but joined with the plurality to conclude that on remand Hamdi should have a meaningful opportunity to offer evidence that he is not an enemy combatant. Pp. 540–541, 553.

O'CONNOR, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and KENNEDY and BREYER, JJ., joined. SOUTER, J., filed an opinion concurring in part, dissenting in part, and concurring in the judgment, in which GINSBURG, J., joined, *post*, p. 539. SCALIA, J., filed a dissenting opinion, in which STEVENS, J., joined, *post*, p. 554. THOMAS, J., filed a dissenting opinion, *post*, p. 579.

Frank W. Dunham, Jr., argued the cause for petitioners. With him on the briefs were *Geremy C. Kamens*, *Kenneth P. Troccoli*, and *Frances H. Pratt.*

Deputy Solicitor General Clement argued the cause for respondents. With him on the brief were *Solicitor General Olson*, *Gregory G. Garre*, and *John A. Drennan.**

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*Briefs of *amici curiae* urging reversal were filed for the American Bar Association by *Dennis W. Archer* and *Barry Sullivan;* for AmeriCares et al. by *Steven M. Pesner*, *Michael Small*, and *Jeffrey P. Kehne;* for the American Civil Liberties Union et al. by *Steven R. Shapiro*, *Sharon M. McGowan*, *David Saperstein*, *Jeffrey Sinensky*, *Kara Stein*, and *Arthur Bryant;* for the Cato Institute by *Timothy Lynch;* for Global Rights by *James F. Fitzpatrick*, *Kathleen A. Behan*, and *Gay J. McDougall;* for Wil-

Justice O'Connor announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice Kennedy, and Justice Breyer join.

At this difficult time in our Nation's history, we are called upon to consider the legality of the Government's detention of a United States citizen on United States soil as an "enemy combatant" and to address the process that is constitutionally owed to one who seeks to challenge his classification as such. The United States Court of Appeals for the Fourth Circuit held that petitioner Yaser Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy-combatant label. We now vacate and remand. We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.

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liam J. Aceves et al. by *Douglas W. Baruch;* for Charles B. Gittings, Jr., by *Donald G. Rehkopf, Jr.;* for the Honorable Nathaniel R. Jones et al. by *Robert P. LoBue;* for Douglas Peterson et al. by *Philip Allen Lacovara* and *Andrew J. Pincus;* and for Mary Robinson et al. by *Harold Hongju Koh* and *Jonathan M. Freiman.*

Briefs of *amici curiae* urging affirmance were filed for the American Center for Law & Justice by *Jay Alan Sekulow, Thomas P. Monaghan, Stuart J. Roth, Colby M. May, James M. Henderson, Sr., Joel H. Thornton, John P. Tuskey,* and *Shannon D. Woodruff;* for the Center for American Unity et al. by *Barnaby W. Zall;* for the Claremont Institute Center for Constitutional Jurisprudence by *John C. Eastman* and *Edwin Meese III;* for Citizens for the Common Defence by *Adam H. Charnes;* and for the Washington Legal Foundation et al. by *Thomas V. Loran, William T. DeVinney, Daniel J. Popeo,* and *Richard A. Samp.*

A brief of *amici curiae* urging affirmance in No. 03–6696 and reversal in No. 03–1027, *Rumsfeld, Secretary of Defense* v. *Padilla et al.*, *ante,* p. 426, was filed for Senator John Cornyn et al. by *Senator Cornyn, pro se.*

Karen B. Tripp filed a brief for the Eagle Forum Education & Legal Defense Fund as *amicus curiae.*

I

On September 11, 2001, the al Qaeda terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these "acts of treacherous violence," Congress passed a resolution authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." Authorization for Use of Military Force (AUMF), 115 Stat. 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

This case arises out of the detention of a man whom the Government alleges took up arms with the Taliban during this conflict. His name is Yaser Esam Hamdi. Born in Louisiana in 1980, Hamdi moved with his family to Saudi Arabia as a child. By 2001, the parties agree, he resided in Afghanistan. At some point that year, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and eventually was turned over to the United States military. The Government asserts that it initially detained and interrogated Hamdi in Afghanistan before transferring him to the United States Naval Base in Guantanamo Bay in January 2002. In April 2002, upon learning that Hamdi is an American citizen, authorities transferred him to a naval brig in Norfolk, Virginia, where he remained until a recent transfer to a brig in Charleston, South Carolina. The Government contends that Hamdi is an "enemy combatant," and that this status justifies holding him in the United States indefinitely—without formal charges or proceedings—unless and until it makes the

determination that access to counsel or further process is warranted.

In June 2002, Hamdi's father, Esam Fouad Hamdi, filed the present petition for a writ of habeas corpus under 28 U. S. C. § 2241 in the Eastern District of Virginia, naming as petitioners his son and himself as next friend. The elder Hamdi alleges in the petition that he has had no contact with his son since the Government took custody of him in 2001, and that the Government has held his son "without access to legal counsel or notice of any charges pending against him." App. 103, 104. The petition contends that Hamdi's detention was not legally authorized. *Id.*, at 105. It argues that, "[a]s an American citizen, . . . Hamdi enjoys the full protections of the Constitution," and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of counsel "violated and continue[s] to violate the Fifth and Fourteenth Amendments to the United States Constitution." *Id.*, at 107. The habeas petition asks that the court, among other things, (1) appoint counsel for Hamdi; (2) order respondents to cease interrogating him; (3) declare that he is being held in violation of the Fifth and Fourteenth Amendments; (4) "[t]o the extent Respondents contest any material factual allegations in this Petition, schedule an evidentiary hearing, at which Petitioners may adduce proof in support of their allegations"; and (5) order that Hamdi be released from his "unlawful custody." *Id.*, at 108–109. Although his habeas petition provides no details with regard to the factual circumstances surrounding his son's capture and detention, Hamdi's father has asserted in documents found elsewhere in the record that his son went to Afghanistan to do "relief work," and that he had been in that country less than two months before September 11, 2001, and could not have received military training. *Id.*, at 188–189. The 20-year-old was traveling on his own for the first time, his father says, and "[b]ecause of his lack of experience, he was

trapped in Afghanistan once the military campaign began." *Ibid.*

The District Court found that Hamdi's father was a proper next friend, appointed the federal public defender as counsel for the petitioners, and ordered that counsel be given access to Hamdi. *Id.*, at 113–116. The United States Court of Appeals for the Fourth Circuit reversed that order, holding that the District Court had failed to extend appropriate deference to the Government's security and intelligence interests. 296 F. 3d 278, 279, 283 (2002). It directed the District Court to consider "the most cautious procedures first," *id.*, at 284, and to conduct a deferential inquiry into Hamdi's status, *id.*, at 283. It opined that "if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one." *Ibid.*

On remand, the Government filed a response and a motion to dismiss the petition. It attached to its response a declaration from one Michael Mobbs (hereinafter Mobbs Declaration), who identified himself as Special Advisor to the Under Secretary of Defense for Policy. Mobbs indicated that in this position, he has been "substantially involved with matters related to the detention of enemy combatants in the current war against the al Qaeda terrorists and those who support and harbor them (including the Taliban)." App. 148. He expressed his "familiar[ity]" with Department of Defense and United States military policies and procedures applicable to the detention, control, and transfer of al Qaeda and Taliban personnel, and declared that "[b]ased upon my review of relevant records and reports, I am also familiar with the facts and circumstances related to the capture of . . . Hamdi and his detention by U. S. military forces." *Ibid.*

Mobbs then set forth what remains the sole evidentiary support that the Government has provided to the courts for Hamdi's detention. The declaration states that Hamdi "traveled to Afghanistan" in July or August 2001, and that

he thereafter "affiliated with a Taliban military unit and received weapons training." *Ibid.* It asserts that Hamdi "remained with his Taliban unit following the attacks of September 11" and that, during the time when Northern Alliance forces were "engaged in battle with the Taliban," "Hamdi's Taliban unit surrendered" to those forces, after which he "surrender[ed] his Kalishnikov assault rifle" to them. *Id.*, at 148–149. The Mobbs Declaration also states that, because al Qaeda and the Taliban "were and are hostile forces engaged in armed conflict with the armed forces of the United States," "individuals associated with" those groups "were and continue to be enemy combatants." *Id.*, at 149. Mobbs states that Hamdi was labeled an enemy combatant "[b]ased upon his interviews and in light of his association with the Taliban." *Ibid.* According to the declaration, a series of "U. S. military screening team[s]" determined that Hamdi met "the criteria for enemy combatants," and "[a] subsequent interview of Hamdi has confirmed the fact that he surrendered and gave his firearm to Northern Alliance forces, which supports his classification as an enemy combatant." *Id.*, at 149–150.

After the Government submitted this declaration, the Fourth Circuit directed the District Court to proceed in accordance with its earlier ruling and, specifically, to " 'consider the sufficiency of the Mobbs declaration as an independent matter before proceeding further.' " 316 F. 3d 450, 462 (2003). The District Court found that the Mobbs Declaration fell "far short" of supporting Hamdi's detention. App. 292. It criticized the generic and hearsay nature of the affidavit, calling it "little more than the government's 'say-so.' " *Id.*, at 298. It ordered the Government to turn over numerous materials for *in camera* review, including copies of all of Hamdi's statements and the notes taken from interviews with him that related to his reasons for going to Afghanistan and his activities therein; a list of all interrogators who had questioned Hamdi and their names and addresses;

statements by members of the Northern Alliance regarding Hamdi's surrender and capture; a list of the dates and locations of his capture and subsequent detentions; and the names and titles of the United States Government officials who made the determinations that Hamdi was an enemy combatant and that he should be moved to a naval brig. *Id.*, at 185–186. The court indicated that all of these materials were necessary for "meaningful judicial review" of whether Hamdi's detention was legally authorized and whether Hamdi had received sufficient process to satisfy the Due Process Clause of the Constitution and relevant treaties or military regulations. *Id.*, at 291–292.

The Government sought to appeal the production order, and the District Court certified the question of whether the Mobbs Declaration, "'standing alone, is sufficient as a matter of law to allow a meaningful judicial review of [Hamdi's] classification as an enemy combatant.'" 316 F. 3d, at 462. The Fourth Circuit reversed, but did not squarely answer the certified question. It instead stressed that, because it was "undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict," no factual inquiry or evidentiary hearing allowing Hamdi to be heard or to rebut the Government's assertions was necessary or proper. *Id.*, at 459. Concluding that the factual averments in the Mobbs Declaration, "if accurate," provided a sufficient basis upon which to conclude that the President had constitutionally detained Hamdi pursuant to the President's war powers, it ordered the habeas petition dismissed. *Id.*, at 473. The Fourth Circuit emphasized that the "vital purposes" of the detention of uncharged enemy combatants—preventing those combatants from rejoining the enemy while relieving the military of the burden of litigating the circumstances of wartime captures halfway around the globe—were interests "directly derived from the war powers of Articles I and II." *Id.*, at 465–466. In that court's view, because "Article III contains nothing analogous to the specific powers of war so

carefully enumerated in Articles I and II," *id.*, at 463, separation of powers principles prohibited a federal court from "delv[ing] further into Hamdi's status and capture," *id.*, at 473. Accordingly, the District Court's more vigorous inquiry "went far beyond the acceptable scope of review." *Ibid.*

On the more global question of whether legal authorization exists for the detention of citizen enemy combatants at all, the Fourth Circuit rejected Hamdi's arguments that 18 U. S. C. § 4001(a) and Article 5 of the Geneva Convention rendered any such detentions unlawful. The court expressed doubt as to Hamdi's argument that § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," required express congressional authorization of detentions of this sort. But it held that, in any event, such authorization was found in the post-September 11 AUMF. 316 F. 3d, at 467. Because "capturing and detaining enemy combatants is an inherent part of warfare," the court held, "the 'necessary and appropriate force' referenced in the congressional resolution necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." *Ibid.;* see also *id.*, at 467–468 (noting that Congress, in 10 U. S. C. § 956(5), had specifically authorized the expenditure of funds for keeping prisoners of war and persons whose status was determined "to be similar to prisoners of war," and concluding that this appropriation measure also demonstrated that Congress had "authoriz[ed these individuals'] detention in the first instance"). The court likewise rejected Hamdi's Geneva Convention claim, concluding that the convention is not self-executing and that, even if it were, it would not preclude the Executive from detaining Hamdi until the cessation of hostilities. 316 F. 3d, at 468–469.

Finally, the Fourth Circuit rejected Hamdi's contention that its legal analyses with regard to the authorization for the detention scheme and the process to which he was consti-

tutionally entitled should be altered by the fact that he is an American citizen detained on American soil. Relying on *Ex parte Quirin*, 317 U. S. 1 (1942), the court emphasized that "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." 316 F. 3d, at 475. "The privilege of citizenship," the court held, "entitles Hamdi to a limited judicial inquiry into his detention, but only to determine its legality under the war powers of the political branches. At least where it is undisputed that he was present in a zone of active combat operations, we are satisfied that the Constitution does not entitle him to a searching review of the factual determinations underlying his seizure there." *Ibid.*

The Fourth Circuit denied rehearing en banc, 337 F. 3d 335 (2003), and we granted certiorari, 540 U. S. 1099 (2004). We now vacate the judgment below and remand.

II

The threshold question before us is whether the Executive has the authority to detain citizens who qualify as "enemy combatants." There is some debate as to the proper scope of this term, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such. It has made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "'part of or supporting forces hostile to the United States or coalition partners'" in Afghanistan and who "'engaged in an armed conflict against the United States'" there. Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized.

The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Con-

stitution. We do not reach the question whether Article II provides such authority, however, because we agree with the Government's alternative position, that Congress has in fact authorized Hamdi's detention, through the AUMF.

Our analysis on that point, set forth below, substantially overlaps with our analysis of Hamdi's principal argument for the illegality of his detention. He posits that his detention is forbidden by 18 U. S. C. § 4001(a). Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U. S. C. § 811 *et seq.*, which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese-American internment camps of World War II. H. R. Rep. No. 92–116 (1971); *id.*, at 4 ("The concentration camp implications of the legislation render it abhorrent"). The Government again presses two alternative positions. First, it argues that § 4001(a), in light of its legislative history and its location in Title 18, applies only to "the control of civilian prisons and related detentions," not to military detentions. Brief for Respondents 21. Second, it maintains that § 4001(a) is satisfied, because Hamdi is being detained "pursuant to an Act of Congress"—the AUMF. *Id.*, at 21–22. Again, because we conclude that the Government's second assertion is correct, we do not address the first. In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals in the narrow category we describe (assuming, without deciding, that such authorization is required), and that the AUMF satisfied § 4001(a)'s requirement that a detention be "pursuant to an Act of Congress" (assuming, without deciding, that § 4001(a) applies to military detentions).

The AUMF authorizes the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11, 2001, terrorist attacks. 115 Stat. 224. There can be no doubt that individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use.

The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by "universal agreement and practice," are "important incident[s] of war." *Ex parte Quirin*, *supra*, at 28, 30. The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again. Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002) ("[C]aptivity in war is 'neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war'" (quoting decision of Nuremberg Military Tribunal, reprinted in 41 Am. J. Int'l L. 172, 229 (1947))); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920) ("The time has long passed when 'no quarter' was the rule on the battlefield . . . . It is now recognized that 'Captivity is neither a punishment nor an act of vengeance,' but 'merely a temporary detention which is devoid of all penal character.' . . . 'A prisoner of war is no convict; his imprisonment is a simple war measure'" (citations omitted)); cf. *In re Territo*, 156 F. 2d 142, 145 (CA9 1946) ("The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on

must be removed as completely as practicable from the front, treated humanely and in time exchanged, repatriated or otherwise released" (footnotes omitted)).

There is no bar to this Nation's holding one of its own citizens as an enemy combatant. In *Quirin*, one of the detainees, Haupt, alleged that he was a naturalized United States citizen. 317 U. S., at 20. We held that "[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war." *Id.*, at 37–38. While Haupt was tried for violations of the law of war, nothing in *Quirin* suggests that his citizenship would have precluded his mere detention for the duration of the relevant hostilities. See *id.*, at 30–31. See also Lieber Code ¶ 153, Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Miscellaneous Writings, p. 273, ¶ 153 (1880) (contemplating, in code binding the Union Army during the Civil War, that "captured rebels" would be treated "as prisoners of war"). Nor can we see any reason for drawing such a line here. A citizen, no less than an alien, can be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States," Brief for Respondents 3; such a citizen, if released, would pose the same threat of returning to the front during the ongoing conflict.

In light of these principles, it is of no moment that the AUMF does not use specific language of detention. Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war, in permitting the use of "necessary and appropriate force," Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.

Hamdi objects, nevertheless, that Congress has not authorized the *indefinite* detention to which he is now subject.

The Government responds that "the detention of enemy combatants during World War II was just as 'indefinite' while that war was being fought." *Id.*, at 16. We take Hamdi's objection to be not to the lack of certainty regarding the date on which the conflict will end, but to the substantial prospect of perpetual detention. We recognize that the national security underpinnings of the "war on terror," although crucially important, are broad and malleable. As the Government concedes, "given its unconventional nature, the current conflict is unlikely to end with a formal cease-fire agreement." *Ibid.* The prospect Hamdi raises is therefore not farfetched. If the Government does not consider this unconventional war won for two generations, and if it maintains during that time that Hamdi might, if released, rejoin forces fighting against the United States, then the position it has taken throughout the litigation of this case suggests that Hamdi's detention could last for the rest of his life.

It is a clearly established principle of the law of war that detention may last no longer than active hostilities. See Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3406, T. I. A. S. No. 3364 ("Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities"). See also Article 20 of the Hague Convention (II) on Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1817 (as soon as possible after "conclusion of peace"); Hague Convention (IV), *supra*, Oct. 18, 1907, 36 Stat. 2301 ("conclusion of peace" (Art. 20)); Geneva Convention, *supra*, July 27, 1929, 47 Stat. 2055 (repatriation should be accomplished with the least possible delay after conclusion of peace (Art. 75)); Paust, Judicial Power to Determine the Status and Rights of Persons Detained without Trial, 44 Harv. Int'l L. J. 503, 510–511 (2003) (prisoners of war "can be detained during an armed conflict, but the detaining country must release and repatriate them 'without delay after the cessation of active hostilities,' unless they are

being lawfully prosecuted or have been lawfully convicted of crimes and are serving sentences" (citing Arts. 118, 85, 99, 119, 129, Geneva Convention (III), 6 U. S. T., at 3384, 3392, 3406, 3418)).

Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized. Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel. But that is not the situation we face as of this date. Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. See, *e. g.*, Constable, U. S. Launches New Operation in Afghanistan, Washington Post, Mar. 14, 2004, p. A22 (reporting that 13,500 United States troops remain in Afghanistan, including several thousand new arrivals); Dept. of Defense, News Transcript, Gen. J. Abizaid Central Command Operations Update Briefing, Apr. 30, 2004, http://www.defenselink.mil/transcripts/2004/tr20040430-1402.html (as visited June 8, 2004, and available in Clerk of Court's case file) (media briefing describing ongoing operations in Afghanistan involving 20,000 United States troops). The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF.

Ex parte Milligan, 4 Wall. 2, 125 (1866), does not undermine our holding about the Government's authority to seize

enemy combatants, as we define that term today. In that case, the Court made repeated reference to the fact that its inquiry into whether the military tribunal had jurisdiction to try and punish Milligan turned in large part on the fact that Milligan was not a prisoner of war, but a resident of Indiana arrested while at home there. *Id.*, at 118, 131. That fact was central to its conclusion. Had Milligan been captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different. The Court's repeated explanations that Milligan was not a prisoner of war suggest that had these different circumstances been present he could have been detained under military authority for the duration of the conflict, whether or not he was a citizen.[1]

Moreover, as Justice Scalia acknowledges, the Court in *Ex parte Quirin*, 317 U. S. 1 (1942), dismissed the language of *Milligan* that the petitioners had suggested prevented them from being subject to military process. *Post*, at 570 (dissenting opinion). Clear in this rejection was a disavowal of the New York State cases cited in *Milligan*, 4 Wall., at 128–129, on which Justice Scalia relies. See *ibid.* Both *Smith* v. *Shaw*, 12 Johns. *257 (N. Y. 1815), and *M'Connell* v. *Hampton*, 12 Johns. *234 (N. Y. 1815), were civil suits for false imprisonment. Even accepting that these cases once could have been viewed as standing for the sweeping proposition for which Justice Scalia cites them—that the military does not have authority to try an American citizen accused of spying against his country during wartime—*Quirin* makes undeniably clear that this is not the law today.

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[1] Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.

Haupt, like the citizens in *Smith* and *M'Connell*, was accused of being a spy. The Court in *Quirin* found him "subject to trial and punishment by [a] military tribuna[l]" for those acts, and held that his citizenship did not change this result. 317 U. S., at 31, 37–38.

Quirin was a unanimous opinion. It both postdates and clarifies *Milligan*, providing us with the most apposite precedent that we have on the question of whether citizens may be detained in such circumstances. Brushing aside such precedent—particularly when doing so gives rise to a host of new questions never dealt with by this Court—is unjustified and unwise.

To the extent that Justice Scalia accepts the precedential value of *Quirin*, he argues that it cannot guide our inquiry here because "[i]n *Quirin* it was uncontested that the petitioners were members of enemy forces," while Hamdi challenges his classification as an enemy combatant. *Post*, at 571. But it is unclear why, in the paradigm outlined by Justice Scalia, such a concession should have any relevance. Justice Scalia envisions a system in which the only options are congressional suspension of the writ of habeas corpus or prosecution for treason or some other crime. *Post*, at 554. He does not explain how his historical analysis supports the addition of a third option—detention under some other process after concession of enemy-combatant status—or why a concession should carry any different effect than proof of enemy-combatant status in a proceeding that comports with due process. To be clear, our opinion only finds legislative authority to detain under the AUMF once it is sufficiently clear that the individual is, in fact, an enemy combatant; whether that is established by concession or by some other process that verifies this fact with sufficient certainty seems beside the point.

Further, Justice Scalia largely ignores the context of this case: a United States citizen captured in a *foreign* combat zone. Justice Scalia refers to only one case involv-

ing this factual scenario—a case in which a United States citizen-prisoner of war (a member of the Italian army) from World War II was seized on the battlefield in Sicily and then held in the United States. The court in that case held that the military detention of that United States citizen was lawful. See *In re Territo*, 156 F. 2d, at 148.

JUSTICE SCALIA's treatment of that case—in a footnote—suffers from the same defect as does his treatment of *Quirin:* Because JUSTICE SCALIA finds the fact of battlefield capture irrelevant, his distinction based on the fact that the petitioner "conceded" enemy-combatant status is beside the point. See *supra*, at 523. JUSTICE SCALIA can point to no case or other authority for the proposition that those captured on a foreign battlefield (whether detained there or in U. S. territory) cannot be detained outside the criminal process.

Moreover, JUSTICE SCALIA presumably would come to a different result if Hamdi had been kept in Afghanistan or even Guantanamo Bay. See *post*, at 577. This creates a perverse incentive. Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. Indeed, the Government transferred Hamdi from Guantanamo Bay to the United States naval brig only after it learned that he might be an American citizen. It is not at all clear why that should make a determinative constitutional difference.

III

Even in cases in which the detention of enemy combatants is legally authorized, there remains the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status. Hamdi argues that he is owed a meaningful and timely hearing and that "extra-judicial detention [that] begins and ends with the submission of an affidavit based on third-hand hearsay" does not comport with

the Fifth and Fourteenth Amendments. Brief for Petitioners 16. The Government counters that any more process than was provided below would be both unworkable and "constitutionally intolerable." Brief for Respondents 46. Our resolution of this dispute requires a careful examination both of the writ of habeas corpus, which Hamdi now seeks to employ as a mechanism of judicial review, and of the Due Process Clause, which informs the procedural contours of that mechanism in this instance.

A

Though they reach radically different conclusions on the process that ought to attend the present proceeding, the parties begin on common ground. All agree that, absent suspension, the writ of habeas corpus remains available to every individual detained within the United States. U. S. Const., Art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it"). Only in the rarest of circumstances has Congress seen fit to suspend the writ. See, *e. g.*, Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755; Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14. At all other times, it has remained a critical check on the Executive, ensuring that it does not detain individuals except in accordance with law. See *INS* v. *St. Cyr*, 533 U. S. 289, 301 (2001). All agree suspension of the writ has not occurred here. Thus, it is undisputed that Hamdi was properly before an Article III court to challenge his detention under 28 U. S. C. § 2241. Brief for Respondents 12. Further, all agree that § 2241 and its companion provisions provide at least a skeletal outline of the procedures to be afforded a petitioner in federal habeas review. Most notably, § 2243 provides that "the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts," and § 2246 allows the taking of evidence in habeas proceedings by deposition, affidavit, or interrogatories.

The simple outline of § 2241 makes clear both that Congress envisioned that habeas petitioners would have some opportunity to present and rebut facts and that courts in cases like this retain some ability to vary the ways in which they do so as mandated by due process. The Government recognizes the basic procedural protections required by the habeas statute, *id.*, at 37–38, but asks us to hold that, given both the flexibility of the habeas mechanism and the circumstances presented in this case, the presentation of the Mobbs Declaration to the habeas court completed the required factual development. It suggests two separate reasons for its position that no further process is due.

B

First, the Government urges the adoption of the Fourth Circuit's holding below—that because it is "undisputed" that Hamdi's seizure took place in a combat zone, the habeas determination can be made purely as a matter of law, with no further hearing or factfinding necessary. This argument is easily rejected. As the dissenters from the denial of rehearing en banc noted, the circumstances surrounding Hamdi's seizure cannot in any way be characterized as "undisputed," as "those circumstances are neither conceded in fact, nor susceptible to concession in law, because Hamdi has not been permitted to speak for himself or even through counsel as to those circumstances." 337 F. 3d, at 357 (opinion of Luttig, J.); see also *id.*, at 371–372 (opinion of Motz, J.). Further, the "facts" that constitute the alleged concession are insufficient to support Hamdi's detention. Under the definition of enemy combatant that we accept today as falling within the scope of Congress' authorization, Hamdi would need to be "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States" to justify his detention in the United States for the duration of the relevant conflict. Brief for Respondents 3. The habeas petition states only that

"[w]hen seized by the United States Government, Mr. Hamdi resided in Afghanistan." App. 104. An assertion that one *resided* in a country in which combat operations are taking place is not a concession that one was "*captured* in a zone of active combat" operations in a foreign theater of war, 316 F. 3d, at 459 (emphasis added), and certainly is not a concession that one was "part of or supporting forces hostile to the United States or coalition partners" and "engaged in an armed conflict against the United States." Accordingly, we reject any argument that Hamdi has made concessions that eliminate any right to further process.

C

The Government's second argument requires closer consideration. This is the argument that further factual exploration is unwarranted and inappropriate in light of the extraordinary constitutional interests at stake. Under the Government's most extreme rendition of this argument, "[r]espect for separation of powers and the limited institutional capabilities of courts in matters of military decisionmaking in connection with an ongoing conflict" ought to eliminate entirely any individual process, restricting the courts to investigating only whether legal authorization exists for the broader detention scheme. Brief for Respondents 26. At most, the Government argues, courts should review its determination that a citizen is an enemy combatant under a very deferential "some evidence" standard. *Id.*, at 34 ("Under the some evidence standard, the focus is exclusively on the factual basis supplied by the Executive to support its own determination" (citing *Superintendent, Mass. Correctional Institution at Walpole* v. *Hill*, 472 U. S. 445, 455–457 (1985) (explaining that the some evidence standard "does not require" a "weighing of the evidence," but rather calls for assessing "whether there is any evidence in the record that could support the conclusion"))). Under this review, a court would assume the accuracy of the Government's articulated

basis for Hamdi's detention, as set forth in the Mobbs Declaration, and assess only whether that articulated basis was a legitimate one. Brief for Respondents 36; see also 316 F. 3d, at 473–474 (declining to address whether the "some evidence" standard should govern the adjudication of such claims, but noting that "[t]he factual averments in the [Mobbs] affidavit, if accurate, are sufficient to confirm" the legality of Hamdi's detention).

In response, Hamdi emphasizes that this Court consistently has recognized that an individual challenging his detention may not be held at the will of the Executive without recourse to some proceeding before a neutral tribunal to determine whether the Executive's asserted justifications for that detention have basis in fact and warrant in law. See, *e. g.*, *Zadvydas* v. *Davis*, 533 U. S. 678, 690 (2001); *Addington* v. *Texas*, 441 U. S. 418, 425–427 (1979). He argues that the Fourth Circuit inappropriately "ceded power to the Executive during wartime to define the conduct for which a citizen may be detained, judge whether that citizen has engaged in the proscribed conduct, and imprison that citizen indefinitely," Brief for Petitioners 21, and that due process demands that he receive a hearing in which he may challenge the Mobbs Declaration and adduce his own counterevidence. The District Court, agreeing with Hamdi, apparently believed that the appropriate process would approach the process that accompanies a criminal trial. It therefore disapproved of the hearsay nature of the Mobbs Declaration and anticipated quite extensive discovery of various military affairs. Anything less, it concluded, would not be "meaningful judicial review." App. 291.

Both of these positions highlight legitimate concerns. And both emphasize the tension that often exists between the autonomy that the Government asserts is necessary in order to pursue effectively a particular goal and the process that a citizen contends he is due before he is deprived of a constitutional right. The ordinary mechanism that we use

for balancing such serious competing interests, and for determining the procedures that are necessary to ensure that a citizen is not "deprived of life, liberty, or property, without due process of law," U. S. Const., Amdt. 5, is the test that we articulated in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). See, *e. g.*, *Heller* v. *Doe*, 509 U. S. 312, 330–331 (1993); *Zinermon* v. *Burch*, 494 U. S. 113, 127–128 (1990); *United States* v. *Salerno*, 481 U. S. 739, 746 (1987); *Schall* v. *Martin*, 467 U. S. 253, 274–275 (1984); *Addington* v. *Texas*, *supra*, at 425. *Mathews* dictates that the process due in any given instance is determined by weighing "the private interest that will be affected by the official action" against the Government's asserted interest, "including the function involved" and the burdens the Government would face in providing greater process. 424 U. S., at 335. The *Mathews* calculus then contemplates a judicious balancing of these concerns, through an analysis of "the risk of an erroneous deprivation" of the private interest if the process were reduced and the "probable value, if any, of additional or substitute procedural safeguards." *Ibid.* We take each of these steps in turn.

1

It is beyond question that substantial interests lie on both sides of the scale in this case. Hamdi's "private interest . . . affected by the official action," *ibid.*, is the most elemental of liberty interests—the interest in being free from physical detention by one's own government. *Foucha* v. *Louisiana*, 504 U. S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action"); see also *Parham* v. *J. R.*, 442 U. S. 584, 600 (1979) (noting the "substantial liberty interest in not being confined unnecessarily"). "In our society liberty is the norm," and detention without trial "is the carefully limited exception." *Salerno*, *supra*, at 755. "We have always been careful not to 'minimize the importance and fundamental nature' of the individu-

al's right to liberty," *Foucha, supra,* at 80 (quoting *Salerno, supra,* at 750), and we will not do so today.

Nor is the weight on this side of the *Mathews* scale offset by the circumstances of war or the accusation of treasonous behavior, for "[i]t is clear that commitment for *any* purpose constitutes a significant deprivation of liberty that requires due process protection," *Jones* v. *United States,* 463 U. S. 354, 361 (1983) (emphasis added; internal quotation marks omitted), and at this stage in the *Mathews* calculus, we consider the interest of the *erroneously* detained individual. *Carey* v. *Piphus,* 435 U. S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"); see also *id.*, at 266 (noting "the importance to organized society that procedural due process be observed," and emphasizing that "the right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions"). Indeed, as *amicus* briefs from media and relief organizations emphasize, the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real. See Brief for AmeriCares et al. as *Amici Curiae* 13–22 (noting ways in which "[t]he nature of humanitarian relief work and journalism present a significant risk of mistaken military detentions"). Moreover, as critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. See *Ex parte Milligan,* 4 Wall., at 125 ("[The Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time,

was especially hazardous to freemen"). Because we live in a society in which "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty," *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975), our starting point for the *Mathews* v. *Eldridge* analysis is unaltered by the allegations surrounding the particular detainee or the organizations with which he is alleged to have associated. We reaffirm today the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests against the curtailment of liberty that such confinement entails.

2

On the other side of the scale are the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States. As discussed above, *supra*, at 518, the law of war and the realities of combat may render such detentions both necessary and appropriate, and our due process analysis need not blink at those realities. Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them. *Department of Navy* v. *Egan*, 484 U. S. 518, 530 (1988) (noting the reluctance of the courts "to intrude upon the authority of the Executive in military and national security affairs"); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 587 (1952) (acknowledging "broad powers in military commanders engaged in day-to-day fighting in a theater of war").

The Government also argues at some length that its interests in reducing the process available to alleged enemy combatants are heightened by the practical difficulties that would accompany a system of trial-like process. In its view, military officers who are engaged in the serious work of wag-

ing battle would be unnecessarily and dangerously distracted by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war. Brief for Respondents 46–49. To the extent that these burdens are triggered by heightened procedures, they are properly taken into account in our due process analysis.

3

Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad. See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 164–165 (1963) ("The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action"); see also *United States* v. *Robel*, 389 U. S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile").

With due recognition of these competing concerns, we believe that neither the process proposed by the Government nor the process apparently envisioned by the District Court below strikes the proper constitutional balance when a United States citizen is detained in the United States as an enemy combatant. That is, "the risk of an erroneous depri-

vation" of a detainee's liberty interest is unacceptably high under the Government's proposed rule, while some of the "additional or substitute procedural safeguards" suggested by the District Court are unwarranted in light of their limited "probable value" and the burdens they may impose on the military in such cases. *Mathews*, 424 U. S., at 335.

We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker. See *Cleveland Bd. of Ed.* v. *Loudermill*, 470 U. S. 532, 542 (1985) ("An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case'" (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950))); *Concrete Pipe & Products of Cal., Inc.* v. *Construction Laborers Pension Trust for Southern Cal.*, 508 U. S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (quoting *Ward* v. *Monroeville*, 409 U. S. 57, 61–62 (1972))). "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.'" *Fuentes* v. *Shevin*, 407 U. S. 67, 80 (1972) (quoting *Baldwin* v. *Hale*, 1 Wall. 223, 233 (1864); *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965) (other citations omitted)). These essential constitutional promises may not be eroded.

At the same time, the exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be

accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria. A burden-shifting scheme of this sort would meet the goal of ensuring that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error while giving due regard to the Executive once it has put forth meaningful support for its conclusion that the detainee is in fact an enemy combatant. In the words of *Mathews*, process of this sort would sufficiently address the "risk of an erroneous deprivation" of a detainee's liberty interest while eliminating certain procedures that have questionable additional value in light of the burden on the Government. 424 U. S., at 335.[2]

We think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts. The parties agree that initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized. The Government has made clear in its briefing that documentation regarding battlefield detainees already is kept in the ordinary course of military affairs. Brief for Respondents 3–4. Any factfinding imposition created by requiring a knowledgeable affiant to summarize these records to an independent tribunal is a minimal one. Likewise, arguments

[2] Because we hold that Hamdi is constitutionally entitled to the process described above, we need not address at this time whether any treaty guarantees him similar access to a tribunal for a determination of his status.

that military officers ought not have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts. This focus meddles little, if at all, in the strategy or conduct of war, inquiring only into the appropriateness of continuing to detain an individual claimed to have taken up arms against the United States. While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here. Cf. *Korematsu* v. *United States*, 323 U. S. 214, 233–234 (1944) (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled"); *Sterling* v. *Constantin*, 287 U. S. 378, 401 (1932) ("What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions").

In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator.

D

In so holding, we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examina-

tion of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. *Youngstown Sheet & Tube*, 343 U. S., at 587. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. *Mistretta* v. *United States*, 488 U. S. 361, 380 (1989) (it was "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty"); *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 426 (1934) (The war power "is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties"). Likewise, we have made clear that, unless Congress acts to suspend it, the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions. See *St. Cyr*, 533 U. S., at 301 ("At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest"). Thus, while we do not question that our due process assessment must pay keen attention to the particular burdens faced by the Executive in the context of military action, it would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court

with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge. Absent suspension of the writ by Congress, a citizen detained as an enemy combatant is entitled to this process.

Because we conclude that due process demands some system for a citizen-detainee to refute his classification, the proposed "some evidence" standard is inadequate. Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short. As the Government itself has recognized, we have utilized the "some evidence" standard in the past as a standard of review, not as a standard of proof. Brief for Respondents 35. That is, it primarily has been employed by courts in examining an administrative record developed after an adversarial proceeding—one with process at least of the sort that we today hold is constitutionally mandated in the citizen enemy-combatant setting. See, *e. g.*, *St. Cyr*, *supra; Hill*, 472 U. S., at 455–457. This standard therefore is ill suited to the situation in which a habeas petitioner has received no prior proceedings before any tribunal and had no prior opportunity to rebut the Executive's factual assertions before a neutral decisionmaker.

Today we are faced only with such a case. Aside from unspecified "screening" processes, Brief for Respondents 3–4, and military interrogations in which the Government suggests Hamdi could have contested his classification, Tr. of Oral Arg. 40, 42, Hamdi has received no process. An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate factfinding before a neutral decisionmaker. Compare Brief for Respondents 42–43 (discussing the "secure interrogation environment," and noting that military interrogations require a controlled "interrogation dynamic" and "a relationship of trust and dependency" and are "a critical source" of

"timely and effective intelligence") with *Concrete Pipe*, 508 U. S., at 617–618 ("[O]ne is entitled as a matter of due process of law to an adjudicator who is not in a situation which would offer a possible temptation to the average man as a judge . . . which might lead him not to hold the balance nice, clear and true" (internal quotation marks omitted)). That even purportedly fair adjudicators "are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey* v. *Ohio*, 273 U. S. 510, 522 (1927). Plainly, the "process" Hamdi has received is not that to which he is entitled under the Due Process Clause.

There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal. Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention. See Headquarters Depts. of Army, Navy, Air Force, and Marine Corps, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, ch. 1, § 1–6 (1997). In the absence of such process, however, a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved. Both courts below recognized as much, focusing their energies on the question of whether Hamdi was due an opportunity to rebut the Government's case against him. The Government, too, proceeded on this assumption, presenting its affidavit and then seeking that it be evaluated under a deferential standard of review based on burdens that it alleged would accompany any greater process. As we have discussed, a habeas court in a case such as this may accept affidavit evidence like that contained in the Mobbs Declaration, so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return. We antici-

pate that a District Court would proceed with the caution that we have indicated is necessary in this setting, engaging in a factfinding process that is both prudent and incremental. We have no reason to doubt that courts faced with these sensitive matters will pay proper heed both to the matters of national security that might arise in an individual case and to the constitutional limitations safeguarding essential liberties that remain vibrant even in times of security concerns.

IV

Hamdi asks us to hold that the Fourth Circuit also erred by denying him immediate access to counsel upon his detention and by disposing of the case without permitting him to meet with an attorney. Brief for Petitioners 19. Since our grant of certiorari in this case, Hamdi has been appointed counsel, with whom he has met for consultation purposes on several occasions, and with whom he is now being granted unmonitored meetings. He unquestionably has the right to access to counsel in connection with the proceedings on remand. No further consideration of this issue is necessary at this stage of the case.

* * *

The judgment of the United States Court of Appeals for the Fourth Circuit is vacated, and the case is remanded for further proceedings.

It is so ordered.

JUSTICE SOUTER, with whom JUSTICE GINSBURG joins, concurring in part, dissenting in part, and concurring in the judgment.

According to Yaser Hamdi's petition for writ of habeas corpus, brought on his behalf by his father, the Government of the United States is detaining him, an American citizen on American soil, with the explanation that he was seized on the field of battle in Afghanistan, having been on the enemy side. It is undisputed that the Government has not charged

him with espionage, treason, or any other crime under domestic law. It is likewise undisputed that for one year and nine months, on the basis of an Executive designation of Hamdi as an "enemy combatant," the Government denied him the right to send or receive any communication beyond the prison where he was held and, in particular, denied him access to counsel to represent him.[1] The Government asserts a right to hold Hamdi under these conditions indefinitely, that is, until the Government determines that the United States is no longer threatened by the terrorism exemplified in the attacks of September 11, 2001.

In these proceedings on Hamdi's petition, he seeks to challenge the facts claimed by the Government as the basis for holding him as an enemy combatant. And in this Court he presses the distinct argument that the Government's claim, even if true, would not implicate any authority for holding him that would satisfy 18 U. S. C. § 4001(a) (Non-Detention Act), which bars imprisonment or detention of a citizen "except pursuant to an Act of Congress."

The Government responds that Hamdi's incommunicado imprisonment as an enemy combatant seized on the field of battle falls within the President's power as Commander in Chief under the laws and usages of war, and is in any event authorized by two statutes. Accordingly, the Government contends that Hamdi has no basis for any challenge by petition for habeas except to his own status as an enemy combatant; and even that challenge may go no further than to enquire whether "some evidence" supports Hamdi's designation, see Brief for Respondents 34–36; if there is "some evidence," Hamdi should remain locked up at the discretion of the Executive. At the argument of this case, in fact, the Government went further and suggested that as long as a prisoner could challenge his enemy combatant des-

[1] The Government has since February 2004 permitted Hamdi to consult with counsel as a matter of policy, but does not concede that it has an obligation to allow this. Brief for Respondents 9, 39–46.

ignation when responding to interrogation during incommunicado detention he was accorded sufficient process to support his designation as an enemy combatant. See Tr. of Oral Arg. 40; *id.*, at 42 ("[H]e has an opportunity to explain it in his own words" "[d]uring interrogation"). Since on either view judicial enquiry so limited would be virtually worthless as a way to contest detention, the Government's concession of jurisdiction to hear Hamdi's habeas claim is more theoretical than practical, leaving the assertion of Executive authority close to unconditional.

The plurality rejects any such limit on the exercise of habeas jurisdiction and so far I agree with its opinion. The plurality does, however, accept the Government's position that if Hamdi's designation as an enemy combatant is correct, his detention (at least as to some period) is authorized by an Act of Congress as required by § 4001(a), that is, by the Authorization for Use of Military Force, 115 Stat. 224 (hereinafter Force Resolution). *Ante*, at 517–521. Here, I disagree and respectfully dissent. The Government has failed to demonstrate that the Force Resolution authorizes the detention complained of here even on the facts the Government claims. If the Government raises nothing further than the record now shows, the Non-Detention Act entitles Hamdi to be released.

I

The Government's first response to Hamdi's claim that holding him violates § 4001(a), prohibiting detention of citizens "except pursuant to an Act of Congress," is that the statute does not even apply to military wartime detentions, being beyond the sphere of domestic criminal law. Next, the Government says that even if that statute does apply, two Acts of Congress provide the authority § 4001(a) demands: a general authorization to the Department of Defense to pay for detaining "prisoners of war" and "similar" persons, 10 U. S. C. § 956(5), and the Force Resolution, passed after the attacks of 2001. At the same time, the Govern-

ment argues that in detaining Hamdi in the manner described, the President is in any event acting as Commander in Chief under Article II of the Constitution, which brings with it the right to invoke authority under the accepted customary rules for waging war. On the record in front of us, the Government has not made out a case on any theory.

II

The threshold issue is how broadly or narrowly to read the Non-Detention Act, the tone of which is severe: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U. S. C. § 4001(a). Should the severity of the Act be relieved when the Government's stated factual justification for incommunicado detention is a war on terrorism, so that the Government may be said to act "pursuant" to congressional terms that fall short of explicit authority to imprison individuals? With one possible though important qualification, see *infra*, at 548–549, the answer has to be no. For a number of reasons, the prohibition within § 4001(a) has to be read broadly to accord the statute a long reach and to impose a burden of justification on the Government.

First, the circumstances in which the Act was adopted point the way to this interpretation. The provision superseded a cold-war statute, the Emergency Detention Act of 1950 (formerly 50 U. S. C. § 811 *et seq.* (1970 ed.)), which had authorized the Attorney General, in time of emergency, to detain anyone reasonably thought likely to engage in espionage or sabotage. That statute was repealed in 1971 out of fear that it could authorize a repetition of the World War II internment of citizens of Japanese ancestry; Congress meant to preclude another episode like the one described in *Korematsu* v. *United States*, 323 U. S. 214 (1944). See H. R. Rep. No. 92–116, pp. 2, 4–5 (1971). While Congress might simply have struck the 1950 statute, in considering the repealer the point was made that the existing statute provided some ex-

press procedural protection, without which the Executive would seem to be subject to no statutory limits protecting individual liberty. See *id.*, at 5 (mere repeal "might leave citizens subject to arbitrary executive action, with no clear demarcation of the limits of executive authority"); 117 Cong. Rec. 31544 (1971) (Emergency Detention Act "remains as the only existing barrier against the future exercise of executive power which resulted in" the Japanese internment); cf. *id.*, at 31548 (in the absence of further procedural provisions, even § 4001(a) "will virtually leave us stripped naked against the great power . . . which the President has"). It was in these circumstances that a proposed limit on Executive action was expanded to the inclusive scope of § 4001(a) as enacted.

The fact that Congress intended to guard against a repetition of the World War II internments when it repealed the 1950 statute and gave us § 4001(a) provides a powerful reason to think that § 4001(a) was meant to require clear congressional authorization before any citizen can be placed in a cell. It is not merely that the legislative history shows that § 4001(a) was thought necessary in anticipation of times just like the present, in which the safety of the country is threatened. To appreciate what is most significant, one must only recall that the internments of the 1940s were accomplished by Executive action. Although an Act of Congress ratified and confirmed an Executive order authorizing the military to exclude individuals from defined areas and to accommodate those it might remove, see *Ex parte Endo*, 323 U. S. 283, 285–288 (1944), the statute said nothing whatever about the detention of those who might be removed, *id.*, at 300–301; internment camps were creatures of the Executive, and confinement in them rested on assertion of Executive authority, see *id.*, at 287–293. When, therefore, Congress repealed the 1950 Act and adopted § 4001(a) for the purpose of avoiding another *Korematsu*, it intended to preclude reliance on vague congressional authority (for example, providing "ac-

commodations" for those subject to removal) as authority for detention or imprisonment at the discretion of the Executive (maintaining detention camps of American citizens, for example). In requiring that any Executive detention be "pursuant to an Act of Congress," then, Congress necessarily meant to require a congressional enactment that clearly authorized detention or imprisonment.

Second, when Congress passed § 4001(a) it was acting in light of an interpretive regime that subjected enactments limiting liberty in wartime to the requirement of a clear statement and it presumably intended § 4001(a) to be read accordingly. This need for clarity was unmistakably expressed in *Ex parte Endo*, *supra*, decided the same day as *Korematsu*. *Endo* began with a petition for habeas corpus by an interned citizen claiming to be loyal and law-abiding and thus "unlawfully detained." 323 U. S., at 294. The petitioner was held entitled to habeas relief in an opinion that set out this principle for scrutinizing wartime statutes in derogation of customary liberty:

> "In interpreting a wartime measure we must assume that [its] purpose was to allow for the greatest possible accommodation between . . . liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used." *Id.*, at 300.

Congress's understanding of the need for clear authority before citizens are kept detained is itself therefore clear, and § 4001(a) must be read to have teeth in its demand for congressional authorization.

Finally, even if history had spared us the cautionary example of the internments in World War II, even if there had been no *Korematsu*, and *Endo* had set out no principle of statutory interpretation, there would be a compelling reason

to read § 4001(a) to demand manifest authority to detain before detention is authorized. The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each. In a government of separated powers, deciding finally on what is a reasonable degree of guaranteed liberty whether in peace or war (or some condition in between) is not well entrusted to the Executive Branch of Government, whose particular responsibility is to maintain security. For reasons of inescapable human nature, the branch of the Government asked to counter a serious threat is not the branch on which to rest the Nation's entire reliance in striking the balance between the will to win and the cost in liberty on the way to victory; the responsibility for security will naturally amplify the claim that security legitimately raises. A reasonable balance is more likely to be reached on the judgment of a different branch, just as Madison said in remarking that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights." The Federalist No. 51, p. 349 (J. Cooke ed. 1961). Hence the need for an assessment by Congress before citizens are subject to lockup, and likewise the need for a clearly expressed congressional resolution of the competing claims.

III

Under this principle of reading § 4001(a) robustly to require a clear statement of authorization to detain, none of the Government's arguments suffices to justify Hamdi's detention.

A

First, there is the argument that § 4001(a) does not even apply to wartime military detentions, a position resting on the placement of § 4001(a) in Title 18 of the United States Code, the gathering of federal criminal law. The text of the

statute does not, however, so limit its reach, and the legislative history of the provision shows its placement in Title 18 was not meant to render the statute more restricted than its terms. The draft of what is now § 4001(a) as contained in the original bill prohibited only imprisonment unauthorized by Title 18. See H. R. Rep. No. 92–116, at 4. In response to the Department of Justice's objection that the original draft seemed to assume wrongly that all provisions for the detention of convicted persons would be contained in Title 18, the provision was amended by replacing a reference to that title with the reference to an "Act of Congress." *Id.*, at 3. The Committee on the Judiciary, discussing this change, stated that "[limiting] detention of citizens . . . to situations in which . . . an Act of Congres[s] exists" would "assure that no detention camps can be established without at least the acquiescence of the Congress." *Id.*, at 5. See also *supra*, at 542–544. This understanding, that the amended bill would sweep beyond imprisonment for crime and apply to Executive detention in furtherance of wartime security, was emphasized in an extended debate. Representative Ichord, chairman of the House Internal Security Committee and an opponent of the bill, feared that the redrafted statute would "deprive the President of his emergency powers and his most effective means of coping with sabotage and espionage agents in war-related crises." 117 Cong. Rec., at 31542. Representative Railsback, the bill's sponsor, spoke of the bill in absolute terms: "[I]n order to prohibit arbitrary executive action, [the bill] assures that no detention of citizens can be undertaken by the Executive without the prior consent of the Congress." *Id.*, at 31551. This legislative history indicates that Congress was aware that § 4001(a) would limit the Executive's power to detain citizens in wartime to protect national security, and it is fair to say that the prohibition was thus intended to extend not only to the exercise of power to vindicate the interests underlying domestic criminal law, but to statutorily unauthor-

ized detention by the Executive for reasons of security in wartime, just as Hamdi claims.[2]

B

Next, there is the Government's claim, accepted by the plurality, that the terms of the Force Resolution are adequate to authorize detention of an enemy combatant under the circumstances described,[3] a claim the Government fails to support sufficiently to satisfy § 4001(a) as read to require a clear statement of authority to detain. Since the Force Resolution was adopted one week after the attacks of September 11, 2001, it naturally speaks with some generality, but its focus is clear, and that is on the use of military power. It is fairly read to authorize the use of armies and weapons, whether against other armies or individual terrorists. But, like the statute discussed in *Endo*, it never so much as uses the word detention, and there is no reason to think Congress might have perceived any need to augment Executive power to deal with dangerous citizens within the United States, given the well-stocked statutory arsenal of defined criminal offenses covering the gamut of actions that a citizen sympathetic to terrorists might commit. See, *e. g.*, 18 U. S. C.

[2] Nor is it possible to distinguish between civilian and military authority to detain based on the congressional object of avoiding another *Korematsu* v. *United States*, 323 U. S. 214 (1944). See Brief for Respondents 21 (arguing that military detentions are exempt). Although a civilian agency authorized by Executive order ran the detention camps, the relocation and detention of American citizens was ordered by the military under authority of the President as Commander in Chief. See *Ex parte Endo*, 323 U. S. 283, 285–288 (1944). The World War II internment was thus ordered under the same Presidential power invoked here and the intent to bar a repetition goes to the action taken and authority claimed here.

[3] As noted, *supra*, at 541, the Government argues that a required Act of Congress is to be found in a statutory authorization to spend money appropriated for the care of prisoners of war and of other, similar prisoners, 10 U. S. C. § 956(5). It is enough to say that this statute is an authorization to spend money if there are prisoners, not an authorization to imprison anyone to provide the occasion for spending money.

§ 2339A (material support for various terrorist acts); § 2339B (material support to a foreign terrorist organization); § 2332a (use of a weapon of mass destruction, including conspiracy and attempt); § 2332b(a)(1) (acts of terrorism "transcending national boundaries," including threats, conspiracy, and attempt); § 2339C (2000 ed., Supp. II) (financing of certain terrorist acts); see also § 3142(e) (pretrial detention). See generally Brief for Janet Reno et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, O. T. 2003, No. 03–1027, pp. 14–19, and n. 17 (listing the tools available to the Executive to fight terrorism even without the power the Government claims here); Brief for Louis Henkin et al. as *Amici Curiae* in *Rumsfeld* v. *Padilla*, O. T. 2003, No. 03–1027, p. 23, n. 27.[4]

C

Even so, there is one argument for treating the Force Resolution as sufficiently clear to authorize detention of a citizen consistently with § 4001(a). Assuming the argument to be sound, however, the Government is in no position to claim its advantage.

Because the Force Resolution authorizes the use of military force in acts of war by the United States, the argument goes, it is reasonably clear that the military and its Commander in Chief are authorized to deal with enemy belligerents according to the treaties and customs known collectively as the laws of war. Brief for Respondents 20– 22; see *ante*, at 517–521 (accepting this argument). Accordingly, the United States may detain captured enemies, and *Ex parte Quirin*, 317 U. S. 1 (1942), may perhaps be claimed for the proposition that the American citizenship of such a captive does not as such limit the Government's power to deal with

[4] Even a brief examination of the reported cases in which the Government has chosen to proceed criminally against those who aided the Taliban shows the Government has found no shortage of offenses to allege. See *United States* v. *Lindh*, 212 F. Supp. 2d 541, 547 (ED Va. 2002); *United States* v. *Khan*, 309 F. Supp. 2d 789, 796 (ED Va. 2004).

him under the usages of war. *Id.*, at 31, 37–38. Thus, the Government here repeatedly argues that Hamdi's detention amounts to nothing more than customary detention of a captive taken on the field of battle: if the usages of war are fairly authorized by the Force Resolution, Hamdi's detention is authorized for purposes of § 4001(a).

There is no need, however, to address the merits of such an argument in all possible circumstances. For now it is enough to recognize that the Government's stated legal position in its campaign against the Taliban (among whom Hamdi was allegedly captured) is apparently at odds with its claim here to be acting in accordance with customary law of war and hence to be within the terms of the Force Resolution in its detention of Hamdi. In a statement of its legal position cited in its brief, the Government says that "the Geneva Convention applies to the Taliban detainees." Office of the White House Press Secretary, Fact Sheet, Status of Detainees at Guantanamo (Feb. 7, 2002), www.whitehouse.gov/news/releases/2002/02/20020207-13.html (as visited June 18, 2004, and available in Clerk of Court's case file) (hereinafter White House Press Release) (cited in Brief for Respondents 24, n. 9). Hamdi presumably is such a detainee, since according to the Government's own account, he was taken bearing arms on the Taliban side of a field of battle in Afghanistan. He would therefore seem to qualify for treatment as a prisoner of war under the Third Geneva Convention, to which the United States is a party. Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3316, 3320, T. I. A. S. No. 3364.

By holding him incommunicado, however, the Government obviously has not been treating him as a prisoner of war, and in fact the Government claims that no Taliban detainee is entitled to prisoner of war status. See Brief for Respondents 24; White House Press Release. This treatment appears to be a violation of the Geneva Convention provision

that even in cases of doubt, captives are entitled to be treated as prisoners of war "until such time as their status has been determined by a competent tribunal." Art. 5, 6 U. S. T., at 3324. The Government answers that the President's determination that Taliban detainees do not qualify as prisoners of war is conclusive as to Hamdi's status and removes any doubt that would trigger application of the Convention's tribunal requirement. See Brief for Respondents 24. But reliance on this categorical pronouncement to settle doubt is apparently at odds with the military regulation, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, ch. 1, §§ 1–5, 1–6 (1997), adopted to implement the Geneva Convention, and setting out a detailed procedure for a military tribunal to determine an individual's status. See, *e. g.*, *id.*, § 1–6 ("A competent tribunal shall be composed of three commissioned officers"; a "written record shall be made of proceedings"; "[p]roceedings shall be open" with certain exceptions; "[p]ersons whose status is to be determined shall be advised of their rights at the beginning of their hearings," "allowed to attend all open sessions," "allowed to call witnesses if reasonably available, and to question those witnesses called by the Tribunal," and to "have a right to testify"; and a tribunal shall determine status by a "[p]reponderance of evidence"). One of the types of doubt these tribunals are meant to settle is whether a given individual may be, as Hamdi says he is, an "[i]nnocent civilian who should be immediately returned to his home or released." *Id.*, § 1–6*e*(10)(*c*). The regulation, jointly promulgated by the Headquarters of the Departments of the Army, Navy, Air Force, and Marine Corps, provides that "[p]ersons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed." *Id.*, § 1–6*g*. The regulation

also incorporates the Geneva Convention's presumption that in cases of doubt, "persons shall enjoy the protection of the . . . Convention until such time as their status has been determined by a competent tribunal." *Id.*, § 1–6*a*. Thus, there is reason to question whether the United States is acting in accordance with the laws of war it claims as authority.

Whether, or to what degree, the Government is in fact violating the Geneva Convention and is thus acting outside the customary usages of war are not matters I can resolve at this point. What I can say, though, is that the Government has not made out its claim that in detaining Hamdi in the manner described, it is acting in accord with the laws of war authorized to be applied against citizens by the Force Resolution. I conclude accordingly that the Government has failed to support the position that the Force Resolution authorizes the described detention of Hamdi for purposes of § 4001(a).

It is worth adding a further reason for requiring the Government to bear the burden of clearly justifying its claim to be exercising recognized war powers before declaring § 4001(a) satisfied. Thirty-eight days after adopting the Force Resolution, Congress passed the statute entitled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT), 115 Stat. 272; that Act authorized the detention of alien terrorists for no more than seven days in the absence of criminal charges or deportation proceedings, 8 U. S. C. § 1226a(a)(5) (2000 ed., Supp. I). It is very difficult to believe that the same Congress that carefully circumscribed Executive power over alien terrorists on home soil would not have meant to require the Government to justify clearly its detention of an American citizen held on home soil incommunicado.

D

Since the Government has given no reason either to deflect the application of § 4001(a) or to hold it to be satisfied, I need

to go no further; the Government hints of a constitutional challenge to the statute, but it presents none here. I will, however, stray across the line between statutory and constitutional territory just far enough to note the weakness of the Government's mixed claim of inherent, extrastatutory authority under a combination of Article II of the Constitution and the usages of war. It is in fact in this connection that the Government developed its argument that the exercise of war powers justifies the detention, and what I have just said about its inadequacy applies here as well. Beyond that, it is instructive to recall Justice Jackson's observation that the President is not Commander in Chief of the country, only of the military. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 643–644 (1952) (concurring opinion); see also *id.*, at 637–638 (Presidential authority is "at its lowest ebb" where the President acts contrary to congressional will).

There may be room for one qualification to Justice Jackson's statement, however: in a moment of genuine emergency, when the Government must act with no time for deliberation, the Executive may be able to detain a citizen if there is reason to fear he is an imminent threat to the safety of the Nation and its people (though I doubt there is any want of statutory authority, see *supra*, at 547–548). This case, however, does not present that question, because an emergency power of necessity must at least be limited by the emergency; Hamdi has been locked up for over two years. Cf. *Ex parte Milligan*, 4 Wall. 2, 127 (1866) (martial law justified only by "actual and present" necessity as in a genuine invasion that closes civilian courts).

Whether insisting on the careful scrutiny of emergency claims or on a vigorous reading of § 4001(a), we are heirs to a tradition given voice 800 years ago by Magna Carta, which, on the barons' insistence, confined executive power by "the law of the land."

IV

Because I find Hamdi's detention forbidden by § 4001(a) and unauthorized by the Force Resolution, I would not reach any questions of what process he may be due in litigating disputed issues in a proceeding under the habeas statute or prior to the habeas enquiry itself. For me, it suffices that the Government has failed to justify holding him in the absence of a further Act of Congress, criminal charges, a showing that the detention conforms to the laws of war, or a demonstration that § 4001(a) is unconstitutional. I would therefore vacate the judgment of the Court of Appeals and remand for proceedings consistent with this view.

Since this disposition does not command a majority of the Court, however, the need to give practical effect to the conclusions of eight Members of the Court rejecting the Government's position calls for me to join with the plurality in ordering remand on terms closest to those I would impose. See *Screws* v. *United States*, 325 U. S. 91, 134 (1945) (Rutledge, J., concurring in result). Although I think litigation of Hamdi's status as an enemy combatant is unnecessary, the terms of the plurality's remand will allow Hamdi to offer evidence that he is not an enemy combatant, and he should at the least have the benefit of that opportunity.

It should go without saying that in joining with the plurality to produce a judgment, I do not adopt the plurality's resolution of constitutional issues that I would not reach. It is not that I could disagree with the plurality's determinations (given the plurality's view of the Force Resolution) that someone in Hamdi's position is entitled at a minimum to notice of the Government's claimed factual basis for holding him, and to a fair chance to rebut it before a neutral decisionmaker, see *ante*, at 533; nor, of course, could I disagree with the plurality's affirmation of Hamdi's right to counsel, see *ante*, at 539. On the other hand, I do not mean to imply agreement that the Government could claim an evidentiary presumption casting the burden of rebuttal on

Hamdi, see *ante*, at 534, or that an opportunity to litigate before a military tribunal might obviate or truncate enquiry by a court on habeas, see *ante*, at 538.

Subject to these qualifications, I join with the plurality in a judgment of the Court vacating the Fourth Circuit's judgment and remanding the case.

JUSTICE SCALIA, with whom JUSTICE STEVENS joins, dissenting.

Petitioner Yaser Hamdi, a presumed American citizen, has been imprisoned without charge or hearing in the Norfolk and Charleston Naval Brigs for more than two years, on the allegation that he is an enemy combatant who bore arms against his country for the Taliban. His father claims to the contrary, that he is an inexperienced aid worker caught in the wrong place at the wrong time. This case brings into conflict the competing demands of national security and our citizens' constitutional right to personal liberty. Although I share the plurality's evident unease as it seeks to reconcile the two, I do not agree with its resolution.

Where the Government accuses a citizen of waging war against it, our constitutional tradition has been to prosecute him in federal court for treason or some other crime. Where the exigencies of war prevent that, the Constitution's Suspension Clause, Art. I, § 9, cl. 2, allows Congress to relax the usual protections temporarily. Absent suspension, however, the Executive's assertion of military exigency has not been thought sufficient to permit detention without charge. No one contends that the congressional Authorization for Use of Military Force, on which the Government relies to justify its actions here, is an implementation of the Suspension Clause. Accordingly, I would reverse the judgment below.

I

The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite

imprisonment at the will of the Executive. Blackstone stated this principle clearly:

> "Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities. . . . To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. . . .
>
> "To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the gaoler is not bound to detain the prisoner. For the law judges in this respect, . . . that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him." 1 W. Blackstone, Commentaries on the Laws of England 131–133 (1765) (hereinafter Blackstone).

These words were well known to the Founders. Hamilton quoted from this very passage in The Federalist No. 84, p. 444 (G. Carey & J. McClellan eds. 2001). The two ideas central to Blackstone's understanding—due process as the right secured, and habeas corpus as the instrument by which due process could be insisted upon by a citizen illegally im-

prisoned—found expression in the Constitution's Due Process and Suspension Clauses. See Amdt. 5; Art. I, § 9, cl. 2.

The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property. When a citizen was deprived of liberty because of alleged criminal conduct, those procedures typically required committal by a magistrate followed by indictment and trial. See, *e. g.*, 2 & 3 Philip & Mary, ch. 10 (1555); 3 J. Story, Commentaries on the Constitution of the United States § 1783, p. 661 (1833) (hereinafter Story) (equating "due process of law" with "due presentment or indictment, and being brought in to answer thereto by due process of the common law"). The Due Process Clause "in effect affirms the right of trial according to the process and proceedings of the common law." *Ibid.* See also T. Cooley, General Principles of Constitutional Law 224 (1880) ("When life and liberty are in question, there must in every instance be judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal, with proper jurisdiction, and a conviction and judgment before the punishment can be inflicted" (internal quotation marks omitted)).

To be sure, certain types of permissible *non*criminal detention—that is, those not dependent upon the contention that the citizen had committed a criminal act—did not require the protections of criminal procedure. However, these fell into a limited number of well-recognized exceptions—civil commitment of the mentally ill, for example, and temporary detention in quarantine of the infectious. See *Opinion on the Writ of Habeas Corpus*, Wilm. 77, 88–92, 97 Eng. Rep. 29, 36–37 (H. L. 1758) (Wilmot, J.). It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely by disclaiming an intent to prosecute, or by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.

Cf. *Kansas* v. *Hendricks*, 521 U. S. 346, 358 (1997) ("A finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment").

These due process rights have historically been vindicated by the writ of habeas corpus. In England before the founding, the writ developed into a tool for challenging executive confinement. It was not always effective. For example, in *Darnel's Case*, 3 How. St. Tr. 1 (K. B. 1627), King Charles I detained without charge several individuals for failing to assist England's war against France and Spain. The prisoners sought writs of habeas corpus, arguing that without specific charges, "imprisonment shall not continue on for a time, but for ever; and the subjects of this kingdom may be restrained of their liberties perpetually." *Id.*, at 8. The Attorney General replied that the Crown's interest in protecting the realm justified imprisonment in "a matter of state . . . not ripe nor timely" for the ordinary process of accusation and trial. *Id.*, at 37. The court denied relief, producing widespread outrage, and Parliament responded with the Petition of Right, accepted by the King in 1628, which expressly prohibited imprisonment without formal charges, see 3 Car. 1, ch. 1, §§5, 10.

The struggle between subject and Crown continued, and culminated in the Habeas Corpus Act of 1679, 31 Car. 2, ch. 2, described by Blackstone as a "second *magna carta*, and stable bulwark of our liberties." 1 Blackstone 133. The Act governed all persons "committed or detained . . . for any crime." §3. In cases other than felony or treason plainly expressed in the warrant of commitment, the Act required release upon appropriate sureties (unless the commitment was for a nonbailable offense). *Ibid.* Where the commitment was for felony or high treason, the Act did not require immediate release, but instead required the Crown to commence criminal proceedings within a specified time. §7. If the prisoner was not "indicted some Time in the next Term,"

the judge was "required . . . to set at Liberty the Prisoner upon Bail" unless the King was unable to produce his witnesses. *Ibid.* Able or no, if the prisoner was not brought to trial by the *next* succeeding term, the Act provided that "he shall be discharged from his Imprisonment." *Ibid.* English courts sat four terms per year, see 3 Blackstone 275–277, so the practical effect of this provision was that imprisonment without indictment or trial for felony or high treason under § 7 would not exceed approximately three to six months.

The writ of habeas corpus was preserved in the Constitution—the only common-law writ to be explicitly mentioned. See Art. I, § 9, cl. 2. Hamilton lauded "the establishment of the writ of *habeas corpus*" in his Federalist defense as a means to protect against "the practice of arbitrary imprisonments . . . in all ages, [one of] the favourite and most formidable instruments of tyranny." The Federalist No. 84, at 444. Indeed, availability of the writ under the new Constitution (along with the requirement of trial by jury in criminal cases, see Art. III, § 2, cl. 3) was his basis for arguing that additional, explicit procedural protections were unnecessary. See The Federalist No. 83, at 433.

II

The allegations here, of course, are no ordinary accusations of criminal activity. Yaser Esam Hamdi has been imprisoned because the Government believes he participated in the waging of war against the United States. The relevant question, then, is whether there is a different, special procedure for imprisonment of a citizen accused of wrongdoing *by aiding the enemy in wartime.*

A

JUSTICE O'CONNOR, writing for a plurality of this Court, asserts that captured enemy combatants (other than those suspected of war crimes) have traditionally been detained

until the cessation of hostilities and then released. *Ante,* at 518–519. That is probably an accurate description of wartime practice with respect to enemy *aliens.* The tradition with respect to American citizens, however, has been quite different. Citizens aiding the enemy have been treated as traitors subject to the criminal process.

As early as 1350, England's Statute of Treasons made it a crime to "levy War against our Lord the King in his Realm, or be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort, in the Realm, or elsewhere." 25 Edw. 3, Stat. 5, c. 2. In his 1762 Discourse on High Treason, Sir Michael Foster explained:

> "With regard to Natural-born Subjects there can be no Doubt. They owe Allegiance to the Crown at all Times and in all Places.
>
> . . . . .
>
> "The joining with Rebels in an Act of Rebellion, or with Enemies in Acts of Hostility, will make a Man a Traitor: in the one Case within the Clause of Levying War, in the other within that of Adhering to the King's enemies.
>
> . . . . .
>
> "States in Actual Hostility with Us, though no War be solemnly Declared, are Enemies within the meaning of the Act. And therefore in an Indictment on the Clause of Adhering to the King's Enemies, it is sufficient to Aver that the Prince or State Adhered to *is an Enemy,* without shewing any War Proclaimed. . . . And if the Subject of a Foreign Prince in Amity with Us, invadeth the Kingdom without Commission from his Sovereign, He is an Enemy. And a Subject of *England* adhering to Him is a Traitor within this Clause of the Act." A Report of Some Proceedings on the Commission . . . for the Trial of the Rebels in the Year 1746 in the County of Surry, and of Other Crown Cases, Introduction, § 1, p. 183; Ch. 2, § 8, p. 216; § 12, p. 219.

Subjects accused of levying war against the King were routinely prosecuted for treason. *E. g.*, *Harding's Case*, 2 Ventris 315, 86 Eng. Rep. 461 (K. B. 1690); *Trial of Parkyns*, 13 How. St. Tr. 63 (K. B. 1696); *Trial of Vaughan*, 13 How. St. Tr. 485 (K. B. 1696); *Trial of Downie*, 24 How. St. Tr. 1 (1794). The Founders inherited the understanding that a citizen's levying war against the Government was to be punished criminally. The Constitution provides: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort"; and establishes a heightened proof requirement (two witnesses) in order to "convic[t]" of that offense. Art. III, § 3, cl. 1.

In more recent times, too, citizens have been charged and tried in Article III courts for acts of war against the United States, even when their noncitizen co-conspirators were not. For example, two American citizens alleged to have participated during World War I in a spying conspiracy on behalf of Germany were tried in federal court. See *United States* v. *Fricke*, 259 F. 673 (SDNY 1919); *United States* v. *Robinson*, 259 F. 685 (SDNY 1919). A German member of the same conspiracy was subjected to military process. See *United States ex rel. Wessels* v. *McDonald*, 265 F. 754 (EDNY 1920). During World War II, the famous German saboteurs of *Ex parte Quirin*, 317 U. S. 1 (1942), received military process, but the citizens who associated with them (with the exception of one citizen-saboteur, discussed below) were punished under the criminal process. See *Haupt* v. *United States*, 330 U. S. 631 (1947); L. Fisher, Nazi Saboteurs on Trial 80–84 (2003); see also *Cramer* v. *United States*, 325 U. S. 1 (1945).

The modern treason statute is 18 U. S. C. § 2381; it basically tracks the language of the constitutional provision. Other provisions of Title 18 criminalize various acts of warmaking and adherence to the enemy. See, *e. g.*, § 32 (destruction of aircraft or aircraft facilities), § 2332a (use of

weapons of mass destruction), § 2332b (acts of terrorism transcending national boundaries), § 2339A (providing material support to terrorists), § 2339B (providing material support to certain terrorist organizations), § 2382 (misprision of treason), § 2383 (rebellion or insurrection), § 2384 (seditious conspiracy), § 2390 (enlistment to serve in armed hostility against the United States). See also 31 CFR § 595.204 (2003) (prohibiting the "making or receiving of any contribution of funds, goods, or services" to terrorists); 50 U. S. C. § 1705(b) (criminalizing violations of 31 CFR § 595.204). The only citizen other than Hamdi known to be imprisoned in connection with military hostilities in Afghanistan against the United States *was* subjected to criminal process and convicted upon a guilty plea. See *United States* v. *Lindh*, 212 F. Supp. 2d 541 (ED Va. 2002) (denying motions for dismissal); Seelye, N. Y. Times, Oct. 5, 2002, p. A1, col. 5.

B

There are times when military exigency renders resort to the traditional criminal process impracticable. English law accommodated such exigencies by allowing legislative suspension of the writ of habeas corpus for brief periods. Blackstone explained:

> "And yet sometimes, when the state is in real danger, even this [*i. e.*, executive detention] may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. . . . In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with it[s] lib-

> erty for a while, in order to preserve it for ever." 1 Blackstone 132.

Where the Executive has not pursued the usual course of charge, committal, and conviction, it has historically secured the Legislature's explicit approval of a suspension. In England, Parliament on numerous occasions passed temporary suspensions in times of threatened invasion or rebellion. *E. g.*, 1 W. & M., c. 7 (1688) (threatened return of James II); 7 & 8 Will. 3, c. 11 (1696) (same); 17 Geo. 2, c. 6 (1744) (threatened French invasion); 19 Geo. 2, c. 1 (1746) (threatened rebellion in Scotland); 17 Geo. 3, c. 9 (1777) (the American Revolution). Not long after Massachusetts had adopted a clause in its constitution explicitly providing for habeas corpus, see Mass. Const. pt. 2, ch. 6, art. VII (1780), reprinted in 3 Federal and State Constitutions, Colonial Charters and Other Organic Laws 1888, 1910 (F. Thorpe ed. 1909), it suspended the writ in order to deal with Shay's Rebellion, see Act for Suspending the Privilege of the Writ of Habeas Corpus, ch. 10, 1786 Mass. Acts p. 510.

Our Federal Constitution contains a provision explicitly permitting suspension, but limiting the situations in which it may be invoked: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." Art. I, § 9, cl. 2. Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I. See *Ex parte Bollman*, 4 Cranch 75, 101 (1807); *Ex parte Merryman*, 17 F. Cas. 144, 151–152 (CD Md. 1861) (Taney, C. J., rejecting Lincoln's unauthorized suspension); 3 Story § 1336, at 208–209.

The Suspension Clause was by design a safety valve, the Constitution's only "express provision for exercise of extraordinary authority because of a crisis," *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 650 (1952) (Jack-

son, J., concurring). Very early in the Nation's history, President Jefferson unsuccessfully sought a suspension of habeas corpus to deal with Aaron Burr's conspiracy to overthrow the Government. See 16 Annals of Congress 402–425 (1807). During the Civil War, Congress passed its first Act authorizing executive suspension of the writ of habeas corpus, see Act of Mar. 3, 1863, 12 Stat. 755, to the relief of those many who thought President Lincoln's unauthorized proclamations of suspension (*e. g.*, Proclamation No. 1, 13 Stat. 730) unconstitutional. Later Presidential proclamations of suspension relied upon the congressional authorization, *e. g.*, Proclamation No. 7, 13 Stat. 734. During Reconstruction, Congress passed the Ku Klux Klan Act, which included a provision authorizing suspension of the writ, invoked by President Grant in quelling a rebellion in nine South Carolina counties. See Act of Apr. 20, 1871, ch. 22, § 4, 17 Stat. 14; A Proclamation [of Oct. 17, 1871], 7 Compilation of the Messages and Papers of the Presidents 136–138 (J. Richardson ed. 1899) (hereinafter Messages and Papers); *id.*, at 138–139.

Two later Acts of Congress provided broad suspension authority to governors of U. S. possessions. The Philippine Civil Government Act of 1902 provided that the Governor of the Philippines could suspend the writ in case of rebellion, insurrection, or invasion. Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 692. In 1905 the writ was suspended for nine months by proclamation of the Governor. See *Fisher* v. *Baker*, 203 U. S. 174, 179–181 (1906). The Hawaiian Organic Act of 1900 likewise provided that the Governor of Hawaii could suspend the writ in case of rebellion or invasion (or threat thereof). Ch. 339, § 67, 31 Stat. 153.

III

Of course the extensive historical evidence of criminal convictions and habeas suspensions does not *necessarily* refute the Government's position in this case. When the writ is

suspended, the Government is entirely free from judicial oversight. It does not claim such total liberation here, but argues that it need only produce what it calls "some evidence" to satisfy a habeas court that a detained individual is an enemy combatant. See Brief for Respondents 34. Even if suspension of the writ on the one hand, and committal for criminal charges on the other hand, have been the only *traditional* means of dealing with citizens who levied war against their own country, it is theoretically possible that the Constitution does not *require* a choice between these alternatives.

I believe, however, that substantial evidence does refute that possibility. First, the text of the 1679 Habeas Corpus Act makes clear that indefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ. In the United States, this Act was read as "enforc[ing] the common law," *Ex parte Watkins*, 3 Pet. 193, 202 (1830), and shaped the early understanding of the scope of the writ. As noted above, see *supra*, at 557–558, § 7 of the Act specifically addressed those committed for high treason, and provided a remedy if they were not *indicted and tried* by the second succeeding court term. That remedy was *not* a bobtailed judicial inquiry into whether there were reasonable grounds to believe the prisoner had taken up arms against the King. Rather, if the prisoner was not indicted and tried within the prescribed time, "he shall be discharged from his Imprisonment." 31 Car. 2, c. 2, § 7. The Act does not contain any exception for wartime. That omission is conspicuous, since § 7 explicitly addresses the offense of "High Treason," which often involved offenses of a military nature. See cases cited *supra*, at 560.

Writings from the founding generation also suggest that, without exception, the only constitutional alternatives are to charge the crime or suspend the writ. In 1788, Thomas Jefferson wrote to James Madison questioning the need for a Suspension Clause in cases of rebellion in the proposed

Constitution. His letter illustrates the constraints under which the Founders understood themselves to operate:

> "Why suspend the Hab. corp. in insurrections and rebellions? The parties who may be arrested may be charged instantly with a well defined crime. Of course the judge will remand them. If the publick safety requires that the government should have a man imprisoned on less probable testimony in those than in other emergencies; let him be taken and tried, retaken and retried, while the necessity continues, only giving him redress against the government for damages." 13 Papers of Thomas Jefferson 442 (July 31, 1788) (J. Boyd ed. 1956).

A similar view was reflected in the 1807 House debates over suspension during the armed uprising that came to be known as Burr's conspiracy:

> "With regard to those persons who may be implicated in the conspiracy, if the writ of habeas corpus be not suspended, what will be the consequence? When apprehended, they will be brought before a court of justice, who will decide whether there is any evidence that will justify their commitment for farther prosecution. From the communication of the Executive, it appeared there was sufficient evidence to authorize their commitment. Several months would elapse before their final trial, which would give time to collect evidence, and if this shall be sufficient, they will not fail to receive the punishment merited by their crimes, and inflicted by the laws of their country." 16 Annals of Congress, at 405 (remarks of Rep. Burwell).

The absence of military authority to imprison citizens indefinitely in wartime—whether or not a probability of treason had been established by means less than jury trial—was confirmed by three cases decided during and immediately after the War of 1812. In the first, *In re Stacy*, 10 Johns.

*328 (N. Y. 1813), a citizen was taken into military custody on suspicion that he was "carrying provisions and giving information to the enemy." *Id.*, at *330 (emphasis deleted). Stacy petitioned for a writ of habeas corpus, and, after the defendant custodian attempted to avoid complying, Chief Justice Kent ordered attachment against him. Kent noted that the military was "without any color of authority in any military tribunal to try a citizen for that crime" and that it was "holding him in the closest confinement, and contemning the civil authority of the state." *Id.*, at *333–*334.

Two other cases, later cited with approval by this Court in *Ex parte Milligan*, 4 Wall. 2, 128–129 (1866), upheld verdicts for false imprisonment against military officers. In *Smith* v. *Shaw*, 12 Johns. *257 (N. Y. 1815), the court affirmed an award of damages for detention of a citizen on suspicion that he was, among other things, "an enemy's spy in time of war." *Id.*, at *265. The court held that "[n]one of the offences charged against *Shaw* were cognizable by a court-martial, except that which related to his being a spy; and if he was an *American* citizen, he could not be charged with such an offence. He might be amenable to the civil authority for treason; but could not be punished, under martial law, as a spy." *Ibid.* "If the defendant was justifiable in doing what he did, every citizen of the *United States* would, in time of war, be equally exposed to a like exercise of military power and authority." *Id.*, at *266. Finally, in *M'Connell* v. *Hampton*, 12 Johns. *234 (N. Y. 1815), a jury awarded $9,000 for false imprisonment after a military officer confined a citizen on charges of treason; the judges on appeal did not question the verdict but found the damages excessive, in part because "it does not appear that [the defendant] . . . knew [the plaintiff] was a citizen." *Id.*, at *238 (Spencer, J.). See generally Wuerth, The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War, 98 Nw. U. L. Rev. 1567 (2004).

President Lincoln, when he purported to suspend habeas corpus without congressional authorization during the Civil War, apparently did not doubt that suspension was required if the prisoner was to be held without criminal trial. In his famous message to Congress on July 4, 1861, he argued only that he could suspend the writ, not that even without suspension, his imprisonment of citizens without criminal trial was permitted. See Special Session Message, 6 Messages and Papers 20–31.

Further evidence comes from this Court's decision in *Ex parte Milligan*, *supra*. There, the Court issued the writ to an American citizen who had been tried by military commission for offenses that included conspiring to overthrow the Government, seize munitions, and liberate prisoners of war. *Id.*, at 6–7. The Court rejected in no uncertain terms the Government's assertion that military jurisdiction was proper "under the 'laws and usages of war,'" *id.*, at 121:

> "It can serve no useful purpose to inquire what those laws and usages are, whence they originated, where found, and on whom they operate; they can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed," *ibid.*[1]

Milligan is not exactly this case, of course, since the petitioner was threatened with death, not merely imprisonment. But the reasoning and conclusion of *Milligan* logically cover the present case. The Government justifies imprisonment of Hamdi on principles of the law of war and admits that, absent the war, it would have no such authority. But if the

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[1] As I shall discuss presently, see *infra*, at 570–572, the Court purported to limit this language in *Ex parte Quirin*, 317 U. S. 1, 45 (1942). Whatever *Quirin*'s effect on *Milligan*'s precedential value, however, it cannot undermine its value as an indicator of original meaning. Cf. *Reid* v. *Covert*, 354 U. S. 1, 30 (1957) (plurality opinion) (*Milligan* remains "one of the great landmarks in this Court's history").

law of war cannot be applied to citizens where courts are open, then Hamdi's imprisonment without criminal trial is no less unlawful than Milligan's trial by military tribunal.

Milligan responded to the argument, repeated by the Government in this case, that it is dangerous to leave suspected traitors at large in time of war:

> "If it was dangerous, in the distracted condition of affairs, to leave Milligan unrestrained of his liberty, because he 'conspired against the government, afforded aid and comfort to rebels, and incited the people to insurrection,' the *law* said arrest him, confine him closely, render him powerless to do further mischief; and then present his case to the grand jury of the district, with proofs of his guilt, and, if indicted, try him according to the course of the common law. If this had been done, the Constitution would have been vindicated, the law of 1863 enforced, and the securities for personal liberty preserved and defended." *Id.*, at 122.

Thus, criminal process was viewed as the primary means—and the only means absent congressional action suspending the writ—not only to punish traitors, but to incapacitate them.

The proposition that the Executive lacks indefinite wartime detention authority over citizens is consistent with the Founders' general mistrust of military power permanently at the Executive's disposal. In the Founders' view, the "blessings of liberty" were threatened by "those military establishments which must gradually poison its very fountain." The Federalist No. 45, p. 238 (J. Madison). No fewer than 10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime. Many safeguards in the Constitution reflect these concerns. Congress's authority "[t]o raise and support Armies" was hedged with the proviso that "no Appropriation of Money to that

Use shall be for a longer Term than two Years." U. S. Const., Art. I, § 8, cl. 12. Except for the actual command of military forces, all authorization for their maintenance and all explicit authorization for their use is placed in the control of Congress under Article I, rather than the President under Article II. As Hamilton explained, the President's military authority would be "much inferior" to that of the British King:

> "It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy: while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature." The Federalist No. 69, p. 357.

A view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the mistrust that engendered these provisions.

IV

The Government argues that our more recent jurisprudence ratifies its indefinite imprisonment of a citizen within the territorial jurisdiction of federal courts. It places primary reliance upon *Ex parte Quirin*, 317 U. S. 1 (1942), a World War II case upholding the trial by military commission of eight German saboteurs, one of whom, Herbert Haupt, was a U. S. citizen. The case was not this Court's finest hour. The Court upheld the commission and denied relief in a brief *per curiam* issued the day after oral argument concluded, see *id.*, at 18–19, unnumbered note; a week later the Government carried out the commission's death sentence upon six saboteurs, including Haupt. The Court eventually explained its reasoning in a written opinion issued several months later.

Only three paragraphs of the Court's lengthy opinion dealt with the particular circumstances of Haupt's case. See *id.*, at 37–38, 45–46. The Government argued that Haupt, like the other petitioners, could be tried by military commission under the laws of war. In agreeing with that contention, *Quirin* purported to interpret the language of *Milligan* quoted above (the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed") in the following manner:

> "Elsewhere in its opinion . . . the Court was at pains to point out that Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war . . . ." 317 U. S., at 45.

In my view this seeks to revise *Milligan* rather than describe it. *Milligan* had involved (among other issues) two separate questions: (1) whether the military trial of Milligan was justified by the laws of war, and if not (2) whether the President's suspension of the writ, pursuant to congressional authorization, prevented the issuance of habeas corpus. The Court's categorical language about the law of war's inapplicability to citizens where the courts are open (with no exception mentioned for citizens who were prisoners of war) was contained in its discussion of the first point. See 4 Wall., at 121. The factors pertaining to whether Milligan could reasonably be considered a belligerent and prisoner of war,

while mentioned earlier in the opinion, see *id.*, at 118, were made relevant and brought to bear in the Court's later discussion, see *id.*, at 131, of whether Milligan came within the statutory provision that effectively made an exception to Congress's authorized suspension of the writ for (as the Court described it) "all parties, not prisoners of war, resident in their respective jurisdictions, . . . who were citizens of states in which the administration of the laws in the Federal tribunals was unimpaired," *id.*, at 116. *Milligan* thus understood was in accord with the traditional law of habeas corpus I have described: Though treason often occurred in wartime, there was, absent provision for special treatment in a congressional suspension of the writ, no exception to the right to trial by jury for citizens who could be called "belligerents" or "prisoners of war."[2]

But even if *Quirin* gave a correct description of *Milligan*, or made an irrevocable revision of it, *Quirin* would still not justify denial of the writ here. In *Quirin* it was uncontested that the petitioners were members of enemy forces. They were "*admitted* enemy invaders," 317 U. S., at 47 (emphasis added), and it was "undisputed" that they had landed in the United States in service of German forces, *id.*, at 20. The specific holding of the Court was only that, "upon the *conceded* facts," the petitioners were "plainly within [the] boundaries" of military jurisdiction, *id.*, at 46 (emphasis added).[3] But where those jurisdictional facts are *not* con-

[2] Without bothering to respond to this analysis, the plurality states that *Milligan* "turned in large part" upon the defendant's lack of prisoner-of-war status, and that the *Milligan* Court explicitly and repeatedly *said* so. *Ante*, at 522. Neither is true. To the extent, however, that prisoner-of-war status was relevant in *Milligan*, it was only because prisoners of war *received different statutory treatment* under the conditional suspension then in effect.

[3] The only two Court of Appeals cases from World War II cited by the Government in which citizens were detained without trial likewise involved petitioners who were conceded to have been members of enemy forces. See *In re Territo*, 156 F. 2d 142, 143–145 (CA9 1946); *Colepaugh*

ceded—where the petitioner insists that he is *not* a belligerent—*Quirin* left the pre-existing law in place: Absent suspension of the writ, a citizen held where the courts are open is entitled either to criminal trial or to a judicial decree requiring his release.[4]

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v. *Looney*, 235 F. 2d 429, 432 (CA10 1956). The plurality complains that *Territo* is the only case I have identified in which "a United States citizen [was] captured in a *foreign* combat zone," *ante*, at 523. Indeed it is; such cases must surely be rare. But given the constitutional tradition I have described, the burden is not upon me to find cases in which the writ was *granted* to citizens in this country *who had been captured on foreign battlefields;* it is upon those who would carve out an exception for such citizens (as the plurality's complaint suggests it would) to find a single case (other than one where enemy status was admitted) in which habeas was *denied*.

[4] The plurality's assertion that *Quirin* somehow "clarifies" *Milligan*, *ante*, at 523, is simply false. As I discuss *supra*, at 570–571 and this page, the *Quirin* Court propounded a mistaken understanding of *Milligan;* but nonetheless its holding was limited to "the case presented by the present record," and to "*the conceded facts*," and thus avoided conflict with the earlier case. See 317 U. S., at 45–46 (emphasis added). The plurality, ignoring this expressed limitation, thinks it "beside the point" whether belligerency is conceded or found "by some other process" (not necessarily a jury trial) "that verifies this fact with sufficient certainty." *Ante*, at 523. But the whole point of the procedural guarantees in the Bill of Rights is to limit the methods by which the Government can determine facts that the citizen disputes and on which the citizen's liberty depends. The plurality's claim that *Quirin*'s one-paragraph discussion of *Milligan* provides a "[c]lear . . . disavowal" of two false imprisonment cases from the War of 1812, *ante*, at 522, thus defies logic; unlike the plaintiffs in those cases, Haupt was concededly a member of an enemy force.

The Government also cites *Moyer* v. *Peabody*, 212 U. S. 78 (1909), a suit for damages against the Governor of Colorado, for violation of due process in detaining the alleged ringleader of a rebellion quelled by the state militia after the Governor's declaration of a state of insurrection and (he contended) suspension of the writ "as incident thereto." *Ex parte Moyer*, 35 Colo. 154, 157, 91 P. 738, 740 (1905). But the holding of *Moyer* v. *Peabody* (even assuming it is transferable from state-militia detention after state suspension to federal standing-army detention without suspension) is simply that "[s]o long as such arrests [were] made in good faith and in the honest belief that they [were] needed in order to head the insurrection

V

It follows from what I have said that Hamdi is entitled to a habeas decree requiring his release unless (1) criminal proceedings are promptly brought, or (2) Congress has suspended the writ of habeas corpus. A suspension of the writ could, of course, lay down conditions for continued detention, similar to those that today's opinion prescribes under the Due Process Clause. Cf. Act of Mar. 3, 1863, 12 Stat. 755. But there is a world of difference between the people's representatives' determining the need for that suspension (and prescribing the conditions for it), and this Court's doing so.

The plurality finds justification for Hamdi's imprisonment in the Authorization for Use of Military Force, 115 Stat. 224, which provides:

> "That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a).

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off," 212 U. S., at 85, an action in damages could not lie. This "good-faith" analysis is a forebear of our modern doctrine of qualified immunity. Cf. *Scheuer* v. *Rhodes*, 416 U. S. 232, 247–248 (1974) (understanding *Moyer* in this way). Moreover, the detention at issue in *Moyer* lasted about 2½ months, see 212 U. S., at 85, roughly the length of time permissible under the 1679 Habeas Corpus Act, see *supra*, at 557–558.

In addition to *Moyer* v. *Peabody*, JUSTICE THOMAS relies upon *Luther* v. *Borden*, 7 How. 1 (1849), a case in which the state legislature had imposed martial law—a step even more drastic than suspension of the writ. See *post*, at 590–591 (dissenting opinion). But martial law has not been imposed here, and in any case is limited to "the theatre of active military operations, where war really prevails," and where therefore the courts are closed. *Ex parte Milligan*, 4 Wall. 2, 127 (1866); see also *id.*, at 129–130 (distinguishing *Luther*).

This is not remotely a congressional suspension of the writ, and no one claims that it is. Contrary to the plurality's view, I do not think this statute even authorizes detention of a citizen with the clarity necessary to satisfy the interpretive canon that statutes should be construed so as to avoid grave constitutional concerns, see *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988); with the clarity necessary to comport with cases such as *Ex parte Endo*, 323 U. S. 283, 300 (1944), and *Duncan* v. *Kahanamoku*, 327 U. S. 304, 314–316, 324 (1946); or with the clarity necessary to overcome the statutory prescription that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress" 18 U. S. C. § 4001(a).[5] But even if it

[5] The plurality rejects any need for "specific language of detention" on the ground that detention of alleged combatants is a "fundamental incident of waging war." *Ante*, at 519. Its authorities do not support that holding in the context of the present case. Some are irrelevant because they do not address the detention of *American citizens*. *E. g.*, Naqvi, Doubtful Prisoner-of-War Status, 84 Int'l Rev. Red Cross 571, 572 (2002). The plurality's assertion that detentions of citizen and alien combatants are equally authorized has no basis in law or common sense. Citizens and noncitizens, even if equally dangerous, are not similarly situated. See, *e. g.*, *Milligan*, *supra; Johnson* v. *Eisentrager*, 339 U. S. 763 (1950); Rev. Stat. 4067, 50 U. S. C. § 21 (Alien Enemy Act). That captivity may be consistent with the principles of international law does not prove that it also complies with the restrictions that the Constitution places on the American Government's treatment of its own citizens. Of the authorities cited by the plurality that do deal with detention of citizens, *Quirin*, *supra*, and *Territo*, 156 F. 2d 142, have already been discussed and rejected. See *supra*, at 571–572, and n. 3. The remaining authorities pertain to U. S. detention of citizens during the Civil War, and are irrelevant for two reasons: (1) the Lieber Code was issued following a congressional authorization of suspension of the writ, see Instructions for the Government of Armies of the United States in the Field, Gen. Order No. 100 (1863), reprinted in 2 F. Lieber, Miscellaneous Writings, p. 246; Act of Mar. 3, 1863, 12 Stat. 755, §§ 1, 2; and (2) citizens of the Confederacy, while citizens of the United States, were also regarded as citizens of a hostile power.

did, I would not permit it to overcome Hamdi's entitlement to habeas corpus relief. The Suspension Clause of the Constitution, which carefully circumscribes the conditions under which the writ can be withheld, would be a sham if it could be evaded by congressional prescription of requirements *other than the common-law requirement of committal for criminal prosecution* that render the writ, though available, unavailing. If the Suspension Clause does not guarantee the citizen that he will either be tried or released, unless the conditions for suspending the writ exist and the grave action of suspending the writ has been taken; if it merely guarantees the citizen that he will not be detained unless Congress by ordinary legislation says he can be detained; it guarantees him very little indeed.

It should not be thought, however, that the plurality's evisceration of the Suspension Clause augments, principally, the power of Congress. As usual, the major effect of its constitutional improvisation is to increase the power of the Court. Having found a congressional authorization for detention of citizens where none clearly exists; and having discarded the categorical procedural protection of the Suspension Clause; the plurality then proceeds, under the guise of the Due Process Clause, to prescribe what procedural protections *it* thinks appropriate. It "weigh[s] the private interest . . . against the Government's asserted interest," *ante*, at 529 (internal quotation marks omitted), and—just as though writing a new Constitution—comes up with an unheard-of system in which the citizen rather than the Government bears the burden of proof, testimony is by hearsay rather than live witnesses, and the presiding officer may well be a "neutral" military officer rather than judge and jury. See *ante*, at 533–534. It claims authority to engage in this sort of "judicious balancing" from *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), a case involving . . . *the withdrawal of disability benefits!* Whatever the merits of this technique when newly

recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.

Having distorted the Suspension Clause, the plurality finishes up by transmogrifying the Great Writ—disposing of the present habeas petition by remanding for the District Court to "engag[e] in a factfinding process that is both prudent and incremental," *ante*, at 539. "In the absence of [the Executive's prior provision of procedures that satisfy due process], . . . a court that receives a petition for a writ of habeas corpus from an alleged enemy combatant must itself ensure that the minimum requirements of due process are achieved." *Ante*, at 538. This judicial remediation of executive default is unheard of. The role of habeas corpus is to determine the legality of executive detention, not to supply the omitted process necessary to make it legal. See *Preiser* v. *Rodriguez*, 411 U. S. 475, 484 (1973) ("[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody"); 1 Blackstone 132–133. It is not the habeas court's function to make illegal detention legal by supplying a process that the Government could have provided, but chose not to. If Hamdi is being imprisoned in violation of the Constitution (because without due process of law), then his habeas petition should be granted; the Executive may then hand him over to the criminal authorities, whose detention for the purpose of prosecution will be lawful, or else must release him.

There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the

other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.

VI

Several limitations give my views in this matter a relatively narrow compass. They apply only to citizens, accused of being enemy combatants, who are detained within the territorial jurisdiction of a federal court. This is not likely to be a numerous group; currently we know of only two, Hamdi and Jose Padilla. Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different. Cf. *Johnson* v. *Eisentrager*, 339 U. S. 763, 769–771 (1950); *Reid* v. *Covert*, 354 U. S. 1, 74–75 (1957) (Harlan, J., concurring in result); *Rasul* v. *Bush*, *ante*, at 502–504 (SCALIA, J., dissenting). Moreover, even within the United States, the accused citizen-enemy combatant may lawfully be detained once prosecution is in progress or in contemplation. See, *e. g.*, *County of Riverside* v. *McLaughlin*, 500 U. S. 44 (1991) (brief detention pending judicial determination after warrantless arrest); *United States* v. *Salerno*, 481 U. S. 739 (1987) (pretrial detention under the Bail Reform Act). The Government has been notably successful in securing conviction, and hence long-term custody or execution, of those who have waged war against the state.

I frankly do not know whether these tools are sufficient to meet the Government's security needs, including the need to obtain intelligence through interrogation. It is far beyond

my competence, or the Court's competence, to determine that. But it is not beyond Congress's. If the situation demands it, the Executive can ask Congress to authorize suspension of the writ—which can be made subject to whatever conditions Congress deems appropriate, including even the procedural novelties invented by the plurality today. To be sure, suspension is limited by the Constitution to cases of rebellion or invasion. But whether the attacks of September 11, 2001, constitute an "invasion," and whether those attacks still justify suspension several years later, are questions for Congress rather than this Court. See 3 Story § 1336, at 208–209.[6] If civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires, rather than by silent erosion through an opinion of this Court.

* * *

The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,

> "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free." The Federalist No. 8, p. 33.

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[6] JUSTICE THOMAS worries that the constitutional conditions for suspension of the writ will not exist "during many . . . emergencies during which . . . detention authority might be necessary," *post*, at 594. It is difficult to imagine situations in which security is so seriously threatened as to justify indefinite imprisonment without trial, and yet the constitutional conditions of rebellion or invasion are not met.

The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.

Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges.* Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it. Because the Court has proceeded to meet the current emergency in a manner the Constitution does not envision, I respectfully dissent.

JUSTICE THOMAS, dissenting.

The Executive Branch, acting pursuant to the powers vested in the President by the Constitution and with explicit congressional approval, has determined that Yaser Hamdi is an enemy combatant and should be detained. This detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail, and there is no reason to remand the case. The plurality reaches a contrary conclusion by failing adequately to consider basic principles of the constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976). I do not think that the Federal Government's war powers can be balanced away by this Court. Arguably, Congress could provide for additional procedural protections, but until it does, we have no right to insist upon them. But even if I were to agree with the general approach the plurality takes, I could not accept the particulars. The plurality utterly fails to account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly. I respectfully dissent.

I

"It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig* v. *Agee*, 453 U. S. 280, 307 (1981) (quoting *Aptheker* v. *Secretary of State*, 378 U. S. 500, 509 (1964)). The national security, after all, is the primary responsibility and purpose of the Federal Government. See, *e. g.*, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 662 (1952) (Clark, J., concurring in judgment); The Federalist No. 23, pp. 146–147 (J. Cooke ed. 1961) (A. Hamilton) ("The principle purposes to be answered by Union are these—The common defence of the members—the preservation of the public peace as well against internal convulsions as external attacks"). But because the Founders understood that they could not foresee the myriad potential threats to national security that might later arise, they chose to create a Federal Government that necessarily possesses sufficient power to handle any threat to the security of the Nation. The power to protect the Nation

> "ought to exist without limitation . . . *[b]ecause it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed." *Id.*, at 147.

See also *id.*, Nos. 34 and 41.

The Founders intended that the President have primary responsibility—along with the necessary power—to protect the national security and to conduct the Nation's foreign relations. They did so principally because the structural advantages of a unitary Executive are essential in these domains. "Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks." *Id.*,

No. 70, at 471 (A. Hamilton). The principle "ingredien[t]" for "energy in the executive" is "unity." *Id.*, at 472. This is because "[d]ecision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number." *Ibid.*

These structural advantages are most important in the national-security and foreign-affairs contexts. "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand." *Id.*, No. 74, at 500 (A. Hamilton). Also for these reasons, John Marshall explained that "[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." 10 Annals of Cong. 613 (1800); see *id.*, at 613–614. To this end, the Constitution vests in the President "[t]he executive Power," Art. II, § 1, provides that he "shall be Commander in Chief of the" Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3.

This Court has long recognized these features and has accordingly held that the President has *constitutional* authority to protect the national security and that this authority carries with it broad discretion.

> "If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. . . . Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance . . . is a question to be decided *by him.*" *Prize Cases*, 2 Black 635, 668, 670 (1863).

The Court has acknowledged that the President has the authority to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and

subdue the enemy." *Fleming* v. *Page*, 9 How. 603, 615 (1850). With respect to foreign affairs as well, the Court has recognized the President's independent authority and need to be free from interference. See, *e. g.*, *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320 (1936) (explaining that the President "has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results"); *Chicago & Southern Air Lines, Inc.* v. *Waterman S. S. Corp.*, 333 U. S. 103, 111 (1948).

Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive. I cannot improve on Justice Jackson's words, speaking for the Court:

> "The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility

> and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Ibid.*

Several points, made forcefully by Justice Jackson, are worth emphasizing. First, with respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld. Second, even if the courts could compel the Executive to produce the necessary information, such decisions are simply not amenable to judicial determination because "[t]hey are delicate, complex, and involve large elements of prophecy." *Ibid.* Third, the Court in *Chicago & Southern Air Lines* and elsewhere has correctly recognized the primacy of the political branches in the foreign-affairs and national-security contexts.

For these institutional reasons and because "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act," it should come as no surprise that "[s]uch failure of Congress . . . does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore* v. *Regan*, 453 U. S. 654, 678 (1981) (quoting *Agee*, 453 U. S., at 291). Rather, in these domains, the fact that Congress has provided the President with broad authorities does not imply—and the Judicial Branch should not infer—that Congress intended to deprive him of particular powers not specifically enumerated. See *Dames & Moore*, 453 U. S., at 678. As far as the courts are concerned, "the enactment of legislation closely related to the question of the President's authority in a particular case which evinces legislative intent to accord the President broad discretion may be considered to 'invite' 'measures on independent presidential responsibility.'" *Ibid.* (quoting *Youngstown*, 343 U. S., at 637 (Jackson, J., concurring)).

Finally, and again for the same reasons, where "the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress[, and i]n such a case the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.'" *Dames & Moore*, *supra*, at 668 (quoting *Youngstown*, *supra*, at 637 (Jackson, J., concurring)). That is why the Court has explained, in a case analogous to this one, that "the detention[,] ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger[, is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted." *Ex parte Quirin*, 317 U. S. 1, 25 (1942). See also *Ex parte Milligan*, 4 Wall. 2, 133 (1866) (Chase, C. J., concurring in judgment) (stating that a sentence imposed by a military commission "must not be set aside except upon the clearest conviction that it cannot be reconciled with the Constitution and the constitutional legislation of Congress"). This deference extends to the President's determination of all the factual predicates necessary to conclude that a given action is appropriate. See *Quirin*, *supra*, at 25 ("We are not here concerned with any question of the guilt or innocence of petitioners"). See also *Hirabayashi* v. *United States*, 320 U. S. 81, 93 (1943); *Prize Cases*, 2 Black, at 670; *Martin* v. *Mott*, 12 Wheat. 19, 29–30 (1827).

To be sure, the Court has at times held, in specific circumstances, that the military acted beyond its warmaking authority. But these cases are distinguishable in important ways. In *Ex parte Endo*, 323 U. S. 283 (1944), the Court held unlawful the detention of an admittedly law-abiding and loyal American of Japanese ancestry. It did so because the

Government's asserted reason for the detention had nothing to do with the congressional and executive authorities upon which the Government relied. Those authorities permitted detention for the purpose of preventing espionage and sabotage and thus could not be pressed into service for detaining a loyal citizen. See *id.*, at 301–302. Further, the Court "stress[ed] the silence . . . of the [relevant] Act *and the Executive Orders.*" *Id.*, at 301 (emphasis added); see also *id.*, at 301–304. The Court sensibly held that the Government could not detain a loyal citizen pursuant to executive and congressional authorities that could not conceivably be implicated given the Government's factual allegations. And in *Youngstown*, Justice Jackson emphasized that "Congress ha[d] not left seizure of private property an open field but ha[d] covered it by three statutory policies inconsistent with th[e] seizure." 343 U. S., at 639 (concurring opinion). See also *Milligan*, *supra*, at 134 (Chase, C. J., concurring in judgment) (noting that the Government failed to comply with statute directly on point).

I acknowledge that the question whether Hamdi's executive detention is lawful is a question properly resolved by the Judicial Branch, though the question comes to the Court with the strongest presumptions in favor of the Government. The plurality agrees that Hamdi's detention is lawful if he is an enemy combatant. But the question whether Hamdi is actually an enemy combatant is "of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & Southern Air Lines*, 333 U. S., at 111. That is, although it is appropriate for the Court to determine the judicial question whether the President has the asserted authority, see, *e. g.*, *Ex parte Endo*, *supra*, we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is

committed to other branches.[1] In the words of then-Judge Scalia:

> "In Old Testament days, when judges ruled the people of Israel and led them into battle, a court professing the belief that it could order a halt to a military operation in foreign lands might not have been a startling phenomenon. But in modern times, and in a country where such governmental functions have been committed to elected delegates of the people, such an assertion of jurisdiction is extraordinary. The [C]ourt's decision today reflects a willingness to extend judicial power into areas where we do not know, and have no way of finding out, what serious harm we may be doing." *Ramirez de Arellano* v. *Weinberger*, 745 F. 2d 1500, 1550–1551 (CADC 1984) (dissenting opinion) (footnote omitted).

See also *id.*, at 1551, n. 1 (noting that "[e]ven the ancient Israelites eventually realized the shortcomings of judicial commanders-in-chief"). The decision whether someone is an enemy combatant is, no doubt, "delicate, complex, and involv[es] large elements of prophecy," *Chicago & Southern Air Lines*, *supra*, at 111, which, incidentally might in part explain why "the Government has never provided any court with the full criteria that it uses in classifying individuals as such," *ante*, at 516. See also *infra*, at 597–598 (discussing other military decisions).

II

"'The war power of the national government is "the power to wage war successfully."'" *Lichter* v. *United States*, 334

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[1] Although I have emphasized national-security concerns, the President's foreign-affairs responsibilities are also squarely implicated by this case. The Government avers that Northern Alliance forces captured Hamdi, and the District Court demanded that the Government turn over information relating to statements made by members of the Northern Alliance. See 316 F. 3d 450, 462 (CA4 2003).

U. S. 742, 767, n. 9 (1948) (quoting Hughes, War Powers Under the Constitution, 42 A. B. A. Rep. 232, 238 (1917)). It follows that this power "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict," *In re Yamashita*, 327 U. S. 1, 12 (1946); see also *Stewart* v. *Kahn*, 11 Wall. 493, 507 (1871), and quite obviously includes the ability to detain those (even United States citizens) who fight against our troops or those of our allies, see, *e. g.*, *Quirin*, 317 U. S., at 28–29, 30–31; *id.*, at 37–39; *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313–314 (1946); W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920); W. Whiting, War Powers Under the Constitution of the United States 167 (43d ed. 1871); *id.*, at 44–46 (noting that Civil War "rebels" may be treated as foreign belligerents); see also *ante*, at 518–519.

Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so. See *ante*, at 517. The Authorization for Use of Military Force (AUMF), 115 Stat. 224, authorizes the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" of September 11, 2001. Indeed, the Court has previously concluded that language materially identical to the AUMF authorizes the Executive to "make the ordinary use of the soldiers . . . ; that he may kill persons who resist and, of course, that he may use the milder measure of seizing [and detaining] the bodies of those whom he considers to stand in the way of restoring peace." *Moyer* v. *Peabody*, 212 U. S. 78, 84 (1909).

The plurality, however, qualifies its recognition of the President's authority to detain enemy combatants in the war on terrorism in ways that are at odds with our precedent. Thus, the plurality relies primarily on Article 118 of the Geneva Convention (III) Relative to the Treatment of Prisoners

of War, Aug. 12, 1949, [1955] 6 U. S. T. 3406, T. I. A. S. No. 3364, for the proposition that "[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities." *Ante*, at 520. It then appears to limit the President's authority to detain by requiring that "the record establis[h] that United States troops are still involved in active combat in Afghanistan" because, in that case, detention would be "part of the exercise of 'necessary and appropriate force.' " *Ante*, at 521. But I do not believe that we may diminish the Federal Government's war powers by reference to a treaty and certainly not to a treaty that does not apply. See n. 6, *infra*. Further, we are bound by the political branches' determination that the United States is at war. See, *e. g.*, *Ludecke* v. *Watkins*, 335 U. S. 160, 167–170 (1948); *Prize Cases*, 2 Black, at 670; *Mott*, 12 Wheat., at 30. And, in any case, the power to detain does not end with the cessation of formal hostilities. See, *e. g.*, *Madsen* v. *Kinsella*, 343 U. S. 341, 360 (1952); *Johnson* v. *Eisentrager*, 339 U. S. 763, 786 (1950); cf. *Moyer*, *supra*, at 85.

Accordingly, the President's action here is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Dames & Moore*, 453 U. S., at 668 (internal quotation marks omitted).[2] The question becomes whether the Federal Government (rather than the President acting alone) has power to detain Hamdi as an enemy combatant. More precisely, we must determine whether the Government may detain Hamdi given the procedures that were used.

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[2] It could be argued that the habeas statutes are evidence of congressional intent that enemy combatants are entitled to challenge the factual basis for the Government's determination. See, *e. g.*, 28 U. S. C. §§ 2243, 2246. But factual development is needed only to the extent necessary to resolve the legal challenge to the detention. See, *e. g.*, *Walker* v. *Johnston*, 312 U. S. 275, 284 (1941).

III

I agree with the plurality that the Federal Government has power to detain those that the Executive Branch determines to be enemy combatants. See *ante*, at 518. But I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants, an authority that includes making virtually conclusive factual findings. In my view, the structural considerations discussed above, as recognized in our precedent, demonstrate that we lack the capacity and responsibility to second-guess this determination.

This makes complete sense once the process that is due Hamdi is made clear. As an initial matter, it is possible that the Due Process Clause requires only "that our Government must proceed according to the 'law of the land'—that is, according to written constitutional and statutory provisions." *In re Winship*, 397 U. S. 358, 382 (1970) (Black, J., dissenting). I need not go this far today because the Court has already explained the nature of due process in this context.

In a case strikingly similar to this one, the Court addressed a Governor's authority to detain for an extended period a person the executive believed to be responsible, in part, for a local insurrection. Justice Holmes wrote for a unanimous Court:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what *he deems* the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm." *Moyer*, 212 U. S., at 85 (citation omitted; emphasis added).

The Court answered Moyer's claim that he had been denied due process by emphasizing:

> "[I]t is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus summary proceedings suffice for taxes, and executive decisions for exclusion from the country. . . . Such arrests are not necessarily for punishment, but are by way of precaution to prevent the exercise of hostile power." *Id.*, at 84–85 (citations omitted).

In this context, due process requires nothing more than a good-faith executive determination.[3] To be clear: The Court has held that an Executive, acting pursuant to statutory and constitutional authority, may, consistent with the Due Process Clause, unilaterally decide to detain an individual if the Executive deems this necessary for the public safety *even if he is mistaken.*

Moyer is not an exceptional case. In *Luther* v. *Borden*, 7 How. 1 (1849), the Court discussed the President's constitutional and statutory authority, in response to a request from a state legislature or executive, "'to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress [an] insurrection.'" *Id.*, at 43 (quoting Act of Feb. 28, 1795). The Court explained that courts could not review the President's decision to recognize one of the competing legislatures or executives. See 7 How., at 43. If a court could second-guess this determination, "it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained

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[3] Indeed, it is not even clear that the Court required good faith. See *Moyer*, 212 U. S., at 85 ("It is not alleged that [the Governor's] judgment was not honest, if that be material, or that [Moyer] was detained after fears of the insurrection were at an end").

by the troops in the service of the United States." *Ibid.* "If the judicial power extends so far," the Court concluded, "the guarantee contained in the Constitution of the United States [referring to Art. IV, § 4] is a guarantee of anarchy, and not of order." *Ibid.* The Court clearly contemplated that the President had authority to detain as he deemed necessary, and such detentions evidently comported with the Due Process Clause as long as the President correctly decided to call forth the militia, a question the Court said it could not review.

The Court also addressed the natural concern that placing "this power in the President is dangerous to liberty, and may be abused." *Id.*, at 44. The Court noted that "[a]ll power may be abused if placed in unworthy hands," and explained that "it would be difficult . . . to point out any other hands in which this power would be more safe, and at the same time equally effectual." *Ibid.* Putting that aside, the Court emphasized that this power "is conferred upon him by the Constitution and laws of the United States, and must therefore be respected and enforced in its judicial tribunals." *Ibid.* Finally, the Court explained that if the President abused this power "it would be in the power of Congress to apply the proper remedy. But the courts must administer the law as they find it." *Id.*, at 45.

Almost 140 years later, in *United States* v. *Salerno*, 481 U. S. 739, 748 (1987), the Court explained that the Due Process Clause "lays down [no] categorical imperative." The Court continued:

> "We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous." *Ibid.*

The Court cited *Ludecke* v. *Watkins*, 335 U. S. 160 (1948), for this latter proposition even though *Ludecke* actually involved detention of enemy aliens. See also *Selective Draft Law Cases*, 245 U. S. 366 (1918); *Jacobson* v. *Massachusetts*, 197 U. S. 11, 27–29 (1905) (upholding legislated mass vaccinations and approving of forced quarantines of Americans even if they show no signs of illness); cf. *Kansas* v. *Hendricks*, 521 U. S. 346 (1997); *Juragua Iron Co.* v. *United States*, 212 U. S. 297 (1909).

The Government's asserted authority to detain an individual that the President has determined to be an enemy combatant, at least while hostilities continue, comports with the Due Process Clause. As these cases also show, the Executive's decision that a detention is necessary to protect the public need not and should not be subjected to judicial second-guessing. Indeed, at least in the context of enemy-combatant determinations, this would defeat the unity, secrecy, and dispatch that the Founders believed to be so important to the warmaking function. See Part I, *supra.*

I therefore cannot agree with JUSTICE SCALIA's conclusion that the Government must choose between using standard criminal processes and suspending the writ. See *ante*, at 578 (dissenting opinion). JUSTICE SCALIA relies heavily upon *Ex parte Milligan*, 4 Wall. 2 (1866), see *ante*, at 567–568, 570–572, and three cases decided by New York state courts in the wake of the War of 1812, see *ante*, at 565–566. I admit that *Milligan* supports his position. But because the Executive Branch there, unlike here, did not follow a specific statutory mechanism provided by Congress, the Court did not need to reach the broader question of Congress' power, and its discussion on this point was arguably dicta, see 4 Wall., at 122, as four Justices believed, see *id.*, at 132, 134–136 (Chase, C. J., joined by Wayne, Swayne, and Miller, JJ., concurring in judgment).

More importantly, the Court referred frequently and pervasively to the criminal nature of the proceedings instituted

against Milligan. In fact, this feature serves to distinguish the state cases as well. See *In re Stacy*, 10 Johns. *328, *334 (N. Y. 1813) ("A military commander is here assuming *criminal jurisdiction* over a private citizen" (emphasis added)); *Smith* v. *Shaw*, 12 Johns. *257, *265 (N. Y. 1815) (Shaw "might be amenable to the civil authority for treason; but could not *be punished*, under martial law, as a spy" (emphasis added)); *M'Connell* v. *Hampton*, 12 Johns. *234 (N. Y. 1815) (same for treason).

Although I do acknowledge that the reasoning of these cases might apply beyond criminal punishment, the punishment-nonpunishment distinction harmonizes all of the precedent. And, subsequent cases have at least implicitly distinguished *Milligan* in just this way. See, *e. g.*, *Moyer*, 212 U. S., at 84–85 ("Such arrests are not necessarily for punishment, but are by way of precaution"). Finally, *Quirin* overruled *Milligan* to the extent that those cases are inconsistent. See *Quirin*, 317 U. S., at 45 (limiting *Milligan* to its facts). Because the Government does not detain Hamdi in order to punish him, as the plurality acknowledges, see *ante*, at 518–519, *Milligan* and the New York cases do not control.

JUSTICE SCALIA also finds support in a letter Thomas Jefferson wrote to James Madison. See *ante*, at 564. I agree that this provides some evidence for his position. But I think this plainly insufficient to rebut the authorities upon which I have relied. In any event, I do not believe that JUSTICE SCALIA's evidence leads to the necessary "clear conviction that [the detention is] in conflict with the Constitution or laws of Congress constitutionally enacted," *Quirin*, *supra*, at 25, to justify nullifying the President's wartime action.

Finally, JUSTICE SCALIA's position raises an additional concern. JUSTICE SCALIA apparently does not disagree that the Federal Government has all power necessary to protect the Nation. If criminal processes do not suffice, however, JUSTICE SCALIA would require Congress to suspend the writ. See *ante*, at 577–578. But the fact that the writ may

not be suspended "unless when in Cases of Rebellion or Invasion the public Safety may require it," Art. I, § 9, cl. 2, poses two related problems. First, this condition might not obtain here or during many other emergencies during which this detention authority might be necessary. Congress would then have to choose between acting unconstitutionally[4] and depriving the President of the tools he needs to protect the Nation. Second, I do not see how suspension would make constitutional otherwise unconstitutional detentions ordered by the President. It simply removes a remedy. JUSTICE SCALIA's position might therefore require one or both of the political branches to act unconstitutionally in order to protect the Nation. But the power to protect the Nation must be the power to do so lawfully.

Accordingly, I conclude that the Government's detention of Hamdi as an enemy combatant does not violate the Constitution. By detaining Hamdi, the President, in the prosecution of a war and authorized by Congress, has acted well within his authority. Hamdi thereby received all the process to which he was due under the circumstances. I therefore believe that this is no occasion to balance the competing interests, as the plurality unconvincingly attempts to do.

IV

Although I do not agree with the plurality that the balancing approach of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), is the appropriate analytical tool with which to analyze this case,[5] I cannot help but explain that the plurality misapplies its chosen framework, one that if applied correctly would probably lead to the result I have reached. The plurality devotes two paragraphs to its discussion of the Government's interest, though much of those two paragraphs explain why the Government's concerns are misplaced. See *ante*, at 531–

[4] I agree with JUSTICE SCALIA that this Court could not review Congress' decision to suspend the writ. See *ante*, at 577–578.

[5] Evidently, neither do the parties, who do not cite *Mathews* even once.

532. But: "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Agee*, 453 U. S., at 307 (quoting *Aptheker*, 378 U. S., at 509). In *Moyer*, the Court recognized the paramount importance of the Governor's interest in the tranquility of a Colorado town. At issue here is the far more significant interest of the security of the Nation. The Government seeks to further that interest by detaining an enemy soldier not only to prevent him from rejoining the ongoing fight. Rather, as the Government explains, detention can serve to gather critical intelligence regarding the intentions and capabilities of our adversaries, a function that the Government avers has become all the more important in the war on terrorism. See Brief for Respondents 15; App. 347–351.

Additional process, the Government explains, will destroy the intelligence gathering function. Brief for Respondents 43–45. It also does seem quite likely that, under the process envisioned by the plurality, various military officials will have to take time to litigate this matter. And though the plurality does not say so, a meaningful ability to challenge the Government's factual allegations will probably require the Government to divulge highly classified information to the purported enemy combatant, who might then upon release return to the fight armed with our most closely held secrets.

The plurality manages to avoid these problems by discounting or entirely ignoring them. After spending a few sentences putatively describing the Government's interests, the plurality simply assures the Government that the alleged burdens "are properly taken into account in our due process analysis." *Ante*, at 532. The plurality also announces that "the risk of an erroneous deprivation of a detainee's liberty interest is unacceptably high under the Government's proposed rule." *Ante*, at 532–533 (internal quotation marks omitted). But there is no particular reason to believe that the federal courts have the relevant information and exper-

tise to make this judgment. And for the reasons discussed in Part I, *supra*, there is every reason to think that courts cannot and should not make these decisions.

The plurality next opines that "[w]e think it unlikely that this basic process will have the dire impact on the central functions of warmaking that the Government forecasts." *Ante*, at 534. Apparently by limiting hearings "to the alleged combatant's acts," such hearings "meddl[e] little, if at all, in the strategy or conduct of war." *Ante*, at 535. Of course, the meaning of the combatant's acts may become clear only after quite invasive and extensive inquiry. And again, the federal courts are simply not situated to make these judgments.

Ultimately, the plurality's dismissive treatment of the Government's asserted interests arises from its apparent belief that enemy-combatant determinations are not part of "the actual prosecution of a war," *ibid.*, or one of the "central functions of warmaking," *ante*, at 534. This seems wrong: Taking *and holding* enemy combatants is a quintessential aspect of the prosecution of war. See, *e. g.*, *ante*, at 518–519; *Quirin*, 317 U. S., at 28. Moreover, this highlights serious difficulties in applying the plurality's balancing approach here. First, in the war context, we know neither the strength of the Government's interests nor the costs of imposing additional process.

Second, it is at least difficult to explain why the result should be different for other military operations that the plurality would ostensibly recognize as "central functions of warmaking." As the plurality recounts:

> "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified. It is equally fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner." *Ante*, at 533 (internal quotation marks omitted).

See also *ibid.* ("notice" of the Government's factual assertions and "a fair opportunity to rebut [those] assertions before a neutral decisionmaker" are essential elements of due process). Because a decision to bomb a particular target might extinguish *life* interests, the plurality's analysis seems to require notice to potential targets. To take one more example, in November 2002, a Central Intelligence Agency (CIA) Predator drone fired a Hellfire missile at a vehicle in Yemen carrying an al Qaeda leader, a citizen of the United States, and four others. See Priest, CIA Killed U. S. Citizen In Yemen Missile Strike, Washington Post, Nov. 8, 2002, p. A1. It is not clear whether the CIA knew that an American was in the vehicle. But the plurality's due process would seem to require notice and opportunity to respond here as well. Cf. *Tennessee* v. *Garner*, 471 U. S. 1 (1985). I offer these examples not because I think the plurality would demand additional process in these situations but because it clearly would not. The result here should be the same.

I realize that many military operations are, in some sense, necessary. But many, if not most, are merely expedient, and I see no principled distinction between the military operation the plurality condemns today (the holding of an enemy combatant based on the process given Hamdi) from a variety of other military operations. In truth, I doubt that there is any sensible, bright-line distinction. It could be argued that bombings and missile strikes are an inherent part of war, and as long as our forces do not violate the laws of war, it is of no constitutional moment that civilians might be killed. But this does not serve to distinguish this case because it is also consistent with the laws of war to detain enemy combatants exactly as the Government has detained Hamdi.[6] This, in fact, bolsters my argument in Part III to the extent that

[6] Hamdi's detention comports with the laws of war, including the Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U. S. T. 3406, T. I. A. S. No. 3364. See Brief for Respondents 22–24.

the laws of war show that the power to detain is part of a sovereign's war powers.

Undeniably, Hamdi has been deprived of a serious interest, one actually protected by the Due Process Clause. Against this, however, is the Government's overriding interest in protecting the Nation. If a deprivation of liberty can be justified by the need to protect a town, the protection of the Nation, *a fortiori*, justifies it.

I acknowledge that under the plurality's approach, it might, at times, be appropriate to give detainees access to counsel and notice of the factual basis for the Government's determination. See *ante*, at 532–533. But properly accounting for the Government's interests also requires concluding that access to counsel and to the factual basis would not always be warranted. Though common sense suffices, the Government thoroughly explains that counsel would often destroy the intelligence gathering function. See Brief for Respondents 42–43. See also App. 347–351 (affidavit of Col. D. Woolfolk). Equally obvious is the Government's interest in not fighting the war in its own courts, see, *e. g.*, *Johnson* v. *Eisentrager*, 339 U. S., at 779, and protecting classified information, see, *e. g.*, *Department of Navy* v. *Egan*, 484 U. S. 518, 527 (1988) (President's "authority to classify and control access to information bearing on national security and to determine" who gets access "flows primarily from [the Commander in Chief Clause] and exists quite apart from any explicit congressional grant"); *Agee*, 453 U. S., at 307 (upholding revocation of former CIA employee's passport in large part by reference to the Government's need "to protect the secrecy of [its] foreign intelligence operations").[7]

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[7] These observations cast still more doubt on the appropriateness and usefulness of *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), in this context. It is, for example, difficult to see how the plurality can insist that Hamdi unquestionably has the right to access to counsel in connection with the proceedings on remand, when new information could become available to the Government showing that such access would pose a grave risk to na-

* * *

For these reasons, I would affirm the judgment of the Court of Appeals.

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tional security. In that event, would the Government need to hold a hearing before depriving Hamdi of his newly acquired right to counsel even if that hearing would itself pose a grave threat?

Syllabus

MISSOURI *v.* SEIBERT

CERTIORARI TO THE SUPREME COURT OF MISSOURI

No. 02–1371. Argued December 9, 2003—Decided June 28, 2004

Respondent Seibert feared charges of neglect when her son, afflicted with cerebral palsy, died in his sleep. She was present when two of her sons and their friends discussed burning her family's mobile home to conceal the circumstances of her son's death. Donald, an unrelated mentally ill 18-year-old living with the family, was left to die in the fire, in order to avoid the appearance that Seibert's son had been unattended. Five days later, the police arrested Seibert, but did not read her her rights under *Miranda* v. *Arizona*, 384 U. S. 436. At the police station, Officer Hanrahan questioned her for 30 to 40 minutes, obtaining a confession that the plan was for Donald to die in the fire. He then gave her a 20-minute break, returned to give her *Miranda* warnings, and obtained a signed waiver. He resumed questioning, confronting Seibert with her prewarning statements and getting her to repeat the information. Seibert moved to suppress both her prewarning and postwarning statements. Hanrahan testified that he made a conscious decision to withhold *Miranda* warnings, question first, then give the warnings, and then repeat the question until he got the answer previously given. The District Court suppressed the prewarning statement but admitted the postwarning one, and Seibert was convicted of second-degree murder. The Missouri Court of Appeals affirmed, finding the case indistinguishable from *Oregon* v. *Elstad*, 470 U. S. 298, in which this Court held that a suspect's unwarned inculpatory statement made during a brief exchange at his house did not make a later, fully warned inculpatory statement inadmissible. In reversing, the State Supreme Court held that, because the interrogation was nearly continuous, the second statement, which was clearly the product of the invalid first statement, should be suppressed; and distinguished *Elstad* on the ground that the warnings had not intentionally been withheld there.

Held: The judgment is affirmed.

93 S. W. 3d 700, affirmed.

JUSTICE SOUTER, joined by JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER, concluded that, because the midstream recitation of warnings after interrogation and unwarned confession in this case could not comply with *Miranda*'s constitutional warning requirement, Seibert's postwarning statements are inadmissible. Pp. 607–617.

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(a) Failure to give *Miranda* warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. Conversely, giving the warnings and getting a waiver generally produces a virtual ticket of admissibility, with most litigation over voluntariness ending with valid waiver finding. This common consequence would not be at all common unless *Miranda* warnings were customarily given under circumstances that reasonably suggest a real choice between talking and not talking. Pp. 607–609.

(b) *Dickerson* v. *United States*, 530 U. S. 428, reaffirmed *Miranda*, holding that *Miranda*'s constitutional character prevailed against a federal statute that sought to restore the old regime of giving no warnings and litigating most statements' voluntariness. The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Pp. 609–611.

(c) When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and the question-first strategy. *Miranda* addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking, 384 U. S., at 464–465, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees, *id.*, at 467. Question-first's object, however, is to render *Miranda* warnings ineffective by waiting to give them until after the suspect has already confessed. The threshold question in this situation is whether it would be reasonable to find that the warnings could function "effectively" as *Miranda* requires. There is no doubt about the answer. By any objective measure, it is likely that warnings withheld until after interrogation and confession will be ineffective in preparing a suspect for successive interrogation, close in time and similar in content. The manifest purpose of question-first is to get a confession the suspect would not make if he understood his rights at the outset. When the warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "deprive a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran* v. *Burbine*, 475 U. S. 412, 424. And it would be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle. Pp. 611–614.

(d) *Elstad* does not authorize admission of a confession repeated under the question-first strategy. The contrast between *Elstad* and this case reveals relevant facts bearing on whether midstream *Miranda* warnings could be effective to accomplish their object: the completeness and detail of the questions and answers to the first round of questioning,

the two statements' overlapping content, the timing and setting of the first and second rounds, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, the station house questioning could sensibly be seen as a distinct experience from a short conversation at home, and thus the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission. Here, however, the unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. The warned phase proceeded after only a 15-to-20 minute pause, in the same place and with the same officer, who did not advise Seibert that her prior statement could not be used against her. These circumstances challenge the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes could not have understood them to convey a message that she retained a choice about continuing to talk. Pp. 614–617.

JUSTICE KENNEDY concluded that when a two-step interrogation technique is used, postwarning statements related to prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Not every violation of *Miranda* v. *Arizona*, 384 U. S. 436, requires suppression of the evidence obtained. Admission may be proper when it would further important objectives without compromising *Miranda*'s central concerns. See, *e. g.*, *Harris* v. *New York*, 401 U. S. 222. *Oregon* v. *Elstad*, 470 U. S. 298, reflects a balanced and pragmatic approach to enforcing the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required, and may not plan to question the suspect or may be waiting for a more appropriate time. Suppressing postwarning statements under such circumstances would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence." *Elstad*, *supra*, at 308. In contrast, the technique used in this case distorts *Miranda*'s meaning and furthers no legitimate countervailing interest. The warning was withheld to obscure both the practical and legal significance of the admonition when finally given. That the interrogating officer relied on respondent's prewarning statement to obtain the postwarning one used at trial shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit, and false, suggestion that the mere repetition of the earlier statement was not independently incriminating. The *Miranda* rule would be frustrated were the police permitted to undermine its meaning and effect. However, the plurality's test—that whenever a two-stage interview occurs, the postwarning statement's admissibility depends on whether the midstream warnings

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could have been effective enough to accomplish their object given the case's specific facts—cuts too broadly. The admissibility of postwarning statements should continue to be governed by *Elstad*'s principles unless the deliberate two-step strategy is employed. Then, the postwarning statements must be excluded unless curative measures are taken before they were made. Such measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and waiver. For example, a substantial break in time and circumstances between the prewarning statement and the warning may suffice in most instances, as may an additional warning explaining the likely inadmissibility of the prewarning statement. Because no curative steps were taken in this case, the postwarning statements are inadmissible and the conviction cannot stand. Pp. 618–622.

SOUTER, J., announced the judgment of the Court and delivered an opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a concurring opinion, *post*, p. 617. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 618. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and THOMAS, JJ., joined, *post*, p. 622.

Karen K. Mitchell, Chief Deputy Attorney General of Missouri, argued the cause for petitioner. With her on the briefs were *Jeremiah W. (Jay) Nixon*, Attorney General, *James R. Layton*, State Solicitor, and *Shaun J. Mackelprang* and *Karen P. Hess*, Assistant Attorneys General.

Irving L. Gornstein argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Olson*, *Acting Assistant Attorney General Wray*, *Deputy Solicitor General Dreeben*, and *Jonathan L. Marcus*.

Amy M. Bartholow argued the cause and filed a brief for respondent.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Jonathan L. Abram*, *Christopher T. Handman*, *William H. Johnson*, *Steven R. Shapiro*, and *Lisa Kemler;* and for Michael R. Bromwich et al. by *George A. Cumming, Jr.*, *Charles D. Weisselberg*, *Stephen J. Schulhofer*, *Kirsten D. Levingston*, *Frederick A. O. Schwarz, Jr.*, and *Tom Gerety*.

JUSTICE SOUTER announced the judgment of the Court and delivered an opinion, in which JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join.

This case tests a police protocol for custodial interrogation that calls for giving no warnings of the rights to silence and counsel until interrogation has produced a confession. Although such a statement is generally inadmissible, since taken in violation of *Miranda* v. *Arizona*, 384 U. S. 436 (1966), the interrogating officer follows it with *Miranda* warnings and then leads the suspect to cover the same ground a second time. The question here is the admissibility of the repeated statement. Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*'s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.

I

Respondent Patrice Seibert's 12-year-old son Jonathan had cerebral palsy, and when he died in his sleep she feared charges of neglect because of bedsores on his body. In her presence, two of her teenage sons and two of their friends devised a plan to conceal the facts surrounding Jonathan's death by incinerating his body in the course of burning the family's mobile home, in which they planned to leave Donald Rector, a mentally ill teenager living with the family, to avoid any appearance that Jonathan had been unattended. Seibert's son Darian and a friend set the fire, and Donald died.

Five days later, the police awakened Seibert at 3 a.m. at a hospital where Darian was being treated for burns. In arresting her, Officer Kevin Clinton followed instructions from Rolla, Missouri, Officer Richard Hanrahan that he refrain from giving *Miranda* warnings. After Seibert had been taken to the police station and left alone in an interview room for 15 to 20 minutes, Officer Hanrahan questioned her

without *Miranda* warnings for 30 to 40 minutes, squeezing her arm and repeating "Donald was also to die in his sleep." App. 59 (internal quotation marks omitted). After Seibert finally admitted she knew Donald was meant to die in the fire, she was given a 20-minute coffee and cigarette break. Officer Hanrahan then turned on a tape recorder, gave Seibert the *Miranda* warnings, and obtained a signed waiver of rights from her. He resumed the questioning with "Ok, 'trice, we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" App. 66, and confronted her with her prewarning statements:

> Hanrahan: "Now, in discussion you told us, you told us that there was a[n] understanding about Donald."
>
> Seibert: "Yes."
>
> Hanrahan: "Did that take place earlier that morning?"
>
> Seibert: "Yes."
>
> Hanrahan: "And what was the understanding about Donald?"
>
> Seibert: "If they could get him out of the trailer, to take him out of the trailer."
>
> Hanrahan: "And if they couldn't?"
>
> Seibert: "I, I never even thought about it. I just figured they would."
>
> Hanrahan: "'Trice, didn't you tell me that he was supposed to die in his sleep?"
>
> Seibert: "If that would happen, 'cause he was on that new medicine, you know . . . ."
>
> Hanrahan: "The Prozac? And it makes him sleepy. So he was supposed to die in his sleep?"
>
> Seibert: "Yes." *Id.*, at 70.

After being charged with first-degree murder for her role in Donald's death, Seibert sought to exclude both her prewarning and postwarning statements. At the suppression hearing, Officer Hanrahan testified that he made a "conscious

decision" to withhold *Miranda* warnings, thus resorting to an interrogation technique he had been taught: question first, then give the warnings, and then repeat the question "until I get the answer that she's already provided once." App. 31–34. He acknowledged that Seibert's ultimate statement was "largely a repeat of information . . . obtained" prior to the warning. *Id.*, at 30.

The trial court suppressed the prewarning statement but admitted the responses given after the *Miranda* recitation. A jury convicted Seibert of second-degree murder. On appeal, the Missouri Court of Appeals affirmed, treating this case as indistinguishable from *Oregon* v. *Elstad*, 470 U. S. 298 (1985). No. 23729, 2002 WL 114804 (Jan. 30, 2002) (not released for publication).

The Supreme Court of Missouri reversed, holding that "[i]n the circumstances here, where the interrogation was nearly continuous, . . . the second statement, clearly the product of the invalid first statement, should have been suppressed." 93 S. W. 3d 700, 701 (2002) (en banc). The court distinguished *Elstad* on the ground that warnings had not intentionally been withheld there, 93 S. W. 3d, at 704, and reasoned that "Officer Hanrahan's intentional omission of a *Miranda* warning was intended to deprive Seibert of the opportunity knowingly and intelligently to waive her *Miranda* rights," *id.*, at 706. Since there were "no circumstances that would seem to dispel the effect of the *Miranda* violation," the court held that the postwarning confession was involuntary and therefore inadmissible. *Ibid.* To allow the police to achieve an "end run" around *Miranda*, the court explained, would encourage *Miranda* violations and diminish *Miranda*'s role in protecting the privilege against self-incrimination. 93 S. W. 3d, at 706–707. Three judges dissented, taking the view that *Elstad* applied even though the police intentionally withheld *Miranda* warnings before the initial statement, and believing that "Seibert's unwarned responses to Officer Hanrahan's questioning did not prevent

her from waiving her rights and confessing." 93 S. W. 3d, at 708 (opinion of Benton, J.).

We granted certiorari, 538 U. S. 1031 (2003), to resolve a split in the Courts of Appeals. Compare *United States* v. *Gale*, 952 F. 2d 1412, 1418 (CADC 1992) (while "deliberate 'end run' around *Miranda*" would provide cause for suppression, case involved no conduct of that order); *United States* v. *Carter*, 884 F. 2d 368, 373 (CA8 1989) ("*Elstad* did not go so far as to fashion a rule permitting this sort of end run around *Miranda*"), with *United States* v. *Orso*, 266 F. 3d 1030, 1034–1039 (CA9 2001) (en banc) (rejecting argument that "tainted fruit" analysis applies because deliberate withholding of *Miranda* warnings constitutes an "improper tactic"); *United States* v. *Esquilin*, 208 F. 3d 315, 319–321 (CA1 2000) (similar). We now affirm.

II

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram* v. *United States*, 168 U. S. 532, 542 (1897). A parallel rule governing the admissibility of confessions in state courts emerged from the Due Process Clause of the Fourteenth Amendment, see, *e. g.*, *Brown* v. *Mississippi*, 297 U. S. 278 (1936), which governed state cases until we concluded in *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964), that "[t]he Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement—the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." In unifying the Fifth and Fourteenth Amendment voluntariness tests, *Malloy* "made clear what had already become apparent—that the substantive and procedural safe-

guards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege" against self-incrimination. *Miranda*, 384 U. S., at 464.

In *Miranda*, we explained that the "voluntariness doctrine in the state cases . . . encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice," *id.*, at 464–465. We appreciated the difficulty of judicial enquiry *post hoc* into the circumstances of a police interrogation, *Dickerson* v. *United States*, 530 U. S. 428, 444 (2000), and recognized that "the coercion inherent in custodial interrogation blurs the line between voluntary and involuntary statements, and thus heightens the risk" that the privilege against self-incrimination will not be observed, *id.*, at 435. Hence our concern that the "traditional totality-of-the-circumstances" test posed an "unacceptably great" risk that involuntary custodial confessions would escape detection. *Id.*, at 442.

Accordingly, "to reduce the risk of a coerced confession and to implement the Self-Incrimination Clause," *Chavez* v. *Martinez*, 538 U. S. 760, 790 (2003) (KENNEDY, J., concurring in part and dissenting in part), this Court in *Miranda* concluded that "the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored," 384 U. S., at 467. *Miranda* conditioned the admissibility at trial of any custodial confession on warning a suspect of his rights: failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained.[1] Conversely, giving the warnings and getting a

[1] "[T]he burden of showing admissibility rests, of course, on the prosecution." *Brown* v. *Illinois*, 422 U. S. 590, 604 (1975). The prosecution bears the burden of proving, at least by a preponderance of the evidence, the *Miranda* waiver, *Colorado* v. *Connelly*, 479 U. S. 157, 169 (1986), and the voluntariness of the confession, *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972).

waiver has generally produced a virtual ticket of admissibility; maintaining that a statement is involuntary even though given after warnings and voluntary waiver of rights requires unusual stamina, and litigation over voluntariness tends to end with the finding of a valid waiver. See *Berkemer* v. *McCarty*, 468 U. S. 420, 433, n. 20 (1984) ("[C]ases in which a defendant can make a colorable argument that a self-incriminating statement was 'compelled' despite the fact that the law enforcement authorities adhered to the dictates of *Miranda* are rare"). To point out the obvious, this common consequence would not be common at all were it not that *Miranda* warnings are customarily given under circumstances allowing for a real choice between talking and remaining silent.

III

There are those, of course, who preferred the old way of doing things, giving no warnings and litigating the voluntariness of any statement in nearly every instance. In the aftermath of *Miranda*, Congress even passed a statute seeking to restore that old regime, 18 U. S. C. § 3501, although the Act lay dormant for years until finally invoked and challenged in *Dickerson* v. *United States*, *supra*. *Dickerson* reaffirmed *Miranda* and held that its constitutional character prevailed against the statute.

The technique of interrogating in successive, unwarned and warned phases raises a new challenge to *Miranda*. Although we have no statistics on the frequency of this practice, it is not confined to Rolla, Missouri. An officer of that police department testified that the strategy of withholding *Miranda* warnings until after interrogating and drawing out a confession was promoted not only by his own department, but by a national police training organization and other departments in which he had worked. App. 31–32. Consistently with the officer's testimony, the Police Law Institute, for example, instructs that "officers may conduct a two-stage interrogation. . . . At any point during the pre-*Miranda* in-

terrogation, usually after arrestees have confessed, officers may then read the *Miranda* warnings and ask for a waiver. If the arrestees waive their *Miranda* rights, officers will be able to repeat any *subsequent* incriminating statements later in court." Police Law Institute, Illinois Police Law Manual 83 (Jan. 2001–Dec. 2003) (available in Clerk of Court's case file) (hereinafter Police Law Manual) (emphasis in original).[2]

[2] Emphasizing the impeachment exception to the *Miranda* rule approved by this Court, *Harris* v. *New York*, 401 U. S. 222 (1971), some training programs advise officers to omit *Miranda* warnings altogether or to continue questioning after the suspect invokes his rights. See, *e. g.*, Police Law Manual 83 ("There is no need to give a *Miranda* warning before asking questions if . . . the answers given . . . will not be required by the prosecutor during the prosecution's case-in-chief"); California Commission on Peace Officer Standards and Training, Video Training Programs for California Law Enforcement, Miranda: Post-Invocation Questioning (broadcast July 11, 1996) ("We . . . have been encouraging you to continue to question a suspect after they've invoked their *Miranda* rights"); D. Zulawski & D. Wicklander, Practical Aspects of Interview and Interrogation 50–51 (2d ed. 2002) (describing the practice of "[b]eachheading" as useful for impeachment purpose (emphasis deleted)); see also Weisselberg, Saving *Miranda*, 84 Cornell L. Rev. 109, 110, 132–139 (1998) (collecting California training materials encouraging questioning "outside *Miranda*"). This training is reflected in the reported cases involving deliberate questioning after invocation of *Miranda* rights. See, *e. g.*, *California Attorneys for Criminal Justice* v. *Butts*, 195 F. 3d 1039, 1042–1044 (CA9 1999); *Henry* v. *Kernan*, 197 F. 3d 1021, 1026 (CA9 1999); *People* v. *Neal*, 31 Cal. 4th 63, 68, 72 P. 3d 280, 282 (2003); *People* v. *Peevy*, 17 Cal. 4th 1184, 1189, 953 P. 2d 1212, 1215 (1998). Scholars have noted the growing trend of such practices. See, *e. g.*, Leo, Questioning the Relevance of *Miranda* in the Twenty-First Century, 99 Mich. L. Rev. 1000, 1010 (2001); Weisselberg, In the Stationhouse After *Dickerson*, 99 Mich. L. Rev. 1121, 1123–1154 (2001).

It is not the case, of course, that law enforcement educators en masse are urging that *Miranda* be honored only in the breach. See, *e. g.*, C. O'Hara & G. O'Hara, Fundamentals of Criminal Investigation 133 (7th ed. 2003) (instructing police to give *Miranda* warnings before conducting custodial interrogation); F. Inbau, J. Reid, & J. Buckley, Criminal Interrogation and Confessions 221 (3d ed. 1986) (hereinafter Inbau, Reid, & Buckley) (same); J. Reid & Assoc., Interviewing & Interrogation: The Reid Technique 61 (1991) (same). Most police manuals do not advocate the question-first tactic, because they understand that *Oregon* v. *Elstad*,

The upshot of all this advice is a question-first practice of some popularity, as one can see from the reported cases describing its use, sometimes in obedience to departmental policy.[3]

IV

When a confession so obtained is offered and challenged, attention must be paid to the conflicting objects of *Miranda* and question-first. *Miranda* addressed "interrogation practices . . . likely . . . to disable [an individual] from making a free and rational choice" about speaking, 384 U. S., at 464–465, and held that a suspect must be "adequately and effectively" advised of the choice the Constitution guarantees, *id.*, at 467. The object of question-first is to render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed.

Just as "no talismanic incantation [is] required to satisfy [*Miranda*'s] strictures," *California* v. *Prysock*, 453 U. S. 355, 359 (1981) *(per curiam)*, it would be absurd to think that mere recitation of the litany suffices to satisfy *Miranda* in every conceivable circumstance. "The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" *Duckworth* v. *Eagan*, 492 U. S. 195, 203 (1989) (quoting *Prysock*, *supra*, at 361). The threshold issue when interrogators question first and warn later is thus whether it would be reasonable to find that in these circumstances the warnings could function "effec-

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470 U. S. 298 (1985), involved an officer's good-faith failure to warn. See, *e. g.*, Inbau, Reid, & Buckley 241 (*Elstad*'s "facts as well as [its] specific holding" instruct that "where an interrogator has failed to administer the *Miranda* warnings in the mistaken belief that, under the circumstances of the particular case, the warnings were not required, . . . corrective measures . . . salvage an interrogation opportunity").

[3] See, *e. g.*, *United States* v. *Orso*, 266 F. 3d 1030, 1032–1033 (CA9 2001) (en banc); *Pope* v. *Zenon*, 69 F. 3d 1018, 1023–1024 (CA9 1995), overruled by *Orso*, *supra*; *Cooper* v. *Dupnik*, 963 F. 2d 1220, 1224–1227, 1249 (CA9 1992) (en banc); *United States* v. *Carter*, 884 F. 2d 368, 373 (CA9 1989); *United States* v. *Esquilin*, 208 F. 3d 315, 317 (CA1 2000); *Davis* v. *United States*, 724 A. 2d 1163, 1165–1166 (D. C. App. 1998).

tively" as *Miranda* requires. Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture? Could they reasonably convey that he could choose to stop talking even if he had talked earlier? For unless the warnings could place a suspect who has just been interrogated in a position to make such an informed choice, there is no practical justification for accepting the formal warnings as compliance with *Miranda*, or for treating the second stage of interrogation as distinct from the first, unwarned and inadmissible segment.[4]

There is no doubt about the answer that proponents of question-first give to this question about the effectiveness of

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[4] Respondent Seibert argues that her second confession should be excluded from evidence under the doctrine known by the metaphor of the "fruit of the poisonous tree," developed in the Fourth Amendment context in *Wong Sun* v. *United States*, 371 U. S. 471 (1963): evidence otherwise admissible but discovered as a result of an earlier violation is excluded as tainted, lest the law encourage future violations. But the Court in *Elstad* rejected the *Wong Sun* fruits doctrine for analyzing the admissibility of a subsequent warned confession following "an initial failure . . . to administer the warnings required by *Miranda*." *Elstad*, 470 U. S., at 300. In *Elstad*, "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," did not "so tain[t] the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made." *Id.*, at 309. *Elstad* held that "a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings." *Id.*, at 318. In a sequential confession case, clarity is served if the later confession is approached by asking whether in the circumstances the *Miranda* warnings given could reasonably be found effective. If yes, a court can take up the standard issues of voluntary waiver and voluntary statement; if no, the subsequent statement is inadmissible for want of adequate *Miranda* warnings, because the earlier and later statements are realistically seen as parts of a single, unwarned sequence of questioning.

warnings given only after successful interrogation, and we think their answer is correct. By any objective measure, applied to circumstances exemplified here, it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content. After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset; the sensible underlying assumption is that with one confession in hand before the warnings, the interrogator can count on getting its duplicate, with trifling additional trouble. Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again.[5] A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "de-

[5] It bears emphasizing that the effectiveness *Miranda* assumes the warnings can have must potentially extend through the repeated interrogation, since a suspect has a right to stop at any time. It seems highly unlikely that a suspect could retain any such understanding when the interrogator leads him a second time through a line of questioning the suspect has already answered fully. The point is not that a later unknowing or involuntary confession cancels out an earlier, adequate warning; the point is that the warning is unlikely to be effective in the question-first sequence we have described.

priv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran* v. *Burbine*, 475 U. S. 412, 424 (1986). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

V

Missouri argues that a confession repeated at the end of an interrogation sequence envisioned in a question-first strategy is admissible on the authority of *Oregon* v. *Elstad*, 470 U. S. 298 (1985), but the argument disfigures that case. In *Elstad*, the police went to the young suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother, while the other one joined the suspect in a "brief stop in the living room," *id.*, at 315, where the officer said he "felt" the young man was involved in a burglary, *id.*, at 301 (internal quotation marks omitted). The suspect acknowledged he had been at the scene. *Ibid.* This Court noted that the pause in the living room "was not to interrogate the suspect but to notify his mother of the reason for his arrest," *id.*, at 315, and described the incident as having "none of the earmarks of coercion," *id.*, at 316. The Court, indeed, took care to mention that the officer's initial failure to warn was an "oversight" that "may have been the result of confusion as to whether the brief exchange qualified as 'custodial interrogation' or . . . may simply have reflected . . . reluctance to initiate an alarming police procedure before [an officer] had spoken with respondent's mother." *Id.*, at 315–316. At the outset of a later and systematic station house interrogation going well beyond the scope of the laconic prior admission, the suspect was given *Miranda* warnings and made a full confession. *Elstad*, *supra*, at 301, 314–315. In holding the

second statement admissible and voluntary, *Elstad* rejected the "cat out of the bag" theory that any short, earlier admission, obtained in arguably innocent neglect of *Miranda*, determined the character of the later, warned confession, *Elstad*, 470 U. S., at 311–314; on the facts of that case, the Court thought any causal connection between the first and second responses to the police was "speculative and attenuated," *id.*, at 313. Although the *Elstad* Court expressed no explicit conclusion about either officer's state of mind, it is fair to read *Elstad* as treating the living room conversation as a good-faith *Miranda* mistake, not only open to correction by careful warnings before systematic questioning in that particular case, but posing no threat to warn-first practice generally. See *Elstad*, *supra*, at 309 (characterizing the officers' omission of *Miranda* warnings as "a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will"); 470 U. S., at 318, n. 5 (Justice Brennan's concern in dissent that *Elstad* would invite question-first practice "distorts the reasoning and holding of our decision, but, worse, invites trial courts and prosecutors to do the same").

The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda*

warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.

At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings.[6] The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited. In particular, the police did not advise that her prior statement could not be used.[7] Nothing was said or done to dispel the oddity of warning about legal rights to silence and counsel right after the police had led her through a systematic interrogation, and any uncertainty on her part about a right to stop talking about matters previously discussed would only have been aggravated by the way Officer Hanrahan set the scene by saying "we've been talking for a little while about what happened on Wednesday the twelfth, haven't we?" App. 66. The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It

[6] Because the intent of the officer will rarely be as candidly admitted as it was here (even as it is likely to determine the conduct of the interrogation), the focus is on facts apart from intent that show the question-first tactic at work.

[7] We do not hold that a formal addendum warning that a previous statement could not be used would be sufficient to change the character of the question-first procedure to the point of rendering an ensuing statement admissible, but its absence is clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation.

would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. These circumstances must be seen as challenging the comprehensibility and efficacy of the *Miranda* warnings to the point that a reasonable person in the suspect's shoes would not have understood them to convey a message that she retained a choice about continuing to talk.[8]

VI

Strategists dedicated to draining the substance out of *Miranda* cannot accomplish by training instructions what *Dickerson* held Congress could not do by statute. Because the question-first tactic effectively threatens to thwart *Miranda*'s purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose, Seibert's postwarning statements are inadmissible. The judgment of the Supreme Court of Missouri is affirmed.

It is so ordered.

JUSTICE BREYER, concurring.

In my view, the following simple rule should apply to the two-stage interrogation technique: Courts should exclude the "fruits" of the initial unwarned questioning unless the failure to warn was in good faith. Cf. *Oregon* v. *Elstad*, 470 U. S. 298, 309, 318, n. 5 (1985); *United States* v. *Leon*, 468 U. S. 897 (1984). I believe this is a sound and workable approach to the problem this case presents. Prosecutors and judges have long understood how to apply the "fruits" approach, which they use in other areas of law. See *Wong Sun* v. *United States*, 371 U. S. 471 (1963). And in the workaday

[8] Because we find that the warnings were inadequate, there is no need to assess the actual voluntariness of the statement.

world of criminal law enforcement the administrative simplicity of the familiar has significant advantages over a more complex exclusionary rule. Cf. *post*, at 628–629 (O'CONNOR, J., dissenting).

I believe the plurality's approach in practice will function as a "fruits" test. The truly "effective" *Miranda* warnings on which the plurality insists, *ante*, at 615, will occur only when certain circumstances—a lapse in time, a change in location or interrogating officer, or a shift in the focus of the questioning—intervene between the unwarned questioning and any postwarning statement. Cf. *Taylor* v. *Alabama*, 457 U. S. 687, 690 (1982) (evidence obtained subsequent to a constitutional violation must be suppressed as "fruit of the poisonous tree" unless "intervening events break the causal connection").

I consequently join the plurality's opinion in full. I also agree with JUSTICE KENNEDY's opinion insofar as it is consistent with this approach and makes clear that a good-faith exception applies. See *post*, at 622 (opinion concurring in judgment).

JUSTICE KENNEDY, concurring in the judgment.

The interrogation technique used in this case is designed to circumvent *Miranda* v. *Arizona*, 384 U. S. 436 (1966). It undermines the *Miranda* warning and obscures its meaning. The plurality opinion is correct to conclude that statements obtained through the use of this technique are inadmissible. Although I agree with much in the careful and convincing opinion for the plurality, my approach does differ in some respects, requiring this separate statement.

The *Miranda* rule has become an important and accepted element of the criminal justice system. See *Dickerson* v. *United States*, 530 U. S. 428 (2000). At the same time, not every violation of the rule requires suppression of the evidence obtained. Evidence is admissible when the central

concerns of *Miranda* are not likely to be implicated and when other objectives of the criminal justice system are best served by its introduction. Thus, we have held that statements obtained in violation of the rule can be used for impeachment, so that the truth-finding function of the trial is not distorted by the defense, see *Harris* v. *New York*, 401 U. S. 222 (1971); that there is an exception to protect countervailing concerns of public safety, see *New York* v. *Quarles*, 467 U. S. 649 (1984); and that physical evidence obtained in reliance on statements taken in violation of the rule is admissible, see *United States* v. *Patane*, *post*, p. 630. These cases, in my view, are correct. They recognize that admission of evidence is proper when it would further important objectives without compromising *Miranda*'s central concerns. Under these precedents, the scope of the *Miranda* suppression remedy depends on a consideration of those legitimate interests and on whether admission of the evidence under the circumstances would frustrate *Miranda*'s central concerns and objectives.

Oregon v. *Elstad*, 470 U. S. 298 (1985), reflects this approach. In *Elstad*, a suspect made an initial incriminating statement at his home. The suspect had not received a *Miranda* warning before making the statement, apparently because it was not clear whether the suspect was in custody at the time. The suspect was taken to the station house, where he received a proper warning, waived his *Miranda* rights, and made a second statement. He later argued that the postwarning statement should be suppressed because it was related to the unwarned first statement, and likely induced or caused by it. The Court held that, although a *Miranda* violation made the first statement inadmissible, the postwarning statements could be introduced against the accused because "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppres-

sion" given the facts of that case. *Elstad*, *supra*, at 308 (citing *Michigan* v. *Tucker*, 417 U. S. 433, 445 (1974)).

In my view, *Elstad* was correct in its reasoning and its result. *Elstad* reflects a balanced and pragmatic approach to enforcement of the *Miranda* warning. An officer may not realize that a suspect is in custody and warnings are required. The officer may not plan to question the suspect or may be waiting for a more appropriate time. Skilled investigators often interview suspects multiple times, and good police work may involve referring to prior statements to test their veracity or to refresh recollection. In light of these realities it would be extravagant to treat the presence of one statement that cannot be admitted under *Miranda* as sufficient reason to prohibit subsequent statements preceded by a proper warning. See *Elstad*, 470 U. S., at 309 ("It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings . . . so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period"). That approach would serve "neither the general goal of deterring improper police conduct nor the Fifth Amendment goal of assuring trustworthy evidence would be served by suppression of the . . . testimony." *Id.*, at 308.

This case presents different considerations. The police used a two-step questioning technique based on a deliberate violation of *Miranda*. The *Miranda* warning was withheld to obscure both the practical and legal significance of the admonition when finally given. As JUSTICE SOUTER points out, the two-step technique permits the accused to conclude that the right not to respond did not exist when the earlier incriminating statements were made. The strategy is based on the assumption that *Miranda* warnings will tend to mean less when recited midinterrogation, after inculpatory statements have already been obtained. This tactic relies on an intentional misrepresentation of the protection that *Mi-*

randa offers and does not serve any legitimate objectives that might otherwise justify its use.

Further, the interrogating officer here relied on the defendant's prewarning statement to obtain the postwarning statement used against her at trial. The postwarning interview resembled a cross-examination. The officer confronted the defendant with her inadmissible prewarning statements and pushed her to acknowledge them. See App. 70 ("'Trice, didn't you tell me that he was supposed to die in his sleep?"). This shows the temptations for abuse inherent in the two-step technique. Reference to the prewarning statement was an implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. The implicit suggestion was false.

The technique used in this case distorts the meaning of *Miranda* and furthers no legitimate countervailing interest. The *Miranda* rule would be frustrated were we to allow police to undermine its meaning and effect. The technique simply creates too high a risk that postwarning statements will be obtained when a suspect was deprived of "knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran* v. *Burbine*, 475 U. S. 412, 423–424 (1986). When an interrogator uses this deliberate, two-step strategy, predicated upon violating *Miranda* during an extended interview, postwarning statements that are related to the substance of prewarning statements must be excluded absent specific, curative steps.

The plurality concludes that whenever a two-stage interview occurs, admissibility of the postwarning statement should depend on "whether [the] *Miranda* warnings delivered midstream could have been effective enough to accomplish their object" given the specific facts of the case. *Ante*, at 615. This test envisions an objective inquiry from the perspective of the suspect, and applies in the case of both intentional and unintentional two-stage interrogations.

Ante, at 615–617. In my view, this test cuts too broadly. *Miranda*'s clarity is one of its strengths, and a multifactor test that applies to every two-stage interrogation may serve to undermine that clarity. Cf. *Berkemer* v. *McCarty*, 468 U. S. 420, 430 (1984). I would apply a narrower test applicable only in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning.

The admissibility of postwarning statements should continue to be governed by the principles of *Elstad* unless the deliberate two-step strategy was employed. If the deliberate two-step strategy has been used, postwarning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made. Curative measures should be designed to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver. For example, a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. Cf. *Westover* v. *United States*, decided with *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Alternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient. No curative steps were taken in this case, however, so the postwarning statements are inadmissible and the conviction cannot stand.

For these reasons, I concur in the judgment of the Court.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE THOMAS join, dissenting.

The plurality devours *Oregon* v. *Elstad*, 470 U. S. 298 (1985), even as it accuses petitioner's argument of "disfigur[ing]" that decision. *Ante*, at 614. I believe that we

are bound by *Elstad* to reach a different result, and I would vacate the judgment of the Supreme Court of Missouri.

I

On two preliminary questions I am in full agreement with the plurality. First, the plurality appropriately follows *Elstad* in concluding that Seibert's statement cannot be held inadmissible under a "fruit of the poisonous tree" theory. *Ante*, at 612, n. 4 (internal quotation marks omitted). Second, the plurality correctly declines to focus its analysis on the subjective intent of the interrogating officer.

A

This Court has made clear that there simply is no place for a robust deterrence doctrine with regard to violations of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Dickerson* v. *United States*, 530 U. S. 428, 441 (2000) ("Our decision in *[Elstad]*—refusing to apply the traditional 'fruits' doctrine developed in Fourth Amendment cases—. . . simply recognizes the fact that unreasonable searches under the Fourth Amendment are different from unwarned interrogation under the Fifth Amendment"); *Elstad*, *supra*, at 306 (unlike the Fourth Amendment exclusionary rule, the "*Miranda* exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself"); see also *United States* v. *Patane*, *post*, at 644–645 (KENNEDY, J., concurring in judgment) (refusal to suppress evidence obtained following an unwarned confession in *Elstad*, *New York* v. *Quarles*, 467 U. S. 649 (1984), and *Harris* v. *New York*, 401 U. S. 222 (1971), was based on "our recognition that the concerns underlying the *Miranda* . . . rule must be accommodated to other objectives of the criminal justice system"). Consistent with that view, the Court today refuses to apply the traditional "fruits" analysis to the physical fruit of a claimed *Miranda* violation. *Patane*, *post*, p. 630. The plu-

rality correctly refuses to apply a similar analysis to testimonial fruits.

Although the analysis the plurality ultimately espouses examines the same facts and circumstances that a "fruits" analysis would consider (such as the lapse of time between the two interrogations and change of questioner or location), it does so for entirely different reasons. The fruits analysis would examine those factors because they are relevant to the balance of deterrence value versus the "drastic and socially costly course" of excluding reliable evidence. *Nix* v. *Williams*, 467 U. S. 431, 442–443 (1984). The plurality, by contrast, looks to those factors to inform the *psychological* judgment regarding whether the suspect has been informed effectively of her right to remain silent. The analytical underpinnings of the two approaches are thus entirely distinct, and they should not be conflated just because they function similarly in practice. Cf. *ante*, at 617–618 (BREYER, J., concurring).

B

The plurality's rejection of an intent-based test is also, in my view, correct. Freedom from compulsion lies at the heart of the Fifth Amendment, and requires us to assess whether a suspect's decision to speak truly was voluntary. Because voluntariness is a matter of the suspect's state of mind, we focus our analysis on the way in which suspects experience interrogation. See generally *Miranda*, 384 U. S., at 455 (summarizing psychological tactics used by police that "undermin[e]" the suspect's "will to resist," and noting that "the very fact of custodial interrogation . . . trades on the weakness of individuals"); *id.*, at 467 ("[I]n-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely").

Thoughts kept inside a police officer's head cannot affect that experience. See *Moran* v. *Burbine*, 475 U. S. 412, 422

(1986) ("Events occurring outside of the presence of the suspect and entirely unknown to him surely can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right"). In *Moran*, an attorney hired by the suspect's sister had been trying to contact the suspect and was told by the police, falsely, that they would not begin an interrogation that night. *Id.*, at 416–418. The suspect was not aware that an attorney had been hired for him. *Id.*, at 417. We rejected an analysis under which a different result would obtain for "the same defendant, armed with the same information and confronted with precisely the same police conduct" if something not known to the defendant—such as the fact that an attorney was attempting to contact him—had been different. *Id.*, at 422. The same principle applies here. A suspect who experienced exactly the same interrogation as Seibert, save for a difference in the undivulged, subjective intent of the interrogating officer when he failed to give *Miranda* warnings, would not experience the interrogation any differently. "[W]hether intentional or inadvertent, the state of mind of the police is irrelevant to the question of the intelligence and voluntariness of respondent's election to abandon his rights. Although highly inappropriate, even deliberate deception of an attorney could not possibly affect a suspect's decision to waive his *Miranda* rights unless he were at least aware of the incident." 475 U. S., at 423. Cf. *Stansbury* v. *California*, 511 U. S. 318, 324–325 (1994) *(per curiam)* (police officer's subjective intent is irrelevant to whether suspect is in custody for *Miranda* purposes; "one cannot expect the person under interrogation to probe the officer's innermost thoughts").

Because the isolated fact of Officer Hanrahan's intent could not have had any bearing on Seibert's "capacity to comprehend and knowingly relinquish" her right to remain silent, *Moran*, *supra*, at 422, it could not by itself affect the voluntariness of her confession. Moreover, recognizing an exception to *Elstad* for intentional violations would require focus-

ing constitutional analysis on a police officer's subjective intent, an unattractive proposition that we all but uniformly avoid. In general, "we believe that 'sending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.'" *United States* v. *Leon*, 468 U. S. 897, 922, n. 23 (1984) (quoting *Massachusetts* v. *Painten*, 389 U. S. 560, 565 (1968) (White, J., dissenting)). This case presents the uncommonly straightforward circumstance of an officer openly admitting that the violation was intentional. But the inquiry will be complicated in other situations probably more likely to occur. For example, different officers involved in an interrogation might claim different states of mind regarding the failure to give *Miranda* warnings. Even in the simple case of a single officer who claims that a failure to give *Miranda* warnings was inadvertent, the likelihood of error will be high. See W. LaFave, Search and Seizure § 1.4(e), p. 124 (3d ed. 1996) ("[T]here is no reason to believe that courts can with any degree of success determine in which instances the police had an ulterior motive").

These evidentiary difficulties have led us to reject an intent-based test in several criminal procedure contexts. For example, in *New York* v. *Quarles*, one of the factors that led us to reject an inquiry into the subjective intent of the police officer in crafting a test for the "public safety" exception to *Miranda* was that officers' motives will be "largely unverifiable." 467 U. S., at 656. Similarly, our opinion in *Whren* v. *United States*, 517 U. S. 806, 813–814 (1996), made clear that "the evidentiary difficulty of establishing subjective intent" was one of the reasons (albeit not the principal one) for refusing to consider intent in Fourth Amendment challenges generally.

For these reasons, I believe that the approach espoused by JUSTICE KENNEDY is ill advised. JUSTICE KENNEDY would extend *Miranda*'s exclusionary rule to any case in which the use of the "two-step interrogation technique" was "deliber-

ate" or "calculated." *Ante*, at 622 (opinion concurring in judgment). This approach untethers the analysis from facts knowable to, and therefore having any potential directly to affect, the suspect. Far from promoting "clarity," *ibid.*, the approach will add a third step to the suppression inquiry. In virtually every two-stage interrogation case, in addition to addressing the standard *Miranda* and voluntariness questions, courts will be forced to conduct the kind of difficult, state-of-mind inquiry that we normally take pains to avoid.

II

The plurality's adherence to *Elstad*, and mine to the plurality, end there. Our decision in *Elstad* rejected two lines of argument advanced in favor of suppression. The first was based on the "fruit of the poisonous tree" doctrine, discussed above. The second was the argument that the "lingering compulsion" inherent in a defendant's having let the "cat out of the bag" required suppression. 470 U. S., at 311. The Court of Appeals of Oregon, in accepting the latter argument, had endorsed a theory indistinguishable from the one today's plurality adopts: "[T]he coercive impact of the unconstitutionally obtained statement remains, because in a defendant's mind it has sealed his fate. It is this impact that must be dissipated in order to make a subsequent confession admissible." *State* v. *Elstad*, 61 Ore. App. 673, 677, 658 P. 2d 552, 554 (1983).

We rejected this theory outright. We did so not because we refused to recognize the "psychological impact of the suspect's conviction that he has let the cat out of the bag," but because we refused to "endo[w]" those "psychological effects" with "constitutional implications." 470 U. S., at 311. To do so, we said, would "effectively immuniz[e] a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver," an immunity that "comes at a high cost to legitimate law enforcement activity, while adding little desirable protection to the indi-

vidual's interest in not being *compelled* to testify against himself." *Id.*, at 312. The plurality might very well think that we struck the balance between Fifth Amendment rights and law enforcement interests incorrectly in *Elstad;* but that is not normally a sufficient reason for ignoring the dictates of *stare decisis.*

I would analyze the two-step interrogation procedure under the voluntariness standards central to the Fifth Amendment and reiterated in *Elstad.* *Elstad* commands that if Seibert's first statement is shown to have been involuntary, the court must examine whether the taint dissipated through the passing of time or a change in circumstances: "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." *Id.*, at 310 (citing *Westover* v. *United States*, decided with *Miranda*, 384 U. S., at 494). In addition, Seibert's second statement should be suppressed if she showed that it was involuntary despite the *Miranda* warnings. *Elstad*, *supra*, at 318 ("The relevant inquiry is whether, in fact, the second statement was also voluntarily made. As in any such inquiry, the finder of fact must examine the surrounding circumstances and the entire course of police conduct with respect to the suspect in evaluating the voluntariness of his statements"). Although I would leave this analysis for the Missouri courts to conduct on remand, I note that, unlike the officers in *Elstad*, Officer Hanrahan referred to Seibert's unwarned statement during the second part of the interrogation when she made a statement at odds with her unwarned confession. App. 70 (" 'Trice, didn't you tell me that he was supposed to die in his sleep?"); cf. *Elstad*, *supra*, at 316 (officers did not "exploit the unwarned admission to pressure respondent into waiving his right to remain silent"). Such a tactic may bear on the voluntariness inquiry. Cf. *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969) (fact that police had falsely

told a suspect that his accomplice had already confessed was "relevant" to the voluntariness inquiry); *Moran*, 475 U. S., at 423–424 (in discussing police deception, stating that simply withholding information is "relevant to the constitutional validity of a waiver if it deprives a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them"); *Miranda*, *supra*, at 476.

* * *

Because I believe that the plurality gives insufficient deference to *Elstad* and that JUSTICE KENNEDY places improper weight on subjective intent, I respectfully dissent.

Syllabus

UNITED STATES *v.* PATANE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 02–1183. Argued December 9, 2003—Decided June 28, 2004

After Officer Fox began to investigate respondent's apparent violation of a temporary restraining order, a federal agent told Fox's colleague, Detective Benner, that respondent, a convicted felon, illegally possessed a pistol. Officer Fox and Detective Benner proceeded to respondent's home, where Fox arrested him for violating the restraining order. Benner attempted to advise respondent of his rights under *Miranda* v. *Arizona*, 384 U. S. 436, but respondent interrupted, asserting that he knew his rights. Benner then asked about the pistol and retrieved and seized it. Respondent was indicted for possession of a firearm by a convicted felon, 18 U. S. C. § 922(g)(1). The District Court granted his motion to suppress the pistol, reasoning that the officers lacked probable cause to arrest him, and declining to rule on his alternative argument that the gun should be suppressed as the fruit of an unwarned statement. The Tenth Circuit reversed the probable-cause ruling, but affirmed the suppression order on respondent's alternative theory. Rejecting the Government's argument that *Oregon* v. *Elstad*, 470 U. S. 298, and *Michigan* v. *Tucker*, 417 U. S. 433, foreclosed application of the fruit of the poisonous tree doctrine of *Wong Sun* v. *United States*, 371 U. S. 471, 488, to the present context, the appeals court reasoned that *Elstad* and *Tucker*, which were based on the view that *Miranda* announced a prophylactic rule, were incompatible with *Dickerson* v. *United States*, 530 U. S. 428, 444, in which this Court held that *Miranda* announced a constitutional rule. The appeals court thus equated *Dickerson*'s ruling with the proposition that a failure to warn pursuant to *Miranda* is itself a violation of the suspect's Fifth Amendment rights.

Held: The judgment is reversed, and the case is remanded.

304 F. 3d 1013, reversed and remanded.

JUSTICE THOMAS, joined by THE CHIEF JUSTICE and JUSTICE SCALIA, concluded that a failure to give a suspect *Miranda* warnings does not require suppression of the physical fruits of the suspect's unwarned but voluntary statements. Pp. 637–644.

(a) The *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause, U. S. Const., Amdt. 5. That Clause's core protection is a prohibition on compelling a criminal defendant to testify against himself at trial. See, *e. g.*, *Chavez* v. *Martinez*,

538 U. S. 760, 764–768. It cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements. See, *e. g.*, *United States* v. *Hubbell*, 530 U. S. 27, 34. The Court has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination. For example, the *Miranda* rule creates a presumption of coercion in custodial interrogations, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief. *E. g.*, 384 U. S., at 467. But because such prophylactic rules necessarily sweep beyond the Self-Incrimination Clause's actual protections, see, *e. g.*, *Withrow* v. *Williams*, 507 U. S. 680, 690–691, any further extension of one of them must be justified by its necessity for the protection of the actual right against compelled self-incrimination, *e. g.*, *Chavez*, *supra*, at 778. Thus, uncompelled statements taken without *Miranda* warnings can be used to impeach a defendant's testimony at trial, see *Elstad*, *supra*, at 307–308, though the fruits of actually compelled testimony cannot, see *New Jersey* v. *Portash*, 440 U. S. 450, 458–459. A blanket rule requiring suppression of statements noncompliant with the *Miranda* rule could not be justified by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, *e. g.*, *Elstad*, 470 U. S., at 308, and would therefore fail the Court's requirement that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it. Furthermore, the Clause contains its own exclusionary rule that automatically protects those subjected to coercive police interrogations from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial. *E. g.*, *id.*, at 307–308. This explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further. Cf. *Graham* v. *Connor*, 490 U. S. 386. Finally, nothing in *Dickerson* calls into question the Court's continued insistence on its close-fit requirement. Pp. 637–641.

(b) That a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule was evident in many of the Court's pre-*Dickerson* cases, see, *e. g.*, *Elstad*, *supra*, at 308, and the Court has adhered to that view since *Dickerson*, see *Chavez*, *supra*, at 772–773. This follows from the nature of the "fundamental *trial* right" protected by the Self-Incrimination Clause, *e. g.*, *Withrow*, *supra*, at 691, which the *Miranda* rule, in turn, protects. Thus, the police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide full *Miranda* warnings. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence. And, at that point, the exclusion of such statements is a complete and sufficient remedy for any perceived *Miranda* violation. *Chavez*, *supra*, at 790. Unlike ac-

tual violations of the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter and therefore no reason to apply *Wong Sun*'s "fruit of the poisonous tree" doctrine. It is not for this Court to impose its preferred police practices on either federal or state officials. Pp. 641–642.

(c) The Tenth Circuit erred in ruling that the taking of unwarned statements violates a suspect's constitutional rights. *Dickerson*'s characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the close-fit requirement. There is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's pistol, does not implicate the Clause. It presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, the exclusion of unwarned statements is a complete and sufficient remedy for any perceived *Miranda* violation. *E. g.*, *Chavez*, *supra*, at 790. Similarly, because police cannot violate the Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement, as the court below believed. The word "witness" in the constitutional text limits the Self-Incrimination Clause's scope to testimonial evidence. *Hubbell*, *supra*, at 34–35. And although the Court requires the exclusion of the physical fruit of actually coerced statements, statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. This Court declines to extend that presumption further. Pp. 642–644.

JUSTICE KENNEDY, joined by JUSTICE O'CONNOR, concluded that it is unnecessary to decide whether the detective's failure to give Patane full *Miranda* v. *Arizona*, 384 U. S. 436, warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is anything to deter so long as the unwarned statements are not later introduced at trial. In *Oregon* v. *Elstad*, 470 U. S. 298, *New York* v. *Quarles*, 467 U. S. 649, and *Harris* v. *New York*, 401 U. S. 222, evidence obtained following unwarned interrogations was held admissible based in large part on the Court's recognition that the concerns underlying the *Miranda* rule must be accommodated to other objectives of the criminal justice system. Here, it is sufficient to note that the Government presents an even stronger case for admitting the evidence obtained as the result of Patane's unwarned statement than was presented in *Elstad* and *Michigan* v. *Tucker*, 417 U. S. 433. Admission of nontestimonial physical fruits (the pistol here) does not run the risk of admitting into trial an accused's coerced incriminating statements against himself. In light of reliable physical evidence's important probative value, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both

law enforcement interests and a suspect's rights during an in-custody interrogation. Pp. 644–645.

THOMAS, J., announced the judgment of the Court and delivered an opinion, in which REHNQUIST, C. J., and SCALIA, J., joined. KENNEDY, J., filed an opinion concurring in the judgment, in which O'CONNOR, J., joined, *post,* p. 644. SOUTER, J., filed a dissenting opinion, in which STEVENS and GINSBURG, JJ., joined, *post,* p. 645. BREYER, J., filed a dissenting opinion, *post,* p. 647.

Deputy Solicitor General Dreeben argued the cause for petitioner. With him on the briefs were *Solicitor General Olson*, *Acting Assistant Attorney General Wray*, *James A. Feldman*, and *Joseph C. Wyderko.*

Jill M. Wichlens argued the cause for respondent. With her on the brief were *Michael G. Katz* and *Virginia L. Grady.**

JUSTICE THOMAS announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and JUSTICE SCALIA join.

In this case we must decide whether a failure to give a suspect the warnings prescribed by *Miranda* v. *Arizona*,

*Briefs of *amici curiae* urging reversal were filed for the State of Alabama et al. by *William H. Pryor, Jr.,* Attorney General of Alabama, *Nathan A. Forrester,* Solicitor General, *Michael B. Billingsley,* Deputy Solicitor General, *Marc A. Starrett,* Assistant Attorney General, and by the Attorneys General for their respective States as follows: *M. Jane Brady* of Delaware, *Charles J. Crist, Jr.,* of Florida, *Mark J. Bennett* of Hawaii, *Lisa Madigan* of Illinois, *Steve Carter* of Indiana, *Mike McGrath* of Montana, *Jim Petro* of Ohio, *D. Michael Fisher* of Pennsylvania, *Lawrence E. Long* of South Dakota, *Paul G. Summers* of Tennessee, *Greg Abbott* of Texas, *Mark L. Shurtleff* of Utah, *William H. Sorrell* of Vermont, *Jerry W. Kilgore* of Virginia, *Peggy A. Lautenschlager* of Wisconsin, and *Patrick J. Crank* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger.*

Briefs of *amici curiae* urging affirmance were filed for the Brennan Center for Justice by *Stephen J. Schulhofer, Frederick A. O. Schwarz, Jr., Tom Gerety,* and *E. Joshua Rosenkranz;* and for the National Association of Criminal Defense Lawyers et al. by *James J. Tomkovicz, David M. Porter,* and *Steven R. Shapiro.*

384 U. S. 436 (1966), requires suppression of the physical fruits of the suspect's unwarned but voluntary statements. The Court has previously addressed this question but has not reached a definitive conclusion. See *Massachusetts* v. *White*, 439 U. S. 280 (1978) *(per curiam)* (dividing evenly on the question); see also *Patterson* v. *United States*, 485 U. S. 922 (1988) (White, J., dissenting from denial of certiorari). Although we believe that the Court's decisions in *Oregon* v. *Elstad*, 470 U. S. 298 (1985), and *Michigan* v. *Tucker*, 417 U. S. 433 (1974), are instructive, the Courts of Appeals have split on the question after our decision in *Dickerson* v. *United States*, 530 U. S. 428 (2000). See, *e. g.*, *United States* v. *Villalba-Alvarado*, 345 F. 3d 1007 (CA8 2003) (holding admissible the physical fruits of a *Miranda* violation); *United States* v. *Sterling*, 283 F. 3d 216 (CA4 2002) (same); *United States* v. *DeSumma*, 272 F. 3d 176 (CA3 2001) (same); *United States* v. *Faulkingham*, 295 F. 3d 85 (CA1 2002) (holding admissible the physical fruits of a negligent *Miranda* violation). Because the *Miranda* rule protects against violations of the Self-Incrimination Clause, which, in turn, is not implicated by the introduction at trial of physical evidence resulting from voluntary statements, we answer the question presented in the negative.

I

In June 2001, respondent, Samuel Francis Patane, was arrested for harassing his ex-girlfriend, Linda O'Donnell. He was released on bond, subject to a temporary restraining order that prohibited him from contacting O'Donnell. Respondent apparently violated the restraining order by attempting to telephone O'Donnell. On June 6, 2001, Officer Tracy Fox of the Colorado Springs Police Department began to investigate the matter. On the same day, a county probation officer informed an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF), that respondent, a convicted felon, illegally possessed a .40 Glock pistol. The ATF relayed this information to Detective Josh Benner, who worked

closely with the ATF. Together, Detective Benner and Officer Fox proceeded to respondent's residence.

After reaching the residence and inquiring into respondent's attempts to contact O'Donnell, Officer Fox arrested respondent for violating the restraining order. Detective Benner attempted to advise respondent of his *Miranda* rights but got no further than the right to remain silent. At that point, respondent interrupted, asserting that he knew his rights, and neither officer attempted to complete the warning.[1] App. 40.

Detective Benner then asked respondent about the Glock. Respondent was initially reluctant to discuss the matter, stating: "I am not sure I should tell you anything about the Glock because I don't want you to take it away from me." *Id.*, at 41. Detective Benner persisted, and respondent told him that the pistol was in his bedroom. Respondent then gave Detective Benner permission to retrieve the pistol. Detective Benner found the pistol and seized it.

A grand jury indicted respondent for possession of a firearm by a convicted felon, in violation of 18 U. S. C. § 922(g)(1). The District Court granted respondent's motion to suppress the firearm, reasoning that the officers lacked probable cause to arrest respondent for violating the restraining order. It therefore declined to rule on respondent's alternative argument that the gun should be suppressed as the fruit of an unwarned statement.

The Court of Appeals reversed the District Court's ruling with respect to probable cause but affirmed the suppression order on respondent's alternative theory. The court rejected the Government's argument that this Court's decisions in *Elstad*, *supra*, and *Tucker*, *supra*, foreclosed application of the fruit of the poisonous tree doctrine of *Wong Sun*

[1] The Government concedes that respondent's answers to subsequent on-the-scene questioning are inadmissible at trial under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), despite the partial warning and respondent's assertions that he knew his rights.

v. *United States*, 371 U. S. 471 (1963), to the present context. 304 F. 3d 1013, 1019 (CA10 2002). These holdings were, the Court of Appeals reasoned, based on the view that *Miranda* announced a prophylactic rule, a position that it found to be incompatible with this Court's decision in *Dickerson*, *supra*, at 444 ("*Miranda* announced a constitutional rule that Congress may not supersede legislatively").[2] The Court of Appeals thus equated *Dickerson*'s announcement that *Miranda* is a constitutional rule with the proposition that a failure to warn pursuant to *Miranda* is itself a violation of the Constitution (and, more particularly, of the suspect's Fifth Amendment rights). Based on its understanding of *Dickerson*, the Court of Appeals rejected the post-*Dickerson* views of the Third and Fourth Circuits that the fruits doctrine does not apply to *Miranda* violations. 304 F. 3d, at 1023–1027 (discussing *United States* v. *Sterling*, 283 F. 3d 216 (CA4 2002), and *United States* v. *DeSumma*, 272 F. 3d 176 (CA3 2001)). It also disagreed with the First Circuit's conclusion that suppression is not generally required in the case of negligent failures to warn, 304 F. 3d, at 1027–1029 (discussing *United States* v. *Faulkingham*, 295 F. 3d 85 (CA1 2002)), explaining that "[d]eterrence is necessary not merely to deter intentional wrongdoing, but also to ensure that officers diligently (non-negligently) protect—and properly are trained to protect—the constitutional rights of citizens," 304 F. 3d, at 1028–1029. We granted certiorari. 538 U. S. 976 (2003).

As we explain below, the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause. The Self-Incrimination Clause, however, is not implicated by the admission into evidence of the physical fruit of a voluntary statement. Accordingly, there is no justification for extending the *Miranda* rule to this con-

[2] The Court of Appeals also distinguished *Oregon* v. *Elstad*, 470 U. S. 298 (1985), on the ground that the second (and warned) confession at issue there was the product of the defendant's volition. 304 F. 3d, at 1019, 1021. For the reasons discussed below, we do not find this distinction relevant.

text. And just as the Self-Incrimination Clause primarily focuses on the criminal trial, so too does the *Miranda* rule. The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn. For this reason, the exclusionary rule articulated in cases such as *Wong Sun* does not apply. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

II

The Self-Incrimination Clause provides: "No person . . . shall be compelled in any criminal case to be a witness against himself." U. S. Const., Amdt. 5. We need not decide here the precise boundaries of the Clause's protection. For present purposes, it suffices to note that the core protection afforded by the Self-Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. See, *e. g.*, *Chavez* v. *Martinez*, 538 U. S. 760, 764–768 (2003) (plurality opinion); *id.*, at 777–779 (SOUTER, J., concurring in judgment); 8 J. Wigmore, Evidence § 2263, p. 378 (J. McNaughton rev. ed. 1961) (explaining that the Clause "was directed at the employment of legal process to *extract from the person's own lips* an admission of guilt, which would thus take the place of other evidence"); see also *United States* v. *Hubbell*, 530 U. S. 27, 49–56 (2000) (THOMAS, J., concurring) (explaining that the privilege might extend to bar the compelled production of any incriminating evidence, testimonial or otherwise). The Clause cannot be violated by the introduction of nontestimonial evidence obtained as a result of voluntary statements. See, *e. g.*, *id.*, at 34 (noting that the word "'witness'" in the Self-Incrimination Clause "limits the relevant category of compelled incriminating communications to those that are 'testimonial' in character"); *id.*, at 35 (discussing why compelled blood samples do not violate the Clause; cataloging other examples and citing cases); *Elstad*, 470 U. S., at 304 ("The Fifth Amendment, of

course, is not concerned with nontestimonial evidence"); *id.*, at 306–307 ("The Fifth Amendment prohibits use by the prosecution in its case in chief only of *compelled* testimony"); *Withrow* v. *Williams*, 507 U. S. 680, 705 (1993) (O'CONNOR, J., concurring in part and dissenting in part) (describing "*true* Fifth Amendment claims [as] the extraction and use of *compelled* testimony"); *New York* v. *Quarles*, 467 U. S. 649, 665–672, and n. 4 (1984) (O'CONNOR, J., concurring in judgment in part and dissenting in part) (explaining that the physical fruit of a *Miranda* violation need not be suppressed for these reasons).

To be sure, the Court has recognized and applied several prophylactic rules designed to protect the core privilege against self-incrimination. See, *e. g.*, *Chavez*, *supra*, at 770–772 (plurality opinion). For example, although the text of the Self-Incrimination Clause at least suggests that "its coverage [is limited to] compelled testimony that is used against the defendant in the trial itself," *Hubbell*, *supra*, at 37, potential suspects may, at times, assert the privilege in proceedings in which answers might be used to incriminate them in a subsequent criminal case. See, *e. g.*, *United States* v. *Balsys*, 524 U. S. 666, 671–672 (1998); *Minnesota* v. *Murphy*, 465 U. S. 420, 426 (1984); cf. *Kastigar* v. *United States*, 406 U. S. 441 (1972) (holding that the Government may compel grand jury testimony from witnesses over Fifth Amendment objections if the witnesses receive "use and derivative use immunity"); *Uniformed Sanitation Men Assn., Inc.* v. *Commissioner of Sanitation of City of New York*, 392 U. S. 280, 284 (1968) (allowing the Government to use economic compulsion to secure statements but only if the Government grants appropriate immunity). We have explained that "[t]he natural concern which underlies [these] decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage." *Tucker*, 417 U. S., at 440–441.

Similarly, in *Miranda*, the Court concluded that the possibility of coercion inherent in custodial interrogations unacceptably raises the risk that a suspect's privilege against self-incrimination might be violated. See *Dickerson*, 530 U. S., at 434–435; *Miranda*, 384 U. S., at 467. To protect against this danger, the *Miranda* rule creates a presumption of coercion, in the absence of specific warnings, that is generally irrebuttable for purposes of the prosecution's case in chief.

But because these prophylactic rules (including the *Miranda* rule) necessarily sweep beyond the actual protections of the Self-Incrimination Clause, see, *e. g.*, *Withrow*, *supra*, at 690–691; *Elstad*, *supra*, at 306, any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination, *Chavez*, *supra*, at 778 (SOUTER, J., concurring in judgment) (requiring a "'powerful showing'" before "expand[ing] . . . the privilege against compelled self-incrimination"). Indeed, at times the Court has declined to extend *Miranda* even where it has perceived a need to protect the privilege against self-incrimination. See, *e. g.*, *Quarles*, *supra*, at 657 (concluding "that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination").

It is for these reasons that statements taken without *Miranda* warnings (though not actually compelled) can be used to impeach a defendant's testimony at trial, see *Elstad*, *supra*, at 307–308; *Harris* v. *New York*, 401 U. S. 222 (1971), though the fruits of actually compelled testimony cannot, see *New Jersey* v. *Portash*, 440 U. S. 450, 458–459 (1979). More generally, the *Miranda* rule "does not require that the statements [taken without complying with the rule] and their fruits be discarded as inherently tainted," *Elstad*, 470 U. S., at 307. Such a blanket suppression rule could not be justi-

fied by reference to the "Fifth Amendment goal of assuring trustworthy evidence" or by any deterrence rationale, *id.*, at 308; see *Tucker*, *supra*, at 446–449; *Harris*, *supra*, at 225–226, and n. 2, and would therefore fail our close-fit requirement.

Furthermore, the Self-Incrimination Clause contains its own exclusionary rule. It provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Amdt. 5. Unlike the Fourth Amendment's bar on unreasonable searches, the Self-Incrimination Clause is self-executing. We have repeatedly explained "that those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." *Chavez*, 538 U. S., at 769 (plurality opinion) (citing, for example, *Elstad*, *supra*, at 307–308). This explicit textual protection supports a strong presumption against expanding the *Miranda* rule any further. Cf. *Graham* v. *Connor*, 490 U. S. 386 (1989).

Finally, nothing in *Dickerson*, including its characterization of *Miranda* as announcing a constitutional rule, 530 U. S., at 444, changes any of these observations. Indeed, in *Dickerson*, the Court specifically noted that the Court's "subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming *[Miranda]*'s core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.*, at 443–444. This description of *Miranda*, especially the emphasis on the use of "unwarned statements . . . in the prosecution's case in chief," makes clear our continued focus on the protections of the Self-Incrimination Clause. The Court's reliance on our *Miranda* precedents, including both *Tucker* and *Elstad*, see, *e. g.*, *Dickerson*, *supra*, at 438, 441, further demonstrates the continuing validity of those decisions. In short, nothing in *Dickerson* calls into question our continued

insistence that the closest possible fit be maintained between the Self-Incrimination Clause and any rule designed to protect it.

III

Our cases also make clear the related point that a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights or even the *Miranda* rule. So much was evident in many of our pre-*Dickerson* cases, and we have adhered to this view since *Dickerson*. See *Chavez*, 538 U. S., at 772–773 (plurality opinion) (holding that a failure to read *Miranda* warnings did not violate the respondent's constitutional rights); 538 U. S., at 789 (KENNEDY, J., concurring in part and dissenting in part) (agreeing "that failure to give a *Miranda* warning does not, without more, establish a completed violation when the unwarned interrogation ensues"); *Elstad*, *supra*, at 308; *Quarles*, 467 U. S., at 654; cf. *Chavez*, *supra*, at 777–779 (SOUTER, J., concurring in judgment). This, of course, follows from the nature of the right protected by the Self-Incrimination Clause, which the *Miranda* rule, in turn, protects. It is "'a fundamental *trial* right.'" *Withrow*, 507 U. S., at 691 (quoting *United States* v. *Verdugo-Urquidez*, 494 U. S. 259, 264 (1990)). See also *Chavez*, 538 U. S., at 766–768 (plurality opinion); *id.*, at 790 (KENNEDY, J., concurring in part and dissenting in part) ("The identification of a *Miranda* violation and its consequences, then, ought to be determined at trial").

It follows that police do not violate a suspect's constitutional rights (or the *Miranda* rule) by negligent or even deliberate failures to provide the suspect with the full panoply of warnings prescribed by *Miranda*. Potential violations occur, if at all, only upon the admission of unwarned statements into evidence at trial. And, at that point, "[t]he exclusion of unwarned statements . . . is a complete and sufficient

remedy" for any perceived *Miranda* violation. *Chavez*, *supra*, at 790.[3]

Thus, unlike unreasonable searches under the Fourth Amendment or actual violations of the Due Process Clause or the Self-Incrimination Clause, there is, with respect to mere failures to warn, nothing to deter. There is therefore no reason to apply the "fruit of the poisonous tree" doctrine of *Wong Sun*, 371 U. S., at 488.[4] See also *Nix* v. *Williams*, 467 U. S. 431, 441 (1984) (discussing the exclusionary rule in the Sixth Amendment context and noting that it applies to "*illegally* obtained evidence [and] other incriminating evidence derived from [it]" (emphasis added)). It is not for this Court to impose its preferred police practices on either federal law enforcement officials or their state counterparts.

IV

In the present case, the Court of Appeals, relying on *Dickerson*, wholly adopted the position that the taking of unwarned statements violates a suspect's constitutional rights. 304 F. 3d, at 1028–1029.[5] And, of course, if this were so, a

[3] We acknowledge that there is language in some of the Court's post-*Miranda* decisions that might suggest that the *Miranda* rule operates as a direct constraint on police. See, *e. g.*, *Stansbury* v. *California*, 511 U. S. 318, 322 (1994) *(per curiam); Moran* v. *Burbine*, 475 U. S. 412, 420 (1986) (stating that "*Miranda* imposed on the police an obligation to follow certain procedures"); cf. *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981). But *Miranda* itself made clear that its focus was the admissibility of statements, see, *e. g.*, 384 U. S., at 439, 467, a view the Court reaffirmed in *Dickerson* v. *United States*, 530 U. S. 428, 443–444 (2000) (equating the *Miranda* rule with the proposition that "unwarned statements may not be used *as evidence* in the prosecution's case in chief" (emphasis added)).

[4] We reject respondent's invitation to apply the balancing test of *Nardone* v. *United States*, 308 U. S. 338 (1939). Brief for Respondent 15–33. At issue in *Nardone* was the violation of a federal wiretap statute, and the Court employed an exclusionary rule to deter those violations. But, once again, there are no violations (statutory or constitutional) to deter here.

[5] It is worth mentioning that the Court of Appeals did not have the benefit of our decision in *Chavez* v. *Martinez*, 538 U. S. 760 (2003).

strong deterrence-based argument could be made for suppression of the fruits. See, *e. g.*, *Nix*, *supra*, at 441–444; *Wong Sun*, *supra*, at 484–486; cf. *Nardone* v. *United States*, 308 U. S. 338, 341 (1939).

But *Dickerson*'s characterization of *Miranda* as a constitutional rule does not lessen the need to maintain the closest possible fit between the Self-Incrimination Clause and any judge-made rule designed to protect it. And there is no such fit here. Introduction of the nontestimonial fruit of a voluntary statement, such as respondent's Glock, does not implicate the Self-Incrimination Clause. The admission of such fruit presents no risk that a defendant's coerced statements (however defined) will be used against him at a criminal trial. In any case, "[t]he exclusion of unwarned statements . . . is a complete and sufficient remedy" for any perceived *Miranda* violation. *Chavez*, *supra*, at 790 (KENNEDY, J., concurring in part and dissenting in part). See also H. Friendly, Benchmarks 280–281 (1967). There is simply no need to extend (and therefore no justification for extending) the prophylactic rule of *Miranda* to this context.

Similarly, because police cannot violate the Self-Incrimination Clause by taking unwarned though voluntary statements, an exclusionary rule cannot be justified by reference to a deterrence effect on law enforcement, as the Court of Appeals believed, 304 F. 3d, at 1028–1029. Our decision not to apply *Wong Sun* to mere failures to give *Miranda* warnings was sound at the time *Tucker* and *Elstad* were decided, and we decline to apply *Wong Sun* to such failures now.

The Court of Appeals ascribed significance to the fact that, in this case, there might be "little [practical] difference between [respondent's] confessional statement" and the actual physical evidence. 304 F. 3d, at 1027. The distinction, the court said, "appears to make little sense as a matter of policy." *Ibid.* But, putting policy aside, we have held that "[t]he word 'witness' in the constitutional text limits the"

scope of the Self-Incrimination Clause to testimonial evidence. *Hubbell*, 530 U. S., at 34–35. The Constitution itself makes the distinction.[6] And although it is true that the Court requires the exclusion of the physical fruit of actually coerced statements, it must be remembered that statements taken without sufficient *Miranda* warnings are presumed to have been coerced only for certain purposes and then only when necessary to protect the privilege against self-incrimination. See Part II, *supra*. For the reasons discussed above, we decline to extend that presumption further.[7]

Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings.

It is so ordered.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR joins, concurring in the judgment.

In *Oregon* v. *Elstad*, 470 U. S. 298 (1985), *New York* v. *Quarles*, 467 U. S. 649 (1984), and *Harris* v. *New York*, 401 U. S. 222 (1971), evidence obtained following an unwarned interrogation was held admissible. This result was based in large part on our recognition that the concerns underlying the *Miranda* v. *Arizona*, 384 U. S. 436 (1966), rule must be accommodated to other objectives of the criminal justice sys-

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[6] While Fourth Amendment protections extend to "persons, houses, papers, and effects," the Self-Incrimination Clause prohibits only compelling a defendant to be "a witness against himself," Amdt. 5.

[7] It is not clear whether the Government could have used legal processes actually to compel respondent to produce the Glock, though there is a reasonable argument that it could have. See, *e. g., United States* v. *Hubbell*, 530 U. S. 27, 42–45 (2000); *Baltimore City Dept. of Social Servs.* v. *Bouknight*, 493 U. S. 549, 554–556 (1990); *Fisher* v. *United States*, 425 U. S. 391 (1976); *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 302–303 (1967); *Schmerber* v. *California*, 384 U. S. 757, 761 (1966). But see *Commonwealth* v. *Hughes*, 380 Mass. 583, 404 N. E. 2d 1239 (1980); *Goldsmith* v. *Superior Court*, 152 Cal. App. 3d 76, 199 Cal. Rptr. 366 (1984). In light of this, it would be especially odd to exclude the Glock here.

tem. I agree with the plurality that *Dickerson* v. *United States*, 530 U. S. 428 (2000), did not undermine these precedents and, in fact, cited them in support. Here, it is sufficient to note that the Government presents an even stronger case for admitting the evidence obtained as the result of Patane's unwarned statement. Admission of nontestimonial physical fruits (the Glock in this case), even more so than the postwarning statements to the police in *Elstad* and *Michigan* v. *Tucker*, 417 U. S. 433 (1974), does not run the risk of admitting into trial an accused's coerced incriminating statements against himself. In light of the important probative value of reliable physical evidence, it is doubtful that exclusion can be justified by a deterrence rationale sensitive to both law enforcement interests and a suspect's rights during an in-custody interrogation. Unlike the plurality, however, I find it unnecessary to decide whether the detective's failure to give Patane the full *Miranda* warnings should be characterized as a violation of the *Miranda* rule itself, or whether there is "[any]thing to deter" so long as the unwarned statements are not later introduced at trial. *Ante*, at 641–642.

With these observations, I concur in the judgment of the Court.

JUSTICE SOUTER, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, dissenting.

The plurality repeatedly says that the Fifth Amendment does not address the admissibility of nontestimonial evidence, an overstatement that is beside the point. The issue actually presented today is whether courts should apply the fruit of the poisonous tree doctrine lest we create an incentive for the police to omit *Miranda* warnings, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), before custodial interrogation.[1]

[1] In so saying, we are taking the legal issue as it comes to us, even though the facts give off the scent of a made-up case. If there was a *Miranda* failure, the most immediate reason was that Patane told the po-

In closing their eyes to the consequences of giving an evidentiary advantage to those who ignore *Miranda*, the plurality adds an important inducement for interrogators to ignore the rule in that case.

Miranda rested on insight into the inherently coercive character of custodial interrogation and the inherently difficult exercise of assessing the voluntariness of any confession resulting from it. Unless the police give the prescribed warnings meant to counter the coercive atmosphere, a custodial confession is inadmissible, there being no need for the previous time-consuming and difficult enquiry into voluntariness. That inducement to forestall involuntary statements and troublesome issues of fact can only atrophy if we turn around and recognize an evidentiary benefit when an unwarned statement leads investigators to tangible evidence. There is, of course, a price for excluding evidence, but the Fifth Amendment is worth a price, and in the absence of a very good reason, the logic of *Miranda* should be followed: a *Miranda* violation raises a presumption of coercion, *Oregon* v. *Elstad*, 470 U. S. 298, 306–307, and n. 1 (1985), and the Fifth Amendment privilege against compelled self-incrimination extends to the exclusion of derivative evidence, see *United States* v. *Hubbell*, 530 U. S. 27, 37–38 (2000) (recognizing "the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from . . . [actually] compelled testimony"); *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972). That should be the end of this case.

The fact that the books contain some exceptions to the *Miranda* exclusionary rule carries no weight here. In *Harris* v. *New York*, 401 U. S. 222 (1971), it was respect for the integrity of the judicial process that justified the admission

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lice to stop giving the warnings because he already knew his rights. There could easily be an analogy in this case to the bumbling mistake the police committed in *Oregon* v. *Elstad*, 470 U. S. 298 (1985). See *Missouri* v. *Seibert*, *ante*, at 614–615 (plurality opinion).

of unwarned statements as impeachment evidence. But Patane's suppression motion can hardly be described as seeking to "perver[t]" *Miranda* "into a license to use perjury" or otherwise handicap the "traditional truth-testing devices of the adversary process." 401 U. S., at 225–226. Nor is there any suggestion that the officers' failure to warn Patane was justified or mitigated by a public emergency or other exigent circumstance, as in *New York* v. *Quarles*, 467 U. S. 649 (1984). And of course the premise of *Oregon* v. *Elstad*, *supra*, is not on point; although a failure to give *Miranda* warnings before one individual statement does not necessarily bar the admission of a subsequent statement given after adequate warnings, 470 U. S. 298; cf. *Missouri* v. *Seibert*, *ante*, at 614–615 (plurality opinion), that rule obviously does not apply to physical evidence seized once and for all.[2]

There is no way to read this case except as an unjustifiable invitation to law enforcement officers to flout *Miranda* when there may be physical evidence to be gained. The incentive is an odd one, coming from the Court on the same day it decides *Missouri* v. *Seibert*, *ante*, p. 600. I respectfully dissent.

JUSTICE BREYER, dissenting.

For reasons similar to those set forth in JUSTICE SOUTER's dissent and in my concurring opinion in *Missouri* v. *Seibert*, *ante*, at 617, I would extend to this context the "fruit of the poisonous tree" approach, which I believe the Court has come close to adopting in *Seibert*. Under that approach,

[2] To the extent that *Michigan* v. *Tucker*, 417 U. S. 433 (1974) (admitting the testimony of a witness who was discovered because of an unwarned custodial interrogation), created another exception to *Miranda*, it is off the point here. In *Tucker*, we explicitly declined to lay down a broad rule about the fruits of unwarned statements. Instead, we "place[d] our holding on a narrower ground," relying principally on the fact that the interrogation occurred before *Miranda* was decided and was conducted in good faith according to constitutional standards governing at that time. 417 U. S., at 447–448 (citing *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)).

courts would exclude physical evidence derived from unwarned questioning unless the failure to provide *Miranda* v. *Arizona*, 384 U. S. 436 (1966), warnings was in good faith. See *Seibert*, *ante*, at 617–618 (BREYER, J., concurring); cf. *ante*, at 645–646, n. 1 (SOUTER, J., dissenting). Because the courts below made no explicit finding as to good or bad faith, I would remand for such a determination.

Syllabus

HOLLAND, WARDEN *v.* JACKSON

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

No. 03–1200. Decided June 28, 2004

Tennessee's principal evidence at respondent's murder trial was Jonathan Hughes' eyewitness testimony that he was at the scene with Melissa Gooch, who did not testify. Respondent was convicted and sentenced to life imprisonment. After unsuccessfully moving for a new trial, he sought state postconviction relief, alleging, *inter alia*, that his trial counsel had been ineffective in failing to conduct an adequate investigation. See *Strickland* v. *Washington*, 466 U. S. 668. The trial court denied relief after an evidentiary hearing, finding that counsel's performance was not deficient and that, in any event, respondent suffered no prejudice. Respondent then moved for a new trial, claiming for the first time—after seven years—that Gooch would testify that she was not with Hughes on the night in question. The trial court denied the motion. In affirming that denial, the State Court of Criminal Appeals found that respondent had filed an earlier such motion and given no satisfactory reason for failing to locate Gooch in seven years, and that Gooch's testimony would only impeach Hughes' memory. In affirming the denial of postconviction relief, the court noted that there had been no showing on the record of favorable evidence that counsel could have elicited from Gooch and that respondent's pleading did not contradict what Hughes claimed to have seen. The Federal District Court granted the State summary judgment on respondent's subsequent federal habeas claim, finding the state court's application of *Strickland* erroneous but not unreasonable within the meaning of 28 U. S. C. § 2254(d)(1). The Sixth Circuit reversed, concluding that the state court had unreasonably applied *Strickland*, given that Gooch's statement undermined Hughes' credibility, and finding that the state court's opinion was contrary to *Strickland* because it assessed prejudice under a preponderance-of-the-evidence, rather than a reasonable-probability, standard.

Held: The Sixth Circuit erred in granting relief under § 2254(d)(1). First, it found the state court's application of *Strickland* unreasonable on the basis of evidence not properly before the state court. Although the state court ventured that it would deny relief on the merits taking Gooch's statement into account, its judgment also rested on the holding that her statement was not properly before it. Granting relief in disre-

gard of this independent basis for decision was error, for the question whether a state court's decision was unreasonable must be assessed in light of the record before that court, see, *e. g.*, *Yarborough* v. *Gentry*, 540 U. S. 1, 6. Second, the Sixth Circuit erred in holding that the state court required proof by a preponderance of the evidence. The state court recited the correct reasonable-probability standard, but the Sixth Circuit inferred from three subsequent passages in the state court's opinion that the state court had actually applied a preponderance standard. In doing so, the Sixth Circuit ignored § 2254(d)'s requirements that "state-court decisions be given the benefit of the doubt," *Woodford* v. *Visciotti*, 537 U. S. 19, 24, and that "readiness to attribute error is inconsistent with the presumption that state courts know and follow the law," *ibid.*

Certiorari granted; 80 Fed. Appx. 392, reversed and remanded.

PER CURIAM.

I

Respondent Jessie Jackson was tried in 1987 by the State of Tennessee for the murder of James Crawley. The State asserted that he had shot Crawley after an argument over drugs. Its principal evidence at trial was the eyewitness testimony of Jonathan Hughes, who claimed to have been at the scene with his girlfriend Melissa Gooch when the shooting occurred. Gooch did not testify. The jury convicted, and respondent was sentenced to life imprisonment.

After unsuccessfully moving for a new trial, respondent sought state postconviction relief, alleging, *inter alia*, that his trial counsel had been ineffective in failing to conduct an adequate investigation. See *Strickland* v. *Washington*, 466 U. S. 668 (1984). The state court held an evidentiary hearing and then denied the petition, finding that counsel's performance was not deficient and that, in any event, respondent suffered no prejudice. Respondent then filed a "Motion for Hearing in Nature of Motion for New Trial," alleging newly discovered evidence. He claimed for the first time—seven years after his conviction—that Gooch would now testify that, contrary to Hughes' trial testimony, she was not with

Hughes on the night of the shooting. The state court denied this motion, and respondent appealed both rulings to the Tennessee Court of Criminal Appeals.

That court affirmed. It upheld the denial of new trial, observing that respondent had already filed an earlier such motion, that there was "no satisfactory reason given for the defendant's failure to locate this witness" during the seven years that had elapsed, and that the proposed testimony "would serve merely to impeach Hughes' memory about having seen [Gooch] that night." App. to Pet. for Cert. 88. It also affirmed the denial of postconviction relief, noting that there had never "been any showing *on the record* of favorable testimony that would have been elicited" from Gooch had counsel interviewed her, and that even crediting respondent's "unsubstantiated pleading," "it in no way rises to the level of contradicting what Hughes claims to have seen" respecting the shooting itself. *Id.*, at 96–97 (emphasis added).

Respondent then sought federal habeas relief, and the District Court granted the State's motion for summary judgment. It found that there had been ineffective assistance of counsel, noting several shortcomings and opining that there was a reasonable probability of prejudice. It observed, however, that it could grant relief only if the state court's adjudication of respondent's claim was "contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U. S. C. § 2254(d)(1). It concluded that the state court's application of *Strickland*, while erroneous, was not unreasonable.

The Sixth Circuit reversed. 80 Fed. Appx. 392 (2003). Although it found a number of flaws in counsel's performance, its grant of relief under § 2254(d)(1) was based on only two specific grounds: first, that the state court had unreasonably applied *Strickland*, given that Gooch's statement undermined the credibility of Hughes' testimony; and second, that the state court's opinion was contrary to *Strickland* because

it assessed prejudice under a preponderance-of-the-evidence standard rather than a reasonable-probability standard.

We now grant the State's petition for a writ of certiorari and respondent's motion for leave to proceed *in forma pauperis,* and reverse.

II

A

The Sixth Circuit erred in finding the state court's application of *Strickland* unreasonable on the basis of evidence not properly before the state court. Although the state court had ventured that it would deny relief on the merits even taking Gooch's statement into account, its judgment also rested on the holding that the statement was not properly before it. See App. to Pet. for Cert. 86–89, 95–98. Granting relief in disregard of this independent basis for decision was error.

The "unreasonable application" clause of § 2254(d)(1) applies when the "state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams* v. *Taylor,* 529 U. S. 362, 413 (2000). In this and related contexts we have made clear that whether a state court's decision was unreasonable must be assessed in light of the record the court had before it. See *Yarborough* v. *Gentry,* 540 U. S. 1, 6 (2003) *(per curiam)* (denying relief where state court's application of federal law was "supported by the record"); *Miller-El* v. *Cockrell,* 537 U. S. 322, 348 (2003) (reasonableness of state court's factual finding assessed "in light of the record before the court"); cf. *Bell* v. *Cone,* 535 U. S. 685, 697, n. 4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

Under the habeas statute, Gooch's statement could have been the subject of an evidentiary hearing by the District Court, but only if respondent was not at fault in failing to

develop that evidence in state court, or (if he was at fault) if the conditions prescribed by § 2254(e)(2) were met. See *Williams* v. *Taylor*, 529 U. S. 420, 431–437 (2000). Those same restrictions apply *a fortiori* when a prisoner seeks relief based on new evidence *without* an evidentiary hearing. See, *e. g.*, *Cargle* v. *Mullin*, 317 F. 3d 1196, 1209 (CA10 2003), and cases cited. Where new evidence is admitted, some Courts of Appeals have conducted *de novo* review on the theory that there is no relevant state-court determination to which one could defer. See, *e. g.*, *Monroe* v. *Angelone*, 323 F. 3d 286, 297–299, and n. 19 (CA4 2003). Assuming, *arguendo*, that this analysis is correct and that it applies where, as here, the evidence does not support a new claim but merely buttresses a previously rejected one, it cannot support the Sixth Circuit's action.

The District Court made no finding that respondent had been diligent in pursuing Gooch's testimony (and thus that § 2254(e)(2) was inapplicable) or that the limitations set forth in § 2254(e)(2) were met. Nor did the Sixth Circuit independently inquire into these matters; it simply ignored entirely the state court's independent ground for its decision, that Gooch's statement was not properly before it. It is difficult to see, moreover, how respondent could claim due diligence given the 7-year delay. He complains that his state postconviction counsel did not heed his pleas for assistance. See App. to Pet. for Cert. 65. Attorney negligence, however, is chargeable to the client and precludes relief unless the conditions of § 2254(e)(2) are satisfied. See *Williams*, *supra*, at 439–440; cf. *Coleman* v. *Thompson*, 501 U. S. 722, 753–754 (1991).

The Sixth Circuit therefore erred in finding the state court's decision an unreasonable application of *Strickland*.*

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*We reject respondent's contention that the State failed adequately to preserve this error. See, *e. g.*, Final Brief for Appellee in No. 01–5720 (CA6), p. 18, and n. 3.

B

The Sixth Circuit also erred in holding that the state court acted contrary to federal law by requiring proof of prejudice by a preponderance of the evidence rather than by a reasonable probability. The state court began by reciting the correct *Strickland* standard:

> "'[T]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" App. to Pet. for Cert. 95 (quoting *Strickland*, 466 U. S., at 694).

The Sixth Circuit nevertheless concluded that the state court had actually applied a preponderance standard, based on three subsequent passages from its opinion.

First was the statement that "[i]n a post-conviction proceeding, the defendant has the burden of proving his allegations by a preponderance of the evidence." App. to Pet. for Cert. 95. In context, however, this statement is reasonably read as addressing the general burden of proof in postconviction proceedings with regard to factual contentions—for example, those relating to whether defense counsel's performance was deficient. Although it is possible to read it as referring also to the question whether the deficiency was prejudicial, thereby supplanting *Strickland*, such a reading would needlessly create internal inconsistency in the opinion.

Second was the statement that "it is asking too much that we draw the inference that the jury would not have believed Hughes at all had Melissa Gooch testified." App. to Pet. for Cert. 96. Although the Court of Appeals evidently thought that this passage intimated a preponderance standard, it is difficult to see why. The quoted language does not imply any particular standard of probability.

Last was the statement that respondent had "failed to carry his burden of proving that the outcome of the trial

would probably have been different but for those errors." *Id.*, at 98. We have held that such use of the unadorned word "probably" is permissible shorthand when the complete *Strickland* standard is elsewhere recited. See *Woodford* v. *Visciotti*, 537 U. S. 19, 23–24 (2002) *(per curiam)*.

As we explained in *Visciotti*, § 2254(d) requires that "state-court decisions be given the benefit of the doubt." *Id.*, at 24. "[R]eadiness to attribute error is inconsistent with the presumption that state courts know and follow the law." *Ibid.* The Sixth Circuit ignored those prescriptions.

* * *

The judgment of the Sixth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the petition for a writ of certiorari.

Syllabus

ASHCROFT, ATTORNEY GENERAL *v.* AMERICAN CIVIL LIBERTIES UNION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 03–218. Argued March 2, 2004—Decided June 29, 2004

To protect minors from exposure to sexually explicit materials on the Internet, Congress enacted the Child Online Protection Act (COPA), 47 U. S. C. § 231, which, among other things, imposes a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," § 231(a)(1), of World Wide Web content that is "harmful to minors," but provides an affirmative defense to commercial Web speakers who restrict access to prohibited materials by "requiring use of a credit card" or "any other reasonable measures that are feasible under available technology," § 231(c)(1). COPA was enacted in response to *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, in which this Court held that the Communications Decency Act of 1996, Congress' first attempt to make the Internet safe for minors by criminalizing certain Internet speech, was unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. Respondents, Web speakers and others concerned with protecting the freedom of speech, filed suit for a preliminary injunction against COPA's enforcement. After considering testimony presented by both respondents and the Government, the District Court granted the preliminary injunction, concluding that respondents were likely to prevail on their argument that there were less restrictive alternatives to COPA, particularly blocking or filtering technology. The Third Circuit affirmed on different grounds, but this Court reversed, *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564. On remand, the Third Circuit again affirmed, concluding, *inter alia*, that COPA was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to harmful materials.

Held: The Third Circuit was correct to affirm the District Court's ruling that enforcement of COPA should be enjoined because the statute likely violates the First Amendment. Pp. 664–673.

(a) The District Court did not abuse its discretion when it entered the preliminary injunction. The abuse-of-discretion standard applies on review of such an injunction. Because 28 U. S. C. § 1254(1)'s grant of appellate jurisdiction does not give this Court license to depart from

an established review standard, *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 336, the injunction must be upheld and the case remanded for trial on the merits if the underlying constitutional question is close. There is therefore no need to consider the broader constructions of the statute adopted by the Court of Appeals. The District Court concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA. See *Reno*, 521 U. S., at 874. When plaintiffs challenge a content-based speech restriction, the Government has the burden to prove that the proposed alternatives will not be as effective as the challenged statute. *Ibid.* The purpose of the test is to ensure that speech is restricted no further than is necessary to accomplish Congress' goal. The District Court's conclusion that respondents were likely to prevail was not an abuse of discretion, because, on the record, the Government has not met its burden. Most importantly, respondents propose that blocking and filtering software is a less restrictive alternative, and the Government had not shown it would be likely to disprove that contention at trial. Filters impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, childless adults may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Promoting filter use does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. Filters, moreover, may well be more effective than COPA. First, the record demonstrates that a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. That COPA does not prevent minors from accessing foreign harmful materials alone makes it possible that filtering software might be more effective in serving Congress' goals. COPA's effectiveness is likely to diminish even further if it is upheld, because providers of the materials covered by the statute simply can move their operations overseas. In addition, the District Court found that verification systems may be subject to evasion and circumvention, *e. g.*, by minors who have their own credit cards. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just the World Wide Web. Filtering's superiority to COPA is confirmed by the explicit findings of the Commission on Child Online Protection, which Congress created to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. 47 U. S. C. § 231, note. Although filtering software is not a perfect solution because it may block some materials

not harmful to minors and fail to catch some that are, the Government has not satisfied its burden to introduce specific evidence proving that filters are less effective. The argument that filtering software is not an available alternative because Congress may not require its use carries little weight, since Congress may act to encourage such use by giving strong incentives to schools and libraries, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, and by promoting the development of filters by industry and their use by parents. The closest precedent is *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, which, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The Court there concluded that, absent a showing that a less restrictive technological alternative already available to parents would not be as effective as a blanket speech restriction, the more restrictive option preferred by Congress could not survive strict scrutiny. *Id.*, at 826. The reasoning of *Playboy Entertainment Group*, and the holdings and force of this Court's precedents, compel the Court to affirm the preliminary injunction here. To do otherwise would be to do less than the First Amendment commands. *Id.*, at 830. Pp. 664–670.

(b) Important practical reasons also support letting the injunction stand pending a full trial on the merits. First, the potential harms from reversal outweigh those of leaving the injunction in place by mistake. Extraordinary harm and a serious chill upon protected speech may result where, as here, a prosecution is a likely possibility but only an affirmative defense is available, so that speakers may self-censor rather than risk the perils of trial. Cf. *Playboy Entertainment Group*, *supra*, at 817. The harm done from letting the injunction stand pending a trial on the merits, in contrast, will not be extensive. Second, there are substantial factual disputes remaining in the case, including a serious gap in the evidence as to the filtering software's effectiveness. By allowing the preliminary injunction to stand and remanding for trial, the Court requires the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so. Third, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet, which evolves at a rapid pace. It is reasonable to assume that technological developments important to the First Amendment analysis have occurred in the five years since the District Court made its factfindings. By affirming the preliminary injunction and remanding for trial, the Court allows the parties to update and supplement the factual record to reflect current technology. Remand will also permit the District Court to take account of a changed legal landscape: Since that court made its factfindings, Congress has passed at least two

further statutes that might qualify as less restrictive alternatives to COPA—a prohibition on misleading domain names, and a statute creating a minors-safe "dot-Kids" domain. Pp. 670–673.

322 F. 3d 240, affirmed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 673. SCALIA, J., filed a dissenting opinion, *post*, p. 676. BREYER, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 676.

Solicitor General Olson argued the cause for petitioner. With him on the briefs were *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *Irving L. Gornstein*, *Barbara L. Herwig*, *Charles W. Scarborough*, and *August E. Flentje*.

Ann E. Beeson argued the cause for respondents. With her on the brief were *Christopher A. Hansen*, *Steven R. Shapiro*, *Stefan Presser*, *Christopher R. Harris*, and *David L. Sobel*.*

JUSTICE KENNEDY delivered the opinion of the Court.

This case presents a challenge to a statute enacted by Congress to protect minors from exposure to sexually explicit materials on the Internet, the Child Online Protection Act

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*Briefs of *amici curiae* urging reversal were filed for DuPage County, Illinois, by *Richard Hodyl, Jr.*, and *Joseph E. Birkett;* for the American Center for Law and Justice et al. by *Jay Alan Sekulow*, *Stuart J. Roth*, *Colby M. May*, *Joel H. Thornton*, *John P. Tuskey*, and *Shannon D. Woodruff;* for Focus on the Family et al. by *William Wagner*, *Steve Reed*, and *Pat Trueman;* for Morality in Media, Inc., by *Paul J. McGeady;* for WallBuilders, Inc., by *Barry C. Hodge;* and for Senator John S. McCain et al. by *Carol A. Clancy* and *Bruce A. Taylor*.

Briefs of *amici curiae* urging affirmance were filed for the American Society of Journalists and Authors et al. by *Carl A. Solano*, *Theresa E. Loscalzo*, *Jennifer DuFault James*, and *Stephen J. Shapiro;* for the Association of American Publishers, Inc., et al. by *R. Bruce Rich*, *Jonathan Bloom*, *Jerry Berman*, *John B. Morris, Jr.*, and *Robert Corn-Revere;* and for Volunteer Lawyers for the Arts et al. by *Seth M. Galanter*, *Charles H. Kennedy*, *Lois K. Perrin*, and *Elliot M. Mincberg*.

(COPA), 112 Stat. 2681–736, codified at 47 U. S. C. § 231. We must decide whether the Court of Appeals was correct to affirm a ruling by the District Court that enforcement of COPA should be enjoined because the statute likely violates the First Amendment.

In enacting COPA, Congress gave consideration to our earlier decisions on this subject, in particular the decision in *Reno* v. *American Civil Liberties Union*, 521 U. S. 844 (1997). For that reason, "the Judiciary must proceed with caution and . . . with care before invalidating the Act." *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 592 (2002) *(Ashcroft I)* (KENNEDY, J., concurring in judgment). The imperative of according respect to the Congress, however, does not permit us to depart from well-established First Amendment principles. Instead, we must hold the Government to its constitutional burden of proof.

Content-based prohibitions, enforced by severe criminal penalties, have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-based restrictions on speech be presumed invalid, *R. A. V.* v. *St. Paul*, 505 U. S. 377, 382 (1992), and that the Government bear the burden of showing their constitutionality, *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 817 (2000). This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question.

This case comes to the Court on certiorari review of an appeal from the decision of the District Court granting a preliminary injunction. The Court of Appeals reviewed the decision of the District Court for abuse of discretion. Under that standard, the Court of Appeals was correct to conclude that the District Court did not abuse its discretion in granting the preliminary injunction. The Government has failed, at this point, to rebut the plaintiffs' contention that there are plausible, less restrictive alternatives to the statute. Sub-

stantial practical considerations, furthermore, argue in favor of upholding the injunction and allowing the case to proceed to trial. For those reasons, we affirm the decision of the Court of Appeals upholding the preliminary injunction, and we remand the case so that it may be returned to the District Court for trial on the issues presented.

I

A

COPA is the second attempt by Congress to make the Internet safe for minors by criminalizing certain Internet speech. The first attempt was the Communications Decency Act of 1996, Pub. L. 104–104, § 502, 110 Stat. 133, 47 U. S. C. § 223 (1994 ed., Supp. II). The Court held the CDA unconstitutional because it was not narrowly tailored to serve a compelling governmental interest and because less restrictive alternatives were available. *Reno*, *supra*.

In response to the Court's decision in *Reno*, Congress passed COPA. COPA imposes criminal penalties of a $50,000 fine and six months in prison for the knowing posting, for "commercial purposes," of World Wide Web content that is "harmful to minors." § 231(a)(1). Material that is "harmful to minors" is defined as:

> "any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that—
>
> "(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;
>
> "(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd

> exhibition of the genitals or post-pubescent female breast; and
>
> "(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." § 231(e)(6).

"Minor[s]" are defined as "any person under 17 years of age." § 231(e)(7). A person acts for "commercial purposes only if such person is engaged in the business of making such communications." "Engaged in the business," in turn,

> "means that the person who makes a communication, or offers to make a communication, by means of the World Wide Web, that includes any material that is harmful to minors, devotes time, attention, or labor to such activities, as a regular course of such person's trade or business, with the objective of earning a profit as a result of such activities (although it is not necessary that the person make a profit or that the making or offering to make such communications be the person's sole or principal business or source of income)." § 231(e)(2).

While the statute labels all speech that falls within these definitions as criminal speech, it also provides an affirmative defense to those who employ specified means to prevent minors from gaining access to the prohibited materials on their Web site. A person may escape conviction under the statute by demonstrating that he

> "has restricted access by minors to material that is harmful to minors—
>
> "(A) by requiring use of a credit card, debit account, adult access code, or adult personal identification number;
>
> "(B) by accepting a digital certificate that verifies age; or
>
> "(C) by any other reasonable measures that are feasible under available technology." § 231(c)(1).

Since the passage of COPA, Congress has enacted additional laws regulating the Internet in an attempt to protect minors. For example, it has enacted a prohibition on misleading Internet domain names, 18 U. S. C. § 2252B (2000 ed., Supp. III), in order to prevent Web site owners from disguising pornographic Web sites in a way likely to cause uninterested persons to visit them. See Brief for Petitioner 7 (giving, as an example, the Web site "whitehouse.com"). It has also passed a statute creating a "Dot Kids" second-level Internet domain, the content of which is restricted to that which is fit for minors under the age of 13. 47 U. S. C. § 941 (2000 ed., Supp. II).

B

Respondents, Internet content providers and others concerned with protecting the freedom of speech, filed suit in the United States District Court for the Eastern District of Pennsylvania. They sought a preliminary injunction against enforcement of the statute. After considering testimony from witnesses presented by both respondents and the Government, the District Court issued an order granting the preliminary injunction. The court first noted that the statute would place a burden on some protected speech. *American Civil Liberties Union* v. *Reno*, 31 F. Supp. 2d 473, 495 (1999). The court then concluded that respondents were likely to prevail on their argument that there were less restrictive alternatives to the statute: "On the record to date, it is not apparent . . . that [petitioner] can meet its burden to prove that COPA is the least restrictive means available to achieve the goal of restricting the access of minors" to harmful material. *Id.*, at 497. In particular, it noted that "[t]he record before the Court reveals that blocking or filtering technology may be at least as successful as COPA would be in restricting minors' access to harmful material online without imposing the burden on constitutionally protected speech that COPA imposes on adult users or Web site operators." *Ibid.*

The Government appealed the District Court's decision to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the preliminary injunction, but on a different ground. *American Civil Liberties Union* v. *Reno*, 217 F. 3d 162, 166 (2000). The court concluded that the "community standards" language in COPA by itself rendered the statute unconstitutionally overbroad. *Ibid.* We granted certiorari and reversed, holding that the community-standards language did not, standing alone, make the statute unconstitutionally overbroad. *Ashcroft I*, 535 U. S., at 585. We emphasized, however, that our decision was limited to that narrow issue. *Ibid.* We remanded the case to the Court of Appeals to reconsider whether the District Court had been correct to grant the preliminary injunction. On remand, the Court of Appeals again affirmed the District Court. 322 F. 3d 240 (2003). The Court of Appeals concluded that the statute was not narrowly tailored to serve a compelling Government interest, was overbroad, and was not the least restrictive means available for the Government to serve the interest of preventing minors from using the Internet to gain access to materials that are harmful to them. *Id.*, at 266–271. The Government once again sought review from this Court, and we again granted certiorari. 540 U. S. 944 (2003).

II

A

"This Court, like other appellate courts, has always applied the abuse of discretion standard on review of a preliminary injunction." *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 336 (1985) (O'Connor, J., concurring) (internal quotation marks omitted). "The grant of appellate jurisdiction under [28 U. S. C.] § 1252 does not give the Court license to depart from established standards of appellate review." *Ibid.* If the underlying constitutional question is close, therefore, we should uphold the injunction

and remand for trial on the merits. Applying this mode of inquiry, we agree with the Court of Appeals that the District Court did not abuse its discretion in entering the preliminary injunction. Our reasoning in support of this conclusion, however, is based on narrower, more specific grounds than the rationale the Court of Appeals adopted. The Court of Appeals, in its opinion affirming the decision of the District Court, construed a number of terms in the statute, and held that COPA, so construed, was unconstitutional. None of those constructions of statutory terminology, however, were relied on by or necessary to the conclusions of the District Court. Instead, the District Court concluded only that the statute was likely to burden some speech that is protected for adults, 31 F. Supp. 2d, at 495, which petitioner does not dispute. As to the definitional disputes, the District Court concluded only that respondents' interpretation was "not unreasonable," and relied on their interpretation only to conclude that respondents had standing to challenge the statute, *id.*, at 481, which, again, petitioner does not dispute. Because we affirm the District Court's decision to grant the preliminary injunction for the reasons relied on by the District Court, we decline to consider the correctness of the other arguments relied on by the Court of Appeals.

The District Court, in deciding to grant the preliminary injunction, concentrated primarily on the argument that there are plausible, less restrictive alternatives to COPA. A statute that "effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another . . . is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." *Reno*, 521 U. S., at 874. When plaintiffs challenge a content-based speech restriction, the burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute. *Ibid.*

In considering this question, a court assumes that certain protected speech may be regulated, and then asks what is the least restrictive alternative that can be used to achieve that goal. The purpose of the test is not to consider whether the challenged restriction has some effect in achieving Congress' goal, regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to ensure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

In deciding whether to grant a preliminary injunction, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits. See, *e. g.*, *Doran* v. *Salem Inn, Inc.*, 422 U. S. 922, 931 (1975). (The court also considers whether the plaintiff has shown irreparable injury, see *ibid.*, but the parties in this case do not contest the correctness of the District Court's conclusion that a likelihood of irreparable injury had been established. See 31 F. Supp. 2d, at 497–498.) As the Government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail. *Id.*, at 496–497. That conclusion was not an abuse of discretion, because on this record there are a number of plausible, less restrictive alternatives to the statute.

The primary alternative considered by the District Court was blocking and filtering software. Blocking and filtering

software is an alternative that is less restrictive than COPA, and, in addition, likely more effective as a means of restricting children's access to materials harmful to them. The District Court, in granting the preliminary injunction, did so primarily because the plaintiffs had proposed that filters are a less restrictive alternative to COPA and the Government had not shown it would be likely to disprove the plaintiffs' contention at trial. *Ibid.*

Filters are less restrictive than COPA. They impose selective restrictions on speech at the receiving end, not universal restrictions at the source. Under a filtering regime, adults without children may gain access to speech they have a right to see without having to identify themselves or provide their credit card information. Even adults with children may obtain access to the same speech on the same terms simply by turning off the filter on their home computers. Above all, promoting the use of filters does not condemn as criminal any category of speech, and so the potential chilling effect is eliminated, or at least much diminished. All of these things are true, moreover, regardless of how broadly or narrowly the definitions in COPA are construed.

Filters also may well be more effective than COPA. First, a filter can prevent minors from seeing all pornography, not just pornography posted to the Web from America. The District Court noted in its factfindings that one witness estimated that 40% of harmful-to-minors content comes from overseas. *Id.*, at 484. COPA does not prevent minors from having access to those foreign harmful materials. That alone makes it possible that filtering software might be more effective in serving Congress' goals. Effectiveness is likely to diminish even further if COPA is upheld, because the providers of the materials that would be covered by the statute simply can move their operations overseas. It is not an answer to say that COPA reaches some amount of materials that are harmful to minors; the question is whether it would reach more of them than less restrictive alternatives. In

addition, the District Court found that verification systems may be subject to evasion and circumvention, for example, by minors who have their own credit cards. See *id.*, at 484, 496–497. Finally, filters also may be more effective because they can be applied to all forms of Internet communication, including e-mail, not just communications available via the World Wide Web.

That filtering software may well be more effective than COPA is confirmed by the findings of the Commission on Child Online Protection, a blue-ribbon Commission created by Congress in COPA itself. Congress directed the Commission to evaluate the relative merits of different means of restricting minors' ability to gain access to harmful materials on the Internet. Note following 47 U. S. C. § 231. It unambiguously found that filters are more effective than age-verification requirements. See Commission on Child Online Protection (COPA), Report to Congress 19–21, 23–25, 27 (Oct. 20, 2000) (assigning a score for "Effectiveness" of 7.4 for server-based filters and 6.5 for client-based filters, as compared to 5.9 for independent adult-ID verification, and 5.5 for credit card verification). Thus, not only has the Government failed to carry its burden of showing the District Court that the proposed alternative is less effective, but also a Government Commission appointed to consider the question has concluded just the opposite. That finding supports our conclusion that the District Court did not abuse its discretion in enjoining the statute.

Filtering software, of course, is not a perfect solution to the problem of children gaining access to harmful-to-minors materials. It may block some materials that are not harmful to minors and fail to catch some that are. See 31 F. Supp. 2d, at 492. Whatever the deficiencies of filters, however, the Government failed to introduce specific evidence proving that existing technologies are less effective than the restrictions in COPA. The District Court made a specific factfinding that "[n]o evidence was presented to the Court as to the

percentage of time that blocking and filtering technology is over- or underinclusive." *Ibid.* In the absence of a showing as to the relative effectiveness of COPA and the alternatives proposed by respondents, it was not an abuse of discretion for the District Court to grant the preliminary injunction. The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; its burden is to show that it is less effective. *Reno*, 521 U. S., at 874. It is not enough for the Government to show that COPA has some effect. Nor do respondents bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective. The Government has the burden to show they are less so. The Government having failed to carry its burden, it was not an abuse of discretion for the District Court to grant the preliminary injunction.

One argument to the contrary is worth mentioning—the argument that filtering software is not an available alternative because Congress may not require it to be used. That argument carries little weight, because Congress undoubtedly may act to encourage the use of filters. We have held that Congress can give strong incentives to schools and libraries to use them. *United States* v. *American Library Assn., Inc.*, 539 U. S. 194 (2003). It could also take steps to promote their development by industry, and their use by parents. It is incorrect, for that reason, to say that filters are part of the current regulatory status quo. The need for parental cooperation does not automatically disqualify a proposed less restrictive alternative. *Playboy Entertainment Group*, 529 U. S., at 824 ("A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act"). In enacting COPA, Congress said its goal was to prevent the "widespread availability of the Internet" from providing "opportunities for minors to access materials through the World Wide Web in a manner that can frustrate

parental supervision or control." Congressional Findings, note following 47 U. S. C. § 231 (quoting Pub. L. 105–277, Tit. XIV, § 1402(1), 112 Stat. 2681–736). COPA presumes that parents lack the ability, not the will, to monitor what their children see. By enacting programs to promote use of filtering software, Congress could give parents that ability without subjecting protected speech to severe penalties.

The closest precedent on the general point is our decision in *Playboy Entertainment Group. Playboy Entertainment Group,* like this case, involved a content-based restriction designed to protect minors from viewing harmful materials. The choice was between a blanket speech restriction and a more specific technological solution that was available to parents who chose to implement it. 529 U. S., at 825. Absent a showing that the proposed less restrictive alternative would not be as effective, we concluded, the more restrictive option preferred by Congress could not survive strict scrutiny. *Id.*, at 826 (reversing because "[t]he record is silent as to the comparative effectiveness of the two alternatives"). In the instant case, too, the Government has failed to show, at this point, that the proposed less restrictive alternative will be less effective. The reasoning of *Playboy Entertainment Group* and the holdings and force of our precedents require us to affirm the preliminary injunction. To do otherwise would be to do less than the First Amendment commands. "The 'starch' in our constitutional standards cannot be sacrificed to accommodate the enforcement choices of the Government." *Id.*, at 830 (THOMAS, J., concurring).

B

There are also important practical reasons to let the injunction stand pending a full trial on the merits. First, the potential harms from reversing the injunction outweigh those of leaving it in place by mistake. Where a prosecution is a likely possibility, yet only an affirmative defense is available, speakers may self-censor rather than risk the perils of

trial. There is a potential for extraordinary harm and a serious chill upon protected speech. Cf. *id.*, at 817 ("Error in marking that line exacts an extraordinary cost"). The harm done from letting the injunction stand pending a trial on the merits, in contrast, will not be extensive. No prosecutions have yet been undertaken under the law, so none will be disrupted if the injunction stands. Further, if the injunction is upheld, the Government in the interim can enforce obscenity laws already on the books.

Second, there are substantial factual disputes remaining in the case. As mentioned above, there is a serious gap in the evidence as to the effectiveness of filtering software. See *supra*, at 668. For us to assume, without proof, that filters are less effective than COPA would usurp the District Court's factfinding role. By allowing the preliminary injunction to stand and remanding for trial, we require the Government to shoulder its full constitutional burden of proof respecting the less restrictive alternative argument, rather than excuse it from doing so.

Third, and on a related point, the factual record does not reflect current technological reality—a serious flaw in any case involving the Internet. The technology of the Internet evolves at a rapid pace. Yet the factfindings of the District Court were entered in February 1999, over five years ago. Since then, certain facts about the Internet are known to have changed. Compare, *e. g.*, 31 F. Supp. 2d, at 481 (36.7 million Internet hosts as of July 1998), with Internet Systems Consortium, Internet Domain Survey, Jan. 2004, http://www.isc.org/index.pl?/ops/ds (as visited June 22, 2004, and available in Clerk of Court's case file) (233.1 million hosts as of Jan. 2004). It is reasonable to assume that other technological developments important to the First Amendment analysis have also occurred during that time. More and better filtering alternatives may exist than when the District Court entered its findings. Indeed, we know that after the District Court entered its factfindings, a congressionally ap-

pointed commission issued a report that found that filters are more effective than verification screens. See *supra*, at 668.

Delay between the time that a district court makes factfindings and the time that a case reaches this Court is inevitable, with the necessary consequence that there will be some discrepancy between the facts as found and the facts at the time the appellate court takes up the question. See, *e. g.*, Benjamin, Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process, 78 Texas L. Rev. 269, 290–296 (1999) (noting the problems presented for appellate courts by changing facts in the context of cases involving the Internet, and giving as a specific example the Court's decision in *Reno*, 521 U. S. 844). We do not mean, therefore, to set up an insuperable obstacle to fair review. Here, however, the usual gap has doubled because the case has been through the Court of Appeals twice. The additional two years might make a difference. By affirming the preliminary injunction and remanding for trial, we allow the parties to update and supplement the factual record to reflect current technological realities.

Remand will also permit the District Court to take account of a changed legal landscape. Since the District Court made its factfindings, Congress has passed at least two further statutes that might qualify as less restrictive alternatives to COPA—a prohibition on misleading domain names, and a statute creating a minors-safe "Dot Kids" domain. See *supra*, at 663. Remanding for trial will allow the District Court to take into account those additional potential alternatives.

On a final point, it is important to note that this opinion does not hold that Congress is incapable of enacting any regulation of the Internet designed to prevent minors from gaining access to harmful materials. The parties, because of the conclusion of the Court of Appeals that the statute's definitions rendered it unconstitutional, did not devote their atten-

tion to the question whether further evidence might be introduced on the relative restrictiveness and effectiveness of alternatives to the statute. On remand, however, the parties will be able to introduce further evidence on this point. This opinion does not foreclose the District Court from concluding, upon a proper showing by the Government that meets the Government's constitutional burden as defined in this opinion, that COPA is the least restrictive alternative available to accomplish Congress' goal.

* * *

On this record, the Government has not shown that the less restrictive alternatives proposed by respondents should be disregarded. Those alternatives, indeed, may be more effective than the provisions of COPA. The District Court did not abuse its discretion when it entered the preliminary injunction. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, concurring.

When it first reviewed the constitutionality of the Child Online Protection Act (COPA), the Court of Appeals held that the statute's use of "contemporary community standards" to identify materials that are "harmful to minors" was a serious, and likely fatal, defect. *American Civil Liberties Union* v. *Reno*, 217 F. 3d 162 (CA3 2000). I have already explained at some length why I agree with that holding. See *Ashcroft* v. *American Civil Liberties Union*, 535 U. S. 564, 603 (2002) (dissenting opinion) ("In the context of the Internet, . . . community standards become a sword, rather than a shield. If a prurient appeal is offensive in a puritan village, it may be a crime to post it on the World Wide Web").

I continue to believe that the Government may not penalize speakers for making available to the general World Wide Web audience that which the least tolerant communities in America deem unfit for their children's consumption, cf. *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 878 (1997), and consider that principle a sufficient basis for deciding this case.

But COPA's use of community standards is not the statute's only constitutional defect. Today's decision points to another: that, as far as the record reveals, encouraging deployment of user-based controls, such as filtering software, would serve Congress' interest in protecting minors from sexually explicit Internet materials as well or better than attempting to regulate the vast content of the World Wide Web at its source, and at a far less significant cost to First Amendment values.

In registering my agreement with the Court's less-restrictive-means analysis, I wish to underscore just how restrictive COPA is. COPA is a content-based restraint on the dissemination of constitutionally protected speech. It enforces its prohibitions by way of the criminal law, threatening noncompliant Web speakers with a fine of as much as $50,000, and a term of imprisonment as long as six months, for each offense. 47 U. S. C. § 231(a). Speakers who "intentionally" violate COPA are punishable by a fine of up to $50,000 for each day of the violation. *Ibid.* And because implementation of the various adult-verification mechanisms described in the statute provides only an affirmative defense, § 231(c)(1), even full compliance with COPA cannot guarantee freedom from prosecution. Speakers who dutifully place their content behind age screens may nevertheless find themselves in court, forced to prove the lawfulness of their speech on pain of criminal conviction. Cf. *Ashcroft* v. *Free Speech Coalition*, 535 U. S. 234, 255 (2002).

Criminal prosecutions are, in my view, an inappropriate means to regulate the universe of materials classified as "ob-

scene," since "the line between communications which 'offend' and those which do not is too blurred to identify criminal conduct." *Smith* v. *United States*, 431 U. S. 291, 316 (1977) (STEVENS, J., dissenting). See also *Marks* v. *United States*, 430 U. S. 188, 198 (1977) (STEVENS, J., concurring in part and dissenting in part). COPA's creation of a new category of criminally punishable speech that is "harmful to minors" only compounds the problem. It may be, as JUSTICE BREYER contends, that the statute's coverage extends "only slightly" beyond the legally obscene, and therefore intrudes little into the realm of protected expression. *Post*, at 679 (dissenting opinion). But even with JUSTICE BREYER's guidance, I find it impossible to identify just how far past the already ill-defined territory of "obscenity" he thinks the statute extends. Attaching criminal sanctions to a mistaken judgment about the contours of the novel and nebulous category of "harmful to minors" speech clearly imposes a heavy burden on the exercise of First Amendment freedoms.

COPA's criminal penalties are, moreover, strong medicine for the ill that the statute seeks to remedy. To be sure, our cases have recognized a compelling interest in protecting minors from exposure to sexually explicit materials. See, *e. g.*, *Ginsberg* v. *New York*, 390 U. S. 629, 640 (1968). As a parent, grandparent, and great-grandparent, I endorse that goal without reservation. As a judge, however, I must confess to a growing sense of unease when the interest in protecting children from prurient materials is invoked as a justification for using criminal regulation of speech as a substitute for, or a simple backup to, adult oversight of children's viewing habits.

In view of the gravity of the burdens COPA imposes on Web speech, the possibility that Congress might have accomplished the goal of protecting children from harmful materials by other, less drastic means is a matter to be considered with special care. With that observation, I join the opinion of the Court.

JUSTICE SCALIA, dissenting.

I agree with JUSTICE BREYER's conclusion that the Child Online Protection Act (COPA), 47 U. S. C. § 231, is constitutional. See *post*, at 689 (dissenting opinion). Both the Court and JUSTICE BREYER err, however, in subjecting COPA to strict scrutiny. Nothing in the First Amendment entitles the type of material covered by COPA to that exacting standard of review. "We have recognized that commercial entities which engage in 'the sordid business of pandering' by 'deliberately emphasiz[ing] the sexually provocative aspects of [their nonobscene products], in order to catch the salaciously disposed,' engage in constitutionally unprotected behavior." *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 831 (2000) (SCALIA, J., dissenting) (quoting *Ginzburg* v. *United States*, 383 U. S. 463, 467, 472 (1966)). See also *Los Angeles* v. *Alameda Books, Inc.*, 535 U. S. 425, 443–444 (2002) (SCALIA, J., concurring); *FW/PBS, Inc.* v. *Dallas*, 493 U. S. 215, 256–261 (1990) (SCALIA, J., concurring in part and dissenting in part).

There is no doubt that the commercial pornography covered by COPA fits this description. The statute applies only to a person who, "as a regular course of such person's trade or business, with the objective of earning a profit," 47 U. S. C. § 231(e)(2)(B), and "with knowledge of the character of the material," § 231(a)(1), communicates material that depicts certain specified sexual acts and that "is designed to appeal to, or is designed to pander to, the prurient interest," § 231(e)(6)(A). Since this business could, consistent with the First Amendment, be banned entirely, COPA's lesser restrictions raise no constitutional concern.

JUSTICE BREYER, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

The Child Online Protection Act (Act), 47 U. S. C. § 231, seeks to protect children from exposure to commercial pornography placed on the Internet. It does so by requiring

commercial providers to place pornographic material behind Internet "screens" readily accessible to adults who produce age verification. The Court recognizes that we should "'proceed . . . with care before invalidating the Act,'" while pointing out that the "imperative of according respect to the Congress . . . does not permit us to depart from well-established First Amendment principles." *Ante*, at 660. I agree with these generalities. Like the Court, I would subject the Act to "the most exacting scrutiny," *Turner Broadcasting System, Inc.* v. *FCC*, 512 U. S. 622, 642 (1994), requiring the Government to show that any restriction of nonobscene expression is "narrowly drawn" to further a "compelling interest" and that the restriction amounts to the "least restrictive means" available to further that interest, *Sable Communications of Cal., Inc.* v. *FCC*, 492 U. S. 115, 126 (1989). See also *Denver Area Ed. Telecommunications Consortium, Inc.* v. *FCC*, 518 U. S. 727, 755–756 (1996).

Nonetheless, my examination of (1) the burdens the Act imposes on protected expression, (2) the Act's ability to further a compelling interest, and (3) the proposed "less restrictive alternatives" convinces me that the Court is wrong. I cannot accept its conclusion that Congress could have accomplished its statutory objective—protecting children from commercial pornography on the Internet—in other, less restrictive ways.

I

Although the Court rests its conclusion upon the existence of less restrictive alternatives, I must first examine the burdens that the Act imposes upon protected speech. That is because the term "less restrictive alternative" is a comparative term. An "alternative" is "less restrictive" only if it will work less First Amendment harm than the statute itself, while at the same time similarly furthering the "compelling" interest that prompted Congress to enact the statute. Unlike the majority, I do not see how it is possible to make this comparative determination without examining both the

extent to which the Act regulates protected expression and the nature of the burdens it imposes on that expression. That examination suggests that the Act, properly interpreted, imposes a burden on protected speech that is no more than modest.

A

The Act's definitions limit the material it regulates to material that does not enjoy First Amendment protection, namely, legally obscene material, and very little more. A comparison of this Court's definition of unprotected, "legally obscene," material with the Act's definitions makes this clear.

Material is legally obscene if

> "(a) . . . 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) . . . the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) . . . the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller* v. *California*, 413 U. S. 15, 24 (1973).

The present statute defines the material that it regulates as material that meets all of the following criteria:

> "(A) the average person, applying contemporary community standards, would find, taking the material as a whole *and with respect to minors*, [that the material] is designed to appeal to, or is designed to pander to, the prurient interest;
>
> "(B) [the material] depicts, describes, or represents, in a manner patently offensive *with respect to minors*, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and
>
> "(C) [the material] taken as a whole, lacks serious literary, artistic, political, or scientific value *for minors*." 47 U. S. C. § 231(e)(6) (emphasis added).

Both definitions define the relevant material through use of the critical terms "prurient interest" and "lacks serious literary, artistic, political, or scientific value." Insofar as material appeals to, or panders to, "the prurient interest," it simply seeks a sexual response. Insofar as "patently offensive" material with "no serious value" simply seeks that response, it does not seek to educate, it does not seek to elucidate views about sex, it is not artistic, and it is not literary. Compare, *e. g.*, *Erznoznik* v. *Jacksonville*, 422 U. S. 205, 213 (1975) (invalidating an ordinance regulating nudity in films, where the ban was not confined to "sexually explicit nudity" or otherwise limited), with *Ginzburg* v. *United States*, 383 U. S. 463, 471 (1966) (finding unprotected material that was "created, represented and sold solely as a claimed instrument of the sexual stimulation it would bring"). That is why this Court, in *Miller*, held that the First Amendment did not protect material that fit its definition.

The only significant difference between the present statute and *Miller*'s definition consists of the addition of the words "with respect to minors," §231(e)(6)(A), and "for minors," §231(e)(6)(C). But the addition of these words to a definition that would otherwise cover only obscenity expands the statute's scope only slightly. That is because the material in question (while potentially harmful to young children) must, first, appeal to the "prurient interest" of, *i. e.*, seek a sexual response from, some group of adolescents or postadolescents (since young children normally do not so respond). And material that appeals to the "prurient interest[s]" of some group of adolescents or postadolescents will almost inevitably appeal to the "prurient interest[s]" of some group of adults as well.

The "lack of serious value" requirement narrows the statute yet further—despite the presence of the qualification "for minors." That is because one cannot easily imagine material that has serious literary, artistic, political, or scientific value for a significant group of adults, but lacks such value for any significant group of minors. Thus, the statute, read

literally, insofar as it extends beyond the legally obscene, could reach only borderline cases. And to take the words of the statute literally is consistent with Congress' avowed objective in enacting this law; namely, putting material produced by professional pornographers behind screens that will verify the age of the viewer. See S. Rep. No. 105–225, p. 3 (1998) (hereinafter S. Rep.) ("The bill seeks to restrict access to commercial pornography on the Web by requiring those engaged in the business of the commercial distribution of material that is harmful to minors to take certain prescribed steps to restrict access to such material by minors . . ."); H. R. Rep. No. 105–775, pp. 5, 14 (1998) (hereinafter H. R. Rep.) (explaining that the bill is aimed at the sale of pornographic materials and provides a defense for the "commercial purveyors of pornography" that the bill seeks to regulate).

These limitations on the statute's scope answer many of the concerns raised by those who attack its constitutionality. Respondents fear prosecution for the Internet posting of material that does not fall within the statute's ambit as limited by the "prurient interest" and "no serious value" requirements; for example: an essay about a young man's experience with masturbation and sexual shame; "a serious discussion about birth control practices, homosexuality, . . . or the consequences of prison rape"; an account by a 15-year-old, written for therapeutic purposes, of being raped when she was 13; a guide to self-examination for testicular cancer; a graphic illustration of how to use a condom; or any of the other postings of modern literary or artistic works or discussions of sexual identity, homosexuality, sexually transmitted diseases, sex education, or safe sex, let alone Aldous Huxley's Brave New World, J. D. Salinger's Catcher in the Rye, or, as the complaint would have it, "Ken Starr's report on the Clinton-Lewinsky scandal." See G. Dillard, Shame on Me, Lodging 609–612; *Reno* v. *American Civil Liberties Union*, 521 U. S. 844, 871 (1997); Brief for Respondents 29 (citing

Lodging 732–736); Brief for American Society of Journalists and Authors et al. as *Amici Curiae* 8, and n. 7 (referring to a guide on the medical advice site www.afraidtoask.com); 322 F. 3d 240, 268 (CA3 2003) (citing Safer Sex Institute, safersex.org/condoms/how.to.use); Complaint ¶ 1, Lodging 40–41 ("a Mapplethorpe photograph," referring to the work of controversial artist Robert Mapplethorpe); *id.*, at 667–669 (Pl. Exh. 80, PlanetOut Youth Message Boards (Internet discussion board for gay teens)); declaration of Adam K. Glickman, president and CEO, Addazi, Inc., d/b/a Condomania, Supp. Lodging of Petitioner 4–10 (describing how Web site has been used for health education); declaration of Roberta Speyer, president and publisher, OBGYN.net, *id.*, at 15–16 (describing Web site as resource for obstetrics, gynecology, and women's health issues); Brief for Volunteer Lawyers for the Arts et al. as *Amici Curiae* 15 (listing works of literature removed from some schools).

These materials are *not* both (1) "designed to appeal to, or . . . pander to, the prurient interest" of significant groups of minors *and* (2) lacking in "serious literary, artistic, political, or scientific value" for significant groups of minors. §§ 231(e)(6)(A), (C). Thus, they fall outside the statute's definition of the material that it restricts, a fact the Government acknowledged at oral argument. Tr. of Oral Arg. 50–51.

I have found nothing elsewhere in the statute's language that broadens its scope. Other qualifying phrases, such as "taking the material as a whole," §§ 231(e)(6)(A), (C), and "for commercial purposes," § 231(a)(1), limit the statute's scope still more, requiring, for example, that individual images be considered in context. See *Roth* v. *United States*, 354 U. S. 476, 490 (1957). In sum, the Act's definitions limit the statute's scope to commercial pornography. It affects unprotected obscene material. Given the inevitable uncertainty about how to characterize close-to-obscene material, it could apply to (or chill the production of) a limited class of border-

line material that courts might ultimately find is protected. But the examples I have just given fall outside that class.

B

The Act does not censor the material it covers. Rather, it requires providers of the "harmful to minors" material to restrict minors' access to it by verifying age. They can do so by inserting screens that verify age using a credit card, adult personal identification number, or other similar technology. See § 231(c)(1). In this way, the Act requires creation of an Internet screen that minors, but not adults, will find difficult to bypass.

I recognize that the screening requirement imposes some burden on adults who seek access to the regulated material, as well as on its providers. The cost is, in part, monetary. The parties agreed that a Web site could store card numbers or passwords at between 15 and 20 cents per number. *American Civil Liberties Union* v. *Reno*, 31 F. Supp. 2d 473, 488–489, ¶¶ 45–47 (ED Pa. 1999). And verification services provide free verification to Web site operators, while charging users less than $20 per year. *Id.*, at 489–490, ¶¶ 48–53. According to the trade association for the commercial pornographers who are the statute's target, use of such verification procedures is "standard practice" in their online operations. See S. Rep., at 7; Legislative Proposals to Protect Children from Inappropriate Materials on the Internet: Hearing on H. R. 3783 et al. before the House Subcommittee on Telecommunications, Trade and Consumer Protection of the House Committee on Commerce, 105th Cong., 2d Sess., 46, 48 (1998) (prepared statement of Jeffrey J. Douglas, Executive Director and Chairman, Free Speech Coalition (calling the proposed child-protecting mechanisms "effective and appropriate")).

In addition to the monetary cost, and despite strict requirements that identifying information be kept confidential, see 47 U. S. C. §§ 231(d)(1), 501, the identification require-

ments inherent in age screening may lead some users to fear embarrassment. See 31 F. Supp. 2d, at 495. Both monetary costs and potential embarrassment can deter potential viewers and, in that sense, the statute's requirements may restrict access to a site. But this Court has held that in the context of congressional efforts to protect children, restrictions of this kind do not automatically violate the Constitution. And the Court has approved their use. See, *e. g.*, *United States* v. *American Library Assn., Inc.*, 539 U. S. 194, 209 (2003) (plurality opinion) ("[T]he Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment"). Cf. *Reno*, 521 U. S., at 890 (O'CONNOR, J., concurring in judgment in part and dissenting in part) (calling the age-verification requirement similar to "a bouncer [who] checks a person's driver's license before admitting him to a nightclub").

In sum, the Act at most imposes a modest additional burden on adult access to legally obscene material, perhaps imposing a similar burden on access to some protected borderline obscene material as well.

II

I turn next to the question of "compelling interest," that of protecting minors from exposure to commercial pornography. No one denies that such an interest is "compelling." See *Denver Area Ed. Telecommunications Consortium, Inc.*, 518 U. S., at 743 (opinion of BREYER, J.) (interest in protecting minors is "compelling"); *Sable Communications*, 492 U. S., at 126 (same); *Ginsberg* v. *New York*, 390 U. S. 629, 639–640 (1968). Rather, the question here is whether the Act, given its restrictions on adult access, significantly advances that interest. In other words, is the game worth the candle?

The majority argues that it is not, because of the existence of "blocking and filtering software." *Ante,* at 666–670. The majority refers to the presence of that software as a

"less restrictive alternative." But that is a misnomer—a misnomer that may lead the reader to believe that all we need do is look to see if the blocking and filtering software is less restrictive; and to believe that, because in one sense it is (one can turn off the software), that is the end of the constitutional matter.

But such reasoning has no place here. Conceptually speaking, the presence of filtering software is not an *alternative* legislative approach to the problem of protecting children from exposure to commercial pornography. Rather, it is part of the status quo, *i. e.*, the backdrop against which Congress enacted the present statute. It is always true, by definition, that the status quo is less restrictive than a new regulatory law. It is always less restrictive to do *nothing* than to do *something.* But "doing nothing" does not address the problem Congress sought to address—namely, that, despite the availability of filtering software, children were still being exposed to harmful material on the Internet.

Thus, the relevant constitutional question is not the question the Court asks: Would it be less restrictive to do nothing? Of course it would be. Rather, the relevant question posits a comparison of (a) a status quo that includes filtering software with (b) a change in that status quo that adds to it an age-verification screen requirement. Given the existence of filtering software, does the problem Congress identified remain significant? Does the Act help to address it? These are questions about the relation of the Act to the compelling interest. Does the Act, compared to the status quo, significantly advance the ball? (An affirmative answer to these questions will not justify "[a]ny restriction on speech," as the Court claims, *ante,* at 666, for a final answer in respect to constitutionality must take account of burdens and alternatives as well.)

The answers to these intermediate questions are clear: Filtering software, as presently available, does not solve the "child protection" problem. It suffers from four serious in-

adequacies that prompted Congress to pass legislation instead of relying on its voluntary use. First, its filtering is faulty, allowing some pornographic material to pass through without hindrance. Just last year, in *American Library Assn.*, JUSTICE STEVENS described "fundamental defects in the filtering software that is now available or that will be available in the foreseeable future." 539 U. S., at 221 (dissenting opinion). He pointed to the problem of underblocking: "Because the software relies on key words or phrases to block undesirable sites, it does not have the capacity to exclude a precisely defined category of images." *Ibid.* That is to say, in the absence of words, the software alone cannot distinguish between the most obscene pictorial image and the Venus de Milo. No Member of this Court disagreed.

Second, filtering software costs money. Not every family has the $40 or so necessary to install it. See 31 F. Supp. 2d, at 492, ¶ 65. By way of contrast, age screening costs less. See *supra*, at 682 (citing costs of up to 20 cents per password or $20 per user for an identification number).

Third, filtering software depends upon parents willing to decide where their children will surf the Web and able to enforce that decision. As to millions of American families, that is not a reasonable possibility. More than 28 million school age children have both parents or their sole parent in the work force, at least 5 million children are left alone at home without supervision each week, and many of those children will spend afternoons and evenings with friends who may well have access to computers and more lenient parents. See *United States* v. *Playboy Entertainment Group, Inc.*, 529 U. S. 803, 842 (2000) (BREYER, J., dissenting).

Fourth, software blocking lacks precision, with the result that those who wish to use it to screen out pornography find that it blocks a great deal of material that is valuable. As JUSTICE STEVENS pointed out, "the software's reliance on words to identify undesirable sites necessarily results in the blocking of thousands of pages that contain content that is

completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as pornography or sex." *American Library Assn.*, *supra*, at 222 (internal quotation marks omitted). Indeed, the American Civil Liberties Union (ACLU), one of the respondents here, told Congress that filtering software "block[s] out valuable and protected information, such as information about the Quaker religion, and web sites including those of the American Association of University Women, the AIDS Quilt, the Town Hall Political Site (run by the Family Resource Center, Christian Coalition and other conservative groups)." Hearing on Internet Indecency before the Senate Committee on Commerce, Science, and Transportation, 105th Cong., 2d Sess., 64 (1998). The software "is simply incapable of discerning between constitutionally protected and unprotected speech." *Id.*, at 65. It "inappropriately blocks valuable, protected speech, and does not effectively block the sites [it is] intended to block." *Id.*, at 66 (citing reports documenting overblocking).

Nothing in the District Court record suggests the contrary. No respondent has offered to produce evidence at trial to the contrary. No party has suggested, for example, that technology allowing filters to interpret and discern among images has suddenly become, or is about to become, widely available. Indeed, the Court concedes that "[f]iltering software, of course, is not a perfect solution to the problem." *Ante*, at 668.

In sum, a "filtering software status quo" means filtering that underblocks, imposes a cost upon each family that uses it, fails to screen outside the home, and lacks precision. Thus, Congress could reasonably conclude that a system that relies entirely upon the use of such software is not an effective system. And a law that adds to that system an age-verification screen requirement significantly increases the system's efficacy. That is to say, at a modest additional cost

to those adults who wish to obtain access to a screened program, that law will bring about better, more precise blocking, both inside and outside the home.

The Court's response—that 40% of all pornographic material may be of foreign origin—is beside the point. *Ante,* at 667 (citing the District Court's findings). Even assuming (I believe unrealistically) that *all* foreign originators will refuse to use screening, the Act would make a difference in respect to 60% of the Internet's commercial pornography. I cannot call that difference insignificant.

The upshot is that Congress could reasonably conclude that, despite the current availability of filtering software, a child protection problem exists. It also could conclude that a precisely targeted regulatory statute, adding an age-verification requirement for a narrow range of material, would more effectively shield children from commercial pornography.

Is this justification sufficient? The lower courts thought not. But that is because those courts interpreted the Act as imposing far more than a modest burden. They assumed an interpretation of the statute in which it reached far beyond legally obscene and borderline obscene material, affecting material that, given the interpretation set forth above, would fall well outside the Act's scope. But we must interpret the Act to save it, not to destroy it. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 30 (1937). So interpreted, see *supra,* at 678–682, the Act imposes a far lesser burden on access to protected material. Given the modest nature of that burden and the likelihood that the Act will significantly further Congress' compelling objective, the Act may well satisfy the First Amendment's stringent tests. Cf. *Sable Communications,* 492 U. S., at 130. Indeed, it does satisfy the First Amendment unless, of course, there is a genuine alternative, "less restrictive" way similarly to further that objective.

III

I turn, then, to the actual "less restrictive alternatives" that the Court proposes. The Court proposes two real alternatives, *i. e.*, two potentially less restrictive ways in which Congress might alter the status quo in order to achieve its "compelling" objective.

First, the Government might "act to encourage" the use of blocking and filtering software. *Ante*, at 669. The problem is that any argument that rests upon this alternative proves too much. If one imagines enough Government resources devoted to the problem and perhaps additional scientific advances, then, of course, the use of software might become as effective and less restrictive. Obviously, the Government could give all parents, schools, and Internet cafes free computers with filtering programs already installed, hire federal employees to train parents and teachers on their use, and devote millions of dollars to the development of better software. The result might be an alternative that is extremely effective.

But the Constitution does not, because it cannot, require the Government to disprove the existence of magic solutions, *i. e.*, solutions that, put in general terms, will solve any problem less restrictively but with equal effectiveness. Otherwise, "the undoubted ability of lawyers and judges," who are not constrained by the budgetary worries and other practical parameters within which Congress must operate, "to imagine *some* kind of slightly less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being." *Playboy Entertainment Group*, 529 U. S., at 841 (BREYER, J., dissenting). As Justice Blackmun recognized, a "judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down." *Illinois Bd. of Elections* v. *Socialist Workers Party*, 440 U. S. 173, 188–189 (1979) (concurring opinion).

Perhaps that is why no party has argued seriously that additional expenditure of government funds to encourage the use of screening is a "less restrictive alternative."

Second, the majority suggests decriminalizing the statute, noting the "chilling effect" of criminalizing a category of speech. *Ante*, at 667. To remove a major sanction, however, would make the statute less effective, virtually by definition.

IV

My conclusion is that the Act, as properly interpreted, risks imposition of minor burdens on some protected material—burdens that adults wishing to view the material may overcome at modest cost. At the same time, it significantly helps to achieve a compelling congressional goal, protecting children from exposure to commercial pornography. There is no serious, practically available "less restrictive" way similarly to further this compelling interest. Hence the Act is constitutional.

V

The Court's holding raises two more general questions. First, what has happened to the "constructive discourse between our courts and our legislatures" that "is an integral and admirable part of the constitutional design"? *Blakely* v. *Washington*, *ante*, at 326 (KENNEDY, J., dissenting). After eight years of legislative effort, two statutes, and three Supreme Court cases the Court sends this case back to the District Court for further proceedings. What proceedings? I have found no offer by either party to present more relevant evidence. What remains to be litigated? I know the Court says that the parties may "introduce further evidence" as to the "relative restrictiveness and effectiveness of alternatives to the statute." *Ante*, at 673. But I do not understand what that new evidence might consist of.

Moreover, Congress passed the current statute "[i]n response to the Court's decision in *Reno*" striking down an earlier statutory effort to deal with the same problem.

Ante, at 661. Congress read *Reno* with care. It dedicated itself to the task of drafting a statute that would meet each and every criticism of the predecessor statute that this Court set forth in *Reno.* It incorporated language from the Court's precedents, particularly the *Miller* standard, virtually verbatim. Compare 413 U. S., at 24, with § 231(e)(6). And it created what it believed was a statute that would protect children from exposure to obscene professional pornography without obstructing adult access to material that the First Amendment protects. See H. R. Rep., at 5 (explaining that the bill was "carefully drafted to respond to the Supreme Court's decision in *Reno*"); S. Rep., at 2 (same). What else was Congress supposed to do?

I recognize that some Members of the Court, now or in the past, have taken the view that the First Amendment simply does not permit Congress to legislate in this area. See, *e. g.*, *Ginzburg,* 383 U. S., at 476 (Black, J., dissenting) ("[T]he Federal Government is without any power whatever under the Constitution to put any type of burden on speech and expression of ideas of any kind"). Others believe that the Amendment does not permit Congress to legislate in certain ways, *e. g.*, through the imposition of criminal penalties for obscenity. See, *e. g.*, *ante,* at 674–675 (STEVENS, J., concurring). There are strong constitutional arguments favoring these views. But the Court itself does not adopt those views. Instead, it finds that the Government has not proved the nonexistence of "less restrictive alternatives." That finding, if appropriate here, is universally appropriate. And if universally appropriate, it denies to Congress, in practice, the legislative leeway that the Court's language seems to promise. If this statute does not pass the Court's "less restrictive alternative" test, what does? If nothing does, then the Court should say so clearly.

As I have explained, I believe the First Amendment permits an alternative holding. We could construe the statute

narrowly—as I have tried to do—removing nearly all protected material from its scope. By doing so, we could reconcile its language with the First Amendment's demands. We would "save" the statute, "not . . . destroy" it. *NLRB*, 301 U. S., at 30. Accord, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 180 (2003) (where a saving construction of the statute's language "'is fairly possible,'" we must adopt it (quoting *Crowell* v. *Benson*, 285 U. S. 22, 62 (1932))). And in the process, we would permit Congress to achieve its basic child-protecting objectives.

Second, will the majority's holding in practice mean greater or lesser protection for expression? I do not find the answer to this question obvious. The Court's decision removes an important weapon from the prosecutorial arsenal. That weapon would have given the Government a choice—a choice other than "ban totally or do nothing at all." The Act tells the Government that, instead of prosecuting bans on obscenity to the maximum extent possible (as respondents have urged as yet another "alternative"), it can insist that those who make available material that is obscene or close to obscene keep that material under wraps, making it readily available to adults who wish to see it, while restricting access to children. By providing this third option—a "middle way"—the Act avoids the need for potentially speech-suppressing prosecutions.

That matters in a world where the obscene and the nonobscene do not come tied neatly into separate, easily distinguishable, packages. In that real world, this middle way might well have furthered First Amendment interests by tempering the prosecutorial instinct in borderline cases. At least, Congress might have so believed. And this likelihood, from a First Amendment perspective, might ultimately have proved more protective of the rights of viewers to retain access to expression than the all-or-nothing choice available to prosecutors in the wake of the majority's opinion.

For these reasons, I dissent.

Syllabus

SOSA *v.* ALVAREZ-MACHAIN ET AL.

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

No. 03–339. Argued March 30, 2004—Decided June 29, 2004*

The Drug Enforcement Administration (DEA) approved using petitioner Sosa and other Mexican nationals to abduct respondent Alvarez-Machain (Alvarez), also a Mexican national, from Mexico to stand trial in the United States for a DEA agent's torture and murder. As relevant here, after his acquittal, Alvarez sued the United States for false arrest under the Federal Tort Claims Act (FTCA), which waives sovereign immunity in suits "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any [Government] employee while acting within the scope of his office or employment," 28 U. S. C. § 1346(b)(1); and sued Sosa for violating the law of nations under the Alien Tort Statute (ATS), a 1789 law giving district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations . . . ," § 1350. The District Court dismissed the FTCA claim, but awarded Alvarez summary judgment and damages on the ATS claim. The Ninth Circuit affirmed the ATS judgment, but reversed the FTCA claim's dismissal.

Held:

1. The FTCA's exception to waiver of sovereign immunity for claims "arising in a foreign country," 28 U. S. C. § 2680(k), bars claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred. Pp. 699–712.

(a) The exception on its face seems plainly applicable to the facts of this action. Alvarez's arrest was said to be "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico. Nonetheless, the Ninth Circuit allowed the action to proceed under what is known as the "headquarters doctrine," concluding that, because Alvarez's abduction was the direct result of wrongful planning and direction by DEA agents in California, his claim did not "aris[e] in" a foreign country. Because it will virtually always be possible to assert negligent activity occurring in the United States, such analysis must be viewed with skepticism. Two considerations confirm this Court's skepticism and lead it to reject the headquarters doctrine. Pp. 700–703.

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*Together with No. 03–485, *United States* v. *Alvarez-Machain et al.*, also on certiorari to the same court.

Syllabus

(b) The first consideration applies to cases like this one, where harm was arguably caused both by action in the foreign country and planning in the United States. Proximate cause is necessary to connect the domestic breach of duty with the action in the foreign country, for the headquarters' behavior must be sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to that behavior. A proximate cause connection is not itself sufficient to bar the foreign country exception's application, since a given proximate cause may not be the harm's exclusive proximate cause. Here, for example, assuming the DEA officials' direction was a proximate cause of the abduction, so were the actions of Sosa and others in Mexico. Thus, at most, recognition of additional domestic causation leaves an open question whether the exception applies to Alvarez's claim. Pp. 703–704.

(c) The second consideration is rooted in the fact that the harm occurred on foreign soil. There is good reason to think that Congress understood a claim "arising in" a foreign country to be a claim for injury or harm occurring in that country. This was the common usage of "arising under" in contemporary state borrowing statutes used to determine which State's limitations statute applied in cases with transjurisdictional facts. And such language was interpreted in tort cases in just the same way that the Court reads the FTCA today. Moreover, there is specific reason to believe that using "arising in" to refer to place of harm was central to the foreign country exception's object. When the FTCA was passed, courts generally applied the law of the place where the injury occurred in tort cases, which would have been foreign law for a plaintiff injured in a foreign country. However, application of foreign substantive law was what Congress intended to avoid by the foreign country exception. Applying the headquarters doctrine would thus have thwarted the exception's object by recasting foreign injury claims as claims not arising in a foreign country because of some domestic planning or negligence. Nor has the headquarters doctrine outgrown its tension with the exception. The traditional approach to choice of substantive tort law has lost favor, but many States still use that analysis. And, in at least some cases the Ninth Circuit's approach would treat as arising at headquarters, even the later methodologies of choice point to the application of foreign law. There is also no merit to an argument that the headquarters doctrine should be permitted when a State's choice-of-law approach would not apply the foreign law of the place of injury. Congress did not write the exception to apply when foreign law would be applied. Rather, the exception was written at a time when "arising in" meant where the harm occurred; and the

odds are that Congress meant simply that when it used the phrase. Pp. 704–712.

2. Alvarez is not entitled to recover damages from Sosa under the ATS. Pp. 712–738.

(a) The limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 is not authority to recognize the ATS right of action Alvarez asserts here. Contrary to Alvarez's claim, the ATS is a jurisdictional statute creating no new causes of action. This does not mean, as Sosa contends, that the ATS was stillborn because any claim for relief required a further statute expressly authorizing adoption of causes of action. Rather, the reasonable inference from history and practice is that the ATS was intended to have practical effect the moment it became law, on the understanding that the common law would provide a cause of action for the modest number of international law violations thought to carry personal liability at the time: offenses against ambassadors, violation of safe conducts, and piracy. Sosa's objections to this view are unpersuasive. Pp. 712–724.

(b) While it is correct to assume that the First Congress understood that district courts would recognize private causes of action for certain torts in violation of the law of nations and that no development of law in the last two centuries has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering such a new cause of action. In deriving a standard for assessing Alvarez's particular claim, it suffices to look to the historical antecedents, which persuade this Court that federal courts should not recognize claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when § 1350 was enacted. Pp. 724–738.

(i) Several reasons argue for great caution in adapting the law of nations to private rights. First, the prevailing conception of the common law has changed since 1790. When § 1350 was enacted, the accepted conception was that the common law was found or discovered, but now it is understood, in most cases where a court is asked to state or formulate a common law principle in a new context, as made or created. Hence, a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision. Second, along with, and in part driven by, this conceptual development has come an equally significant rethinking of the federal courts' role in making common law. In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 78, this Court denied the existence of any federal "general" common law, which largely withdrew to havens of specialty, with the general practice being to look

for legislative guidance before exercising innovative authority over substantive law. Third, a decision to create a private right of action is better left to legislative judgment in most cases. *E. g.*, *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 68. Fourth, the potential implications for the foreign relations of the United States of recognizing private causes of action for violating international law should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. Fifth, this Court has no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. Pp. 725–731.

(ii) The limit on judicial recognition adopted here is fatal to Alvarez's claim. Alvarez contends that prohibition of arbitrary arrest has attained the status of binding customary international law and that his arrest was arbitrary because no applicable law authorized it. He thus invokes a general prohibition of arbitrary detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government. However, he cites little authority that a rule so broad has the status of a binding customary norm today. He certainly cites nothing to justify the federal courts in taking his rule as the predicate for a federal lawsuit, for its implications would be breathtaking. It would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under 42 U. S. C. § 1983 and *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, that now provide damages for such violations. And it would create a federal action for arrests by state officers who simply exceed their authority under state law. Alvarez's failure to marshal support for his rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States, which refers to prolonged arbitrary detention, not relatively brief detention in excess of positive authority. Whatever may be said for his broad principle, it expresses an aspiration exceeding any binding customary rule with the specificity this Court requires. Pp. 731–738.

331 F. 3d 604, reversed.

SOUTER, J., delivered the opinion of the Court, Parts I and III of which were unanimous, Part II of which was joined by REHNQUIST, C. J., and STEVENS, O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., and Part IV of which was joined by STEVENS, O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which REHNQUIST, C. J., and THOMAS, J., joined, *post*, p. 739. GINSBURG, J., filed an opinion concurring in part and concur-

ring in the judgment, in which BREYER, J., joined, *post*, p. 751. BREYER, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 760.

Deputy Solicitor General Clement argued the cause for the United States, as petitioner in No. 03–485, and respondent under this Court's Rule 12.6 in support of petitioner in No. 03–339. With him on the briefs were *Solicitor General Olson*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Kneedler*, *Deputy Assistant Attorney General Katsas*, *Gregory G. Garre*, *Jeffrey A. Lamken*, *Douglas N. Letter*, *Barbara L. Herwig*, *Robert M. Loeb*, and *William H. Taft IV*. *Carter G. Phillips* argued the cause for petitioner in No. 03–339. With him on the briefs were *Joseph R. Guerra*, *Marinn F. Carlson*, *Maria T. DiGiulian*, *Ryan D. Nelson*, and *Charles S. Leeper*.

Paul L. Hoffman argued the cause for respondent Alvarez-Machain in both cases. With him on the brief were *Erwin Chemerinsky*, *Ralph G. Steinhardt*, *Mark D. Rosenbaum*, *Steven R. Shapiro*, *Douglas E. Mirell*, and *W. Allan Edmiston*.†

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†Briefs of *amici curiae* urging reversal in No. 03–339 were filed for the National Association of Manufacturers by *Paul R. Friedman*, *John Townsend Rich*, *William F. Sheehan*, *Jan S. Amundson*, and *Quentin Riegel;* for the National Foreign Trade Council et al. by *Daniel M. Petrocelli*, *M. Randall Oppenheimer*, *Walter E. Dellinger III*, *Pamela A. Harris*, and *Robin S. Conrad;* for the Pacific Legal Foundation by *Anthony T. Caso;* for the Washington Legal Foundation et al. by *Donald B. Ayer*, *Christian G. Vergonis*, *Daniel J. Popeo*, and *Richard A. Samp;* and for Samuel Estreicher et al. by *Paul B. Stephan* and *Mr. Estreicher*, *pro se*.

Briefs of *amici curiae* urging affirmance in No. 03–339 were filed for Alien Friends Representing Hungarian Jews and Bougainvilleans Interests by *Steve W. Berman*, *R. Brent Walton*, *Jonathan W. Cuneo*, *David W. Stanley*, *Michael Waldman*, and *Samuel J. Dubbin;* for Amnesty International et al. by *Beth Stephens;* for the Center for Justice and Accountability et al. by *Laurel E. Fletcher*, *Peter Weiss*, and *Jennifer Green;* for the Center for Women Policy Studies et al. by *Rhonda Copelon;* for the Presbyterian Church of Sudan et al. by *Carey R. D'Avino*, *Stephen A. Whinston*, and *Lawrence Kill;* for the World Jewish Congress et al. by

JUSTICE SOUTER delivered the opinion of the Court.

The two issues are whether respondent Alvarez-Machain's allegation that the Drug Enforcement Administration instigated his abduction from Mexico for criminal trial in the United States supports a claim against the Government under the Federal Tort Claims Act (FTCA or Act), 28 U. S. C. §§ 1346(b)(1), 2671–2680, and whether he may recover under the Alien Tort Statute (ATS), 28 U. S. C. § 1350. We hold that he is not entitled to a remedy under either statute.

I

We have considered the underlying facts before, *United States* v. *Alvarez-Machain*, 504 U. S. 655 (1992). In 1985, an agent of the Drug Enforcement Administration (DEA), Enrique Camarena-Salazar, was captured on assignment in Mexico and taken to a house in Guadalajara, where he was tortured over the course of a 2-day interrogation, then murdered. Based in part on eyewitness testimony, DEA officials in the United States came to believe that respondent Humberto Alvarez-Machain (Alvarez), a Mexican physician, was present at the house and acted to prolong the agent's life in order to extend the interrogation and torture. *Id.*, at 657.

In 1990, a federal grand jury indicted Alvarez for the torture and murder of Camarena-Salazar, and the United States District Court for the Central District of California issued a

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Bill Lann Lee, *Stanley M. Chesley*, *Paul De Marco*, *Burt Neuborne*, and *Michael D. Hausfeld;* for Wendy A. Adams et al. by *William J. Aceves* and *David S. Weissbrodt;* and for Mary Robinson et al. by *Harold Hongju Koh*, *John M. Townsend*, and *William R. Stein.*

Briefs of *amici curiae* were filed in No. 03–339 for the Government of the Commonwealth of Australia et al. by *Donald I. Baker* and *W. Todd Miller;* for the International Labor Rights Fund et al. by *Terrence P. Collingsworth* and *Natacha Thys;* for the European Commission by *Jeffrey P. Cunard;* for James Akins et al. by *Thomas E. Bishop;* for Vikram Amar et al. by *Nicholas W. van Aelstyn;* and for Barry Amundsen et al. by *Penny M. Venetis.*

warrant for his arrest. 331 F. 3d 604, 609 (CA9 2003) (en banc). The DEA asked the Mexican Government for help in getting Alvarez into the United States, but when the requests and negotiations proved fruitless, the DEA approved a plan to hire Mexican nationals to seize Alvarez and bring him to the United States for trial. As so planned, a group of Mexicans, including petitioner Jose Francisco Sosa, abducted Alvarez from his house, held him overnight in a motel, and brought him by private plane to El Paso, Texas, where he was arrested by federal officers. *Ibid.*

Once in American custody, Alvarez moved to dismiss the indictment on the ground that his seizure was "outrageous governmental conduct," *Alvarez-Machain*, 504 U. S., at 658, and violated the extradition treaty between the United States and Mexico. The District Court agreed, the Ninth Circuit affirmed, and we reversed, *id.*, at 670, holding that the fact of Alvarez's forcible seizure did not affect the jurisdiction of a federal court. The case was tried in 1992, and ended at the close of the Government's case, when the District Court granted Alvarez's motion for a judgment of acquittal.

In 1993, after returning to Mexico, Alvarez began the civil action before us here. He sued Sosa, Mexican citizen and DEA operative Antonio Garate-Bustamante, five unnamed Mexican civilians, the United States, and four DEA agents. 331 F. 3d, at 610. So far as it matters here, Alvarez sought damages from the United States under the FTCA, alleging false arrest, and from Sosa under the ATS, for a violation of the law of nations. The former statute authorizes suit "for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U. S. C. § 1346(b)(1). The latter provides in its entirety that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation

of the law of nations or a treaty of the United States." § 1350.

The District Court granted the Government's motion to dismiss the FTCA claim, but awarded summary judgment and $25,000 in damages to Alvarez on the ATS claim. A three-judge panel of the Ninth Circuit then affirmed the ATS judgment, but reversed the dismissal of the FTCA claim. 266 F. 3d 1045 (2001).

A divided en banc court came to the same conclusion. 331 F. 3d, at 641. As for the ATS claim, the court called on its own precedent, "that [the ATS] not only provides federal courts with subject matter jurisdiction, but also creates a cause of action for an alleged violation of the law of nations." *Id.*, at 612. The Circuit then relied upon what it called the "clear and universally recognized norm prohibiting arbitrary arrest and detention," *id.*, at 620, to support the conclusion that Alvarez's arrest amounted to a tort in violation of international law. On the FTCA claim, the Ninth Circuit held that, because "the DEA had no authority to effect Alvarez's arrest and detention in Mexico," *id.*, at 608, the United States was liable to him under California law for the tort of false arrest, *id.*, at 640–641.

We granted certiorari in these companion cases to clarify the scope of both the FTCA and the ATS. 540 U. S. 1045 (2003). We now reverse in each.

II

The Government seeks reversal of the judgment of liability under the FTCA on two principal grounds. It argues that the arrest could not have been tortious, because it was authorized by 21 U. S. C. § 878, setting out the arrest authority of the DEA, and it says that in any event the liability asserted here falls within the FTCA exception to waiver of sovereign immunity for claims "arising in a foreign country," 28 U. S. C. § 2680(k). We think the exception applies and decide on that ground.

A

The FTCA "was designed primarily to remove the sovereign immunity of the United States from suits in tort and, with certain specific exceptions, to render the Government liable in tort as a private individual would be under like circumstances." *Richards* v. *United States,* 369 U. S. 1, 6 (1962); see also 28 U. S. C. § 2674. The Act accordingly gives federal district courts jurisdiction over claims against the United States for injury "caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). But the Act also limits its waiver of sovereign immunity in a number of ways. See § 2680 (no waiver as to, *e. g.,* "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter," "[a]ny claim for damages caused by the imposition or establishment of a quarantine by the United States," or "[a]ny claim arising from the activities of the Panama Canal Company").

Here the significant limitation on the waiver of immunity is the Act's exception for "[a]ny claim arising in a foreign country," § 2680(k), a provision that on its face seems plainly applicable to the facts of this action. In the Ninth Circuit's view, once Alvarez was within the borders of the United States, his detention was not tortious, see 331 F. 3d, at 636–637; the appellate court suggested that the Government's liability to Alvarez rested solely upon a false arrest claim. *Id.,* at 640–641. Alvarez's arrest, however, was said to be "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico.[1] The actions

[1] In the Ninth Circuit's view, it was critical that "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles." 331 F. 3d, at 640. Once Alvarez arrived in the United States, "the actions of domestic law enforce-

in Mexico are thus most naturally understood as the kernel of a "claim arising in a foreign country," and barred from suit under the exception to the waiver of immunity.

Notwithstanding the straightforward language of the foreign country exception, the Ninth Circuit allowed the action to proceed under what has come to be known as the "headquarters doctrine." Some Courts of Appeals, reasoning that "[t]he entire scheme of the FTCA focuses on the place where the negligent or wrongful act or omission of the government employee occurred," *Sami* v. *United States*, 617 F. 2d 755, 761 (CADC 1979), have concluded that the foreign country exception does not exempt the United States from suit "for acts or omissions occurring here which have their operative effect in another country," *id.*, at 762 (refusing to apply § 2680(k) where a communique sent from the United States by a federal law enforcement officer resulted in plaintiff's wrongful detention in Germany).[2] Headquarters claims "typically involve allegations of negligent guidance in an office within the United States of employees who cause damage while in a foreign country, or of activities which take place within a foreign country." *Cominotto* v. *United States*, 802 F. 2d 1127, 1130 (CA9 1986). In such instances, these courts have concluded that § 2680(k) does not bar suit.

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ment set in motion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process." *Id.*, at 637.

[2] See also *Couzado* v. *United States*, 105 F. 3d 1389, 1395 (CA11 1997) ("'[A] claim is not barred by section 2680(k) where the tortious conduct occurs in the United States, but the injury is sustained in a foreign country'" (quoting *Donahue* v. *United States Dept. of Justice*, 751 F. Supp. 45, 48 (SDNY 1990))); *Martinez* v. *Lamagno*, No. 93–1573, 1994 WL 159771, *2, judgt. order reported at 23 F. 3d 402 (CA4 1994) *(per curiam)* (unpublished opinion) ("A headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country"), rev'd on other grounds, 515 U. S. 417 (1995); *Leaf* v. *United States*, 588 F. 2d 733, 736 (CA9 1978) ("A claim 'arises', as that term is used in . . . 2680(k), where the acts or omissions that proximately cause the loss take place"); cf. *Eaglin* v. *United States, Dept. of Army*, 794 F. 2d 981, 983 (CA5 1986) (assuming, *arguendo*, that headquarters doctrine is valid).

The reasoning of the Ninth Circuit here was that, since Alvarez's abduction in Mexico was the direct result of wrongful acts of planning and direction by DEA agents located in California, "Alvarez's abduction fits the headquarters doctrine like a glove." 331 F. 3d, at 638.

> "Working out of DEA offices in Los Angeles, [DEA agents] made the decision to kidnap Alvarez and . . . gave [their Mexican intermediary] precise instructions on whom to recruit, how to seize Alvarez, and how he should be treated during the trip to the United States. DEA officials in Washington, D. C., approved the details of the operation. After Alvarez was abducted according to plan, DEA agents supervised his transportation into the United States, telling the arrest team where to land the plane and obtaining clearance in El Paso for landing. The United States, and California in particular, served as command central for the operation carried out in Mexico." *Id.*, at 638–639.

Thus, the Ninth Circuit held that Alvarez's claim did not "aris[e] in" a foreign country.

The potential effect of this sort of headquarters analysis flashes the yellow caution light. "[I]t will virtually always be possible to assert that the negligent activity that injured the plaintiff [abroad] was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States." *Beattie* v. *United States*, 756 F. 2d 91, 119 (CADC 1984) (Scalia, J., dissenting). Legal malpractice claims, *Knisley* v. *United States*, 817 F. Supp. 680, 691–693 (SD Ohio 1993), allegations of negligent medical care, *Newborn* v. *United States*, 238 F. Supp. 2d 145, 148–149 (DC 2002), and even slip-and-fall cases, *Eaglin* v. *United States, Dept. of Army*, 794 F. 2d 981, 983–984 (CA5 1986), can all be repackaged as headquarters claims based on a failure to train, a failure to warn, the offering of bad advice, or the adoption of a negligent policy. If

we were to approve the headquarters exception to the foreign country exception, the "'headquarters claim' [would] become a standard part of FTCA litigation" in cases potentially implicating the foreign country exception. *Beattie*, *supra*, at 119 (Scalia, J., dissenting). The headquarters doctrine threatens to swallow the foreign country exception whole, certainly at the pleadings stage.

The need for skepticism is borne out by two considerations. One of them is pertinent to cases like this one, where harm was arguably caused both by individual action in a foreign country as well as by planning in the United States; the other is suggested simply because the harm occurred on foreign soil.

B

Although not every headquarters case is rested on an explicit analysis of proximate causation, this notion of cause is necessary to connect the domestic breach of duty (at headquarters) with the action in the foreign country (in a case like this) producing the foreign harm or injury. It is necessary, in other words, to conclude that the act or omission at home headquarters was sufficiently close to the ultimate injury, and sufficiently important in producing it, to make it reasonable to follow liability back to the headquarters behavior. Only in this way could the behavior at headquarters properly be seen as the act or omission on which all FTCA liability must rest under § 2675. See, *e. g.*, *Cominotto*, *supra*, at 1130 ("[A] headquarters claim exists where negligent acts in the United States proximately cause harm in a foreign country"); *Eaglin*, *supra*, at 983 (noting that headquarters cases require "a plausible proximate nexus or connection between acts or omissions in the United States and the resulting damage or injury in a foreign country").

Recognizing this connection of proximate cause between domestic behavior and foreign harm or injury is not, however, sufficient of itself to bar application of the foreign country exception to a claim resting on that same foreign conse-

quence. Proximate cause is causation substantial enough and close enough to the harm to be recognized by law, but a given proximate cause need not be, and frequently is not, the exclusive proximate cause of harm. See, *e. g.*, 57A Am. Jur. 2d § 529 (2004) (discussing proper jury instructions in cases involving multiple proximate causes); *Beattie*, *supra*, at 121 (Scalia, J., dissenting) ("[I]n the ordinary case there may be *several* points along the chain of causality" pertinent to the enquiry). Here, for example, assuming that the direction by DEA officials in California was a proximate cause of the abduction, the actions of Sosa and others in Mexico were just as surely proximate causes, as well. Thus, understanding that California planning was a legal cause of the harm in no way eliminates the conclusion that the claim here arose from harm proximately caused by acts in Mexico. At most, recognition of additional domestic causation under the headquarters doctrine leaves an open question whether the exception applies to the claim.

C

Not only does domestic proximate causation under the headquarters doctrine fail to eliminate application of the foreign country exception, but there is good reason to think that Congress understood a claim "arising in" a foreign country in such a way as to bar application of the headquarters doctrine. There is good reason, that is, to conclude that Congress understood a claim "arising in a foreign country" to be a claim for injury or harm occurring in a foreign country. 28 U. S. C. § 2680(k). This sense of "arising in" was the common usage in state borrowing statutes contemporary with the Act, which operated to determine which State's statute of limitations should apply in cases involving transjurisdictional facts. When the FTCA was passed, the general rule, as set out in various state statutes, was that "a cause of action arising in another jurisdiction, which is barred by the laws of that jurisdiction, will [also] be barred in the domestic courts." 41 A. L. R. 4th 1025, 1029, § 2 (1985). These bor-

rowing statutes were typically restricted by express terms to situations where a cause of action was time barred in the State *"where [the] cause of action arose, or accrued, or originated."* 75 A. L. R. 203, 211 (1931) (emphasis in original). Critically for present purposes, these variations on the theme of "arising in" were interpreted in tort cases in just the same way that we read the FTCA today. A commentator noted in 1962 that, for the purposes of these borrowing statutes, "[t]he courts unanimously hold that a cause of action sounding in tort arises in the jurisdiction where the last act necessary to establish liability occurred"; *i. e.*, "the jurisdiction in which injury was received." Ester, Borrowing Statutes of Limitation and Conflict of Laws, 15 U. Fla. L. Rev. 33, 47.

There is, moreover, specific reason to believe that using "arising in" as referring to place of harm was central to the object of the foreign country exception. Any tort action in a court of the United States based on the acts of a Government employee causing harm outside the State of the district court in which the action is filed requires a determination of the source of the substantive law that will govern liability. When the FTCA was passed, the dominant principle in choice-of-law analysis for tort cases was *lex loci delicti:* courts generally applied the law of the place where the injury occurred. See *Richards* v. *United States*, 369 U. S., at 11–12 ("The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties" (footnote omitted)); see also Restatement (First) of Conflict of Laws § 379 (1934) (defendant's liability determined by "the law of the place of wrong");[3] *id.*, § 377, Note 1 (place of wrong for

[3] See also Restatement (Second) of Conflict of Laws 412 (1969) (hereinafter Restatement 2d) ("The original Restatement stated that, with minor exceptions, all substantive questions relating to the existence of a tort claim are governed by the local law of the 'place of wrong.' This was described . . . as 'the state where the last event necessary to make an

torts involving bodily harm is "*the place where the harmful force takes effect upon the body*" (emphasis in original)); *ibid.* (same principle for torts of fraud and torts involving harm to property).[4] For a plaintiff injured in a foreign country, then, the presumptive choice in American courts under the traditional rule would have been to apply foreign law to determine the tortfeasor's liability. See, *e. g.*, *Day & Zimmermann, Inc.* v. *Challoner*, 423 U. S. 3 (1975) *(per curiam)* (noting that Texas would apply Cambodian law to wrongful-death action involving explosion in Cambodia of an artillery round manufactured in United States); *Thomas* v. *FMC Corp.*, 610 F. Supp. 912 (MD Ala. 1985) (applying German law to determine American manufacturer's liability for negligently designing and manufacturing a Howitzer that killed decedent in Germany); *Quandt* v. *Beech Aircraft Corp.*, 317 F. Supp. 1009 (Del. 1970) (noting that Italian law applies to allegations of negligent manufacture in Kansas that resulted in an airplane crash in Italy); *Manos* v. *Trans World Airlines*, 295 F. Supp. 1170 (ND Ill. 1969) (applying Italian law to determine American corporation's liability for negligent manufacture of a plane that crashed in Italy); see also, *e. g.*, *Dallas* v. *Whitney*, 118 W. Va. 106, 188 S. E. 766 (1936) (Ohio law applied where blasting operations on a West Virginia highway caused property damage in Ohio); *Cam-*

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actor liable for an alleged tort takes place.' Since a tort is the product of wrongful conduct and of resulting injury and since the injury follows the conduct, the state of the 'last event' is the state where the injury occurred").

[4] The FTCA was passed with precisely these kinds of garden-variety torts in mind. See S. Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946) ("With the expansion of governmental activities in recent years, it becomes especially important to grant to private individuals the right to sue the Government in respect to such torts as negligence in the operation of vehicles"); see generally *Feres* v. *United States*, 340 U. S. 135, 139–140 (1950) (Congress was principally concerned with making the Government liable for ordinary torts that "would have been actionable if inflicted by an individual or a corporation").

eron v. *Vandegriff*, 53 Ark. 381, 13 S. W. 1092 (1890) (Arkansas law applied where a blasting of a rock in Indian territory inflicted injury on plaintiff in Arkansas).

The application of foreign substantive law exemplified in these cases was, however, what Congress intended to avoid by the foreign country exception. In 1942, the House Committee on the Judiciary considered an early draft of the FTCA that would have exempted all claims "arising in a foreign country in behalf of an alien." H. R. 5373, 77th Cong., 2d Sess., § 303(12). The bill was then revised, at the suggestion of the Attorney General, to omit the last five words. In explaining the amendment to the House Committee on the Judiciary, Assistant Attorney General Shea said that

> "[c]laims arising in a foreign country have been exempted from this bill, H. R. 6463, whether or not the claimant is an alien. Since liability is to be determined by the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country. This seems desirable because the law of the particular State is being applied. Otherwise, it will lead I think to a good deal of difficulty." Hearings on H. R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942).

The amended version, which was enacted into law and constitutes the current text of the foreign country exception, 28 U. S. C. § 2680(k), thus codified Congress's "unwilling[ness] to subject the United States to liabilities depending upon the laws of a foreign power." *United States* v. *Spelar*, 338 U. S. 217, 221 (1949). See also *Sami* v. *United States*, 617 F. 2d, at 762 (noting *Spelar*'s explanation but attempting to recast the object behind the foreign country exception); *Leaf* v. *United States*, 588 F. 2d 733, 736, n. 3 (CA9 1978).

The object being to avoid application of substantive foreign law, Congress evidently used the modifier "arising in a foreign country" to refer to claims based on foreign harm or

injury, the fact that would trigger application of foreign law to determine liability. That object, addressed by the quoted phrase, would obviously have been thwarted, however, by applying the headquarters doctrine, for that doctrine would have displaced the exception by recasting claims of foreign injury as claims not arising in a foreign country because some planning or negligence at domestic headquarters was their cause.[5] And that, in turn, would have resulted in applying foreign law of the place of injury, in accordance with the choice-of-law rule of the headquarters jurisdiction.

Nor, as a practical matter, can it be said that the headquarters doctrine has outgrown its tension with the exception. It is true that the traditional approach to choice of substantive tort law has lost favor, Simson, The Choice-of-Law Revolution in the United States: Notes on Rereading Von Mehren, 36 Cornell Int'l L. J. 125 (2002) ("The traditional methodology of place of wrong . . . has receded in importance, and new approaches and concepts such as governmental interest analysis, most significant relationship, and better rule of law have taken over center stage" (footnotes omitted)).[6]

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[5] The application of foreign law might nonetheless have been avoided in headquarters cases if courts had been instructed to apply the substantive tort law of the State where the federal act or omission occurred, regardless of where the ultimate harm transpired. But in *Richards* v. *United States*, 369 U. S. 1 (1962), we held that the Act requires "the whole law (including choice-of-law rules) . . . of the State where the [allegedly tortious federal] act or omission occurred," *id.*, at 3, 11. Given the dominant American choice-of-law approach at the time the Act was passed, that would have resulted in the application of foreign law in virtually any case where the plaintiff suffered injury overseas.

[6] See also Rydstrom, Modern Status of Rule that Substantive Rights of Parties to a Tort Action are Governed by the Law of the Place of the Wrong, 29 A. L. R. 3d 603, 608, § 2[a] (1970) ("[M]any courts [are] now abandoning the orthodox rule that the substantive rights of the parties are governed by the law of the place of the wrong" (footnotes omitted)). We express no opinion on the relative merits of the various approaches to choice questions; our discussion of the subject is intended only to indi-

But a good many States still employ essentially the same choice-of-law analysis in tort cases that the First Restatement exemplified. Symeonides, Choice of Law in the American Courts, 51 Am. J. Comp. L. 1, 4–5 (2003) ("Ten states continue to adhere to the traditional method in tort conflicts"); see, *e. g.*, *Raskin* v. *Allison*, 30 Kan. App. 2d 1240, 1242, 1241, 57 P. 3d 30, 32 (2002) (under "traditional choice of law principles largely reflected in the original Restatement," Mexican law applied to boating accident in Mexican waters because "the injuries were sustained in Mexican waters").

Equally to the point is that in at least some cases that the Court of Appeals's approach would treat as arising at headquarters, not the foreign country, even the later methodologies of choice point to the application of foreign law. The Second Restatement itself, encouraging the general shift toward using flexible balancing analysis to inform choice of law,[7] includes a default rule for tort cases rooted in the traditional approach: "[i]n an action for a personal injury, the local law of the state where the injury occurred determines the rights and liabilities of the parties, unless . . . some other state has a more significant relationship . . . to the occurrence and the parties." Restatement 2d § 146; see also *id.*, Comment *e* ("On occasion, conduct and personal injury will occur in different states. In such instances, the local law of the state of injury will usually be applied to determine most issues involving the tort"). In practice, then, the new dispensation frequently leads to the traditional application of the

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cate how, as a positive matter, transjurisdictional cases are likely to be treated today.

[7] Under the Second Restatement, tort liability is determined "by the local law of the state which . . . has the most significant relationship to the occurrence and the parties," taking into account "the place where the injury occurred," "the place where the conduct causing the injury occurred," "the domicil, residence, nationality, place of incorporation and place of business of the parties," and "the place where the relationship, if any, between the parties is centered." Restatement 2d § 145.

law of the jurisdiction of injury. See, *e. g.*, *Dorman* v. *Emerson Elec. Co.*, 23 F. 3d 1354 (CA8 1994) (applying Canadian law where negligent saw design in Missouri caused injury in Canada); *Bing* v. *Halstead*, 495 F. Supp. 517 (SDNY 1980) (applying Costa Rican law where letter written and mailed in Arizona caused mental distress in Costa Rica); *McKinnon* v. *F. H. Morgan & Co.*, 170 Vt. 422, 750 A. 2d 1026 (2000) (applying Canadian law where a defective bicycle sold in Vermont caused injuries in Quebec).

In sum, current flexibility in choice-of-law methodology gives no assurance against applying foreign substantive law if federal courts follow headquarters doctrine to assume jurisdiction over tort claims against the Government for foreign harm. Based on the experience just noted, the expectation is that application of the headquarters doctrine would in fact result in a substantial number of cases applying the very foreign law the foreign country exception was meant to avoid.[8]

Before concluding that headquarters analysis should have no part in applying the foreign country exception, however,

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[8] The courts that have applied the headquarters doctrine, believing it to be intimated by our emphasis, in *Richards* v. *United States*, *supra*, on the place of the occurrence of the negligent act, have acknowledged the possibility that foreign law may govern FTCA claims as a function of *Richards*'s further holding that the whole law of the pertinent State (including its choice-of-law provisions) is to be applied. See, *e. g.*, *Leaf*, 588 F. 2d, at 736, n. 3. Some courts have attempted to defuse the resulting tension with the object behind the foreign country exception. See, *e. g.*, *Sami* v. *United States*, 617 F. 2d 755, 763 (CADC 1979) (believing that norm against application of foreign law when contrary to forum policy is sufficient to overcome possible conflict). We think that these attempts to resolve the tension give short shrift to the clear congressional mandate embodied by the foreign country exception. Cf. Shapiro, Choice of Law Under the Federal Tort Claims Act: *Richards* and Renvoi Revisited, 70 N. C. L. Rev. 641, 659–660 (1992) (noting that the *Richards* rule that the totality of a State's law is to be consulted may undermine the object behind the foreign country exception).

a word is needed to answer an argument for selective application of headquarters doctrine, that it ought to be permitted when a State's choice-of-law approach would not apply the foreign law of place of injury. See *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1254 (EDNY 1984) (noting that the purpose of the exception did not apply to the litigation at hand because foreign law was not implicated). The point would be well taken, of course, if Congress had written the exception to apply when foreign law would be applied. But that is not what Congress said. Its provision of an exception when a claim arises in a foreign country was written at a time when the phrase "arising in" was used in state statutes to express the position that a claim arises where the harm occurs; and the odds are that Congress meant simply this when it used the "arising in" language.[9] Finally, even if it were not a stretch to equate "arising in a foreign country" with "implicating foreign law," the result of accepting headquarters analysis for foreign injury cases in which no application of foreign law would ensue would be a scheme of federal jurisdiction that would vary from State to State, benefiting or penalizing plaintiffs accordingly. The idea that Congress would have intended any

[9] It is difficult to reconcile the Government's contrary reading with the fact that two of the Act's other exceptions specifically reference an "act or omission." See 28 U. S. C. § 2680(a) (exempting United States from liability for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation"); § 2680(e) ("Any claim arising out of an act or omission of any employee of the Government in administering [certain portions of the Trading with the Enemy Act of 1917]"). The Government's request that we read that phrase into the foreign country exception, when it is clear that Congress knew how to specify "act or omission" when it wanted to, runs afoul of the usual rule that "when the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended." 2A N. Singer, Statutes and Statutory Construction § 46:06, p. 194 (6th rev. ed. 2000).

such jurisdictional variety is too implausible to drive the analysis to the point of grafting even a selective headquarters exception onto the foreign country exception itself. We therefore hold that the FTCA's foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.

III

Alvarez has also brought an action under the ATS against petitioner Sosa, who argues (as does the United States supporting him) that there is no relief under the ATS because the statute does no more than vest federal courts with jurisdiction, neither creating nor authorizing the courts to recognize any particular right of action without further congressional action. Although we agree the statute is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law. We do not believe, however, that the limited, implicit sanction to entertain the handful of international law *cum* common law claims understood in 1789 should be taken as authority to recognize the right of action asserted by Alvarez here.

A

Judge Friendly called the ATS a "legal Lohengrin," *IIT* v. *Vencap, Ltd.*, 519 F. 2d 1001, 1015 (CA2 1975); "no one seems to know whence it came," *ibid.*, and for over 170 years after its enactment it provided jurisdiction in only one case. The first Congress passed it as part of the Judiciary Act of 1789, in providing that the new federal district courts "shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the

law of nations or a treaty of the United States." Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 77.[10]

The parties and *amici* here advance radically different historical interpretations of this terse provision. Alvarez says that the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law. We think that reading is implausible. As enacted in 1789, the ATS gave the district courts "cognizance" of certain causes of action, and the term bespoke a grant of jurisdiction, not power to mold substantive law. See, *e. g.*, The Federalist No. 81, pp. 447, 451 (J. Cooke ed. 1961) (A. Hamilton) (using "jurisdiction" interchangeably with "cognizance"). The fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is itself support for its strictly jurisdictional nature. Nor would the distinction between jurisdiction and cause of action have been elided by the drafters of the Act or those who voted on it. As Fisher Ames put it, "there is a substantial difference between the jurisdiction of the courts and the rules of decision." 1 Annals of Cong. 807 (Gales ed. 1834). It is unsurprising, then, that an authority on the historical origins of the ATS has written that "section 1350 clearly does not create a statutory cause of action," and that the contrary suggestion is "simply frivolous." Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 479, 480 (1986) (hereinafter Casto, Law of Nations); cf. Dodge, The Constitutionality of the Alien Tort Statute: Some Observations on Text and Context, 42 Va. J. Int'l L. 687, 689 (2002).

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[10] The statute has been slightly modified on a number of occasions since its original enactment. It now reads in its entirety: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U. S. C. § 1350.

In sum, we think the statute was intended as jurisdictional in the sense of addressing the power of the courts to entertain cases concerned with a certain subject.

But holding the ATS jurisdictional raises a new question, this one about the interaction between the ATS at the time of its enactment and the ambient law of the era. Sosa would have it that the ATS was stillborn because there could be no claim for relief without a further statute expressly authorizing adoption of causes of action. *Amici* professors of federal jurisdiction and legal history take a different tack, that federal courts could entertain claims once the jurisdictional grant was on the books, because torts in violation of the law of nations would have been recognized within the common law of the time. Brief for Vikram Amar et al. as *Amici Curiae.* We think history and practice give the edge to this latter position.

1

"When the *United States* declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement." *Ware* v. *Hylton,* 3 Dall. 199, 281 (1796) (Wilson, J.). In the years of the early Republic, this law of nations comprised two principal elements, the first covering the general norms governing the behavior of national states with each other: "*the science which teaches the rights subsisting between nations or states, and the obligations correspondent to those rights,*" E. de Vattel, Law of Nations, Preliminaries §3 (J. Chitty et al. transl. and ed. 1883) (hereinafter Vattel) (footnote omitted), or "that code of public instruction which defines the rights and prescribes the duties of nations, in their intercourse with each other," 1 J. Kent, Commentaries on American Law *1. This aspect of the law of nations thus occupied the executive and legislative domains, not the judicial. See 4 W. Blackstone, Commentaries on the Laws of England 68 (1769) (hereinafter Commentaries) ("[O]ffences against" the law of nations are "principally incident to whole states or nations").

The law of nations included a second, more pedestrian element, however, that did fall within the judicial sphere, as a body of judge-made law regulating the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor. To Blackstone, the law of nations in this sense was implicated "in mercantile questions, such as bills of exchange and the like; in all marine causes, relating to freight, average, demurrage, insurances, bottomry . . . ; [and] in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills." *Id.*, at 67. The law merchant emerged from the customary practices of international traders and admiralty required its own transnational regulation. And it was the law of nations in this sense that our precursors spoke about when the Court explained the status of coast fishing vessels in wartime grew from "ancient usage among civilized nations, beginning centuries ago, and gradually ripening into a rule of international law . . . ." *The Paquete Habana*, 175 U. S. 677, 686 (1900).

There was, finally, a sphere in which these rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships. Blackstone referred to it when he mentioned three specific offenses against the law of nations addressed by the criminal law of England: violation of safe conducts, infringement of the rights of ambassadors, and piracy. 4 Commentaries 68. An assault against an ambassador, for example, impinged upon the sovereignty of the foreign nation and if not adequately redressed could rise to an issue of war. See Vattel 463–464. It was this narrow set of violations of the law of nations, admitting of a judicial remedy and at the same time threatening serious consequences in international affairs, that was probably on minds of the men who drafted the ATS with its reference to tort.

2

Before there was any ATS, a distinctly American preoccupation with these hybrid international norms had taken

shape owing to the distribution of political power from independence through the period of confederation. The Continental Congress was hamstrung by its inability to "cause infractions of treaties, or of the law of nations to be punished," J. Madison, Journal of the Constitutional Convention 60 (E. Scott ed. 1893), and in 1781 the Congress implored the States to vindicate rights under the law of nations. In words that echo Blackstone, the congressional resolution called upon state legislatures to "provide expeditious, exemplary and adequate punishment" for "the violation of safe conducts or passports, . . . of hostility against such as are in amity . . . with the United States, . . . infractions of the immunities of ambassadors and other public ministers . . . [and] infractions of treaties and conventions to which the United States are a party." 21 Journals of the Continental Congress 1136–1137 (G. Hunt ed. 1912) (hereinafter Journals of the Continental Congress). The resolution recommended that the States "authorise suits . . . for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen." *Id.*, at 1137; cf. Vattel 463–464 ("Whoever offends . . . a public minister . . . should be punished . . . , and . . . the state should, at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister"). Apparently only one State acted upon the recommendation, see Public Records of the State of Connecticut, 1782, pp. 82, 83 (L. Larabee ed. 1982) (1942 compilation, exact date of Act unknown), but Congress had done what it could to signal a commitment to enforce the law of nations.

Appreciation of the Continental Congress's incapacity to deal with this class of cases was intensified by the so-called Marbois incident of May 1784, in which a French adventurer, De Longchamps, verbally and physically assaulted the Secretary of the French Legion in Philadelphia. See *Respublica*

v. *De Longchamps*, 1 Dall. 111 (O. T. Phila. 1784).[11] Congress called again for state legislation addressing such matters, and concern over the inadequate vindication of the law of nations persisted through the time of the Constitutional Convention. See 1 Records of the Federal Convention of 1787, p. 25 (M. Farrand ed. 1911) (speech of J. Randolph). During the Convention itself, in fact, a New York City constable produced a reprise of the Marbois affair and Secretary Jay reported to Congress on the Dutch Ambassador's protest, with the explanation that "'the federal government does not appear . . . to be vested with any judicial Powers competent to the Cognizance and Judgment of such Cases.'" Casto, Law of Nations 494, and n. 152.

The Framers responded by vesting the Supreme Court with original jurisdiction over "all Cases affecting Ambassadors, other public ministers and Consuls." U. S. Const., Art. III, § 2, and the First Congress followed through. The Judiciary Act reinforced this Court's original jurisdiction over suits brought by diplomats, see 1 Stat. 80, ch. 20, § 13, created alienage jurisdiction, § 11, and, of course, included the ATS, § 9. See generally Randall, Federal Jurisdiction over International Law Claims: Inquiries into the Alien Tort Statute, 18 N. Y. U. J. Int'l L. & Pol. 1, 15–21 (1985) (herein-

[11] The French minister plenipotentiary lodged a formal protest with the Continental Congress, 27 Journals of the Continental Congress 478, and threatened to leave Pennsylvania "unless the decision on Longchamps Case should give them full satisfaction." Letter from Samuel Hardy to Gov. Benjamin Harrison of Virginia, June 24, 1784, in 7 Letters of Members of the Continental Congress 558, 559 (E. Burnett ed. 1934). De Longchamps was prosecuted for a criminal violation of the law of nations in state court.

The Congress could only pass resolutions, one approving the state-court proceedings, 27 Journals of the Continental Congress 503, another directing the Secretary of Foreign Affairs to apologize and to "explain to Mr. De Marbois the difficulties that may arise . . . from the nature of a federal union," 28 *id.*, at 314, and to explain to the representative of Louis XVI that "many allowances are to be made for" the young Nation, *ibid.*

after Randall) (discussing foreign affairs implications of the Judiciary Act); W. Casto, The Supreme Court in the Early Republic 27–53 (1995).

3

Although Congress modified the draft of what became the Judiciary Act, see generally Warren, New Light on the History of the Federal Judiciary Act of 1789, 37 Harv. L. Rev. 49 (1923), it made hardly any changes to the provisions on aliens, including what became the ATS, see Casto, Law of Nations 498. There is no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; there is no record even of debate on the section. Given the poverty of drafting history, modern commentators have necessarily concentrated on the text, remarking on the innovative use of the word "tort," see, *e. g.*, Sweeney, A Tort only in Violation of the Law of Nations, 18 Hastings Int'l & Comp. L. Rev. 445 (1995) (arguing that "tort" refers to the law of prize), and the statute's mixture of terms expansive ("all suits"), see, *e. g.*, Casto, Law of Nations 500, and restrictive ("for a tort only"), see, *e. g.*, Randall 28–31 (limiting suits to torts, as opposed to commercial actions, especially by British plaintiffs).[12] The historical scholarship has also placed the ATS within the competition between federalist and antifederalist forces over the national role in foreign relations. *Id.*, at 22–23 (nonexclusiveness of federal jurisdiction under the ATS may reflect compromise). But despite considerable scholarly attention, it is fair to say

[12] The restriction may have served the different purpose of putting foreigners on notice that they would no longer be able to prosecute their own criminal cases in federal court. Compare, *e. g.*, 3 Commentaries 160 (victims could start prosecutions) with the Judiciary Act § 35 (creating the office of the district attorney). Cf. 1 Op. Atty. Gen. 41, 42 (1794) (British consul could not himself initiate criminal prosecution, but could provide evidence to the grand jury).

that a consensus understanding of what Congress intended has proven elusive.

Still, the history does tend to support two propositions. First, there is every reason to suppose that the First Congress did not pass the ATS as a jurisdictional convenience to be placed on the shelf for use by a future Congress or state legislature that might, someday, authorize the creation of causes of action or itself decide to make some element of the law of nations actionable for the benefit of foreigners. The anxieties of the preconstitutional period cannot be ignored easily enough to think that the statute was not meant to have a practical effect. Consider that the principal draftsman of the ATS was apparently Oliver Ellsworth,[13] previously a member of the Continental Congress that had passed the 1781 resolution and a member of the Connecticut Legislature that made good on that congressional request. See generally W. Brown, The Life of Oliver Ellsworth (1905). Consider, too, that the First Congress was attentive enough to the law of nations to recognize certain offenses expressly as criminal, including the three mentioned by Blackstone. See An Act for the Punishment of Certain Crimes Against the United States, § 8, 1 Stat. 113–114 (murder or robbery, or other capital crimes, punishable as piracy if committed on the high seas), and § 28, *id.*, at 118 (violation of safe conducts and assaults against ambassadors punished by imprisonment and fines described as "infract[ions of] the law of nations"). It would have been passing strange for Ellsworth and this very Congress to vest federal courts expressly with jurisdiction to entertain civil causes brought by aliens alleging violations of the law of nations, but to no effect whatever until the Congress should take further action. There is too much in the historical record to believe that Congress would have enacted the ATS only to leave it lying fallow indefinitely.

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[13] The ATS appears in Ellsworth's handwriting in the original version of the bill in the National Archives. Casto, Law of Nations 498, n. 169.

The second inference to be drawn from the history is that Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions alleging violations of the law of nations. Uppermost in the legislative mind appears to have been offenses against ambassadors, see *id.*, at 118; violations of safe conduct were probably understood to be actionable, *ibid.*, and individual actions arising out of prize captures and piracy may well have also been contemplated, *id.*, at 113–114. But the common law appears to have understood only those three of the hybrid variety as definite and actionable, or at any rate, to have assumed only a very limited set of claims. As Blackstone had put it, "offences against this law [of nations] are principally incident to whole states or nations," and not individuals seeking relief in court. 4 Commentaries 68.

4

The sparse contemporaneous cases and legal materials referring to the ATS tend to confirm both inferences, that some, but few, torts in violation of the law of nations were understood to be within the common law. In *Bolchos* v. *Darrel*, 3 F. Cas. 810 (No. 1,607) (SC 1795), the District Court's doubt about admiralty jurisdiction over a suit for damages brought by a French privateer against the mortgagee of a British slave ship was assuaged by assuming that the ATS was a jurisdictional basis for the court's action. Nor is *Moxon* v. *The Fanny*, 17 F. Cas. 942 (No. 9,895) (Pa. 1793), to the contrary, a case in which the owners of a British ship sought damages for its seizure in United States waters by a French privateer. The District Court said in dictum that the ATS was not the proper vehicle for suit because "[i]t cannot be called a suit for a tort only, when the property, as well as damages for the supposed trespass, are sought for." *Id.*, at 948. But the judge gave no intimation that further legislation would have been needed to give the District Court jurisdiction over a suit limited to damages.

Then there was the 1795 opinion of Attorney General William Bradford, who was asked whether criminal prosecution was available against Americans who had taken part in the French plunder of a British slave colony in Sierra Leone. 1 Op. Atty. Gen. 57. Bradford was uncertain, but he made it clear that a federal court was open for the prosecution of a tort action growing out of the episode:

> "But there can be no doubt that the company or individuals who have been injured by these acts of hostility have a remedy by a *civil* suit in the courts of the United States; jurisdiction being expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations, or a treaty of the United States . . . ." *Id.*, at 59.

Although it is conceivable that Bradford (who had prosecuted in the Marbois incident, see Casto, Law of Nations 503, n. 201) assumed that there had been a violation of a treaty, 1 Op. Atty. Gen., at 58, that is certainly not obvious, and it appears likely that Bradford understood the ATS to provide jurisdiction over what must have amounted to common law causes of action.

B

Against these indications that the ATS was meant to underwrite litigation of a narrow set of common law actions derived from the law of nations, Sosa raises two main objections. First, he claims that this conclusion makes no sense in view of the Continental Congress's 1781 recommendation to state legislatures to pass laws authorizing such suits. Sosa thinks state legislation would have been "absurd," Reply Brief for Petitioner Sosa 5, if common law remedies had been available. Second, Sosa juxtaposes Blackstone's treatise mentioning violations of the law of nations as occasions for criminal remedies, against the statute's innovative reference to "tort," as evidence that there was no familiar

set of legal actions for exercise of jurisdiction under the ATS. Neither argument is convincing.

The notion that it would have been absurd for the Continental Congress to recommend that States pass positive law to duplicate remedies already available at common law rests on a misunderstanding of the relationship between common law and positive law in the late 18th century, when positive law was frequently relied upon to reinforce and give standard expression to the "brooding omnipresence"[14] of the common law then thought discoverable by reason. As Blackstone clarified the relation between positive law and the law of nations, "those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of [its] decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world." 4 Commentaries 67. Indeed, Sosa's argument is undermined by the 1781 resolution on which he principally relies. Notwithstanding the undisputed fact (per Blackstone) that the common law afforded criminal law remedies for violations of the law of nations, the Continental Congress encouraged state legislatures to pass criminal statutes to the same effect, and the first Congress did the same, *supra*, at 719.[15]

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[14] See *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 222 (1917) (Holmes, J., dissenting).

[15] Being consistent with the prevailing understanding of international law, the 1781 resolution is sensibly understood as an act of international politics, for the recommendation was part of a program to assure the world that the new Republic would observe the law of nations. On the same day it made its recommendation to state legislatures, the Continental Congress received a confidential report, detailing negotiations between American representatives and Versailles. 21 Journals of the Continental Congress 1137–1140. The King was concerned about the British capture of the ship *Marquis de la Fayette* on its way to Boston, *id.*, at 1139, and he "expresse[d] a desire that the plan for the appointment of consuls should

Nor are we convinced by Sosa's argument that legislation conferring a right of action is needed because Blackstone treated international law offenses under the rubric of "public wrongs," whereas the ATS uses a word, "tort," that was relatively uncommon in the legal vernacular of the day. It is true that Blackstone did refer to what he deemed the three principal offenses against the law of nations in the course of discussing criminal sanctions, observing that it was in the interest of sovereigns "to animadvert upon them with a becoming severity, that the peace of the world may be maintained," 4 Commentaries 68.[16] But Vattel explicitly linked

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be digested and adopted, as the Court of France wished to make it the basis of some commercial arrangements between France and the United States," *id.*, at 1140. The congressional resolution would not have been all that Louis XVI wished for, but it was calculated to assure foreign powers that Congress at least intended their concerns to be addressed in the way they would have chosen. As a French legal treatise well known to early American lawyers, see Helmholz, Use of the Civil Law in Post-Revolutionary American Jurisprudence, 66 Tulane L. Rev. 1649 (1992), put it, "the laws ought to be written, to the end that the writing may fix the sense of the law, and determine the mind to conceive a just idea of that which is established by the law, and that it not [be] left free for every one to frame the law as he himself is pleased to understand it . . . ." 1 J. Domat, The Civil Law in its Natural Order 108 (W. Strahan transl. and L. Cushing ed. 1861). A congressional statement that common law was up to the task at hand might well have fallen short of impressing a continental readership.

[16] Petitioner says animadversion is "an archaic reference to the imposition of *punishment*." Reply Brief for Petitioner Sosa 4 (emphasis in original). That claim is somewhat exaggerated, however. To animadvert carried the broader implication of "turn[ing] the attention officially or judicially, tak[ing] legal cognizance of anything deserving of chastisement or censure; *hence*, to proceed by way of punishment or censure." 1 Oxford English Dictionary 474 (2d ed. 1989). Blackstone in fact used the term in the context of property rights and damages. Of a man who is disturbed in his enjoyment of "qualified property" "the law will animadvert hereon as an injury." 2 Commentaries 395. See also 9 Papers of James Madison 349 (R. Rutland ed. 1975) ("As yet foreign powers have not been rigorous in animadverting on us" for violations of the law of nations).

the criminal sanction for offenses against ambassadors with the requirement that the state, "at the expense of the delinquent, give full satisfaction to the sovereign who has been offended in the person of his minister." Vattel 463–464. Cf. Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DePaul L. Rev. 433, 444 (2002) (observing that a "mixed approach to international law violations, encompassing both criminal prosecution . . . and compensation to those injured through a civil suit, would have been familiar to the founding generation"). The 1781 resolution goes a step further in showing that a private remedy was thought necessary for diplomatic offenses under the law of nations. And the Attorney General's Letter of 1795, as well as the two early federal precedents discussing the ATS, point to a prevalent assumption that Congress did not intend the ATS to sit on the shelf until some future time when it might enact further legislation.

In sum, although the ATS is a jurisdictional statute creating no new causes of action, the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law. The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.

IV

We think it is correct, then, to assume that the First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations, though we have found no basis to suspect Congress had any examples in mind beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy. We assume, too, that no development in the two centuries from the enactment of § 1350 to the birth of the

modern line of cases beginning with *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (CA2 1980), has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law; Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute. Still, there are good reasons for a restrained conception of the discretion a federal court should exercise in considering a new cause of action of this kind. Accordingly, we think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized. This requirement is fatal to Alvarez's claim.

A

A series of reasons argue for judicial caution when considering the kinds of individual claims that might implement the jurisdiction conferred by the early statute. First, the prevailing conception of the common law has changed since 1789 in a way that counsels restraint in judicially applying internationally generated norms. When § 1350 was enacted, the accepted conception was of the common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 533 (1928) (Holmes, J., dissenting). Now, however, in most cases where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created. Holmes explained famously in 1881 that

> "in substance the growth of the law is legislative . . . [because t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life.

> I mean, of course, considerations of what is expedient for the community concerned." The Common Law 31–32 (Howe ed. 1963).

One need not accept the Holmesian view as far as its ultimate implications to acknowledge that a judge deciding in reliance on an international norm will find a substantial element of discretionary judgment in the decision.

Second, along with, and in part driven by, that conceptual development in understanding common law has come an equally significant rethinking of the role of the federal courts in making it. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), was the watershed in which we denied the existence of any federal "general" common law, *id.*, at 78, which largely withdrew to havens of specialty, some of them defined by express congressional authorization to devise a body of law directly, *e. g.*, *Textile Workers* v. *Lincoln Mills of Ala.*, 353 U. S. 448 (1957) (interpretation of collective-bargaining agreements); Fed. Rule Evid. 501 (evidentiary privileges in federal-question cases). Elsewhere, this Court has thought it was in order to create federal common law rules in interstitial areas of particular federal interest. *E. g.*, *United States* v. *Kimbell Foods, Inc.*, 440 U. S. 715, 726–727 (1979).[17] And although we have even assumed competence to make judicial rules of decision of particular importance to foreign relations, such as the act of state doctrine, see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U. S. 398, 427 (1964), the general practice has been to look for legislative guidance before exercising innovative authority over substantive law. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.

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[17] See generally R. Fallon, D. Meltzer, & D. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System, ch. 7 (5th ed. 2003); Friendly, In Praise of *Erie*—and of the New Federal Common Law, 39 N. Y. U. L. Rev. 383, 405–422 (1964).

Third, this Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 68 (2001); *Alexander* v. *Sandoval*, 532 U. S. 275, 286–287 (2001). The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Accordingly, even when Congress has made it clear by statute that a rule applies to purely domestic conduct, we are reluctant to infer intent to provide a private cause of action where the statute does not supply one expressly. While the absence of congressional action addressing private rights of action under an international norm is more equivocal than its failure to provide such a right when it creates a statute, the possible collateral consequences of making international rules privately actionable argue for judicial caution.

Fourth, the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law, for the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs. It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. Cf. *Sabbatino*, *supra*, at 431–432. Yet modern international law is very much concerned with just such questions, and apt to stimulate calls for vindicating private interests in § 1350 cases. Since many attempts by federal courts to craft remedies for the violation

of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution. Cf. *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 813 (CADC 1984) (Bork, J., concurring) (expressing doubt that § 1350 should be read to require "our courts [to] sit in judgment of the conduct of foreign officials in their own countries with respect to their own citizens").

The fifth reason is particularly important in light of the first four. We have no congressional mandate to seek out and define new and debatable violations of the law of nations, and modern indications of congressional understanding of the judicial role in the field have not affirmatively encouraged greater judicial creativity. It is true that a clear mandate appears in the Torture Victim Protection Act of 1991, 106 Stat. 73, providing authority that "establish[es] an unambiguous and modern basis for" federal claims of torture and extrajudicial killing, H. R. Rep. No. 102–367, pt. 1, p. 3 (1991). But that affirmative authority is confined to specific subject matter, and although the legislative history includes the remark that § 1350 should "remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law," *id.*, at 4, Congress as a body has done nothing to promote such suits. Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law, as when its ratification of the International Covenant on Civil and Political Rights declared that the substantive provisions of the document were not self-executing. 138 Cong. Rec. 8071 (1992).

B

These reasons argue for great caution in adapting the law of nations to private rights. JUSTICE SCALIA, *post*, p. 739 (opinion concurring in part and concurring in judgment), concludes that caution is too hospitable, and a word is in order

to summarize where we have come so far and to focus our difference with him on whether some norms of today's law of nations may ever be recognized legitimately by federal courts in the absence of congressional action beyond § 1350. All Members of the Court agree that § 1350 is only jurisdictional. We also agree, or at least JUSTICE SCALIA does not dispute, *post*, at 739, 744, that the jurisdiction was originally understood to be available to enforce a small number of international norms that a federal court could properly recognize as within the common law enforceable without further statutory authority. JUSTICE SCALIA concludes, however, that two subsequent developments should be understood to preclude federal courts from recognizing any further international norms as judicially enforceable today, absent further congressional action. As described before, we now tend to understand common law not as a discoverable reflection of universal reason but, in a positivistic way, as a product of human choice. And we now adhere to a conception of limited judicial power first expressed in reorienting federal diversity jurisdiction, see *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), that federal courts have no authority to derive "general" common law.

Whereas JUSTICE SCALIA sees these developments as sufficient to close the door to further independent judicial recognition of actionable international norms, other considerations persuade us that the judicial power should be exercised on the understanding that the door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today. *Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way. For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, *e. g.*, *Sabbatino*, 376 U. S., at 423 ("[I]t is, of course, true that United States

courts apply international law as a part of our own in appropriate circumstances");[18] *The Paquete Habana*, 175 U. S., at 700 ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination"); *The Nereide*, 9 Cranch 388, 423 (1815) (Marshall, C. J.) ("[T]he Court is bound by the law of nations which is a part of the law of the land"); see also *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 641 (1981) (recognizing that "international disputes implicating . . . our relations with foreign nations" are one of the "narrow areas" in which "federal common law" continues to exist). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals.

We think an attempt to justify such a position would be particularly unconvincing in light of what we know about congressional understanding bearing on this issue lying at the intersection of the judicial and legislative powers. The First Congress, which reflected the understanding of the framing generation and included some of the Framers, assumed that federal courts could properly identify some international norms as enforceable in the exercise of § 1350 jurisdiction. We think it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism. Later Congresses

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[18] *Sabbatino* itself did not directly apply international law, see 376 U. S., at 421–423, but neither did it question the application of that law in appropriate cases, and it further endorsed the reasoning of a noted commentator who had argued that *Erie* should not preclude the continued application of international law in federal courts, 376 U. S., at 425 (citing Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am. J. Int'l L. 740 (1939)).

seem to have shared our view. The position we take today has been assumed by some federal courts for 24 years, ever since the Second Circuit decided *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (CA2 1980), and for practical purposes the point of today's disagreement has been focused since the exchange between Judge Edwards and Judge Bork in *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774 (CADC 1984). Congress, however, has not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail. See *supra*, at 728 (discussing the Torture Victim Protection Act).

While we agree with JUSTICE SCALIA to the point that we would welcome any congressional guidance in exercising jurisdiction with such obvious potential to affect foreign relations, nothing Congress has done is a reason for us to shut the door to the law of nations entirely. It is enough to say that Congress may do that at any time (explicitly, or implicitly by treaties or statutes that occupy the field), just as it may modify or cancel any judicial decision so far as it rests on recognizing an international norm as such.[19]

C

We must still, however, derive a standard or set of standards for assessing the particular claim Alvarez raises, and

[19] Our position does not, as JUSTICE SCALIA suggests, imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350), see *post*, at 745, n. Section 1350 was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie*, see *supra*, at 726, 729–730, as a more expansive common law power related to 28 U. S. C. § 1331 might not be.

for this action it suffices to look to the historical antecedents. Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted. See, *e. g.*, *United States* v. *Smith*, 5 Wheat. 153, 163–180, n. *a* (1820) (illustrating the specificity with which the law of nations defined piracy). This limit upon judicial recognition is generally consistent with the reasoning of many of the courts and judges who faced the issue before it reached this Court. See *Filartiga*, *supra*, at 890 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); *Tel-Oren*, *supra*, at 781 (Edwards, J., concurring) (suggesting that the "limits of section 1350's reach" be defined by "a handful of heinous actions—each of which violates definable, universal and obligatory norms"); see also *In re Estate of Marcos Human Rights Litigation*, 25 F. 3d 1467, 1475 (CA9 1994) ("Actionable violations of international law must be of a norm that is specific, universal, and obligatory"). And the determination whether a norm is sufficiently definite to support a cause of action[20] should (and, indeed, inevitably must) involve an element of judgment about the practical consequences of

[20] A related consideration is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual. Compare *Tel-Oren* v. *Libyan Arab Republic*, 726 F. 2d 774, 791–795 (CADC 1984) (Edwards, J., concurring) (insufficient consensus in 1984 that torture by private actors violates international law), with *Kadic* v. *Karadžić*, 70 F. 3d 232, 239–241 (CA2 1995) (sufficient consensus in 1995 that genocide by private actors violates international law).

making that cause available to litigants in the federal courts.[21]

Thus, Alvarez's detention claim must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized.

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[21] This requirement of clear definition is not meant to be the only principle limiting the availability of relief in the federal courts for violations of customary international law, though it disposes of this action. For example, the European Commission argues as *amicus curiae* that basic principles of international law require that before asserting a claim in a foreign forum, the claimant must have exhausted any remedies available in the domestic legal system, and perhaps in other forums such as international claims tribunals. See Brief for European Commission as *Amicus Curiae* 24, n. 54 (citing I. Brownlie, Principles of Public International Law 472–481 (6th ed. 2003)); cf. Torture Victim Protection Act of 1991, § 2(b), 106 Stat. 73 (exhaustion requirement). We would certainly consider this requirement in an appropriate case.

Another possible limitation that we need not apply here is a policy of case-specific deference to the political branches. For example, there are now pending in Federal District Court several class actions seeking damages from various corporations alleged to have participated in, or abetted, the regime of apartheid that formerly controlled South Africa. See *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (JPML 2002) (granting a motion to transfer the cases to the Southern District of New York). The Government of South Africa has said that these cases interfere with the policy embodied by its Truth and Reconciliation Commission, which "deliberately avoided a 'victors' justice' approach to the crimes of apartheid and chose instead one based on confession and absolution, informed by the principles of reconciliation, reconstruction, reparation and goodwill." Declaration of Penuell Mpapa Maduna, Minister of Justice and Constitutional Development, Republic of South Africa, reprinted in App. to Brief for Government of Commonwealth of Australia et al. as *Amici Curiae* 7a, ¶ 3.2.1 (emphasis deleted). The United States has agreed. See Letter of William H. Taft IV, Legal Adviser, Dept. of State, to Shannen W. Coffin, Deputy Asst. Atty. Gen., Oct. 27, 2003, reprinted in *id.*, at 2a. In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy. Cf. *Republic of Austria* v. *Altmann*, 541 U. S. 677, 701–702 (2004) (discussing the State Department's use of statements of interest in cases involving the Foreign Sovereign Immunities Act of 1976, 28 U. S. C. § 1602 *et seq.*).

> "[W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is." *The Paquete Habana*, 175 U. S., at 700.

To begin with, Alvarez cites two well-known international agreements that, despite their moral authority, have little utility under the standard set out in this opinion. He says that his abduction by Sosa was an "arbitrary arrest" within the meaning of the Universal Declaration of Human Rights (Declaration), G. A. Res. 217A (III), U. N. Doc. A/810 (1948). And he traces the rule against arbitrary arrest not only to the Declaration, but also to article nine of the International Covenant on Civil and Political Rights (Covenant), Dec. 16, 1966, 999 U. N. T. S. 171,[22] to which the United States is a party, and to various other conventions to which it is not. But the Declaration does not of its own force impose obligations as a matter of international law. See Humphrey, The UN Charter and the Universal Declaration of Human Rights, in The International Protection of Human Rights 39, 50 (E. Luard ed. 1967) (quoting Eleanor Roosevelt calling the Declaration "'a statement of principles . . . setting up a common standard of achievement for all peoples and all nations'"

[22] Article nine provides that "[n]o one shall be subjected to arbitrary arrest or detention," that "[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law," and that "[a]nyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." 999 U. N. T. S., at 175–176.

and " 'not a treaty or international agreement . . . impos[ing] legal obligations' ").[23] And, although the Covenant does bind the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts. See *supra*, at 728. Accordingly, Alvarez cannot say that the Declaration and Covenant themselves establish the relevant and applicable rule of international law. He instead attempts to show that prohibition of arbitrary arrest has attained the status of binding customary international law.

Here, it is useful to examine Alvarez's complaint in greater detail. As he presently argues it, the claim does not rest on the cross-border feature of his abduction.[24] Although the District Court granted relief in part on finding a violation of international law in taking Alvarez across the border from Mexico to the United States, the Court of Appeals rejected that ground of liability for failure to identify a norm of requisite force prohibiting a forcible abduction across a border. Instead, it relied on the conclusion that the law of the United States did not authorize Alvarez's arrest, because the DEA lacked extraterritorial authority under 21 U. S. C. § 878, and because Federal Rule of Criminal Procedure 4(d)(2) limited the warrant for Alvarez's arrest to "the jurisdiction of the United States."[25] It is this position that Alvarez takes now:

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[23] It has nevertheless had substantial indirect effect on international law. See Brownlie, *supra*, at 535 (calling the Declaration a "good example of an informal prescription given legal significance by the actions of authoritative decision-makers").

[24] Alvarez's brief contains one footnote seeking to incorporate by reference his arguments on cross-border abductions before the Court of Appeals. Brief for Respondent Alvarez-Machain 47, n. 46. That is not enough to raise the question fairly, and we do not consider it.

[25] The Rule has since been moved and amended and now provides that a warrant may also be executed "anywhere else a federal statute authorizes an arrest." Fed. Rule Crim. Proc. 4(c)(2).

that his arrest was arbitrary and as such forbidden by international law not because it infringed the prerogatives of Mexico, but because no applicable law authorized it.[26]

Alvarez thus invokes a general prohibition of "arbitrary" detention defined as officially sanctioned action exceeding positive authorization to detain under the domestic law of some government, regardless of the circumstances. Whether or not this is an accurate reading of the Covenant, Alvarez cites little authority that a rule so broad has the status of a binding customary norm today.[27] He certainly cites nothing to justify the federal courts in taking his broad rule as the predicate for a federal lawsuit, for its implications would be breathtaking. His rule would support a cause of action in federal court for any arrest, anywhere in the world, unauthorized by the law of the jurisdiction in which it took place, and would create a cause of action for any seizure of an alien in violation of the Fourth Amendment, supplanting the actions under Rev. Stat. § 1979, 42 U. S. C. § 1983, and

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[26] We have no occasion to decide whether Alvarez is right that 21 U. S. C. § 878 did not authorize the arrest.

[27] Specifically, he relies on a survey of national constitutions, Bassiouni, Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions, 3 Duke J. Comp. & Int'l L. 235, 260–261 (1993); a case from the International Court of Justice, *United States* v. *Iran*, 1980 I. C. J. 3, 42; and some authority drawn from the federal courts, see Brief for Respondent Alvarez-Machain 49, n. 50. None of these suffice. The Bassiouni survey does show that many nations recognize a norm against arbitrary detention, but that consensus is at a high level of generality. The *Iran* case, in which the United States sought relief for the taking of its diplomatic and consular staff as hostages, involved a different set of international norms and mentioned the problem of arbitrary detention only in passing; the detention in that case was, moreover, far longer and harsher than Alvarez's. See 1980 I. C. J., at 42, ¶ 91 ("detention of [United States] staff by a group of armed militants" lasted "many months"). And the authority from the federal courts, to the extent it supports Alvarez's position, reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today.

Bivens v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), that now provide damages remedies for such violations. It would create an action in federal court for arrests by state officers who simply exceed their authority; and for the violation of any limit that the law of any country might place on the authority of its own officers to arrest. And all of this assumes that Alvarez could establish that Sosa was acting on behalf of a government when he made the arrest, for otherwise he would need a rule broader still.

Alvarez's failure to marshal support for his proposed rule is underscored by the Restatement (Third) of Foreign Relations Law of the United States (1986), which says in its discussion of customary international human rights law that a "state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . prolonged arbitrary detention." 2 *id.*, § 702. Although the Restatement does not explain its requirements of a "state policy" and of "prolonged" detention, the implication is clear. Any credible invocation of a principle against arbitrary detention that the civilized world accepts as binding customary international law requires a factual basis beyond relatively brief detention in excess of positive authority. Even the Restatement's limits are only the beginning of the enquiry, because although it is easy to say that some policies of prolonged arbitrary detentions are so bad that those who enforce them become enemies of the human race, it may be harder to say which policies cross that line with the certainty afforded by Blackstone's three common law offenses. In any event, the label would never fit the reckless policeman who botches his warrant, even though that same officer might pay damages under municipal law. *E. g.*, *Groh* v. *Ramirez*, 540 U. S. 551 (2004).[28]

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[28] In this action, Sosa might well have been liable under Mexican law. Alvarez asserted such a claim, but the District Court concluded that the applicable law was the law of California, and that under California law Sosa had been privileged to make a citizen's arrest in Mexico. Whether

Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require.[29] Creating a private cause of action to further that aspiration would go beyond any residual common law discretion we think it appropriate to exercise.[30] It is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.

* * *

The judgment of the Court of Appeals is

Reversed.

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this was correct is not now before us, though we discern tension between the court's simultaneous conclusions that the detention so lacked any legal basis as to violate international law, yet was privileged by state law against ordinary tort recovery.

[29] It is not that violations of a rule logically foreclose the existence of that rule as international law. Cf. *Filartiga* v. *Pena-Irala*, 630 F. 2d 876, 884, n. 15 (CA2 1980) ("The fact that the prohibition of torture is often honored in the breach does not diminish its binding effect as a norm of international law"). Nevertheless, that a rule as stated is as far from full realization as the one Alvarez urges is evidence against its status as binding law; and an even clearer point against the creation by judges of a private cause of action to enforce the aspiration behind the rule claimed.

[30] Alvarez also cites, Brief for Respondent Alvarez-Machain 49–50, a finding by a United Nations working group that his detention was arbitrary under the Declaration, the Covenant, and customary international law. See Report of the United Nations Working Group on Arbitrary Detention, U. N. Doc. E/CN.4/1994/27, pp. 139–140 (Dec. 17, 1993). That finding is not addressed, however, to our demanding standard of definition, which must be met to raise even the possibility of a private cause of action. If Alvarez wishes to seek compensation on the basis of the working group's finding, he must address his request to Congress.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE THOMAS join, concurring in part and concurring in the judgment.

There is not much that I would add to the Court's detailed opinion, and only one thing that I would subtract: its reservation of a discretionary power in the Federal Judiciary to create causes of action for the enforcement of international-law-based norms. Accordingly, I join Parts I, II, and III of the Court's opinion in these consolidated cases. Although I agree with much in Part IV, I cannot join it because the judicial lawmaking role it invites would commit the Federal Judiciary to a task it is neither authorized nor suited to perform.

I

The question at hand is whether the Alien Tort Statute (ATS), 28 U. S. C. § 1350, provides respondent Alvarez-Machain (hereinafter respondent) a cause of action to sue in federal court to recover money damages for violation of what is claimed to be a customary international law norm against arbitrary arrest and detention. The ATS provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." *Ibid.* The challenge posed by this action is to ascertain (in the Court's felicitous phrase) "the interaction between the ATS at the time of its enactment and the ambient law of the era." *Ante*, at 714. I begin by describing the general principles that must guide our analysis.

At the time of its enactment, the ATS provided a federal forum in which aliens could bring suit to recover for torts committed in "violation of the law of nations." The law of nations that would have been applied in this federal forum was at the time part of the so-called general common law. See Young, Sorting out the Debate Over Customary International Law, 42 Va. J. Int'l L. 365, 374 (2002); Bradley & Gold-

smith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. 815, 824 (1997); Brief for Vikram Amar et al. as *Amici Curiae* 12–13.

General common law was not federal law under the Supremacy Clause, which gave that effect only to the Constitution, the laws of the United States, and treaties. U. S. Const., Art. VI, cl. 2. Federal and state courts adjudicating questions of general common law were not adjudicating questions of federal or state law, respectively—the general common law was neither. See generally Clark, Federal Common Law: A Structural Reinterpretation, 144 U. Pa. L. Rev. 1245, 1279–1285 (1996). The nonfederal nature of the law of nations explains this Court's holding that it lacked jurisdiction in *New York Life Ins. Co.* v. *Hendren*, 92 U. S. 286 (1876), where it was asked to review a state-court decision regarding "the effect, under the general public law, of a state of sectional civil war upon [a] contract of life insurance." *Ibid.* Although the case involved "the general laws of war, as recognized by the law of nations applicable to this case," *ibid.*, it involved no federal question. The Court concluded: "The case, . . . having been presented to the court below for decision upon principles of general law alone, and it nowhere appearing that the constitution, laws, treaties, or executive proclamations, of the United States were necessarily involved in the decision, we have no jurisdiction." *Id.*, at 287.

This Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), signaled the end of federal-court elaboration and application of the general common law. *Erie* repudiated the holding of *Swift* v. *Tyson*, 16 Pet. 1 (1842), that federal courts were free to "express our own opinion" upon "the principles established in the general commercial law." *Id.*, at 19, 18. After canvassing the many problems resulting from "the broad province accorded to the so-called 'general law' as to which federal courts exercised an independent judgment,"

304 U. S., at 75, the *Erie* Court extirpated that law with its famous declaration that "[t]here is no federal general common law." *Id.*, at 78. *Erie* affected the status of the law of nations in federal courts not merely by the implication of its holding but quite directly, since the question decided in *Swift* turned on the "law merchant," then a subset of the law of nations. See Clark, *supra*, at 1280–1281.

After the death of the old general common law in *Erie* came the birth of a new and different common law pronounced by federal courts. There developed a specifically federal common law (in the sense of judicially pronounced law) for a "few and restricted" areas in which "a federal rule of decision is necessary to protect uniquely federal interests, and those in which Congress has given the courts the power to develop substantive law." *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U. S. 630, 640 (1981) (internal quotation marks and citations omitted). Unlike the general common law that preceded it, however, federal common law was self-consciously "made" rather than "discovered," by judges who sought to avoid falling under the sway of (in Holmes's hyperbolic language) "[t]he fallacy and illusion" that there exists "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Black and White Taxicab & Transfer Co.* v. *Brown and Yellow Taxicab & Transfer Co.*, 276 U. S. 518, 533 (1928) (dissenting opinion).

Because post-*Erie* federal common law is made, not discovered, federal courts must possess some federal-common-law-making authority before undertaking to craft it. "Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision." *Milwaukee* v. *Illinois*, 451 U. S. 304, 312 (1981).

The general rule as formulated in *Texas Industries*, 451 U. S., at 640–641, is that "[t]he vesting of jurisdiction in the federal courts does not in and of itself give rise to authority

to formulate federal common law." This rule applies not only to applications of federal common law that would displace a state rule, but also to applications that simply create a private cause of action under a federal statute. Indeed, *Texas Industries* itself involved the petitioner's unsuccessful request for an application of the latter sort—creation of a right of contribution to damages assessed under the antitrust laws. See *id.*, at 639–646. See also *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U. S. 77, 99 (1981) (declining to create a federal-common-law right of contribution to damages assessed under the Equal Pay Act and Title VII).

The rule against finding a delegation of substantive lawmaking power in a grant of jurisdiction is subject to exceptions, some better established than others. The most firmly entrenched is admiralty law, derived from the grant of admiralty jurisdiction in Article III, § 2, cl. 3, of the Constitution. In the exercise of that jurisdiction federal courts develop and apply a body of general maritime law, "the well-known and well-developed venerable law of the sea which arose from the custom among seafaring men." *R. M. S. Titanic, Inc.* v. *Haver*, 171 F. 3d 943, 960 (CA4 1999) (Niemeyer, J.) (internal quotation marks omitted). At the other extreme is *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971), which created a private damages cause of action against federal officials for violation of the Fourth Amendment. We have said that the authority to create this cause of action was derived from "our general jurisdiction to decide all cases 'arising under the Constitution, laws, or treaties of the United States.'" *Correctional Services Corp.* v. *Malesko*, 534 U. S. 61, 66 (2001) (quoting 28 U. S. C. § 1331). While *Bivens* stands, the ground supporting it has eroded. For the past 25 years, "we have consistently refused to extend *Bivens* liability to any new context." *Correctional Services Corp.*, *supra*, at 68. *Bivens* is "a relic of the heady days in which this Court assumed common-law powers to create causes of action." 534 U. S., at 75 (SCALIA, J., concurring).

II

With these general principles in mind, I turn to the question presented. The Court's detailed exegesis of the ATS conclusively establishes that it is "a jurisdictional statute creating no new causes of action." *Ante*, at 724. The Court provides a persuasive explanation of why respondent's contrary interpretation, that "the ATS was intended not simply as a jurisdictional grant, but as authority for the creation of a new cause of action for torts in violation of international law," is wrong. *Ante*, at 713. Indeed, the Court properly endorses the views of one scholar that this interpretation is "'simply frivolous.'" *Ibid.* (quoting Casto, The Federal Courts' Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 479, 480 (1986)).

These conclusions are alone enough to dispose of the present case in favor of petitioner Sosa. None of the exceptions to the general rule against finding substantive lawmaking power in a jurisdictional grant apply. *Bivens* provides perhaps the closest analogy. That is shaky authority at best, but at least it can be said that *Bivens* sought to enforce a command of our *own* law—the *United States* Constitution. In modern international human rights litigation of the sort that has proliferated since *Filartiga* v. *Pena-Irala*, 630 F. 2d 876 (CA2 1980), a federal court must first *create* the underlying federal command. But "the fact that a rule has been recognized as [customary international law], by itself, is not an adequate basis for viewing that rule as part of federal common law." Meltzer, Customary International Law, Foreign Affairs, and Federal Common Law, 42 Va. J. Int'l L. 513, 519 (2002). In Benthamite terms, creating a federal command (federal common law) out of "international norms," and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the ATS, is nonsense upon stilts.

III

The analysis in the Court's opinion departs from my own in this respect: After concluding in Part III that "the ATS is a jurisdictional statute creating no new causes of action," *ante,* at 724, the Court addresses at length in Part IV the "good reasons for a restrained conception of the *discretion* a federal court should exercise in considering a new cause of action" under the ATS. *Ante,* at 725 (emphasis added). By framing the issue as one of "discretion," the Court skips over the antecedent question of authority. This neglects the "lesson of *Erie*," that "grants of jurisdiction alone" (which the Court has acknowledged the ATS to be) "are not themselves grants of lawmaking authority." Meltzer, *supra,* at 541. On this point, the Court observes only that no development between the enactment of the ATS (in 1789) and the birth of modern international human rights litigation under that statute (in 1980) "has categorically *precluded* federal courts from recognizing a claim under the law of nations as an element of common law." *Ante,* at 725 (emphasis added). This turns our jurisprudence regarding federal common law on its head. The question is not what case or congressional action *prevents* federal courts from applying the law of nations as part of the general common law; it is what *authorizes* that peculiar exception from *Erie*'s fundamental holding that a general common law *does not exist.*

The Court would apparently find authorization in the understanding of the Congress that enacted the ATS, that "district courts would recognize private causes of action for certain torts in violation of the law of nations." *Ante,* at 724. But as discussed above, that understanding rested upon a notion of general common law that has been repudiated by *Erie.*

The Court recognizes that *Erie* was a "watershed" decision heralding an avulsive change, wrought by "conceptual development in understanding common law . . . [and accompanied by an] equally significant rethinking of the role of the federal courts in making it." *Ante,* at 726. The Court's

analysis, however, does not follow through on this insight, interchangeably using the unadorned phrase "common law" in Parts III and IV to refer to pre-*Erie* general common law and post-*Erie* federal common law. This lapse is crucial, because the creation of post-*Erie* federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century. Post-*Erie* federal common lawmaking (all that is left to the federal courts) is so far removed from that general-common-law adjudication which applied the "law of nations" that it would be anachronistic to find authorization to do the former in a statutory grant of jurisdiction that was thought to enable the latter.* Yet that is precisely what the discretion-only analysis in Part IV suggests.

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*The Court conjures the illusion of common-law-making continuity between 1789 and the present by ignoring fundamental differences. The Court's approach places the law of nations on a federal-law footing unknown to the First Congress. At the time of the ATS's enactment, the law of nations, being part of general common law, was *not* supreme federal law that could displace state law. S*upra*, at 739–740. By contrast, a judicially created federal rule based on international norms *would be* supreme federal law. Moreover, a federal-common-law cause of action of the sort the Court reserves discretion to create would "arise under" the laws of the United States, not only for purposes of Article III but also for purposes of *statutory* federal-question jurisdiction. See *Illinois* v. *Milwaukee*, 406 U. S. 91, 99–100 (1972).

The lack of genuine continuity is thus demonstrated by the fact that today's opinion renders the ATS unnecessary for federal jurisdiction over (so-called) law-of-nations claims. If the law of nations can be transformed into federal law on the basis of (1) a provision that merely grants jurisdiction, combined with (2) some residual judicial power (from whence nobody knows) to create federal causes of action in cases implicating foreign relations, then a grant of federal-question jurisdiction would give rise to a power to create international-law-based federal common law just as effectively as would the ATS. This would mean that the ATS became largely superfluous as of 1875, when Congress granted general federal-question jurisdiction subject to a $500 amount-in-controversy requirement, Act of Mar. 3, 1875, §1, 18 Stat. 470, and entirely superfluous as of 1980, when Congress eliminated the amount-in-controversy requirement, Pub. L. 96–486, 94 Stat. 2369.

Because today's federal common law is not our Framers' general common law, the question presented by the suggestion of discretionary authority to enforce the law of nations is not whether to extend old-school general-common-law adjudication. Rather, it is whether to create new federal common law. The Court masks the novelty of its approach when it suggests that the difference between us is that I would "close the door to further independent judicial recognition of actionable international norms," whereas the Court would permit the exercise of judicial power "on the understanding that the door is still ajar subject to vigilant doorkeeping." *Ante*, at 729. The general common law was the old door. We do not close that door today, for the deed was done in *Erie*. *Supra*, at 740–741. Federal common law is a *new* door. The question is not whether that door will be left ajar, but whether this Court will open it.

Although I fundamentally disagree with the discretion-based framework employed by the Court, we seem to be in accord that creating a new federal common law of international human rights is a questionable enterprise. We agree that:

- "[T]he general practice has been to look for legislative guidance before exercising innovative authority over substantive law [in the area of foreign relations]. It would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries." *Ante*, at 726.
- "[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution." *Ante*, at 727.
- "It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments' power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold

that a foreign government or its agent has transgressed those limits." *Ibid.*

- "[M]any attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences." *Ante,* at 727–728.
- "Several times, indeed, the Senate has expressly declined to give the federal courts the task of interpreting and applying international human rights law." *Ante,* at 728.

These considerations are not, as the Court thinks them, reasons why courts must be circumspect in use of their extant general-common-law-making powers. They are reasons why courts cannot possibly be thought to have been given, and should not be thought to possess, federal-common-law-making powers with regard to the creation of private federal causes of action for violations of customary international law.

To be sure, today's opinion does not itself precipitate a direct confrontation with Congress by creating a cause of action that Congress has not. But it invites precisely that action by the lower courts, even while recognizing (1) that Congress understood the difference between granting jurisdiction and creating a federal cause of action in 1789, *ante,* at 713, (2) that Congress understands that difference today, *ante,* at 728, and (3) that the ATS itself supplies only jurisdiction, *ante,* at 724. In holding open the possibility that judges may create rights where Congress has not authorized them to do so, the Court countenances judicial occupation of a domain that belongs to the people's representatives. One does not need a crystal ball to predict that this occupation will not be long in coming, since the Court endorses the reasoning of "many of the courts and judges who faced the issue before it reached this Court," including the Second and Ninth Circuits. *Ante,* at 732.

The Ninth Circuit brought us the judgment that the Court reverses today. Perhaps its decision in this particular case,

like the decisions of other lower federal courts that receive passing attention in the Court's opinion, "reflects a more assertive view of federal judicial discretion over claims based on customary international law than the position we take today." *Ante*, at 736, n. 27. But the verbal formula it applied is the same verbal formula that the Court explicitly endorses. Compare *ante*, at 732 (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F. 3d 1467, 1475 (CA9 1994), for the proposition that actionable norms must be "'specific, universal, and obligatory'"), with 331 F. 3d 604, 621 (CA9 2003) (en banc) (finding the norm against arbitrary arrest and detention in this action to be "universal, obligatory, and specific"); *id.*, at 619 ("[A]n actionable claim under the [ATS] requires the showing of a violation of the law of nations that is specific, universal, and obligatory" (internal quotation marks omitted)). Endorsing the very formula that led the Ninth Circuit to its result in this action hardly seems to be a recipe for restraint in the future.

The Second Circuit, which started the Judiciary down the path the Court today tries to hedge in, is a good indicator of where that path leads us: directly into confrontation with the political branches. *Kadic* v. *Karadžić*, 70 F. 3d 232 (CA2 1995), provides a case in point. One of the norms at issue in that case was a norm against genocide set forth in the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U. N. T. S. 278. The Second Circuit held that the norm was actionable under the ATS after applying Circuit case law that the Court today endorses. 70 F. 3d, at 238–239, 241–242. The Court of Appeals then did something that is perfectly logical and yet truly remarkable: It dismissed the determination by Congress and the Executive that this norm should *not* give rise to a private cause of action. We *know* that Congress and the Executive made this determination, because Congress inscribed it into the Genocide Convention Implementation Act of 1987, 18 U. S. C. § 1091 *et seq.*, a law signed by the

President attaching criminal penalties to the norm against genocide. The Act, Congress said, shall not "be construed as creating any substantive or procedural right enforceable by law by any party in any proceeding." § 1092. Undeterred, the Second Circuit reasoned that this "decision not to create a *new* private remedy" could hardly be construed as *repealing* by implication the cause of action supplied by the ATS. 70 F. 3d, at 242 (emphasis added). Does this Court truly wish to encourage the use of a jurisdiction-granting statute with respect to which there is "no record of congressional discussion about private actions that might be subject to the jurisdictional provision, or about any need for further legislation to create private remedies; [and] no record even of debate on the section," *ante*, at 718, to override a clear indication from the political branches that a "specific, universal, and obligatory" norm against genocide is *not* to be enforced through a private damages action? Today's opinion leads the lower courts right down that perilous path.

Though it is not necessary to resolution of the present action, one further consideration deserves mention: Despite the avulsive change of *Erie*, the Framers who included reference to "the Law of Nations" in Article I, § 8, cl. 10, of the Constitution would be entirely content with the post-*Erie* system I have described, and quite terrified by the "discretion" endorsed by the Court. That portion of the general common law known as the law of nations was understood to refer to the accepted practices of nations in their dealings with one another (treatment of ambassadors, immunity of foreign sovereigns from suit, etc.) and with actors on the high seas hostile to all nations and beyond all their territorial jurisdictions (pirates). Those accepted practices have for the most part, if not in their entirety, been enacted into United States statutory law, so that insofar as they are concerned the demise of the general common law is inconsequential. The notion that a law of nations, redefined to mean the consensus of states on *any* subject, can be used by a private citizen to

control a sovereign's treatment of *its own citizens* within *its own territory* is a 20th-century invention of internationalist law professors and human rights advocates. See generally Bradley & Goldsmith, Critique of the Modern Position, 110 Harv. L. Rev., at 831–837. The Framers would, I am confident, be appalled by the proposition that, for example, the American peoples' democratic adoption of the death penalty, see, *e. g.,* Tex. Penal Code Ann. § 12.31 (West 2003), could be judicially nullified because of the disapproving views of foreigners.

* * *

We Americans have a method for making the laws that are over us. We elect representatives to two Houses of Congress, each of which must enact the new law and present it for the approval of a President, whom we also elect. For over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law. Today's opinion approves that process in principle, though urging the lower courts to be more restrained.

This Court seems incapable of admitting that some matters—*any* matters—are none of its business. See, *e. g.*, *Rasul* v. *Bush*, *ante*, p. 466; *INS* v. *St. Cyr*, 533 U. S. 289 (2001). In today's latest victory for its Never Say Never Jurisprudence, the Court ignores its own conclusion that the ATS provides only jurisdiction, wags a finger at the lower courts for going too far, and then—repeating the same formula the ambitious lower courts *themselves* have used—invites them to try again.

It would be bad enough if there were some assurance that future conversions of perceived international norms into American law would be approved by this Court itself. (Though we know ourselves to be eminently reasonable, self-awareness of eminent reasonableness is not really a substitute for democratic election.) But in this illegitimate lawmaking endeavor, the lower federal courts will be the princi-

pal actors; we review but a tiny fraction of their decisions. And no one thinks that all of them are eminently reasonable.

American law—the law made by the people's democratically elected representatives—does not recognize a category of activity that is so universally disapproved by other nations that it is automatically unlawful here, and automatically gives rise to a private action for money damages in federal court. That simple principle is what today's decision should have announced.

JUSTICE GINSBURG, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

I join in full the Court's disposition of Alvarez's claim pursuant to 28 U. S. C. § 1350. See *ante*, at 712–738. As to Alvarez's Federal Tort Claims Act (FTCA or Act) claim, see *ante*, at 699–712, although I agree with the Court's result and much of its reasoning, I take a different path and would adopt a different construction of 28 U. S. C. § 2680(k). Alvarez's case against the Government does not call for any comparison of old versus newer choice-of-law methodologies. See *ante*, at 708–710. See generally Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 525–584 (1983). In particular, the Court's discussion of developments in choice of law after the FTCA's enactment hardly illuminates the meaning of that statute, and risks giving undue prominence to a jurisdiction-selecting approach the vast majority of States have long abandoned. See Symeonides, Choice of Law in the American Courts in 2002: Sixteenth Annual Survey, 51 Am. J. Comp. L. 1, 5–6 (2003) (*lex loci delicti* rule has been abandoned in 42 States).

I

The FTCA renders the United States liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. The Act gives federal district courts "exclusive jurisdiction

of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." § 1346(b)(1). Congress included in the FTCA a series of exceptions to that sovereign-immunity waiver. Relevant to this litigation, the Act expressly excepts "[a]ny claim arising in a foreign country." § 2680(k). I agree with the Court, see *ante*, at 699–712, that this provision, the foreign-country exception, applies here, and bars Alvarez's tort claim against the United States. But I would read the words "arising in," as they appear in § 2680(k), to signal "place where the act or omission occurred," § 1346(b)(1), not "place of injury," *ante*, at 707–708, 711, and n. 9.[1]

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[1] In common with § 2680(k), most of the exceptions listed in § 2680 use the "claim arising" formulation. See §§ 2680(b), (c), (e), (h), (j), (*l*), (m), and (n). Only two use the "act or omission" terminology. See § 2680(a) (exception for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . ."); § 2680(e) (no liability for "[a]ny claim arising out of an act or omission of any employee of the Government in administering [certain provisions concerning war and national defense]"). It is hardly apparent, however, that Congress intended only §§ 2680(a) and (e) to be interpreted in accord with § 1346(b). Congress used the phrase "arising out of" for § 2680 exceptions that focus on a governmental act or omission. See § 2680(b) (exception for "[a]ny claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter"); § 2680(h) (no liability for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contractual rights"). Given that usage, and in light of the legislative

A

On its face, the foreign-country exception appears to cover this litigation. See *ante*, at 700. Alvarez's suit is predicated on an arrest in Mexico alleged to be "false" only because it occurred there. Sosa's conduct in Mexico, implicating questions of Mexican law, is, as the Court notes, "the kernel" of Alvarez's claim. *Ante*, at 701. Once Alvarez was inside United States borders, the Ninth Circuit observed, no activity regarding his detention was tortious. See 331 F. 3d 604, 636–637 (2003). Government liability to Alvarez, as analyzed by the Court of Appeals, rested solely upon a false-arrest claim. *Id.*, at 640–641. Just as Alvarez's arrest was "false," and thus tortious, only because, and only to the extent that, it took place and endured in Mexico, so damages accrued only while the alleged wrongful conduct continued abroad. *Id.*, at 636–637.

Critical in the Ninth Circuit's view, "DEA agents had no authority under federal law to execute an extraterritorial arrest of a suspect indicted in federal court in Los Angeles." *Id.*, at 640; see *ante*, at 700–701, n. 1. See also *Fermino* v. *Fedco, Inc.*, 7 Cal. 4th 701, 715, 872 P. 2d 559, 567 (1994) (defining as tortious "the nonconsensual, intentional confinement of a person, *without lawful privilege*, for an appreciable length of time, however short" (emphasis added and internal quotation marks omitted)); App. to Pet. for Cert. in No. 03–339, p. 184a (same). Once Alvarez arrived in El Paso, Texas, "the actions of domestic law enforcement set in mo-

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history of § 2680(k), omission of a reference to an "act or omission of any employee" from that provision may reflect only Congress' attempt to use the least complex statutory language feasible. Cf. *Sami* v. *United States*, 617 F. 2d 755, 762, n. 7 (CADC 1979) ("We do not think the omission of a specific reference to acts or omissions in § 2680(k) was meaningful or that the focus of that exemption shifted from acts or omissions to resultant injuries.").

tion a supervening prosecutorial mechanism which met all of the procedural requisites of federal due process." 331 F. 3d, at 637; see *ante,* at 700–701, n. 1.

Accepting, as the Ninth Circuit did, that no tortious act occurred once Alvarez was within United States borders, the Government's liability on Alvarez's claim for false arrest necessarily depended on the foreign location of the arrest and implicated foreign law. While the Court of Appeals focused on whether United States law furnished authority to seize Alvarez in Mexican territory, see 331 F. 3d, at 626–631, Mexican law equally could have provided—or denied—authority for such an arrest. Had Sosa and the arrest team been Mexican law enforcement officers, authorized by Mexican law to arrest Alvarez and to hand him over to United States authorities, for example, no false-arrest claim would have been tenable. Similarly, there would have been no viable false-arrest claim if Mexican law authorized a citizen's arrest in the circumstances presented here. Indeed, Mexican and Honduran agents seized other suspects indicted along with Alvarez, respectively in Mexico and Honduras; "Alvarez's abduction was unique in that it involved neither the cooperation of local police nor the consent of a foreign government." *Id.*, at 623, n. 23.

The interpretation of the FTCA adopted by the Ninth Circuit, in short, yielded liability based on acts occurring in Mexico that entangled questions of foreign law. Subjecting the United States to liability depending upon the law of a foreign sovereign, however, was the very result § 2680(k)'s foreign-country exception aimed to exclude. See *United States* v. *Spelar*, 338 U. S. 217, 221 (1949).

B

I would construe the foreign-country exception, § 2680(k), in harmony with the FTCA's sovereign-immunity waiver, § 1346(b), which refers to the place where the negligent or intentional act occurred. See Brief for United States in

No. 03–485, p. 45 (urging that § 2680(k) should be applied by looking to "where the prohibited act is committed"); *id.*, at 46 ("the foreign country exception must be viewed together with [§]1346," which points to "the law of the place where the [allegedly wrongful] act or omission occurred" (internal quotation marks and citations omitted and emphasis deleted)).

Interpretation of § 2680(k) in the light of § 1346, as the Government maintains, is grounded in this Court's precedent. In construing § 2680(k)'s reference to a "foreign country," this Court has "draw[n] support from the language of § 1346(b), the principal provision of the [FTCA]." *Smith* v. *United States*, 507 U. S. 197, 201 (1993) (internal quotation marks omitted). In *Smith*, the Court held that a wrongful-death action "based exclusively on acts or omissions occurring in Antarctica" was barred by the foreign-country exception. *Id.*, at 198–199. Were it not, the Court noted, "§ 1346(b) would instruct courts to look to the law of a place that has no law [*i. e.*, Antarctica] in order to determine the liability of the United States—surely a bizarre result." *Id.*, at 201–202. Thus, in *Smith*, the Court presumed that the place "where the act or omission occurred" for purposes of the sovereign-immunity waiver, § 1346(b)(1), coincided with the place where the "claim ar[ose]" for purposes of the foreign-country exception, § 2680(k). See also *Beattie* v. *United States*, 756 F. 2d 91, 122 (CADC 1984) (Scalia, J., dissenting) ("[A] claim 'arises' for purposes of § 2680(k) where there occurs the alleged [standard-of-care] violation . . . (attributable to government action or inaction) nearest to the injury . . . ."); *Sami* v. *United States*, 617 F. 2d 755, 761–762 (CADC 1979) (looking to where "the act or omission complained of occurred" in applying § 2680(k)).

Harmonious construction of §§ 1346(b) and 2680(k) accords with Congress' intent in enacting the foreign-country exception. Congress was "unwilling to subject the United States to liabilities depending upon the laws of a foreign power."

Spelar, 338 U. S., at 221. The legislative history of the FTCA suggests that Congress viewed cases in which the relevant *act or omission* occurred in a foreign country as entailing too great a risk of foreign-law application. Thus, Assistant Attorney General Francis M. Shea, in explaining the finally enacted version of the foreign-country exception to the House Committee on the Judiciary, emphasized that, when an *act or omission* occurred in a foreign country, § 1346(b) would direct a court toward the law of that country: "Since liability is to be determined by *the law of the situs of the wrongful act or omission it is wise to restrict the bill to claims arising in this country.*" Hearings on H. R. 5373 et al. before the House Committee on the Judiciary, 77th Cong., 2d Sess., 35 (1942) (emphasis added); see *ante*, at 707.[2] In the enacting Congress' view, it thus appears, §§ 1346(b) and 2680(k) were aligned so as to block the United States' waiver of sovereign immunity when the relevant act or omission took place overseas. See *supra*, at 752–753, n. 1.

True, the Court has read *renvoi* into § 1346(b)(1)'s words "in accordance with the law of." See *Richards* v. *United States*, 369 U. S. 1, 11 (1962) ("the [FTCA] . . . requires application of the *whole* law of the State where the act or omission occurred" (emphasis added)).[3] That, however, is no reason to resist defining the place where a claim arises for § 2680(k) purposes to mean the place where the liability-creating act

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[2] The foreign-country exception's focus on the location of the tortious act or omission is borne out by a further colloquy during the hearing before the House Committee on the Judiciary. A member of that Committee asked whether he understood correctly that "any representative of the United States who *committed a tort* in England or some other country could not be reached under [the FTCA]." Hearings on H. R. 5373 et al., at 35 (emphasis added). Assistant Attorney General Shea said yes to that understanding of § 2680(k). *Ibid.*

[3] *Renvoi* is "[t]he doctrine under which a court in resorting to foreign law adopts as well the foreign law's conflict-of-laws principles, which may in turn refer the court back to the law of the forum." Black's Law Dictionary 1300 (7th ed. 1999).

or omission occurred, with no *renvoi* elsewhere. It is one thing to apply *renvoi* to determine which State, within the United States, supplies the governing law, quite another to suppose that Congress meant United States courts to explore what choice of law a foreign court would make.[4]

In 1948, when the FTCA was enacted, it is also true, Congress reasonably might have anticipated that the then prevailing choice-of-law methodology, reflected in the Restatement (First) of Conflicts, would lead mechanically to the law of the place of injury. See Restatement (First) of Conflicts § 377 (1934) ("The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place."); *Richards*, 369 U. S., at 11–12 ("The general conflict-of-laws rule, followed by a vast majority of the States, [wa]s to apply the law of the place of injury to the substantive rights of the parties." (footnote omitted)); *ante*, at 705–707, 708, n. 5 (same). Generally, albeit not always, the place where the negligent or intentional act or omission takes place coincides with the place of injury.[5] Looking to the whole law of the State where the wrongful "act or omission occurred" would therefore ordinarily lead to application of that State's own law. But cf. *ante*, at 707–708, 711–712 (adopting a place-of-injury rule for § 2680(k)).

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[4] Reading *renvoi* into § 1346(b)(1), even to determine which State supplies the governing law, moreover, is questionable. See Shapiro, Choice of Law Under the Federal Tort Claims Act: *Richards* and Renvoi Revisited, 70 N. C. L. Rev. 641, 679 (1992) ("It is only fair that federal liability be determined by the law where the federal employee's negligence took place, as Congress intended. The simplicity of the internal law approach is preferable to the complexity and opportunity for manipulation of *[Richards']* whole law construction.").

[5] Enacting the FTCA, Congress was concerned with quotidian "wrongs which would have been actionable if inflicted by an individual or a corporation," *Feres* v. *United States*, 340 U. S. 135, 139–140 (1950), such as vehicular accidents, see S. Rep. No. 1400, 79th Cong., 2d Sess., 31 (1946). See also *ante*, at 706, n. 4. The place of injury in such torts almost inevitably would be the place the act or omission occurred as well.

II

The Ninth Circuit concluded that the foreign-country exception did not bar Alvarez's false-arrest claim because that claim "involve[d] federal employees working from offices in the United States to guide and supervise actions in other countries." 331 F. 3d, at 638. In so holding, the Court of Appeals applied a "'headquarters doctrine,'" whereby "a claim can still proceed . . . if harm occurring in a foreign country was proximately caused by acts in the United States." *Ibid.*

There is good reason to resist the headquarters doctrine described and relied upon by the Ninth Circuit. The Court of Appeals' employment of that doctrine renders the FTCA's foreign-country exception inapplicable whenever some authorization, support, or planning takes place in the United States. But "it will virtually always be possible to assert that the negligent [or intentional] activity that injured the plaintiff was the consequence of faulty training, selection or supervision—or even less than that, lack of careful training, selection or supervision—in the United States." *Beattie*, 756 F. 2d, at 119 (Scalia, J., dissenting); see *ante*, at 702–703 (same). Hence the headquarters doctrine, which considers whether steps toward the commission of the tort occurred within the United States, risks swallowing up the foreign-country exception.

Furthermore, the Court of Appeals failed to address the choice-of-law question implicated by both §§ 1346(b) and 2680(k) whenever tortious acts are committed in multiple states. Both those provisions direct federal courts "in multistate tort actions, to look in the first instance to the law of the place where the acts of negligence [or the intentional tort] took place." *Richards*, 369 U. S., at 10. In cases involving acts or omissions in several states, the question is which acts count. "Neither the text of the FTCA nor *Richards* provides any guidance . . . when the alleged acts or omissions occur in more than one state. Moreover, the leg-

islative history of the FTCA sheds no light on this problem." *Gould Electronics Inc.* v. *United States*, 220 F. 3d 169, 181 (CA3 2000); see *Raflo* v. *United States*, 157 F. Supp. 2d 1, 9 (DC 2001) (same).

Courts of appeals have adopted varying approaches to this question. See *Simon* v. *United States*, 341 F. 3d 193, 202 (CA3 2003) (listing five different choice-of-law methodologies for § 1346(b)(1)); *Gould Electronics*, 220 F. 3d, at 181–183 (same).[6] Having canvassed those different approaches, Third Circuit Judge Becker concluded that "clarity is the most important virtue in crafting a rule by which [a federal court would] choose a jurisdiction." *Simon*, 341 F. 3d, at 204. Eschewing "vague and overlapping" approaches that yielded "indeterminate" results, Judge Becker "appl[ied] [under § 1346(b)(1)] the choice-of-law regime of the jurisdiction in which the last significant act or omission occurred. This has the salutary effect of avoiding the selection of a jurisdiction based on a completely incidental 'last contact,'

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[6] As cataloged by the Court of Appeals for the Third Circuit, these are: "(1) applying different rules to different theories of liability; (2) choosing the place of the last allegedly-wrongful act or omission; (3) determining which asserted act of wrongdoing had the most significant effect on the injury; (4) choosing the state in which the United States' physical actions could have prevented injury; and (5) determining where the 'relevant' act or omission occurred." *Simon*, 341 F. 3d, at 202. For cases applying and discussing one or another of those five approaches, see *Ducey* v. *United States*, 713 F. 2d 504, 508, n. 2 (CA9 1983) (considering where "physical acts" that could have prevented the harm would have occurred); *Hitchcock* v. *United States*, 665 F. 2d 354, 359 (CADC 1981) (looking for the "relevant" act or omission); *Bowen* v. *United States*, 570 F. 2d 1311, 1318 (CA7 1978) (noting "the alternatives of the place of the last act or omission having a causal effect, or the place of the act or omission having the most significant causal effect," but finding that both rules would lead to the same place); *Raflo* v. *United States*, 157 F. Supp. 2d 1, 10 (DC 2001) (applying *Hitchcock*'s relevance test by looking for the place where the "most substantial portion of the acts or omissions occurred"); *Kohn* v. *United States*, 591 F. Supp. 568, 572 (EDNY 1984) (applying different States' choice-of-law rules on an act-by-act basis).

while also avoiding the conjecture that [alternative] inquires often entail." *Ibid.* I agree.

A "last significant act or omission" rule applied under § 2680(k) would close the door to the headquarters doctrine as applied by the Ninth Circuit in this litigation. By directing attention to the place where the last significant act or omission occurred, rather than to a United States location where some authorization, support, or planning may have taken place, the clear rule advanced by Judge Becker preserves § 2680(k) as the genuine limitation Congress intended it to be.

The "last significant act or omission" rule works in this litigation to identify Mexico, not California, as the place where the instant controversy arose. I would apply that rule here to hold that Alvarez's tort claim for false arrest under the FTCA is barred under the foreign-country exception.

Accordingly, I concur in the Court's judgment and concur in Parts I, III, and IV of its opinion.

JUSTICE BREYER, concurring in part and concurring in the judgment.

I join JUSTICE GINSBURG's concurrence and join the Court's opinion in respect to the Alien Tort Statute (ATS) claim. The Court says that to qualify for recognition under the ATS a norm of international law must have a content as definite as, and an acceptance as widespread as, those that characterized 18th-century international norms prohibiting piracy. *Ante*, at 732. The norm must extend liability to the type of perpetrator (*e. g.*, a private actor) the plaintiff seeks to sue. *Ante*, at 732, n. 20. And Congress can make clear that courts should not recognize any such norm, through a direct or indirect command or by occupying the field. See *ante*, at 731. The Court also suggests that principles of exhaustion might apply, and that courts should give "serious weight" to the Executive Branch's view of the impact on for-

eign policy that permitting an ATS suit will likely have in a given case or type of case. *Ante*, at 733, n. 21. I believe all of these conditions are important.

I would add one further consideration. Since enforcement of an international norm by one nation's courts implies that other nations' courts may do the same, I would ask whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement. In applying those principles, courts help ensure that "the potentially conflicting laws of different nations" will "work together in harmony," a matter of increasing importance in an ever more interdependent world. *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, *ante*, at 164; cf. *Murray* v. *Schooner Charming Betsy*, 2 Cranch 64, 118 (1804). Such consideration is necessary to ensure that ATS litigation does not undermine the very harmony that it was intended to promote. See *ante*, at 715–718.

These comity concerns normally do not arise (or at least are mitigated) if the conduct in question takes place in the country that provides the cause of action or if that conduct involves that country's own national—where, say, an American assaults a foreign diplomat and the diplomat brings suit in an American court. See Restatement (Third) of Foreign Relations Law of the United States §§ 402(1), (2) (1986) (hereinafter Restatement) (describing traditional bases of territorial and nationality jurisdiction). They do arise, however, when foreign persons injured abroad bring suit in the United States under the ATS, asking the courts to recognize a claim that a certain kind of foreign conduct violates an international norm.

Since different courts in different nations will not necessarily apply even similar substantive laws similarly, workable harmony, in practice, depends upon more than substantive uniformity among the laws of those nations. That is to say, substantive uniformity does not *automatically* mean

that universal jurisdiction is appropriate. Thus, in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him. See, *e. g.*, *United States* v. *Smith*, 5 Wheat. 153, 162 (1820) (referring to "the general practice of all nations in punishing all persons, whether natives or foreigners, who have committed [piracy] against any persons whatsoever, with whom they are in amity").

Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. See Restatement § 404, and Comment *a;* International Law Association, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences 2 (2000). That subset includes torture, genocide, crimes against humanity, and war crimes. See *id.*, at 5–8; see also, *e. g.*, *Prosecutor* v. *Furundzija,* Case No. IT–95–17/1–T, ¶¶ 155–156 (International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in Territory of Former Yugoslavia Since 1991, Dec. 10, 1998); *Attorney Gen. of Israel* v. *Eichmann*, 36 I. L. R. 277 (Sup. Ct. Israel 1962).

The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement § 404, Comment *b.* That is because the criminal courts of many nations combine civil and criminal proceedings, allowing those injured

by criminal conduct to be represented, and to recover damages, in the criminal proceeding itself. Brief for European Commission as *Amicus Curiae* 21, n. 48 (citing 3 Y. Donzallaz, La Convention de Lugano du 16 septembre 1988 concernant la compétence judiciaire et l'exécution des décisions en matière civile et commerciale, ¶¶ 5203–5272 (1998); EC Council Regulation Art. 5, § 4, No. 44/2001, 2001 O. J. (L 12/1) (Jan. 16, 2001)). Thus, universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well.

Taking these matters into account, as I believe courts should, I can find no similar procedural consensus supporting the exercise of jurisdiction in these cases. That lack of consensus provides additional support for the Court's conclusion that the ATS does not recognize the claim at issue here—where the underlying substantive claim concerns arbitrary arrest, outside the United States, of a citizen of one foreign country by another.

Reporter's Note

The next page is purposely numbered 901. The numbers between 763 and 901 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR JUNE 14 THROUGH
SEPTEMBER 30, 2004

JUNE 14, 2004

Certiorari Granted—Vacated and Remanded

No. 03–284. SOCIETE NATIONALE DES CHEMINS DE FER FRANCAIS *v.* ABRAMS ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004). Reported below: 332 F. 3d 173.

No. 03–500. REPUBLIC OF AUSTRIA ET AL. *v.* WHITEMAN ET AL.; and

No. 03–517. REPUBLIC OF POLAND ET AL. *v.* GARB ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004). Reported below: 72 Fed. Appx. 850.

No. 03–741. HWANG GEUM JOO ET AL. *v.* JAPAN. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Republic of Austria* v. *Altmann*, 541 U. S. 677 (2004). Reported below: 332 F. 3d 679.

No. 03–1348. KO *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Crawford* v. *Washington*, 541 U. S. 36 (2004). Reported below: 304 App. Div. 2d 451, 757 N. Y. S. 2d 561.

Certiorari Dismissed

No. 03–9788. MARTIN *v.* NEBRASKA BOARD OF PAROLE. Ct. App. Neb. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

No. 03–10241. ORTLOFF *v.* FLEMING, WARDEN. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis*

denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 88 Fed. Appx. 715.

Miscellaneous Orders

No. 02–10038. TENNARD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. [Certiorari granted, 540 U. S. 945.] Motion of respondent for leave to file supplemental brief after argument granted.

No. 03–409. KP PERMANENT MAKE-UP, INC. *v.* LASTING IMPRESSION I, INC., ET AL. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–878. CRAWFORD, INTERIM FIELD OFFICE DIRECTOR, PORTLAND, IMMIGRATION AND CUSTOMS ENFORCEMENT, ET AL. *v.* SUAREZ MARTINEZ. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1217]; and

No. 03–7434. BENITEZ *v.* MATA, INTERIM FIELD OFFICE DIRECTOR, MIAMI, IMMIGRATION AND CUSTOMS ENFORCEMENT. C. A. 11th Cir. [Certiorari granted, 540 U. S. 1147.] Motion of respondent Suarez Martinez and petitioner Benitez for divided argument granted. Request for additional time for oral argument denied.

No. 03–9345. OWEN *v.* FLORIDA. Sup. Ct. Fla. Motion of petitioner to defer consideration of petition for writ of certiorari granted.

No. 03–10442. IN RE CARROLL;

No. 03–10508. IN RE MILLER; and

No. 03–10510. IN RE RHETT. Petitions for writs of habeas corpus denied.

No. 03–10478. IN RE BAILEY. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of habeas corpus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule

33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

No. 03–9751. IN RE BELLON. Petition for writ of mandamus and/or prohibition denied.

No. 03–10175. IN RE MORRISON. Motion of petitioner for leave to proceed *in forma pauperis* denied, and petition for writ of mandamus dismissed. See this Court's Rule 39.8. As petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) *(per curiam)*. JUSTICE STEVENS dissents. See *id.*, at 4, and cases cited therein.

Certiorari Granted

No. 02–1672. JACKSON *v.* BIRMINGHAM BOARD OF EDUCATION. C. A. 11th Cir. Certiorari granted. Reported below: 309 F. 3d 1333.

No. 03–1423. MUEHLER ET AL. *v.* MENA. C. A. 9th Cir. Motion of Police Officers Research Association of California Legal Defense Fund for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 332 F. 3d 1255.

No. 03–8661. SMITH *v.* MASSACHUSETTS. App. Ct. Mass. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 58 Mass. App. 166, 788 N. E. 2d 977.

Certiorari Denied

No. 03–201. CLAYTON HOSPITALITY GROUP, INC. *v.* ORANGE COUNTY, FLORIDA, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 67 Fed. Appx. 588.

No. 03–1159. SKWIRA, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF SKWIRA, ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 344 F. 3d 64.

No. 03–1281. TOWN OF ISLIP, NEW YORK, ET AL. *v.* NORTON. C. A. 2d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 56.

No. 03–1288. HOLMES *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, DEPARTMENT OF LABOR, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 66 Fed. Appx. 491.

No. 03–1298. WILLIAMS *v.* DEVELL R. YOUNG, M. D., P. C., ET AL. Ct. App. Ga. Certiorari denied. Reported below: 258 Ga. App. 821, 575 S. E. 2d 648.

No. 03–1314. LURIE *v.* BLACKWELL, LIQUIDATING TRUSTEE OF THE POPKIN & STERN LIQUIDATING TRUST. C. A. 8th Cir. Certiorari denied. Reported below: 346 F. 3d 804.

No. 03–1343. JOHNSON *v.* ORANGE COUNTY, FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 865 So. 2d 512.

No. 03–1390. WASTE RECOVERY ENTERPRISES, LLC *v.* TOWN OF UNADILLA, NEW YORK, ET AL. App. Div., Sup. Ct. N. Y., 3d Jud. Dept. Certiorari denied. Reported below: 294 App. Div. 2d 766, 742 N. Y. S. 2d 715.

No. 03–1405. HOTEL & MOTEL ASSOCIATION OF OAKLAND ET AL. *v.* CITY OF OAKLAND, CALIFORNIA. C. A. 9th Cir. Certiorari denied. Reported below: 344 F. 3d 959.

No. 03–1411. DOE, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR DOE, A MINOR, ET AL. *v.* LEBBOS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 348 F. 3d 820.

No. 03–1412. COASTAL PETROLEUM CO. ET AL. *v.* FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION ET AL. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 864 So. 2d 402.

No. 03–1421. UNITED STATES EX REL. GOLDSTEIN *v.* FABRICARE DRAPERIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 341.

No. 03–1422. DEGIDIO *v.* WEST GROUP CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 355 F. 3d 506.

No. 03–1468. LAKIN LAW FIRM, P. C. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 352 F. 3d 1122.

No. 03–1476. McGregor *v.* Mineta, Secretary of Transportation. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 656.

No. 03–1486. Northern Voyager Limited Partnership et al. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 350 F. 3d 247.

No. 03–1489. Carroll *v.* Potter, Postmaster General, et al. C. A. 3d Cir. Certiorari denied. Reported below: 75 Fed. Appx. 874.

No. 03–1491. Thames Shipyard & Repair Co. *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 350 F. 3d 247.

No. 03–1493. Doe *v.* United States. C. A. 8th Cir. Certiorari denied.

No. 03–1494. Jackson *v.* Department of Justice et al. C. A. D. C. Cir. Certiorari denied.

No. 03–1516. Wyatt et al. *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 508.

No. 03–1539. King *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 351 F. 3d 859.

No. 03–8444. Jennings *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 63 Fed. Appx. 35.

No. 03–8622. Harrington *v.* Northwest Airlines, Inc. Ct. App. Minn. Certiorari denied.

No. 03–8804. Conrod *v.* Moore et al. C. A. 5th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 605.

No. 03–8808. Jones *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 119 S. W. 3d 766.

No. 03–9167. Simpson *v.* Texas. Ct. Crim. App. Tex. Certiorari denied. Reported below: 119 S. W. 3d 262.

No. 03–9274. Raby *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 324.

No. 03–9323. DUNN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 345 F. 3d 1285.

No. 03–9333. OVERBY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 575 Pa. 227, 836 A. 2d 20.

No. 03–9351. AGUILERA-DE FLORES *v.* UNITED STATES; and JALOMO-GALLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 969 (first judgment); 87 Fed. Appx. 388 (second judgment).

No. 03–9715. TURNER *v.* HORN ET AL. Sup. Ct. Pa. Certiorari denied.

No. 03–9716. BROWN *v.* SCOTT ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 569.

No. 03–9717. MACKEY *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 329 Ill. App. 3d 1231, 835 N. E. 2d 196.

No. 03–9735. DALAL *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 988.

No. 03–9736. O'NEAL *v.* HAMMER ET AL. Sup. Ct. Haw. Certiorari denied.

No. 03–9745. LEE *v.* CALIFORNIA. Ct. App. Cal., 6th App. Dist. Certiorari denied. Reported below: 111 Cal. App. 4th 1310, 4 Cal. Rptr. 3d 642.

No. 03–9747. JON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9749. JOHNSON *v.* MARSHALL ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 906.

No. 03–9758. ROGERS *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9760. JOHNSON *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied. Reported below: 80 Fed. Appx. 557.

No. 03–9763. CHAPIN *v.* FERNALD, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 363.

No. 03–9764. TRINIDAD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9766. CATHRON *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 835.

No. 03–9771. LOLLAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 77 Fed. Appx. 701.

No. 03–9781. BROWN *v.* WILLIAMS, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 03–9782. SCOTT *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 101 Ohio St. 3d 31, 800 N. E. 2d 1133.

No. 03–9785. KALINOWSKI *v.* BOND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 358 F. 3d 978.

No. 03–9789. DUENAS *v.* GALAZA, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 180.

No. 03–9795. JACKSON *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 310.

No. 03–9797. SCOTT *v.* LOUISIANA. Ct. App. La., 4th Cir. Certiorari denied. Reported below: 846 So. 2d 1002.

No. 03–9798. SMITH *v.* BERRY. Ct. App. Tex., 14th Dist. Certiorari denied.

No. 03–9801. MCQUEEN *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–9806. BELTON *v.* TURNER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 66.

No. 03–9810. SUDDUTH, AKA MUHAMMAD *v.* STRASSBURGER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 874.

No. 03–9813. MATHIS *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 835 A. 2d 833.

No. 03–9814. SHOYINKA *v.* CITY OF LOS ANGELES, CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9818. MCLAURIN *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9820. STAMPONE *v.* KEARFOTT GUIDANCE & NAVIGATION CORP. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 437.

No. 03–9829. HASSINK *v.* GANSHEIMER, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9831. HODGE ET AL. *v.* GIANT FOOD INC. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 765.

No. 03–9833. BIROS *v.* BRADSHAW, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9834. EVANS *v.* HAMRICK ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–9836. MCGEE *v.* MOTE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9841. PRESIDENT *v.* STALDER, SECRETARY, LOUISIANA DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 711.

No. 03–9842. LINDSEY *v.* COLORADO. Ct. App. Colo. Certiorari denied.

No. 03–9843. JUSTICE *v.* SUPERIOR COURT OF CALIFORNIA, SAN DIEGO COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 03–9844. ANGEL *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9848. GORDON ET AL. *v.* ALABAMA ET AL. Sup. Ct. Ala. Certiorari denied. Reported below: 899 So. 2d 314.

No. 03–9849. MARTIN *v.* HERNANDEZ, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 170.

No. 03–9850. KISSANE *v.* JONES, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 577.

No. 03–9864. HICKS *v.* HEAD, WARDEN. C. A. 11th Cir. Certiorari denied. Reported below: 333 F. 3d 1280.

No. 03–9878. SIGALA *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9896. MAYS *v.* STRAUB, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9953. HOWARD *v.* HILLSBOROUGH COUNTY SHERIFF'S DEPARTMENT. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 392.

No. 03–9963. AUSTIN *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–9972. POSEY *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 193, 82 P. 3d 755.

No. 03–10005. WILLIAMS *v.* ROWLEY, SUPERINTENDENT, MISSOURI EASTERN CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–10013. QUEVADO *v.* RUMSFELD, SECRETARY OF DEFENSE, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 303.

No. 03–10014. EVERETT *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10022. LEWIS *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 573.

No. 03–10036. BUSHARD *v.* YUKINS, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 505.

No. 03–10073. GALE *v.* VAUGHN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD. C. A. 3d Cir. Certiorari denied. Reported below: 83 Fed. Appx. 472.

No. 03–10090. DAVIS *v.* WALDRON, CLERK, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10113. MOLINEAUX *v.* WEST VIRGINIA. Sup. Ct. App. W. Va. Certiorari denied.

No. 03–10133. TOMLIN *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 83 Fed. Appx. 925.

No. 03–10145. LOCKLEAR *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 160 N. C. App. 596, 587 S. E. 2d 682.

No. 03–10167. ATTIA *v.* SOCIAL SECURITY ADMINISTRATION ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 142.

No. 03–10194. GUY *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 10th Cir. Certiorari denied. Reported below: 62 Fed. Appx. 848.

No. 03–10212. GRANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10219. WARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 382.

No. 03–10226. CASEY *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10231. AREVALO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10236. WATKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 578.

No. 03–10239. BURR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 631.

No. 03–10244. CRAYTON, AKA HARRIS, AKA WINTERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 357 F. 3d 560.

No. 03–10247. CONCEPCION *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–10248. WILLIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 986.

No. 03–10250. BONILLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 86 Fed. Appx. 545.

No. 03–10251. SMITH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10252. SANDERS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 83.

No. 03–10254. DECATO *v.* EXECUTIVE OFFICE FOR UNITED STATES ATTORNEYS. C. A. D. C. Cir. Certiorari denied.

No. 03–10256. CARTER *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied.

No. 03–10258. BURNETT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 906.

No. 03–10262. JIMENEZ-VELASCO *v.* UNITED STATES; GONZALEZ *v.* UNITED STATES; HINOJOSA-AGUIRRE *v.* UNITED STATES; DEL BOSQUE *v.* UNITED STATES; LOZANO-TAMEZ *v.* UNITED STATES; QUIROZ-ESCOBEDO *v.* UNITED STATES; and CAMPOS MADRIGAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* Reported below: 86 Fed. Appx. 726 (fourth judgment); 87 Fed. Appx. 935 (sixth judgment) and 993 (first judgment); 88 Fed. Appx. 779 (second judgment); 89 Fed. Appx. 479 (seventh judgment); 90 Fed. Appx. 79 (fifth judgment); 95 Fed. Appx. 640 (third judgment).

No. 03–10264. PEVELER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 359 F. 3d 369.

No. 03–10265. MEDINA-ANICACIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 325 F. 3d 638.

No. 03–10266. MONSIBAIS-TOVIAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 47.

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*[REPORTER'S NOTE: This order was vacated on January 24, 2005. 543 U. S. 1116.]

No. 03–10267. ROJAS AFANADOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–10269. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 353.

No. 03–10271. WELCH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 221.

No. 03–10272. NEWSOME *v.* UNITED STATES (Reported below: 89 Fed. Appx. 466); MARTIN *v.* UNITED STATES (87 Fed. Appx. 392); CHIMNEY *v.* UNITED STATES (88 Fed. Appx. 77); SONGALIA FLORES *v.* UNITED STATES; VILLARREAL-MEDINA *v.* UNITED STATES (87 Fed. Appx. 395); ABNEY *v.* UNITED STATES (87 Fed. Appx. 960); GUERRERO *v.* UNITED STATES (87 Fed. Appx. 990); AGUILAR-CORTEZ *v.* UNITED STATES (87 Fed. Appx. 937); AVILA-CHAVEZ *v.* UNITED STATES (87 Fed. Appx. 433); HERNANDEZ-HERNANDEZ *v.* UNITED STATES (87 Fed. Appx. 425); DE LOS SANTOS *v.* UNITED STATES (87 Fed. Appx. 421); MEDINA-TENIENTE *v.* UNITED STATES (87 Fed. Appx. 978); and DE LUNA-VIGIL *v.* UNITED STATES (87 Fed. Appx. 976). C. A. 5th Cir. Certiorari denied.*

No. 03–10273. MIRANDA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10274. COLEMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 776.

No. 03–10275. EPPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.* Reported below: 89 Fed. Appx. 627.

No. 03–10276. CARDENAS-GUTIERREZ *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 9.

No. 03–10277. RUDDOCK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 82 Fed. Appx. 752.

No. 03–10278. SALCEDA-GUERRERO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 849.

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*[REPORTER'S NOTE: These orders were vacated on January 24, 2005. 543 U. S. 1116.]

No. 03–10282. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 353 F. 3d 816 and 85 Fed. Appx. 569.

No. 03–10287. STEPHENS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10291. WRIGHT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10292. TERRELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 95 Fed. Appx. 746.

No. 03–10293. BURKE, AKA HAKIMI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 883.

No. 03–10294. ALEXANDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 889.

No. 03–10295. MERICHKO *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 3d Cir. Certiorari denied. Reported below: 85 Fed. Appx. 872.

No. 03–10297. REID *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 357 F. 3d 574.

No. 03–10299. LAMPKIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 14.

No. 03–10303. RICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 596.

No. 03–10306. ELDRIDGE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 942.

No. 03–10312. NIX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 415.

No. 03–10313. MONTGOMERY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 69 Fed. Appx. 132.

No. 03–10314. LAWRENCE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–10318. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 917.

No. 03–10319. SMYTHE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 363 F. 3d 127.

No. 03–10320. ADAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 879.

No. 03–10322. NEAL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–10324. BERRY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–10326. AMADO-NUNEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 357 F. 3d 119.

No. 03–10329. HERNANDEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 637.

No. 03–10330. HERNANDEZ-PUGA *v.* UNITED STATES; CRUZ-DURAN *v.* UNITED STATES; and TERAN-GOMEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 404 (third judgment) and 918 (first judgment); 88 Fed. Appx. 50 (second judgment).

No. 03–10338. CARTER *v.* UNITED STATES ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10344. MCFARLANE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 906.

No. 03–10346. WALKER, AKA SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 56.

No. 03–10347. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 93 Fed. Appx. 454.

No. 03–10350. PERSAUD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 869.

No. 03–10362. SPRINGER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 354 F. 3d 772.

No. 03–10365. SPYKES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 731.

No. 03–10366. HAYS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10367. GOMEZ-VALDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 836.

No. 03–10368. GAINES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 145.

No. 03–10370. BEARD *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 354 F. 3d 691.

No. 03–10374. DELGADO-ROMERO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 667.

No. 03–10377. FLORENCE *v.* GALLEGOS, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–10380. HUPP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–10386. GIBSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 643.

No. 03–10388. HICKMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–10392. GREEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10417. MCDONNELL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* Reported below: 88 Fed. Appx. 701.

No. 03–10421. LONGORIA-CONTRERAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 367.

No. 03–1147. ROEDER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, ET AL. *v.* ISLAMIC REPUBLIC OF IRAN ET AL. C. A. D. C. Cir. Motion of George Allen et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 333 F. 3d 228.

No. 03–1282. HEALTHPLAN SERVICES, INC., ET AL. *v.* GUNNELLS ET AL. C. A. 4th Cir. Motions of National Home Equity Mortgage Association and Chamber of Commerce of the United

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*[REPORTER'S NOTE: This order was vacated on January 24, 2005. 543 U. S. 1116.]

States for leave to file briefs as *amici curiae* granted. Certiorari denied. Reported below: 348 F. 3d 417.

Rehearing Denied

No. 01–8625. STROUD *v.* POLLUNSKY ET AL., 535 U. S. 1038;

No. 03–1035. KELSO *v.* UNITED STATES DEFENSE INTELLIGENCE AGENCY, 540 U. S. 1220;

No. 03–1249. FILOSO *v.* PRINCE WILLIAM COUNTY SCHOOL BOARD, 541 U. S. 1030;

No. 03–1278. PERSIK *v.* COLORADO STATE UNIVERSITY, 541 U. S. 990;

No. 03–8446. MOTT *v.* SISTRUNK, SUPERINTENDENT, CROSS CITY CORRECTIONAL INSTITUTION, ET AL., 541 U. S. 945;

No. 03–8583. BOWMAN *v.* UNITED STATES, 540 U. S. 1226;

No. 03–8691. HARVEY *v.* GARCIA, WARDEN, 541 U. S. 977;

No. 03–8895. RUSSELL *v.* VITTANDS, 541 U. S. 994;

No. 03–8928. PERRY *v.* CITY OF BIRMINGHAM, ALABAMA, ET AL., 541 U. S. 995;

No. 03–8984. THOMPSON *v.* DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT, 541 U. S. 996;

No. 03–9068. FLEMING *v.* BROOKS, WARDEN, 541 U. S. 966;

No. 03–9113. WEST *v.* WORKMAN, WARDEN, 541 U. S. 1014;

No. 03–9293. ALDER *v.* BURT, WARDEN, 541 U. S. 1016;

No. 03–9302. MANLEY *v.* DAVIS, SUPERINTENDENT, INDIANA STATE PRISON, 541 U. S. 999;

No. 03–9499. IN RE REYNOLDS, 541 U. S. 986;

No. 03–9522. MUNOZ *v.* UNITED STATES, 541 U. S. 1017; and

No. 03–9759. IN RE BELLON, 541 U. S. 1029. Petitions for rehearing denied.

No. 03–8397. COOPER *v.* JOHNSON, REGIONAL DIRECTOR, GEORGIA DEPARTMENT OF CORRECTIONS, ET AL., 540 U. S. 1224. Motion for leave to file petition for rehearing denied.

JUNE 16, 2004

Miscellaneous Order

No. 03A1023. SIZER, COMMISSIONER, MARYLAND DEPARTMENT OF CORRECTIONS, ET AL. *v.* OKEN. Application to vacate the stay of execution of sentence of death entered by the United States District Court for the District of Maryland on June 14, 2004, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE GINSBURG, and

JUSTICE BREYER would deny the application to vacate the stay of execution.

Certiorari Denied

No. 03–10808 (03A1011). OKEN *v.* MARYLAND. Ct. App. Md. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 381 Md. 580, 851 A. 2d 538.

JUNE 17, 2004

Certiorari Denied

No. 03–10888 (03A1031). OKEN *v.* MARYLAND. Cir. Ct. Baltimore County, Md. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied.

No. 03–10908 (03A1034). OKEN *v.* MARYLAND. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari before judgment denied. JUSTICE SCALIA took no part in the consideration or decision of this application and this petition.

JUNE 21, 2004

Certiorari Granted—Vacated and Remanded

No. 03–109. VENEMAN, SECRETARY OF AGRICULTURE, ET AL. *v.* MONTANA WILDERNESS ASSN., INC., ET AL.; and

No. 03–123. BLUE RIBBON COALITION, INC., ET AL. *v.* MONTANA WILDERNESS ASSN., INC., ET AL. C. A. 9th Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Norton* v. *Southern Utah Wilderness Alliance*, *ante*, p. 55. Reported below: 314 F. 3d 1146.

No. 03–1015. BANK AUSTRIA AG ET AL. *v.* SNIADO ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *F. Hoffmann-La Roche Ltd* v. *Empagran S. A.*, *ante*, p. 155. Reported below: 352 F. 3d 73.

Certiorari Granted—Remanded

No. 02–1703. UTAH SHARED ACCESS ALLIANCE ET AL. *v.* SOUTHERN UTAH WILDERNESS ALLIANCE ET AL. C. A. 10th Cir. The Court reversed the judgment below in *Norton* v. *Southern*

Utah Wilderness Alliance, *ante*, p. 55. Therefore, certiorari granted, and case remanded for further proceedings. Reported below: 301 F. 3d 1217.

Certiorari Dismissed

No. 03–10341. MENDEZ *v.* UNITED STATES ET AL. C. A. 4th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8. Reported below: 94 Fed. Appx. 987.

Miscellaneous Orders

No. 03M80. HERIBERTO C. *v.* LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES. Motion for leave to proceed *in forma pauperis* without an affidavit of indigency executed by petitioner denied.

No. 03–10035. NASSRALAH *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 3d Cir.; and

No. 03–10211. REYES *v.* VERIZON DATA SERVICES, INC. C. A. 11th Cir. Motions of petitioners for leave to proceed *in forma pauperis* denied. Petitioners are allowed until July 12, 2004, within which to pay the docketing fees required by Rule 38(a) and to submit petitions in compliance with Rule 33.1 of the Rules of this Court.

No. 03–10608. IN RE CRAWFORD. Petition for writ of habeas corpus denied.

No. 03–10481. IN RE KIRKSEY; and

No. 03–10563. IN RE CHAMBERS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 03–1293. WHITFIELD *v.* UNITED STATES; and

No. 03–1294. HALL *v.* UNITED STATES. C. A. 11th Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 349 F. 3d 1320.

No. 03–9168. SHEPARD *v.* UNITED STATES. C. A. 1st Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 348 F. 3d 308.

Certiorari Denied

No. 03–1268. CITY OF ANAHEIM, CALIFORNIA, ET AL. *v.* DRUMMOND, BY AND THROUGH HIS GUARDIAN AD LITEM, DRUMMOND.

C. A. 9th Cir. Certiorari denied. Reported below: 343 F. 3d 1052.

No. 03–1302. CONROY *v.* TOWNSHIP OF LOWER MERION, PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 77 Fed. Appx. 556.

No. 03–1322. PROVENZA *v.* FRIEND. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 101.

No. 03–1326. HAWKINS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.* Reported below: 340 F. 3d 459.

No. 03–1327. FANNING, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 346 F. 3d 386.

No. 03–1334. IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT *v.* SIERRA CLUB ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 346 F. 3d 955 and 352 F. 3d 1186.

No. 03–1426. DEKALB COUNTY, GEORGIA *v.* PRICKETT ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 349 F. 3d 1294.

No. 03–1429. 4-MALI LLC *v.* BANKERS INSURANCE CO. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 970.

No. 03–1437. WAITE *v.* HIPPE ET AL. Ct. App. Neb. Certiorari denied. Reported below: 11 Neb. App. lxxii.

No. 03–1441. BISHOP ET AL. *v.* NEW JERSEY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 84 Fed. Appx. 220.

No. 03–1442. EAGLE INSURANCE CO. ET AL. *v.* BANKVEST CAPITAL CORP. C. A. 1st Cir. Certiorari denied. Reported below: 360 F. 3d 291.

No. 03–1444. ARCHDIOCESE OF MILWAUKEE *v.* SUPERIOR COURT OF CALIFORNIA, ORANGE COUNTY. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 112 Cal. App. 4th 423, 5 Cal. Rptr. 3d 154.

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*[REPORTER'S NOTE: This order was vacated on January 24, 2005. 543 U. S. 1097.]

No. 03–1445. REGIER, SECRETARY, FLORIDA DEPARTMENT OF CHILDREN & FAMILIES, ET AL. *v.* DOES 1–13 ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 655.

No. 03–1446. ROMO *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 864 So. 2d 625.

No. 03–1447. ROE *v.* AWARE WOMAN CENTER FOR CHOICE, INC., ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 357 F. 3d 1226.

No. 03–1459. OPETUBO *v.* CITIBANK STUDENT LOAN CORP. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 145.

No. 03–1460. SAVAGE *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 263 Ga. App. 180, 587 S. E. 2d 294.

No. 03–1461. AVERY DENNISON CORP. *v.* 3M INNOVATIVE PROPERTIES CO. ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 350 F. 3d 1365.

No. 03–1463. HOOD *v.* STATE FARM FIRE & CASUALTY CO. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 599.

No. 03–1464. INFUSION RESOURCES, INC., ET AL. *v.* MINIMED, INC. C. A. 5th Cir. Certiorari denied. Reported below: 351 F. 3d 688.

No. 03–1492. CORAGGIOSO *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 3d Cir. Certiorari denied. Reported below: 355 F. 3d 730.

No. 03–1501. SOLEM ET AL. *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–1508. GRAVES ET AL., AS PERSONAL REPRESENTATIVES OF THE ESTATE OF AMEDURE, DECEASED *v.* WARNER BROTHERS ET AL. Sup. Ct. Mich. Certiorari denied. Reported below: 469 Mich. 853, 666 N. W. 2d 665.

No. 03–1509. GOLDSBERRY *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 03–1513. RAY *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 832 A. 2d 542.

No. 03–1528. PHILLIPS *v.* MEZERA ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 641.

No. 03–1530. QUINTERO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–1544. SIBLEY *v.* LANDO, JUDGE, CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, MIAMI-DADE COUNTY, FLORIDA. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 907.

No. 03–1547. PASSPORT VIDEO ET AL. *v.* ELVIS PRESLEY ENTERPRISES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 349 F. 3d 622 and 357 F. 3d 896.

No. 03–1553. TRENKLER *v.* PUGH, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 83 Fed. Appx. 468.

No. 03–1558. BURTON *v.* CONNECTICUT YANKEE ATOMIC POWER CO. ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 93 Fed. Appx. 332.

No. 03–1573. JONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–6324. INFANTE-CABRERA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 441.

No. 03–8965. BEASLEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 346 F. 3d 930.

No. 03–9072. ADAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 343 F. 3d 1024.

No. 03–9398. CHRISTOPHER, AKA YISRAEL *v.* TOWN OF YEMASSEE, SOUTH CAROLINA. Ct. App. S. C. Certiorari denied.

No. 03–9839. MCLEAN *v.* BOHANNON ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 425.

No. 03–9840. PALMER *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 854.

No. 03–9854. MOORE *v.* CAHILL-MASCHING, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–9855. YATES *v.* HINES, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–9856. ORTIZ *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Reported below: 75 Fed. Appx. 14.

No. 03–9859. COOK *v.* NORRIS, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied.

No. 03–9860. SMITH *v.* SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9863. JOHNSON *v.* BOARD, ADMINISTRATIVE JUDGE. Sup. Ct. Tex. Certiorari denied.

No. 03–9868. TURNER *v.* SOUTHEAST ATLANTIC BEVERAGE CORP. ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 654.

No. 03–9872. KAVIC *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 9th Cir. Certiorari denied.

No. 03–9875. HEREDIA NARANJO *v.* YARBOROUGH, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 598.

No. 03–9883. TROOP *v.* WOLFE, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT ALBION. C. A. 3d Cir. Certiorari denied.

No. 03–9890. CAUDILL *v.* KENTUCKY; and
No. 03–9926. GOFORTH *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 120 S. W. 3d 635.

No. 03–9892. D'ANGELO *v.* RATELLE, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 193.

No. 03–9893. EDMONSON *v.* HANKS, SUPERINTENDENT, WABASH VALLEY CORRECTIONAL FACILITY. C. A. 7th Cir. Certiorari denied.

No. 03–9894. BEAUDOIN *v.* FLORIDA. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 861 So. 2d 37.

No. 03–9897. BOWIE *v.* JORDAN, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 03–9898. ALVE *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 03–9901. MCCALL *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 32 Cal. 4th 175, 82 P. 3d 351.

No. 03–9903. MUNN *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 872 So. 2d 902.

No. 03–9904. MANNING *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–9905. LAGARDE *v.* MILLER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 03–9907. O'HARE *v.* RUNNELS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9908. BUTLER *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–9909. WILSON *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 352 F. 3d 847.

No. 03–9917. CARTER *v.* LOWNDES COUNTY, MISSISSIPPI, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 439.

No. 03–9925. YBARRA VILLAGRANA *v.* SCRIBNER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9927. JOHNSON *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. Reported below: 865 So. 2d 718.

No. 03–9928. BREWER *v.* SMITH, SUPERINTENDENT, SHAWANGUNK CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–9932. KING *v.* JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS. C. A. 4th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 428.

No. 03–9933. BROWN *v.* OHIO. Ct. App. Ohio, Mahoning County. Certiorari denied.

No. 03–9934. BRUCE *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied.

No. 03–9974. DORSEY *v.* YARBOROUGH, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 83.

No. 03–9988. WALLIS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Dist. Ct. App. Fla., 1st Dist. Certiorari denied. Reported below: 866 So. 2d 1216.

No. 03–10004. TOMPKINS *v.* KELLY, SUPERINTENDENT, CENTRAL MISSISSIPPI CORRECTIONAL FACILITY. C. A. 5th Cir. Certiorari denied.

No. 03–10016. NASRALLAH *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 23.

No. 03–10024. KIDD *v.* HOOKS, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10027. THORPE *v.* GRILLO ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 80 Fed. Appx. 215.

No. 03–10039. BROWN *v.* ATHENS REGIONAL MEDICAL CENTER. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 388.

No. 03–10062. DUPONT *v.* MASSACHUSETTS. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 1102, 795 N. E. 2d 12.

No. 03–10082. FRAZIER *v.* SMALL, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 100 Fed. Appx. 608.

No. 03–10084. GROHS *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 03–10101. FATY *v.* ASHCROFT, ATTORNEY GENERAL. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 260.

No. 03–10104. ROBINSON *v.* EPPS, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS, ET AL. C. A. 5th Cir. Certiorari denied.

No. 03–10110. LIBECKI *v.* KLAUSER, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10119. FEARS *v.* LUEBBERS, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER. C. A. 8th Cir. Certiorari denied.

No. 03–10120. GOOLSBY *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 860 So. 2d 991.

No. 03–10124. GARRISON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 03–10130. HINTON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 333 Ill. App. 3d 1207, 836 N. E. 2d 229.

No. 03–10162. NORDLUND *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 117 Wash. App. 1011.

No. 03–10182. RICE *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 337 Ill. App. 3d 1160, 843 N. E. 2d 513.

No. 03–10199. CASHION, AS EXECUTRIX OF THE ESTATE OF SMITH *v.* TORBERT. Sup. Ct. Ala. Certiorari denied. Reported below: 881 So. 2d 408.

No. 03–10225. CESARIO *v.* BERGQUIST. Sup. Ct. R. I. Certiorari denied. Reported below: 844 A. 2d 100.

No. 03–10232. BENNETT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 886 So. 2d 186.

No. 03–10300. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 76 Fed. Appx. 873.

No. 03–10327. INGRAM *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 74 Fed. Appx. 96.

No. 03–10331. BRODIT *v.* GOUGHNOUR, ACTING WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 350 F. 3d 985.

No. 03–10337. BAILEY *v.* NORTH CAROLINA. Ct. App. N. C. Certiorari denied. Reported below: 162 N. C. App. 181, 590 S. E. 2d 332.

No. 03–10340. BEAUMONT *v.* BARNHART, COMMISSIONER OF SOCIAL SECURITY. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 839.

No. 03–10359. AI FA YANG *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 389.

No. 03–10361. MCQUISTION *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 211.

No. 03–10369. HANEY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 151.

No. 03–10372. MALDONADO-CANALES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 732.

No. 03–10396. GOIST *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 78 Fed. Appx. 244.

No. 03–10397. FERREIRA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 782.

No. 03–10399. GREGG *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 03–10400. HUGH *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 03–10403. JONES *v.* TAPIA, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 781.

No. 03–10407. WILLIAMS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10408. VAN ALSTYNE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.* Reported below: 87 Fed. Appx. 640.

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*[REPORTER'S NOTE: This order was vacated on January 24, 2005. 543 U. S. 1116.]

No. 03–10413. CHOATE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–10415. ESTRADA-AGUIAR *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 178.

No. 03–10416. CARBAJAL-MARTINEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* Reported below: 87 Fed. Appx. 368.

No. 03–10419. PHIPPS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 368 F. 3d 505.

No. 03–10420. JEWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 03–10424. PEARSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* Reported below: 86 Fed. Appx. 749.

No. 03–10425. ACUNA-NAVARRO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 308.

No. 03–10427. SALAS *v.* UNITED STATES; and TORRES-VASQUEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* Reported below: 86 Fed. Appx. 788 (first judgment); 87 Fed. Appx. 417 (second judgment).

No. 03–10428. SINCLAIR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 93 Fed. Appx. 885.

No. 03–10429. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 380.

No. 03–10430. SCHEIDT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 801.

No. 03–10432. ALEGRIA-MORENO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10434. JIMINEZ PEREZ *v.* ANDREWS, ADMINISTRATOR, TAFT CORRECTIONAL INSTITUTION. C. A. 9th Cir. Certiorari denied. Reported below: 94 Fed. Appx. 657.

No. 03–10444. DAY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 986.

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*[REPORTER'S NOTE: These orders were vacated on January 24, 2005. 543 U. S. 1116.]

No. 03–10446. BANUELOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 188.

No. 03–10449. MARTINEZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 338 F. 3d 809.

No. 03–10451. LUJANO-PEREZ *v.* UNITED STATES (Reported below: 87 Fed. Appx. 398); REYES-RAMIREZ *v.* UNITED STATES (87 Fed. Appx. 973); CELEDON *v.* UNITED STATES (87 Fed. Appx. 966); FLORES-BENITEZ *v.* UNITED STATES (87 Fed. Appx. 395); CONTRERAS-PEREZ *v.* UNITED STATES (87 Fed. Appx. 989); SALGADO-CASTRO *v.* UNITED STATES (87 Fed. Appx. 936); REYES-AMAYA *v.* UNITED STATES (87 Fed. Appx. 957); VELA-PEREZ *v.* UNITED STATES (87 Fed. Appx. 984); GARCIA-GALIANO *v.* UNITED STATES (86 Fed. Appx. 786); CUELLAR-ARRELLANO *v.* UNITED STATES (87 Fed. Appx. 954); FORTUNA-TURBIARTES *v.* UNITED STATES (87 Fed. Appx. 953); GARCIA-CAMACHO *v.* UNITED STATES (87 Fed. Appx. 983); MARQUEZ-CONDE *v.* UNITED STATES (87 Fed. Appx. 951); BLANCO-MELGAR *v.* UNITED STATES (87 Fed. Appx. 434); CASTILLO-HERNANDEZ *v.* UNITED STATES (87 Fed. Appx. 949); BARRIGAS-VALDOVINOS *v.* UNITED STATES (86 Fed. Appx. 770); DAVILA-JUAREZ *v.* UNITED STATES (87 Fed. Appx. 981); LOPEZ-MARTINEZ *v.* UNITED STATES (87 Fed. Appx. 922); JUAREGUI-DURAN *v.* UNITED STATES (87 Fed. Appx. 426); GONZALEZ-CONTRERAS *v.* UNITED STATES (87 Fed. Appx. 424); PEREZ-SANCHEZ *v.* UNITED STATES (87 Fed. Appx. 424); MATA-ALVAREZ *v.* UNITED STATES (87 Fed. Appx. 412); RODRIGUEZ-TELLEZ *v.* UNITED STATES (87 Fed. Appx. 413); and HERNANDEZ-HERRERA *v.* UNITED STATES (87 Fed. Appx. 968). C. A. 5th Cir. Certiorari denied.

No. 03–10455. VILLANUEVA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 346 F. 3d 55.

No. 03–10460. GARDEA-VENEGAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 206.

No. 03–10462. HILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 96 Fed. Appx. 306.

No. 03–10463. HERNANDEZ-CARRASCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 207.

No. 03–10467. GONZALEZ-ALANIS *v.* UNITED STATES (Reported below: 88 Fed. Appx. 770); GARCIA-LUNA *v.* UNITED STATES (87 Fed. Appx. 927); MARTINEZ-VASQUEZ *v.* UNITED STATES (87 Fed. Appx. 975); DELGADO-GENCHIS *v.* UNITED STATES (88 Fed. Appx. 747); LOYOLA-HERNANDEZ *v.* UNITED STATES (87 Fed. Appx. 991); BOCANEGRA-CAMARILLO *v.* UNITED STATES (87 Fed. Appx. 959); TORRES-PEREZ *v.* UNITED STATES (87 Fed. Appx. 958); RANGEL-ORDUNA *v.* UNITED STATES (87 Fed. Appx. 937); RODRIGUEZ-HERNANDEZ *v.* UNITED STATES (87 Fed. Appx. 933); SALAZAR-GONZALEZ *v.* UNITED STATES (87 Fed. Appx. 990); YANEZ-BRILLANO *v.* UNITED STATES (88 Fed. Appx. 758); GONZALEZ-GARCIA *v.* UNITED STATES (86 Fed. Appx. 773); SOTO-FUERTE *v.* UNITED STATES (88 Fed. Appx. 752); CHAVEZ *v.* UNITED STATES (87 Fed. Appx. 985); MERAZ-SANCHEZ *v.* UNITED STATES (87 Fed. Appx. 956); SALDANA-AMANZA *v.* UNITED STATES (87 Fed. Appx. 955); ALCARAZ-RODRIGUEZ *v.* UNITED STATES (88 Fed. Appx. 45); RODRIGUEZ-GARCIA, AKA SUSTAITA-SAENZ *v.* UNITED STATES (87 Fed. Appx. 424); GARZA-FLORES *v.* UNITED STATES (87 Fed. Appx. 431); LEIJA-MARTINEZ *v.* UNITED STATES (87 Fed. Appx. 422); and GONZALEZ-CORA *v.* UNITED STATES (87 Fed. Appx. 945). C. A. 5th Cir. Certiorari denied.

No. 03–10469. CALHOUN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 65 Fed. Appx. 495.

No. 03–10473. PETRIE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 386.

No. 03–10475. ALLEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 03–10477. WILLIAMS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–10482. HAIRE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 551.

No. 03–10483. MINOR *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied.

No. 03–10487. TERRY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–10489. ESPINOZA-MADRID *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 348.

No. 03–10490. CRISTON *v.* UNITED STATES; PERALES *v.* UNITED STATES; GUERRA *v.* UNITED STATES; and SALINAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.* Reported below: 87 Fed. Appx. 391 (first judgment), 428 (third judgment), and 430 (second judgment); 95 Fed. Appx. 628 (fourth judgment).

No. 03–10491. ARZOLA-JUAREZ *v.* UNITED STATES; and MAGALLANES-TORRES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 919 (second judgment); 88 Fed. Appx. 762 (first judgment).

No. 03–10492. TENORIO JUAREZ *v.* UNITED STATES; and
No. 03–10495. JUAREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 360 F. 3d 491.

No. 03–10494. AMAYA-TORRES *v.* UNITED STATES (Reported below: 87 Fed. Appx. 965); GIRON-APODACA *v.* UNITED STATES (88 Fed. Appx. 735); OLVERA-BERMUDEZ *v.* UNITED STATES (87 Fed. Appx. 942); TAPIA-CARRENO *v.* UNITED STATES (88 Fed. Appx. 760); GOMEZ-CELIS *v.* UNITED STATES (87 Fed. Appx. 415); CHAVEZ-RAMIREZ *v.* UNITED STATES (87 Fed. Appx. 402); REYES-FLORES *v.* UNITED STATES (87 Fed. Appx. 386); GONZALEZ-CHAVEZ *v.* UNITED STATES (87 Fed. Appx. 926); FRIAS-SALAZAR *v.* UNITED STATES (88 Fed. Appx. 49); LOPEZ-HUERTA *v.* UNITED STATES (88 Fed. Appx. 750); MAZARIEGOS *v.* UNITED STATES (87 Fed. Appx. 916); PONCE-MARTINEZ *v.* UNITED STATES (88 Fed. Appx. 781); PUENTES-ROMERO *v.* UNITED STATES (88 Fed. Appx. 749); BAEZ TOVAR *v.* UNITED STATES (88 Fed. Appx. 51); and ZAPATA-AGUILAR *v.* UNITED STATES (88 Fed. Appx. 763). C. A. 5th Cir. Certiorari denied.

No. 03–10499. AVALOS-LUMBRERAS *v.* UNITED STATES (Reported below: 87 Fed. Appx. 917); DE HOYOS-GARCIA *v.* UNITED STATES (88 Fed. Appx. 769); DUQUE-RESTREPO *v.* UNITED STATES (88 Fed. Appx. 743); FRAYRE-SALAS *v.* UNITED STATES (87 Fed. Appx. 436); GARCIA-CASTRO *v.* UNITED STATES (87 Fed. Appx. 943); GONZALEZ-APODACA *v.* UNITED STATES (87 Fed. Appx. 437); GRAJEDA-ZAMORANO *v.* UNITED STATES (88 Fed. Appx. 759); HERNANDEZ-SOSA *v.* UNITED STATES (88 Fed. Appx. 764); JUAREZ-SANCHEZ *v.* UNITED STATES (88 Fed. Appx. 736); LOPEZ-

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*[REPORTER'S NOTE: This order was vacated in part on January 24, 2005. 543 U. S. 1117.]

MERCADO *v.* UNITED STATES (88 Fed. Appx. 767); NEGRETE-ALBA *v.* UNITED STATES (88 Fed. Appx. 739); PUNAY-BELTRAN *v.* UNITED STATES (88 Fed. Appx. 741); RIOS-QUINTERO *v.* UNITED STATES (88 Fed. Appx. 748); and RONQUILLO-BARRAZA *v.* UNITED STATES (88 Fed. Appx. 737). C. A. 5th Cir. Certiorari denied.

No. 03–10500. WEATHERSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 683.

No. 03–10501. ROTHEWELL *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 03–10507. TURNER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 390.

No. 03–10514. DANIELS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 90 Fed. Appx. 384.

No. 03–10516. BEAL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 03–10518. GRIGGS *v.* FLEMING, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 705.

No. 03–10520. HARRIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 03–10522. MUNIZ-SOLIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 929.

No. 03–10524. CORDELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 475.

No. 03–10525. CAMPBELL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.* Reported below: 88 Fed. Appx. 580.

No. 03–10526. DOE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 3d 929.

No. 03–10529. SHEPHERD *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 978.

No. 03–10530. VALADEZ SOTO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.* Reported below: 89 Fed. Appx. 44.

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*[REPORTER'S NOTE: These orders were vacated on January 24, 2005. 543 U. S. 1116, 1117.]

No. 03–10532. SALINAS-ROMO *v.* UNITED STATES (Reported below: 87 Fed. Appx. 399); RIOS-ELIAS *v.* UNITED STATES (95 Fed. Appx. 607); MENDOZA-BARCENAS *v.* UNITED STATES (88 Fed. Appx. 780); MORIN-DAVILA *v.* UNITED STATES (86 Fed. Appx. 785); SALAZAR-MARTINEZ *v.* UNITED STATES (88 Fed. Appx. 756); QUINTANILLA-RAMIREZ *v.* UNITED STATES (87 Fed. Appx. 987); CASTELLANO *v.* UNITED STATES (87 Fed. Appx. 986); RODRIGUEZ *v.* UNITED STATES (87 Fed. Appx. 935); VENTURA, aka GARCIA-CASTILLO *v.* UNITED STATES (87 Fed. Appx. 982); TORRES-GONZALEZ *v.* UNITED STATES (87 Fed. Appx. 934); MEDINA-SALDANA *v.* UNITED STATES (87 Fed. Appx. 949); RAMIREZ-GARCIA, aka HERNANDEZ-GARCIA *v.* UNITED STATES (87 Fed. Appx. 947); CASTILLO-SANTOS *v.* UNITED STATES (87 Fed. Appx. 435); ORTIZ-ARELLANO, aka RAMOS-OCHOA, aka AGUILAR-OCHOA *v.* UNITED STATES (87 Fed. Appx. 947); PUENTE-MORENO *v.* UNITED STATES (87 Fed. Appx. 921); RIVAS-SARMIENTO *v.* UNITED STATES (87 Fed. Appx. 944); CORTEZ *v.* UNITED STATES (87 Fed. Appx. 419); MARTINEZ-MARTINEZ *v.* UNITED STATES (95 Fed. Appx. 644); HERRERA-MIJARES, aka VILLA-DIAZ *v.* UNITED STATES (95 Fed. Appx. 685); HERNANDEZ-NAVARRO *v.* UNITED STATES (95 Fed. Appx. 580); DE LA CERDA-GARCIA, aka SERNA-GAONA *v.* UNITED STATES (94 Fed. Appx. 684); MENDOZA-LOPEZ *v.* UNITED STATES (95 Fed. Appx. 633); CAMACHO-OROZCO *v.* UNITED STATES (95 Fed. Appx. 650); VILLEGAS-MARIN *v.* UNITED STATES (95 Fed. Appx. 652); and RODRIGUEZ-PENA *v.* UNITED STATES (95 Fed. Appx. 586). C. A. 5th Cir. Certiorari denied.

No. 03–10535. BENDER *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 905.

No. 03–10537. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 03–10544. CORTEZ-CARRASCO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 638.

No. 03–10545. CALLOWAY, aka BEASLEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 982.

No. 03–1451. KRAMER *v.* BANC OF AMERICA SECURITIES, LLC. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part

in the consideration or decision of this petition. Reported below: 355 F. 3d 961.

No. 03–1456. SPENCER, SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION AT NORFOLK *v.* NORTON. C. A. 1st Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 351 F. 3d 1.

No. 03–9913. THROUMOULOS *v.* WAL-MART STORES, INC. C. A. 1st Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 03–1242. IN RE HOLBROOK, 541 U. S. 1029;
No. 03–8316. WELDON *v.* CALIFORNIA, 541 U. S. 909;
No. 03–8780. CHANDLER *v.* SMITH, WARDEN, 541 U. S. 991;
No. 03–9054. BALLARD *v.* BRAXTON, WARDEN, 541 U. S. 1013;
No. 03–9200. WOODRUFF *v.* MAINE DEPARTMENT OF HUMAN SERVICES, 541 U. S. 1033; and
No. 03–9217. IN RE MENDEZ, 541 U. S. 986. Petitions for rehearing denied.

JUNE 28, 2004

Certiorari Granted—Vacated and Remanded

No. 03–69. VYTRA HEALTHCARE ET AL. *v.* CICIO, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF CICIO. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Aetna Health Inc.* v. *Davila*, *ante*, p. 200. Reported below: 321 F. 3d 83.

No. 03–357. ADAMS, WARDEN, ET AL. *v.* BRAMBLES. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pliler* v. *Ford*, *ante*, p. 225. Reported below: 330 F. 3d 1197.

No. 03–520. PLILER, WARDEN *v.* HUNT. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Pliler* v. *Ford*, *ante*, p. 225. Reported below: 336 F. 3d 839.

No. 03–649. CIGNA HEALTHCARE OF FLORIDA *v.* LAND ET UX. C. A. 11th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Aetna*

Health Inc. v. *Davila, ante,* p. 200. Reported below: 339 F. 3d 1286.

No. 03–8659. NELSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Tennard* v. *Dretke, ante,* p. 274. Reported below: 77 Fed. Appx. 209.

No. 03–9412. DILTS *v.* OREGON. Sup. Ct. Ore. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Blakely* v. *Washington, ante,* p. 296. Reported below: 336 Ore. 158, 82 P. 3d 593.

Certiorari Granted—Reversed and Remanded. (See No. 03–1200, *ante,* p. 649.)

Certiorari Dismissed

No. 03–9948. SHABAZZ *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Motion of petitioner for leave to proceed *in forma pauperis* denied, and certiorari dismissed. See this Court's Rule 39.8.

Miscellaneous Orders

No. 03M81. TAYLOR *v.* PRUDENTIAL INSURANCE COMPANY OF AMERICA. Motion for leave to file petition for writ of certiorari under seal granted.

No. 03M82. HARTSFIELD *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motion to direct the Clerk to file petition for writ of certiorari out of time under this Court's Rule 14.5 denied.

No. 03M83. MCCULLUM *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. 105, Orig. KANSAS *v.* COLORADO. Motion of Solicitor General for divided argument granted. [For earlier order herein, see, *e. g.,* 541 U. S. 1071.]

No. 02–626. SOUTH FLORIDA WATER MANAGEMENT DISTRICT *v.* MICCOSUKEE TRIBE OF INDIANS ET AL., 541 U. S. 95. Motion of respondents to retax costs denied.

No. 02–1028. Norfolk Southern Railway Co. *v.* James N. Kirby, Pty Ltd., dba Kirby Engineering, et al. C. A. 11th Cir. [Certiorari granted, 540 U. S. 1099.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–750. Small *v.* United States. C. A. 3d Cir. [Certiorari granted, 541 U. S. 958.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 03–1116. Granholm, Governor of Michigan, et al. *v.* Heald et al. C. A. 6th Cir.;

No. 03–1120. Michigan Beer & Wine Wholesalers Assn. *v.* Heald et al. C. A. 6th Cir.; and

No. 03–1274. Swedenburg et al. *v.* Kelly, Chairman, New York Division of Alcoholic Beverage Control, State Liquor Authority, et al. C. A. 2d Cir. [Certiorari granted, 541 U. S. 1062.] Motion for realignment of the parties and to set a briefing schedule denied.

No. 03–1202. Hewlett-Packard Company Employee Benefits Organization Income Protection Plan *v.* Jebian. C. A. 9th Cir.; and

No. 03–1443. Hill *v.* Lockheed Martin Logistics Management, Inc. C. A. 4th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 03–10531. In re Shemonsky. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until July 19, 2004, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33.1 of the Rules of this Court.

No. 03–10669. In re Parker;

No. 03–10697. In re Almeyda; and

No. 03–10730. In re Sambrano Villarreal. Petitions for writs of habeas corpus denied.

No. 03–1542. In re Fleming et al.; and

No. 03–10233. In re McMillian. Petitions for writs of mandamus denied.

No. 03–10007. In re McCormick. Petition for writ of prohibition denied.

Certiorari Granted

No. 03–388. BATES ET AL. *v.* DOW AGROSCIENCES LLC. C. A. 5th Cir. Certiorari granted. Reported below: 332 F. 3d 323.

No. 03–855. CITY OF SHERRILL, NEW YORK *v.* ONEIDA INDIAN NATION OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted. Reported below: 337 F. 3d 139.

No. 03–1395. TENET, INDIVIDUALLY AND AS DIRECTOR OF CENTRAL INTELLIGENCE AND DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY, ET AL. *v.* DOE ET UX. C. A. 9th Cir. Certiorari granted. Reported below: 329 F. 3d 1135.

No. 03–1454. ASHCROFT, ATTORNEY GENERAL, ET AL. *v.* RAICH ET AL. C. A. 9th Cir. Certiorari granted. Reported below: 352 F. 3d 1222.

No. 03–9046. RHINES *v.* WEBER, WARDEN. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 346 F. 3d 799.

No. 03–9560. HOWELL, AKA COX *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. In addition to the question presented by the petition, the parties are directed to brief and argue the following question: "Was petitioner's federal constitutional claim properly raised before the Mississippi Supreme Court for purposes of 28 U. S. C. § 1257?" Reported below: 860 So. 2d 704.

No. 03–9659. MILLER-EL *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 361 F. 3d 849.

No. 03–932. DURA PHARMACEUTICALS, INC., ET AL. *v.* BROUDO ET AL. C. A. 9th Cir. Motion of Securities Industry Association for leave to file a brief as *amicus curiae* granted. Certiorari granted. Reported below: 339 F. 3d 933.

Certiorari Denied

No. 02–1864. CONOVER *v.* AETNA US HEALTHCARE, INC., ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 320 F. 3d 1076.

No. 03–641. Regal Cinemas, Inc., et al. *v.* Stewmon et al. C. A. 9th Cir. Certiorari denied. Reported below: 339 F. 3d 1126.

No. 03–786. Williams *v.* Benicorp Insurance Co. C. A. 11th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 223.

No. 03–1131. Cinemark USA, Inc. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 348 F. 3d 569.

No. 03–1266. Laton *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 352 F. 3d 286.

No. 03–1313. Davis, as Guardian and Next Friend for Davis, et al. *v.* United States et al. C. A. 10th Cir. Certiorari denied. Reported below: 343 F. 3d 1282.

No. 03–1339. University of Medicine and Dentistry of New Jersey et al. *v.* Corrigan, Acting Inspector General, Department of Health and Human Services. C. A. 3d Cir. Certiorari denied. Reported below: 347 F. 3d 57.

No. 03–1342. DaimlerChrysler Corp. *v.* Ysbrand et al., Individually and on Behalf of All Others Similarly Situated. Sup. Ct. Okla. Certiorari denied. Reported below: 81 P. 3d 618.

No. 03–1347. Orloff *v.* Federal Communications Commission et al. C. A. D. C. Cir. Certiorari denied. Reported below: 352 F. 3d 415.

No. 03–1359. Mitchell *v.* Chapman et al. C. A. 6th Cir. Certiorari denied. Reported below: 343 F. 3d 811.

No. 03–1369. Baker et al. *v.* Sunny Chevrolet, Inc., dba Wayland Chevrolet. C. A. 6th Cir. Certiorari denied. Reported below: 349 F. 3d 862.

No. 03–1430. Sibley *v.* Sibley. Dist. Ct. App. Fla., 3d Dist. Certiorari denied. Reported below: 866 So. 2d 1223.

No. 03–1455. Sappington, Judge, Circuit Court of Macon County, Illinois *v.* Robinson. C. A. 7th Cir. Certiorari denied. Reported below: 351 F. 3d 317.

No. 03–1462. Egbune *v.* Colorado. Sup. Ct. Colo. Certiorari denied.

No. 03–1466. CHASE MANHATTAN BANK, TRUSTEE *v.* BASCOM CORP. ET AL.; and

No. 03–1467. CHASE MANHATTAN BANK, TRUSTEE *v.* ASKEW. Super. Ct. N. J., App. Div. Certiorari denied. Reported below: 363 N. J. Super. 334, 832 A. 2d 956.

No. 03–1469. JONAS *v.* SOUTH CAROLINA DISCOUNT AUTO CENTER. Sup. Ct. S. C. Certiorari denied.

No. 03–1477. GESIORSKI ET UX. *v.* BRANCH BANKING & TRUST CO., FKA CARROLL COUNTY BANK & TRUST. C. A. 3d Cir. Certiorari denied. Reported below: 94 Fed. Appx. 968.

No. 03–1478. GOUIN *v.* GOULD, ASSOCIATE JUSTICE, MASSACHUSETTS PROBATE AND FAMILY COURT DEPARTMENT, SUFFOLK COUNTY DIVISION, ET AL. C. A. 1st Cir. Certiorari denied.

No. 03–1479. GALLEGOS *v.* JICARILLA APACHE NATION ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 806.

No. 03–1483. RAHN *v.* KAPS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 149.

No. 03–1484. YEE *v.* COURT OF APPEALS OF MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 03–1497. SAUDI *v.* MARINE TRANSPORT LINES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 505.

No. 03–1525. FORD *v.* NEW YORK CITY TRANSIT AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 81 Fed. Appx. 385.

No. 03–1526. HOCKING VALLEY COMMUNITY HOSPITAL *v.* EDWARDS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 542.

No. 03–1531. ANDERSON *v.* PEARSON ET AL. C. A. 4th Cir. Certiorari denied.

No. 03–1556. MACY *v.* KENTUCKY. Cir. Ct. Hopkins County, Ky. Certiorari denied.

No. 03–1580. MALDONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 787.

No. 03–1589. SPITZER, ATTORNEY GENERAL OF NEW YORK *v.* MATEO ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 2 N. Y. 3d 786, 812 N. E. 2d 1258.

No. 03–1591. LARSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 87 Fed. Appx. 10.

No. 03–1606. PAUL REVERE LIFE INSURANCE CO. ET AL. *v.* GREENBERG. C. A. 9th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 539.

No. 03–7361. LOTTER *v.* NEBRASKA. Sup. Ct. Neb. Certiorari denied. Reported below: 266 Neb. 245, 664 N. W. 2d 892.

No. 03–9006. KNIGHT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 86 Fed. Appx. 2.

No. 03–9036. MARQUEZ-URQUIDI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 516.

No. 03–9118. CHAMPNEY *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 574 Pa. 435, 832 A. 2d 403.

No. 03–9215. WILLS, AKA SHORT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 346 F. 3d 476.

No. 03–9273. SANSING *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 206 Ariz. 232, 77 P. 3d 30.

No. 03–9402. RIDEOUT *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied.* Reported below: 80 Fed. Appx. 836.

No. 03–9519. STROMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 03–9920. BELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–9922. STRINGHAM ET AL. *v.* TITSWORTH ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 7.

No. 03–9941. MARTINEZ *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

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*[REPORTER'S NOTE: This order was vacated on January 24, 2005. 543 U. S. 1116.]

No. 03–9942. YOUNG *v.* PHILLIPS, SUPERINTENDENT, GREEN HAVEN CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 03–9943. ALLEN, AKA ALI *v.* NEVADA. Sup. Ct. Nev. Certiorari denied.

No. 03–9944. ALLISON *v.* ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–9949. SLACK *v.* JACKSON, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9950. STERLING *v.* TEXAS. Ct. App. Tex., 7th Dist. Certiorari denied.

No. 03–9955. HENDERSON *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–9959. HENDERSON *v.* BRILEY, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 354 F. 3d 907.

No. 03–9962. HARRIS *v.* WEST VIRGINIA. Cir. Ct. Kanawha County, W. Va. Certiorari denied.

No. 03–9964. BRIDGEFORTH *v.* MULLIN, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 291.

No. 03–9979. RECTOR *v.* OHIO. Ct. App. Ohio, Carroll County. Certiorari denied.

No. 03–9984. JOHNSON *v.* ILLINOIS. App. Ct. Ill., 3d Dist. Certiorari denied.

No. 03–9985. JOHNSON *v.* LEWIS, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–9987. BEHARRY *v.* M. T. A. NEW YORK CITY TRANSIT AUTHORITY ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 75 Fed. Appx. 863.

No. 03–9990. WILLIAMS *v.* JAMROG, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–9992. ANDERSON *v.* DEMIS. Cir. Ct. Ingham County, Mich. Certiorari denied.

No. 03–9993. EDDY *v.* SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS. C. A. 9th Cir. Certiorari denied.

No. 03–9994. CORRADINI *v.* CORRADINI. C. A. 6th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 444.

No. 03–9997. GRAY *v.* EDWARDS ET AL. Ct. App. D. C. Certiorari denied. Reported below: 834 A. 2d 859.

No. 03–9998. MILLER *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 357 N. C. 583, 588 S. E. 2d 857.

No. 03–10003. LIVINGSTON *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 03–10006. MCCORMICK *v.* DEMPSTER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 871.

No. 03–10008. SMITH *v.* NORTH CAROLINA. Sup. Ct. N. C. Certiorari denied. Reported below: 357 N. C. 604, 588 S. E. 2d 453.

No. 03–10017. REED *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Certiorari denied.

No. 03–10019. WILLIAMS *v.* LAMARQUE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 03–10020. NANTHABOUTHDY *v.* HUMPHREY, WARDEN. Super. Ct. Mitchell County, Ga. Certiorari denied.

No. 03–10021. TAYLOR *v.* GEORGIA. Ct. App. Ga. Certiorari denied. Reported below: 263 Ga. App. 420, 587 S. E. 2d 791.

No. 03–10023. LAVIGNE *v.* VARNER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT SMITHFIELD, ET AL. C. A. 3d Cir. Certiorari denied.

No. 03–10029. BARBOA, AKA SANDOVAL *v.* BAIRD ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 81 Fed. Appx. 301.

No. 03–10032. BRANCH *v.* BERGHUIS, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10040. SANTIAGO *v.* PENNSYLVANIA. Super. Ct. Pa. Certiorari denied. Reported below: 822 A. 2d 716.

No. 03–10049. WILCHER *v.* MISSISSIPPI (two judgments). Sup. Ct. Miss. Certiorari denied. Reported below: 863 So. 2d 719 (second judgment) and 776 (first judgment).

No. 03–10065. FITTS *v.* BIRKETT, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10093. FEATHERSTONE *v.* COLUMBUS CITY SCHOOL DISTRICT BOARD OF EDUCATION. C. A. 6th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 279.

No. 03–10100. HENDLEY *v.* SMITH, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 03–10122. HAWKINS *v.* BERTRAND, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 03–10140. IHSAN *v.* VISA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 111.

No. 03–10141. KURTI ET UX. *v.* BIEDESS. Ct. App. Ariz. Certiorari denied. Reported below: 206 Ariz. 311, 78 P. 3d 280.

No. 03–10155. ALFORD *v.* BERBARY, SUPERINTENDENT, COLLINS CORRECTIONAL FACILITY. App. Div., Sup. Ct. N. Y., 4th Jud. Dept. Certiorari denied. Reported below: 2 App. Div. 3d 1337, 768 N. Y. S. 2d 920.

No. 03–10160. KANDEKORE *v.* FLORIDA BAR. Sup. Ct. Fla. Certiorari denied. Reported below: 868 So. 2d 525.

No. 03–10163. MCLAUGHLIN-COX *v.* MARYLAND PAROLE COMMISSION. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 903.

No. 03–10168. PHELPS ET UX. *v.* NATIONWIDE INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 591.

No. 03–10195. HENDERSON *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 341 Ill. App. 3d 1108, 853 N. E. 2d 450.

No. 03–10227. DuPont *v.* Maloney, Commissioner, Massachusetts Department of Correction. App. Ct. Mass. Certiorari denied. Reported below: 59 Mass. App. 908, 794 N. E. 2d 1254.

No. 03–10230. Wheaton *v.* Yarborough, Warden. C. A. 9th Cir. Certiorari denied. Reported below: 101 Fed. Appx. 648.

No. 03–10253. Sumpter *v.* Georgia Board of Pardons and Parole, Department of Offender Rehabilitation, et al. C. A. 11th Cir. Certiorari denied.

No. 03–10290. Scott *v.* Galaza, Warden. C. A. 9th Cir. Certiorari denied.

No. 03–10309. Danks *v.* Deuth, Superintendent, Correctional Industrial Facility. C. A. 7th Cir. Certiorari denied. Reported below: 355 F. 3d 1005.

No. 03–10351. Jelks *v.* Small, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 74 Fed. Appx. 737.

No. 03–10352. Jameson *v.* Alameida, Director, California Department of Corrections, et al. C. A. 9th Cir. Certiorari denied.

No. 03–10390. Harrison *v.* Crosby, Secretary, Florida Department of Corrections, et al. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 386.

No. 03–10395. Hernandez *v.* South Carolina et al. C. A. 4th Cir. Certiorari denied. Reported below: 91 Fed. Appx. 891.

No. 03–10398. Govan *v.* South Carolina et al. C. A. 4th Cir. Certiorari denied. Reported below: 71 Fed. Appx. 276.

No. 03–10496. Martin *v.* Carey, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 89 Fed. Appx. 80.

No. 03–10502. Stone *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 85 Fed. Appx. 925.

No. 03–10576. Gonzalez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 905.

No. 03–10577. Fraser *v.* Zenk, Warden. C. A. 3d Cir. Certiorari denied. Reported below: 90 Fed. Appx. 428.

No. 03–10581. TELLO-DURAN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 240.

No. 03–10586. ALLEN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 876.

No. 03–10587. BAINES, AKA BROWN *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 97 Fed. Appx. 907.

No. 03–10589. LANDEROS-VILLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 227.

No. 03–10591. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 73 Fed. Appx. 631.

No. 03–10593. BERRYHILL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 352 F. 3d 315.

No. 03–10594. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 03–10595. BRELAND ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 356 F. 3d 787.

No. 03–10597. MCGRIFF *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 390.

No. 03–10601. MILLER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 75 Fed. Appx. 128.

No. 03–10602. LAWRENCE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 349 F. 3d 109.

No. 03–10603. LOPEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 84 Fed. Appx. 889.

No. 03–10605. DYSON *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 845 A. 2d 550.

No. 03–10606. MARTINEZ-ANDRADE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 88 Fed. Appx. 168.

No. 03–10609. AJADI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 03–10610. YOCUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 82 Fed. Appx. 193.

No. 03–10613. GARRIDO-SANTANA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 360 F. 3d 565.

No. 03–10618. EVANS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 845 A. 2d 550.

No. 03–10619. BURTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 362 F. 3d 536.

No. 03–10629. THOMAS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 79 Fed. Appx. 908.

No. 03–10631. ALEXANDER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 992.

No. 03–10636. ALLEN, AKA BLAKE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 99 Fed. Appx. 882.

No. 03–10648. MEDINA-MAELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 351 F. 3d 944.

No. 03–10656. MOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 92 Fed. Appx. 780.

No. 03–10657. ADEGBUJI *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 1st Cir. Certiorari denied.

No. 03–10660. MEDINA *v.* WISCONSIN. Ct. App. Wis. Certiorari denied. Reported below: 268 Wis. 2d 845, 673 N. W. 2d 411.

No. 02–1646. HIGBEE CO., DBA DILLARD DEPARTMENT STORES, INC. *v.* CHAPMAN. C. A. 6th Cir. Motion of Ohio Council of Retail Merchants et al. for leave to file a brief as *amici curiae* granted. Certiorari denied. Reported below: 319 F. 3d 825.

No. 03–151. MITCHELL, WARDEN *v.* DAVIS. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 318 F. 3d 682.

No. 03–699. ALAMEIDA, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS *v.* SMITH. C. A. 9th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 323 F. 3d 813.

No. 03–959. VARCO *v.* ADMINISTRATIVE COMMITTEE OF THE WAL-MART STORES, INC. ASSOCIATES' HEALTH AND WELFARE

PLAN. C. A. 7th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 338 F. 3d 680.

No. 03–1341. BAXTER INTERNATIONAL INC. ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 345 F. 3d 866.

No. 03–1541. FLEMING *v.* UNITED STATES; and ARNOLD *v.* UNITED STATES. C. A. 11th Cir. Certiorari before judgment denied.

No. 03–1570. NEW YORK *v.* MATEO. Ct. App. N. Y. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 2 N. Y. 3d 383, 811 N. E. 2d 1053.

No. 03–9956. HOLLIS-ARRINGTON *v.* CENDANT MORTGAGE CORP. ET AL. C. A. 9th Cir. Certiorari denied. JUSTICE BREYER took no part in the consideration or decision of this petition.

Rehearing Denied

No. 03–1028. MIDDLETON, WARDEN *v.* MCNEIL, 541 U. S. 433;
No. 03–1210. JOHNSON *v.* BELL, WARDEN, 541 U. S. 1010;
No. 03–1218. ROANE *v.* NATIONAL CHILDREN'S CENTER, INC., ET AL., 541 U. S. 1030;
No. 03–8007. ENGLISH *v.* BENNETT, SUPERINTENDENT, ELMIRA CORRECTIONAL FACILITY, 540 U. S. 1196;
No. 03–8317. AYER *v.* NEW HAMPSHIRE, 541 U. S. 942;
No. 03–8828. HUME *v.* BARTON PROTECTIVE SERVICES, 541 U. S. 992;
No. 03–8839. BARBER *v.* OHIO UNIVERSITY ET AL., 541 U. S. 993;
No. 03–9085. FIELDS *v.* UNITED STATES, 541 U. S. 966;
No. 03–9130. HOLIDAY *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 541 U. S. 1014;
No. 03–9173. LEINENBACH, AKA NELSON *v.* UNITED STATES, 541 U. S. 968;
No. 03–9223. HURST *v.* DELAWARE, 541 U. S. 1033;

No. 03–9340. BARNES *v.* UNITED STATES, 541 U. S. 1000; and No. 03–9662. WILLIAMS *v.* KEMNA, SUPERINTENDENT, CROSSROADS CORRECTIONAL CENTER, 541 U. S. 1052. Petitions for rehearing denied.

JUNE 29, 2004

Miscellaneous Order

No. 03A1058 (03–11049). BARRAZA *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the issuance of the mandate of this Court.

JUNE 30, 2004

Affirmed on Appeal

No. 03–1413. COX, GEORGIA SECRETARY OF STATE *v.* LARIOS ET AL. Affirmed on appeal from D. C. N. D. Ga. Reported below: 300 F. Supp. 2d 1320.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring.

Today we affirm the District Court's judgment that Georgia's legislative reapportionment plans for the State House of Representatives and Senate violate the one-person, one-vote principle of the Equal Protection Clause. The District Court's findings disclose two reasons for the unconstitutional population deviations in the state legislative reapportionment plans. The first was "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta." 300 F. Supp. 2d 1320, 1327 (ND Ga. 2004). The second was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another." *Id.*, at 1329. The court found that Democratic incumbents "attempted to draw districts that would enhance their own prospects at re-

election and further their other political ends (such as building up a support base for a future run for Congress)" and also "targeted particular Republicans to prevent their re-election." *Id.*, at 1330. As a result,

> "[w]hile Democratic incumbents who supported the plans were generally protected, Republican incumbents were regularly pitted against one another in an obviously purposeful attempt to unseat as many of them as possible. In the House Plan, forty-seven incumbents were paired, including thirty-seven Republicans, which was 50% of the Republican caucus, but only nine Democrats, comprising less than 9% of that caucus (as well as one Independent). Because six of the twenty-one districts involved were multi-member districts, the end result was that a maximum of twenty-eight of the paired incumbents could be re-elected, and the remaining nineteen would be unseated. Similarly, the 2002 Senate Plan included six incumbent pairings: four Republican-Republican pairings and two Republican-Democrat pairings. In the 2002 general election, eighteen Republican incumbents in the House and four Republican incumbents in the Senate lost their seats due to the pairings, while only three Democratic incumbents in the House and no Democratic incumbents in the Senate lost seats this way." *Id.*, at 1329–1330 (citations and footnote omitted).

Although "[t]he numbers largely speak for themselves," the District Court found that the shapes of many of the newly created districts supplied further evidence that the plans' drafters "inten[ded] not only to aid Democratic incumbents in getting re-elected but also to oust many of their Republican incumbent counterparts." *Id.*, at 1330. The court noted, for example, that a Republican senator had been "drawn into a district with a Democratic incumbent who ultimately won the 2002 general election, while an open district was drawn within two blocks of her residence," that two of the most senior Republican senators had been drawn into the same district, and that a Republican House member "who was generally disliked by several of the Democratic incumbent[s] was paired with another representative in an attempt to unseat him." *Ibid.* Moreover, many of the districts that paired Republicans were both oddly shaped and overpopulated, "suggesting that the districts were drawn to force Republi-

can incumbents to run against each other and to draw in as many Republican voters as possible in the process." *Ibid.*

The drafters' efforts at selective incumbent protection "led to a significant overall partisan advantage for Democrats in the electoral maps," with "Republican-leaning districts . . . vastly more overpopulated as a whole than Democratic-leaning districts," and with many of the large positive population deviations in districts that paired Republican incumbents against each other. *Id.*, at 1331. The District Court found that the population deviations did not result from any attempt to create districts that were compact or contiguous, or to keep counties whole, or to preserve the cores of prior districts. *Id.*, at 1331–1334. Rather, the court concluded, "the population deviations were designed to allow Democrats to maintain or increase their representation in the House and Senate through the underpopulation of districts in Democratic-leaning rural and inner-city areas of the state and through the protection of Democratic incumbents and the impairment of the Republican incumbents' reelection prospects." *Id.*, at 1334. The District Court correctly held that the drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote. See *Reynolds* v. *Sims*, 377 U. S. 533, 565–566 (1964) (regionalism is an impermissible basis for population deviations); *Gaffney* v. *Cummings*, 412 U. S. 735, 754 (1973) ("[M]ultimember districts may be vulnerabl[e] if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized"). See also *Reynolds*, 377 U. S., at 579 (explaining that the "overriding objective" of districting "must be substantial equality of population among the various districts" and that deviations from the equal-population principle are permissible only if "incident to the effectuation of a rational state policy").

In challenging the District Court's judgment, appellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation. After our recent decision in *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004), the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its

strength. It bears emphasis, however, that had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case. Appellees alleged that the House and Senate plans were the result of an unconstitutional partisan gerrymander. The District Court rejected that claim because it considered itself bound by the plurality opinion in *Davis* v. *Bandemer*, 478 U. S. 109 (1986), and appellees could not show that they had been "'essentially shut out of the political process.'" App. to Juris. Statement 86a (quoting *Bandemer*, 478 U. S., at 139). Appellees do not challenge that ruling, and it is not before us. But the District Court's detailed factual findings regarding appellees' equal protection claim confirm that an impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standards. Indeed, the District Court's findings make clear that appellees could satisfy either the standard endorsed by the Court in its racial gerrymandering cases or that advocated in Justice Powell's dissent in *Bandemer*, 478 U. S., at 173–185.*

Drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district is probative of the same impermissible intent as the "uncouth twenty-eight-sided figure" that defined the boundary of Tuskegee, Alabama, in *Gomillion* v. *Lightfoot*, 364 U. S. 339, 340 (1960), or the "dragon descending on Philadelphia from the west" that defined Pennsylvania's District 6 in *Vieth*, 541 U. S., at 340 (STEVENS, J., dissenting) (internal quotation marks omitted). The record in this case, like the allegations in *Gomillion* and in *Vieth*, reinforce my conclusion that "the unavailability of judicially

*A tally of the votes in the State Senate elections shows that, although Republicans won a majority of votes statewide (991,108 Republican votes to 814,641 Democrat votes), Democrats won a majority of the State Senate seats (30 to 26). See 2002 Georgia Election Results, www.sos.state.ga.us/elections/election_results/2002_1105/senate.htm (as visited June 23, 2004, and available in Clerk of Court's case file). Thus, it appears that appellees also could state a partisan gerrymandering claim under JUSTICE BREYER's indicia of unjustified entrenchment. See *Vieth* v. *Jubelirer*, 541 U. S. 267, 366 (2004) (dissenting opinion) ("[a] the boundary-drawing criteria depart radically from previous or traditional criteria; [b] the departure cannot be justified or explained other than by reference to an effort to obtain partisan political advantage; and [c] a majority party [*i. e.*, party receiving majority of total votes in relevant election] has once failed to obtain a majority of the relevant seats in election using the challenged map").

manageable standards" cannot justify a refusal "to condemn even the most blatant violations of a state legislature's fundamental duty to govern impartially." *Vieth*, 541 U. S., at 341. I remain convinced that in time the present "failure of judicial will," *ibid.*, will be replaced by stern condemnation of partisan gerrymandering that does not even pretend to be justified by neutral principles.

JUSTICE SCALIA, dissenting.

When reviewing States' redistricting of their own legislative boundaries, we have been appropriately deferential. See *Mahan* v. *Howell*, 410 U. S. 315, 327 (1973). A series of our cases established the principle that "minor deviations" among districts—deviations of less than 10%—are "'insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.'" *Brown* v. *Thomson*, 462 U. S. 835, 842 (1983) (quoting *Gaffney* v. *Cummings*, 412 U. S. 735, 745 (1973)); see also *Voinovich* v. *Quilter*, 507 U. S. 146, 160–162 (1993). This case presents a question that *Brown*, *Gaffney*, and *Voinovich* did not squarely confront—whether a districting plan that *satisfies* this 10% criterion may nevertheless be invalidated on the basis of circumstantial evidence of partisan political motivation.

The state officials who drafted Georgia's redistricting plan believed the answer to that question was "no," reading our cases to establish a 10% "safe harbor" with which they meticulously complied. The court below disagreed. No party here contends that, beyond grand generalities in cases such as *Reynolds* v. *Sims*, 377 U. S. 533, 577 (1964), this Court has addressed the question. The opinion below is consistent with others to have addressed the issue; there is no obvious conflict among the lower courts. This is not a petition for certiorari, however, but an appeal, and we should not summarily affirm unless it is clear that the disposition of this case is correct.

In my view, that is not clear. A substantial case can be made that Georgia's redistricting plan *did* comply with the Constitution. Appellees do not contend that the population deviations—all less than 5% from the mean—were based on race or some other suspect classification. They claim only impermissible *political* bias—that state legislators tried to improve the electoral chances of Democrats over Republicans by underpopulating inner-city and

rural districts and by selectively protecting incumbents, while ignoring "traditional" redistricting criteria. The District Court agreed. See App. to Juris. Statement 8a–25a.

The problem with this analysis is that it assumes "politics as usual" is not *itself* a "traditional" redistricting criterion. In the recent decision in *Vieth* v. *Jubelirer*, 541 U. S. 267 (2004), all but one of the Justices agreed that it *is* a traditional criterion, and a constitutional one, so long as it does not go too far. See *id.*, at 285–286 (plurality opinion); *id.*, at 307 (KENNEDY, J., concurring in judgment); *id.*, at 344 (SOUTER, J., dissenting); *id.*, at 355 (BREYER, J., dissenting). It is not obvious to me that a legislature goes too far when it stays within the 10% disparity in population our cases allow. To say that it does is to invite allegations of political motivation whenever there is population disparity, and thus to destroy the 10% safe harbor our cases provide. Ferreting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights.

I would set the case for argument.

Certiorari Granted—Vacated and Remanded

No. 03–590. WISCONSIN *v.* KNAPP. Sup. Ct. Wis. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Patane*, *ante*, p. 630. Reported below: 265 Wis. 2d 278, 666 N. W. 2d 881.

No. 03–1245. BUSH, PRESIDENT OF THE UNITED STATES, ET AL. *v.* GHEREBI. C. A. 9th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Rumsfeld* v. *Padilla*, *ante*, p. 426. Reported below: 352 F. 3d 1278.

Miscellaneous Orders

No. 04A5. HARRIS *v.* JOHNSON, EXECUTIVE DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL. Application to stay or vacate Fifth Circuit order, reinstate District Court order, or for a temporary restraining order, presented to JUSTICE SCALIA, and by him referred to the Court, denied.

No. 02–1433 (03A1056). HARRIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 540 U. S. 1218. Application for stay of execution

of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Motion of petitioner for leave to proceed further herein *in forma pauperis* granted. Motion for leave to file petition for rehearing denied.

No. 03–11092 (03A1065). IN RE HARRIS. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Petition for writ of habeas corpus denied. JUSTICE BREYER would grant the application for stay of execution.

Certiorari Denied

No. 02–1865. 3M CO., FKA MINNESOTA MINING & MANUFACTURING CO. *v.* LEPAGE'S INC. ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 324 F. 3d 141.

No. 02–7385. FAULKINGHAM *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 295 F. 3d 85.

No. 03–1381. CHAVEZ *v.* MARTINEZ. C. A. 9th Cir. Certiorari denied. Reported below: 337 F. 3d 1091.

No. 03–11042 (03A1057). LENZ *v.* TRUE, WARDEN. Sup. Ct. Va. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. Reported below: 267 Va. 318, 593 S. E. 2d 292.

No. 04–5010 (04A1). HARRIS *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

JULY 1, 2004

Miscellaneous Order

No. 04–5049 (04A9). IN RE HICKS. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for writ of habeas corpus denied.

Certiorari Denied

No. 04–5040 (04A8). HICKS *v.* SCHOFIELD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, pre-

sented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. Reported below: 278 Ga. 159, 599 S. E. 2d 156.

JULY 7, 2004

Miscellaneous Order

No. 04A14 (03–10472). KUNKLE *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION. C. A. 5th Cir. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, granted pending the disposition of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court.

JULY 19, 2004

Miscellaneous Order

No. 04A59. CRAWFORD *v.* SCHOFIELD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. JUSTICE O'CONNOR took no part in the consideration or decision of this application.

Certiorari Denied

No. 04–5222 (04A46). CRAWFORD *v.* SCHOFIELD, WARDEN. Sup. Ct. Ga. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 278 Ga. 95, 597 S. E. 2d 403.

Rehearing Denied

No. 04–5222 (04A58). CRAWFORD *v.* SCHOFIELD, WARDEN, *supra* this page. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied. Petition for rehearing denied. JUSTICE STE-

VENS, JUSTICE SOUTER, and JUSTICE GINSBURG would grant the application for stay of execution. JUSTICE O'CONNOR took no part in the consideration or decision of this application and this petition.

JULY 21, 2004

Miscellaneous Orders

No. 04–104. UNITED STATES *v.* BOOKER. C. A. 7th Cir. Respondent is directed to file responses to petition for writ of certiorari and to motion to expedite consideration on or before 3 p.m., Wednesday, July 28, 2004.

No. 04–105. UNITED STATES *v.* FANFAN. C. A. 1st Cir. Respondent is directed to file responses to petition for writ of certiorari before judgment and to motion to expedite consideration on or before 3 p.m., Wednesday, July 28, 2004.

Certiorari Denied

No. 04–5251 (04A54). BAILEY *v.* TRUE, WARDEN. C. A. 4th Cir. Application for stay of execution of sentence of death, presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS and JUSTICE GINSBURG would grant the application for stay of execution. Reported below: 100 Fed. Appx. 128.

AUGUST 2, 2004

Miscellaneous Orders

No. 03A965. KRONCKE *v.* HOOD ET AL. Application for certificate of appealability, addressed to JUSTICE STEVENS and referred to the Court, denied.

No. 03A990. STERN *v.* UNITED STATES. Application for bail, addressed to JUSTICE SCALIA and referred to the Court, denied.

No. D–2373. IN RE DISBARMENT OF WALK. Disbarment entered. [For earlier order herein, see 541 U. S. 933.]

No. D–2374. IN RE DISBARMENT OF AYENI. Disbarment entered. [For earlier order herein, see 541 U. S. 933.]

No. D–2375. IN RE DISBARMENT OF GATES. Disbarment entered. [For earlier order herein, see 541 U. S. 985.]

No. D–2376. In re Disbarment of Gomez. Disbarment entered. [For earlier order herein, see 541 U. S. 985.]

No. D–2377. In re Discipline of Vinyard. It is ordered that Michael C. Vinyard, of Ottumwa, Iowa, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

Certiorari Granted

No. 04–104. United States *v.* Booker. C. A. 7th Cir.; and No. 04–105. United States *v.* Fanfan. C. A. 1st Cir. Motion of the Acting Solicitor General for leave to file a reply brief in excess of the page limits granted. Certiorari in No. 04–104 granted. Certiorari before judgment in No. 04–105 granted. Cases consolidated, and a total of two hours allotted for oral argument. Brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, September 1, 2004. Briefs of respondents are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, September 21, 2004. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, September 27, 2004. Oral argument set for Monday, October 4, 2004. Reported below: No. 04–104, 375 F. 3d 508.

Rehearing Denied

No. 03–1008. Pastene *v.* Pikkert, 541 U. S. 987;

No. 03–1229. DeMoss *v.* Texas, 541 U. S. 1030;

No. 03–1251. Walker *v.* QuadGraphics, Inc., 541 U. S. 1041;

No. 03–1318. Whitehorn *v.* Federal Communications Commission, 541 U. S. 1031;

No. 03–1373. St. Hilaire *v.* St. Hilaire, 541 U. S. 1044;

No. 03–9052. Bohm *v.* Burt, Warden, 541 U. S. 1013;

No. 03–9064. Haley *v.* United States, 541 U. S. 966;

No. 03–9161. In re Bell, 541 U. S. 1029;

No. 03–9220. Parnell *v.* Crosby, Secretary, Florida Department of Corrections, 541 U. S. 1033;

No. 03–9246. Ruggiere *v.* Ruggiere, 541 U. S. 1045;

No. 03–9314. Robinson *v.* Conway, Superintendent, Attica Correctional Facility, 541 U. S. 1016;

No. 03–9322. Restucci *v.* Spencer, Superintendent, Massachusetts Correctional Institution at Norfolk, 541 U. S. 1047;

No. 03–9331. Butler *v.* Cloud et al., 541 U. S. 1047;

No. 03–9360. Sturgis *v.* Lavan, Superintendent, State Correctional Institution at Dallas, 541 U. S. 1048;

No. 03–9370. Gregory *v.* Spannagel et ux., 541 U. S. 1048;

No. 03–9385. Debejare *v.* Barnhart, Commissioner of Social Security, 541 U. S. 1048;

No. 03–9428. Bryant *v.* Fletcher, Warden, 541 U. S. 1049;

No. 03–9435. Pope *v.* Marshall, 541 U. S. 1065;

No. 03–9442. Wimbush *v.* Gaddis et al., 541 U. S. 1065;

No. 03–9444. Ligon *v.* Boswell, 541 U. S. 1017;

No. 03–9459. O'Neal *v.* National Plastics Corp., 541 U. S. 1050;

No. 03–9489. Russell *v.* Garrard et al., 541 U. S. 1066;

No. 03–9501. Mitchell *v.* Tennessee et al., 541 U. S. 1066;

No. 03–9528. Aranda *v.* United States District Court for the Northern District of Texas, 541 U. S. 1017;

No. 03–9535. In re Setts, 541 U. S. 986;

No. 03–9536. Colon *v.* Connolly et al., 541 U. S. 1034;

No. 03–9544. Adams *v.* Negron et al., 541 U. S. 1035;

No. 03–9578. Latson *v.* Dretke, Director, Texas Department of Criminal Justice, Correctional Institutions Division, 541 U. S. 1076;

No. 03–9594. Perry *v.* Lockheed Missiles & Space Co., Inc., et al., 541 U. S. 1076;

No. 03–9606. Chaudry *v.* Whispering Ridge Homeowners Assn., 541 U. S. 1067;

No. 03–9608. Davila *v.* Armstrong et al., 541 U. S. 1051;

No. 03–9635. Moppins *v.* Carey, Warden, 541 U. S. 1087;

No. 03–9647. Cason *v.* Maryland Division of Correction et al., 541 U. S. 1067;

No. 03–9657. Dulisse *v.* Central Penn Property Service, Inc., 541 U. S. 1088;

No. 03–9695. Nowik *v.* North Dakota, 541 U. S. 1077;

No. 03–9710. Bryant-Bey *v.* Georgia, 541 U. S. 1089;

No. 03–9729. Fagan *v.* United States, 541 U. S. 1053;

No. 03–9748. Webber *v.* United States, 541 U. S. 1054;

No. 03–9772. Glover *v.* United States, 541 U. S. 1054;

No. 03–9812. Lawrence *v.* DeRosa, Warden, 541 U. S. 1055;

No. 03–9848. GORDON ET AL. *v.* ALABAMA ET AL., *ante*, p. 908;
No. 03–9899. MOORE *v.* SCHUETZLE, WARDEN, 541 U. S. 1079;
No. 03–9910. TAYLOR *v.* UNITED STATES, 541 U. S. 1069;
No. 03–9912. MORRIS *v.* UNITED STATES, 541 U. S. 1069;
No. 03–9935. VEGA-COLON ET AL. *v.* UNITED STATES, 541 U. S. 1074;
No. 03–9963. AUSTIN *v.* GILLIS, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT COAL TOWNSHIP, ET AL., *ante*, p. 909;
No. 03–9977. IN RE ELLIS, 541 U. S. 1040;
No. 03–10071. GIBSON ET AL. *v.* UNITED STATES, 541 U. S. 1081;
No. 03–10118. IN RE HESS, 541 U. S. 1071;
No. 03–10137. ARNETT *v.* UNITED STATES, 541 U. S. 1091;
No. 03–10143. MADRIGAL-FERREIRA *v.* UNITED STATES, 541 U. S. 1091;
No. 03–10153. IN RE WEST, 541 U. S. 1071;
No. 03–10188. GRAHAM *v.* ADAMS ET AL., 541 U. S. 1092; and
No. 03–10206. GREEN *v.* UNITED STATES, 541 U. S. 1092. Petitions for rehearing denied.

No. 02–1259. STEVENS *v.* DEPARTMENTAL DISCIPLINARY COMMITTEE FOR THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT, 538 U. S. 979;
No. 03–9260. DYE *v.* OZMINT, DIRECTOR, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 541 U. S. 1016;
No. 03–9886. BEAR CHILD *v.* UNITED STATES, 541 U. S. 1056; and
No. 03–9971. PATTERSON *v.* UNITED STATES, 541 U. S. 1079. Motions for leave to file petitions for rehearing denied.

No. 03–9656. DULISSE *v.* HOMESIDE LENDING, INC., 541 U. S. 1096; and
No. 03–9858. DIXON *v.* EQUICREDIT CORP. ET AL., 541 U. S. 1083. Petitions for rehearing denied. JUSTICE BREYER took no part in the consideration or decision of these petitions.

AUGUST 5, 2004

Certiorari Denied

No. 04–5646 (04A130). HUBBARD *v.* CAMPBELL, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Application for stay of execution of sentence of death, pre-

sented to JUSTICE KENNEDY, and by him referred to the Court, denied. Certiorari denied. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would grant the application for stay of execution. Reported below: 379 F. 3d 1245.

AUGUST 11, 2004

Miscellaneous Order

No. 04A87. JOHNSON, DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS, ET AL. *v.* REID. Application to vacate the stay of execution of sentence of death entered by the United States Court of Appeals for the Fourth Circuit on December 17, 2003, presented to THE CHIEF JUSTICE, and by him referred to the Court, granted. JUSTICE STEVENS, JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER would deny the application to vacate the stay of execution.

AUGUST 12, 2004

Certiorari Denied

No. 04–5707 (04A114). DENNIS, BY AND THROUGH BUTKO, AS NEXT FRIEND *v.* BUDGE, WARDEN, ET AL. C. A. 9th Cir. Application for stay of execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. Certiorari denied. Reported below: 378 F. 3d 880.

AUGUST 19, 2004

Dismissals Under Rule 46

No. 03–1538. MAMANDUR ET UX. *v.* POWER ET AL. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 73 Fed. Appx. 902.

No. 03–1694. NEW YORK LIFE INSURANCE CO. *v.* BESS. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 87 Fed. Appx. 661.

AUGUST 23, 2004

Dismissals Under Rule 46

No. 03–1598. RECTOR AND VISITORS OF GEORGE MASON UNIVERSITY *v.* SHEPARD ET AL. C. A. 4th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 77 Fed. Appx. 615.

No. 04–92. NEBRASKA ET AL. *v.* CENTRAL INTERSTATE LOW-LEVEL RADIOACTIVE WASTE COMMISSION. C. A. 8th Cir. Certiorari dismissed under this Court's Rule 46.1. Reported below: 358 F. 3d 528.

Rehearing Denied

No. 03–357. ADAMS, WARDEN, ET AL. *v.* BRAMBLES, *ante*, p. 933;

No. 03–984. BALSER ET UX. *v.* DEPARTMENT OF JUSTICE, OFFICE OF THE UNITED STATES TRUSTEE, 541 U. S. 1041;

No. 03–1357. BUSH *v.* CITY OF ZEELAND, MICHIGAN, ET AL., 541 U. S. 1072;

No. 03–1385. HOLGUIN *v.* FLOOD CONTROL DISTRICT OF GREENLEE COUNTY, ARIZONA, ET AL., 541 U. S. 1086;

No. 03–1387. PHILSON, AKA ALLAH *v.* SHERRER, ADMINISTRATOR, NORTHERN STATE PRISON, ET AL., 541 U. S. 1086;

No. 03–1447. ROE *v.* AWARE WOMAN CENTER FOR CHOICE, INC., ET AL., *ante*, p. 920;

No. 03–1469. JONAS *v.* SOUTH CAROLINA DISCOUNT AUTO CENTER, *ante*, p. 938;

No. 03–1473. PERSIK *v.* MANPOWER INC., 541 U. S. 1086;

No. 03–5554. HIIBEL *v.* SIXTH JUDICIAL DISTRICT COURT OF NEVADA, HUMBOLDT COUNTY, ET AL., *ante*, p. 177;

No. 03–9072. ADAMS *v.* UNITED STATES, *ante*, p. 921;

No. 03–9273. SANSING *v.* ARIZONA, *ante*, p. 939;

No. 03–9613. ALEXANDER *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, 541 U. S. 1077;

No. 03–9707. IBANEZ *v.* VERIZON VIRGINIA INC., 541 U. S. 1077;

No. 03–9771. LOLLAR *v.* DRETKE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION, *ante*, p. 907;

No. 03–9815. AUSTIN *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA, 541 U. S. 1078;

No. 03–9889. MITCHELL *v.* DEPARTMENT OF COMMERCE, 541 U. S. 1079;

No. 03–10006. MCCORMICK *v.* DEMPSTER ET AL., *ante*, p. 941;

No. 03–10007. IN RE MCCORMICK, *ante*, p. 935;

No. 03–10014. EVERETT *v.* PENNSYLVANIA ET AL., *ante*, p. 909;

No. 03–10049. WILCHER *v.* MISSISSIPPI (two judgments), *ante*, p. 942;

No. 03–10061. DANIELS *v.* UNITED STATES, 541 U. S. 1081;

No. 03–10167. ATTIA *v.* SOCIAL SECURITY ADMINISTRATION ET AL., *ante*, p. 910;

No. 03–10237. BLUNT *v.* HIGHLAND PARK CITY SCHOOL DISTRICT, 541 U. S. 1093;

No. 03–10252. SANDERS *v.* UNITED STATES, *ante*, p. 911;

No. 03–10291. WRIGHT *v.* UNITED STATES, *ante*, p. 913; and

No. 03–10730. IN RE SAMBRANO VILLARREAL, *ante*, p. 935. Petitions for rehearing denied.

No. 02–1624. ELK GROVE UNIFIED SCHOOL DISTRICT ET AL. *v.* NEWDOW ET AL., *ante*, p. 1. Petition for rehearing denied. JUSTICE SCALIA took no part in the consideration or decision of this petition.

No. 02–1632. BLAKELY *v.* WASHINGTON, *ante*, p. 296. Motion of respondent to expedite consideration of petition for rehearing denied. Petition for rehearing denied.

No. 01–1697. MENON *v.* FRINTON, 537 U. S. 817;

No. 02–1119. YOUNG *v.* UNITED STATES, 537 U. S. 1234; and

No. 03–9009. J. K. *v.* DAUPHIN COUNTY CHILDREN AND YOUTH SERVICES, 541 U. S. 1012. Motions of petitioners for leave to file petitions for rehearing denied.

No. 03–16. KRILICH *v.* UNITED STATES, 540 U. S. 946 and 1086. Motion of petitioner for leave to file second petition for rehearing denied.

AUGUST 25, 2004

Certiorari Denied

No. 04–6001 (04A168). BUSBY *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court, denied. Certiorari denied.

AUGUST 26, 2004

Certiorari Denied

No. 04–262 (04A170). ALLRIDGE *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE SCALIA, and by him referred to the Court,

denied. Certiorari denied. JUSTICE STEVENS would grant the application for stay of execution.

SEPTEMBER 3, 2004

Miscellaneous Orders

No. 03A1020. SUGDEN *v.* UNITED STATES. Application for certificate of appealability, addressed to JUSTICE SOUTER and referred to the Court, denied.

No. 04A98. GREEN *v.* DRAGOVICH ET AL. Application for bail, addressed to JUSTICE GINSBURG and referred to the Court, denied.

Rehearing Denied

No. 03–9379. HUNDLEY *v.* UNITED STATES, 541 U. S. 1001;

No. 03–9562. GADSON *v.* FLORIDA, 541 U. S. 1075;

No. 03–9563. BALL *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 541 U. S. 1075;

No. 03–9643. JONES *v.* KOLB ET AL. (five judgments), 541 U. S. 1087;

No. 03–9658. DANIELS *v.* MCLEMORE, WARDEN, 541 U. S. 1088;

No. 03–9964. BRIDGEFORTH *v.* MULLIN, WARDEN, *ante,* p. 940;

No. 03–10119. FEARS *v.* LUEBBERS, SUPERINTENDENT, FARMINGTON CORRECTIONAL CENTER, *ante,* p. 925;

No. 03–10124. GARRISON *v.* ILLINOIS, *ante,* p. 925;

No. 03–10191. FOUNTAIN *v.* UNITED STATES, 541 U. S. 1092;

No. 03–10226. CASEY *v.* LAVAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL., *ante,* p. 910;

No. 03–10256. CARTER *v.* UNITED STATES ET AL., *ante,* p. 911;

No. 03–10338. CARTER *v.* UNITED STATES ET AL., *ante,* p. 914;

No. 03–10390. HARRISON *v.* CROSBY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., *ante,* p. 943;

No. 03–10483. MINOR *v.* UNITED STATES, *ante,* p. 929; and

No. 03–10510. IN RE RHETT, *ante,* p. 902. Petitions for rehearing denied.

No. 03–9966. TOLIVER *v.* UNITED STATES, 541 U. S. 1079. Motion of petitioner for leave to file petition for rehearing denied.

September 9, 2004

Miscellaneous Order

No. 04A197. Reid *v.* Johnson, Director, Virginia Department of Corrections, et al. Application for preliminary injunction, presented to The Chief Justice, and by him referred to the Court, denied. Justice Stevens would grant the application for preliminary injunction.

September 24, 2004

Miscellaneous Order

No. 02–1028. Norfolk Southern Railway Co. *v.* James N. Kirby, Pty Ltd., dba Kirby Engineering, et al. C. A. 11th Cir. [Certiorari granted, 540 U. S. 1099.] Parties are directed to file supplemental briefs addressing the following question: "Does federal or state substantive law govern the questions presented?" The Acting Solicitor General is invited to file an *amicus* brief on the same question. Briefs are to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, October 4, 2004. Twenty copies of the briefs prepared under this Court's Rule 33.2 may be filed initially in order to meet the October 4 filing date. Forty copies of the briefs prepared under this Court's Rule 33.1 are to be filed as soon as possible thereafter.

September 27, 2004

Miscellaneous Order

No. 04–104. United States *v.* Booker. C. A. 7th Cir.; and No. 04–105. United States *v.* Fanfan. C. A. 1st Cir. [Certiorari granted, *ante,* p. 956.] Motion of the Acting Solicitor General to dispense with printing the joint appendix granted. Motion of respondents for divided argument granted. Each counsel must be prepared to discuss both questions presented. Motion of Ad Hoc Group of Former Judges for leave to participate in oral argument as *amici curiae* and for divided argument denied.

September 28, 2004

Miscellaneous Orders

No. 04A242. Kucera et al. *v.* Bradbury, Secretary of State of Oregon, et al. Application to stay order of the Ore-

gon Supreme Court pending the filing and disposition of a petition for writ of certiorari, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. JUSTICE BREYER would grant the application for stay.

No. 03–636. JOHNSON *v.* CALIFORNIA ET AL. C. A. 9th Cir. [Certiorari granted, 540 U. S. 1217.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–710. DEVENPECK ET AL. *v.* ALFORD. C. A. 9th Cir. [Certiorari granted, 541 U. S. 987.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–923. ILLINOIS *v.* CABALLES. Sup. Ct. Ill. [Certiorari granted, 541 U. S. 972.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–931. FLORIDA *v.* NIXON. Sup. Ct. Fla. [Certiorari granted, 540 U. S. 1217.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 03–725. PASQUANTINO ET AL. *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 541 U. S. 972.] Motion of petitioners for divided argument denied.

No. 03–814. STEWART *v.* DUTRA CONSTRUCTION CO. C. A. 1st Cir. [Certiorari granted, 540 U. S. 1177.] Motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted. Motion of respondent for leave to file a surreply brief denied.

No. 03–892. COMMISSIONER OF INTERNAL REVENUE *v.* BANKS. C. A. 6th Cir.; and

No. 03–907. COMMISSIONER OF INTERNAL REVENUE *v.* BANAITIS. C. A. 9th Cir. [Certiorari granted, 541 U. S. 958.] Motion of respondents for divided argument granted. Motion of respondents for additional time for oral argument denied. Motion of respondent Banks to allow James R. Carty to argue *pro hac vice* granted. Motion of the Acting Solicitor General to allow David B. Salmons to argue *pro hac vice* granted.

No. 03–1039. BROWN, ACTING WARDEN *v.* PAYTON. C. A. 9th Cir. [Certiorari granted, 541 U. S. 1062.] Motion of Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae* granted.

No. 03–1407. ROUSEY ET UX. *v.* JACOWAY. C. A. 8th Cir. [Certiorari granted, 541 U. S. 1085.] Motion of petitioners to dispense with printing the joint appendix granted.

No. 03–1423. MUEHLER ET AL. *v.* MENA. C. A. 9th Cir. [Certiorari granted, *ante*, p. 903.] Motion of Police Officers Research Association of California Legal Defense Fund for leave to file a brief as *amicus curiae* granted.

Certiorari Granted

No. 03–1388. SPECTOR ET AL. *v.* NORWEGIAN CRUISE LINE LTD. C. A. 5th Cir. Certiorari granted. Reported below: 356 F. 3d 641.

No. 03–1488. TORY ET AL. *v.* COCHRAN. Ct. App. Cal., 2d App. Dist. Certiorari granted.

No. 03–1601. CITY OF RANCHO PALOS VERDES, CALIFORNIA, ET AL. *v.* ABRAMS. C. A. 9th Cir. Certiorari granted. Reported below: 354 F. 3d 1094.

No. 03–9627. PACE *v.* DIGUGLIELMO, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT GRATERFORD, ET AL. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 71 Fed. Appx. 127.

No. 03–9685. JOHNSON *v.* UNITED STATES. C. A. 11th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 340 F. 3d 1219.

No. 04–37. CLINGMAN, SECRETARY, OKLAHOMA STATE ELECTION BOARD, ET AL. *v.* BEAVER ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 363 F. 3d 1048.

No. 04–108. KELO ET AL. *v.* CITY OF NEW LONDON, CONNECTICUT, ET AL. Sup. Ct. Conn. Certiorari granted. Reported below: 268 Conn. 1, 843 A. 2d 500.

No. 04–5462. ROMPILLA *v.* BEARD, SECRETARY, PENNSYLVANIA DEPARTMENT OF CORRECTIONS. C. A. 3d Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 355 F. 3d 233.

SEPTEMBER 30, 2004

Dismissal Under Rule 46

No. 04–5978. MCLAUGHLIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari dismissed under this Court's Rule 46. Reported below: 97 Fed. Appx. 769.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 966 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

OPINIONS OF INDIVIDUAL JUSTICES IN CHAMBERS

ASSOCIATED PRESS ET AL. *v.* DISTRICT COURT FOR THE FIFTH JUDICIAL DISTRICT OF COLORADO

ON APPLICATION FOR STAY

No. 04A73. Decided July 26, 2004

An application to stay orders of a Colorado trial court and the Colorado Supreme Court restricting publication of transcripts of *in camera* pretrial proceedings in a sexual assault prosecution held to determine the relevance and admissibility of certain evidence pursuant to Colorado's rape shield law is denied without prejudice to its being filed again subsequent to July 28, 2004. After applicants, newspaper publishers and media outlets, were mistakenly e-mailed the transcripts, the trial court prohibited their publication and required their deletion from the applicants' computers. The applicants challenged the order before the State Supreme Court, which agreed that it was a prior restraint on speech, but found that a more narrowly tailored order would pass constitutional muster. After this application was filed, the state trial court found some of the evidence admissible under the state statute, but has not determined whether the transcripts at issue should be made public. The trial court's determination as to the rape shield material's relevancy will significantly change the circumstances leading to this application. That court may decide to release the transcripts in their entirety or in part. Release may be imminent. Though the constitutional interests are important, a brief delay will permit the state courts to clarify, perhaps avoid, the controversy at issue.

JUSTICE BREYER, Circuit Justice.

This is an application for a stay of orders of the Colorado State District Court for Eagle County and the Supreme Court of Colorado restricting publication of the contents of transcripts of *in camera* pretrial proceedings held in a criminal prosecution for sexual assault. The applicants are several major newspaper publishers and media outlets that have

been covering the prosecution. They filed their application in this Court on July 21, 2004. Due to a change in circumstances following the submission of their application, I deny the application without prejudice to its being filed again in two days' time (or thereafter), *i. e.*, subsequent to July 28, 2004.

At issue are the transcripts of trial court hearings, held *in camera* on June 21 and June 22, 2004, to determine the relevance and admissibility of certain evidence pursuant to Colorado's rape shield statute, Colo. Rev. Stat. § 18–3–407(2) (Lexis 2003). The transcripts were mistakenly e-mailed to the applicants by a court reporter of the trial court. Upon realizing its mistake, the trial court issued an order prohibiting publication of the contents of the transcripts and requiring their deletion from the applicants' computers. See Order in *People* v. *Bryant*, No. 03–CR–204 (Dist. Ct., Eagle Cty., June 24, 2004). The applicants challenged the order before the Colorado Supreme Court, which agreed with them that the order imposed a prior restraint on speech, but concluded that a more narrowly tailored version of the order would pass constitutional muster. See *People* v. *Bryant*, 94 P. 3d 624 (2004).

Accordingly, the Colorado Supreme Court ordered the trial court to:

> "(1) make its rape shield rulings as expeditiously as possible and promptly enter its findings of facts and conclusions of law thereon; (2) determine if some or all portions of the June 21 and June 22 transcripts are relevant and material and, therefore, admissible under the rape shield statute at trial; and (3) enter an appropriate order, which may include releasing to the [applicants] and the public a redacted version of the June 21 and June 22 transcripts that contains those portions that are relevant and material in the case, if any, and maintains the ongoing confidentiality of portions that are irrelevant and immaterial, if any." *Id.*, at 626–627.

In evaluating the validity of the prior restraint, the Colorado Supreme Court made clear that the government's "interest of the highest order" in preventing publication applied only to those portions of "the *in camera* transcripts that are not relevant and material under the rape shield statute." *Id.*, at 626. Two days after the Colorado Supreme Court issued its opinion, the applicants submitted their application for a stay of the trial court's and the Colorado Supreme Court's orders, directing it to me as Circuit Justice.

On July 23, the same day that responses to the application were filed in this Court, the Colorado trial court issued its ruling on the admissibility of evidence under the Colorado rape shield statute. See Order re: Defendant's Motion to Admit Evidence Pursuant to C. R. S. § 18–3–407 and People's Motions *in Limine* #5 and #7 in *People* v. *Bryant*, No. 03–CR–204 (Dist. Ct., Eagle Cty., July 23, 2004). According to this ruling (which affects all of the hearings held *in camera* pursuant to the rape shield statute, not just those at issue in this application) the trial court

> "determines that certain evidence . . . is relevant to a material issue(s) in this case . . . and will permit the evidence to be offered at the trial of this matter. The Court determines that certain other evidence . . . is not relevant to any material issue in this case, and therefore may not be offered at the trial of this matter, unless circumstances later warrant." *Id.*, at 5–6.

The ruling goes on to specify the evidence that is relevant and material. To my knowledge, the trial court has not yet made its determination as to whether the transcripts of June 21 and 22, in whole or in part, shall be made public.

My reading of the transcripts leads me to believe that the trial court's determination as to the relevancy of the rape shield material will significantly change the circumstances that have led to this application. As a result of that determination, the trial court may decide to release the tran-

scripts at issue here in their entirety, or to release some portions while redacting others. Their release, I believe, is imminent. I recognize the importance of the constitutional interests at issue. See, *e. g.*, *Capital Cities Media, Inc.* v. *Toole*, 463 U. S. 1303, 1304 (1983) (Brennan, J., in chambers); *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1327, 1329 (1975) (Blackmun, J., in chambers). But a brief delay will permit the state courts to clarify, perhaps avoid, the controversy at issue here. See *Nebraska Press Assn.* v. *Stuart*, 423 U. S. 1319, 1325 (1975) (same).

Consequently, the application is denied without prejudice to the applicants' filing again in two days' time. Should they do so, the respondent shall file a response one day subsequent indicating: (1) (if the trial court has acted) why any redacted portions of the transcripts must remain confidential; or (2) (if the trial court has not acted) which portions of the transcripts it believes, in light of the trial court's admissibility determinations, should remain confidential and why. The applicants shall file their reply, if they wish to file one, one further day later.

The application is denied without prejudice.

Opinion in Chambers

WISCONSIN RIGHT TO LIFE, INC. *v.* FEDERAL ELECTION COMMISSION

ON APPLICATION FOR INJUNCTION

No. 04A194. Decided September 14, 2004

Applicant's request for an injunction pending appeal barring the enforcement of § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA) is denied. Applicant contends that § 203—which bans corporations from using general treasury funds to finance certain electioneering communications—violates the First Amendment as applied to its political advertisements. An injunction pending appeal would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 189–210, and when a three-judge District Court unanimously rejected applicant's request for a preliminary injunction. The All Writs Act, the only source of this Court's authority to issue the instant injunction, is to be used "'"sparingly and only in the most critical and exigent circumstances."'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313, (SCALIA, J., in chambers). Applicant has not established that this extraordinary remedy is appropriate here.

CHIEF JUSTICE REHNQUIST, Circuit Justice.

Applicant Wisconsin Right to Life, Inc., has requested I grant an injunction pending appeal barring the enforcement of § 203 of the Bipartisan Campaign Reform Act of 2002 (BCRA), 116 Stat. 91, 2 U. S. C. § 441b (2000 ed. and Supp. II), which bars corporations from using general treasury funds to finance electioneering communications as defined in BCRA § 201. Applicant contends that § 203 violates the First Amendment as applied to its political advertisements. A three-judge District Court, convened pursuant to BCRA § 403(a)(1), denied applicant's motion for a preliminary injunction and denied applicant's motion for an injunction pending appeal. I herewith deny the application for an injunction pending appeal.

An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, par-

ticularly when this Court recently held BCRA facially constitutional, *McConnell* v. *Federal Election Comm'n*, 540 U. S. 93, 189–210 (2003), and when a unanimous three-judge District Court rejected applicant's request for a preliminary injunction. See *Turner Broadcasting System, Inc.* v. *FCC*, 507 U. S. 1301, 1302–1303 (1993) (REHNQUIST, C. J., in chambers). The All Writs Act, 28 U. S. C. § 1651(a), is the only source of this Court's authority to issue such an injunction. That authority is to be used "'"sparingly and only in the most critical and exigent circumstances."'" *Ohio Citizens for Responsible Energy, Inc.* v. *NRC*, 479 U. S. 1312, 1313 (1986) (SCALIA, J., in chambers) (quoting *Fishman* v. *Schaffer*, 429 U. S. 1325, 1326 (1976) (Marshall, J., in chambers)). It is only appropriately exercised where (1) "necessary or appropriate in aid of [our] jurisdictio[n]," 28 U. S. C. § 1651(a), and (2) the legal rights at issue are "indisputably clear," *Brown* v. *Gilmore*, 533 U. S. 1301, 1303 (2001) (REHNQUIST, C. J., in chambers). Applicant has failed to establish that this extraordinary remedy is appropriate. Therefore, I decline to issue an injunction pending appeal in this case.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS, 2001, 2002, AND 2003

	ORIGINAL			PAID			IN FORMA PAUPERIS			TOTALS		
	2001	**2002**	**2003**	**2001**	**2002**	**2003**	**2001**	**2002**	**2003**	**2001**	**2002**	**2003**
Number of cases on dockets	8	7	6	2,210	2,190	2,058	6,958	7,209	6,818	9,176	9,406	8,882
Number disposed of during term	1	1	2	1,889	1,853	1,758	6,135	6,483	6,030	8,025	8,337	7,790
Number remaining on dockets	7	6	4	321	337	300	823	726	788	1,151	1,069	1,092

	TERMS		
	2001	**2002**	**2003**
Cases argued during term	88	84	[2] 91
Number disposed of by full opinions	85	79	[2] 89
Number disposed of by per curiam opinions	3	5	2
Number set for reargument	0	0	0
Cases granted review this term	[1] 88	91	87
Cases reviewed and decided without oral argument	[1] 72	66	52
Total cases to be available for argument at outset of following term	47	[2] 52	47

[1] Includes 01–339.

[2] Includes 02–1674, 02–1675, 02–1676, 02–1702, 02–1727, 02–1733, 02–1734, 02–1740, 02–1747, 02–1753, 02–1755, 02–1756 argued September 8, 2003.

JUNE 30, 2004

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